No. S184929

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

JAMSHID ARYEH,
Plaintiff and Appellant,

v.

CANON BUSINESS SOLUTIONS, INC.,
Defendant and Respondent.

After a Decision By the Court of Appeal,
Second Appellate District, Division Eight
Case No. B213104

Appeal from Los Angeles County Superior Court
Robert L. Hess, Judge
Case No. BC 384674

ANSWER BRIEF ON THE MERITS

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I. PRELIMINARY STATEMENT

Plaintiff-Appellant Jamshid Aryeh ("Plaintiff") begins his Opening Brief on the Merits ("Pl. Br.") by quoting an aphorism lauding "invention," and proceeds to urge this Court to "invent" a new rule for applying the statute of limitations to claims alleged pursuant to the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"). Plaintiff hopes that the "invention" of such a new rule will resuscitate the single, time-barred UCL claim that he has unsuccessfully pursued from the inception of this action. "Invention" has been a hallmark of Plaintiff's prosecution of this case. From the start, he has struggled to "invent" a basis for a timely, sustainable UCL class action lawsuit. But, as the courts below repeatedly held, the undisputed facts and the applicable law conclusively establish that no such basis exists.

This is a putative UCL class action based upon a stale dispute between two businesses over a term in two expired commercial contracts. That dispute could and should have been raised and resolved in a prior (and timely) lawsuit between the parties in which Defendant-Respondent Canon Business Solutions, Inc. ("Canon") prevailed.

The single, integrated, fraud-based UCL claim alleged by Plaintiff in his original Complaint was dismissed on the basis of the expiration of the statute of limitations. Recognizing that his allegations clearly established that his claim was untimely, Plaintiff "reinvented" his claim in his Amended Complaint by omitting and/or contradicting key allegations contained in the original pleading. Plaintiff's Amended Complaint reflected his contention that he was no longer pursuing a single UCL claim,

but instead a series of purportedly "separate and distinct" claims, some of which were time-barred, while others were not.

When his amended pleading was likewise challenged on the basis of the statute of limitations, Plaintiff "invented" a new argument that had never previously been applied in a reported UCL decision of a California court – that the "continuing violations doctrine" should be invoked to preserve his claim. This argument was repeatedly rejected by the Superior Court, and then again by the Court of Appeal in the decision which Plaintiff has persuaded this Court to review.

In urging this Court to grant his Petition for Review (the "Petition"), Plaintiff contended that this case implicates three limitations-related doctrines under the UCL – the "continuing violations doctrine," the "delayed discovery rule," and the "continuous accrual doctrine." However, once review was granted to address these three doctrines (as indicated in the Court's designation of issues to be considered on appeal), he promptly abandoned two of them, asserting in his opening brief that the "continuing violations doctrine" and the "delayed discovery rule" are "not applicable to the matter *sub judice*."

Accordingly, this case is not the appropriate means for the Court to address the broad issues of whether the "continuing violations doctrine" or the "delayed discovery rule" apply to UCL claims, because Plaintiff has now joined Canon, the Superior Court and all three justices of the Court of Appeal in concluding that those doctrines do *not* apply to Plaintiff's UCL claim. In fact, given Plaintiff's concession that two of the three grounds upon which he urged this Court to grant review are irrelevant to his case, it

would be entirely appropriate for the Court to dismiss this appeal without further consideration.

Plaintiff makes only a single argument supporting reversal – that the "continuous accrual doctrine" should be applied for the first time in reported UCL jurisprudence to salvage his action. Plaintiff did not assert this argument below, and does so now only because it was articulated by the dissenting Court of Appeal justice, even though neither party had briefed or argued "continuous accrual" at any point in this litigation.

Plaintiff's own allegations conclusively establish that "continuous accrual" cannot apply to his UCL claim. In each of his three successive pleadings, Plaintiff alleged his UCL claim as sounding in fraud, *i.e.*, that Canon violated the UCL by failing to disclose material information concerning charges that could be imposed under the parties' agreements. Plaintiff alleged that he discovered the purported fraud at about the time the charges at issue were initially incurred, approximately six (6) years prior to the commencement of the action. His fraud-based UCL claim accrued at that time, and is barred by the UCL's four-year statute of limitations.

Plaintiff's "continuous accrual" argument is entirely dependent upon acceptance of the patently absurd contention that Plaintiff could be defrauded in the same manner, over and over again, on seventeen (17) occasions, each giving rise to a "separate and distinct" UCL claim, despite the fact that he affirmatively alleged that he unmasked Canon's purported fraud just after the first instance occurred. Under these alleged facts, "continuous accrual" simply has no application; as a matter of policy and logic, a single alleged failure to disclose, promptly discovered, cannot give

rise to multiple fraud-based causes of action stretching years into the future. Accordingly, this Court should affirm the conclusions reached by the Superior Court and the Court of Appeal that Plaintiff's action is barred by expiration of the statute of limitations.

II. FACTS AND PROCEDURAL CHRONOLOGY

The "Summary of the Case" set forth in Plaintiff's opening brief omits numerous important facts, as addressed below.

A. The Parties and Their Agreements

This is a commercial dispute concerning two written agreements entered into by two businesses. Plaintiff is the proprietor of a copy shop in Los Angeles known as "ABC Copy & Print." (*See* Appellant's Appendix ("App") 124-26, 134-39 (Second Amended Complaint ("SAC"), ¶¶ 6, 12-13 and Exs. 1 and 2).) Canon is an authorized retail dealer of, and service provider for, Canon-brand business equipment, including Canon-brand business copiers. (*See* App. 125, 134-139 (SAC, ¶ 11 and Exs. 1 and 2).)

Plaintiff entered into written agreements with Canon in November 2001 and February 2002, pursuant to which ABC Copy & Print leased two copiers for its copy shop business. (App. 125-26 (SAC, ¶¶ 12, 13 and Exs. 1 and 2).) The agreements are two-page documents whose principal terms provide that Plaintiff would make specified monthly lease payments for each of the copiers for the five-year duration of the agreements. (*Id.*)

The agreements further specify a "monthly copy allowance" for each copier, which consists of a specified number of copies that could be made

each month on the copiers without incurring additional charges.[1] (*Id.*) The agreements also provide for Plaintiff to pay a small, specified "excess copy charge" for each "excess copy" made over and above the "monthly copy allowance." (*Id.*) The "excess copy charge" for the Canon-brand model IR8500 "black and white" copier that Plaintiff leased was a fraction of a penny per "excess copy." (*See* App. 125, 135 (SAC, ¶ 12, Ex. 1).) The "excess copy charge" for the more expensive Canon-brand model CLC 1120 color laser copier leased by Plaintiff was slightly more than twelve cents ($0.12) per "excess copy." (*See* App. 125-126, 138 (SAC, ¶ 13, Ex. 2).) The word "copy" in the term "excess copy charge" is not expressly defined in the agreements.

B. The Disputed Charges

In his original Complaint, Plaintiff alleged that, "shortly after" entering into the second written agreement with Canon in February 2002, he realized that Canon was including, as part of "excess copy charges" imposed pursuant to the terms of the parties' agreements, charges for what Plaintiff refers to as "test copies" made by Canon service technicians while providing maintenance and repair services for Plaintiff's copiers. (*See* App. 4 (Original Complaint, ¶ 14).) Plaintiff alleged that he complained at that time to Canon about the charges, and began keeping his own records of the number of copies made on his machines. (*Id.*) Plaintiff did not, however, allege that the number of "test copies" made by Canon's service technicians

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[1] Like the mileage limitations contained in automobile lease agreements, the "monthly copy allowance" reflects a calculation of the amount of use a leased copier could endure while experiencing normal "wear and tear."

was excessive, or that the service provided by Canon was otherwise objectionable.

Plaintiff alleged that "excess copy charges" for "test copies" were imposed on seventeen (17) occasions beginning in February 2002 and extending to November 2004. (*See* App. 126 (SAC, ¶ 14).) Although Plaintiff did not specifically allege that he paid such charges, he must have done so, given that he originally sought restitution for all such charges.[2] (App. 5, 7, 10 (Original Complaint, ¶¶ 17, 24, Prayer (c)).)

Plaintiff did not allege that he refused to pay the purportedly objectionable charges, or that he took any other actions in furtherance of his claimed objections to them. Nor did Plaintiff allege that Canon misrepresented to him at any time that "excess copy charges" would not, or did not, include charges for "test copies," or that Canon took any actions that hindered Plaintiff's ability to seek redress for the charges.

Plaintiff asserts that Canon's imposition of "excess copy charges" for "test copies" constitutes a UCL violation. Plaintiff essentially contends

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[2] While Plaintiff has specifically alleged the dates on which "excess copy charges" for "test copies" purportedly were incurred, and the number of such copies for which he paid, he has never specified on which of his two copiers the "test copies" were made. If all of the "test copies" were made on the more expensive CLC 1120, the total charges for "test copies" imposed over the five-year duration of the agreements were $615.43. (*See* App. 126-127, 138 (SAC, ¶ 14, Ex. 2 at p. 1).) If, however, all of the "test copies" were made on the IR8500 "black and white" copier, the total charges for "test copies" imposed during those five years were just $35.20. (*See* App. 126-127, 135 (SAC, ¶ 14, Ex. 1 at p. 1).) These figures contrast with the more than $70,000.00 in lease payments made by Plaintiff over the same time period. (*See* App. 125-126, 135, 138 (SAC, ¶¶ 12, 13, Ex. 1, 2.).)

that he was deceived by Canon's failure to inform him, presumably at the time the agreements were entered, that such charges would be imposed. Plaintiff's allegations establish, however, that he was aware that "excess copy charges" included charges for "test copies" when he first paid such charges in or about February 2002, as well as on each of the sixteen (16) subsequent occasions when he purportedly incurred and paid such charges. (*See* App. 4 (Original Complaint, ¶ 14) (*i.e.*, Plaintiff learned of such facts "[s]hortly after" he signed the parties' agreements in November 2001 and February 2002).)

The substance of Plaintiff's claim essentially is that the meaning of the word "copy" in the phrase "excess copy charge" as used in the parties' agreements was limited solely to copies made by Plaintiff himself. Canon's position is that, if such charges were in fact imposed,[3] they were entirely proper and consistent with the parties' agreements. Those agreements contemplate "excess copy charges" for *any* copies made beyond the specified monthly allotments, including copies necessarily made by service technicians performing maintenance and repairs that benefited Plaintiff by keeping his copiers in good working order.

Thus, notwithstanding Plaintiff's labored efforts to mold such facts into a basis for a viable UCL class action, it is apparent that this dispute is

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[3] Canon neither concedes that "excess copy charges" for "test copies" were imposed at any time upon Plaintiff, nor that "excess copy charges" for "test copies" are imposed upon Canon's customers generally as a matter of company policy. However, for purposes of Canon's demurrers to Plaintiff's pleadings and this appeal, Plaintiff's allegations are accepted as true. *See Campbell v. Regents of University of California,* 35 Cal. 4th 311, 320 (2005).

nothing more than a disagreement between two businesses concerning the meaning of the word "copy" as used in the contractual term "excess copy charges" – specifically, whether "copy" retains its plain meaning and refers to *all* copies made on the copiers (Canon's position), or whether it instead means only *certain types* of copies made on the machines (Plaintiff's position).

C. The Parties' Intervening Litigation

In July 2005, more than three years after Plaintiff asserts he understood that Canon was imposing "excess copy charges" for "test copies," and many months after the last of the seventeen (17) occasions on which such charges allegedly were incurred, Canon commenced a small claims lawsuit against Plaintiff. (App. 187-89 (Claim and Order to Go to Small Claims Court).) Canon sought recovery of $2,152.82 in unpaid charges for service and supplies (not "excess copy charges") owed by Plaintiff. (*Id.* at 188.) Despite having paid purportedly objectionable "excess copy charges" to Canon totaling from $35.20 to perhaps $615.43 over the preceding three and a half years, Plaintiff did not assert a counterclaim against Canon, and apparently did not argue that such charges should have been set off against any judgment that Canon might obtain.

The small claims proceeding resulted in a judgment in Canon's favor. (App. 190-91 (Notice of Appeal and Notice of Filing Appeal).) Plaintiff appealed, and in December 2005, a trial de novo was conducted before the Superior Court, at which Plaintiff was represented by counsel. (*Id.*) That proceeding resulted in a final judgment in Canon's favor for the

full amount sought in its complaint. (App. 192 (Judgment After Trial De Novo).)

D. Proceedings Before the Superior Court

This action was commenced in the Superior Court, Los Angeles County on January 31, 2008. (*See* App. 1-10 (Original Complaint).) That was (i) nearly six (6) years after Plaintiff purportedly learned that he was incurring "excess copy charges" for "test copies," (ii) more than three (3) years after the last "excess copy charges" for "test copies" were incurred, and (iii) nearly a year after the second of the two lease agreements between Plaintiff and Canon expired by its terms.

Although the allegations in the original Complaint are sketchy, they clearly establish that Plaintiff was asserting a single, integrated UCL claim against Canon for the imposition of unspecified "overcharges" beginning "[s]hortly after" the parties' agreements were executed in late 2001 and early 2002, approximately six (6) years prior to the commencement of the action. (App. 4 (Original Complaint, ¶ 4).) Canon's demurrer to the original Complaint based upon the expiration of the four-year statute of limitations for UCL claims set forth in Cal. Bus. & Prof. Code § 17208 was sustained with leave to amend. (App. 21-24 (Demurrer to Original Complaint pp. 6-9).)

Recognizing the insuperable barrier to his case posed by the statute of limitations, Plaintiff reinvented his claim in his Amended Complaint by contradicting or simply omitting problematic allegations set forth in his original Complaint. Plaintiff did assert more specific allegations establishing that he was challenging Canon's imposition of "excess copy

charges" for "test copies." (App. 57-58 (SAC, ¶¶ 14-15).) But he also sought to plead around the statute of limitations by improperly splitting the single, integrated UCL claim asserted in his original Complaint. To do so, Plaintiff omitted the allegation that he learned of the purportedly improper charges "shortly after" entering into his agreements with Canon, and asserted that, although the imposition of such charges began in early 2002, he now sought restitution only for charges imposed in 2004 (*i.e.*, charges incurred less than four years prior to the commencement of the action). (App. 58 (SAC, ¶ 15).)

Canon demurred to the Amended Complaint, arguing, among other things, that Plaintiff's recast claim still accrued in early 2002 and remained barred by the statute of limitations. (App. 66-87 (Demurrer to First Amended Complaint pp. 2-6).) In response, Plaintiff argued that the "continuing violations doctrine," which had never been applied by a California court to a UCL claim in a reported decision, should be invoked to salvage his claim. (App. 93-97 (Opposition to Demurrer to First Amended Complaint).) At the demurrer hearing, the Superior Court inquired concerning Plaintiff's reasons for failing to commence his action sooner, something Plaintiff had not addressed in either of his pleadings.

The Court:	Why did your guy wait all these years? Why did your guy wait six years?
Plaintiff's Counsel:	They can ask him that in a deposition, but –
The Court:	Why did your guy wait six years from the incidence of this?
Plaintiff's Counsel:	It doesn't matter.
The Court:	Okay.

Plaintiff's Counsel: I don't know the answer to that.
The Court: Okay. It doesn't matter. So it sounds to me like you've got a problem here.

(Reporter's Transcript ("Rptr. Trans.") B-11:22-B-12:4.) The Superior Court sustained Canon's demurrer, but generously granted Plaintiff yet another opportunity to replead, directing him to attach copies of the parties' agreements to his Second Amended Complaint (which Plaintiff had failed to do when filing his first two pleadings). (Rptr. Trans. B-15:10-17.)

The Second Amended Complaint was largely duplicative of the Amended Complaint, and again did not include an explanation for Plaintiff's dilatory commencement of the action. Once more, Plaintiff asserted a single claim, for violation of the UCL. (App. 122-140 (SAC).) Canon again demurred, asserting four grounds as bases for dismissal: (i) the expiration of the statute of limitations; (ii) the doctrine of laches; (iii) the doctrines of *res judicata* and collateral estoppel based upon the intervening litigation between the parties; and (iv) failure to state a cause of action. (App. 141-163 (Demurrer to SAC).) The Superior Court sustained Canon's demurrer with prejudice. Its order of dismissal cited all four grounds argued by Canon as bases for its ruling. (App. 232 (Order p. 2).)

E. The Court of Appeal's Decision

Plaintiff appealed the Superior Court's dismissal of his action, and on June 22, 2010, the Court of Appeal affirmed. *See Aryeh v. Canon Business Solutions, Inc.,* 185 Cal. App. 4th 1159 (2010). The Court of Appeal addressed only one of the four legal bases cited in the Superior Court's order of dismissal and argued by Canon in favor of affirmance,

holding that Plaintiff's UCL claim was barred by the applicable four-year statute of limitations. The Court of Appeal held that (i) Plaintiff's UCL claim accrued when Canon's imposition of "excess copy charges" for "test copies" began in early 2002; (ii) the "continuing violations doctrine," which Plaintiff argued applied to his claim and mandated reversal, was not applicable; and (iii) Plaintiff's nearly six-year delay in commencing his action established that his claim was time-barred. (*Id.*)

A dissenting opinion (the "Dissent") was filed by one of the Court of Appeal panelists. As did the majority, the Dissent rejected Plaintiff's "continuing violations doctrine" argument, asserting that "the continuing violation rule . . . has little to do with this case." 185 Cal. App. 4th at 221. Instead, the Dissent posited that the doctrine of "continuous accrual," which had not been briefed or argued by either party and which had never been applied by a California court in a reported UCL decision, could be applied to salvage Plaintiff's claim. The Dissent asserted that Plaintiff's UCL claim was akin to a series of severable claims for breach of contract, and that those "breaches" occurring less than four years prior to the commencement of the lawsuit were timely. 185 Cal. App. 4th at 222-223.

F. Proceedings Before This Court

Plaintiff filed his Petition with this Court on or about July 29, 2010.[4] Plaintiff essentially argued two points in favor of review.

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[4] By letter dated August 19, 2010, Plaintiff requested that the Court of Appeal decision be depublished, for essentially the same reasons as those he cited in support of his Petition.

First, Plaintiff adopted wholesale the Dissent's "continuous accrual" theory, arguing that the "continuous accrual" case law cited in the Dissent, when applied to his UCL claim, would establish that those instances in 2004 when "excess copy charges" for "test copies" were imposed could form the basis for a timely claim. (Petition pp. 10-15.) Plaintiff tried to obscure the fact that he had not made this argument below by asserting that he had simply "incorrectly labeled his theory" when he advocated for application of the "continuing violations doctrine" before the Superior Court and the Court of Appeal. (Petition p. 10 fn. 3.) Second, Plaintiff contended that review should be granted to resolve a "confusion in the courts" concerning whether the "delayed discovery rule" applied to UCL claims. (Petition pp. 20-24.) Plaintiff neglected to mention that he had expressly disavowed application of the "delayed discovery rule" to his claim while arguing before the Court of Appeal. (*See* Plaintiff's Court of Appeal Opening Brief pp. 20-21; Plaintiff's Court of Appeal Reply Brief p. 12.)

By letter dated August 30, 2010, the Office of the California Attorney General urged this Court to grant the Petition. (Letter from Deputy Attorney General Michel R. Van Gelderen dated August 30, 2010 ("AG Letter") p. 1.) The AG Letter argued that the Court should use this case as a vehicle for resolving the applicability to the UCL of three separate limitations-related doctrines: "continuous accrual," the "continuing violations doctrine," and the "delayed discovery rule." (*Id.*)

Following Canon's filing of its oppositions to the Petition and to Plaintiff's request for depublication, Plaintiff filed a reply brief in further

support of his Petition. Having failed to raise the "continuing violations doctrine" as a basis for review in his Petition, but having noted its inclusion in the AG Letter, Plaintiff spent a significant portion of his reply adopting the AG Letter's argument that the "continuing violations doctrine" provided a further basis for granting the Petition. (Plaintiff's Reply in Support of Petition for Review pp. 9-14.)

This Court granted the Petition on October 20, 2010, and designated for its consideration the three issues enumerated in the AG Letter and adopted by Plaintiff. On November 18, 2010, Plaintiff filed his opening brief. There, after having led the Court to believe that all three issues designated for consideration were relevant to his appeal, Plaintiff expressly disavowed the applicability of two of them. While admitting that neither the "continuing violations doctrine" nor the "delayed discovery rule" is "applicable to the matter *sub judice,*" Plaintiff nevertheless argues that this Court should issue what would amount to an advisory opinion on their applicability, as a matter of policy, to UCL claims generally. (Plaintiff's Pl. Br. pp. 26-35, 39-46.) Plaintiff makes only a single argument, not raised below, in favor of reversal – that the "continuous accrual" doctrine should be applied to revive his time-barred claim. (*Id.*)

III. ARGUMENT

A. Plaintiff's UCL Claim Accrued Once, in Early 2002, and is Time-Barred

Section 17208 of the Business & Professions Code provides that a timely UCL claim "shall be commenced within four years after the cause of action accrued." Thus, as with statutes of limitations generally, it must be

determined when a UCL cause of action accrued in order to resolve whether it is timely. To make that determination, it is necessary to examine the nature of the underlying misconduct giving rise to the UCL cause of action and the allegations purporting to establish such misconduct.

Here, Plaintiff has consistently alleged in three successive pleadings that the basis for his UCL claim is that he was the victim of a fraud perpetrated by Canon. Plaintiff has spent this entire litigation attempting to flee from the inescapable fact that his claim accrued in or about February 2002, when he alleges that he became aware that "excess copy charges" for "test copies" were first imposed upon him. Because this action was commenced nearly six (6) years later in January 2008, Plaintiff's claim is barred by the applicable four-year statute of limitations.

1. Statutes of Limitations and Accrual of Claims Under California Law

Statutes of limitations are a fundamental feature of civil law. As this Court recently explained in *Pineda v. Bank of America, N.A.,* 50 Cal. 4th 1389 (2010), "statutes of limitations serve a number of functions including 'to prevent stale claims, give stability to transactions, protect settled expectations, promote diligence, encourage the prompt enforcement of substantive law, and reduce the volume of litigation'" (quoting *Stockton Citizens for Sensible Planning v. City of Stockton,* 48 Cal. 4th 481, 499 (2010)).

Put another way, statutes of limitations serve to "protect potential defendants from stale claims and to encourage plaintiffs to be diligent. Such provisions, by creating limits on the period during which a person's

conduct may engender litigation and liability, promote predictability and stability." *Shively v. Bozanich,* 31 Cal. 4th 1230, 1246 (2003). In addition to protecting defendants, statutes of limitations exist to motivate plaintiffs to act to protect their interests. A statute of limitations "has as a purpose to protect defendants from the stale claims of dilatory plaintiffs. It has a related purpose to stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion." *Norgart v. Upjohn Co.,* 21 Cal. 4th 383, 395 (1999) (citations omitted).

Generally, statutes of limitations provide plaintiffs with a prescribed period of time subsequent to a claim's accrual within which a cause of action must be commenced without being forfeited. The key, therefore, to determining whether a particular cause of action was commenced within the applicable limitations period is ascertaining when that claim accrued. This Court has explained the concept of claim accrual as follows:

> The general rule for defining accrual of a cause of action sets the date as the time "when, under substantive law, the wrongful act is done" or the wrongful result occurs, and the consequent "liability arises . . ." In other words, it sets the date as the time when the cause of action is complete with all of its elements.

Norgart v. Upjohn Co., 21 Cal. 4th at 397 (citations omitted). Or, as this Court stated in *Howard Jarvis Taxpayers Assn. v. City of La Habra,* 25 Cal. 4th 809, 815 (2001):

> Generally, a cause of action accrues and the statute of limitations begins to run when a suit may be maintained. Ordinarily this is when the wrongful act is done and the obligation or liability arises, but it does not "accrue until the party owning it is entitled to begin and prosecute the action thereon." In other words, "[a] cause of action accrues 'upon

the occurrence of the last element essential to the cause of action.'" (Citations omitted.)

Consistent with these principles, causes of action based upon fraud accrue when all of the conduct constituting the fraud has occurred *and* upon "the discovery, by the aggrieved party, of the facts constituting the fraud." Cal. Code Civ. Proc. § 338(d); *see also State ex rel. Metz v. CCC Information Services, Inc.*, 149 Cal. App. 4th 402, 415 (2007) ("[T]his state's courts 'have long interpreted [the statute of limitations for fraud] to commence upon the discovery by the aggrieved party of the fraud *or* facts that would lead a reasonably prudent person to *suspect* fraud'" (emphasis in original)). Due to the deception inherent in the commission of a fraud, an action for fraud "may be maintained" only after the victim of the fraud knows, or should know, that a fraud has occurred.

2. Plaintiff's UCL Claim Was "Complete With All of Its Elements" In or About February 2002

In each of the three successive versions of his Complaint, Plaintiff based his UCL claim on Canon's alleged fraud. (*See, e.g.*, App. 8-9, 61-62, 130-131 (Original Complaint, ¶¶ 27-29; First Amended Complaint ("FAC"), ¶¶ 28-30; SAC, ¶¶ 28-30).) In essence, Plaintiff contends that he was injured because Canon failed to inform him that "excess copy charges" incurred under the terms of the parties' agreements could include charges for "test copies" made by service technicians while maintaining or repairing his copiers. (App. 130-131 (SAC, ¶ 28.).) This alleged deception, Plaintiff contends, violated the UCL. (*Id.*)

When was this claim "complete with all of its elements"? When did "the last element essential to the cause of action" occur? When could "a

suit be maintained" based upon such claim? The answer to these questions becomes crystal clear upon consideration of the implications of the following statement alleged by Plaintiff in his initial Complaint:

> Shortly after entering into the [parties' agreements], Plaintiff began to notice that the meter readings taken by [Canon's] field servicemen did not appear to reflect the accurate number of copies that were actually made on each of Plaintiff's copiers. (App. 4 (Complaint, ¶ 14).)

Plaintiff's later pleadings expounded on this statement by asserting that the reason the readings on the copy meters (which display a count of the number of aggregate copies made on a machine) "did not appear to reflect the accurate number of copies that were actually made" was that such readings included "test copies," which Plaintiff contends should not have been reflected on the meters, and resulted in "excess copy charges" for "test copies." (App. 57-58, 126-127 (FAC, ¶ 14 and SAC, ¶ 14).)

Plaintiff has conceded that his allegation that he "began to notice that the meter readings . . . did not appear to reflect the accurate number of copies" meant that he was aware, "shortly after" he entered into the parties' agreements in November 2001 and February 2002, that he was incurring "excess copy charges" for "test copies." (*See, e.g.,* Pl. Br. p. 7 ("Shortly after entering into [the parties' agreements], Plaintiff . . . determined that he was being charged for "Test Copies" made when Canon personnel repaired or serviced the machines"); *see also Aryeh,* 185 Cal. App. 4th at 214.)

Plaintiff's own allegations establish the following critical elements demonstrating that his UCL claim accrued in or about February 2002:

- Plaintiff claims that he was not informed by Canon prior to entering into the parties' agreements that he could incur "excess copy charges" for "test copies" (App. 130-131 (SAC, ¶¶ 28-30));
- Plaintiff contends that he should have been informed that he could incur such charges, and that Canon's failure to inform him was fraudulent (App. 130-131 (SAC, ¶¶ 28-30));
- "Excess copy charges" for "test copies" were first incurred by Plaintiff on February 6, 2002 (App. 126-127 (SAC, ¶ 14));
- Plaintiff realized at about that time that he had been charged "excess copy charges" for "test copies" (App. 4 (Original Complaint, ¶ 14)); and
- Plaintiff complained to Canon at that time about such charges yet paid them, thereby purportedly sustaining monetary injury (*Id.*).

Thus, based on the facts as he alleged them, Plaintiff's UCL claim accrued in or about February 2002, when he paid "excess copy charges" for "test copies" after having learned that he had incurred such charges. Plaintiff's UCL cause of action was "complete with all of its elements" at that time, because (i) Canon's alleged deception had occurred, (ii) Plaintiff suffered injury by reason of such alleged deception when he paid "excess copy charges" for "test copies," and (iii) Plaintiff became aware at that time that he purportedly had been deceived and injured by Canon.

The "last element essential to the cause of action" occurred in or about February 2002, when Plaintiff knowingly paid "excess copy charges" for "test copies" and thereby suffered a purportedly actionable injury arising from Canon's allegedly fraudulent conduct. A UCL "suit could be

maintained" by Plaintiff at that time based upon Canon's allegedly fraudulent conduct and the resulting injury that Plaintiff purportedly suffered.

It is indisputable that Plaintiff could have commenced a lawsuit against Canon in or about February 2002 asserting a UCL claim based upon the same factual allegations and purported misconduct as was set forth in his original Complaint filed in January 2008. As of February 2002 or shortly thereafter, Plaintiff could have (i) alleged every fact forming the basis for his contention that he was defrauded by Canon, (ii) asserted a UCL claim for restitution based upon his incurrence of "excess copy charges" for "test copies" on February 6, 2002, (iii) sought injunctive relief under the UCL that, if granted, would have avoided his incurrence of the additional allegedly improper charges that he claims were imposed upon him on sixteen (16) further occasions between March 2002 and November 2004, and (iv) sought to pursue his claim as a class action on behalf of a class of persons analogous to that which he purported to represent when he filed his original Complaint.

Plaintiff implicitly contends that his UCL claim was not "complete with all of its elements" until he purportedly paid the last "excess copy charge" for "test copies" in or about November 2004. That contention fundamentally misconstrues the nature of his claim. The additional disputed charges that Plaintiff allegedly incurred through November 2004 were not essential "elements" of his UCL claim against Canon. Instead, such charges merely increased the amount of the purported injury that he suffered as a result of the alleged UCL violation. All of the elements

essential to Plaintiff's UCL cause of action had occurred as of February 2002, including a purported monetary injury. The additional monetary losses resulting from further "excess copy charges" for "test copies" merely increased the amount of restitution sought by Plaintiff; they were not elements essential to Plaintiff's ability to file his claim.

Accordingly, as held by both the Superior Court and the Court of Appeal, Plaintiff's claim accrued in or about February 2002, nearly six (6) years prior to the commencement of this action, and was therefore barred by the UCL's four-year statute of limitations. *See Aryeh,* 185 Cal. App. 4th at 217-18.

3. The Court of Appeal Correctly Determined That This Action Was Analogous to *Snapp & Associates Insurance Services, Inc. v. Robertson*

In ruling in Canon's favor, the Court of Appeal relied upon *Snapp & Associates Insurance Services, Inc. v. Robertson,* 96 Cal. App. 4th 884 (2002), the only other reported decision of a California court addressing whether a UCL claim involving conduct that occurred both prior to and within the limitations period was time-barred. Plaintiff strenuously argues that *Snapp* is distinguishable. (*See* Pl. Br. pp. 34-39.) But Plaintiff's argument concerning *Snapp* is erroneous, and the Court of Appeal correctly relied upon *Snapp* in affirming the dismissal of Plaintiff's claim.

Snapp involved UCL and other claims asserted by one insurance agency against another relating to an agent's conversion of the plaintiff agency's accounts. The agent, Gwin, was terminated by the plaintiff agency, Snapp, on March 1, 1993 after it was discovered that Gwin was depositing commissions from certain of Snapp's accounts into his own

bank account. Snapp also learned that the defendant agency, Robertson, was ultimately receiving such commissions from Gwin and was acting as a broker of record for Gwin. Snapp sued Gwin, but not Robertson, in March 1993. Snapp ultimately sued Robertson in August 1997, more than four years later, after additional information concerning Robertson came to light in a subsequent legal proceeding. 96 Cal. App. 4th at 887-89.

The court held that Snapp's claims against Robertson, including its UCL claim, were barred by the applicable statutes of limitations. The court determined that, despite the fact that Snapp alleged that Robertson's misappropriation of insurance commission payments was "ongoing" (*i.e.*, continuing to occur within the limitations period), Snapp's UCL and other claims accrued when the initial misappropriation occurred (and was known to Snapp) more than four years prior to the commencement of the action. 96 Cal. App. 4th at 892.

The Court of Appeal concluded that *Snapp* and this case were closely analogous:

> The UCL claim asserted in *Snapp* was based upon essentially the same type of conduct at issue in the present case: the allegedly wrongful collection of fees on a recurring basis. In *Snapp,* the fees at issue were recurring insurance premiums collected over a period of time beginning outside the limitations period and continuing into the limitations period. In the instant action, the fees at issue are recurring "excess copy charges" imposed over a period of time beginning outside the limitations period and continuing into the limitations period. The court in *Snapp* held that the very first allegedly improper brokering charge, which became known to the plaintiff soon after its imposition, commenced the running of the four-year statute of limitations, barring the plaintiff's claim even though plaintiff asserted that the imposition of

> such charges was "ongoing." Here, [Plaintiff's] initial complaint alleged that [Plaintiff] began to notice that the meter readings taken by Canon's field service personnel did not appear to reflect the accurate number of copies "[s]hortly after" [Plaintiff] entered into the [written agreements between the parties].

Aryeh, 185 Cal. App. 4th at 217 (citation omitted).

Plaintiff argues that *Snapp* differs from this case because Snapp's UCL claim was based upon a "***single act*** of misappropriation of client accounts by an insurance broker, albeit the broker later collected insurance premiums" (Pl. Br. pp. 34-35 (emphasis in original).) But this illustrates precisely why *Snapp* and this case *are*, in fact, analogous.

As in *Snapp,* Plaintiff's UCL claim is founded upon a "single act" of alleged fraud by Canon, *i.e.,* its purported failure to inform Plaintiff that "excess copy charges" could include charges for "test copies." As in *Snapp,* this "single act" purportedly was followed by a series of charges beginning outside the limitations period and continuing into the period, the aggregate amount of which comprised the injury for which restitution was sought. As the *Snapp* court and the Court of Appeal in this case correctly ruled, the UCL claims at issue accrued (*i.e.,* were "complete with all of their elements") upon the occurrence of the initial injury resulting from the "single act" of misconduct giving rise to such claims, despite the fact that additional charges/collections resulting in further alleged injury occurred later.

B. "Continuous Accrual" Does Not Apply to Plaintiff's UCL Claim

Plaintiff did not originate his "continuous accrual" argument, and only fully briefed it for the first time in his Opening Brief. (*See* Pl. Br. pp.

15-26.) Nor was any of the case law upon which Plaintiff now relies in support of his "continuous accrual" argument referenced in any brief submitted or argument made by him in the courts below. As Plaintiff concedes, that argument was first articulated in the Dissent. Consequently, Canon never had cause or opportunity to address "continuous accrual" in briefs submitted in or arguments made before the Superior Court or the Court of Appeal, and the dissenting Court of Appeal justice did not have the benefit of considering the counterarguments that Canon would have made if his theory had been argued below. Moreover, it is undisputed that "continuous accrual" has never been applied by a California court in a reported UCL decision.

Had Canon been afforded the opportunity below to respond to the Dissent's "continuous accrual" theory, it would have demonstrated that the application of that theory would be incompatible with the manner in which Plaintiff had asserted his UCL claim, and with the facts alleged by Plaintiff. This action is not the proper vehicle for examining the novel question of whether "continuous accrual" can ever be applied to a UCL claim because Plaintiff's own allegations preclude its application to his case.

1. Plaintiff's Claim, Based Upon a Single Alleged Fraud, Is Not Divisible Into Seventeen "Separate and Distinct" UCL Claims

The "continuous accrual" theory articulated in the Dissent and now argued by Plaintiff is dependent upon acceptance of the hypothesis that each occasion on which Plaintiff claims he paid "excess copy charges" for "test copies" constitutes its own unique, self-contained UCL violation. Plaintiff's talismanic repetition of phrases like "self-contained" and "free-

standing" in his Opening Brief in reference to each time that he purportedly incurred "excess copy charges" for "test copies" seeks to underscore his current position that there are seventeen (17) distinct and unique UCL causes of action, some of which, he claims, are timely. But Plaintiff's own pleadings conclusively establish otherwise.

a. Plaintiff's Own Factual Allegations Belie His Contention That He Has Alleged Multiple "Separate and Distinct" UCL Claims.

Neither Plaintiff nor the Dissent makes any reference to the manner in which Plaintiff first alleged his UCL claim in his original Complaint. There, contrary to his current position, Plaintiff alleged his claim as a single, integrated UCL cause of action, and not as a series of seventeen (17) "free-standing" claims. Under a "statement of facts" section which he headed "PLAINTIFF'S TRANSACTION" (*i.e.,* singular), Plaintiff alleged that, "[s]hortly after" entering into his agreements with Canon, he realized that Canon was "charging Plaintiff for excessive copies . . . due to the inaccurate meter readings" taken by Canon field service personnel, resulting in unspecified aggregate "overcharges" for which Plaintiff was seeking restitution. (App. 4, 5, 7, 10 (Original Complaint, ¶¶ 14, 17, 24, Prayer (c)).) There are no allegations whatsoever in the original Complaint purporting to break down the "overcharges" into multiple "self-contained" claims – only allegations of a single claim for "overcharges" incurred beginning "shortly after" the parties' agreements were entered.

The Superior Court correctly sustained Canon's demurrer to this single, integrated UCL claim on the basis of the expiration of the statute of

limitations. It was only then, when confronted by the insurmountable hurdle to his case posed by the fact that his own allegations demonstrated that his claim was time-barred, that Plaintiff began to assert that he was pursuing not one, but numerous claims against Canon.

In his Amended Complaint, Plaintiff improperly split the single UCL claim that he alleged in his original Complaint and asserted, contrary to the allegations in the original pleading, that his single claim was now seventeen (17) "separate and distinct" claims, some of which were timely, while others were not. (App. 57-58 (FAC, ¶ 14).) Based upon these new allegations, Plaintiff argued to both the Superior Court and the Court of Appeal that the "continuing violations doctrine" should be applied to salvage the purportedly timely "separate and distinct" claims. This argument was properly rejected twice by the Superior Court, and then by the Court of Appeal.

Plaintiff cannot reinvent his case in an amended pleading in a manner which contradicts his prior allegations. As this Court has held, when a complaint "contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation." *Hendy v. Losse,* 54 Cal. 3d 723, 742 (1991) (citation omitted); *see also State ex rel. Metz v. CCC Information Services, Inc.,* 149 Cal. App. 4th 402, 412 (2007) ("A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false" (citation omitted)); *Deveny v. Entropin,* 139 Cal. App. 4th 408, 425 (2006) ("[P]laintiffs are precluded

from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers" (citation omitted)). Plaintiff cannot pretend that the original construction of his claim as a single, integrated UCL cause of action never occurred.

But there is an even more fundamental reason why Plaintiff is precluded from contending that he has alleged multiple claims, rather than just a single claim. Even if he had not originally alleged only a single, integrated UCL claim, the factual allegations supporting his contention that he was defrauded by Canon conclusively establish that he is precluded from asserting multiple "separate and distinct" claims. In each of his three complaints, Plaintiff has asserted his UCL claim as one sounding in fraud, a fact not mentioned in the Dissent. As set forth in his most recent pleading, the Second Amended Complaint, Plaintiff alleges the following:

> [Canon's] policy and practice of charging their customers for amounts associated with [Canon's] making Test Copies, as set forth above, constitute a fraudulent business practice because [Canon's] practice is likely to mislead Plaintiff, and all others similarly situated, and members of the Class, and by deceiving and leading their customers to believe, among other things, that they would only be charged for the actual number of copies made by the customer. (App. 130-131 (SAC, ¶ 28(b)).)
>
> The subsequent acts of Plaintiff and the Class were consistent with reliance upon [Canon's] representations in that they were induced to use [Canon's] products, without knowing that they would be charged an amount associated with copies not made by Plaintiff and the class. (App. 131 (SAC, ¶ 29).)
>
> Plaintiff and members of the Class have suffered injury and [sic] fact and lost money as a result of the violations alleged above in this complaint in that Plaintiff and each member of the Class were induced to use [Canon's] products, without

> knowing that they would be charged and pay an amount associated with copies not made by Plaintiff and the Class. (App. 131 (SAC, ¶ 30).)

Thus, it is abundantly clear that the gravamen of Plaintiff's UCL claim is, and always has been, that he was not informed by Canon prior to the time that he entered into the parties' agreements that "excess copy charges" could include charges for "test copies," and that this failure to disclose constituted a fraud resulting in injury when "excess copy charges" for "test copies" were incurred. Plaintiff further alleged in his original Complaint that he discovered the purported fraud "shortly after" he entered into the agreements when the first "excess copy charges" for "test copies" were incurred in February 2002. (App. 4 (Original Complaint, ¶ 14).) Crucially, this means that Plaintiff was aware of the alleged fraud prior to the sixteen (16) additional occasions between March 2002 and November 2004 on which he claims further "excess copy charges" for "test copies" were imposed.

These alleged facts establish beyond question that Plaintiff could not have been, and was not, the victim of multiple "separate and distinct" frauds giving rise to multiple "separate and distinct" UCL claims. Plaintiff contends that he was deceived by Canon's alleged failure to inform him of a single purported fact, *i.e.,* that "excess copy charges" could include charges for "test copies." He admits that he became aware of that alleged fact prior to sixteen (16) of the occasions on which he claims that "excess copy charges" for "test copies" were imposed, including *all* of the instances which he contends give rise to timely, "separate and distinct" UCL claims.

It is logically impossible for Plaintiff to have been the victim, over and over again, of sixteen (16) "separate and distinct," yet identical, frauds on those occasions, because he could not have been deceived by the imposition of such charges after having discovered in February 2002 that they were being imposed. In short, Plaintiff could only have been defrauded *once*, and his fraud-based UCL claim could not have arisen later than February 2002, when he admits that he learned the facts giving rise to such claim.

The inexorable truth established by Plaintiff's own factual allegations is that he has not pled multiple "separate and distinct" claims, because each of those purported claims relates back, and is inextricably tied, to Canon's single alleged act of fraud that purportedly occurred at the time of contract formation in late 2001 and/or early 2002, and which Plaintiff claims he discovered in or about February 2002. The only reasonable way to construe such alleged facts was the way the Superior Court and the majority of the Court of Appeal did – as a single, integrated and untimely UCL claim that accrued in or about February 2002 and that purportedly resulted in cumulative injury to Plaintiff on each additional occasion on which the disputed charges were incurred. "Continuous accrual" does not, and cannot, apply to such a claim as a matter of law.

b. The "Continuous Accrual" Case Law Cited by Plaintiff is Inapposite.

The case law relied upon by Plaintiff in making his "continuous accrual" argument (and cited in the Dissent for the same purpose) has no relevance to this case. Plaintiff cites several cases involving non-UCL

statutory claims asserted against public entities in which such claims were held timely even though the challenged conduct first occurred outside the limitations period. *See Howard Jarvis Taxpayers Association v. City of La Habra*, 25 Cal. 4th 809 (2001); *Green v. Obledo,* 29 Cal. 3d 126 (1981); *Jones v. Tracy School District,* 27 Cal. 3d 99 (1980); *Dryden v. Board of Pension Commissioners,* 6 Cal. 2d 575 (1936); *Hogar Dulce Hogar v. Community Development Commission of City of Escondido,* 110 Cal. App. 4th 1288 (2003). None of these cases bear even a remote resemblance to the case at bar.

For example, in *Howard Jarvis Taxpayers Association,* this Court addressed a claim against a city seeking declaratory and mandamus relief establishing that the city's ongoing collection of a tax violated state law. The Court held that the claim was timely even though the tax had first been collected prior to the limitations period. The crux of the Court's decision was that, because collection of the challenged tax was ongoing, the plaintiffs' action seeking a declaration that the collection of the tax violated state law constituted a ripe controversy that was timely. 25 Cal. 4th at 818-25. There is no legitimate comparison between a fraud-based UCL dispute among two private commercial parties and an action for declaratory and mandamus relief against a public entity concerning its collection of taxes. Nor is there any ongoing purported misconduct by Canon directed at Plaintiff analogous to the city's ongoing collection of taxes in *Howard Jarvis Taxpayers Association*, because Plaintiff's allegations establish that

the disputed charges ceased, and the parties' relationship expired, long before this action was commenced.[5]

Similarly inapposite are this Court's decisions in *Green* and *Jones*. *Green* involved a declaratory judgment action by a class of welfare recipients challenging California's application of a federal regulation in a manner that excluded the aid recipients' receipt of reimbursements for certain commuting expenses. This Court held, *inter alia,* that each instance where such reimbursements were excluded constituted a separate and independent violation of law for purposes of applying the statute of limitations. 29 Cal. 3d at 141. In *Jones,* this Court held that the application of the statute of limitations to an employee's gender discrimination claim against a school district might be equitably tolled by reason of a parallel federal proceeding pursued by the employee. 27 Cal. 3d at 107-09. Plaintiff appears to cite these cases for the proposition that "continuous accrual" has been recognized "in a broad range of subject matters, including the employment context" (Pl. Br. p. 21), but neither that debatable point nor the decisions themselves have any relevance to his case.

Plaintiff places even greater emphasis on two Court of Appeal cases standing for the rather unremarkable proposition that severable installment

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[5] *Hogar Dulce Hogar* was another case involving a claim for declaratory and mandamus relief brought against a public entity based upon ongoing conduct allegedly violative of state law. There, a community development agency's method of calculating its payments to a housing fund was challenged, with the Court of Appeal ruling that, although the method of calculation had been employed by the agency prior to the limitations period, its ongoing use created a ripe controversy that was timely. 110 Cal. App. 4th at 1295-96. *Hogar Dulce Hogar* is thus as equally inapt as *Howard Jarvis Taxpayers Association.*

payments made under the terms of a contract may give rise to "separate and distinct" claims for breach of contract. *See Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.,* 116 Cal. App. 4th 1375 (2004); *Tsemetzin v. Coast Federal Savings and Loan Association,* 57 Cal. App. 4th 1334 (1997); *see also* Pl. Br. pp. 23-26. These authorities are also the centerpiece of the Dissent's analysis positing that "continuous accrual" may be applied to rescue Plaintiff's claim. *See Aryeh,* 185 Cal. App. 4th at 224. But the relevance of these cases is dependent upon the validity of Plaintiff's assertion that "each separate act of misconduct [by Canon] is a stand-alone wrong," severable from and independent of what had previously occurred. (Pl. Br. p. 26.) Plaintiff's own allegations belie this contention.

Based upon Plaintiff's own assertions and theory of the case, the purportedly wrongful nature of his incurrence of "excess copy charges" for "test copies" derives from Canon's alleged failure to inform him that such charges could be incurred. (App. 130-131 (SAC, ¶¶ 28-30).) Consequently, each "excess copy charge" for "test copies" was not "separate and independent" or "severable" from all the others – every one relates back to and derives its purportedly actionable nature from Canon's single alleged deception.

A far more instructive precedent is *State ex rel. Metz v. CCC Information Services, Inc.,* 149 Cal. App. 4th 402 (2007), which Plaintiff cited in his Petition. In that case, an automobile owner named Metz commenced a *qui tam* action against an auto insurance company, essentially alleging that the insurer had committed fraud by determining the value of his car (for purposes of calculating the payment on a claim

following an accident) based on information that deliberately understated such value. Metz alleged that such valuation, as well as his discovery of the purported fraud, occurred outside the applicable limitations period. But Metz contended, on the basis of "continuous accrual," that his claim was timely because the insurer had made further misrepresentations to him within the limitations period in an effort to justify the alleged fraud.

The Court of Appeal affirmed the dismissal of Metz's claim on the basis of, *inter alia,* the expiration of the statute of limitations. The Court of Appeal held that the claim accrued, and the statute of limitations began to run, at the time that Metz claimed he discovered that the valuation of his car was fraudulent. 149 Cal. App. 4th at 417-18. The Court of Appeal rejected Metz's argument that, because of the additional purported misrepresentations made by the insurer during the limitations period, his claim was timely by reason of "continuous accrual." The court held that "*every* fraudulent statement or omission Metz alleges arose out of a single transaction," *i.e.,* the original purportedly fraudulent valuation which occurred prior to the limitations period. *Id.* at 418 (emphasis in original).

As in *Metz,* the fraud-based UCL claim asserted by Plaintiff accrued (*i.e.,* was "complete with all of its elements") outside the limitations period, when Plaintiff first purportedly sustained an injury arising from Canon's alleged fraud, and understood that such fraud had occurred. As in *Metz,* Plaintiff asserts that misconduct related to the original alleged fraud continued to occur within the limitations period. But, just as the Court of Appeal held in *Metz,* every "excess copy charge" for "test copies" arose out of a single alleged wrong (*i.e.,* Canon's purported failure to inform Plaintiff

that "excess copy charges" for "test copies" could be incurred) that occurred prior to the limitations period. Accordingly, as in *Metz,* Plaintiff's single, integrated fraud-based UCL cause of action accrued outside the limitations period, and is time-barred.

2. Plaintiff's UCL Claim Is Not Divisible Into Seventeen (17) "Separate and Distinct" "Unfair" Acts

a. Plaintiff Has Never Alleged (Nor Could He) That His UCL Claim is Based Upon Multiple "Separate and Distinct" Breaches of Contract

The Dissent does not mention the fact that Plaintiff's UCL claim is based on an alleged fraudulent failure to disclose, nor does it address the legal impossibility inherent in the contention that Plaintiff was defrauded, over and over again, in the same manner after he discovered the alleged fraud following the incurrence of the initial disputed charge. Instead, the Dissent posits that Plaintiff's allegations can be construed as akin to a series of independently actionable "unfair acts" of breach of contract violative of the UCL. *See Aryeh,* 185 Cal. App. 4th at 222-23.

This formulation of Plaintiff's cause of action is fundamentally contradicted by Plaintiff's actions and allegations, and by applicable law.[6] Plaintiff has never asserted that his UCL claim is based on breach of contract, and has never sought to assert a breach of contract claim against Canon, for two readily apparent reasons.

First, a breach of contract claim based on the facts as alleged by Plaintiff could not prevail. There is no provision in the parties' agreements that Plaintiff could have legitimately claimed was breached by Canon. The dispute concerning the parties' purportedly differing interpretations of the word "copy" in the phrase "excess copy charge" as used in the agreements pits an interpretation consistent with the plain meaning of the word "copy" (*i.e.,* Canon's position that "copy" means every "copy" made on Plaintiff's machines) against an interpretation unsupported by any express definition or any other terms contained in the agreements (*i.e.,* Plaintiff's position that

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[6] While relying on *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.,* 116 Cal. App. 4th 1375 (2004), in contending that Plaintiff's alleged serial payment of "excess copy charges" for "test copies" was analogous to a series of severable breaches of contract, the Dissent does not consider the distinction drawn in *Armstrong* between a series of severable breaches of contract and "a single breach or other wrong which has continuing impact." 116 Cal. App. 4th at 1389. Where, like here, the alleged misconduct is not a severable series of independent wrongs but instead a single alleged wrong (*i.e.,* fraud) that "has continuing impact" (*i.e.,* periodic imposition of "excess copy charges" for "test copies"), there is no basis for applying "continuous accrual." *See, e.g., Boon Rawd Trading International Co. v. Paleewong Trading Co.,* 688 F. Supp. 2d 940, 951 (N.D. Cal. 2010) (in breach of contract action where plaintiff sought to invoke "continuous accrual," court rejected application of that doctrine to defendant's performance over time under contract where "there is no indication in the facts alleged that the . . . agreement was severable").

"copy" means only certain types of copies, specifically those made by Plaintiff himself). Plaintiff correctly appears to realize that, in the context of a commercial agreement freely entered into by two businesses, pursuit of a breach of contract claim based upon his self-serving belief that he should not have to pay "excess copy charges" for "test copies" would have been fruitless.

Second, and perhaps more significantly, Plaintiff's primary goal of devising a basis for pursuing a potentially lucrative UCL class action would be thwarted by styling his claim as one predicated on breach of contract. Although breach of contract can in some circumstances give rise to a UCL claim, this Court has held that "the Legislature never intended" that "the UCL would be used as an all-purpose substitute for a . . . contract action." *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1151 (2003); *see also Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 173 (2000); *South Bay Chevrolet v. General Motors Acceptance Corp.,* 72 Cal. App. 4th 861, 886-87 (1999) ("[T]he 'unfairness' prong of section 17200 does not give the courts a general license to review the fairness of contracts").

Particularly where class claims turn upon representations made (or not made) about contractual terms, class certification of breach of contract-based UCL claims is a very difficult proposition. *See, e.g., Kaldenbach v. Mutual of Omaha Life Insurance Co.,* 178 Cal. App. 4th 830 (2009) (denying class certification motion in action alleging UCL, breach of contract and common law fraud claims based upon representations by defendant's agents concerning contractual terms prior to class members'

entry into insurance contracts); *Campion v. Old Republic Home Protection Co.*, Case No. 09-CV-748-JMA, 2011 WL 42759 (S.D. Cal. Jan. 6, 2011) (denying class certification motion in action alleging UCL, breach of contract and other claims based upon defendant's alleged fraudulent inducement of class members to enter into home warranty contracts in circumstances where defendant maintained policies relating to its performance under such agreements that conflicted with class members' understanding of such agreements).

b. "Excess Copy Charges" for "Test Copies" Cannot, Standing Alone, Constitute "Unfair Acts" in Violation of the UCL

Had Plaintiff actually attempted to plead a series of "separate and distinct" UCL claims based upon breach of contract, he would have been required to prove, in each instance, not only that the parties' agreements were breached, but that each such breach, standing alone, constituted an "unfair" act as defined under the UCL. This Plaintiff cannot do, as a matter of law.

First, the nature of Plaintiff's cause of action is incompatible with the contention that his incurrence of "excess copy charges" for "test copies" is objectively "unfair." Plaintiff apparently believes that it is self-evident that "excess copy charges" for "test copies" are "unfair," because he has not cited any statutory or other authority supporting that position. But there is nothing inherently "unfair" about Canon's alleged interpretation of the contractual term "excess copy charges," consistent with the plain meaning of the word "copy," to encompass charges for all copies made on Plaintiff's

machines, including copies purportedly made by service personnel during their performance of maintenance or repairs that benefited Plaintiff by keeping his copiers in good working order.

Second, Plaintiff asserts that the only "excess copy charges" for "test copies" that can give rise to timely UCL claims were those incurred in 2004, and he cannot show that it was "unfair," taking into account all the relevant alleged facts, for Canon to impose such charges at that time. Plaintiff's own allegations establish that: (i) he was aware that he was incurring "excess copy charges" for "test copies" in or about February 2002 (App. 4, 126-127 (Original Complaint, ¶¶ 13, 14; SAC, ¶¶ 14-15)); (ii) he complained about the charges at that time but ultimately paid them (App. 4-6 (Original Complaint, ¶¶ 14-16)); (iii) further "excess copy charges" for "test copies" were imposed upon him on several additional occasions in 2003 (App. 126-127 (SAC, ¶ 14)); and (iv) he paid those additional charges as well.

Given these alleged facts, Plaintiff cannot legitimately contend that it was "unfair" for Canon to impose "excess copy charges" for "test copies" in 2004. Plaintiff had acquiesced to and paid such charges on a number of occasions over the preceding two years. His payment of such charges signaled either that he had changed his mind concerning the legitimacy of the charges, or that he had waived his objections to the charges because they were *de minimis* and of little consequence in light of the overall benefit that he was receiving from his ongoing relationship with Canon. Plaintiff's dilatory conduct, which he has never explained even when

prompted by the Superior Court to do so (*see* Rptr. Trans. B-11:22-B-12:4), belies any contention that Canon was "unfair" to him.

Had Plaintiff attempted to plead his UCL claim as one based upon the allegedly inherent "unfairness" of "excess copy charges" for "test copies" without reference to Canon's alleged fraud (which he did not), such claim would have been subject to dismissal for failing to state a cognizable cause of action. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal. 4th 163 (1999), this Court established a standard for evaluating whether alleged misconduct in the context of unfair competition rises to the level of an "unfair practice" sufficient to sustain a UCL claim, but declined to set such a standard for UCL claims in the context of consumer and other types of UCL claims. In doing so, the Court emphasized that, while "unfairness" is an intentionally broad term, it is not unlimited and "courts may not simply impose their own notions of the day as to what is fair and unfair" or "apply purely subjective notions of unfairness." 20 Cal. 4th at 182, 184.

Subsequent to *Cel-Tech,* the Court of Appeal has articulated and applied several standards for determining whether conduct is "unfair" under the UCL in consumer cases and other contexts, with the most definitive and effective standard being that articulated in *Camacho v. Automobile Club of Southern California,* 142 Cal. App. 4th 1394 (2006). There, the Court of Appeal articulated a three-part test for use in the consumer and commercial contexts, holding that conduct is "unfair" for UCL purposes if it (i) causes or is likely to cause substantial injury; (ii) is not outweighed by

countervailing benefits; and (iii) produces an injury that consumers themselves could not have reasonably avoided. 142 Cal. App. 4th at 1403.[7]

It is readily apparent that the imposition of "excess copy charges" for "test copies" does not constitute "unfair" conduct under the *Camacho* three-part test, or any other standard articulated by the courts for evaluating "unfairness" under the UCL. Among other things, Plaintiff cannot reasonably contend that he suffered "substantial injury" on account of the purportedly wrongful charges, nor can he legitimately dispute that he could have avoided incurring and/or paying such charges which he asserts form the bases for timely UCL claims.

Plaintiff does not allege the amount that he claims he was wrongfully charged for "test copies." However, depending upon which of his two copiers were used to make the "test copies" at issue, he paid at most a little more than $600.00 for such copies over the course of his entire five-year business relationship with Canon, and perhaps as little as approximately $35.00. Since Plaintiff's aggregate lease payments for his copiers under the agreements totaled more than $70,000.00, the challenged "excess copy charges" at most constituted less than one percent of the total

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[7] Following the lead of this Court in *Cel-Tech*, the *Camacho* court looked to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), in adopting the three-part test. That test has been applied in numerous reported Court of Appeal decisions in addition to *Camacho*. *See, e.g., Davis v. Ford Motor Credit Co.,* 179 Cal. App. 4th 581 (2009); *Berryman v. Merit Property Management, Inc.,* 152 Cal. App. 4th 1544 (2007); *Daugherty v. American Honda Motor Co.,* 144 Cal. App. 4th 824 (2006); *In re Firearm Cases,* 126 Cal. App. 4th 959 (2005).

amount that Plaintiff paid during the parties' business relationship. This hardly can be described as a "substantial injury."

Furthermore, Plaintiff's avowed discovery of Canon's alleged fraud in or about February 2002 establishes that, with diligence, he could easily have taken steps to avoid incurring all but the first of the challenged "excess copy charges," including *all* of such charges that Plaintiff contends form the bases for timely UCL claims. After purportedly discovering the alleged fraud, Plaintiff took no action in furtherance of his purported objections to the disputed charges until he filed this lawsuit nearly six (6) years later. Plaintiff could have (i) promptly commenced a UCL lawsuit seeking to enjoin Canon's further imposition of "excess copy charges" for "test copies," or (ii) refused to pay such charges, which would have resulted either in Canon waiving the charges or taking legal action against him seeking payment (in which case he could have asserted Canon's alleged misconduct as a defense). Instead, he inexplicably failed to act to protect his alleged interests.

Accordingly, the facts as Plaintiff has alleged them simply cannot support the contention that each imposition of "excess copy charges" for "test copies" constituted a "separate and distinct" "unfair act" giving rise to a UCL claim.

3. The Policy Considerations Favoring Statutes of Limitations Would be Promoted by the Rejection of Plaintiff's "Continuous Accrual" Argument

It is beyond dispute that Plaintiff could have commenced a UCL action against Canon, based upon the facts as he alleged them, as early as February 2002. Plaintiff contends that he suffered injury by then as a result

of Canon's purported misconduct, and that he was fully aware by then of all of the facts that he alleges in support of his claim. Yet Plaintiff did not commence this action until nearly six (6) years later.

Plaintiff failed to act to either enjoin or seek recompense for the purportedly wrongful charges even though they allegedly were imposed upon him by Canon, again and again, over the course of several years. Plaintiff did not even refuse to pay such charges. Moreover, even when a golden opportunity to assert a claim against Canon arose when Canon commenced a lawsuit against him in 2005 seeking payment for other charges, Plaintiff did not do so. In fact, Plaintiff took no steps to protect his interests during the generous four-year limitations period afforded under the UCL, which did not expire until early 2006, more than a year after the last of the challenged charges had been imposed. Instead, additional years went by before Plaintiff finally commenced this lawsuit in 2008.

As Plaintiff's counsel stated to the Superior Court during one of the demurrer hearings, Plaintiff apparently would have this Court conclude that such patently dilatory conduct "doesn't matter." (*See* Rptr. Trans. B-11:22-B-12:4.) But it seems likely that, since Plaintiff refrained from taking action until approximately a year after his lease agreements with Canon expired by their terms, he was intent on securing all of the benefits of such agreements before springing a class action upon Canon. Now, Plaintiff improperly seeks to have the Court reward his inordinate and strategic delay by devising a stratagem for avoiding the statute of limitations in the form of "continuous accrual."

The policies articulated by this Court for enforcing statutes of limitations would be frustrated by any result other than affirmance of the dismissal of the action. Resuscitation of the claim would directly contradict their purpose of "protect[ing] defendants from the stale claims of dilatory plaintiffs." *Norgart v. Upjohn Co.,* 21 Cal. 4th 383, 395 (1999). It would undermine the goal of "stimulat[ing] plaintiffs to assert fresh claims against defendants in a diligent fashion." *Id.* In circumstances where Canon had every reason to believe that it would not be subject to litigation by Plaintiff over purported objections to charges imposed many years before, and where the parties' contractual relationship had long since ended, the revival of Plaintiff's stale claim would be antithetical to "promot[ing] predictability and stability" in the conduct of, among other things, business affairs. *Shively v. Bozanich,* 31 Cal. 4th 1230, 1246 (2003).

Finally, excusing Plaintiff's dilatory conduct would be incompatible with the UCL's "overarching legislative concern to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition." *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 173-74 (2000) (citation and emphasis omitted). The equitable relief provided by the UCL was intended to afford aggrieved parties the means to take action to stop ongoing improper conduct violative of the statute. Plaintiff had every opportunity *for years* after he purportedly discovered Canon's alleged misconduct to invoke the UCL's equitable remedies, including injunctive relief, to bring such alleged wrongdoing to a halt. Yet he failed to do so.

Plaintiff would have this Court believe that proper application of the UCL's statute of limitations to his claim would mean that he would have had no choice other than to "run to court . . . to preserve [his] rights." (*See* Pl. Br. p. 50.) The absurdity of this contention is highlighted by the fact that, while failing to "run to court" after he understood that he had purportedly been injured by Canon's allegedly improper conduct in or about February 2002, Plaintiff claims that he was subject to sixteen (16) additional instances of further injury over the course of nearly *three years* thereafter. None of those instances apparently motivated him to run or walk to court to seek to enjoin such purported wrongdoing.

Instead, Plaintiff chose to wait until after his relationship with Canon concluded to commence his action, when the UCL's equitable remedies designed to provide a means to halt ongoing misconduct were no longer available. In doing so, Plaintiff is essentially seeking to utilize the "streamlined procedure" and restitution remedy afforded by the UCL as a substitute for an action at law for damages. As this Court has held, that is not the purpose for which the UCL was intended. *See Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1151 (2003); *Cortez,* 23 Cal. 4th at 173.

For these reasons, and because the Superior Court and the Court of Appeal were correct in holding that the suit was untimely, this appeal should be rejected.

C. Plaintiff Has Disavowed the Application of the "Delayed Discovery Rule" and the "Continuing Violations Doctrine" To His Time-Barred Claim

Both Plaintiff and the Office of the Attorney General encouraged the Court to grant Plaintiff's Petition in order to address the potential applicability of three limitations-related doctrines to UCL claims – "delayed discovery," "continuing violations" and "continuous accrual." This Court granted the Petition to address those three issues. Plaintiff has now expressly disavowed the relevance of two of those issues to his UCL claim, asserting in his Opening Brief that the "delayed discovery rule" and the "continuing violations doctrine" are both "not applicable to the matter *sub judice*." (Pl. Br. pp. 26, 39.)

Canon will leave to the Court any evaluation of the propriety of Plaintiff having raised and argued issues in support of his Petition, only to disavow them as irrelevant to the case once the Petition was granted. Oddly, although Plaintiff concedes the inapplicability of the "delayed discovery rule" and the "continuing violations doctrine" to his claim, he nevertheless devotes nearly a third of his Opening Brief to arguing that, as a general matter, those doctrines should be applicable to UCL claims. (*See* Pl. Br. pp. 26-34, 39-46.) In effect, Plaintiff is seeking to have this Court render an advisory opinion as to whether, as a theoretical matter, the "delayed discovery rule" and the "continuing violations doctrine" are applicable to UCL cases other than his own suit. This is an improper purpose for Plaintiff's appeal, and an abuse of the Court's time and resources. *See People v. Slayton,* 26 Cal. 4th 1076, 1084 (2001) ("As a general rule, we do not issue advisory opinions indicating "'what the law

would be upon a hypothetical state of facts'"" (citation omitted)); *Pacific Legal Foundation v. California Coastal Com.*, 33 Cal. 3d 158, 169-74 (1982).

With respect to the "continuing violations doctrine," Plaintiff now agrees with Canon, the Superior Court and all three Court of Appeal justices (including the dissenting justice) that this doctrine is not applicable in this case. In the courts below, Canon argued in opposition to Plaintiff's invocation of the "continuing violations doctrine" that such doctrine, as articulated by this Court in *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001), has only been applied by California courts in limited contexts not analogous to that of this case. Because the "continuing violations doctrine" has only been applied by California courts in adjudicating employment discrimination claims[8] and in other limited circumstances involving lengthy and repeated harassing conduct,[9] there is no legitimate reason for the Court to issue an opinion pronouncing the doctrine generally applicable to UCL claims of whatever nature.

As Plaintiff now admits, the patent inapplicability of the "delayed discovery rule" to his claim is readily discernible from his allegation that he became aware of Canon's purported misconduct at approximately the same time that "excess copy charges" for "test copies" first were imposed upon him in or about February 2002. Consequently, the "delayed discovery rule" has never been a subject of dispute in this case. Canon respectfully submits

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[8] *See, e.g., Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Alch v. Superior Court,* 122 Cal. App. 4th 339 (2004).

[9] *See Komarova v. National Credit Acceptance, Inc.,* 175 Cal. App. 4th 324 (2009).

that there is no basis for the Court to issue an opinion pronouncing that rule generally applicable to all UCL claims, regardless of the nature of such claims or the facts supporting them.

D. Plaintiff's Action Properly Was Dismissed on Other Grounds

In addition to arguing that Plaintiff's UCL claim is barred by the statute of limitations, Canon urged the Superior Court to dismiss the case on three other grounds. These alternative grounds are briefly described below.

1. Laches. Canon argued that Plaintiff's UCL claim was barred by laches because of Plaintiff's "unreasonable delay" in commencing this action and his "acquiescence in the act about which [he] complains." *See Johnson v. City of Loma Linda,* 24 Cal. 4th 61, 68 (2000); *Conti v. Board of Civil Service Commissioners,* 1 Cal. 3d 351, 359 (1969). Canon contended that "unreasonable delay" was manifest in Plaintiff's unexplained failure to act for six (6) years subsequent to his discovery of Canon's purported fraud, and that his "acquiescence" was demonstrated by his continued payment of the allegedly improper "excess copy charges" for "test copies" for years while simultaneously enjoying the fruits of his agreements with Canon. *See In re Marriage of Burkle,* 139 Cal. App. 4th 712, 753 (2006).[10]

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[10] In a footnote, the Dissent asserts that laches did not apply to Plaintiff's UCL claim because "the second amended complaint does not show prejudice on its face." 185 Cal. App. 4th at 227 fn. 6. Under this Court's precedents, however, Canon did not need to show prejudice if Plaintiff's "acquiescence" to the disputed charges was demonstrated. *See Johnson,* 24 Cal. 4th at 68; *Conti,* 1 Cal. 3d at 359.

2. *Res judicata* and collateral estoppel. Canon asserted that Plaintiff's UCL claim was barred by the doctrines of *res judicata* and collateral estoppel by reason of the judgment in Canon's favor in the intervening small claims lawsuit between the parties in 2005. Canon contended that the record of the small claims proceeding clearly established the subject matter of what was litigated in the intervening action and its result, which facts alone are sufficient to warrant the application of *res judicata* and/or collateral estoppel. *See Perez v. City of San Bruno,* 27 Cal. 3d 875, 885 (1980); *Pitzen v. Superior Court,* 120 Cal. App. 4th 1374, 1381 (2004).

3. Failure to state a cause of action. Canon argued that Plaintiff's allegations, which essentially seek to rewrite the parties' agreements to exclude "excess copy charges" for "test copies," failed to state a cause of action for either "fraudulent" or "unfair" acts in violation of the UCL. *See, e.g., Puentes v. Wells Fargo Home Mortgage, Inc.,* 160 Cal. App. 4th 638 (2008); *Berryman v. Merit Property Management, Inc.,* 152 Cal. App. 4th 1544 (2007).[11]

In its order dismissing the action with prejudice, the Superior Court cited laches, *res judicata* and collateral estoppel, and failure to state a

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[11] Despite the reference to this ground in the Superior Court's order dismissing the action with prejudice and Canon's devotion of nearly ten (10) pages of its brief to the Court of Appeal to the argument that the dismissal should be affirmed on the ground that Plaintiff had failed to state a viable UCL cause of action, the Dissent mistakenly asserts that the Superior Court did not address "whether on the merits [Plaintiff] has stated a cause of action for violating the UCL," and that "no court has been called upon to determine whether . . . [Plaintiff] has adequately alleged a UCL claim." 185 Cal. App. 4th at 223 fn. 4.

cause of action as additional grounds for dismissal. (App. 232 (Court Order dated October 29, 2008).) Canon argued each of these grounds before the Court of Appeal. (Canon's Court of Appeal Opposition Brief, pp. 28-47.) Although the Court of Appeal majority apparently did not reach these additional grounds, they continue to stand as independently sufficient bases for affirming the dismissal of Plaintiff's UCL claim.

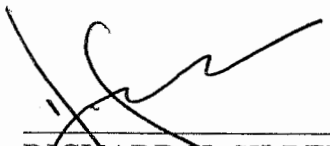
IV. CONCLUSION

Plaintiff's reversal of field after inducing this Court to grant review, belatedly admitting that the "continuing violations doctrine" and the "delayed discovery rule" are inapplicable to his UCL claim, would support a dismissal of this appeal without further consideration pursuant to Rule 8.528(b)(1) of the California Rules of Court. If the Court proceeds to hear the appeal on the merits, Canon submits that, for the reasons set forth above, the Court should affirm the dismissal of Plaintiff's UCL claim with prejudice.

Dated: January 28, 2011

Respectfully submitted,

DORSEY & WHITNEY LLP



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V. CERTIFICATION OF WORD COUNT

I, Kent J. Schmidt, state and declare as follows:

1. I am one of the attorneys for Canon Business Solutions, Inc. ("Respondent").

2. I certify that the number of words contained in this Answer Brief on the Merits is 13,177, based on the Word Count feature of Microsoft Word (excluding tables, certificate, verification and supporting documents).

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing matters are true and correct.

Executed on January 28, 2011 in Irvine, California.

KENT J. SCHMIDT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the City of Irvine, County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is 38 Technology Drive, Suite 100, Irvine, California 92618-5310. On January 28, 2011, I served the documents named below on the parties in this action as follows:

DOCUMENT(S) SERVED: **ANSWER BRIEF ON THE MERITS**

SERVED UPON: **SEE ATTACHED SERVICE LIST**

☐ (BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Irvine, California. I am readily familiar with the practice of Dorsey & Whitney LLP for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

☐ (BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by Time Machine Network, Inc. to receive documents to be delivered on the same date. A proof of service signed by the authorized courier will be filed with the court upon request.

☒ (BY FEDERAL EXPRESS) I am readily familiar with the practice of Dorsey & Whitney LLP for collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by Federal Express for overnight delivery.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court, at whose direction this service was made.

Executed on January 28, 2011, at Irvine, California.

Maria Santos

MARIA SANTOS

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