In the Supreme Court of the State of California

JAMSHID ARYEH, Appellant, **v.** **CANON BUSINESS SOLUTIONS,** Respondent.	Case No. S184929 Second Appellate District, Division 8, Case No. B213104 Los Angeles County Superior Court, Case No. BC384674

BRIEF OF THE ATTORNEY GENERAL

AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The Attorney General is the chief law officer of this State (Cal. Const., art. V, § 13) and has broad statutory and common law powers that may be invoked to protect the public interest. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) The Attorney General and other prosecutorial agencies are specifically authorized under the Unfair Competition Law, Business and Professions Code section 17200 (hereafter, the UCL) to bring actions in the name of the People of the State of California to obtain injunctive and other equitable relief, restitution, and civil penalties to redress unfair, unlawful, and fraudulent business practices and deceptive advertising. (See Bus. & Prof. Code, §§ 17203, 17204, 17206.) This Court has characterized the Attorney General's UCL actions as civil law enforcement actions. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17.) Private parties who meet the standing requirements may also bring actions for injunctive and other equitable relief but not for civil penalties. (Bus. & Prof. Code, § 17203.)

Proceedings in a private action involving the UCL may have profound ramifications for law enforcement agencies, which regularly rely on the UCL to combat a host of unfair, deceptive, and unlawful practices. Any person filing a brief in a case involving the UCL in the Courts of Appeal or in this Court must serve the Attorney General with copies of the briefs. (Bus. & Prof. Code, § 17209; Cal. Rules of Court, rule 8.29(c).) The Attorney General may then decide to file a brief as amicus curiae to present the public law enforcement perspective. (Cal. Rules of Court, rules 8.200(c)(6) and 8.520(f)(8) [permitting Attorney General to file brief as amicus curiae without obtaining prior leave of court in Court of Appeal and Supreme Court, respectively].)

The Attorney General has a significant interest in ensuring that the state's consumer protection laws are properly construed and applied in

private actions. Legitimate actions by private litigants both supplement law enforcement efforts and vindicate consumers' rights. Where, as here, a court of appeal's misapplication of the law improperly prevents a timely filed private action from going forward, other acts of unfair competition may go unredressed, to the public's detriment. Harm to the public will be compounded if trial and appellate courts wrongly apply the court of appeal's holding in public UCL actions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant and petitioner Jamshid Aryeh brought this putative UCL class action on behalf of himself and others for overcharges by respondent Canon Business Solutions, Inc. (Canon) during the four years preceding the action. Canon allegedly overcharged Aryeh repeatedly, beginning six years before the lawsuit. Although Aryeh sought redress only for the wrongful acts that Canon continued to commit within four years of the date that Aryeh filed his action, the appellate court held that the matter was time-barred because the cause of action accrued when Canon committed the first act six years earlier. The court held that Aryeh could not sue to redress *any* of the misconduct, no matter how recent.

The appellate court's holding flowed from its rejection in UCL cases of the "continuous accrual" doctrine.[1] The plain language of the UCL gives no support for a wholesale rejection of accrual rules that apply in numerous civil contexts. This Court should reject the appellate court's analysis and hold that the "continuous accrual" doctrine applies to claims arising under the UCL alleging discrete acts of misconduct. Under that doctrine, where a defendant repeatedly commits wrongful acts, each of which gives rise to a

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[1] Dissenting Justice Rubin properly noted the majority's confusion of the "continuous accrual" doctrine with the "continuing violation" doctrine. (See Slip opn. at p. 2 (dis. opn. of Rubin, J.))

separate cause of action, a separate limitations period runs for each new claim from the occurrence of each wrongful act. An action to redress violations thus committed within the limitations period for each independently actionable wrong is timely; an action to redress those discrete violations that occur outside the limitations period is not.

Appellant Aryeh seeks relief only for acts of misconduct occurring within four years of the filing of his complaint; accordingly, the Court need not apply the related but distinct doctrine of *continuing violation*. Aryeh's claim is adequately covered by application of the *continuous accrual* doctrine. Nevertheless, if the Court addresses the application of the continuing violation doctrine in UCL cases, amicus will address that doctrine as well.

Precluding recovery, as the appellate court did here, even for recent bad acts, because the defendant committed similar acts outside the limitations period, would significantly undermine the effectiveness of California's consumer protection laws. First, it would hinder public actions brought by the Attorney General and other law enforcement agencies because courts would doubtless apply similar reasoning to bar public actions. Second, it would cripple meritorious private consumer actions by barring many timely lawsuits against defendants who have been engaging in repeated acts of misconduct for more than four years. Such a result would, in effect, offer a new species of immunity to the worst offenders – those who have been the most persistent in breaking the law.

STATEMENT OF FACTS

According to Aryeh's second amended complaint, Aryeh is a copy shop owner and Canon is a retailer of, and service provider for, copy machines. (Appellant's Appendix (App.) at pp. 124-125, 135.) In November 2001, Aryeh entered into an agreement with Canon to lease

black and white copy machines. (*Id.* at p. 125.) In February 2002, the parties entered into a second lease for color copiers. (*Ibid.*)

The leases obligated Aryeh to pay a monthly service fee in exchange for service and a monthly copy allowance. (App. at pp. 125-126, 135-36, 138-139.) The leases also provided that Aryeh would pay an "excess copy charge." (*Id.* at pp. 125-126, 135, 138.) Aryeh alleges that Canon misled the class members into believing that they would be charged only for the actual number of copies made that they made. (*Id.* at pp. 130-131.) Aryeh alleges, however, that the monthly allowance and excess copies included test copies that Canon's employees made during service calls. (*Id.* at p. 126.) During some months, Aryeh exceeded the monthly allowance and incurred excess copy charges because of these test copies. Aryeh documented 17 separate examples of alleged improper charges for test copies, occurring between February 2002 and November 2004. (*Ibid.*)

In this putative class action under the UCL, Aryeh seeks recovery for wrongful charges within four years of filing the complaint. He does not seek recovery for the overcharges that Canon allegedly imposed more than four years before filing. (*Id.* at p. 127.)

STANDARD OF REVIEW

The Court is called upon here to construe the UCL. Statutory interpretation is a question of law that the Court reviews *de novo*. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311, citation omitted ["the issues before us involve the meaning of certain language in the UCL as amended by Proposition 64 and, as such, present questions of law that we review *de novo*"].) The Court's task in construing a statute is "to ascertain the intent of the enacting legislative body so that [the Court] may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.)

ARGUMENT

I. THE CONTINUOUS ACCRUAL DOCTRINE SHOULD APPLY TO UCL CLAIMS PREDICATED ON A PRACTICE OF MISCONDUCT COMPRISED OF REPEATED DISCRETE ACTS

An action under the UCL "shall be commenced within four years after the cause of action accrued." (Bus. & Prof. Code, § 17208) (hereafter, section 17208.) The Legislature could have – but did not – indicate any intent to preclude the application in UCL cases of general limitations principles that apply in a variety of other civil contexts. The continuous accrual doctrine, which applies to the facts here, is one such principle.

This Court has been "mindful of the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose." (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530 [construing Song-Beverly Credit Card Act, Civ. Code § 1747 et seq., which is "designed to promote consumer protection"; internal quotations and citations omitted]; *King v. Central Bank* (1977) 18 Cal.3d 840, 846 [Unruh Act, Civ. Code § 1802 et seq., governing consumer credit sales, is "liberally construed to protect consumers, with a view toward expanding, rather than limiting, its coverage"].)

"The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike* (2002) 27 Cal.4th 939, 949. See also, *In re Tobacco II Cases, supra,* 6 Cal.4th at p. 324 ["[t]he substantive right extended to the public by the UCL is the right to protection from fraud, deceit and unlawful conduct"; citation and internal quotations omitted].) The Legislature intended the UCL's remedies "'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267,

quoting *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 449.)

Consistent with the Legislature's intent, the continuous accrual doctrine ought to apply where, as in this case, the plaintiff seeks recovery for a series of discrete wrongs evidencing a practice of misconduct, that occurred within the limitations period, even if similar conduct also occurred outside the limitations period. As noted by dissenting Justice Rubin below, application of the doctrine in this circumstance "acknowledges the reality that similar acts can continue to occur. . . . Earlier conduct [that occurred outside the limitations period] is not *extended* but *repeated.*" (Slip Opn. at p. 5 (dis. opn. of Rubin, J.), citing 3 Witkin Cal. Procedure (5th ed. 2008) Actions, § 562, p. 665 ["where a right or obligation is continuing, successive causes of action to enforce it continuously accrue, and the bar of the statute can only be set up against those causes on which the period has run"].)

The continuous accrual doctrine should be available to plaintiffs alleging violations of the UCL just as it is to plaintiffs with claims based on contract or other theories. The policies of both the UCL and the statute of limitations are equally furthered if the plaintiff may recover for each wrong committed within four years of the complaint's filing. In contrast, to permit the defendant to escape liability entirely because it has engaged in the same illegal activities for more than four years: (1) would render the UCL virtually useless in deterring the most persistent offenders; and (2) would give the defendant protection, not from stale claims, but from recent ones.

Applying the continuous accrual doctrine in UCL actions does not encourage dilatory behavior because damages are not available in such actions. Private litigants in UCL actions can seek only an injunction and restitution of money or property that the defendant wrongfully took from plaintiff. (*Cortez v. Purolator Air Filtration Products Company* (2000) 23

Cal.4th 163, 173.) Surely a plaintiff should be able to seek an injunction to prevent the defendant from continuing to engage in the alleged misconduct, a remedy unaffected by the passage of time. Delay in bringing an action may have the effect of permitting the defendant to accumulate more money to which it is not entitled; the UCL would require only that the defendant return that wrongly obtained money as restitution. The wrongdoer cannot plausibly claim prejudice from being allowed to accumulate more money to which it was not entitled.

II. CONTRARY TO RESPONDENT'S CONTENTION, APPLICATION OF THE CONTINUOUS ACCRUAL DOCTRINE IN CASES ARISING UNDER THE "FRAUDULENT" PRONG OF THE UCL IS UNAFFECTED BY THE STATUTE OF LIMITATIONS FOR THE TORT OF FRAUD

The continuous accrual doctrine should be available for discrete fraudulent business practices occurring within four years of filing of a complaint *under the UCL* even if a claim for the *tort of fraud* would be barred by the tort's statute of limitations. To be sure, a plaintiff class representative seeking relief under the "fraudulent" prong of the UCL must establish that he was personally *injured* by defendant's fraudulent practice in order to establish *standing* under the UCL (see *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 319-31 [class plaintiff must meet Proposition 64's standing requirement]), but it is immaterial to a claim under the UCL that the elements of the tort of fraud were complete more than four years before filing of the UCL complaint. The elements of the two claims are quite distinct. "[T]o state a claim under . . . the UCL . . . it is necessary only to show that members of the public are likely to be deceived." (*In re Tobacco II Cases, supra*, 46 Cal.4th at p. 312, citation and internal quotations omitted.) So even if the class representative's tort action in fraud would be barred by the statute of limitations, that fact would not also bar his action

under the "fraudulent" prong of the UCL, under the continuous accrual doctrine, if the complaint is filed within four years of the most recent discrete act of misconduct.

In this case, Canon argues that Aryeh alleged one fraudulent act – the initial inducement to enter into the lease agreements. Under this theory, because Aryeh was allegedly deceived, discovered the alleged deception and was injured by paying the disputed charges more than four years before he filed his complaint, the statute of limitations has expired – the cause of action was "complete with all of its elements" more than four years ago, and Aryeh discovered as much at that time. (Answer Br. at pp. 16-19.) But Aryeh is not alleging a tort claim for fraud; he is alleging a claim under the "fraudulent" prong of the UCL and, as noted above, the elements of *that* claim are satisfied by proof that members of the public are likely to be deceived by the challenged business practice. "This distinction [in the elements of the cause of action] reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." (*In re Tobacco II Cases, supra*, 46 Cal.4th at p. 312, citations omitted.) Canon's theory that Aryeh's hypothetical claim for fraud would be barred by the statute of limitations is immaterial, therefore, to the question whether Aryeh's claim *under the "fraudulent"* prong of the UCL is viable under the continuous accrual doctrine.[2]

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[2] Canon also argues that the trial court properly sustained the demurrer because its actions were not unfair as a matter of law. (Answer Br. at pp. 37-41.) Amicus will not address that issue. Consideration of the meaning and coverage of the UCL's "unfair" prong – an issue of importance to the bar, business community, consumers and public prosecutors – is outside the scope of the petition for review in this case and has not been briefed by the parties.

III. THE CONTINUING VIOLATION DOCTRINE SHOULD ALSO APPLY IN APPROPRIATE UCL CASES

Because Aryeh does not seek recovery for allegedly wrongful acts that Canon committed more than four years ago, the Court need not address the continuing violation doctrine in order to resolve the specific case at bench. Nevertheless, amicus will discuss the application of that related doctrine in order to assist the Court should it decide to address that doctrine as well.

A. The UCL Broadly Reaches Illegal Practices.

The Legislature has consistently evinced its intent to expand, not contract, the coverage of the UCL. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570.)[3] For example, since it was first codified in the Business and Professions Code, the UCL has always prohibited any unfair, unlawful or fraudulent business *practice*. (Bus. & Prof. Code, § 17200 as added by Stats. 1977, ch. 299, § 1.) This Court noted in 1988 that section 17200's "'practice' requirement envisions something more than a single transaction . . . ; it contemplates a 'pattern . . . of conduct', 'on-going . . . conduct', 'a pattern of behavior' or a 'course of conduct.'" (*State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1169-1170, citations omitted.) In 1992, however, the Legislature broadened the UCL's coverage by amending the statute to ensure coverage of any act, as well as any practice. (See Stats. 1992, ch. 430, § 2; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra,* 17 Cal.4th

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[3] Although the electorate significantly restricted the standing requirements for private UCL and false advertising actions under Business and Professions Code sections 17200 and 17500, "the substantive reach of these statutes remains expansive. . . ." (*Kwikset Corporation v. Superior Court* (2011) 51 Cal.4th 310, __, 120 Cal.Rptr.3d 741, 749. See also, *In re Tobacco II, supra*, 46 Cal.4th at p. 317.)

at p. 570.) Accordingly, a UCL action can now be based on a challenge either to any illegal business act *or* practice. (Bus. & Prof. Code, § 17200.) Construing the UCL's period of limitations to encompass an entire illegal practice advances the statute's remedial purpose of protecting the public and the marketplace against unlawful, unfair and fraudulent practices. Indeed, the broad remedial purpose of the UCL is undermined if a court ignores the ongoing nature of the practice and allows a defendant to escape the consequences for that portion of the practice antedating the limitations period.

Conversely, permitting the court to reach the defendant's entire illegal practice does not undermine the statute of limitations' purpose, which the appellate court here described as "to give the defendants reasonable repose and to protect parties from having to defend stale claims." (Slip opn. at p. 9, citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.) Where the defendant continues to engage in an illegal practice from before the beginning of the limitations period into the limitations period, the defendant cannot credibly argue that it is entitled to repose from having to defend the allegedly unlawful activities that it has committed on an ongoing basis for more than four years. (Cf,, *Wyatt v. Union Mortgage Company* (1979) 24 Cal.3d 773, 788 ["So long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built on the passage of time"].)

B. A UCL Action Challenging an Ongoing Illegal Practice Should Be Deemed Timely If Filed Within Four Years of the Last Incident.

As this Court has noted, the law regarding the continuing violation doctrine as used in employment law is "muddled" because it refers "not to a single theory, but to a number of different approaches, in different contexts

and using a variety of formulations, to extending the statute of limitations in employment discrimination cases." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 813.) Nevertheless, a predominant test has emerged that the Court should adopt here, should it reach the issue. Under this test, a cause of action challenging an unlawful, unfair or fraudulent practice should be deemed timely filed if plaintiff alleges, not isolated incidents, but a continuing violation consisting of a number of incidents, and plaintiff files the lawsuit within four years after the last incident occurred.

The United States Supreme Court applied the continuing violation doctrine in this manner in *Havens Realty Corporation v. Coleman* (1982) 455 U.S. 363. In that case, plaintiffs alleged that the defendant, the owner of two apartment complexes, violated the federal Fair Housing Act, 42 U.S.C. section 3604 (FHA), by engaging in a pattern of steering white applicants to one complex, and African American applicants to the other complex. Section 812(a) of the FHA requires that a civil suit be brought within 180 days after "the alleged discriminatory housing practice occurred." (*Havens Realty, supra,* 455 U.S. at p. 379, citing 42 U.S.C. § 3612(a).) Plaintiffs alleged five incidents of unlawful "racial steering," with four incidents occurring more than 180 days before they brought suit, and one incident occurring within 180 days. (*Id.* at p. 380.)

The Court held that none of the claims was barred because the incidents were all part of a "continuing violation" of the FHA. (*Havens Realty, supra,* 455 U.S. at p. 380.) Plaintiffs alleged a "pattern, practice and policy of unlawful racial steering"; their claims were "not based solely on isolated incidents . . . , but a continuing violation manifested in a number of incidents – including at least one . . . that is asserted to have occurred within the 180-day period." (*Id.* at p. 381.) The action was timely, then, because plaintiffs filed "within 180 days of the last asserted occurrence of the practice." (*Ibid.* See also, *Ramirez v. Greenpoint Mortgage Funding,*

Inc. (N.D.Cal. 2008) 633 F.Supp.2d 922, 929 [following *Havens* and applying continuing violation doctrine to claims under Equal Credit Opportunity Act and FHA].)[4]

The Supreme Court in *Havens* concluded that applying the continuing violation doctrine in FHA cases did not contravene the purpose of statutes of limitations, which is "to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears." (*Id.* at p. 380.) Further, a contrary holding, "which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the [Fair Housing] Act." (*Ibid.*)

Likewise, in UCL cases challenging a business practice that continues until within four years of the lawsuit, the staleness concern disappears. Also as in *Havens*, to ignore the continuing nature of a defendant's violation of the UCL would undermine the Legislature's broad remedial intent, particularly where that intent is construed broadly as the law requires. (Ante at p. 5.) (Cf., *Richards, supra*, 26 Cal.4th at p. 819, citation omitted [FEHA provisions, including the statute of limitations, construed

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[4] At least one federal appellate court applied the continuing violation doctrine in this manner in a case under state consumer protection law. In *Tubos de Acero de Mexico, S.A. v. American International Investment Corp., Inc.* (5th Cir. 2002) 292 F.3d 471, the Fifth Circuit held that the continuing violation doctrine applied to the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA). There, the plaintiff alleged that the defendant's misconduct in connection with a 1997 equipment lease violated the LUPTA. The court held that the LUPTA's one year peremptive period did not begin to run until the lease ended in May 1999 because the plaintiff alleged "continuous unfair or deceptive actions by [defendant] throughout the lease period." (*Id.* at p. 482.) Accordingly, the plaintiff's lawsuit, filed in August 1999, was timely. In determining that the continuing violation doctrine applied, the court cited three Louisiana state appellate decisions holding that "where a violation of LUPTA is continuing, the peremptive period does not begin to run until the violation ceases." (*Id.* at p. 481, citations omitted.)

broadly to accomplish FEHA's purpose to protect employees from discrimination]; *Joseph v. J.J. MacIntyre Companies, LLC* (N.D.Cal. 2003) 281 F.Supp.2d 1156, 1162 [applying the continuing violations doctrine to causes of action under federal and California fair debt collection laws "is entirely consistent with [both acts'] broad remedial purpose of protecting consumers"].) As the Ninth Circuit stated in the context of Title VII:

> A consequence of the continuing violation doctrine is that a defendant cannot insulate itself from liability by engaging in a series of related violations of Title VII and asserting that the statute of limitations has run for all violations as soon as the limitations period has run for the first violation in the series. This consequence suggests that an important purpose of the continuing violation doctrine is to prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct of the same sort.

(*O'Loghlin v. County of Orange* (9th Cir. 2000) 229 F.3d 871, 875.)

The same is true in UCL cases. Applying the continuing violation doctrine ensures that the defendant who engages in a pattern of wrongful conduct for more than four years will not benefit from the very persistence of its wrongdoing.

CONCLUSION

An action is timely filed under the continuous accrual doctrine where the plaintiff seeks relief for discrete acts committed within four years of the lawsuit. Should the Court address whether a private plaintiff in a UCL case can reach back further, the Attorney General submits that the UCL permits the court to reach an entire illegal practice under appropriate circumstances.

Dated: April 25, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT** uses a 13 point Times New Roman font and contains 3,772 words.

Dated: April 25, 2011

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

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Case No.: California Supreme Court Case No. S184929

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On April 25, 2011, I served the attached **BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT** to be delivered on the same day to an authorized courier or driver authorized by Federal Express to receive documents, in an envelope or package designated by Federal Express, addressed as follows:

See Service List Attached

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 25, 2011, at Los Angeles, California.

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