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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CITIZENS OF HUMANITY, LLC,

Plaintiff and Respondent,

v.

CAITAC INTERNATIONAL, INC., et al.,

Defendants and Appellants.

B215232

(Los Angeles County
Super. Ct. No. BC380930)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Rita Miller, Judge. Affirmed.

Quinn Emanuel Urquhart Oliver & Hedges, Jeffery D. McFarland, Ryan S. Goldstein, Matthew S. Warren; Henrichs Law Firm, John Henrichs, Stephanie M. Levy for Defendants and Appellants.

Law Offices of Gary Freedman, Gary Freedman; Sussman Shank, John A. Schwimmer for Plaintiff and Respondent.

This appeal follows a jury verdict finding breach of contract, trademark infringement, and fraud with punitive damages against defendant Caitac International, Inc., and other related entities (hereinafter collectively referred to as Caitac). The jury found that Caitac breached its distribution agreement with plaintiff Citizens of Humanity, LLC (hereinafter, Citizens), which had required that defendant purchase for distribution in Japan minimum quantities of Citizens' fashionable premium denim apparel. The jury awarded Citizens damages in the amount of approximately \$2.7 million for breach of contract, \$2.1 for trademark infringement, \$5 million for fraud, and \$1.5 million as punitive damages.

Caitac principally contends: (1) the trial court erred in its application of federal trademark law; (2) the trial court erred in its evidentiary rulings and jury instruction regarding the distribution agreement and in precluding some expert testimony; (3) Citizens failed to prove Caitac's fraudulent intent; and (4) the trial court erred in the admission of parol evidence to explain the meaning of contract provisions, and in precluding Caitac from pursuing its unpleaded defense of force majeure based on the economic downturn in the Japanese market for premium denim. We find the contentions unavailing and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Evidence at trial.

Citizens is in the business of designing and producing denim fashion apparel. Citizens manufactures its denim jeans in the United States, uses an intensive wash treatment process, details the jeans with embroidery and stitching, and sells them in the price range of approximately \$140 to \$300.

Before the parties entered into the 2006 distribution agreement at issue in this lawsuit, they had an agreement in 2003. That agreement granted Caitac the right to distribute Citizens apparel in Japan through the end of 2005. The 2003 agreement did not impose any minimum purchase obligations on Caitac.

In late 2005, the parties negotiated to renew the distribution agreement. Citizens, however, was not pleased with Caitac's level of sales or its efforts to sell Citizens apparel

in Japan. Citizens advised Caitac that if it wanted to renew the distribution agreement, it would have to guarantee to purchase minimum levels of Citizens apparel.

Citizens drafted a new distribution agreement. The draft provided for a one-year term and required that Caitac purchase a guaranteed minimum of \$3.6 million worth of Citizens merchandise. The minimum amount was based on the projections Caitac had provided. The draft also required that in each quarter of the year 2006, Caitac would have to purchase specified percentages of the total annual minimum amount it had guaranteed to purchase.

After receiving this draft agreement, the parties met and discussed the terms. Caitac wanted the term of the new agreement to be three years, rather than one year. Citizens agreed to the longer term. Caitac also agreed to minimum purchase amounts as a goal or target, but did not want to guarantee or commit to purchasing the amounts indicated in the draft. Citizens, however, insisted on a commitment to guaranteed minimum purchases during each year of the contract. Caitac then agreed to make guaranteed minimum annual purchases during each year of the contract, with specified quarterly percentages of minimum purchases from Citizens.

The signed agreement was effective as of January 1, 2006. Pursuant to the agreement (par. 2.1), Caitac became the exclusive distributor of Citizens apparel in Japan. The agreement (par. 2.3) also provided as follows: “During the term of this Agreement the Distributor shall purchase from [Citizens] *all of its requirements for resale* within the Territory of the Products. During the term of this Agreement, the Products shall represent the primary, number one United States brand represented by Distributor.” (Italics added.)

At trial, Citizens elicited testimony about the meaning and understanding of the above “requirements” provision. Caitac did not object to such questions; its counsel also asked questions and elicited testimony about the parties’ understanding of this “requirements” provision.

The outside general counsel for Citizens, Gary Freedman, participated in the negotiations and drafting of the agreement and testified that the above provision (par. 2.3)

limited Caitac's right to purchase Citizens apparel to only its "requirements," meaning that Caitac should not buy more than it could sell. Freedman explained during direct examination that the purpose of this provision was to avoid a situation where Caitac built up a big inventory that could result in apparel being distributed in undesirable locations or sold at a discount, which could adversely affect the Citizens brand. During cross-examination by counsel for Caitac, Freedman further explained that Caitac was only supposed to buy as much inventory as it could reasonably sell.

Personnel at Caitac essentially had the same understanding of this provision (par. 2.3) as Freedman. Yoshi Taenaka assisted in negotiating the agreement for Caitac. Taenaka understood that when Caitac submitted purchase orders to Citizens, Caitac represented that it had sufficient orders in Japan to be able to sell the merchandise ordered. Similarly, Masatoshi Kaga, the managing director of Caitac, testified that he understood that when Caitac placed an order with Citizens, it was advising Citizens that it was buying what it needed to fill orders in Japan.

Another provision in the 2006 agreement (par. 3.1) set forth the minimum purchases that Caitac guaranteed. Pursuant to that provision, Caitac committed to purchase at least \$3.6 million worth of Citizens apparel in 2006, \$4 million in 2007, and \$4.4 million in 2008. Caitac also specifically agreed (par. 4.1) to "actively and energetically sell and promote the sale of [Citizens] Products and [to] use its best efforts to create an active demand and market for such Products" in Japan. Caitac understood that pursuant to those provisions, it had to make all promotional efforts necessary to sell in Japan the amount of apparel that it had guaranteed to purchase from Citizens.

The agreement also restricted the type of stores to which Caitac could sell Citizens apparel. The agreement (par. 4.2) specified, in pertinent part, that Caitac may "sell only to top quality specialty and department retail stores located in the Territory." That portion of the contract also defined those stores as meaning "those specialty and department retail stores with a first class image, product selection and reputation and selling only the highest quality apparel products." Caitac understood that to protect the Citizens brand, it was important where Citizens apparel was sold.

The 2006 agreement (par. 4.4) further required that Caitac give Citizens quarterly reports that accounted for all sales. The purpose of this provision was, in part, to allow Citizens to compare what Caitac was buying with what it was selling. Although the agreement required Caitac to provide such reports quarterly, no such reports were given by Caitac at any time in 2006, which was the first full year of the agreement.

Near the end of the year, on November 22, 2006, Citizens specifically asked for the reports required by the agreement. At a meeting between the parties on January 16, 2007, Caitac finally gave Citizens a report that reflected its inventory of Citizens apparel. That report showed that Caitac had an inventory of 22,435 units, with a wholesale value of more than \$1.7 million; i.e. almost 50 percent of Caitac's \$3.6 million minimum purchase obligation for the year 2006. Caitac concealed this build up of inventory. At trial, Caitac's personnel acknowledged no one at Caitac ever told anyone at Citizens that Caitac was ordering more merchandise from Citizens than it was going to be able to sell.

At the January 16, 2007, meeting, Caitac also advised Citizens that it projected it would purchase \$2.9 million worth of Citizens apparel in 2007, which was less than the \$4 million minimum purchase guarantee set forth in the agreement. Citizens expressed concern about these weak projections and about the excess inventory and told Caitac that it must increase its promotional and marketing efforts to increase sales and thus satisfy the agreed upon minimum sales.

During the ensuing months, Caitac identified several initiatives that it asserted it would try in an effort to increase sales. However, only some of those initiatives were pursued. Meanwhile, in March or April of 2007, Caitac began negotiations to distribute the apparel of another company, Joe's Jeans, which was a competitor of Citizens.

By May of 2007, it appeared to Citizens that Caitac was not going to purchase by June 30, 2007, the required 40 percent of the \$4 million minimum guaranteed amount for 2007. Caitac's inability to meet the minimum guaranteed amount became apparent because it was obligated to place sufficient orders by the first week in May in order to satisfy its requirement to purchase \$1.6 million of merchandise (i.e., 40 percent of \$4 million annual minimum for 2007) for delivery by June 30. This was required

pursuant to the agreement (par. 3.3, B), which specified that quarterly percentages must be met with respect to merchandise *delivered* by the end of each quarter.

On May 23, 2007, counsel for Citizens informed Caitac that because of Caitac's failure to meet the minimums guaranteed in the agreement, Citizens was going to terminate the agreement and sought a smooth transition to a new distributor and a resolution of the inventory situation. During the course of ensuing e-mail communications between the parties, Caitac acknowledged it had not met the minimum purchase guarantees, and it "respect[ed] the decision by [Citizens] to terminate our distribution agreement." However, Caitac declined overtures by Citizens to discuss a settlement of the amount it should pay for breach of the agreement to buy the guaranteed minimum amounts of merchandise. Ultimately, on August 13, 2007, Citizens gave formal written notice of termination the agreement.

The terms of the distribution agreement (par. 7.2) set forth the rights of the parties regarding termination of the agreement. Pursuant to the agreement (par. 7.1 D), Citizens could terminate the agreement prior to its expiration if Caitac "fails to timely complete any of the minimum purchases" specified in the agreement (par. 3.3 B), or if Caitac violates its obligation to sell only to quality retail stores (par. 4.2). The agreement specified (par. 7.2 A) that upon termination of the agreement, "The Distributor shall cease soliciting orders for the Products."

Regarding existing inventory, Caitac was required to "*arrange for the disposition of the stock of Products* then owned by Distributor [Caitac] and all sales aids in its possession in a fair and equitable manner in the mutual interest of the parties and not inconsistent with any rights of the parties as herein provided, *within a 90 day period.*" (Par. 7.2 D, italics added.) This provision, commonly known as a "sell-off" provision, was intended to facilitate an orderly transition if Citizens changed distributors by limiting the extent that two distributors would be selling in the same territory at the same time. In a May 29, 2007, e-mail communication from Caitac to counsel for Citizens, Caitac acknowledged "it will be difficult for Japan to dispose of inventory within 90 days

period” and hoped there was “room for negotiation on this,” reflecting its understanding that the agreement only permitted such inventory to be sold for 90 days after termination.

The termination provision in the 2006 distribution agreement also provided that upon termination, “[Citizens] shall be entitled to recover any and all damages arising from Distributor’s breach, along with reimbursement for any reasonable attorneys’ fees that it may incur in collecting any sums due or otherwise enforcing its rights under this Agreement.” (Par. 7.2 B) And, upon termination Caitac must immediately discontinue all use of Citizens “trademark, design, or marking that, in the opinion of [Citizens], is confusingly similar thereto.” (Par. 7.2 C.)

By the time Citizens sent its formal notice of termination of the agreement on August 13, 2007, Citizens had already made arrangements for a new distributor in Japan, IPGI, to commence distribution of its apparel as of October 1, 2007. Because the distribution agreement limited Caitac’s ability to sell its inventory after termination of the agreement (pars. 7.2 A, 7.2 D), Caitac tried to negotiate for IPGI to purchase its existing inventory of Citizens apparel after termination.

During the course of those negotiations, Caitac threatened to take actions that would impair IPGI’s ability to sell Citizens apparel and that eventually would “ruin” the image of the Citizens brand in Japan. Caitac was aware that in Japan, retailers would only buy a brand from one distributor. Caitac knew that if two distributors tried to sell the same brand in Japan, there would be two suppliers and “confusion in the market.” From the confusion, “customers will be troubled,” meaning the “stores” that are Caitac’s customers. Caitac then threatened that if IPGI did not agree to Caitac’s demands and purchase its inventory of Citizens apparel, Caitac would lower prices and expand distribution channels for its remaining inventory of Citizens apparel.¹ Caitac was aware that if it discounted prices and expanded retail outlets, it “would ruin the Citizens of

¹ Kaga of Caitac did not view his statement as a “threat” because it was conveyed in a letter he wrote in Japanese that was “very courteous and proper courteous” and not in his opinion a threat.

Humanity brand in Japan,” and that discounting Citizens apparel would make it difficult for another company to sell that brand at full price.

When IPGI would not purchase Caitac’s inventory, Caitac continued to sell Citizens apparel after termination of the distribution agreement, right through the date of trial. However, the terms of the agreement (par. 7.2 D) only permitted disposition of the inventory for 90 days and under specified conditions. In fact, although the distribution agreement limited sales to only top quality specialty and department stores (par. 4.2), Caitac sold its inventory of Citizens apparel to outlet stores and internet retailers. Caitac also heavily discounted the merchandise it sold after termination of the agreement, merchandise that was no longer current and was arguably no longer as fashionable, reducing prices on average by approximately one-third. IPGI then had difficulty trying to sell current Citizens apparel at the full price.

At trial, Caitac acknowledged that Citizens was having difficulty going forward with sales in Japan because of Caitac’s actions. Caitac engaged in such actions not only to try to gain leverage in its negotiations with IPGI, but also to hurt the image of Citizens in Japan because it distributed other premium brands in competition with Citizens, including Joe’s Jeans, a company with which Caitac was negotiating in March or April of 2007. According to Citizens, such harm inflicted on its image would help Caitac’s efforts to sell such competing brands.

Damages and the jury’s verdict.

Citizens argued to the jury that it had established three separate and independent components of damages arising from Caitac’s conduct. First, it alleged lost profits in the amount of \$2,701,713, as a result of Caitac’s failure to meet the minimum purchase guarantees for the full term of the distribution agreement.

Second, Citizens alleged damages from Caitac’s unauthorized sale of Citizens apparel after termination of the agreement and in breach of the agreement (pars. 7.2 A, 7.2 D). Citizens established that Caitac had received \$2,107,935 from those unauthorized sales, and Caitac offered no evidence of any offsetting expenses. Citizens argued that this amount was recoverable under both its claim for breach of contract and its claim for

trademark infringement.² The trademark theory was premised on the notion that such improper posttermination of contract sales constituted trademark infringement.

The third and final component of damages alleged was the harm to Citizens from the decline in the value of its brand in Japan caused by its unauthorized sales of excess inventory after termination at discounted prices to outlet stores and other retailers prohibited by the distribution agreement. According to the rationale and detailed calculations of an expert witness, that harm inflicted by Caitac resulted in a loss of \$7 million in the value of Citizens as a company. Citizens argued that such a loss was recoverable under all three of its causes of action—breach of contract, trademark infringement and fraud.

The jury's verdict awarded \$2,701,713, the amount requested by Citizens for lost profits from Caitac's failure to satisfy the minimum purchase guarantees, and the jury attributed that amount to the breach of contract claim. The jury's verdict also awarded \$2,107,935, the amount requested by Citizens reflecting the revenues received by Caitac from its unauthorized sales after termination of the distribution agreement. The jury allocated that amount only to the trademark infringement claim.

Furthermore, the jury's verdict awarded Citizens \$5 million (not the \$7 million it had urged) for fraud by Caitac, regarding Citizens' loss from the harm caused to the image of the Citizen brand in Japan. The jury also expressly found that there was no duplication or overlap among the amounts awarded for the three causes of action. Finally, the jury found clear and convincing evidence of malice, oppression, or fraud by the three Caitac defendants, and imposed a total of \$1,510,000 in punitive damages among the three defendants.

The Caitac defendants appeal.

² Also, a jury instruction proposed by Citizens and not objected to by Caitac defined the damages recoverable for breach of contract as including "profits earned by Caitac International from unauthorized sales after the contract was terminated."

DISCUSSION

I. The trial court properly applied federal trademark law.

In trademark cases arising under the Lanham Act (15 U.S.C. § 1051 et seq.), the jurisdiction of federal and state courts is concurrent. (*Duggan’s Funeral Service, Inc. v. Duggan’s Serra Mortuary, Inc.* (2000) 80 Cal.App.4th 151, 157; see 28 U.S.C. § 1338(a).) We review de novo the purely legal issue of whether the Lanham Act applies in the context of the trial court’s denial of Caitac’s motions for judgment notwithstanding the verdict (JNOV) and for a new trial. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

A. *Trademark law permits the sale of genuine goods with true marks, but not after permission to use the mark has expired and a distributor is in violation of the terms of its agreement with the manufacturer.*

Trademark law has two goals. First, a trademark protects the public so that it may avoid confusion in the marketplace and confidently distinguish among the goods of competing manufacturers. Second, trademark law ensures that the owner of a trademark, who has spent energy, time, and money presenting the product to the public, has its investment protected from misappropriation by those not authorized to use the product. (*Inwood Laboratories, Inc. v. Ives Laboratories* (1982) 456 U.S. 844, 854, fn. 14; see also *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 782, fn. 15.)

Caitac focuses only on the first goal of trademark law—protection of the public—in urging that trademark law does not regulate its conduct, because Caitac sold no counterfeit goods and resold only to retailers genuine goods bearing true marks. Caitac relies upon “the ‘first sale’ or ‘exhaustion’ doctrine, [whereby] a trademark owner’s authorized initial sale of its product into the stream of commerce extinguishes the trademark owner’s rights to maintain control over who buys, sells, and reuses the product in its authorized form.” (*Iberia Foods Corp. v. Romeo* (3d Cir. 1998) 150 F.3d 298, 301, fn. 4.) “It is the essence of the ‘first sale’ doctrine that a purchaser who does no more than . . . resell a producer’s product under the producer’s trademark violates no right

conferred upon the producer by the Lanham Act.” (*Sebastian Intern. v. Longs Drug Stores* (9th Cir. 1995) 53 F.3d 1073, 1076.)

Here, however, Caitac did more than merely resell Citizens apparel; it resold Citizens apparel after the distribution agreement was terminated, and resold the merchandise when it specifically was not permitted to do so under the explicit terms of the distribution agreement. None of the authorities discussed by Caitac address the applicable rule governing unauthorized sales of trademarked goods by an exclusive distributor after the distributorship has been terminated.

The present case is much more akin to situations, for example, where “[o]nce a franchise, dealership or license contract is terminated, there is no doubt that the former franchisee, dealer or licensee has no authorization or consent to continue use of the mark. After permission to use the mark has ended, use of the mark must cease. The terminated dealer who is a ‘hold-over’ and refuses to change the mark is an infringer. . . . Once a license has expired, sale or liquidation of the inventory of a product under the mark may also constitute infringement, depending on the provisions of the license.” (4 McCarthy on Trademarks and Unfair Competition, § 25:31 (4th ed.); see *United States Jaycees v. Philadelphia Jaycees* (3d Cir. 1981) 639 F.2d 134, 143.) Notwithstanding the first sale doctrine, the “sale of trademarked goods after termination of a license amounts to trademark infringement.” (*Bill Blass, Ltd. v. SAZ Corp.* (3d Cir. 1984) 751 F.2d 152, 154.)

Unless a contract specifically permits a posttermination sale of inventory, “[i]f a former licensee were permitted to sell off its inventory over an indefinite period after termination of the license, ‘the expiration date would have little force or meaning.’ The licensee could create a large surplus and give itself a de facto extension of the license.” (4 McCarthy on Trademarks and Unfair Competition, *supra*, § 25:31, citing *Ryan v. Volpone Stamp Co., Inc.* (S.D.N.Y. 2000) 107 F.Supp.2d 369, 385 [denying motion to dismiss Lanham Act claim].) Rather than interpreting an expired license agreement to allow the licensee to liquidate existing inventory indefinitely, the “far more reasonable construction is that the licensee . . . undertook the risk that if it kept its inventory at too

high a level, the inventory might not be sold by the expiration date of the license.” (*Bill Blass, Ltd. v. SAZ Corp.*, *supra*, 751 F.2d at p. 155.)

We acknowledge, of course, that in the present case Caitac was not involved in a franchise, a dealership or a license contract, but rather was a reseller as a result of the distribution agreement with Citizens. However, that is a difference without any meaningful distinction for the purposes of Caitac’s unpermitted sale of trademarked goods after the termination of its distribution agreement. The bottom line is that Caitac’s disposition of leftover inventory (to unauthorized discount retailers) after the distribution agreement was terminated constituted the improper sale of trademarked goods.

B. The trial court did not prejudicially err in refusing to instruct the jury that it must find the element of confusion among purchasers as to the source of the goods.

According to Caitac, the trial court erred in refusing to instruct the jury with a version of the Ninth Circuit Model Civil Jury Instruction No. 15.5.³ The trial court instructed the jury with only a modified version of that instruction. The instruction as given referred to Caitac’s use of Citizens’ mark without consent after termination of the distribution agreement, but the instruction omitted the requirement that the mark be used “in a manner that is likely to cause confusion among ordinary purchasers as to the source of the goods.”

The trial court properly refused to give Caitac’s version of the instruction, because (1) the element of confusion is not necessarily limited to “confusion among ordinary

³ That proposed jury instruction, as modified with case specific information, was as follows: “On Citizens of Humanity’s claim for trademark infringement, Citizens has the burden of proving each of the following elements (against each of the Defendants) by a preponderance of the evidence that: [¶] 1. The Citizens of Humanity mark is a valid protectable trademark [¶] 2. The Plaintiff owns the Citizens of Humanity mark as a trademark and [¶] 3. Defendants used the Citizens of Humanity mark without Citizens’ consent, *in a manner that is likely to cause confusion among ordinary purchasers as to the source of the goods.* [¶] If you find that each of the elements on which Citizens of Humanity has the burden of proof has been proved, your verdict should be for Citizens. If, on the other hand, Citizens of Humanity failed to prove any of these elements, your verdict should be for Defendants.” (Italics added.)

purchasers,” and (2) the factor of consumer confusion exists as a matter of law in the context of the continued and unauthorized distribution of a product after the termination of a franchise, dealership, license, or—as in the present case—a limited distribution agreement where suddenly the distributor essentially dumps the product at huge discounts to retailers.

First, the instruction as requested by Caitac referred only to confusion “among ordinary purchasers,” meaning consumers, and that is not an element of the cause of action. The broad statutory language of the Lanham Act, in pertinent part, gives the producer of merchandise a cause of action when another uses “any word, term, name, symbol, or device, or any combination thereof . . . *which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association . . . or as to the origin, sponsorship, or approval of . . . goods, services, or commercial activities.*” (15 U.S.C. § 1125(a), italics added.) The statute is not limited by its terms to consumer confusion. Thus, the trial court properly rejected Caitac’s proposed modification of the instruction because although the avoidance of consumer confusion is one goal of the Lanham Act, the factor of confusion as an element of a cause of action for trademark violation is not so limited. Caitac’s proposed modification to the jury instruction would have improperly precluded consideration of confusion in the marketplace among Japanese retailers.

Moreover, in the context of a distribution agreement with a manufacturer, Japanese retailers are effectively the customers of the product. In fact, defense witness Kaga specifically referred to the retail stores as “customers.” Kaga explained that the department stores in Japan operated on a consignment basis and were in essence the customers for the purposes of a manufacturer such as Citizens.

Uncontested evidence indicated that in Japan it is very difficult for two different distributors to try to sell the same brand to the same department store, and that the attempt to do so would create “confusion” at a retail store. Kaga admitted that it “was not good” for the Citizens brand that Caitac was continuing to sell Citizens products after the

termination of the distribution agreement and while there was a new distributor, because “there would be two suppliers” resulting in “confusion in the market.”

Regarding whether consumers—meaning the ultimate purchasers—were confused, Caitac urges that consumers buying genuine Citizens goods bearing a true Citizens mark would not be confused just because a distributor (of which they have no knowledge) had received a termination letter from the manufacturer. “[C]onfusion *ordinarily* does not exist when a genuine article bearing a true mark is sold.” (*NEC Electronics v. CAL Circuit Abco* (9th Cir. 1987) 810 F.2d 1506, 1509, italics added.) Here, however, consumers could have been confused because of the sudden lack of consistency in pricing and the sale of outdated merchandise in retail stores that were not top quality. Consumers reasonably could be confused and think that because they suddenly found some low-end retail stores selling Citizens apparel at huge discounts, that the genuine items in such discount stores were not in fact genuine items.

The situation with a license or a franchise is somewhat different but instructive. “The likelihood of confusion exists as a matter of law if a licensee continues to use marks owned by the licensor after the termination of the license.” (*Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.* (C.D.Ill. 2000) 88 F.Supp.2d 914, 922; see also *Bill Blass, Ltd. v. SAZ Corp.*, *supra*, 751 F.2d at pp. 153-154 [a former licensee gradually liquidated its existing inventory of goods bearing plaintiff’s mark after termination of a license agreement, and appellate court upheld a preliminary injunction].) “Common sense compels the conclusion that a strong risk of consumer confusion arises when a terminated franchisee continues to use the former franchisor’s trademarks. A patron of a restaurant adorned with the Burger King trademarks undoubtedly would believe that BKC endorses the operation of the restaurant. Consumers automatically would associate the trademark user with the registrant and assume that they are affiliated. Any shortcomings of the franchise therefore would be attributed to BKC. Because of this risk, many courts have held that continued trademark use by one whose trademark license has been cancelled satisfies the likelihood of confusion test and constitutes trademark infringement.” (*Burger King Corp. v. Mason* (11th Cir. 1983) 710 F.2d 1480, 1492-1493.)

In the present case, the shortcomings involve the distributor's use of lesser quality retailers and the sale of merchandise at discount prices, merchandise which may not have been the most current model or the latest style. Citizens apparel was sometimes discounted by more than 50 percent, and it was sold at outlets and on the internet. Thus, the reputation of the genuine merchandise was undermined and the product brand was cheapened, as Caitac in effect had threatened it would do. Skeptical consumers might have been confused to the extent of even doubting whether the genuine merchandise was actually genuine.

As the trial court concluded in deciding to modify the requested instruction to omit reference to the element of confusion, "[The authorities] just treated confusion as occurring on almost a per se level when a distributor or licensee or someone of that nature continues to use something beyond the date of the license. I am assuming that it is equivalent to confusion per se that when something is licensed, somebody continues to use it afterwards and the owner then tries to market it, and you have two people trying to market the same thing, that that is viewed in the court[s] inherently as confusing."

Finally, any instructional error on this point was harmless. As previously noted, unrebutted testimony (some from Caitac's own witness, Kaga) established the existence of "confusion in the market" as to retailers. And, although the record reflects no specific evidence of either the existence or lack of consumer confusion,⁴ we find that reasonable inferences from the facts support the likelihood of confusion among consumers as well as retailers. Thus, even if the jury had been instructed as Caitac requested, a different result would not have been probable and a reversal of the judgment would not be warranted. (Code Civ. Proc., § 475.)

⁴ In response to questioning by Caitac's counsel, Freedman acknowledged that he had "no information as to whether or not any customer that bought the jeans that Caitac was selling after termination of the contract ever believed the ones they bought had not been made by Citizens."

C. The extraterritorial application of trademark law was proper here.

Caitac contends that federal trademark law does not apply in the present case to disputed sales in Japan. As Caitac correctly asserts, federal trademark law can reach foreign conduct only if, in pertinent part, there is “some effect on American foreign commerce,” which is “sufficiently great to present a cognizable injury to plaintiffs under the federal statute.” (*Reebok Intern., Ltd. v. Marnatech Enterprises, Inc. (Reebok)* (9th Cir. 1992) 970 F.2d 552, 554.) However, Caitac’s theory that federal law cannot apply here because the domestic effect of its activities was solely one of lost revenue by Citizens due to reduced sales in Japan is without merit.

In *Reebok*, the Ninth Circuit affirmed the application of the Lanham Act to infringing activity in Mexico. (*Reebok, supra*, 970 F.2d at p. 554.) Caitac notes that in *Reebok*, the defendant “organized and directed” (*ibid.*) the manufacture of counterfeit Reebok products from the United States, while Caitac is a Japanese company that is organized and directed from Japan. Nonetheless, the court in *Reebok* emphasized, among other factors, that sales of the infringing items “directly decreased the value of Reebok’s consolidated holdings,” and that the defendant’s activities “thus affect[ed] American foreign commerce in a manner which causes injury to Reebok cognizable under the Lanham Act.” (*Id.* at p. 555; see also *Aristocrat Technologies v. High Impact Design* (D.Nev. 2009) 642 F.Supp.2d 1228, 1236 [infringing activities in Venezuela, which prevented United States company from importing goods into Venezuela, were sufficient to support jurisdiction under the Lanham Act].)

Similarly, here, the trial court correctly held that Citizens had presented evidence that defendant’s infringement directly resulted in a multimillion dollar decrease in the value of Citizens as a company, and that this harm to Citizens in the United States was sufficient to support application of the federal trademark law. Also, Caitac’s infringing activities resulted in a decline of Citizens’ sales from the United States to IPGI, the distributor that replaced Caitac. Subjecting Caitac to the Lanham Act was particularly appropriate because the distribution agreement specifically required (pars. 8.2, 10.7) that any dispute between the parties would be determined by courts in Los Angeles County.

(See *Best Western International, Inc. v. 1496815 Ontario, Inc.* (D.Ariz. Mar. 13, 2007, No. CV 04-1194-PHX-SMM) [2007 WL 779699] [in denying motion to dismiss Lanham Act claims for lack of subject matter jurisdiction, court noted the “significant importance” of the Arizona forum selection clause in contract between the parties].)

Caitac’s reliance on *Love v. The Mail on Sunday* (C.D.Cal. 2007) 473 F.Supp.2d 1052, is misplaced. In *Love*, the district court held that plaintiff had not established that the alleged foreign infringement affected American foreign commerce because it was undisputed that the defendant had not distributed the allegedly infringing CD *anywhere*, and thus there was “no evidence that the alleged activity affected United States commerce in any way.” (*Id.* at p. 1056.) The court also observed that the plaintiff’s only other allegation of harm was a “purely speculative” declaration from plaintiff himself concerning “the attenuated effect” of the infringing CD on decreasing demand for plaintiff’s performances. (*Ibid.*) The district court concluded that the plaintiff had failed to provide any support for his alleged lost profits.

In contrast to the situation in *Love*, here, Citizens provided testimony of measurable financial harm suffered by Citizens in the United States as a result of Caitac’s infringing activity. As the trial court observed, Citizens’ value was deflated by approximately \$7 million due to infringement, and the company’s lower valuation could limit its ability to obtain credit, reduce the sale value of the company, and adversely affect the number of jobs in the United States the company could support.

Accordingly, because Citizens presented substantial evidence at trial that Caitac’s infringing sales caused harm to Citizens in the United States, the trial court properly found that federal trademark law applied to Caitac’s infringing conduct. The trial court thus rejected Caitac’s argument of a purported lack of subject matter jurisdiction and properly denied the motion for a directed verdict.

II. The trial court did not prejudicially err regarding various breach of contract issues.

A. Parol evidence concerning the meaning of the 2006 distribution agreement was admissible.

Caitac contends that the trial court erroneously admitted extrinsic evidence concerning the distribution agreement—largely testimony from Gary Freedman, Citizens’ chief contract negotiator and trial counsel (as well as counsel on appeal), who interpreted the meaning of key terms in the agreement. Freedman testified, in pertinent part, that under the terms of the agreement, each of Caitac’s purchase orders essentially amounted to a representation that Caitac could promptly find buyers for the items purchased. Caitac’s assertion that such evidence was improper under the parol evidence rule and should have been excluded is unavailing.

Freedman’s testimony (unobjected to by Caitac) explained that in addition to the minimum orders to which Caitac committed itself in the distribution agreement (par. 3.1), Caitac committed to use its best efforts to have whatever promotions and staffing were necessary to fully develop the market to make sales (par. 4.1).⁵ Specifically at issue is Freedman’s further testimony, explaining that Caitac would have to purchase from

⁵ Paragraph 4.1 of the distribution agreement provided as follows: “Use of Best Efforts. Distributor shall actively and energetically sell and promote the sale of [Citizens] Products and will use its best efforts to create an active demand and market for such Products in Distributor’s Territory. Without limiting the foregoing, Distributor shall use its best efforts to to: [¶] A. Maintain an adequate and efficient sales staff to fulfill Distributor’s obligations contained herein, for full market coverage; [¶] B. Fully utilize [Citizens] provided market development assistance and promotional programs; provided, however, that Distributor shall not be required to use any such programs that Distributor determines, in its sole discretion, would be unacceptable or would be considered disrespectful of Japanese culture or mores; [¶] C. Make every effort to fully develop the market and sales opportunities for [Citizens] products through Distributor’s dealer organization by, among other things, actively providing (i) marketing, (ii) sales training and instructions to its dealers, (iii) expenditure of advertising and promotional funds, and (iv) displays pursuant to [Citizens] programs.”

Citizens all of its requirements for resale (par. 2.3),⁶ meaning that Caitac would have to maximize sales while being careful not to build up a big inventory with excess merchandise. As further indicated by Freedman, Caitac's obligation to promptly find buyers for the merchandise it had ordered and thus to avoid excess inventory was consistent with Caitac's specific duty to give a quarterly accounting of its sales (par. 4.4), so Citizens could compare what Caitac was buying with what it was selling.⁷

At the outset we note that Citizens urges that Caitac's admission at trial of its breach of contract precludes its challenge on appeal of any breach of contract issue. (See *Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 605-606.) Indeed, in its closing argument, Caitac conceded that it had breached the agreement by failing to "meet the minimums," acknowledging there has "never been a dispute about that." This concession was, of course, consistent with Caitac's admission before the agreement was even terminated that it had breached the agreement, and that it "respected" Citizens' decision to terminate the agreement. In a similar vein, Citizens urges that Caitac's failure to object to Freedman's testimony at trial waives any claim of error. (*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1611; Evid. Code, § 353.) Although Caitac belatedly complained in its motion for JNOV and for a new trial about

⁶ Paragraph 2.3 of the distribution agreement provided as follows: "Requirements. During the term of this Agreement the Distributor [Caitac] shall purchase from [Citizens] all of its requirements for resale within the Territory of the Products. During the term of this Agreement, the Products shall represent the primary, number one United States brand represented by Distributor."

⁷ Freedman testified, for example, as follows: "As a minimum, [Caitac was] supposed to create a market. In Paragraph 4.1, [the 'use of best efforts' clause,] they're supposed to make every effort to fully develop the market and sales opportunities for [Citizens'] products [through marketing, sales training, advertising, promotions, etc.], so they're supposed to do what is necessary to build up that market and there's a number of ways to do it . . . in selling apparel. So, they're supposed to do that. They're supposed to buy minimums. So, they took the risk of doing that. If they can't buy minimums because they can't create the market, they're not supposed to build up an inventory that will lead to the problems that they created by buying more inventory than they can use."

the admission of such extrinsic evidence, counsel for Caitac even elicited some of the now complained of testimony from Freedman about the meaning of the agreement. Apart from the validity of Citizens' waiver arguments, we find that the parol evidence rule simply did not prohibit the testimony of which Caitac complains.

The parol evidence rule provides, in pertinent part, that the "[t]erms set forth in a writing intended by the parties as a final expression of their agreement [i.e., a fully integrated agreement] . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." (Code Civ. Proc., § 1856, subd. (a).)

Nonetheless, the statutory definition of the parol evidence rule specifically permits the introduction of certain evidence, such as "evidence of the circumstances under which the agreement was made or to which it relates, . . . or to explain an extrinsic ambiguity *or otherwise interpret the terms of the agreement*, or to establish illegality or fraud." (Code Civ. Proc., § 1856, subd. (g), italics added.)

Garcia v. Truck Ins. Exchange (1984) 36 Cal.3d 426, 435, is instructive. In *Garcia*, at page 435, the Supreme Court affirmed the decision of the trial court permitting testimony concerning the meaning of an integrated insurance contract from an attorney responsible for negotiating that policy. The attorney testified about the negotiation of the agreement, the rationale for adding certain provisions to that agreement, and the meaning of certain elements of the contract. In finding that the testimony had been properly admitted, the court observed that "'The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.'" (*Ibid.*, citing the landmark case, *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

Accordingly, the parol evidence rule did not bar the testimony by Citizens' counsel regarding the meaning of the requirements clause (par. 2.3), which in the context of other provisions required Caitac to sell to retailers all the merchandise it had ordered to satisfy the product demand that Caitac was required to create.

B. The lack of preliminary findings by the trial court regarding the interpretation of the requirements clause and the submission of the issue to the jury do not warrant a reversal.

As discussed above, because the language of paragraph 2.3 was reasonably susceptible to the interpretation urged by Caitac, when viewed in the context of the best efforts requirement in paragraph 4.1 and other provisions in the agreement, extrinsic evidence was admissible. (*Garcia v. Truck Ins. Exchange, supra*, 36 Cal.3d at p. 435.) As properly explained by Caitac, the procedure for admitting evidence to “interpret the terms of the agreement” (Code Civ. Proc., § 1856, subd. (g)), entails a three-step process by the trial court: (1) it provisionally receives the proffered evidence that is relevant to prove a meaning to which the language of the agreement is reasonably susceptible; (2) if the extrinsic evidence renders the language reasonably susceptible to the interpretation urged, the evidence is admitted to assist in interpreting the contract; and (3) if there is no material conflict in the extrinsic evidence, then the court interprets the contract as a matter of law, but with conflicts in extrinsic evidence, the factual conflict is properly resolved by the jury. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co., supra*, 69 Cal.2d at pp. 39-40; *Wolf v. Walt Disney Pictures & Television, supra*, 162 Cal.App.4th at pp. 1126-1127.)

In the present case, the extrinsic evidence was admitted without the court’s performing the three-step analysis discussed above. Also, because there was no conflict in the extrinsic evidence for the jury to resolve, the finding as to intent of the parties at the time of the agreement regarding the meaning of paragraph 2.3 should have been, as Caitac properly urges, solely a judicial function. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

Nonetheless, the judgment as to Citizens’ cause of action for breach of contract was not fatally flawed. In interpreting a contract, the trial court must “give effect to the mutual intention of the parties as it existed” at the time the contract was executed. (Civ. Code, § 1636; see *Wolf v. Walt Disney Pictures & Television, supra*, 162 Cal.App.4th at p. 1126.)

Here, Caitac's own officers (Yoshi Taenaka and Masatoshi Kaga) in effect had the same interpretation of the agreement as Freedman. They acknowledged that they understood that whenever Caitac submitted a purchase order to Citizens, Caitac was representing that it had sufficient orders to be able to sell such merchandise.

Thus, if the trial court had provisionally received the proffered evidence, as it should have, it would have arrived at the same interpretation of the intent of the parties that the jury did; i.e., that Caitac was required to purchase merchandise in amounts approximately no greater than it could resell. The trial court merely would have done so earlier in proceedings, and it would have done so as a matter of law.

Accordingly, the flaw of which Caitac complains was not prejudicial and does not warrant a reversal.

C. *There was no reversible jury instruction error regarding paragraph 2.3 of the agreement.*

Caitac claims that the trial court should have granted its motion for a new trial on the ground that the court failed to instruct the jury on how to interpret paragraph 2.3 of the distribution agreement. Caitac urges that although the trial court instructed the jury on other disputed sections of the agreement, it erroneously did not include any discussion of paragraph 2.3. According to Caitac, because paragraph 2.3 was not included in the instruction addressing disputed sections of the agreement, "the jury could easily have concluded that [paragraph] 2.3 was undisputed."

The problem with this contention is that, as previously discussed, there was no dispute among the witnesses at trial about the interpretation of paragraph 2.3. Even though the instructional issue was not waived because it was raised in the context of a motion for a new trial (see Code Civ. Proc., § 657; *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 984), "it is improper to give an instruction which lacks support in the evidence, even if the instruction correctly states the law." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875.)

Here, counsel for Caitac urged in closing argument that paragraph 2.3 merely required it to purchase all of its requirements of Citizens products from the manufacturer,

Citizens itself, and not to purchase from another distributor. However, closing argument is not evidence. Caitac does not point to any disputed trial testimony supporting its interpretation of paragraph 2.3. Thus, the jury instruction complained of was not flawed.

D. The trial court did not err in precluding evidence of a “force majeure” defense related to the economic downturn in the Japanese market for denim apparel.

“Force majeure” is the equivalent of the common law contract defense of impossibility. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 828, pp. 916-917.)⁸ An excuse for the failure to perform a contractual obligation, such as impossibility of performance, is an affirmative defense (*Eucalyptus G. Assn. v. Orange C. N. & L. Co.* (1917) 174 Cal. 330, 334-335), which must be expressly pleaded in the answer, or the defense is waived. (See *California Academy of Science v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.)

Caitac asserts that it did not have to affirmatively allege this defense because its general denial of the unverified first amended complaint was sufficient to permit it to present a force majeure defense based on the economic downturn in the Japanese denim apparel market. However, Caitac’s purported defense of impossibility or force majeure was not an element of Citizens’ breach of contract cause of action, and the first amended complaint did not put in issue anything related to the state of the Japanese denim apparel market. (Compare *Advantec Group, Inc. v. Edwin’s Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 626-630 [contractor’s license is by statute an element of contractor’s

⁸ Paragraph 10.3 of the distribution agreement provided as follows: “Force Majeure. Neither party shall be in default hereunder by reason of any failure or delay in the performance of any obligation under this Agreement where such failure or delay arises out of any cause beyond the reasonable control and without the fault or negligence of such party. Such causes shall include, without limitation, storms, floods, other acts of nature, fires, explosions, riots, war or civil disturbance, strikes or other labor unrests, embargoes and other governmental actions or regulations that would prohibit either party from ordering or furnishing Products or from performing any other aspects of the obligations hereunder, delays in transportation, and liability to obtain necessary labor, supplies, or manufacturing facilities. Force majeure shall not, however, excuse the obligation of a party to make any payments required under this Agreement.”

claim for compensation, and thus defendant's general denial put proper licensing at issue, without the need to assert it as an affirmative defense].) Although the defendant's general denial in a breach of contract action places at issue whether the "plaintiff performed or had an excuse for nonperformance" (*Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532, 1545), a general denial does not place at issue whether the *defendant* had any excuse for nonperformance. Such a defense must be expressly pleaded in the answer as an affirmative defense, and Caitac failed to do so.

Moreover, even assuming that the unpleaded affirmative defense of force majeure should have been permitted, it lacked any substantive merit. First, testimony from Caitac's own personnel (Kaga) revealed that the market for premium jeans in Japan had peaked in 2004—two years before the distribution agreement at issue was signed—and that after 2004 the market "settled down." Because Caitac was aware of the already existing decline in the Japanese market when it signed the agreement in 2006, such knowledge defeats any possible force majeure affirmative defense. Second, it is highly questionable whether a mere economic downturn in the market for a product—a normal risk commonly inherent in many business transactions—can constitute a valid excuse for the nonperformance of a contract under a force majeure theory. (See *Mateo Community College Dist. v. Half Moon Bay Limited Partnership* (1998) 65 Cal.App.4th 401, 414.)

Lastly, the language of the particular force majeure provision in the present case provided, "Force majeure shall not, however, excuse the obligation of a party to make any payments required under this Agreement." Here, the money awarded by the jury for the breach of contract claim reflected the lost profits from Caitac's failure to satisfy the minimum purchase guarantees. To the extent the required minimum purchases are viewed as payments under the distribution agreement, the terms of the agreement preclude application of the force majeure defense.

Accordingly, the trial court did not err in precluding Caitac from pursuing its unpleaded defense of force majeure, which was premised on the decline of the premium denim market in Japan, a fact of which Caitac was aware prior to the agreement.

III. Substantial evidence supports the jury's verdict on the fraud cause of action.

A. Evidence of Caitac's fraudulent intent.

To recover on a cause of action for the intentional tort of fraud, a plaintiff must establish, in pertinent part, the defendant's "intent to deceive or induce reliance." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.) Fraud requires more than an unfulfilled promise; it requires "[a] promise, made without any intention of performing it." (Civ. Code, § 1710.) Intentional concealment can give rise to an inference of fraudulent intent. (*Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 161.)

We review Caitac's claim of insufficient evidence of fraudulent intent under the customary standard of appellate review for substantial evidence contentions. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369; *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123.) As Citizens' counsel explained in closing argument, the fraud cause of action was based on the following facts: "Caitac deceived Citizens because each time an order was submitted, Caitac was representing that it had orders to fill for that merchandise or could sell it within a reasonable period of time. That representation was false. It was not true. Caitac also concealed that they were building up this inventory and making more purchases when it didn't have orders to fill."

Caitac admitted that each time it submitted a purchase order to Citizens, Caitac represented that they had orders to be able to sell in Japan approximately the amount of merchandise ordered within a reasonable period of time. It is reasonable to infer that Caitac knew such representations were not true at the time they were made, based on its failure to submit the quarterly reports required by the distribution agreement. Caitac failed to provide any such reports in 2006, and Citizens was constrained to request such information in November of 2006. From such intentional concealment, the jury could infer that Caitac purposely did not furnish the reports required by the agreement to conceal its dramatic build up of inventory.

The information required by the agreement was not provided until January of 2007, and then Caitac disclosed it had more than 22,000 units of Citizens' apparel in

inventory. That concealment of a huge inventory, coupled with Caitac's admission that each time it submitted a purchase order to Citizens it was representing that Caitac was only ordering enough merchandise to fill orders it reasonably expected to receive, is sufficient to support the intent element for fraud.

B. No reversible error in excluding testimony from an expert witness on Japanese business practices.

Caitac contends that even if there is sufficient evidence of fraud, the verdict as to that cause of action should be reversed because it was not permitted to submit evidence to rebut fraudulent intent. Caitac offered testimony from Antonio R. Sarabia, an expert on business practices in the Japanese apparel industry. According to Caitac, Sarabia would have testified, as he did at his deposition, that Japanese stores often retain the right to return unsold goods, unlike comparable American stores. The situation in Japanese retail stores is akin to a consignment situation. However, the distributor itself has its own sales people and solicits sales inside the department stores, the department store operates the building and has greeters for the customers, and the department store does not really own the merchandise until it is sold.

Caitac asserts that the significance of such expert testimony explaining the right to return unsold goods was that it would have rebutted Citizens' argument that Caitac could not actually "sell" its orders within a reasonable time. It would rebut such testimony because Caitac actually could "sell" its orders, as the term "sell" is understood in Japan.

Even assuming the trial court erred in prohibiting such expert testimony because "the law favors permitting experts to testify" and it would have been "helpful to the jury" (*Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1443), the error was not prejudicial. First, Caitac did procure from two other witnesses (Kaga and Taenaka) testimony explaining the way consignment sales work in Japanese department stores. Second, consignment sales comprised a relatively small percentage of the more than 29,000 units in inventory that Caitac reported in July of 2007.

Accordingly, any error in precluding the expert testimony of Sarabia does not warrant a reversal of the fraud verdict.

IV. Other issues.

Caitac urges that even if the fraud verdict stands, the punitive damages award should be reversed because it was not supported by convincing evidence. The claim is perfunctorily asserted in two sentences in Caitac's opening brief. An appellate court need only "discuss those arguments that are sufficiently developed to be cognizable," and the contention may be rejected on that basis. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19)

In any event, the award of punitive damages is supported by sufficient substantial evidence. (See *Shade Foods, Inc. v. Innovative Product Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.) After Caitac concealed from Citizens its buildup of excess inventory in breach of its representations, Caitac then sold such merchandise to unauthorized retailers at dramatically discounted prices in a manner it knew would "ruin" the value of the Citizens brand in Japan. Before doing so, Caitac threatened to take those harmful actions in an effort to pressure Citizens and its new distributor (IPGI) to agree to concessions to which Caitac was not entitled under the distribution agreement. Such misconduct constituted substantial evidence of "conscious disregard of the plaintiff's rights" (*Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462), and supports the award of punitive damages.

Finally, Caitac contends that a reversal of the trademark or breach of contract verdicts would require a reduction of the award of attorney fees. Because we affirm the judgment, there is no reason to disturb the award of attorney fees.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.