

[Dremak v. Urban Outfitters, Inc.](#)

Court of Appeal of California, Fourth Appellate District, Division One

March 23, 2018, Opinion Filed

D071308

Reporter

2018 Cal. App. Unpub. LEXIS 1925 *; 2018 WL 1441834

ANDREW R. DREMAK et al., Plaintiffs and Appellants, v. URBAN OUTFITTERS, INC. et al., Defendants and Appellants.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. [CALIFORNIA RULES OF COURT, RULE 8.1115\(a\)](#), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY [RULE 8.1115\(b\)](#). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF [RULE 8.1115](#).

Subsequent History: Time for Granting or Denying Review Extended [Dremak v. Urban Outfitters, Inc., 2018 Cal. LEXIS 4909 \(Cal., June 28, 2018\)](#)

Review denied by [Dremak v. Urban Outfitters, 2018 Cal. LEXIS 5072 \(Cal., July 11, 2018\)](#)

Prior History: [*1] APPEAL from a judgment of the Superior Court of San Diego County, No. 37-2011-00085814-CU-BT-CTL, Joel M. Pressman, Judge.

Disposition: Affirmed.

Counsel: Blood Hurst & O'Reardon, Timothy G. Blood, Paula R. Brown; Stonebarger Law, Gene J. Stonebarger for Plaintiffs and Appellants.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Gordon & Rees, Miles D. Scully, Timothy K. Branson and Matthew G. Kleiner for Defendants and Appellants.

Judges: HUFFMAN, Acting P. J.; NARES, J., O'ROURKE, J. concurred.

Opinion by: HUFFMAN, Acting P. J.

Opinion

The Song-Beverly Credit Card Act (Credit Card Act) prohibits merchants from requesting and recording "personal identification information" as a condition of completing a credit card transaction. ([Civ. Code, § 1747.08, subd. \(a\)\(2\)](#)).¹ In 2011, Andrew R. Dremak, Donna Motta, and Anne Nicolucci each brought suit under the Credit Card Act alleging retailer Urban Outfitters, Inc. (Urban) and its wholly owned subsidiary Anthropologie, Inc. (Anthropologie) violated the law by asking customers to provide their ZIP codes at check out. The plaintiffs' cases were consolidated and a class of similarly situated consumers was eventually certified. After the defendants' unsuccessful motions for summary judgment and to decertify the class, the court [*2] conducted a bench trial of the plaintiffs' claims. The court dismissed their claim against Anthropologie and found they had not met their burden to

¹ Subsequent undesignated statutory references are to the Civil Code.

prove that a reasonable consumer would believe that Urban required a ZIP code as a condition of accepting a credit card payment. The court entered judgment in favor of Urban and eventually awarded defense costs of \$150,449.49.

On appeal, the plaintiffs contend the court applied the wrong legal standard to conclude they failed to meet their burden of proof, and improperly dismissed their claims against Anthropologie. The plaintiffs also assert the court erred in ordering them to pay the defendants' costs related to electronically stored documents. Urban and Anthropologie cross-appeal, asserting the court erred by denying their pretrial motion to decertify the class. We conclude the trial court applied the correct legal standard and affirm its factual finding that the plaintiffs failed to meet their burden of proof. Because we affirm this finding we need not address plaintiffs' challenge of the dismissal of their claims against Anthropologie or the defendants' cross-appeal. Finally, we reject plaintiffs' claim that the court abused its discretion [*3] in its award of defense costs.

FACTUAL AND PROCEDURAL BACKGROUND

Urban is a retail company that sells merchandise through five brands, including under its own name and Anthropologie. During the class period of February 15, 2010 to February 10, 2011, Urban operated 64 Urban and Anthropologie stores in California. In 2009, Urban contracted with another company, Merkle, Inc., to build and implement a customer relationship management (CRM) database. The CRM database was constructed to maintain a profile of Urban and Anthropologie's customers that included the customer's name, address, telephone number, age, and gender, as well as information regarding each purchase the customer made from the company. Urban would then use this information for its marketing purposes.

In order to obtain retail store customers' addresses without directly asking, the CRM project included an initiative to collect ZIP codes from credit card customers at the point of sale. Urban would then match the customer's ZIP code to the name on their credit card, which was then used to determine the customer's address from Urban's existing database or Merkle's proprietary databases. When Urban was considering how to collect [*4] addresses, Merkle recommended this process as "a less-intrusive way of capturing information" than asking for a full address because "consumers are more accustomed to providing zip at time of purchase due to security and identify theft concerns." Urban vetted this method of collecting ZIP codes with the company's legal team. The company understood that to avoid running afoul of the Credit Card Act, the collection needed to occur after a transaction, including payment, was completed and that the sale could not be dependent on the customer providing his or her ZIP code.

During the certified class period, all of Urban's stores used the same computerized cash register equipment and software, including a customer terminal and PIN pad. The automated software on the stores' cash registers prompted the sales associate operating the register through a series of steps that could not be varied. After the associate scanned the items to be purchased, the register displayed a list of tender options, including credit/debit. Once the associate selected credit/debit, the associate would prompt the customer to swipe his or her card on the customer terminal. If the credit or debit card was approved, the [*5] customer signed on the terminal and pressed "Done." The register then prompted the associate to verify the customer's signature and select "Yes." The register next displayed a prompt for the associate to request the customer's ZIP code. The associate then entered the ZIP code or pressed a key to skip entering the ZIP code, at which point the customer's receipt printed.

In addition to collecting customer's ZIP codes at the point of sale, Urban also collected consumers' personal identification information through other methods, including online transactions, call center sales, and a loyalty program Urban operated for its Anthropologie brand. Consumers who joined the Anthropologie loyalty program were not asked to provide their ZIP codes at the point of sale.

Urban began the ZIP code collection initiative in September 2009 at a handful of its Anthropologie stores. At that time, the company's store operations manager, Whitney Grob, provided store managers with a memorandum that outlined the program and the register operation. The memo explained that when the sales associate reached the "'Enter Zip' screen" on the register, the associate should "politely ask the customer if she would like [*6] to provide us with her zip code." The memo then provided a script for three scenarios: (1) "If the customer says yes ... Enter the 5 digit code and the customer's receipt will print, bringing the transaction to an end." (2) "If the customer asks why ... Explain that we are gathering the information to see how far our customers travel to come to our locations, to

better plan for future stores, and to identify the best ways to reach our best customers." (3) "If the customer says no ... It's ok! Zip Code is not needed to complete the transaction. Simply press F2/Skip and the receipt will print, bringing the transaction to an end."

Urban launched the initiative at the rest of its Anthropologie stores and its Urban stores in October 2009. In regular weekly e-mail correspondence to Anthropologie store managers in 2010, Grob reminded managers that the ZIP code capture program was implemented to "see how far our customers travel to come to our stores, to plan for future stores, and to identify the best ways to reach our customers." The communication stated that the register update that implemented the program prompted the cashier to "ask if the customer would like to provide us with her zip [*7] code." In June 2010, Grob noted stores had increased their ZIP code capture rate from 35 to 70 percent, and that the company's goal was to obtain a capture rate of 85 percent. At trial, Grob testified that the company wanted to ensure stores knew that ZIP codes were not required and that employees should "not demand it" but "should politely inquire" if customers wanted to provide the information.

Documentation provided to Urban stores in October 2009 to kick off the ZIP code capture initiative stated "[i]f the customer pays with a credit or debit card the cashier will be prompted to ask for the zip code" and that "[i]f a customer says no to zip code or email - PLEASE DO NOT ENTER any information in the fields - this will mess up the compliance reporting. **Simply hit Skip.**" Urban did not provide Urban Outfitters stores with a script to follow to collect ZIP codes, and Grob testified that training on the initiative was done by store managers and other cashiers, and varied by location. At trial, several Urban and Anthropologie employees testified that obtaining ZIP codes was never required to complete a sales transaction and that it varied whether bagged merchandise was provided to the customer [*8] before or after the receipt printed.

Urban discontinued the ZIP code capture program on February 10, 2011, the day the California Supreme Court issued its opinion in [*Pineda v. Williams-Sonoma Stores, Inc. \(2011\) 51 Cal.4th 524, 120 Cal. Rptr. 3d 531, 246 P.3d 612 \(Pineda\)*](#), which held that ZIP codes constitute "personal identification information" under the Credit Card Act. (*Id. at p. 527.*)

In 2011, Dremak, Motta, and Nicolucci each filed a complaint in superior court alleging Urban and Anthropologie had violated the Credit Card Act by asking customers to provide their ZIP codes when making a purchase by credit card. The three cases were consolidated and the parties proceeded to discovery. In February 2014, the defendants filed motions for summary judgment and to strike the class allegations. The following month the plaintiffs brought a competing motion for class certification. The court denied the defendants' motions. The court granted the plaintiffs' motion to certify a class "consisting of all persons from whom Urban Outfitters, Inc. or Anthropologie, Inc. requested and recorded ZIP codes in conjunction with an in-store credit card purchase transaction in California from February 15, 2010 through February 10, 2011" and appointed Dremak, Motta, and Nicolucci as class representatives.

Before [*9] trial, the defendants brought a motion to decertify the class based primarily on a recent Court of Appeal opinion, [*Harrold v. Levi Strauss & Co. \(2015\) 236 Cal.App.4th 1259, 187 Cal. Rptr. 3d 347 \(Harrold\)*](#). The court rejected the defendants' arguments and denied the motion, finding that even under the interpretation of the law advanced by the defendants, the class was properly certified. The case proceeded to a bench trial that took place over six days in June 2016. After the conclusion of the trial, the parties submitted proposed statements of decision. In addition to asserting the plaintiffs had not met their burden to show a violation of the Credit Card Act, the defendants' statement requested (1) that the claims against Anthropologie be dismissed because none of the class representatives had made a purchase at an Anthropologie store in which their ZIP code was requested and (2) a renewed request to decertify the class. On August 5, 2016, the court issued its final statement of decision in favor of the defendants. The statement dismissed the plaintiffs' claims against Anthropologie and found that plaintiffs had "not met their burden to show by a preponderance of the evidence that any request for ZIP codes was a 'condition to accepting the credit card as payment.'" [*10] The court denied the defendants' request to decertify the class.

On August 23, 2016, the court entered judgment in favor of the defendants and on January 4, 2017 awarded defense costs in the amount of \$150,449.49. Class plaintiffs appealed the judgment and the subsequent cost award.

DISCUSSION

I

LEGAL PRINCIPALS

The Credit Card Act is "designed to promote consumer protection.' [Citation.] One of its provisions, [section 1747.08](#), prohibits businesses from requesting that cardholders provide 'personal identification information' during credit card transactions, and then recording that information. (*Civ. Code, § 1747.08, subd. (a)(2).*)" (*Pineda, supra, 51 Cal.4th at p. 527.*) [Section 1747.08, subdivision \(a\)](#) provides in relevant part that "no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall do any of the following: [¶] (1) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information upon the credit card transaction form or otherwise. [¶] (2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, [*11] which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise. [¶] (3) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder."

The statute "defines personal identification information as 'information concerning the cardholder . . . including, but not limited to, the cardholder's address and telephone number.' ([§ 1747.08, subd. \(b\), . . .](#)) 'Concerning' is a broad term meaning 'pertaining to; regarding; having relation to; [or] respecting' (Webster's New Internat. Dict. (2d ed.1941) p. 552.)" (*Pineda, supra, 51 Cal.4th at p. 531.*) As discussed, in 2011 in *Pineda* the Supreme Court held that "[a] cardholder's ZIP code, which refers to the area where a cardholder works or lives," is personal identification information under the Credit Card Act. (*Ibid.*)

[Section 1747.8](#) was added to the Credit Card Act in 1990 as part of legislation enacted "'to address the misuse of personal identification information for, inter alia, marketing purposes" (*Pineda, supra, 51 Cal.4th at p. 534.*) The Legislature found there was "'no [*12] legitimate need to obtain such information from credit card customers if it was not necessary to the completion of the credit card transaction'" and sought to "'protect the personal privacy of consumers who pay for transactions with credit cards.'" (*Ibid.*, quoting Assem. Com. on Finance & Insurance, Analysis of Assem. Bill No. 2920 (1989-1990 Reg. Sess.) as amended Mar. 19, 1990, p. 2.) The version of the statute enacted in 1990 prohibited retailers from "requir[ing] the cardholder, as a condition to accepting the credit card, to provide personal identification information" (Stats. 1990, ch. 999, § 1, p. 4192.) The following year, the provision was broadened to forbid businesses from "*requesting*," in addition to "*requiring*," personal identification information as a condition of accepting a credit card for payment. (*Pineda, supra, at p. 534*, quoting Stats. 1991, ch. 1089, § 2, p. 5043, italics added.)

"The Legislature's stated purpose in amending [subdivisions (a)(1) and (a)(2)] was to clarify that merchants 'may neither require nor request, as a condition to accepting the credit card, the taking or recording of personal identification information from the cardholder. (Current law states that such information may not [*13] be required, but does not prohibit requesting such information.)' (See Assem. Com. on Banking, Finance and Public Indebtedness Rep. on Assem. Bill No. 1477 (1991-1992 Reg. Sess.), May 13, 1991.) The word 'request' was added to subdivision (a)(1) and (2) to 'prevent a "request" for personal information, because a customer might perceive that request as a condition of credit card payment. In effect, the 1991 amendment prevents a retailer from making an end-run around the law by claiming the customer furnished personal identification data 'voluntarily.' (*Florez, supra, 108 Cal.App.4th at p. 453.*)" (*Absher v. AutoZone, Inc. (2008) 164 Cal.App.4th 332, 342-343, 78 Cal. Rptr. 3d 817.*)

In *Harrold*, in affirming the denial of a motion for class certification, the First District held that "the [Credit Card] Act is not intended to forbid merchants from obtaining [personal identification information] voluntarily, if the customer understands that the information need not be disclosed in order to use a credit card." (*Harrold, supra, 236 Cal.App.4th at p. 1266.*) "Neither the legislative history nor the cases that have interpreted the statute indicate that

the Act prohibits merchants from requesting personal identification information if the request is not made under circumstances suggesting that a credit card will not be accepted as payment without such information." [*14] (*Ibid.*) Thus, the Credit Card Act is violated by a request for personal identification information only if the request "is made under circumstances in which the customer could reasonably understand that [the information] was required to process the credit card transaction" (*Harrold, at p. 1268.*)

The trial court's interpretation of [section 1747.8, subdivision \(a\)](#) is a question of law this court reviews independently. (*Pineda, supra, 51 Cal.4th at p. 529.*) A different standard governs our review of findings of the trial court as the trier of fact. In order to establish a violation of the Credit Card Act, the class plaintiffs had the burden to prove a reasonable consumer would believe providing his or her ZIP code was a requirement to complete a purchase. "[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, . . . whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc. (2011) 196 Cal.App.4th 456, 466, 126 Cal. Rptr. 3d 301 (Sonic).*)

II

THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD

A

Class plaintiffs [*15] assert that in finding they had not met their burden of proof, the trial court applied the wrong legal standard. Specifically, plaintiffs contend the court improperly required them to prove that Urban and Anthropologie actually required customers to provide their ZIP codes to complete a credit card transaction, rather than to prove a *reasonable consumer would believe* providing their ZIP code was required to complete the transaction. Plaintiffs mischaracterize the trial court's order.

We agree with the plaintiffs that the statute, its legislative history, and the case law interpreting the provision make clear that the Credit Card Act can be violated even if the personal identification information is not actually required to complete the transaction. We do not agree, however, that the trial court interpreted [section 1747.8, subdivision \(a\)](#) in the contrary manner they assert. Rather, the trial court's order makes clear that it required the plaintiffs to prove that they, and other consumers like them, reasonably believed the defendants' "request for [a] ZIP code[]" was a 'condition to accepting the credit card as payment.'"

The court stated its findings in those terms, holding that "*no consumer could reasonably perceive* [*16] that a request for a ZIP code that was made after the card had already been accepted was a condition for acceptance of the card." (Italics added.) Further, as both parties point out, just weeks before trial, the court articulated the correct standard in its order denying defendants' motion to decertify the class. That order demonstrated the court understood that a violation of the Credit Card Act occurs if a reasonable consumer would believe the requested personal identification information was a condition of the retailer accepting the credit card payment.

B

The plaintiffs also argue that the court incorrectly considered the issue from the perspective of the retailer, rather than the consumer. The court's order does not support this assertion. The trial court's consideration of documents establishing the companies' internal operating procedures and the testimony of the defendants' witnesses, including cashiers who interacted with consumers, was relevant to its determination of what reasonable consumers would believe if confronted with Urban and Anthropologie's request for their ZIP code. This evidence established what process was used to collect ZIP codes and how that process was presented [*17] to consumers. There is nothing improper in the court's consideration of these facts. (*Harrold, supra, 236 Cal.App.4th at p. 1264.*)

The trial court's order is also clear that the court considered the evidence that plaintiffs categorize as relating to consumer perception: the class representatives' testimony, the documents showing the screens viewed by customers on the customer terminal, and the testimony of the plaintiffs' expert who attempted to discredit the defense expert. With respect to the class representatives' testimony, the court found their testimony to be unreliable, noting that none "could recall the details of their transaction, except that a ZIP code was requested at some point in the transaction" that was "earlier than Urban's procedure."²

Plaintiffs rely on [Harrold, supra, 236 Cal.App.4th 1259](#) to suggest the trial court was precluded from considering the defendants' internal procedures in its consideration of what a reasonable consumer would believe. *Harrold*, however, contains no such limitation. Rather, the *Harrold* opinion affirmed the trial court's consideration of factual information offered by the defendant retailer about its procedures to determine how a reasonable consumer would view the request for his or her personal information. (*Id. at p. 1264* [Affirming [*18] denial of class certification by trial court based on defense evidence that cashiers were trained to "wait[] until the receipt is printed, handed over to the customer and the merchandise is bagged before" requesting customer's e-mail address.].)³ The same type of evidence was properly considered by the court here.

III

THE EVIDENCE DID NOT COMPEL A FINDING IN FAVOR OF PLAINTIFFS

Plaintiffs next contend reversal is required because uncontroverted evidence supported their assertion that a reasonable consumer would perceive the defendants' requests for ZIP codes as a condition to completing a transaction. In support, plaintiffs point to: (1) Merkle's recommendation that Urban and Anthropologie collect ZIP codes at the point of sale because "consumers are more accustomed to providing zip at the time of purchase due to security and identity theft concerns." (2) Statements by store employees contained in summaries of feedback from store managers on the ZIP code capture project that ZIP codes were easier to capture than e-mail addresses because consumers often think the request [*19] is part of the card verification process, and "often think it is necessary in order to pay by card." And (3) the testimony of the defendants' marketing expert, David Stewart, Ph.D., who conducted a survey to measure consumers' perception of the request for their ZIP codes.⁴

² Dremak could not recall one of the two purchases he made during the class period, and with respect to the other he "had no recollection of the exact words of the cashier's request for a ZIP code or whether he had asked why it was being requested." Nicolucci testified about events that did not occur and recalled few details of the Urban Outfitters transaction in which she was asked for her ZIP code, except that the request was made prior to receiving a receipt and that the cashier asked "something along of the lines of, May I have your ZIP code?" The court found this statement could "only reasonably be construed as a voluntary request." Motta also could not recall the details of any transaction and testified about events that did not occur.

³ Plaintiffs also rely on two unpublished California Federal District Court orders, [Juhline v. Ben Bridge Jeweler, Inc. \(S.D. Cal. Sept. 7, 2012, No. 11cv2906-WQH-NLS\) 2012 U.S. Dist. LEXIS 129413 \(Juhline\)](#) and [Gossoo v. Microsoft Corp. \(C.D. Cal. Oct. 9, 2013, No. CV 13-2043 SVW\) 2013 U.S. Dist. LEXIS 149677 \(Gossoo\)](#). Like *Harrold*, *Gossoo* addressed class certification. *Juhline* reviewed the denial of a motion for summary judgment. Despite the different procedural posture, the court in *Gossoo* looked to the defendants' evidence concerning its sales practices to determine that certification of a class was not appropriate where there was no evidence that the retailer's cashiers requested personal identification information in a consistent manner. ([Gossoo, 2013 U.S. Dist. LEXIS at pp. 7, 12.](#)) On facts similar to those here, the court in *Juhline* concluded that defendant had not established it was entitled to judgment as a matter of law on plaintiff's Credit Card Act claim where the customer was asked for personal identification information after he signed for the purchase, but prior to being given his receipt. ([Juhline, supra, 2012 U.S. Dist. LEXIS at pp. 14-16.](#)) A determination that a case may proceed to trial, like *Juhline*, does not foreclose a finder of fact from later concluding the plaintiff has not met his burden of proof.

⁴ The survey was commissioned by Dr. Stewart for this litigation and was conducted at several stores in Denver, Colorado and Seattle, Washington. For the survey, the cash register process used by Urban in California during the class period was implemented at those stores and cashiers were given directions to follow the register process, but were not provided with any direction on how to request the ZIP code from the customer. After a transaction was complete, surveyors then interviewed consumers who used a credit card about their purchasing experience, including the request to provide a ZIP code.

Contrary to the plaintiffs' assertion, however, this evidence was contradicted. The summaries of store feedback showed that cashiers often completed transactions without obtaining the customers' zip code and that when customers questioned cashiers about why ZIP codes were collected, cashiers accurately informed customers it was for marketing purposes and was not required to complete a purchase. Because consumers often questioned the request for their zip code and did not provide it to the cashier, the court could fairly infer a reasonable consumer would not believe the information was required to complete a transaction. This evidence was at most ambiguous on the question of what a reasonable customer would believe.

With respect to Dr. Stewart's survey, the plaintiffs' own expert discredited the survey at trial. Further, the results of the survey questions that plaintiffs rely on do not lead necessarily to the conclusion [*20] that a reasonable consumer would perceive providing his or her ZIP code as a condition of completing a transaction. For instance, Dr. Stewart's survey concluded that 26 of the 113 surveyed consumers thought they needed to do something to complete their transaction after signing the customer terminal, and that 19 of those 26 believed it was necessary to provide their ZIP code. Thus, just 19 of the 113 consumers interviewed thought providing a ZIP code was necessary to complete their purchase. Plaintiffs argue that because 49 percent of the customers surveyed (55 of the 113) thought they were asked for their ZIP code for security purposes, these consumers also necessarily believed that providing their ZIP code was required to complete the transaction. Class plaintiffs, however, point to no evidence that supports this leap in logic.

Likewise, Merkle's opinion that requesting ZIP codes was an effective way of capturing customer data because consumers are accustomed to providing this information for security purposes, did not establish that a reasonable consumer would believe providing their ZIP code was necessary to complete a purchase. The evidence relied on by the plaintiffs does not, [*21] as a matter of law, compel a judgment in their favor. Rather, plaintiffs have shown only that conflicting inferences could be drawn by the finder of fact. It is not this court's role to reweigh the evidence in the manner the plaintiffs suggest.⁵ (See [Sonic, supra, 196 Cal.App.4th at p. 466](#) ["We decline plaintiff's invitation to examine whether substantial evidence supports his position. It is not our function to retry the case."].)

IV

THE TRIAL COURT'S AWARD OF DEFENSE COSTS WAS NOT AN ABUSE OF DISCRETION

Class plaintiffs argue that the court abused its discretion by awarding the defendants \$57,912.84 for costs associated with the production of documents in response to plaintiffs' discovery requests. Specifically, plaintiffs argue these costs were not "reasonably necessary to the conduct of the litigation" and not "reasonable in amount" as required by [Code of Civil Procedure section 1033.5](#).

A

[Code of Civil Procedure section 1032](#) provides in part: "(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." [Code of Civil Procedure section 1033.5](#) "expressly defines the term 'costs' as used in [Code of Civil Procedure section 1032](#)" and "specifies which costs are 'allowable' (*id.*, subd. (a)), which are 'not allowable . . . , except when expressly authorized by law' (*id.*, subd. (b)), and [*22] which may be allowed or denied in the court's discretion (*id.*, subd. (c))." ([Davis v. KGO-T.V. \(1998\) 17 Cal.4th 436, 441, 71 Cal. Rptr. 2d 452, 950 P.2d 567.](#))

⁵ Because we affirm the trial court's finding that the plaintiffs failed to meet their burden of proof to establish that the defendants violated the Credit Card Act, the plaintiffs' contention concerning the court's comment on the evidence that related to the number of violations is moot. Additionally, any error in the trial court's dismissal of plaintiffs' claim against Anthropologie was harmless in light of our affirmance of the court's conclusion that the conduct at issue did not violate the Credit Card Act. (See [Diaz v. Carcamo \(2011\) 51 Cal.4th 1148, 1161, 126 Cal. Rptr. 3d 443, 253 P.3d 535](#) ["To establish prejudice, a party must show 'a reasonable probability that in the absence of the error, a result more favorable to [it] would have been reached.'"].)

For those costs that may be awarded at the court's discretion, the statute provides that "[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" and that those "costs shall be reasonable in amount." ([Code of Civ. Proc., § 1033.5, subd. \(c\).](#)) "In ruling upon a motion to tax costs, the trial court's first determination is whether the statute expressly allows the particular item and whether it appears proper on its face. "If so, the burden is on the objecting party to show [the costs] to be unnecessary or unreasonable." [Citation.] Where costs are not expressly allowed by the statute, the burden is on the party claiming the costs to show that the charges were reasonable and necessary. [Citation.] "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion."" ([Gorman v. Tassajara Development Corp. \(2009\) 178 Cal.App.4th 44, 71, 100 Cal. Rptr. 3d 152.](#))

B

The costs at issue consisted of Urban's payment to vendors to process documents, conduct coding analytics to identify relevant documents, and to create and maintain a database to store thousands of documents. [*23] These costs are neither specifically allowed under [Code of Civil Procedure section 1033.5, subdivision \(a\)](#), nor specifically disallowed under subdivision (b). Thus, the trial court had discretion to grant defendants' request for these costs if they were reasonable and necessary. In its order denying the plaintiffs' motion to tax these costs, the trial court concluded that while the "parties are expected to bear routine discovery costs, the document database in this case was specially required in order to process the unique discovery in this litigation."

In Urban's opposition to the plaintiffs' motion to tax this cost, Urban's counsel explained that the search terms and document custodians the plaintiffs asked Urban to use to identify potentially relevant documents resulted in a universe of over 400,000 documents. Because of the size of the universe of documents, Urban employed predictive coding to narrow the scope of documents to produce. In support of its request to be awarded the special cost of this method of document retrieval, Urban's counsel submitted a declaration setting forth the time-consuming process that Urban employed to produce a final set of 1,658 responsive documents and the associated costs of that process. This evidence [*24] supported the trial court's finding that these costs were reasonable and necessary to the litigation and class plaintiffs have not shown this finding constituted an abuse of discretion.

V

Given our resolution of the class plaintiffs' appeal, the defendants' cross-appeal of the court's order denying its motion for decertification is moot. (See [Hewlett v. Squaw Valley Ski Corp. \(1997\) 54 Cal.App.4th 499, 510, 546, 63 Cal. Rptr. 2d 118.](#))

DISPOSITION

The judgement is affirmed. Defendants are awarded costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.