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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**JAMES THOMAS,**

**Plaintiff and Respondent,**

**A130517**

**v.**

**(Alameda County  
Super. Ct. No. RG03091195)**

**ANTHONY IMBRIOLO,**

**Defendant and Appellant.**

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Plaintiff James Thomas filed a class action complaint against the manufacturers and marketers of Avacor hair regrowth system — including defendant Thomas Imbriolo and others — asserting claims for violating California’s Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and claims for violating the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.).<sup>1</sup> The trial court granted plaintiff’s class certification motion and certified a class of California residents who purchased Avacor from January 1, 2000 through April 20, 2007 (the class or plaintiffs).

<sup>1</sup> Unless otherwise noted, all further statutory references are to the Civil Code. Plaintiffs also sued Global Vision Products, Inc. (Global Vision), Derrike Cope, David L. Gordon, Powertel Technologies, Inc., Craig Dix, Henry Edelson, and Robert DeBenedictis. These defendants are not parties on appeal and are mentioned only where relevant to the issues raised in Imbriolo’s appeal.

Following a four-week trial, a jury returned a verdict for the class, finding Imbriolo violated the CLRA and aided and abetted other defendants' violations of the CLRA. The jury awarded the class \$36,829,373 in compensatory damages and \$30,000 in punitive damages. The court determined Imbriolo violated the UCL and awarded the class \$40,000,000 in restitution. The court entered judgment for the class and denied Imbriolo's new trial motion.

On appeal, Imbriolo claims: (1) the court erred by granting the motion for class certification; (2) the court erred by admitting the trial testimony of plaintiffs' expert; (3) the CLRA verdict is "against law;" (4) plaintiffs' failure to comply with the notice provisions in section 1782 precludes them from recovering damages; (5) the class was not entitled to restitution; and (6) the court erred by instructing the jury that one of the defendants had settled with the class.

We affirm.<sup>2</sup>

## FACTUAL AND PROCEDURAL BACKGROUND

We provide factual and procedural details in the discussion of Imbriolo's specific claims.

## DISCUSSION

### I.

#### *Imbriolo Has Forfeited His Challenge to the Order Granting Class Certification*

The bulk of Imbriolo's opening brief challenges the order granting the class certification motion. Plaintiffs contend Imbriolo forfeited his right to challenge this order by failing to oppose the motion for class certification in the trial court. We agree. Defendants Global Vision and Dix opposed the class certification motion and defendants

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<sup>2</sup> Imbriolo has violated the California Rules of Court by: (1) including in the record numerous documents not relevant to this appeal and by omitting all but the first page of various pleadings filed by plaintiffs; (2) providing an incomplete factual summary; (3) failing to provide record citations to support his arguments (*infra*, pages 9, 21); and (4) citing an unpublished superior court decision. (Cal. Rules of Court, rules 8.204, 8.276(a)(2), 8.1115.)

Cope, Gordon, DeBenedictis, and Edelson joined the opposition. Imbriolo, however, did not oppose the motion and did not join the other defendants' opposition. As a result, he has forfeited his right to challenge the grant of class certification on appeal. (See, e.g., *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 174 [“[g]enerally, a reviewing court will not consider claims raised for the first time on appeal that could have been but were not presented to the trial court . . . [f]ailure to raise a claim may be forfeited or waived”]; *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 950 [“because appellant failed to object” in the trial court, “it forfeited its procedural challenge” on appeal.]

In his reply brief, Imbriolo claims he “raise[d] the question of improper certification” in the trial court by filing a memorandum of points and authorities “opposing equitable relief.” We are not persuaded. First, the document to which Imbriolo refers is dated February 1, 2008, almost one year *after* the court granted the class certification motion. Second, and perhaps most importantly, the order granting the class certification motion lists the parties opposing the motion. Imbriolo is not one of those parties.

Imbriolo contends he may appeal the order granting class certification pursuant to Code of Civil Procedure section 902 because he is a “party.” That statute provides, “[a]ny party aggrieved may appeal in the cases prescribed in this title. A party appealing is known as an appellant, and an adverse party as a respondent.” Imbriolo is confused. He may not avoid the forfeiture doctrine by relying on the fact that other parties objected in the trial court. Simply because a party has a right to appeal does not mean that party has properly preserved an issue for appeal. To be sure, Imbriolo, as a “party aggrieved” may appeal pursuant to Code of Civil Procedure section 902, but he has forfeited his complaints about class certification by failing to oppose the certification motion in the trial court.

The reason for the forfeiture rule is straightforward. It is “designed to advance efficiency and deter gamesmanship.” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) “The purpose of the general doctrine of waiver [or forfeiture] is to encourage a

defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . . No procedural principle is more familiar to this Court than that a *constitutional* right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. . . . The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.” (*Id.* at pp. 264-265, internal citations & fn. omitted.) Applying the forfeiture rule here promotes the policy behind the rule. We conclude Imbriolo forfeited his right to challenge the propriety of the order granting class certification by failing to oppose the motion for certification in the trial court. Accordingly, we decline to address Imbriolo’s numerous claims of error pertaining to the order granting certification.

## II.

### *The Court Did Not Abuse its Discretion by Admitting Colin Weir’s Expert Testimony*

Imbriolo’s second contention is the court erred by admitting the testimony of plaintiffs’ expert, Colin Weir, at trial. According to Imbriolo: (1) Weir was not qualified under Evidence Code section 720 to testify as an expert on the proper method to calculate damages; (2) Weir’s testimony on damages “was based on improper matter;” and (3) Weir’s sampling of Global Vision’s sales records “was without scientific basis and violated due process.” The standard of review is not — as Imbriolo contends — *de novo*. We review the court’s admission of Weir’s testimony under the deferential abuse of discretion standard. (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.)

Before Weir testified at trial, the court held an Evidence Code section 402 hearing on his qualifications. At the hearing, Weir testified he has a bachelor’s degree in business economics from the College of Wooster and is pursuing a masters in business

administration from Northeastern University. From 2003 to 2007, Weir worked at Economic and Technology, Inc., conducting economic research and analysis. Weir has submitted written testimony and has performed statistical or economic analyses underlying expert testimony in other cases.

At the hearing, Weir explained his background in statistics: he described his undergraduate course work in statistical analysis and noted he learns about statistical analysis “on a daily basis” in his current job. He has also published papers on statistical analysis, but none specifically dealing with “sampling.” Weir, however, has performed statistical sampling and has prepared damages calculations at Economic and Technology, Inc. At the conclusion of the hearing, the court determined Weir was qualified to provide an “analysis of the records that were provided [to him] and some fundamental arithmetic calculations based on sample methodology and the conclusions drawn therefrom.”

In the presence of the jury, Weir testified he received 12,957 Avacor purchase invoices and used them to “calculate the money obtained by [Global Vision] from class members.” Weir explained that although the class contained 150,000 members, Global Vision “lost all the rest of its purchase invoice records and [could not] find any other additional data.” Weir took a “systematic random sample” of the invoices Global Vision provided rather than examining all 12,957 invoices because “taking a sample can provide just as valid a calculation of the underlying data as examining all the records[.]”

Weir used a random number generator to find three random numbers between 1 and 100. Then he examined all of the purchase records with Bates numbers ending in those three random numbers. He used a technique called systematic sampling, “whereby you . . . choose a random sample of documents but you do it systematically using each of the numbers.” Weir analyzed 315 purchase invoices and determined the average Avacor purchase price for each class member was \$390.97.<sup>3</sup> Based on Dix’s testimony that the

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<sup>3</sup> Defendants criticized this calculation, claiming it was based on the use of nationwide data, so Weir “went back and examined every single California purchase[ ] record provided by [Global Vision] and calculated the actual average for purchases of Avacor in California. The result of that study was an average purchase price per

approximate cost of a three-month supply of Avacor was between \$26 and \$32, Weir determined the average class member purchased a 6.88 month supply of Avacor and the average cost of goods sold per order was \$66.53. Weir determined the total amount of money Global Vision received from the sale of Avacor (less the cost of the goods) was \$48,666,088.89 and explained how he reached this figure. Weir did not consider various costs associated with Global Vision's sale of Avacor, such as advertising or employee salaries. He also did not examine refunds given to class members.

A. *Weir Was Qualified to Give the Challenged Testimony*

Imbriolo contends Weir “gave testimony on matters outside his area of expertise, ” apparently because he was not a “primary author” on a statistical analysis paper, had not testified in court as an expert witness on damages, and had only recently begun a masters program in business administration.

“A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.” (Evid. Code, § 720, subd. (a).) However, “a person may be qualified as an expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject. [Citations.]” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120, quoting *People v. Williams* (1992) 3 Cal.App.4th 1326, 1334.) “The determination that a witness qualifies as an expert and the decision to admit expert testimony are within the discretion of the trial court and will not be disturbed without a showing of manifest abuse. [Citation.] ‘Error regarding a witness’s qualifications as an expert will be found only if the evidence shows that the witness ““clearly lacks qualification as an expert.””’ [Citations.]” (*Hill, supra*, 191 Cal.App.4th at p. 1118, quoting *People v. Farnam* (2002) 28 Cal.4th 107, 162.)

Imbriolo has not established the court abused its discretion by finding Weir qualified to testify on his statistical analysis of the purchase invoices and his conclusions regarding that analysis. (*Hill, supra*, 191 Cal.App.4th at p. 1118.) Weir has a bachelor’s

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purchase of Avacor of \$408.30, which . . . confirm[ed] that [Weir’s] previous number, \$390.97, was well within its margin.”

degree in business economics — including course work in statistical analysis — and substantial experience in data collection and analysis. Weir has published papers on statistical analysis, has performed statistical sampling, and has prepared damages calculations in the course of his employment. Additionally, Weir has submitted written testimony and has performed statistical or economic analyses underlying expert testimony in other cases. That Weir had not yet completed a masters program in business administration and had not testified as an expert at trial does not alter our conclusion. The court was well within its discretion to conclude Weir — based on his education and work experience — was qualified to analyze the purchase invoices and render calculations based on those records. Additionally, Weir’s testimony was within the scope of his expertise. Weir testified about how he collected the data, and how he analyzed it.

*People v. Hogan* (1982) 31 Cal.3d 815, the only case Imbriolo cites to support his argument, does not alter our conclusion.<sup>4</sup> In *Hogan*, the California Supreme Court concluded a criminologist was not qualified to determine whether “blood had been spattered or transferred by contact” (*id.* at p. 852) because “[h]e had never performed any laboratory analyses to make such determinations either in the past or in the present case. He had admittedly received no formal education or training to make such determinations. His background on the subject consisted of viewing some years prior an exhibit, which had since been discarded, prepared by some unknown criminalist which demonstrated patterns of human blood dropped from various heights and angles. . . . Also, he had observed bloodstains at many crime scenes, and had determined in his own mind whether they were spatters or ‘wipes,’ but had never verified his conclusions in any way.” (*Ibid.*, fn. omitted.) The *Hogan* court determined “mere observation of preexisting stains without inquiry, analysis or experiment, does not invest the criminalist with expertise to determine whether the stains were deposited by ‘spatters’ or ‘wipes’” and characterized the criminologist’s qualifications as an expert on this issue as “nonexistent.” (*Id.* at pp. 852, 853.)

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<sup>4</sup> *Hogan* has been overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.

Here and in contrast to the criminologist in *Hogan*, Weir’s qualifications were not “nonexistent.” (*Hogan, supra*, 31 Cal.3d at p. 852.) Unlike the criminologist in *Hogan*, Weir had formal education and training in data collection and analysis and had routinely performed such analysis at Economic and Technology, Inc. As a result, the court “could reasonably conclude that [Weir’s] expertise rendered him qualified to testify to the challenged opinions.” (*Hill, supra*, 191 Cal.App.4th at p. 1121, fn. omitted.)

B. *Weir’s Testimony Was Not Based on “Improper Matter”*

Next, Imbriolo claims the court erred by admitting Weir’s testimony on the amount of revenue received by Global Vision because: (1) “it was based upon an improperly small sampling of sales throughout the United States, rather than just California;” (2) Weir relied on Dix’s testimony on the cost of the Avacor product “without any showing that . . . Dix was qualified to give an opinion in that regard;” and (3) Weir did not consider amounts refunded to Avacor customers when determining Global Vision’s revenue.

None of these claims has any merit. As an initial matter, Imbriolo appears to be confused about the scope of Weir’s testimony. Weir did not testify as an expert on damages. He merely reviewed purchase invoice records and provided figures relevant to a damages calculation. Second, Weir’s testimony was not, as Imbriolo argues, based on an “improperly small sampling of sales throughout the United States, rather than just California[.]” Imbriolo seems to ignore the fact that Weir examined “every single California purchase[ ] record provided by [Global Vision] and calculated the actual average for purchases of Avacor in California.” The result of that study was an average purchase price by California consumers of \$408.30, over ten dollars more than the average purchase price for consumers nationwide. Had the jury used the average purchase price for California consumers — as Imbriolo seems to contend was appropriate — the jury’s award of damages and the court’s restitution award would have been significantly greater. Because the very error about which Imbriolo claims appears to benefit him, we disregard it. (See, e.g., *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431; *Vogelsang v. Wolpert* (1964) 227 Cal.App.2d 102, 125

[the “appellate court need not and will not review errors which could not have been prejudicial” to appellant, citation omitted].)

Imbriolo’s argument that Dix was not qualified to testify about the average cost of Avacor borders on the absurd. Dix testified he was the president of Global Vision from 2003 to 2007; we see no reason why the president of a company would not be qualified to testify about the cost of his or her company’s products. Moreover, Imbriolo has not directed us to the place in the record where he objected to Weir’s testimony on this ground at trial. We conclude Imbriolo has not demonstrated Weir’s reliance on Dix’s testimony regarding the price of Avacor violated Evidence Code section 801, subdivision (b).

Finally, there was no need for Weir to testify regarding the amounts refunded to class members because those amounts were indicated on Global Vision’s tax returns, which were admitted into evidence. The jury considered the amount of money refunded by Global Vision in its calculation of damages, as did the court in its restitution award.

C. *Weir’s Random Sampling of Global Vision’s Purchase Invoices Did Not Violate Imbriolo’s Due Process Rights*

Imbriolo contends the court erred by admitting Weir’s testimony because Weir failed to “explain or justify his random sampling” of the purchase invoices. Imbriolo is wrong. Weir explained how — and why — he used a random sample of purchase invoices. Weir testified he took a “systematic random sample” of the records Global Vision provided rather than examining all the records because “taking a sample can provide just as valid a calculation of the underlying data as examining all the records[.]” Using a systematic sampling technique, Weir generated three random numbers and examined all of the purchase records with Bates numbers ending in those random numbers. Weir analyzed a total of 315 purchase invoice records and determined the average Avacor purchase price for each class member. In addition, Imbriolo’s reliance on *Connecticut v. Doher* (1991) 501 U.S. 1 is misplaced. That case has absolutely nothing to do with whether the admission of evidence concerning random sampling comports with due process.

### III.

*The Court Properly Denied Imbriolo's New Trial Motion;  
the CLRA Verdict is Not "Against Law"*

Imbriolo's third claim is the CLRA damage verdict is "against law" and must be reversed because: (1) the jury disregarded the court's instructions about how to calculate damages; and (2) plaintiffs did not present evidence of "the fair market value of what [they] received from defendants."

The court instructed the jury: "If you decide that Plaintiff . . . has proved his case and his class' claim against any of the defendants . . . you must also decide how much money will reasonably compensate Plaintiff . . . and the class for the harm caused by that defendant. This compensation is called 'damages.'" The court continued, "[t]he amount of damages must include an award for all harm that a defendant was a substantial factor in causing, even if the particular harm could not have been anticipated. Plaintiff . . . must prove the amount of his and his class's damages. However, Plaintiff . . . does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages." Finally, the court instructed the jury that "[t]o decide the amount of damages you must determine the value of what Plaintiff . . . and the class members gave and subtract from that amount the fair market value of what they received."<sup>5</sup> The court defined fair market value.

Question number 7 of the verdict form asked the jury, "What amount of damages do you find Plaintiff James Thomas proved Defendant Anthony Imbriolo caused to Plaintiff James Thomas and the class members?" The jury used Global Vision's overall revenue of \$58,645,500, and subtracted \$13,195,238, the Food and Drug Administration Satisfied Customer Average of 22.5 percent. From this amount — \$45,450,262 — the jury subtracted \$8,620,889 — the existing refunds of 14.7 percent — and reached \$36,829,373.

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<sup>5</sup> This instruction is based on section 3343, which describes what "[o]ne defrauded in the purchase, sale or exchange of property is entitled to recover. . . ." (§ 3343, subd. (a).)

After entry of judgment, Imbriolo moved for a new trial, claiming the “jury disregarded the court’s proper jury instruction and substituted a faulty method of calculating damages based upon speculation and guesswork.” Imbriolo argued the jury’s improper method of calculating damages “prejudiced [him] and resulted in an excessive damage award.” The court denied the new trial motion.

Though it is not clear from his briefs, we assume Imbriolo challenges the court’s denial of his new trial motion. (See *Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 743 [“[a] jury is bound to follow proper instructions, and a verdict contrary thereto is against the law;” Code Civ. Proc., § 657(5), (7).) We review the court’s denial of Imbriolo’s new trial motion for an abuse of discretion, “mindful of the fact that a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal.” (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) “In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]” (*Id.* at p. 872; see also *Sandoval v. Los Angeles County Dept. of Public Social Services* (2008) 169 Cal.App.4th 1167, 1176, fn. 6.)

Imbriolo contends the jury disregarded the court’s instructions on damages and erroneously deducted an amount that it “speculated or guessed was the percentage paid to defendants by ‘satisfied customers.’” According to Imbriolo, the verdict is “against law” because the jury did not calculate the amount of money the class paid to him individually and did not subtract from that amount what the class received from him. There are several problems with this argument. First, it is barred by the invited error doctrine. “Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) “In other words, one whose conduct induces or invites the commission or error by the trial court is estopped from asserting it

as a ground for reversal on appeal.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 8:245, p. 8-161.)

Here, Imbriolo urged the jury to consider the number of satisfied customers and the amount of refunds when calculating damages. For example, John Hansen, Imbriolo’s expert, criticized Weir’s analysis of the purchase invoices because Weir failed to consider the amount of satisfied customers or the customers who received a refund. And during closing argument, counsel for Imbriolo repeatedly criticized Weir for “disregard[ing] satisfied customers” and for failing to consider whether class members “received funds or refunds.” Counsel also excoriated plaintiffs for failing to provide evidence about refunds, claiming plaintiffs did not satisfy their burden with respect to damages. Finally, defendants submitted a trial exhibit showing that the overall customer satisfaction rate was 22.5 percent.

What did the jury do? It did exactly what Imbriolo wanted it to do — what he urged it to do. The jury took the total amount of money Global Vision received from the sale of products to the class and subtracted the money paid by satisfied customers and the money refunded to customers. Imbriolo cannot now claim the jury erred when it followed his instructions. Second — and assuming for the sake of argument that the invited error doctrine does not bar Imbriolo’s claim — we cannot conclude the jury failed to follow the jury instructions at issue. First, the jury determined the amount of money Global Vision received from the sale of Avacor to class members. That the jury did not subtract the fair market value of the product does not, as Imbriolo contends, mean the jury disregarded the jury instructions. The jury simply determined the fair market value of the product was zero, perhaps in light of the testimony of class members who stated they would not have purchased Avacor had they known the truth about it. The court also concluded Avacor was worthless.

Imbriolo relies on *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116. In that case, the trial court denied the plaintiffs’ motion for class certification, concluding, among other things, that class damages were not subject to common proof. (*Id.* at p. 127.) The trial court “concluded that the monetary value plaintiffs wish[ed] to assign to

their claim—the difference in price between Vioxx and a generic, nonspecific NSAID, implicate[d] a patient-specific inquiry and therefore fail[ed] the community of interest test.” (*Id.* at p. 135, fn. omitted.) The appellate court affirmed, explaining: “[a]s this evidence indicates that Vioxx was worth more than naproxen to *a majority of class members*, it is more than sufficient to support the trial court’s conclusion that naproxen is not a valid comparator on a class-wide basis.” (*Id.* at p. 136.) Imbriolo contends *In re Vioxx Class Cases* “provides guidance with respect to the level of proof required to establish the actual, or fair market value, of the goods or services received by a consumer.” He is wrong. *In re Vioxx Class Cases* concerns an appeal from a denial of class certification; it is not authority for the quantum of proof required to establish damages in a CLRA or UCL case.

Based on the foregoing, we conclude the court did not err by denying Imbriolo’s new trial motion.

#### IV.

##### *Imbriolo Has Failed to Provide an Adequate Record to Support His Claim Regarding the Purported Lack of Section 1782 Notice*

Next, Imbriolo contends the class’s “claim for damages should have been barred from the outset for failure to comply” with section 1782. The CLRA allows a consumer “who suffers any damage” as a result of the “use or employment . . . of a method, act, or practice” made unlawful by the CLRA to bring a class action on his behalf and behalf of other similarly situated consumers. (§§ 1780, subd. (a), 1781, subd. (a).) The CLRA, however, “imposes a special condition of notice to the prospective defendant and an opportunity to remedy the defect.” (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 302(3), pp. 409-410.) “To recover damages for unfair or deceptive practices under the Consumers Legal Remedies Act . . . the consumer must notify the seller at least 30 days before filing suit, of the allegedly unfair or deceptive practice and give the seller an opportunity to repair or replace the goods or services involved, or make a suitable adjustment. . . . Such notice and demand must be in writing, and must be sent by registered mail or certified mail, return receipt requested.” (Weil & Brown et al., Cal.

Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶¶ 1:848-1:849, p. 1-182; § 1782, subd. (a).)

Section 1782, subdivision (d) creates an exception to this notice requirement. It provides, “[a]n action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with subdivision (a), the consumer may amend his or her complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.” Section 1782 “contemplates that a consumer may amend a complaint for injunctive relief to add a request for damages under the CLRA. Indeed, the statute expressly allows such an amendment, as long as it is done 30 days or more after filing of the original complaint and compliance with the notice requirement. [Citation.]” (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1260.)

Imbriolo contends plaintiff did not comply with the notice requirements set forth in section 1782. Imbriolo’s argument is difficult to follow because he does not summarize what happened in the trial court in any kind of logical order and because he has failed to include many relevant documents in the record. From what we can discern from our review of the record, the initial complaint, filed in 2003, asserted a CLRA claim for injunctive relief, not damages. It also sought restitution and damages under the Maine Unfair Trade Practices Act. Plaintiffs amended the complaint in December 2004. The first cause of action in the first amended complaint asserted a claim under the Maine Unfair Trade Practices Act. The third cause of action, for violation of the CLRA, alleged “defendants have violated and, unless enjoined therefrom, will continue to violate, the Consumer Legal Remedies Act . . . . As a proximate result thereof, Plaintiff and the members of the Class have suffered harm, and will continue to be harmed unless the Court grants relief as prayed for herein.” The first amended complaint sought restitution, as well as compensatory and punitive damages.

Imbriolo and Global Vision demurred to the first and third causes of action in the first amended complaint. The moving and opposition papers are not part of the record, nor is the transcript of the hearing on the demurrer. In a written order dated February 4, 2005, the court overruled Imbriolo and Global Vision's demurrer to the first cause of action, concluding a letter dated January 21, 2005 satisfied the requirements of 5 Maine Revised Statutes 213(1-A). The court explained, "the January 21, 2005 demand letter is adequate and should be construed to apply to a California class only to the extent the letter is relevant to this case. Although the letter refers to a nationwide class, the attached First Amended Complaint refers to a California class at paragraph 62." The order did not specifically address Imbriolo and Global Vision's demurrer to the third cause of action alleging a violation of the CLRA.

Plaintiffs filed second and third amended complaints, but they are not part of the appellate record. Dix, Edelson, and DeBenedictis demurred to the second cause of action in plaintiffs' third amended complaint and moved to strike. The moving and opposition papers and the transcript of the hearing on the demurrer are not part of the record. In a written order, the court overruled Dix's demurrer to the second cause of action in the third amended complaint, concluding plaintiffs complied with the CLRA by attaching a letter dated January 21, 2005 to their second amended complaint. The court explained, "[t]he demurrer of Dix to the Second Cause of Action for failure to comply with . . . section 1782 is OVERRULED. The letter from Plaintiffs' counsel dated January 21, 2005, which was addressed to Craig Dix, among other defendants, and included a copy of the Second Amended Complaint as an attachment, has already been found to comply with the CLRA notice requirement by Judge Sabraw in his order dated February 4, 2005."

Imbriolo makes several claims relating to section 1782's notice requirement. First, he contends plaintiff "did *not* serve his pre-litigation notice under [section] 1782 until *after* he filed the First Amended Complaint, which prayed for damages and eliminated the qualifying language in the original Complaint that the CLRA cause of action was limited to injunctive relief." Next, he claims the letter did not mention section 1770 and was not sent by certified or registered mail, "two absolute requirements of

section 1782 before damages may be sought under the CLRA.” Finally, he argues the court “erred in its interpretation of Judge Sabraw’s ruling” because “[p]laintiff’s alleged compliance with the CLRA requirements was never even briefed or before Judge Sabraw in his prior ruling.”

We reject these arguments because Imbriolo has failed to comply with his duty to provide this court with an adequate record on appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498.) None of the relevant documents — the complaints, demurrers, opposition papers, or transcripts are part of the appellate record — “which severely impairs [our] analysis” of Imbriolo’s claims of error. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002-1003 [claim considered abandoned where appellant did not provide reporter’s transcript of relevant hearing].) Here, we have no way to evaluate the court’s rulings on the various demurrers because Imbriolo has not provided us with any of the moving or opposition papers relevant to this issue or with the reporter’s transcripts of the hearings on the demurrers. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [plaintiff “failed to carry his burden” to provide an adequate record where he failed to include the motion to strike, his opposition, or the court’s order granting the motion].)

Nor can we discern — as Imbriolo contends in his reply brief — whether the issue of CLRA notice “was raised, fully briefed, and decided with exactly the same arguments Imbriolo presents on this appeal.” It appears Imbriolo did *not* contend plaintiffs’ failed to comply with CLRA notice provisions in the trial court. In his opening brief, Imbriolo concedes he did not raise the issue of “compliance with the CLRA requirements” in his demurrer to the first amended complaint and did not demur to any of the subsequent complaints. “When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two. In this case, [Imbriolo] totally missed the appellate mark by failing to provide an adequate record for review.” (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

We reject all of Imbriolo's claims regarding plaintiffs' purported failure to comply with the CLRA notice provisions.

V.

*The Court Did Not Err by Ordering Imbriolo to Pay Restitution*

Imbriolo's fifth claim is the court erred by ordering him to pay restitution. He concedes the court properly held him liable under the UCL because he "directly participated in the formulating of the advertising of the products on behalf of Global Vision," but contends he cannot be ordered to pay restitution "of all the amounts the court found to be sales to California plaintiffs by Global Vision," apparently because there was no evidence he received any money from plaintiffs.

After the jury trial and before the bench trial on plaintiffs' CLRA and UCL claims, Imbriolo filed a motion "opposing equitable relief." In it, Imbriolo argued plaintiffs were not entitled to restitution under the CLRA because they did not establish he "acquired any property belonging to plaintiff or the class members." It is not clear whether the court ruled on Imbriolo's motion because Imbriolo has not directed us to such a ruling in the voluminous appellate record. In his motion for new trial, Imbriolo did not argue restitution could not be awarded against him.

As noted above, the court determined "Imbriolo created the Avacor product," participated in the formation of Global Vision, was the president of the company, its majority owner, and later a consultant to the company. The court also determined Imbriolo "was responsible for the content of all of the company's advertising." The court concluded Imbriolo violated the UCL and aided and abetted other defendants' UCL violations; the court also determined Imbriolo was liable under agency, conspiracy, and respondeat superior theories of liability. The court ordered Imbriolo to pay \$40,000,000 in restitution to the class.

Restitution under Business and Professions Code "section 17203 is confined to restoration of any interest in 'money or property, real or personal, which may have been acquired by means of such unfair competition.' A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand,

and that it have been acquired by a defendant, on the other.” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 336, emphasis omitted.)

Imbriolo has not identified the applicable standard of review. We review the court’s order of restitution for abuse of discretion. The “‘object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.’ [Citations.] Thus, ‘restitutionary awards encompass quantifiable sums one person owes to another. . . .’ [Citation.] These awards are for ‘money that once had been in the possession of the person to whom it [is] to be restored.’ [Citations.] . . . [¶] ‘[Business and Professions Code] section [17203] itself provides for the “restoration” of money or property acquired by means of unfair competition. . . . From the authorities we conclude that restitution under the statutes involved here must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence.’” (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 697-698.) Once an unfair business practice has been shown under the Business and Professions Code section 17203, the court “‘may make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or . . . to restore . . . money or property.’ [Citation.] That is, as our cases confirm, a grant of broad equitable power. A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute.” (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180.)

We conclude the court did not abuse its discretion by ordering Imbriolo to pay restitution to plaintiffs. Here, there was evidence that plaintiffs lost money, and that Imbriolo acquired that money. Imbriolo cannot seriously contend he did not “directly or indirectly receive[ ] the proceeds of [the] sales” of Avacor. Imbriolo was president of Global Vision and owned 51 percent of the company. Global Vision paid Imbriolo consulting fees and transferred hundreds of thousands of dollars to various companies he owned. In addition, Global Vision purchased a “country house” for Imbriolo in New York and paid for Imbriolo’s expenses associated with that house. Moreover, Global

Vision transferred “[m]aybe over 3 million” to bank accounts Imbriolo maintained in Ireland. This evidence is more than sufficient to establish Imbriolo acquired money wrongfully from the wrongful business practices at issue here.

Imbriolo relies on a single case, *Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440 (*Bradstreet*), to support his argument that the court erred by ordering him to pay restitution.<sup>6</sup> In *Bradstreet*, former employees sued the corporate officers, directors, and managers of three garment manufacturing companies for various Labor Code violations. They alleged the companies failed to pay their employees. The Chinese Progressive Association intervened and filed a complaint against the principals of the garment corporations alleging a UCL claim. (*Id.* at pp. 1444, 1458.) The intervenor sought recovery of unpaid wages under the UCL, alleging the defendants were individually liable for the garment companies’ unfair business practices because the defendants directly and actively participated in the alleged violations. (*Id.* at p. 1458.) The trial court determined only the garment companies — not the individual defendants — could be ordered to pay restitution because the defendants “‘obtained no money or gains from which to disgorge or pay restitution.’” The court, however, “did not make explicit findings on the issue whether defendants had directly and actively participated in the alleged violations.” (*Ibid.*)

A division of this court affirmed. (*Bradstreet, supra*, 161 Cal.App.4th at pp. 1444, 1463.) The court explained that although an “owner or officer of a corporation may be individually liable under the UCL if he or she actively and directly participates in the unfair business practice, it does not necessarily follow that all of the remedies imposed with respect to the corporation are equally applicable to the individual.” (*Id.* at p. 1458.) As framed by the *Bradstreet* court, “[t]he issue in the case before us is whether these defendants, who were *not* the employers, and who were not found to have required any employee to work for them personally, or to have misappropriated corporate funds for

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<sup>6</sup> *Bradstreet* was decided a few weeks before the trial court issued its statement of decision. Imbriolo, however, did not bring the case to the court’s attention. *Bradstreet* has been abrogated on another point as stated in *Martinez v. Combs* (2010) 49 Cal.4th 35.

their own use, may also be required to pay the earned but unpaid wages as restitution.” (*Id.* at p. 1459, fn. omitted.) The court concluded the defendants were not required to pay unpaid wages as restitution because they “did not personally obtain the benefit of those services, and the duty to pay wages was owed by the corporations as employers, not by defendants as owners, officers or managers.” (*Id.* at p. 1460.)

The *Bradstreet* court explained, “[i]n the absence of a finding that intervener performed labor for defendants personally, rather than for the benefit of Wins Corporations, or that defendants appropriated for themselves corporate funds that otherwise would have been used to pay the unpaid wages, we agree with the trial court’s conclusion that an order requiring defendants to pay the unpaid wages would not be ‘restitutionary as it would not replace any money or property that [defendants] took directly from’ intervener.” (*Bradstreet, supra*, 161 Cal.App.4th at p. 1460, quoting *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149.) *Bradstreet* stands for the proposition that defendants in a UCL case alleging wage and hour violations may not be ordered to pay back wages to employees of a corporation as restitution if those defendants did not require the employees to work for them personally and did not misappropriate corporate funds for their own use. (See, e.g., 13 Witkin, Summary of Cal. Law (10th ed. 2005 & Supp. 2011) Equity, § 125, pp. 441-442 & Supp. pp. 116-117.)

*Bradstreet* is distinguishable for two reasons. First, this is not a wage and hour case. Second — and in contrast to *Bradstreet* — there was ample evidence Imbriolo used Global Vision funds for his own use.

## VI.

### *Imbriolo’s Complaint about the Court’s Treatment of the Dix Settlement Has No Merit*

Imbriolo’s last complaint is the court erred by informing the jury that Dix settled with plaintiffs “when that settlement had not been approved.” Imbriolo urges us to reverse the jury’s verdict because the jury “should have been able to consider Dix as an alternative defendant who served as President of . . . Global [Vision] . . . and admittedly

was involved in the advertising.” Imbriolo posits the jury “would have found Dix liable for the sales during this period” had the jury been instructed properly. Even if we assume for the sake of argument the court erred, Imbriolo’s claim fails for several reasons. First, Imbriolo has not directed our attention to the portion of the reporter’s transcript where the court apparently “erroneously informed the jury that . . . Dix had settled with plaintiffs[.]” As appellant, Imbriolo “has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) “We are not required to search the record to ascertain whether it contains support for [Imbriolo’s] contentions.” (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) Second, Imbriolo has failed to demonstrate — by argument or citation to authority — that it is probable he would have obtained a more favorable result absent the error. (Code Civ. Proc., § 475.) We will not comb the record searching for facts to support Imbriolo’s argument. It is Imbriolo’s burden to present a coherent narrative supported by cogent arguments, and direct us to the places in the record proving his points are grounded in fact. (*Mansell, supra*, 30 Cal.App.4th at p. 546 [“it is not this court’s function to serve as [appellant’s] backup counsel and we decline to speculate as to how [appellant] may have been prejudiced”].)

#### DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to costs on appeal.

Jones, P.J.

We concur:

Simons, J.

Needham, J.