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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOHN SCHUMAN,

Plaintiff and Appellant,

v.

CLARK PEST CONTROL OF
STOCKTON, INC.,

Defendant and Respondent.

A131973

(Contra Costa County
Super. Ct. No. MSC08-02325)

Clark Pest Control of Stockton, Inc. (Clark) offers residential and commercial pest control services, including a termite infestation treatment and monitoring service plan known as Term-Alert service. Appellant John Schuman claimed that the Term-Alert service plan is unlawful under California Structural Pest Control Board (SPCB) regulations, and that Clark falsely represented the efficacy of the service. Schuman sued Clark, on behalf of himself and others similarly situated, for violation of the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.),¹ the Consumer Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.), false advertising law (FAL; § 17500 et seq.), breach of contract, breach of professional duty, negligent training, supervision and retention, and assumpsit. The trial court denied Schuman's motion for class certification, concluding that Schuman had not met his burden to show that common

¹ All further statutory references are to the Business and Professions Code unless otherwise indicated.

questions of law or fact predominate. Schuman challenges that order on appeal, contending that the trial court misconstrued his claims. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Clark's Term-Alert Service

Clark, which is based in Lodi, is organized into 22 separate branch offices, each headed by a branch manager. At the time of Schuman's motion, Clark employed over 900 people in its three service lines—residential and commercial pest services, agricultural and lawn services, and termite services. In 1997, Clark began providing its Term-Alert service, which is the subject of this litigation.

Clark's Term-Alert service consists of four components: inspection, initial treatment, periodic monitoring, and follow-up treatment. Every Term-Alert service begins with a thorough inspection by a licensed termite inspector. Once the inspection is complete, the Clark inspector prepares a detailed inspection report, which includes a drawing of the structure showing the location of any signs of termite activity noted during the inspection. The report also lists any unique characteristics, such as plumbing leaks, wood-to-soil contact, infestation by dry rot fungus, or other conditions conducive to termite infestation. A copy of the report is given to the homeowner, and another copy is kept on file by Clark for at least three years. The SPCB requires the use of standard forms for the reports (§ 8516), but each treatment plan is tailored to the individual property.

If a Clark inspector finds signs of active termite infestation, he or she recommends a treatment plan appropriate for the particular conditions on the property. The inspector may choose to treat, with a pesticide used to kill termites (termiticide), all of the soil around a structure, which is known as a full perimeter treatment. Or the inspector may choose to treat selected areas where signs of termite activity are present, sometimes called a spot treatment. Each inspector uses his training, education, and experience to make the appropriate recommendation for each property. While there is significant variation among properties in the recommended initial treatment, in most cases where

evidence of an active termite infestation is found, a full perimeter treatment is Clark's preferred initial treatment option.

Once the initial treatment is completed and if desired by the customer, Clark installs Term-Alert monitoring stations in the soil around the house. Generally, stations are placed approximately every eight to 12 feet around the foundation and near conditions conducive to termite infestation, such as areas of poor drainage, near tree stumps and firewood piles, and in flowerbeds. The stations consist of a wooden stake topped with a plastic cap approximately six inches in diameter. When the installation is complete, the top of the plastic cap is flush with the ground.

Approximately every three months, a Clark technician visits each home and inspects the stations, sometimes removing the wood stake from the ground and inspecting it for signs of termite activity, in other instances applying small amounts of termiticide to the station. At least once every three years, Clark reinspects the entire property. If an active termite infestation occurs at any time while a customer has contracted for the Term-Alert service, Clark will treat the infestation at no additional cost.

Schuman's Contract and Complaint

In 2002, after a termite infestation was discovered at his townhome in Pleasant Hill, Schuman entered into an agreement with Clark for its Term-Alert service. He read the entire written agreement and reviewed a Clark sales presentation before signing the contract. The contract Schuman signed provided: "It is understood that while the purpose of the service is to prevent damage by subterranean termites, we cannot be responsible should such damage occur." Schuman understood that Clark did not guarantee it would prevent any and all termite infestations. But, he understood that Clark would address any subsequent reinfestations. Schuman was a Term-Alert customer between 2002 and 2007. Termites were detected at Schuman's home on three occasions during 2006. Schuman terminated Clark's service in mid-2007.

In 2009, Schuman filed the operative "Second Amended Class Action Complaint," which contains seven causes of action, brought on his own behalf and on behalf of a class of other property owners: (1) breach of contract/breach of the duty of good faith and fair

dealing; (2) breach of professional duty; (3) negligent training, supervision and retention; (4) assumpsit/money had and received; (5) violation of the CLRA; (6) violation of the UCL; and (7) false advertising.²

Schuman alleged: “[Clark] engaged in a practice of falsely advertising that it had developed a system that would ‘intercept’ and destroy or divert termites before they could attack the structure thereby preventing infestation and damage to induce customers to enter into ‘Term-Alert’ contracts. [¶] [Clark] knew the stations did not lure, attract, trap or otherwise intercept termites because termites actually forage randomly in soil and, therefore, have to randomly stumble upon them. . . . [¶] Clark deceptively advertised and advised that termites can only get to the Plaintiff’s house to attack and damage it if the termites somehow ‘sneak past’ the interceptors. Clark knew or should have known that termites are incapable of the ‘sneaky’ behavior characteristic of higher-level organisms . . . termites are just dumb bugs. [¶] Clark falsely advertises that it detects infestation of interceptor stations by measuring methane gas expelled by feeding termites. If methane gas is detected at a period inspection, the inspector applies a chemical under the plastic dome of Term-Alert station to kill or intoxicate the termites and thereby allegedly prevent them from continuing to feed at the station or from continuing on to attack the structure. So the theory is that interceptors will attract or trap termites so an inspector can poison the station to prevent continued feeding. *No scientific evidence was or is available to support claims that termites will not infest nearby wood in houses and offices because termites are harmed or killed or misdirected in plastic tubes in the yard with the quality and concentration of Premise termiticide used. No scientifically valid studies exist to support any of Clark’s claims.* No label for Premise has ever described applying Premise in the manner used by Clark and the ‘off-label’ use is therefore illegal under the statutes cited herein.”

² The initiating pleading is not included in the appellant’s appendix provided to us, but the case number would indicate that the complaint was filed some time in 2008.

The Motion for Class Certification

On September 1, 2010, Schuman filed his motion for class certification. He sought to certify the following proposed class: “[A]ll individuals, proprietorships, partnerships, corporations, and other entities that are residents of the State of California or domiciled in the State of California . . . that own any home, condominium, apartment complex, commercial building, or other structure and/or improvements to real property . . . located in the State of California who have been issued a Term-Alert Service . . . contract from [Clark] which covers subterranean termites or subterranean termites and other wood destroying organisms from 1997 to present.”

In his motion, Schuman argued: (1) Clark misrepresented, through a “uniform” marketing campaign, that its Term-Alert service would prevent termite infestations; and (2) Clark’s use of Premise and Optiguard termiticides at monitoring stations was “illegal and ineffective everywhere.” In his moving papers, Schuman did not offer any explanation as to why the first four causes of action were properly subject to class treatment. Instead, the focus of his class certification argument was on the UCL, CLRA, and FAL claims.³

Clark opposed Schuman’s motion for class certification. In support of its argument that Schuman could not meet his burden to show that common questions predominate over individual ones, Clark submitted numerous declarations. That evidence

³ Schuman has forfeited any argument that a class should be certified with respect to his first four causes of action by both failing to raise the argument before the trial court and by only raising the argument, in anything more than a passing manner, in his reply brief on appeal. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [if no legal argument with citation to authority “ ‘is furnished on a particular point, the court may treat it as waived, and pass it without consideration’ ”]; *Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 106, 119, fn. 9 (*Davis-Miller*) [declining to address causes of actions not discussed in motion for class certification]; *Fairbanks v. Farmers New World Life Ins. Co.* (2011) 197 Cal.App.4th 544, 547 (*Fairbanks*) [declining to reach arguments not made before the trial court]; *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486 [“[i]t is elementary that points raised for the first time in a reply brief are not considered by the court”].) Accordingly, we only address Schuman’s UCL, CLRA, and FAL causes of action herein.

included sworn statements from 19 of Clark's sales inspectors, who indicated Clark had no uniform marketing campaign. Clark advertised its various services, including the Term-Alert service, in written flyers, brochures, and television and internet ads. But, the inspectors testified that they had discretion when making sales presentations regarding the Term-Alert service to potential customers. Some inspectors used Clark's marketing materials, others used none at all. There was no "canned" or standard sales pitch and most inspectors varied their presentation from customer to customer.

Clark also presented declarations from a sampling of its customers, who reported various motivations for purchasing the Term-Alert service, several of which have nothing whatsoever to do with any representations made by Clark. Several customers did not recall seeing any marketing material at all. The declarations also showed that the treatment at each property was not uniform, as Clark's technicians had broad discretion to determine what treatment was necessary, depending on a given property's characteristics, maintenance practices, and experience with repeat infestations.

Order Denying Class Certification

The trial court concluded that a class of nearly 33,000 Term-Alert service customers satisfied class action requirements with respect to ascertainability, numerosity, and impracticability. The trial court also concluded that Schuman had standing under the UCL and FAL, that Schuman's counsel was well qualified to represent the class, and that the typicality of Schuman's claims did not disqualify him as a class representative.⁴ However, the trial court concluded that Schuman had not met his burden to show that common questions of law or fact would predominate. Accordingly, the trial court denied Schuman's motion for class certification. The order denying class certification was an appealable "judgment" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757; *Daar v.*

⁴ These conclusions were not challenged by Clark on cross-appeal, therefore we do not consider them further. (See *Tuchman v. Aetna Casualty & Surety Co.* (1996) 44 Cal.App.4th 1607, 1612 & fn. 1.)

Yellow Cab Co. (1967) 67 Cal.2d 695, 699), from which Schuman filed a timely notice of appeal.

II. DISCUSSION

On appeal, Schuman contends that the trial court misconstrued his claims and made erroneous legal assumptions. He contends that “[his] request for class wide relief is based upon the allegation (and related claims) that when Clark sold its standard-form [Term-Alert service] agreements to putative class members it was selling a service that fails to meet a critical requirement of California’s Structural Pest Control Act [(SPCA; § 8500 et seq.)] and was thus selling an unlawful service. Clark’s [Term-Alert service] is unlawful because it does not meet the requirement under the SPCA that a subterranean termite-damage prevention service be ‘substantiated’ as effective by scientifically-acceptable studies.” We cannot agree that the trial court misconstrued Schuman’s claims or made erroneous legal assumptions. In fact, the trial court’s careful analysis of both the facts and the applicable law shows quite the opposite.

A. *Class Certification Requirements/Standard of Review*

Our Supreme Court has recently reviewed the requirements for maintaining a class action. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*)). “Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever ‘the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court’ (Code Civ. Proc., § 382; see *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1078 [(*Fireside Bank*)]; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 [(*City of San Jose*)).) Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (Code Civ. Proc., § 382; *Fireside Bank*, at p. 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *City of San Jose*, at p. 459.) ‘In turn, the

“community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.”’ (*Fireside Bank*, at p. 1089, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)” (*Brinker*, at p. 1021, parallel citations omitted.)⁵

The question here is whether Schuman’s complaint presents predominant common questions of law or fact. “Commonality as a general rule depends on whether the defendant’s liability can be determined by issues common to all class members: ‘A class may be certified when common questions of law and fact predominate over individualized questions. As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. . . . [T]o determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.’” [Citation.] [¶] ‘In examining whether common issues of law or fact predominate, the court must consider the plaintiff’s legal theory of liability. [Citation.]’” (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941 (*Knapp*)). “Predominance is a comparative concept, and ‘the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.’ [Citations.]” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 (*Sav-On*)). Thus, “[a] class action can be maintained even if each class member must at some point individually show his or her

⁵ Class claims under the CLRA are governed by Civil Code section 1781, “ ‘which sets out the four conditions that, if met, mandate certification of a class: (1) it is impracticable to bring all members of the class before the court; (2) the questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and (4) the representative plaintiffs will fairly and adequately protect the interests of the class.’ ” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 116.) The commonality requirement under the UCL and CLRA are substantially similar. (*Id.* at p. 123.)

eligibility for recovery or the amount of his or her damages, so long as each class member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover.” (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 397, fn. omitted.)

On appeal from the denial of a motion for class certification, “ ‘we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’” (*Sav-On, supra*, 34 Cal.4th at p. 327.) As part of this process, we consistently look to the allegations in the complaint and the declarations of attorneys representing the class. (*Ibid.*)” (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (*Capitol People*)). “ ‘Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed “unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]” [citation]. . . . “Any valid pertinent reason stated will be sufficient to uphold the order.” ’ [Citations.]” (*Sav-On, supra*, 34 Cal.4th at pp. 326–327.)

“[W]hen denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. [Citation.] We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling.” (*Knapp, supra*, 195 Cal.App.4th at p. 939.) If denying class certification, the trial court must state only one valid reason for denying the motion. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at pp. 440, 435–436.)

“A class certification motion is not a license for a free-floating inquiry into the validity of the complaint’s allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation.] [¶] We have recognized, however, that ‘issues affecting the merits of a case may be enmeshed with class action requirements’ [Citations.] When

evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them. [Citations.] [¶] . . . [¶] . . . Presented with a class certification motion, a trial court must examine the plaintiff’s theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. [Citations.]” (*Brinker, supra*, 53 Cal.4th at pp. 1023–1025.)

“A trial court ruling on a certification motion determines ‘whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Sav-On, supra*, 34 Cal.4th at p. 326.) “It is the burden of the proponent of class certification to show, with substantial evidence, that common questions of law or fact predominate over questions affecting individual members. [Citation.] And whether such substantial evidence exists involves analysis of whether the proponent’s ‘theory of recovery’ is likely to prove compatible with class treatment. [Citation.]” (*Capitol People, supra*, 155 Cal.App.4th at pp. 689–690.) “‘[I]t is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.’ [Citations.]” (*Sav-On, supra*, 34 Cal.4th at p. 331.) “‘[W]here a certification order turns on inferences to be drawn from the facts, “ ‘the reviewing court has no authority to substitute its decision for that of the trial court.’ ” ’ [Citations.]” (*Id.* at p. 328.) When no specific findings are made, “we may also resort to the familiar rule that permits us to imply any findings which are necessary to support the trial court’s order, so long as any such implied findings are themselves supported by substantial evidence. [Citation.]” (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287–1288 (*Massachusetts Mutual*).)

B. UCL, CLRA, and FAL Claims

As noted previously, our focus here is on Schuman’s CLRA, UCL, and FAL causes of action. Schuman insists that “the central point” of his class theory was his allegation that Clark violated the SPCA by recommending a termite prevention service that had never been substantiated, as required by California Code of Regulations, title 16, section 1999.5.⁶ The record shows, however, that Schuman’s class claims were not so clear cut.

In his CLRA cause of action, Schuman alleged: “Plaintiff has been injured in that Plaintiff was obliged to and did pay [Clark] for a plan that was promised to provide a benefit that it, in fact, failed to provide.” In his FAL cause of action, Schuman alleged: “The standardized practice of offering ‘termite protection’ and advertisements regarding the practice were uniformly applied to [all class members.] . . . Additionally, the contracts themselves were presented as advertisements of the problem to be addressed and services to be performed. [¶] [Schuman] relied on the advertisements and was damaged as a result by paying [Clark] for service it could not and did not provide” In his UCL cause of

⁶ California Code of Regulations, title 16, section 1999.5 provides in relevant part: “It is the purpose of this regulation to protect the public from false, misleading, deceptive, or unfair *representations or claims concerning structural pest control* while enabling the public to receive truthful and legitimate information about those structural pest control products and services and the potential of these products and services to reduce impact to health or the environment. [¶] (a) It is unlawful for any licensee, or any employee thereof, directly or indirectly to make, disseminate, represent, claim, state, or advertise, or cause to be made, disseminated, represented, claimed, stated or advertised by any manner or means whatever, *any statement or representation concerning structural pest control*, as defined in . . . section 8505, which is unfair, deceptive, untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be unfair, deceptive, untrue or misleading. [¶] . . . [¶] (f) Examples of direct or indirect *statements or representations* which are unfair, deceptive, untrue or misleading include, but are not limited to, the following: [¶] . . . [¶] (14) *claims regarding services and products for which the licensee does not have substantiation* in the form of tests, analysis, research, studies, or other evidence that was conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results” (Italics added.)

action, Schuman alleged: “[Clark’s] unlawful, unfair and fraudulent business acts and practices include, but are not limited to, *wrongfully claiming to ‘prevent damage by subterranean termites’*; providing inaccurate information regarding the effectiveness of the services provided and failing to provide reasonable notice of these practices; misrepresenting or failing to provide accurate information regarding the true nature of services it had or would provide; providing false information about termite behavior to make it appear as if its service was reasonable; *making unsubstantiated scientific claims*; misusing chemicals in violation of labels and labeling or using products for ‘off label’ uses; and falsely implying its service is registered and approved by government regulators.” (Italics added.) At oral argument on the class certification motion, the trial court expressed confusion over what representation was being relied on, and Schuman’s counsel represented that the misrepresentation was that the Term-Alert service is a “reasonably effective” way to prevent termites.

Thus, we think the trial court was correct in viewing Schuman’s claims as presenting two distinct theories: (1) that Clark misrepresented in its advertising that the Term-Alert service would prevent termites; and (2) that Clark provided a service which was illegal and not reasonably effective at preventing termites. Although Schuman attempts, on appeal, to blend the two theories into one, we consider each separately.

1. *Legal Principles*

a. *FAL Claims*

“[T]he FAL prohibits the dissemination of any advertising ‘which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.’ [Citation.]” (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 129.) “ ‘A violation of the UCL’s fraud prong is also a violation of the [FAL]. [Citation.]’ [Citations.]” (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312, fn. 8 (*Tobacco II Cases*).)

b. *UCL Claims*

“The UCL defines unfair competition as ‘any unlawful, unfair or fraudulent business act or practice.’ (§ 17200.) Therefore, under the statute ‘there are three

varieties of unfair competition: practices which are unlawful, unfair or fraudulent.’ [Citation.]” (*Tobacco II Cases, supra*, 46 Cal.4th at p. 311.) To state a claim under the UCL, “the plaintiff must establish that the practice is either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely to deceive members of the public). [Citations.]” (*Albillo v. Intermodal Container Services, Inc.* (2003) 114 Cal.App.4th 190, 206.) “Each of these three prongs—unlawful, unfair, or fraudulent—implicates a different legal standard, although a single practice may simultaneously violate more than one prong” (*Fairbanks, supra*, 197 Cal.App.4th at p. 546, fn. 1.) In our view, Schuman’s claims implicate two separate prongs of the UCL—the “fraudulent” prong and the “unlawful” prong.

“The definitions of unlawful and fraudulent business practices are straightforward and well established. An unlawful business practice under the UCL is ‘ “ “anything that can properly be called a business practice and that at the same time is forbidden by law.” ’ ’ ’ [Citation.] A fraudulent business practice is one in which ‘ “ “members of the public are likely to be deceived.” ’ ’ ’ [Citation.]” (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1254.) The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud and “ ‘relief under the UCL is available without individualized proof of deception, reliance and injury.’ [Citation.]” (*Tobacco II Cases, supra*, 46 Cal.4th at p. 326; accord, *Massachusetts Mutual, supra*, 97 Cal.App.4th at p. 1288.) Nonetheless, a class action for a fraudulent business practice under the UCL still requires that a defendant have “engaged in uniform conduct likely to mislead the entire class.” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 121; *Fairbanks, supra*, 197 Cal.App.4th at p. 562; see also *Knapp, supra*, 195 Cal.App.4th at p. 945 [“ ‘we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice’ ”].)

The scope of remedies available under the UCL, however, is limited. “ ‘A UCL action is equitable in nature; damages cannot be recovered. [Citation.] . . . We have stated under the UCL, “[p]revailing plaintiffs are generally limited to injunctive relief and

restitution.” [Citation.]’ [Citation.]” (*Tobacco II Cases, supra*, 46 Cal.4th at p. 312; see § 17203.) Section 17203 provides for restitution “to restore to any person in interest any money or property, real or personal, which may have been acquired” by means of the unfair practice. “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.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149.) “[I]n order to obtain classwide restitution under the UCL, plaintiffs need establish not only a misrepresentation that was likely to deceive [citation] but also the existence of a ‘measurable amount’ of restitution, supported by the evidence [citation].” (*In re Vioxx Class Cases, supra*, 180 Cal.App.4th at p. 136.)

c. *CLRA Claims*

In contrast, with respect to the CLRA, actual reliance must be established for an award of damages. (*Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 980 (*Cohen*.) The CLRA provides, in relevant part: “(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: [¶] . . . [¶] (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” (Civ. Code, § 1770, subd. (a)(5).) The CLRA allows recovery when a consumer “suffers any damage as a result of” the unlawful practice. (Civ. Code, § 1780, subd. (a).) This provision “requires that plaintiffs in a CLRA action show not only that a defendant’s conduct was deceptive but that the deception caused them harm. [Citation.]” (*Massachusetts Mutual, supra*, 97 Cal.App.4th at p. 1292; accord, *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 155 (*Steroid Cases*) [“CLRA requires a showing of actual injury as to each class member”].

Causation, on a classwide basis, may be established by materiality. (*Massachusetts Mutual, supra*, 97 Cal.App.4th at p. 1292 [“ ‘plaintiffs [may] satisfy their burden of showing causation as to each by showing materiality as to all’ ”].) “If the trial

court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class. [Citation.] This is so because a representation is considered material if it induced the consumer to alter his position to his detriment. [Citation.]” (*In re Vioxx Class Cases*, *supra*, 180 Cal.App.4th at p. 129; see *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 668 (*Caro*)). If the issue of materiality or reliance, however, is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action. (*Caro*, at pp. 668–669; *Davis-Miller*, *supra*, 201 Cal.App.4th at p. 125.)

2. *Fraudulent Prong*

“ [T]o state a claim under either the UCL or the [FAL], based on false advertising or promotional practices, “it is necessary only to show that ‘members of the public are likely to be deceived’ ” [Citation.]” (*Tobacco II Cases*, *supra*, 46 Cal.4th at p. 312, fn. omitted.) Because “[a] violation of the UCL’s fraud prong is also a violation of the [FAL],” we analyze the two causes of action together. (*Id.* at p. 312, fn. 8.)

With respect to Schuman’s FAL case, in its order denying class certification, the trial court wrote: “The moving and opposing papers disclose that the essence of the case is [Schuman’s] claim that [Clark] misleads customers and potential customers by representing that its Term-Alert service ‘prevents termites.’ He alleges that [Clark] does not and cannot prevent termites; that its advertising and marketing materials are misleading in many details and that its use of certain chemicals in certain ways is neither authorized nor efficacious. In short, he asserts [Clark] made the same false representations to all members of the class. [¶] . . . [¶] But the evidence submitted on the motion shows that there was no such uniform marketing campaign. [¶] . . . [¶] . . . Clark submitted evidence that established that its only such campaigns had a single purpose: to embed Clark’s name in the public’s mind together with the phrase ‘Clark, We Need You.’ . . . There was no uniform campaign to advertise a service that would ‘prevent termites’; there was no uniform campaign with respect to the Term-Alert service. [¶] . . . [¶] The evidence presented by Clark shows that sales presentations varied according [to] the different customer’s needs and property conditions. While Clark

provides its sales inspectors with certain marketing materials, each is free to use them or not, as he sees fit.^[7] [¶] . . . [¶] This case is far closer to *Pfizer [Inc. v. Superior Court* (2010) 182 Cal.App.4th 622 (*Pfizer*)]; *Kaldenbach [v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830 (*Kaldenbach*)] and *Cohen*[, *supra*, 178 Cal.App.4th 966] than it is to the cases on which [Schuman] relies. There is no evidence that all members of the class were exposed to a ‘uniform stimulus,’ a ‘lengthy advertising campaign,’ ‘a single material misrepresentation [made] to [all] class members,’ or to sales using a ‘common script’ or a ‘canned presentation.’ The contrary is true. Here ‘there was no showing of uniform conduct likely to mislead the entire class’ and ‘the members of the class stand in a myriad of different positions insofar as the essential allegation in the complaint is concerned.’ Common issues do not predominate.” (Fns. omitted.)

On appeal, Schuman contends that the trial court improperly “disregarded admissions by Clark’s counsel that [the Term-Alert service] was indeed sold as a termite prevention service.” Schuman contends that such “admissions are proof sufficient to demonstrate Clark’s *uniform* representation to the class that [the Term-Alert service] was sold as a termite prevention service.” Schuman’s arguments on appeal are not entirely clear. But, as we understand it, Schuman is challenging the trial court’s finding that Clark’s advertising representations were not uniform. However, he fails to show that the finding is unsupported by substantial evidence.

During argument of the class certification motion, the trial court asked Clark’s counsel: “So you’re agreeing with [Schuman’s counsel] that a material part of the contract is to prevent termite damage, in other words, prevent them from getting to the house?” Clark’s counsel responded: “Well, *I agree that the purpose of the contract,*

⁷ The court noted that Schuman disputed whether Clark’s marketing campaign was uniform and provided some conflicting evidence on this point. However, the court also stated: “Some of the [deposition excerpts cited by Schuman] support the evidence quoted in the above text; some cut against it. Considering the totality of the evidence presented, including the extensive presentations made at oral argument, the Court finds the facts to be as stated in the text of this Opinion and Order.”

purpose of the service, is . . . to prevent termite damage. There's no guarantee, there's no promise to that effect, but . . . if I take . . . an Advil or something, the purpose may be to prevent a headache, but that doesn't mean it's a guarantee." (Italics added.) Then again, Clark's counsel told the court: "There's been a lot of talk about . . . what does the word 'prevent' mean? You know, there's language in some of the marketing brochures about helping us prevent damage to your home, prevent termite infestations. [¶] Your Honor, we submit that that is meaningless in this case. When I go to a cardiologist and I have high blood pressure, he prescribes medication. And the purpose of that is to prevent a heart attack. That's no guarantee that I'm . . . not going to have a heart attack. . . . [¶] *Of course Clark marketed its product, its service as helping to prevent termite infestation, and that's exactly what it has done.*" (Italics added.)

Later, the trial court asked Clark's counsel: "Time and time again in the . . . marketing materials put together by Clark statements such as, 'This will control the colony before they get to their house. This will prevent the termites, except the sneaky ones, before they get into the house,' can I infer that there's a theme that was used in . . . Clark's sales presentations? And since I don't have to find individualized reliance, can I infer that Clark's marketing department considered that an important theme to state and infer that it was something that was being set out there in the field?" Clark's counsel responded: "Yes. *I think you can infer that, and . . . there is no evidence however with respect to the issues about conveying that to who received it, who listened to it, what impact did it have, on the decision to buy the service.*" (Italics added.)

Schuman contends that the above admissions are "proof sufficient to demonstrate Clark's uniform representation to the class that [the Term-Alert service] was sold as a termite prevention service." In the alternative, Schuman argues: "In addition to the admissions by Clark's counsel that [the Term-Alert service] is a termite prevention service, there was other substantial evidence of this fact before the Trial Court." He relies on deposition testimony from Clark executives, including Clark's president, Joseph Clark, and Clark's vice president and secretary, Terrence Clark, in which each suggested that termite prevention was, in fact, the purpose of Term-Alert and a claim made in

Clark's advertising.⁸ Schuman also points to the following testimony from Gregory Carpenter, Clark's expert marketing witness: " 'I understand that Clark's sales inspectors who make the presentations to homeowners following the termite inspections have primarily used the large brochures and/or the roughly eight-minute DVD.' "

Schuman appears to misunderstand the nature of our review. None of the cited evidence establishes that there was an *absence* of substantial evidence to support the court's finding that uniform representations were not made to all members of the proposed class. Even if we could read the above "admissions" as suggesting that Clark made uniform representations, we would still be compelled to conclude that substantial

⁸ Schuman also argues that the declarations of Joseph Clark and other witnesses submitted in opposition to the motion for class certification that conflicted with prior deposition testimony should have been disregarded. But, we agree with Clark that Schuman forfeited any such objection to the declarations by failing to raise them before the trial court. (See *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 563–564 [evidentiary objection forfeited by failure to present to trial court]; *Fairbanks, supra*, 197 Cal.App.4th at p. 547 [declining to reach arguments not made before the trial court].) In any event, Schuman's newfound reliance on *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 (*D'Amico*), disapproved on other grounds by *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 944, is misplaced. In *D'Amico*, our Supreme Court held that a party cannot create a triable issue of material fact in opposition to a motion for summary judgment by submitting a witness affidavit that directly contradicts that witness's clear and unequivocal admission in prior discovery. (*D'Amico*, at pp. 11–12, 20–22; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]; *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 549 ["[w]e cannot accept as substantial evidence of a triable issue of fact a declaration that directly contradicts the declarant's prior statement, where the contradiction is unexplained"]; *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451 ["[a] party cannot create an issue of fact by a declaration which contradicts his prior pleadings"].)

But, this is not a summary judgment case. "[T]he function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves. [Citations.]" (*Preach v. Monter Rainbow, supra*, 12 Cal.App.4th at pp. 1449–1450.) However, on a motion for class certification, our Supreme Court has made clear that consideration of the merits is appropriate in some cases. (*Brinker, supra*, 53 Cal.4th at p. 1023.)

evidence supports the trial court's finding that Clark's advertising was *not* uniform. (See *Sav-On, supra*, 34 Cal.4th at p. 331 [“ ‘[i]t is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion’ ”].) Clark's evidence showed that, although the corporate office develops policies, practices, and training materials, branch managers have wide discretion to develop their own training programs and practices for implementation of various programs. As a result, Clark's sales practices varied across branches and inspectors. Clark's sales inspectors had the discretion to use any of Clark's marketing materials, or none at all. Some used different marketing materials every time, and some never used any. Some sales inspectors almost always showed Clark's video presentation, some showed it occasionally, and some never showed it. The sales inspectors were not provided with any canned sales pitch or written script; instead, sales inspectors were allowed to develop their own way of presenting the Term-Alert service and therefore described it in various ways. Clark's declarations also showed that many sales inspectors made it a point to tell customers that the Term-Alert service cannot and does not prevent termites. The trial court's finding with respect to uniformity is supported by substantial evidence.

Schuman also argues that the trial court erred by requiring him to show individualized proof of deception, reliance, and injury. Schuman insists that a general theme or pattern of advertising is sufficient for class certification. He relies on *Steroid Cases, supra*, 181 Cal.App.4th 145 and *Capitol People, supra*, 155 Cal.App.4th 676, for this proposition. But, as mentioned previously, there are several distinct analytical prongs under the UCL. Neither *Steroid Cases* nor *Capitol People* involved the “fraudulent” prong of the UCL. (*Steroid Cases, supra*, 181 Cal.App.4th at pp. 150, 155; *Capitol People, supra*, 155 Cal.App.4th at p. 685, fn. 8.) Thus, this authority is not relevant to Schuman's claims regarding misrepresentations.

To the extent that Schuman is arguing that a class can be certified by showing that a defendant engaged in conduct which may have misled only some of the class, we disagree. Certification of a class may be appropriate when the plaintiff can show by

common proof that the defendant used a uniform sales pitch or nondisclosure that every class member was exposed to. (*Tobacco II Cases, supra*, 46 Cal.4th at p. 324; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 361–363; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811–812, 814; *Massachusetts Mutual, supra*, 97 Cal.App.4th at pp. 1292–1293.) But, Schuman has not pointed to any authority holding that a class must be certified, under the UCL, when the defendant did not engage in uniform conduct likely to mislead the entire class. In fact, our colleagues in the Second District Court of Appeal have said: “[W]hen the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be required to determine whether the representations at issue were actually made to each member of the class. [Citations.]” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 121.) We agree with the trial court and with the other appellate courts who, have observed, in similar situations where class members were exposed to a variety of statements or none at all, that resolution of individualized factual questions—i.e., whether misrepresentations were made—is necessary.⁹ (*See ibid.*; *Pfizer, supra*, 182 Cal.App.4th 622; *Kaldenbach, supra*, 178 Cal.App.4th 830; *Cohen, supra*, 178 Cal.App.4th 966.)

In *Pfizer, supra*, 182 Cal.App.4th 622, the plaintiff sued Pfizer, under the UCL and FAL, alleging that Pfizer misrepresented, during the course of a six-month marketing campaign, that its Listerine mouthwash was “as effective as floss.” (*Pfizer*, at pp. 625–626.) The Second District Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order granting the plaintiff’s motion to certify a class of consumers who purchased Listerine during that period. (*Id.* at p. 634.) The court observed: “We are here concerned with the third prong of the [UCL]—an allegation of a fraudulent business act or practice, specifically claims of deceptive advertisements and

⁹ We likewise agree that *Tobacco II Cases, supra*, 46 Cal.4th at page 306, focused only on post-Proposition 64 requirements for standing and did not suggest that the Supreme Court “intended our state’s trial courts to dispatch with an examination of commonality when addressing a motion for class certification.” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 124; *Cohen, supra*, 178 Cal.App.4th at p. 981.)

misrepresentations by Pfizer about the efficacy of Listerine mouthwash.” (*Pfizer*, at pp. 629–630, fn. omitted.) The reviewing court also noted that injunctive relief was not available because the “ ‘as effective as floss’ ” campaign had ended. (*Id.* at p. 631, fn. 5.) It then went on to conclude: “[O]ne who was not exposed to the alleged misrepresentations and therefore could not possibly have lost money or property as a result of the unfair competition is not entitled to restitution. [¶] [T]he class certified by the trial court, i.e., all purchasers of Listerine in California during a six-month period, is grossly overbroad because many class members, if not most, clearly are not entitled to restitutionary disgorgement. The record reflects that of 34 different Listerine mouthwash bottles, 19 never included any label that made any statement comparing Listerine mouthwash to floss. . . . Also, although Pfizer ran four different television commercials with the ‘as effective as floss’ campaign, the commercials did not run continuously and there is no evidence that a majority of Listerine consumers viewed any of those commercials. Thus, perhaps the majority of class members who purchased Listerine during the pertinent six-month period did so not because of any exposure to Pfizer’s allegedly deceptive conduct, but rather, because they were brand-loyal customers or for other reasons. [¶] . . . *Tobacco II* does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution.” (*Pfizer*, at pp. 631–632.)

In *Kaldenbach*, *supra*, 178 Cal.App.4th 830, the plaintiff sued an insurance company, alleging that its representations regarding the costs of vanishing premium policies were misleading and violated the UCL and the CLRA. He also alleged common law causes of action for fraud and concealment. When the plaintiff moved to certify a class of individuals who had purchased similar policies, competing evidence was presented regarding the uniformity of representations made by the agents, who worked as independent contractors. The plaintiff claimed all sales of the policies were based on the same scripted sales presentations and illustrations. He presented evidence, in the form of declarations from an agent, that the insurance company used standard training methods and required its agents to adhere to a script which concealed the potential costs of the

policy. Declarations from 11 other policy purchasers, however, established that they had been referred to “documents,” but most did not mention any illustration. In opposition to the motion, the insurance company’s executives and agents declared that it had no standardized method of sales and that the company did not require agents to use any particular sales materials. (*Kaldenbach*, at pp. 835–840.)

The reviewing court noted that “[a] business practice is fraudulent under the UCL if a plaintiff can show that ‘ “ ‘members of the public are likely to be deceived.’ ” ’ [Citation.]” (*Kaldenbach*, *supra*, 178 Cal.App.4th at p. 847.) The court affirmed the trial court’s order denying certification, rejecting the plaintiff’s reliance on *Tobacco II* and *Massachusetts Mutual*. The court explained: “[B]oth [*Tobacco II*] and *Massachusetts Mutual* involved identical misrepresentations and/or nondisclosures by the defendants made to the entire class. . . . In other words, there was no issue about the defendant’s uniform business practices giving rise to the UCL claim. [¶] But here there is no such uniformity. Although *Kaldenbach* claimed *Mutual*’s presentations relating to [the policies] were uniform and that it utilized standardized training methods, materials, and scripts to which agents were required to adhere, the evidence showed the opposite. . . . [¶] Thus, separate from whether any individual purchaser relied on alleged misrepresentations, or suffered injury as a result, here the determination of what business practices were allegedly unfair turns on individual issues.” (*Kaldenbach*, at pp. 849–850.)

In *Cohen*, the plaintiff alleged that the defendant satellite television company violated the CLRA and the UCL by making advertising misrepresentations concerning the technical specifications of its high-definition (HD) television services. (*Cohen*, *supra*, 178 Cal.App.4th at pp. 969–970.) The trial court found that common issues of fact did not predominate because the proposed class would include subscribers who never saw the advertisements or representations of any kind before deciding to purchase the company’s HD services, or who decided to subscribe to the services for entirely different reasons. (*Id.* at p. 979.) The Second District Court of Appeal affirmed the trial court’s denial of class certification, stating: “The record supports the trial court’s finding that

common issues of fact do not predominate over the proposed class because the class would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services, and subscribers who only saw and/or relied upon advertisements that contained no mention of technical terms regarding bandwidth or pixels, and subscribers who purchased DIRECTV HD primarily based on word of mouth" (*Ibid.*)

Pfizer, Kaldenbach, and Cohen teach that a class may not be certified under the UCL when a variety of different statements were made and some of the class members were not exposed to any misrepresentation at all. In other words: "[A] class action cannot proceed for a fraudulent business practice under the UCL when it cannot be established that the defendant engaged in uniform conduct likely to mislead the entire class. [Citations.] [W]hen the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be required to determine whether the representations at issue were actually made to each member of the class. [Citations.]" (*Fairbanks, supra*, 197 Cal.App.4th at p. 562; see also *Knapp, supra*, 195 Cal.App.4th at pp. 942–943.) Here, the proposed class clearly includes individuals who did not recall seeing any marketing material at all. Thus, the trial court did not err in concluding that common issues would not predominate with respect to Schuman's UCL fraudulent business practice, FAL, and CLRA claims.

Schuman's reliance on the standard written Term-Alert contracts does not undermine our conclusion. Schuman does not support his assertion that every class member received a uniform Term-Alert service contract. Our independent review of the record reveals that most of the Term-Alert contracts produced in discovery state: "It is understood that while the purpose of the service is to prevent damage by subterranean termites, we cannot be responsible should such damage occur." But, in fact, one version of the form contract does not make this statement at all. Instead, it states: "We will provide all appropriate measures that it [*sic*] deems necessary to intercept foraging termites." Thus, not even the Term-Alert contracts are uniform across all members of the proposed class.

In *Fairbanks, supra*, 197 Cal.App.4th 544, the plaintiffs sued an insurance company, under the UCL, alleging that the insurer's marketing and sale of universal life insurance was misleading. The trial court denied the plaintiffs' motion for class certification. (*Id.* at p. 546.) The reviewing court affirmed, noting: "*Kaldenbach*[, *supra*, 178 Cal.App.4th 830] is indistinguishable from this case. Because the trial court determined, based on substantial evidence, that the alleged misrepresentations . . . were not commonly made to members of the class, the denial of class certification must be upheld. Plaintiffs argue that there was, in fact, a common marketing scheme generated from Farmer's headquarters; Farmers's evidence contradicted this, and the trial court found Farmers's evidence persuasive." (*Fairbanks*, at p. 564.) The reviewing court went on to observe that the language in all putative class members' life insurance policies was identical and thus, "indisputably amenable to common proof." (*Ibid.*) Nonetheless, the court explained: "[I]t is still impossible to consider the language of the policies without considering the information conveyed by the Farmers agents in the process of selling them. [Citation.] Plaintiffs are implicitly aware of this; their opening brief identifies a policy reference which is allegedly improper '[w]ithout further explanation'; Farmers's evidence is that such further explanations were provided to many members of the prospective class, and the trial court accepted this evidence. Thus, plaintiffs cannot obtain a reversal of the denial of class certification on this basis." (*Id.* at p. 565, fn. omitted.)

Here, just as in *Fairbanks*, the trial court could properly conclude that the question of whether Clark's representations were likely to deceive turns on numerous individual issues. As Schuman's own deposition testimony makes clear, Clark did not simply present its customers the written contract in a vacuum. Rather, Clark's termite inspectors engaged in detailed discussions regarding the Term-Alert service with potential customers. Thus, in many instances, Clark's inspectors may very well have provided the "disclaimer" that Schuman contends was necessary. In fact, Schuman himself understood that Clark did not guarantee it would prevent any and all termite infestations.

3. *Unlawful Prong*

Schuman's briefing focuses primarily on the "unlawful" prong of the UCL, contending that it is unlawful for Clark to sell its Term-Alert service unless it meets the substantiation requirement found in California Code of Regulations, title 16, section 1999.5. Although the trial court did not specifically mention this regulation, we see no evidence that the trial court misunderstood Schuman's theory.

In its order denying class certification, the trial court wrote: "[Schuman] makes another argument. He contends that there is a separate set of issues as to which there is commonality. To put it in simple terms, [Schuman] claims that Clark's methods do not work. Indeed, [Schuman] devotes much of his briefing (and the voluminous submissions) to an effort to show that [Clark's] methods fail to prevent termites. As [Schuman] says, ' . . . the theory of liability . . . is that [the Term-Alert service] does not work anywhere, and applying chemical as Clark does is illegal and ineffective everywhere.' . . . [¶] There seem to be two strands to this argument: one is a general set of arguments that the chemicals used by Clark in the Term-Alert service do not work or were not approved by the regulatory agencies for the uses to which Clark put them. These are issues subject to common proof. Presumably experts would argue over the efficacy of the chemicals used. There might even be testimony, if appropriate, as to their legality. Since the chemicals used by Clark have changed over time, there may have to be subclasses for different time periods, but that does not appear to be an unmanageable problem. [¶] But the other part of the argument ('applying chemical as Clark does . . .') is not subject to common proof. Plaintiff appears to be arguing that Clark does spot treatment of homes rather than full barrier protection. . . . Clark disputes that. That raises the question: what was done at each house? That is not subject to common proof. [¶] The overwhelming testimony is that Clark's services are provided by persons who have a Branch 3 License from the [SPCB¹⁰]. . . . Each sales inspector retains discretion to

¹⁰ A "Branch 3 license" is issued, by the SPCB, for "[t]he practice relating to the control of wood-destroying pests or organisms by the use of insecticides, or structural

determine what treatment is necessary based on the inspection done: [¶] ‘If subterranean termites are detected, the technician may choose to treat the soil around the structure, known as a “full perimeter treatment,” or instead treat selected areas of the property where signs of termite activity are present, sometimes called a “spot treatment.” As noted, individual differences in the property and conditions affect the technician’s treatment decisions’ [¶] Thus, when it comes to the ‘as applied’ argument there would not be common proof. The questions would include what was done at a given house and was it effective to prevent damage to that house. As to these issues, common questions would not predominate. [¶] It is generally the case that proof of eligibility for or the amount of damages is not an impediment to class certification. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46. But here, the issue is not simply the *amount* of damages. Indeed, it is not even the *fact* of damage. It is a question of whether a treatment tailored to a given home was effective. . . . [¶] When the court weighs the common versus the individual issues it finds the latter predominate. Were the case to go to trial, the expert evidence on the common issues might take a few days. But the proof of the remaining issues would take far longer. Indeed, it is difficult to imagine (and [Schuman] has offered no suggestions) how there could be testimony to establish what representations were made to given class members or what treatment was done at a class member’s home. These simply are not susceptible to common proof under the circumstances of this case.” (Fns. omitted.)

Schuman contends that the trial court “incorrectly concluded that each of the 33,000 class members would have to prove their homes have termite damage to prove Clark’s liability. . . . Under the correct legal standard, Schuman need only prove the class was sold a termite prevention service that fails to meet the SPCA Substantiation Standard. That issue is subject to common proof.” Although Schuman states his claim in a manner slightly different from the trial court, he is still unable to evade the reality that

repairs and corrections, excluding fumigation with poisonous or lethal gases.” (§ 8560, subds. (a), (b).)

his theory is composed of two distinct subparts—one of which may be subject to common proof and one in which common questions will not predominate. The distinction lies in the nature of the “termite prevention service” sold to each member of the proposed claim. Schuman asserts: “[I]f the absence of substantiation is proven at trial, Clark’s [Term-Alert service] contracts are then unlawful and Clark’s liability *to the class* is established.” (Italics added.) According to Schuman, “should the jury find that Clark’s [service] fails to meet the SPCA [s]ubstantiation [s]tandard, Schuman and the class need only prove that they are a [Term-Alert] customer.” Contrary to Schuman’s suggestion, this case is not so simple. Schuman’s theory of class liability crumbles on closer inspection because it is premised on the assumption that Clark’s Term-Alert service is composed only of installation of Clark’s interceptor stations and “spot treatment” application of termiticide to those interceptor stations (without benefit of an initial inspection, an initial barrier treatment, regular monitoring and follow-up visits).

In opining that Clark’s Term-Alert service is unsubstantiated, Schuman’s expert entomologist relies on precisely this assumption. Schuman also relies on the concession from both of Clark’s expert entomologists, Dr. Michael Haverty and Dr. Vernard Lewis, that there are no scientific studies substantiating the use of the Premise termiticide as a termite bait. In their declarations in opposition to the motion for class certification, the two experts opine: “The Term-Alert interceptor is a monitoring device. It is not capable of preventing, eliminating, destroying, repelling, attracting, or mitigating termites. Even once Premise or another registered termiticide is applied to the stake, the stake becomes nothing more than a piece of ‘equipment used for the application of pesticides.’ (Food & Agr. Code, § 15300[, subd.] (a).)” Schuman’s expert agreed.

Contrary to Schuman’s assertion, the trial court did not err “by disregarding this undisputed expert testimony.” Nor did the trial court determine that Clark was excused from the substantiation requirement. The problem identified by the trial court is the lack of any substantial evidence to support Schuman’s theory that the Term-Alert service is, in fact, comprised of only these two steps in every instance—i.e., that every property owner only received spot treatment plus installation of monitors—or that Clark has ever made

uniform representations that these two steps alone would prevent termites. In the absence of such evidence, we agree with the trial court that Clark's liability to the class is not a common question.

The parties appear to disagree regarding what must be substantiated under California Code of Regulations, title 16, section 1999.5—the service itself or the advertising claims about the service. We tend to agree with Clark that the plain language of the regulation is more amenable to the latter interpretation. So understood, we need not reconsider whether the trial court properly denied the motion for class certification because, as we have already stated above, the court's finding regarding uniformity of advertising is supported by substantial evidence and not based on erroneous legal assumptions.

Nonetheless, even if Schuman's interpretation is correct, we need not reverse the trial court's order denying class certification—because substantial evidence supports the trial court's finding that the Term-Alert service is not, in fact, a one-size-fits-all service, comprised uniformly of only spot treatment plus installation of monitors. Clark's evidence shows that the Term-Alert service consists of four components: inspection, initial treatment, periodic monitoring, and follow-up treatment. Practices with respect to each of those steps varied depending on branch, inspector, time of service, and property conditions.

For instance, if an inspection reveals signs of an active termite infestation, the inspector may choose to treat all of the soil around a structure, known as a full perimeter treatment, or selected areas where signs of termite activity are present, sometimes called a spot treatment. Although Schuman received a spot treatment with the termiticide Premise as the initial treatment of his termite infestation, most sales inspectors routinely recommended full perimeter treatments, often with Termidor or IMaxx Pro, for detached single-family homes. In fact, several Clark inspectors declared that, if an inspection reveals an active infestation and the customer insists on only a spot treatment, that the customer generally is not eligible for the Term-Alert service.

In asserting that Clark uniformly provided the purportedly unsubstantiated two-part service, Schuman relies on the following series of questions and answers at Terrence Clark's deposition:

"Q. So if . . . the sales inspector goes out to a house and decides, you know, I think [the] idea about these interceptor systems is unproven and unsubstantiated and I'm just not going to use them, I won't issue somebody a Term-Alert service contract and I'm going to order up a complete, full label direction treatment at the maximum label rate for Termidor and charge the customer \$4,000 for that and never install an interceptor station. [¶] Is that something they can do in the exercise of their Branch 3 license?

"A. I'm sure they could for a while. An initial without an install would show up in the computer, might raise a red flag. And the fact that there's no monitoring going on, . . . there's no route associated with it would get their inspector's attention. But if that's what they felt was the best thing to do, they certainly could. It's their license.

"Q. When you say they could do that for a while, at some point would you talk to that sales technician and say, our expectation here is that we sell the Term-Alert service, and, you know, if you don't like that and you want to sell . . . a Termidor treatment renewable warranty, then go work at Terminix?

"A. *It's never come up*, so it's pretty much a hypothetical. [¶] And, yes, occasionally people get creative ideas about how to package the system . . . or to shift costs from one sector to another from lowering the initial and raising the monitoring or something. [¶] But those guidelines, you don't want to get them out of whack. They should be maintained. *And we would have a discussion with that inspector and tell them this doesn't qualify, you shouldn't be offering this particular service. Please stop doing that or you're not going to get commission on the next one.*

"Q. You just answered my next question.

"A. Usually we'll stop them.

"Q. How would you make them stop that?

“A. That would usually stop them.” (Italics added.) This evidence does not suggest that all Term-Alert customers uniformly received only spot termiticide treatment plus monitors.

“[T]he UCL does not ‘authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.’ [Citation.]” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 124.) Schuman’s substantiation argument is essentially a question of what treatment was done at each home. Substantial evidence supports the trial court’s finding that this is not a question subject to common proof.

Schuman’s reliance on *Steroid Cases, supra*, 181 Cal.App.4th 145, does not convince us otherwise. In that case, the plaintiff sued General Nutrition Companies, Inc. (GNC), under the UCL and CLRA, alleging that it sold products containing anabolic steroids, which are controlled substances under California law, without a prescription and without notifying consumers that the products contained a controlled substance. (*Id.* at pp. 149–150 & fn. 1.) The plaintiff’s motion for class certification was denied by the trial court on the ground that resolution of the restitution and injunctive relief claims would require an individualized inquiry into whether the illegality of the products was material to each class member. (*Id.* at pp. 150–152 & fn. 5.)

On appeal, the Second District Court of Appeal reversed. With respect to the UCL claim, the court concluded that the trial court had improperly assumed that, after Proposition 64, each class member would need to show individual injury—i.e., whether the legality of the sale was material to him or her. Because, in *Tobacco II*, the Supreme Court had disapproved that assumption, the UCL claim presented only “two predominant issues (other than [the named plaintiff’s] individual standing), both of which are common to the class: (1) whether GNC’s sale of androstenediol products was unlawful; and if so, (2) the amount of money GNC ‘may have . . . acquired by means of’ those sales that must be restored to the class (. . . § 17203).” (*Steroid Cases, supra*, 181 Cal.App.4th at p. 155.)

With respect to the CLRA claim, the reviewing court acknowledged that “the CLRA requires a showing of actual injury as to each class member.” (*Steroid Cases*, *supra*, 181 Cal.App.4th at p. 155.) Nonetheless, the court determined that the denial of class certification of the CLRA claim was based on an erroneous legal assumption, reasoning: “The ‘damage’ [the plaintiff] alleged in this case is that, in reliance on GNC’s deceptive conduct, he bought an illegal product he would not have bought had he known it was illegal. He does not seek actual damages, but instead seeks restitution. He correctly argues that he is entitled to show that GNC’s alleged deceptive conduct caused the same damage to the class by showing that the alleged misrepresentation was material, even if GNC might be able to show that some class members would have bought the products even if they had known they were unlawful to sell or possess without a prescription. [Citation.] . . . [¶] . . . [T]he question that must be answered in this case is whether a reasonable person would find it important when determining whether to purchase a product that it is unlawful to sell or possess that product. It requires no stretch to conclude that the proper answer is ‘yes’—we assume that a reasonable person would not knowingly commit a criminal act. [Citations.]” (*Steroid Cases*, at pp. 156–157, fn. omitted.)

Schuman insists that “[j]ust as the law did not allow GNC to sell a prescription drug as an over-the-counter product, it does not permit Clark to sell its unsubstantiated [Term-Alert service.]” But, the analogy only goes so far. GNC was selling a product, all of which contained anabolic steroids. Clark is selling a service that varies from customer to customer. Furthermore, with respect to Schuman’s CLRA claim, it is not clear to us that the inference of materiality made by the *Steroid Cases* court can also be made here. Section 8553 does provide: “Any person who violates any provision of *this chapter* . . . is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.” But, that section is part of the SPCA (§ 8500 et seq.), which regulates the conduct of structural pest control operators, not the conduct of property owners contracting with such operators.

(See § 8555, subd. (c); *Americana Termite Co. v. Structural Pest Control Bd.* (1988) 199 Cal.App.3d 228, 231–232 [SPCA “authorizes the Board to regulate, administrate, license, and discipline structural pest control operators”].) It does not provide that any property owners who contracted for an unsubstantiated Term-Alert service committed a criminal act.

Schuman’s reliance on *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908 (*Hicks*) is similarly misplaced. In *Hicks*, the Second District Court of Appeal concluded that common questions predominated in a cause of action for breach of warranty regarding allegedly defective foundation materials. The court explained: “[I]f plaintiffs prove their foundations contain an inherent defect which is substantially certain to result in malfunction during the useful life of the product they have established a breach of Kaufman’s express and implied warranties. It is not necessary for each individual homeowner to prove his foundation has already cracked or split or that he has suffered property damage as a result of the cracking or splitting. We see no reason why a homeowner should have to wait for the inevitable injuries to occur before recovering damages to repair the defect and prevent the injuries from occurring.” (*Id.* at p. 923, fn. omitted.)

In *Hicks, supra*, 89 Cal.App.4th 908, the only question was whether a class could be certified when some members had not yet suffered inevitable foundation cracks due to a defect inherent *in all* of their foundations. Here, unlike in *Hicks*, Schuman is attempting to prove a defect that is *not* uniform to every member of the proposed class.¹¹

¹¹ The other cases relied on by Schuman are distinguishable for similar reasons—because the presence of a uniform and common defect was not disputed. (See *Bomersheim v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1485 [“[i]n the class context, where individuals are *uniformly* subjected to a material stimulus and thereafter uniformly act in a manner consistent with a reasonable response, a classwide inference is raised that the stimulus caused the response” (italics added)]; *Hewlett-Packard Co. v. Superior Court* (2008) 167 Cal.App.4th 87, 96 [“Plaintiffs here allege *a common defect* in the HP notebook computers and their display screens”]; *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d 699, 704–705 [“gravamen of plaintiffs’ case is the contention that *all wheels of the type involved* contain an inherent

Schuman also misplaces reliance on *Capitol People*, *supra*, 155 Cal.App.4th 676. In that case, a group of persons with developmental disabilities sued the California Department of Developmental Services (Department), alleging that the Department had systemically failed to enforce their rights, under the Lanterman Act and the Constitution, to avoid unnecessary institutionalization. The plaintiffs sought only injunctive and declaratory relief on behalf of a class of similarly situated individuals. The trial court denied the plaintiffs’ motion for class certification because, *inter alia*, they had failed to establish commonality. (*Id.* at pp. 681, 684–685, 688.) Division Four of this court reversed the trial court’s order, concluding that it was based on improper criteria and erroneous legal assumptions. (*Id.* at p. 681.)

With respect to commonality, the *Capitol People* court reasoned: “The trial court delivered a ruling on the issue of commonality that was marked by contradictions and inconsistencies. While acknowledging that appellants *were seeking only systemic relief*, and not individual solutions to individual problems, it nonetheless insisted on defining the claims asserted in the litigation with respect to the ‘common discrete wrongs that affect individual class members.’ . . . ¶¶ . . . ¶¶ Here . . . appellants’ theory of recovery, as gleaned from the pleadings and declarations, *focuses on the common practices, policies, acts and omissions* of the state actors and regional centers. The overarching theme is that there is a pattern and practice of failure to meet constitutional, statutory and regulatory mandates to provide services and place class members in less restrictive settings, and *the systemic effect* of this failure is to impinge upon plaintiffs’ rights under state and federal law. . . . ¶¶ . . . ¶¶ In support of certification . . . , *appellants submitted pattern and practice evidence including testimony from respondents about their policies and practices*; admissions; documents; statistics; expert testimony; and sampling. . . . ¶¶ . . . ¶¶ The court misunderstood the nature of practice and pattern litigation and therefore based its determination that common factual and legal issues did not predominate on

defect which may cause them to fail at some time, . . . [which] is exactly the sort of common issue for which class actions are designed” (*italics added*).)

improper criteria and erroneous legal assumptions. These errors led the court to prejudge the merits of appellants' case. Either sampling is valid and reliable, or it is not. Either statistical proof is compelling and convincing, or it is not. These inquiries go to the merits—the quantum of proof appellants are able to amass. It is not the trial court's role to become enmeshed with the merits of the underlying action, or to concern itself with which side's experts are more qualified. At the class certification stage, the concern is whether the evidence plaintiffs will offer is 'sufficiently generalized in nature.'

[Citation.] Here, appellants *only* proffered evidence that was generalized in nature.” (*Capitol People, supra*, 155 Cal.App.4th at pp. 690, 693–694, 696, fns. omitted & some italics added.)

Here, unlike in *Capitol People*, Schuman is not seeking only systemic relief. He is also seeking restitution and damages for every member of the class. Furthermore, he has presented no substantial evidence suggesting that Clark's pattern and practice was to provide a uniform Term-Alert service. Finally, we must reject Schuman's assertion, relying on *Capitol People*, that the trial court cannot resolve merits questions in connection with a motion for class certification. *Capitol People* was decided before *Brinker*, in which our Supreme Court made clear that consideration of the merits, on a motion for class certification, is appropriate to the extent that it is necessary to do so. (*Brinker, supra*, 53 Cal.4th at p. 1023.)

The problem is not, as Schuman contends in his reply brief, that he was improperly required to prove that the Term-Alert service is unsubstantiated at the class certification stage. And, the trial court did not impermissibly resolve a conflict between the experts on this point. The trial court merely looked beyond the surface of Schuman's argument and concluded that common issues would not predominate. “When the trial court determines the propriety of class action treatment, ‘the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact.’ [Citation.]” (*Caro, supra*, 18 Cal.App.4th at p. 656.) Substantial evidence supports the trial court's implicit finding that the defect Schuman seeks to prove will be irrelevant for large members of the class—i.e., because it cannot be proven that

every member of the class in fact received only spot termiticide treatment and monitors. Because the trial court stated at least one valid reason for denying the class certification motion, we affirm its order. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 440, 435–436.)

C. *Motion for Sanctions*

Clark has filed a motion seeking sanctions in the amount of \$94,052, under Code of Civil Procedure section 907 and California Rules of Court, rule 8.276, on the ground that Schuman’s appeal is frivolous and that Schuman unreasonably violated appellate rules.

Code of Civil Procedure section 907 provides: “When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.” Rule 8.276 of the California Rules of Court similarly provides that the court may impose sanctions on a party or an attorney for “[t]aking a frivolous appeal or appealing solely to cause delay,” as well as for “[c]ommitting any other unreasonable violation of these rules.” (Cal. Rules of Court, rule 8.276(a)(1), (4).)

We first address Clark’s contention that the appeal is frivolous. We have already concluded that Schuman’s appeal of the denial of his motion for class certification lacks merit. That an appeal lacks merit does not, alone, establish it is frivolous. “An appeal is frivolous ‘only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]’ [Citation.] The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively. [Citation.]” (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.) “‘[A]n appeal, though unsuccessful, should not be penalized as frivolous if it presents a unique issue which is not undisputedly without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension,

modification, or reversal of existing law. [Citation.]’ [Citation.]” (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.)

Clark argues that Schuman’s substantiation argument is frivolous because it is without legal support. Specifically, Clark insists: “Schuman cites no case law or other authority which gives legal credence to his specious argument that the trial court adopted an incorrect interpretation of [California Code of Regulations, title 16,] section 1999.5.” But, we are aware of no case law interpreting this regulation. And, appellate sanctions are disfavored in such a scenario. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 129; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 551.)

Clark also argues that Schuman’s appeal was frivolous to the extent it attempted to challenge denial of class certification with respect to the first through fourth causes of action. “Sanctions for an appeal which is [only] partially frivolous are appropriate if the frivolous claims are a significant and material part of the appeal.” (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010, italics omitted.) We have previously determined that Schuman forfeited his insufficiently developed arguments with respect to these causes of action. It seems to go without saying that an insufficiently developed argument is not a significant and material part of the appeal. Furthermore, Clark has not provided us with a declaration that suggests what kind of monetary sanction would compensate it for responding to these claims by raising the forfeiture argument in one page of its respondent’s brief. (See Cal. Rules of Court, rule 8.276(b)(1).)

Finally, Clark argues that sanctions should be imposed because Schuman’s opening brief fails to provide a statement of facts, fails, in some instances, to provide citations to the record, and contains 51 footnotes, 26 of which attempt to set out substantive argument. (See Cal. Rules of Court, rules 8.204(a)(1)(B) [each brief must state each point under a separate heading or subheading and support each point by argument and, if possible, by citation of authority], 8.204(a)(1)(C) [each brief must support any reference to the record by citation to volume and page number], 8.204(a)(2)(C) [appellant’s opening brief must provide a summary of the significant

facts].) Sanctions may be warranted for a party's unreasonable violations of the rules of appellate procedure. (See Cal. Rules of Court, rule 8.276(a)(4); *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 165–166; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29.)

Here, the first of Clark's contentions is not well-taken. It is true that Schuman's counsel's citation to the record is less than exemplary and that his opening brief does raise substantive arguments in the footnotes. But, we cannot say that the violations were egregious. (See *Pierotti v. Torian, supra*, 81 Cal.App.4th at pp. 21, 29–31 [awarding sanctions where appeal was frivolous and appellant's attorneys grossly violated the California Rules of Court in preparing their briefs].)

Our Supreme Court has cautioned that sanctions should be “used most sparingly to deter only the most egregious conduct.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650–651.) This is not such conduct. We simply do not address any arguments raised solely in footnotes. (See *Evans v. Centerstone Development Co., supra*, 134 Cal.App.4th at p. 160 [condemning a similar practice as violative of court rules requiring arguments to be contained in discrete sections with headings summarizing the point]; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562.) Likewise, we disregard any factual assertions that are not supported by citation to the record. (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 [an appellate court may disregard any factual contention not supported by a proper citation to the record].) For all of the above stated reasons, Clark's motion for sanctions is denied.

III. DISPOSITION

The order denying Schuman's motion for class certification is affirmed.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.