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 CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT · DIVISION EIGHT · CASE NO. B213104
SERVICE ON THE CALIFORNIA ATTORNEY GENERAL AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY PURSUANT TO BUSINESS & PROFESSIONS CODE § 17209 AND C.R.C. RULE 8.29

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATE CASES (Cont'd.)

STATE CASES (Cont'd.)

STATE CASES (Cont'd.)

FEDERAL CASES

STATUTES & RULES

QUESTIONS PRESENTED FOR REVIEW

The issues presented, as stated on the docket page, are as follows:

1) May the continuing violation doctrine, under which a defendant may be held liable for actions that take place outside the limitations period if those actions are sufficiently linked to unlawful conduct within the limitations period, be asserted in an action under the Unfair Competition Law (Bus. & Prof. Code § 17200 *et seq*)?

2) May the continuous accrual doctrine, under which each violation of a periodic obligation or duty is deemed to give rise to a separate cause of action that accrues at the time of the individual wrong, be asserted in such an action?

3) May the delayed discovery rule, under which a cause of action does not accrue until a reasonable person in the plaintiff's position has actual or constructive knowledge of facts giving rise to a claim, be asserted in such an action?

INTRODUCTION

"Necessity is the mother of invention." - Plato.

The issues raised by this Court reflect the wide-range of analyses required to reach the innumerably varying fact situations which are intended to be addressed by *Bus. & Prof. Code* § 17200 *et seq.* (Unfair Competition Law ("UCL")). The purpose of the UCL is to provide remedies in cases presenting vastly different facts through its prohibition against any "unlawful, unfair or fraudulent business act or practice." Therefore, the analysis of the statute of limitations applicable to a UCL claim must necessarily be sufficiently flexible to address those diverse facts and legal prongs. Under the UCL, "one size does not fit all" and, consequently, courts have adapted their approaches so as to achieve substantial justice for the parties.

As this Court stated in McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the general equitable principles underlying the *Bus. & Prof. Code,*

> [v]ests the trial court with broad authority to fashion a remedy that will prevent unfair trade practices and will deter the defendant and others from engaging in such practices in the future. McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., (1983) 33 Cal.3d 816, 821, 191 Cal.Rptr. 458.

As explained below, the direct answer to each of the three questions presented for review by the Court is "yes", with the governing approach controlled by the facts of each case presented.

This particular case presents the important and unsettled legal issue of how to apply the statue of limitations in a UCL case involving multiple, repeated wrongful acts, whereby each separate act is a stand-alone wrong occurring both within and outside the statute of limitations. In this matter, the Second District Court of Appeal was asked to resolve the issue of whether there is a ***single accrual*** or ***multiple accruals*** for purposes of the UCL statute of limitations. The Second District concluded that Plaintiff's UCL claim accrued ***only once at the time of the initial occurrence***. *See*, Aryeh v. Canon Business Solutions, Inc., (June 22, 2010, B213104) Slip Opinion p. 6-7 (hereinafter, "Slip Opn.") (stating,"when allegations regarding a defendant's conduct covers a period of time the cause of action accrues at the time of the initial conduct."). For reasons set forth herein, the Second District's ruling is contrary to the general rule governing accrual of claims, ignores the applicable continuous accrual doctrine, contravenes public policy, and overlooks the flexibility required to achieve the goals of the UCL.

In this action, Plaintiff contends that his UCL claims are timely under the general rule governing accrual because he seeks recovery ***only*** for free-standing actionable wrongs occurring within the last four years before filing suit. As a general rule, a cause of action accrues at the time when the cause of action is complete with all of its elements. Fox v. Ethicon Endo-Surgery,

Inc. (2005) 35 Cal.4th 797, 807, 27 Cal.Rptr.3d 66. The fact patterns giving rise to application of the doctrine of continuous accrual are best summarized in the cases involving periodic payments. Howard Jarvis Taxpayers Association v. City Of La Habra (2001) 25 Cal.4th 809, 107 Cal.Rptr.2d 369. As Justice Rubin explained in his ten-page dissenting opinion, continuous accrual "[a]cknowledges the reality that similar acts can continue to occur: one can breach the same contract over and over again in substantially the same manner. Earlier conduct is not ***extended***, but ***repeated***." Slip Opn. - Dissent, p. 5. [emphasis in original] Thus, the ***continuous accrual doctrine is an application of, not an exception to, the traditional rule governing accrual of claims***. Under the rule governing accrual of claims, generally, and the continuous accrual doctrine, specifically, Plaintiff's UCL cause of action is timely.

There are, however, ***exceptions*** to the general rule of accrual, including: 1) the delayed discovery doctrine; and 2) the continuing violation doctrine. The delayed discovery doctrine is an exception to the general rule that postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. Fox, supra, 35 Cal.4th at 807. The continuing violation doctrine is an exception to the general rule that holds a defendant liable for actions that take place outside the limitations period if

those actions are sufficiently linked to conduct within the limitations period. Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 802, 111 Cal.Rptr.2d 87. Both of these exceptions delay the accrual of claims and reach conduct outside the limitations periods based on equitable considerations. Here, the majority opinion fails to take into account the realities of the various factual situations which arise under the UCL and its goal of providing remedies for recurring conduct, as well as single-isolated offenses.[1] The Second District's outright rejection of the delayed discovery doctrine and the continuing violation doctrine to the UCL is erroneous and attempts to find a simplistic answer to complex issues.

Further, although Plaintiff disavowed application of delayed discovery and equitable tolling, the Court of Appeal used Plaintiff's knowledge, not to extend accrual, but rather to bar claims based on independent acts that occurred within the limitations period. Slip Opn., pp. 8 and 11-12. In other words, the Second District uses a plaintiff's discovery to "cut short" the running of the statutory clock. The Second District's "reverse" use of

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[1] The 1992 Amendment to *Bus. & Prof. Code* § 17200 changed the formerly plural term "practices" to the singular term "practice" and added the singular term "act" preceded by the singular modifier "any." Klein v. Earth Elements, Inc. (1997) 59 Cal.App.4th 965, 969, 69 Cal.Rptr.2d 623 (observing that the plain meaning of the amendment is that the UCL now covers single acts of misconduct.)

Plaintiff's discovery of wrongdoing to bar recovery of independent conduct occurring within the limitations period is unprecedented and ignores the intended broad reach of the UCL.

Resolving the question of whether the UCL statute of limitations begins to run on the first-occurrence of a series of actionable wrongs or runs anew with each subsequent free-standing violation greatly impacts the extent to which victims of unfair business practices can vindicate their rights. The practical effect of the Second District's holding that, when a defendant's wrongful acts cover a period of time, a UCL cause of action accrues only once at the time of the initial act is far-reaching. If the statutory clock begins to run when the first violation occurs, irrespective of a defendant's subsequent repeated wrongful acts, then plaintiffs who do not bring UCL claims within four years of the first violation ***will lose the ability to seek recourse forever*** for subsequent violations. If the first violation establishes accrual without regard to subsequent, repeated violations, then defendants, who "escape" the statutory time frame, will be given *carte blanche* to continue to invade a plaintiff's rights indefinitely. Thus, the Second District's ruling encourages the very types of conduct that the UCL is intended to prevent.

For these reasons, this Court should reverse the judgment of the Court of Appeal and remand with directions to enter an order summarily overruling

Defendant's demurrer. To the extent the operative complaint is held untimely or deficient on other grounds, the Court should reverse the judgment of the Court of Appeal and remand with directions to allow Plaintiff to file an amended complaint in the trial court seeking to satisfy the guidelines announced in this Court's opinion.

SUMMARY OF THE CASE

The facts of this case are straightforward and undisputed. In November 2001, Jamshid Aryeh ("Plaintiff") entered into a lease agreement with Canon Business Solutions, Inc. ("Defendant" or "Canon") for the lease of a black and white copier. Slip Opn., p. 2. Under the agreement, Plaintiff agreed to pay a monthly fee in return for a monthly copy allowance, and also agreed to pay additional excess copy charges for each additional copy beyond the monthly allotment. In February 2002, Plaintiff entered into a second lease agreement with Canon for the lease of a color copier under similar terms.

Shortly after entering into the copy rental agreements, Plaintiff began to notice that monthly meter readings taken by Canon's servicemen did not accurately reflect the actual number of copies made. Consequently, Plaintiff began keeping his own records of the number of copies made on each machine and determined that he was being charged for "Test Copies" made when Canon personnel repaired or serviced the machines. Slip Opn., p. 3.

Whenever problems arose or maintenance on a copier was required, Canon dispatched personnel to repair or service the copier, during which time the serviceman would run Test Copies on the copier. These Test Copies caused Plaintiff to exceed the monthly total allowable photocopies for a given month and incur additional fees. Despite Plaintiff's attempts to have Canon correct the "excessive" copying charges, Canon failed to reimburse Plaintiff for the overcharges and also charged him late fees. Id.

On January 31, 2008, Plaintiff filed a consumer class action complaint on behalf of himself and similarly-situated persons residing in the State of California who entered into copy rental agreements with Canon and who were overcharged for copies. Slip Opn., p. 3. The complaint alleged a single cause of action for unfair competition pursuant to the UCL (*Bus. & Prof. Code* § 17200 *et seq.*) and sought restitution for overcharges. The relief requested was limited to recovery for improper charges incurred during the four year period immediately preceding the filing of the action. Canon demurred to the complaint and asserted, among other grounds, that the claims were barred by the four-year statute of limitations under *Business & Professions Code* § 17208. Based on its finding that Plaintiff had notice of the overcharges since at least 2002, the trial court sustained the demurrer with leave to amend. Id.

Plaintiff then filed his first amended complaint which incorporated an amendment whereby Plaintiff omitted his prior reference to first discovering the overcharges "shortly after entering into the copy rental agreements" and substituted in lieu thereof a listing of 17 ***specific dates*** and instances of overcharges spanning from February 6, 2002 through November 16, 2004. Slip Opn., p. 3-4. Specifically, Plaintiff alleged the following unauthorized charges for Test Copies:

February 6, 2002	100 Test Copies
March 12, 2003	100 Test Copies
March 13, 2003	100 Test Copies
June 5, 2003	100 Test Copies
February 24, 2004	870 Test Copies
February 27, 2004	700 Test Copies
March 24, 2004	116 Test Copies
April 1, 2004	421 Test Copies
April 2, 2004	490 Test Copies
April 5, 2004	260 Test Copies
April 6, 2004	622 Test Copies
April 9, 2004	250 Test Copies
May 6, 2004	169 Test Copies
June 9, 2004	204 Test Copies
June 16, 2004	179 Test Copies
October 1, 2004	294 Test Copies
November 16, 2004	53 Test Copies

[Appellant's Appendix filed in support of Appellant's Appeal, p. 57].

Of the 17 itemized instances, Plaintiff pursued UCL claims and sought redress for the ***13 charges occurring on dates within the four years*** preceding the

filing of the suit - in other words, after January 2004. Slip Opn., p. 4.[2] Plaintiff alleged that "Each time [Canon's] servicemen ran Test Copies...was independent of any prior occasions when [Canon's] servicemen ran Test Copies" and each date "resulted in a separate and distinct violation giving rise to separate and distinct damage." Id. Canon demurred to the amended complaint and the trial court again sustained the demurrer with leave to amend. Id.

Pursuant to the trial court's directive, with the filing of the second amended complaint, Plaintiff attached copies of the November 2001 and November 2002 lease agreements. Id. Canon demurred again based on the statute of limitation and also argued that Plaintiff's claims were barred by laches. The trial court determined the second amended complaint was barred by the statute of limitations. The trial court stated that "there is no continuing practices doctrine that applies here" and that,

> No equitable tolling that I can see that could possibly apply; [under section] 17200, when the act occurs the clock starts, and here were have an allegation that there was actual knowledge in February of 2002 in an earlier pleading. Slip Opn., p. 5.

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[2] Specifically, Plaintiff alleged "By this complaint, Plaintiff seeks to recover for amounts wrongfully obtained by Defendants from Plaintiff, and others similarly situated, in connection with Test Copies ran by Defendants from January 31, 2004 (four years prior to the filing of this action) through the date of judgment in this action." [Appellant's Appendix, p. 59]

Having concluded that Plaintiff was "concededly" aware of his claim "almost six years in advance of the suit being filed," the trial court sustained the demurrer without leave to amend. Id. Plaintiff filed a timely appeal.

On June 22, 2010, the Court of Appeal, Second District filed its published opinion affirming the trial court's dismissal. In affirming the trial court's ruling, the Second District held that when the allegations regarding a defendant's conduct covers a period of time, the cause of action accrues at the time of the initial conduct. Slip Opn., pp. 6-7. Since Plaintiff knew "shortly after" he entered into the second contract in February 2002 of Canon's alleged overcounting of copies and overcharging for them, the Second District found that Plaintiff's claims accrued six years earlier. Slip Opin., p. 8. Further, the Second District found no precedent or policy considerations to support applying the continuing violation doctrine to UCL claims. The Second District concluded:

> Here, once appellant was aware he was being "overcharged" for test copies and that his protests to Canon were futile, he could and should have taken diligent action. He could not wait for years until the agreement expired while more "overcharges" accumulated before filing a complaint. Slip Opin., pp. 11-12.

Rejecting Plaintiff's assertion that the statutory clock started anew each distinct time Canon invaded Plaintiff's rights, the Second District held Plaintiff's UCL claims untimely.

ARGUMENT

I. Plaintiff's UCL Claim Accrued Each Time Defendant Invaded Plaintiff's Rights And Caused Injury.

Statutes of limitations serve to protect entities and persons from having to defend against stale claims. If individuals let too much time lapse between the accrual of a claim of wrongdoing and seeking redress, statues of limitations will declare the lawsuit time-barred. The statute of limitations for actions brought under the UCL is "four years after the cause of action accrued." Bus. & Prof. Code § 17208. With respect to the unfair competition laws, the limitations period begins to run when a putative plaintiff has been subjected to "any unlawful, unfair or fraudulent business act or practice" and "has suffered injury in fact and lost money or property as a result of the unfair competition." Bus. & Prof. Code §§ 17200 and 17204. Simply put, as to a private party plaintiff, the alleged wrongful act and the resulting sustained injury are the "triggering events" that start the running of the statutory clock. In the context of a continuing wrong where the same offending act is independently actionable and repeated, the statutory clock runs anew with ***each*** offending act and resulting injury.

A. Plaintiff's Position Is Consistent With The Rules Governing Accrual Of Claims Generally.

A cause of action accrues at the time when the cause of action is

complete with all of its elements. Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 807, 27 Cal.Rptr.3d 661.

> 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***.' Howard Jarvis Taxpayers Assn. v. City Of La Habra (2001) 25 Cal.4th 809, 815, 107 Cal.Rptr.2d 369. [emphasis added]

The elements of a UCL claim are found in the definition of "unfair competition" set forth as "any unlawful, unfair or fraudulent business act or practice..." Bus. & Prof. Code § 17200. Therefore, under the statute, there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent. Daugherty v. American Honda Motor Co., Inc. (2006) 144 Cal.App.4th 824, 837, 51 Cal.Rptr.3d 118.

While certainly the date of defendant's initial misconduct - be it allegedly "unlawful, unfair or fraudulent" - is essential, it is not necessarily controlling. Since the passage of Proposition 64, private suits may only be filed under the UCL upon a showing that the plaintiff "has suffered injury in fact and has lost money or property as a result of such unfair competition." Bus. & Prof. Code § 17204. This Court has admonished that Proposition 64's procedural modifications concerning standing, "left entirely unchanged the

substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." *see*, Californians for Disability Rights v. Mervyn's (2006) 39 Cal.4th 223, 232, 46 Cal.Rptr.3d 57. Because this standing requirement is necessary for a private party to invoke the judicial process, it is essential to calculating the accrual date for a UCL claim. Salenga v. Mitsubishi Motors Credit Of America, Inc. (2010) 183 Cal.App.4th 986, 1000-1002, 107 Cal.Rptr.3d 836 (allowing appellant to amend pleading to allege that she incurred actual injury and UCL standing within the statutory period).

Applying standard accrual principles, a UCL cause of action accrues for a private party plaintiff when there has been a violative act and sustained injury. In other words, the statutory clock accrues upon the occurrence of the latest of: 1) unfair competition (*e.g.,* "unlawful, unfair or fraudulent act or practice"), ***and*** 2) injury (*e.g.*, "loss of money or property"). Notably absent from the substantive elements of a UCL claim is any inquiry into a party's intent or knowledge. On the contrary, the UCL is a strict liability statute and it is not necessary to show that a defendant intended to injure anyone. Community Assisting Recovery, Inc. v. Aegis Ins. Co. (2001) 92 Cal.App.4th 886, 891, 112 Cal.Rptr.2d 304. The focus of the UCL is "***on 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 (2009) 46 Cal.4th 298, 312, 93 Cal.Rptr.3d 559. [emphasis added] Thus, the UCL claim is not, and should not be, dependent upon a plaintiff's knowledge of the wrongdoing, but upon the wrongdoing itself.

Here, Canon engaged in a new violative act under the UCL ***each*** time it overcharged Plaintiff for Test Copies and Plaintiff overpaid. In concluding that only the first-occurrence of the wrongful conduct triggers the statutory clock without regard to subsequent, repeated violations, the Court of Appeal shields wrongdoers from liability for free-standing acts occurring within the limitations period. Such a rule departs from traditional principles governing accrual of claims and ignores the purpose of the UCL.

B. Plaintiff's Position Is Consistent With The Continuous Accrual Doctrine Specifically.

Notwithstanding application of traditional accrual principles, here, the parties dispute whether there was a ***single accrual*** versus ***multiple accruals*** for the UCL statute of limitations purposes. The Second District correctly articulated the dispute as follows:

> However, appellant asserts the statutory clock not only starts at the time of the first occurrence - i.e., the time an allegedly offending act was committed and caused injury - but rather "re-starts" each time the defendant invades the plaintiff's rights and causes injury. Slip Opn., pp.6-7.

Ultimately, the Second District rejected Plaintiff's contentions and concluded that "when allegations regarding a defendant's conduct covers a period of time, the cause of action accrues at the time of the initial conduct." Thus, the Second District's ruling ignores the recurring misconduct of a defendant.

In briefing and argument before the Second District and lower court, Plaintiff incorrectly recommended application of the "continuing violation" doctrine. Justice Rubin, writing for the dissent, correctly suggests that what Plaintiff advocates is better termed the "continuous accrual" instead of the "continuous violation" doctrine. Slip Opn. - Dissent, pp. 2 and 5. The confusion arose because both similarly-named doctrines involve conduct occurring both within and without a statutory period. The conceptually distinct continuous accrual doctrine, however, seeks to remedy only those claims that accrued within the relevant statutory period; it does not seek to delay or toll accrual of claims that would otherwise fall outside that period. Slip Opn. - Dissent, p. 5.

As pleaded and unambiguously stated in his briefing, Plaintiff is ***not*** pursuing claims for charges incurred outside the statutory period, ***but only the***

thirteen (13) overcharges made by Canon during the four-year period prior to filing his Complaint. Regardless of name, however, the Second District rejected the proposition that when an "unfair, unlawful, or fraudulent conduct" recurs, a cause of action accrues ***each*** time a wrongful act occurs.

Outside of the UCL, California courts have long recognized what is commonly referred to as, the "continuous accrual" doctrine, often attributed to Justice Werdegar's reference in the Howard Jarvis Taxpayers Association v. City Of La Habra (2001) 25 Cal.4th 809, 107 Cal.Rptr.2d 369 decision. The "continuous accrual" doctrine recognizes that, traditionally, a statute of limitations accrues when a plaintiff has the right to sue on a cause of action, but addresses the factual circumstance that, "when an obligation or ***liability arises on a recurring basis***, a cause of action accrues ***each time*** a wrongful act occurs, triggering a new limitations period." Hogar Dulce Hogar v. Community Development Com'n Of City Of Escondido (2003) 110 Cal.App.4th 1288, 1295, 2 Cal.Rptr.3d 497. [emphasis added] Thus, the "continuous accrual" doctrine does not delay or toll the limitations period, but rather acknowledges the reality that actionable wrongs can be repeated and allows recovery for those wrongful acts that accrued within the statutory period.

The continuous accrual doctrine has been applied in a variety of actions involving the obligation to make periodic payments under California statute or regulations. *See, e.g.,* Howard Jarvis Taxpayers Assn., supra, 25 Cal.4th at 818-825 [refund of illegal taxes]; Green v. Obledo (1981) 29 Cal.3d 126, 144, 172 Cal.Rptr. 206 [welfare benefits]; Jones v. Tracy School Dist. (1980) 27 Cal.3d 99, 105-106, 165 Cal.Rptr. 100 [back pay wages]; Dryden v. Board Of Pension Commrs. (1936) 6 Cal.2d 575, 580-582 [pension benefits]. The continuous accrual doctrine has also been applied in actions involving breaches of contractual arrangements with periodic payments. *See, e.g.,* Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004) 116 Cal.App.4th 1375, 1388-1389, 11 Cal.Rptr.3d 412 [payments per oil and gas operating agreement] Tsemetzin v. Coast Federal Savings And Loan Assn. (1997) 57 Cal.App.4th 1334, 1344-1345, 67 Cal.Rptr.2d 726 [unpaid rent on lease agreement]. In instances of long-standing breaches or violations, the continuous accrual rule effectively limits the amount of retroactive relief a plaintiff can obtain to the benefits or obligations which came due within the limitations period. Hogar, supra, 110 Cal.App.4th at 1295. Thus, the continuous accrual doctrine addresses the misconduct of the defendant without providing a windfall to the plaintiff.

1) Periodic Payments Pursuant To Statute

This Court applied the continuous accrual doctrine to the plaintiffs' claims in Howard Jarvis Taxpayers Association v. City Of La Habra (2001) 25 Cal.4th 809, 107 Cal.Rptr.2d 369. In Howard, while the original enactment of the City's Ordinance was an event giving rise to plaintiffs' cause of action to invalidate a tax, it was not the only event. Id. at 819. The Court found that taxpayers had alleged an ongoing violation based on the City's continued imposition of a tax without voter approval and that the statute of limitations ***began anew with each collection***. See, Howard, supra, 25 Cal.4th at 813 (stating that "if, as alleged, the tax is illegal, its continued imposition and collection is an ongoing violation, upon which the limitations period begins anew with each collection.") The Court also limited the claims to "injuries occurring in the statutory three-year period before suit is brought and applies only to plaintiffs injured by tax collections within the three-year period." Id. at 825.

Like the City of La Habra's continued collection of an illegal tax on its residents, Canon's continued collection of unfair charges for Test Copies is an ongoing violation, upon which the limitations period begins anew with each collection. In arguing the correctness of the Court of Appeal's decision, Defendant presents precisely the same rationale that was rejected by this Court

in Howard,

> The Court of Appeal's decision was correct. It is beyond dispute that Plaintiff's cause of action was "complete with all of its elements" as of February 2002 - when Plaintiff alleges that Canon first charged him "excess copy charges" for "test copies," and he apparently paid such charges despite his belief that they were improper. Plaintiff's UCL claim ***accrued then because Plaintiff could have, at that point, commenced legal action*** seeking restitution for the allegedly improper charges, and an injunction preventing Canon's further imposition of such charges. Answer To Petition For Review, p. 12. [emphasis added]

Defendant's position is diametrically opposed to this Court's pronouncement that plaintiffs' [c]auses of action are not barred ***merely because similar claims could have been made at earlier times as to earlier violations***..." Howard, supra, 25 Cal.4th at 821-822. [emphasis added] This Court's refusal to be influenced by claims that could have been brought earlier is consistent with the general rule of accrual; it simply acknowledges that claims between parties can accrue more than once and furthers the purpose of the UCL.

The Courts of Appeal have likewise recognized the applicability of the continuous accrual doctrine. In Hogar Dulce Hogar v. Community Development Com'n Of City Of Escondido (2003) 110 Cal.App.4th 1288, 1298, 2 Cal.Rptr.3d 497, a nonprofit association filed a writ of mandate and declaratory relief action alleging that a redevelopment agency miscalculated and underpaid its Housing Fund obligations pursuant to community

redevelopment law. The Fourth District found that plaintiff's claims were subject to the continuous accrual rule and held that the statute of limitations began on each date that the redevelopment agency's payments were actually due. Since the agency's obligation to pay the Housing Fund twenty percent of its gross (as opposed to net) tax increment receipts was a recurring annual duty, a cause of action arose ***each year*** when the agency failed to properly pay the fund. Id. at 1296. Relying on *Code Of Civil Procedure* § 338(a), however, the Court held that defendant could only be required to reimburse the Housing Fund amounts due within the three years preceding the date of plaintiff's complaint. Id.

In reaching its decision, the Hogar court explores prior decisions applying the continuous accrual doctrine in a broad range of subject matters, including the employment context. For example, quoting Green v. Obledo, the Fourth District observes:

> Our courts have viewed the obligation of a governmental entity to pay welfare benefits pursuant to law as a debt due the recipient as of the date he first became entitled to them. [Citations] Such a debt is analogous to the obligation of a governmental entity to make payments of back wages unlawfully withheld from its workers or of pension benefits unlawfully withheld from its retirees: ***each such payment becomes a debt due to the employee as of the date he was entitled to receive it.*** It is settled that in such cases each deficient payment constitutes a separate violation triggering the running of a new period of limitations, and hence that the employee can recover only those payments which accrued

> within the period of the applicable statute of limitations preceding the filing of his complaint. [Citations.] *See*, Hogar, supra, 110 Cal.App.4th at 1296 (citing Green, supra, 29 Cal.3d at 141). [emphasis added]

Green illustrates the continuous accrual doctrine extended to the employment context where employee back wages are involved.

In fact, application of the continuous accrual doctrine to employee wages was recognized by this Court in, Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100, as early as 1980. In Jones, the plaintiff was unlawfully discriminated against because of her sex and a portion of her salary was withheld from 1968 and 1974 in violation of California's "equal pay" provision under *Labor Code* § 1197.5. Section 1197.5 had a two year statute of limitations and the issue in Jones was whether plaintiff could recover for the entire six-year period or for only the two years preceding plaintiff's complaint. Jones, supra, 27 Cal.3d at 103. Interpreting the *Labor Code*, the Court found it significant that the Legislature required an employer keep wage records for only two years and held that "The application of this 'separate violation' rationale to suits filed under section 1197.5 would allow recovery for the same period during which employers must retain wage records." Id., at 106. The "separate violation" rationale - where "each deficient payment created a separate and distinct violation, triggering the running of a new limitation period" - is an application of the continuous accrual doctrine. Id., at 105.

Today, the continuous accrual doctrine (or "separate violation" rationale) is implicitly acknowledged in every wage and hour lawsuit brought by employees whose continued exposure to their employers' misconduct exceeds the limitations period. Like Jones, ***the scope of recovery may be limited, but the right to recover is not.*** Application of the Second District's holding, however, would leave employees without remedy for continuing *Labor Code* violations and provide employers a license to engage in further misconduct.

2) Periodic Payments Pursuant To Contract

Even more analogous to Plaintiff's claims, however, is that the California courts likewise recognize application of the continuous accrual doctrine in actions involving breaches of contractual arrangements with periodic payments. In Tsemetzin v. Coast Federal Savings And Loan Association, plaintiff and defendant entered into a written lease agreement regarding certain ground and building property in California. Tsemetzin v. Coast Federal Savings And Loan Association (1997) 57 Cal.App.4th 1334, 1338, 67 Cal.Rptr.2d 726. The lease agreement did not specify the amount of rent, but rather set out a formula for calculating the rent. Id. By 1982, a dispute had arisen between the parties over the amount which was required to be paid under the lease formula. Id. at 1339. Plaintiff repeatedly

communicated to defendant that it was underpaying on its rent obligations and in breach of the lease agreement. Id. Plaintiff Tsemetzin even began keeping a running account of the rental arrearages owed by defendant. Id.

In April 1993, having waited eleven (11) years, plaintiff brought suit against defendant for all unpaid rental installments. Id. Relying on the lapse of eleven years since the parties initial dispute, defendant argued that plaintiff's claims were barred by the four-year statute of limitations for recovery on a written lease. Id. at 1344. While unwilling to allow plaintiff to recover all eleven years of back rent, the Second District held plaintiff was entitled to recover unpaid rent during the four-years preceding his lawsuit. Id. Significantly, the Second District concluded that periodic monthly payments called for by a lease agreement create severable contractual obligations where the duty to make each rental payment ***arises independently*** and the statute begins to run from the time performance of ***each*** is due. Id. Since defendant's obligation to pay increased rent commenced each month when such payment was due and not paid, plaintiff was permitted to recover all unpaid rental installments falling within the four-year statutory period. Id.

The Tsemetzin case and its accrual analysis is analogous to this litigation. Like Tsemetzin, the parties dispute the calculation of periodic payment obligations pursuant to a written lease agreement. In Tsemetzin, the

controversy surrounded square footage and escalation intervals for real property rent; here, the controversy surrounds monthly charges for Test Copies made on leased photocopiers. Like Tsemetzin, Plaintiff kept records of the on-going overcharges. While Tsemetzin waited eleven years, Plaintiff waited six years from Canon's initial wrongful overcharge to bring suit. Both defendants raised a statute of limitations defense seeking to completely bar Plaintiff's recovery. For the legal claims of breach of contract and the UCL, the statute of limitations runs from when each claim accrues. Accordingly, Plaintiff's UCL claims are subject to the same continuous accrual doctrine, and like Tsemetzin, it should be recognized that where, the factual predicates of Defendant's misconduct recur, the statute of limitations runs anew.

It is the repetitive nature of a defendant's misconduct that is the focal point of the analysis of the continuous accrual doctrine. The Fifth District affirmed application of the continuous accrual doctrine to contractual arrangements with periodic payments in Armstrong Petroleum Corp., supra, 116 Cal.App.4th at 1388-1389. Like Plaintiff's multiple and recurring charges for Test Copies pursuant to a lease, the Fifth District held that, where periodic monthly rental payments are involved, "[e]ach cause of action for breach of a divisible part may accrue at a different time for purposes of determining whether an action is timely under the applicable statute of limitations."

Armstrong, supra, 116 Cal.App.4th at 1389.

Having repeatedly acknowledged the continuous accrual doctrine in the context of illegal taxes, employee wages, statutory violations, and contractual breaches, there is no justification to exclude it from the UCL. Like traditional principles governing accrual of a UCL claim, the continuous accrual doctrine examines the same precipitating events: the misconduct of defendant. The continuous accrual doctrine recognizes recovery within the limitations period preceding suit because each separate act of misconduct is a stand-alone wrong. Like any statute of limitations, it gives plaintiff a reasonable time to seek redress and holds defendant accountable ***each*** time it acts. Thus, continuous accrual is nothing more than the normal application of a statute of limitations measured against a series of acts of misconduct, rather than one individual act.

II. While Not Applicable To The Matter *Sub Judice*, The Delayed Discovery Doctrine Should Apply To The UCL.

The delayed discovery doctrine ***is an exception*** to the general rule of accrual that postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. Fox, supra, 35 Cal.4th at 807. A plaintiff has reason to discover a cause of action when he or she "has reason at least to suspect a factual basis for its elements." Id. Under the discovery rule, suspicion of one or more of the elements of a cause of action coupled with knowledge of any remaining elements, will generally trigger the statute

of limitations period. Id. Thus, notwithstanding that the elements of a cause of action have been met, the doctrine of delayed discovery ***delays*** accrual of a cause of action until plaintiff gains (or should have gained) knowledge.

Here, Plaintiff has and continues to disavow application of the delayed discovery doctrine because he learned that he was being charged for Test Copies in February 2002. Although Plaintiff alleges that Defendant's charges for Test Copies are a fraudulent business practice, the delayed discovery doctrine is not applicable because Plaintiff is ***not*** seeking to recover overcharges paid outside the four-year period preceding his lawsuit. Notwithstanding its inapplicability to the matter *sub judice*, Plaintiff urges the Court to recognize that the delayed discovery doctrine is an exception that should supplement the general rule of accrual with regard to UCL cases in order to take into account the realities of Defendant's misconduct.

A. Application Of The Delayed Discovery Doctrine To The UCL Is Unsettled And The Subject Of An Appellate Court Split.

This Court previously recognized the current split in appellate authority regarding use of the delayed discovery rule to the UCL. Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal.4th 623, 635, fn. 7, 54 Cal.Rptr. 3d 735. Without deciding it, in Grisham, the Court assumed, for purposes of its discussion, that the delayed discovery rule applies to unfair competition claims, but observed that the delayed discovery rule is "currently not settled

under California law." Id. At that time, the Court identified the appellate split as the Second District's Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891, 117 Cal Rptr.2d 331 (delayed discovery rule does not apply) versus the Fourth District's Massachusetts Mutual Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 1295, 119 Cal.Rptr.2d 190 (delayed discovery rule "probably" applies). Grisham, supra, 40 Cal.4th at 635, fn.7. Recently, in Broberg v. Guardian Life Ins. Co. Of America, the Second District again tackled the delayed discovery issue and held that a UCL cause of action premised on fraudulent conduct starts to run only when a reasonable person would have discovered the factual basis for a claim. Broberg v. Guardian Life Ins. Co. Of America, (2009) 171 Cal.App.4th 912, 921, 90 Cal.Rptr.3d 225. Faced with conflicting appellate authority, California and federal courts are now equally divided.

B. The Delayed Discovery Doctrine Is Well-Recognized And Application To The UCL Is Justified.

Outside of the UCL context, the delayed discovery rule is a well-recognized doctrine used by plaintiffs to assert claims in which the conduct occurred outside the statutory limitations period. The rationale for the delayed discovery rule is that, in certain circumstances where plaintiffs, through no fault of their own, are unaware of defendants' misconduct, then plaintiffs should not be penalized and barred from vindicating their rights. April

Enterprises, Inc. v. KTTV (1983) 147 Cal.App.3d 805, 826, 195 Cal.Rptr. 421.

As the April Enterprises court explained,

> [T]he discovery rule reflects concern for the practical needs of plaintiffs. It avoids dismissing a suit on grounds of limitation when a plaintiff is blamelessly ignorant of his cause of action. Id. at 826-827.

Although an exception to the general rule of accrual, it is one which is used in a growing number of actions. Id. at 828 (stating "However, our research reveals the discovery rule has replaced the date-of-injury accrual rule in a growing number of actions in California.")[3]

In April Enterprises, the court applied the delayed discovery rule to the rather unique circumstances of a difficult-to-detect breach of contract action. There the court found it factually persuasive that, where the evidence of the breach, television videotapes, remained within defendant's exclusive custody

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[3] For example, the delayed discovery doctrine has been applied in the following types of cases: 1) professional malpractice (*see e.g.*, Neel v. Magana, Olney, Levy, Cathcart & Gelfund (1971) 6 Cal.3d 176, 194, 98 Cal.Rptr. 837); 2) underground trespass (*see e.g.*, Oakes v. McCarthy Co. (1968) 267 Cal.App.2d 231, 255, 73 Cal.Rptr. 127); 3) personal injury from negligently manufactured drugs (*see e.g.,* Warrington v. Charles Pfizer & Co. (1969) 274 Cal.App.2d 564, 569-570, 80 Cal.Rptr. 130); 4) invasion of the right to privacy (*see e.g.*, Cain v. State Farm Mut. Auto. Ins. Co (1970) 62 Cal.App.3d 310, 315, 132 Cal.Rptr. 860); 5) damages for libel (*see e.g.*, Manguso v. Oceanside Unified School Dist. (1979) 88 Cal.App.3d 725, 731, 152 Cal.Rptr. 27); 6) damages for latent defects in real property (*see e.g.,* Allen v. Sundean (1982) 137 Cal.App.3d 216, 222, 186 Cal.Rptr. 863); and 7) breaches of fiduciary duty (*see e.g.,* Seelenfreund v. Terminix of Northern California, Inc. (1978) 84 Cal.App.3d 133, 137, 148 Cal.Rptr. 307).

and control, application of the delayed discovery rule was appropriate. April Enterprises, supra, 147 Cal.App.3d at 832. In examining other cases where courts have applied the delayed discovery exception, the court noted:

> A common thread seems to run through all the types of actions where courts have applied the discovery rule. ***The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect.*** In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that ***plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed.*** And often this is accompanied by the corollary notion that defendant should not be allowed to knowingly profit from their injuree's ignorance. Id. at 831. [emphasis added] *See also*, Gryczman v. 4550 Pico Partners, LTD (2003) 107 Cal.App. 4th 1, 5-6, 131 Cal.Rptr.2d 680.

Thus, the delayed discovery doctrine is an equitable principle designed to effect substantial justice between the parties. In fact, the delayed discovery rule is founded on such important public policy considerations that contractual efforts to eviscerate the delayed discovery rule have been declared void as against public policy. Moreno v. Sanchez (2003) 106 Cal.App.4th 1415, 1430-1433, 131 Cal.Rptr.2d 684.

In light of the broad-sweeping, equitable nature of the UCL, these public policy considerations should apply with equal force. Frequently, UCL victims are unwittingly exposed to a defendant's unlawful, unfair, or fraudulent business acts and practices, but are without sufficient means of

discovering the wrongdoing. For example, consumers of latently defective products or products sold in violation an administrative regulation (*e.g.,* FDA, FTC, NHSTA) intended to protect the consuming public's safety, may not learn of the defect or violation, if ever, until something goes wrong. In such situations, the manufacturer is in a superior position to comprehend its conduct and the natural consequences that flow therefrom. Similarly, in the antitrust context, consumers who pay supracompetitive prices for products are often unaware of the monopolistic and unfair competition practices by businesses that indirectly influenced the purchase price. Where a plaintiff is blamelessly ignorant of his UCL cause of action, the delayed discovery doctrine should apply to delay accrual until such time as the plaintiff knew, or should have known, of the misconduct forming the basis of the UCL claim.

One area where application of the delayed discovery is undisputedly pervasive is in the context of fraud. Cleveland v. Internet Specialties West, Inc. (2009) 171 Cal.App.4th 24, 33, 88 Cal.Rptr.3d 892 (finding a triable issue of fact whether plaintiff had knowledge of facts sufficient to make a reasonable prudent person suspicious of fraud); Brandon G. v. Gray (2003) 111 Cal.App.4th 29, 35, 3 Cal.Rptr.3d 330 (finding that plaintiff's cause of action accrues when the plaintiff learns or is put on notice that a representation was false); Bernson v. Browning-Ferris Industries (1994) 7 Cal.4th 926, 932,

30 Cal.Rptr.2d 440 (comparing delayed discovery rule and fraudulent concealment principles); Lee v. Escrow Consultants, Inc. (1989) 210 Cal.App.3d 915, 921, 259 Cal.Rptr. 117. In fact, the California Legislature codified the delayed discovery doctrine by explicitly providing that, in cases involving fraud or mistake, the cause of action is deemed not to accrue until the aggrieved party discovers the facts constituting the fraud or mistake. Code of Civil Procedure § 338 (d) (providing a three-year statute of limitations for fraud or mistake).

In light of the statutorily mandated and judicially recognized use of the delayed discovery doctrine in cases involving fraud, substantial justification exists for applying the doctrine to those cases implicating the "fraud" prong of the UCL. This focus-on-fraud approach to the UCL was recently recognized in Broberg v. Guardian Life Ins. Co.,

> At least in the context of unfair competition claims based on the defendant's allegedly deceptive marketing materials and sales practices, ***which is simply a different legal theory for challenging fraudulent conduct and where the harm from the unfair conduct will not reasonably be discovered until a future date***, we believe the better view is that the time to file a section 17200 cause of action starts to run ***only when a reasonable person would have discovered the factual basis for a claim.*** Broberg, supra, 171 Cal.App.4th at 920-921. [emphasis added]

In analogizing deceptive advertising to common law fraud cases, the Broberg court explained that "the nature of the right sued on, not the form of the

action...determines the applicability of the statue of limitations." Id. at 921 (citing April Enterprises, supra, 147 Cal.App.3d at 828). Accordingly, the Broberg court allowed plaintiff to bring a UCL claim ***thirteen years*** after purchasing his life insurance policy because he did not discover the falsity of the "vanishing premium" marketing materials until eleven years later.

In Grisham, this Court assumed the delayed discovery doctrine without deciding the issue, but its analysis is instructive. Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal.4th 623, 54 Cal.Rptr.3d 735. Plaintiff Grisham started smoking after reading cigarette advertising marketed by Philip Morris in 1962 and 1963. Id. at 629. In 2002, Grisham brought suit alleging, among other claims an unfair competition cause of action. Id. at 630. Grisham's theory was, that after relying on defendant's advertising as a minor, she became addicted to cigarettes causing her economic injury. Id. at 634.

Significantly, however, the Court explained that "California law recognizes a ***general, rebuttable presumption***, that plaintiffs have '***knowledge of the wrongful cause of an injury***." Id. (citing Fox, supra, 35 Cal.4th at 808). [emphasis added] To rebut that presumption, a plaintiff must plead facts to show when he or she discovered the claims and the inability to have made that discovery earlier despite reasonable diligence. Id. Having attempted to plead discovery within the limitations period, Grisham failed to rebut that

presumption. Id. at 639. The Court concluded that Grisham knew, or at least suspected, her tobacco addiction and economic injury when she joined Nicotine Anonymous in 1993-1994, outside the limitations period. Id. at 638-639.

Based on the strong public policy against dismissing suits when a plaintiff is blamelessly ignorant of a cause of action application of the delayed discovery doctrine, especially coupled with the practical realities involving a "fraudulent" business act or practice, application of the delayed discovery doctrine to the UCL is warranted.

III. The Court Of Appeal's Only Cited Supporting Precedent, The *Snapp* Case, Is Not Controlling.

In ruling that the first occurrence of wrongdoing commenced the running of the statute of limitations and bars claims arising from any separate and independent repeated acts occurring within the four-years preceding the lawsuit, the Second District unambiguously found Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891, 117 Cal.Rptr.2d 331, controlling. Slip Opn., p. 8 (stating "We find Snapp to be controlling"). But the Second District's interpretation that Snapp involves "allegedly wrongful collection of fees on a recurring basis" and characterization as a "multiple violations" case is erroneous. Slip Opn., p. 8. The wrongdoing alleged in Snapp was the ***single act*** of misappropriation of client accounts by

an insurance broker, albeit the broker later collected insurance premiums. Snapp, supra, 96 Cal.App.4th at 888-889. The confusion arises because the issue of ***when*** that single misappropriation occurred was hotly-contested by the parties in Snapp with various dates being proposed - *e.g.,* 1993, 1994, or 1995 - for the purpose of either salvaging or defeating the statute of limitations.[4]

Legally, the confusion is compounded because the Snapp court, in its discussion of the applicable statutes of limitations, is actually addressing ***two (2) separate statutes*** both with a four-year limitation period, but measured differently - the UCL ***and*** the fraudulent transfer claims. Snapp, supra, 96 Cal.4th at 891. Snapp concerns the delayed discovery rule, but is completely silent as to the "continuing violation" or "continuous accrual" doctrines. Snapp, supra, 96 Cal.4th 884 (discussing delayed discovery, but no where using the terms "continuing violation" or "continuing accrual"). *See also,* Slip Opn.- Dissent, p. 8 (stating that Snapp begins and ends with a rejection of equitable tolling and delayed discovery and fails to discuss continuing violation or continuous accrual). The Ninth Circut case of Betz v. Trainer Wortham & Co., Inc. (9th Cir. 2007) 236 Fed. Appx. 253 is equally instructive

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[4] The Second District's own observation about Snapp that "The trial court rejected plaintiff's claim that the statute did not commence running ***until*** the defendant purchased the TRG accounts from the salesman in February 1994," Slip Opn., p. 7 [emphasis added], reflects inquiry about when a ***single*** act of misconduct occurred.

on the Snapp case. In Betz, the Ninth Circuit stated:

> The defendants claim that Snapp [citation omitted] stands for the proposition that the ***continuing violation doctrine*** does not apply to unfair business practices claims under California law. However, ***it does not appear that the court in Snapp directly considered the argument that the plaintiff's claim was not time-barred because it alleged multiple, continuous acts, some of which occurred inside the limitations period.*** 236 Fed. Appx. at 256, fn. 4. [emphasis added]

Thus, the Second District relied on authority which did not consider the relevant issues, is not germane to the subject case, and cannot support its decision.

A. Snapp Is Factually Inapposite.

There are persuasive factual reasons to understand Snapp as a single violation case despite use of the words "initially" and "on-going" in the opinion. Factually, the case arose and was prosecuted as a result of defendant Robertson's alleged taking of a ***single set of accounts***, the TRG accounts, once belonging to Snapp and then stolen by a former employee, Gwin. While asserting multiple legal, claims the underlying focus in Snapp was on the wrongful conversion of the TRG accounts. Snapp, supra, 96 Cal.App.4th at 887-889. Snapp sued Robertson, who purchased the TRG accounts from former employee, Gwin, for: 1) conversion; 2) misappropriation of trade secrets in violation of Uniform Trade Secrets Act (Civ. Code § 3426.1); 3) fraudulent transfer in violation of the Uniform Fraudulent Transfer Act (Civ.

Code § 3439.01); 4) unfair competition (Bus. & Prof. Code § 17200); 5) interference with contract; 6) intentional interference with economic advantage; and 7) fraudulent concealment. Id. at 889. These causes of action emphasize a wrongful taking or inappropriate acquisition, as opposed to the mere wrongful collection of fees as suggested by Defendant and the Second District. Additionally, the Snapp court describes the wrongdoing as follows: "It is alleged in the cause of action for misappropriation of trade secrets that the misappropriation of client information ***occurred in May 1993.***" Id. [emphasis added] The importance is that the Snapp court viewed the cause of action as accruing ***only once, in 1993***, even as it acknowledged the continuing damages in lost commissions flowing therefrom.

B. ***Snapp* Is Legally Inapposite.**

Legally, as the Snapp court recognized, a cause of action for conversion requires plaintiff's ownership or right to possession of the property at the time of the alleged conversion. Snapp, supra, 96 Cal.App.4th at 892, fn. 2. The parties in Snapp disputed ***when*** the alleged conversion occurred. While the Snapp court ultimately concluded it was when defendant Robertson first began his brokering activity on the TRG accounts, as both a factual and legal matter, the conversion of the TRG accounts could only, and did only, occur once.

Also, it is worth noting that the statute of limitations for Snapp's claim

for misappropriation of trade secrets (Uniform Trade Secrets Act, Civil Code § 3426.1) explicitly ***does not*** recognize a "continuing misappropriation" theory. Section 3426.6 of the *Civil Code* states:

> An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, ***a continuing misappropriation constitutes a single claim***. Civil Code § 3426.6. [emphasis added]

Thus, even assuming *arguendo* that defendant Robertson's misappropriation could be construed as "continuing" or "on-going" conduct, for purposes of the UTSA statute of limitations, it is treated as a "single claim." Similar language is noticeably absent from Section 17208 of the *Business & Professions Code* prescribing the UCL's limitations period.

Finally, to the extent Snapp found that plaintiff had notice and "knew of potential claims against Robertson for his retention of commissions on the TRG accounts more than four years before it filed its complaint," *see*, Snapp, supra, 96 Cal.App.4th at 891, that discussion is relevant to the four-year statute of limitations on the ***fraudulent transfer claim*** (Uniform Fraudulent Transfer Act, Civil Code § 3439.01), ***not the UCL***. Because the Snapp court was measuring the statute of limitations for a cause of action that accrued only once, it is in no way relevant to Plaintiff's discussion of a cause of action subject to multiple accrual. The most that can be said is that the Snapp case

is a "delayed discovery" decision and, because Plaintiff is not relying on delayed discovery, it is irrelevant and should not dictate the result here. Thus, the Second District's reliance on Snapp for the proposition that the UCL statute of limitations starts only once at the first occurrence of wrongdoing and that Plaintiff's knowledge bars misconduct occurring within the four-year statutory period is erroneous.

IV. While Not Applicable To The Matter *Sub Judice*, Blanket Rejection Of The Applicability Of The Continuing Violation Doctrine To The UCL Is Unwarranted.

The continuing violation doctrine is another ***exception*** to the general rule of accrual that holds a defendant liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period. Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 812, 111 Cal.Rptr.2d 87. Unfortunately, the continuing violation doctrine is not just "arguably the most muddled area in all of employment discrimination law," Id., it is arguably the most muddled doctrine in a vast range of legal areas.[5] As the Court recognized "[t]he ***doctrine refers not to a***

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[5] *See, e.g.,* application of the continuing violation doctrine in the following contexts: antitrust (*see,* Process Specialties, Inc. v. Sematech (E.D. Cal 2001) 2001 WL 36105562 and Pace Industries, Inc. v. Three Phoenix Co. (9th Cir. 1987) 813 F.2d 234); employment retaliation (*see,* Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028); hostile work environment (*see,* Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798 and Joseph v. J.J. Mac Intyre Companites, L.L.C. (N.D. Cal. 2003) 281 F.Supp.1156); securities (*see,* Betz

single theory, but to a number of different approaches, in different contexts and using a variety of formulations" to extend the statute of limitations. Id. [emphasis added]. While Plaintiff mistakenly referred to the continuing violation doctrine in his argument before the Court of Appeal and trial court, Justice Rubin correctly suggests that the doctrine is not applicable to the matter *sub judice* because Plaintiff does not seek to recover Test Copy charges falling outside the statutory period. Slip Opn. - Dissent, pp. 3-4. Accordingly, while Plaintiff no longer contends that the continuing violation doctrine applies to his case, he does contend that the Second District's blanket rejection of the continuing violation doctrine to the UCL is unwarranted.

While the continuing violation doctrine is no longer exclusive to employment discrimination cases in California law, that is still the prevailing context. *See, e.g.*, Richards, supra; Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436; Alch v. Superior Court (2004) 122 Cal.App.4th 339, 19 Cal.Rptr.3d 29. In the employment arena,

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v. Trainer Wortham & Co., Inc. (9th Cir. 2007) 236 Fed. Appx. 253); trademark (*see*, Suh v. Yang (N.D. Cal. 2997) 987 F.Supp. 783); patent infringement (*see,* Rambus, Inc. v. Micron Technology, Inc. (N.D. Cal. 2007) 2007 WL 1792310); civil conspiracy (*see,* Wyatt v. Union Mortgage Company (1979) 24 Cal.3d 773); malicious prosecution (*see,* Lauter v. Anoufrieva (C.D. Cal. 2009) 2009 WL 2192362, *infra*) and debt collection cases (*see,* Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal.App.4th 324, 95 Cal.Rptr.3d 880 and Gruen v. Edfund (N.D. Cal. 2009) 2009 WL 2136786, *infra*).

> The continuing violations doctrine comes into play when an employee raises a claim based on conduct that occurred ***in part*** outside the limitations period. Provided that at least one of the acts occurred ***within*** the statutory period, the employer may be liable for the entire course of conduct, including acts predating the statutory period, under the continuing violations doctrine. Richards, supra, 26 Cal.4th at 812. [emphasis added]

The common policy gleaned from these employment discrimination cases is that certain causes of action only arise after a cumulation of individual bad acts - a course of conduct (*e.g.*, a course of harassment or retaliatory conduct) - as opposed to one single discrete bad act. Yanowitz, supra, 36 Cal.4th at 1058. In such instances, California courts hold that, instead of running the statutory clock from the first act of misconduct, which standing alone would not be actionable, the continuing violation doctrine will defer running the statutory clock until the "totality of acts" renders the cause of action accrued. Yanowitz, supra, 36 Cal.4th at 1058 (noting in the absence of the continuing violation doctrine, the statute of limitations would start running upon the first act of retaliation, even if that act would not be actionable standing alone). Thus, without the continuing violation doctrine, plaintiffs subject to employment discrimination or harassment would be encouraged to bring litigation too early and seek adjudication of unripe claims.

In a newly emerging line of cases, the continuing violation doctrine has also been applied to debt collection practices. These cases analogize the

repeated and harassing acts prohibited by the Fair Debt Collection Practices Act ("FDCPA") to the continuing violation doctrine used in the hostile work environment cases. *See, e.g.*, Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal.App.4th 324, 95 Cal.Rptr.3d 880; Gruen v. Edfund (N.D. Cal. 2009) 2009 WL 2136786. In Komarova, the court used the continuing violation doctrine to permit recovery for unlawful debt collection acts occurring outside the statutory period because harassing phone calls were a continuing course of conduct that extended into the limitations period. Id. at 344-345 (finding that "unreasonably frequent calling is clearly a continuing course of conduct under this test because the violation occurs only through repetition.")

Relying on the standard set by preceding employment cases, the First District observed that the test of the continuing violation doctrine is whether the violations constitute "a continuing pattern and course of conduct" or "unrelated discrete acts." Id. at 344 (citing Joseph v. J.J. Mac Intyre Companies, LLC (N.D. Cal. 2003) 281 F.Supp.2d 1156, 1161.) This distinction is also helpful in discerning the difference between the "continuing violation" versus the "continuous accrual" doctrines.

Here, in wholly rejecting application of the continuing violation doctrine to the UCL, the Second District remarked that,

> [R]outinely billing and collecting for 'test' copies is not the type of harassing and egregious conduct the continuing violation doctrine is designed to deter. ***No comparable policy considerations compel applying the continuing violations doctrine to violations of the UCL.***" Slip Opn., p. 12. [emphasis added]

But there is no authority to support the Court of Appeal's limiting of the continuing violation doctrine to "harassing and egregious" conduct. The Second District's suggestion that application of the continuing violation doctrine is only warranted if a heightened degree of egregious conduct is involved is inconsistent with the UCL's liberal consumer protections. Community Assisting Recovery, supra, 92 Cal.App.4th at 494. (recognizing that the UCL imposes strict liability and "it is not necessary to show that the defendant intended to injure anyone.")

Given that the UCL is available to remedy "unlawful" and "unfair" conduct, along with business practices that constitute a "pattern of ongoing conduct," it would work an absurd result if plaintiffs alleging employment discrimination or unfair debt collection, could timely assert and recover for the underlying statutory violations (*e.g.,* FEHA, Titile VII, or FDCPA) pursuant to the continuing violation doctrine, but be barred pursuant to California's UCL.[6] Accordingly, the Second District's blanket refusal to apply the

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[6] For purposes of this discussion, it is assumed that the relief sought is indeed recoverable restitution pursuant to the UCL.

continuing violation doctrine to the UCL, in ***any*** context, ignores the realities of a defendant's misconduct in favor of a single bright line rule.

Federal courts also substantially rely on the continuing violation doctrine, albeit typically in the realms of trademark infringement, securities, patent, and antitrust. One relevant case, Suh v. Yang (N.D. Cal. 1997) 987 F.Supp. 783, recognized in the UCL context the notion of multiple claims, some of which occurred within the statute of limitations and some of which were outside the statute. In Suh, the plaintiff alleged trademark infringement and unfair competition claims based on defendant's use of "Kuk Sool Won" and "Wold Sook Sool Won Association" logo marks that were first used approximately nine years prior to the filing of the complaint. Id. at 795.

Rejecting defendant's statute of limitations defense, the district court found that plaintiff was subjected to a series of multiple wrongs in that the allegedly infringing display of defendant's service name on products and advertisements could create a separate cause of action for unfair competition and trademark infringement. Id. at 796. Specifically, the Suh court stated,

> [p]laintiff's claims for unfair competition would not be barred by the four-year statute of limitations ***since the alleged wrongs*** (i.e., the wrongful use and dilution of Suh's service marks) ***are multiple, continuous acts, and some of these acts have occurred within the limitations period.*** Id. at 795. [emphasis added]

The district court concluded that the plaintiff's claims involved repeated acts

of wrongful appropriation, each creating "a separate cause of action for unfair competition and trademark infringement." Id. at 796. Without using the term "continuous accrual" or "continuing violation," Suh involved multiple, continuous acts, some within and without the limitations period, and allowed recovery for acts within the statutory period pursuant to the UCL.[7]

The Ninth Circuit likewise allowed recovery pursuant to the UCL for "multiple, continuous acts," some of which occurred within the limitations period in the securities case of Betz v. Trainer Wortham & Co., Inc. (2007) 236 Fed.Appx. 253. After recognizing that, under California law, it is an open question whether the delayed discovery rule applies to the UCL or whether the statute of limitations begins to run as soon as the claims accrue, the Ninth Circuit stated:

> Regardless, a claim for unfair business practices is not barred by the four-year statute of limitations if the alleged wrongs are "***multiple, continuous acts***," some of which occurred within the limitations period. Id. at 256 (citing Suh, supra). [emphasis added]

Relying on Betz's contention that the defendants made continuous

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[7] Justice Rubin characterizes Suh as a "continuous accrual" case, Slip Opn. - Dissent, pp. 9-10, but that conclusion is not readily apparent because it is not clear that Suh allowed recovery for infringement occurring ***prior to*** the four years before commencing suit. The distinction is necessary to decipher whether Suh is an example of the continuous accrual or continuing violation doctrine.

misrepresentations from 1999 until June 2002, the court declined to find the plaintiff's unfair business practices claims untimely as a matter of law. Id. *See also,* Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 380, 102 S.Ct. 1114, 71 L.Ed.2d 214 (recognizing and applying the continuing violation doctrine in the Fair Housing Act context).

Thus, the Second District's outright rejection of the "continuing violation" doctrine to the UCL is problematic for future litigants with different fact scenarios who might, except for the Second District's opinion, seek to avail themselves of the "continuing violation" doctrine. Beyond the confines of this case, the Second District's rejection of the "continuing violation" doctrine negatively impacts UCL litigants by unconditionally barring recovery for prior misconduct outside, but closely related to misconduct occurring within the statutory period, that would be recoverable except that a UCL claim is implicated. The purposes of the UCL necessitate requiring more innovative approaches which recognize the varied forms of misconduct to be remedied.

V. Fundamental Consumer Protection And Fair Competition Policies Of The UCL Would Be Frustrated By The Court Of Appeal's Holding That The First Violation Establishes Accrual.

The impact of the Second District's holding that, when a defendant's wrongful acts cover a period of time, a UCL cause of action accrues only once at the time of the initial act is far-reaching. If the statutory clock begins to run

when the first violation occurs, irrespective of a defendant's subsequent repeated misconduct, then plaintiffs who do not bring UCL claims within four years will lose the ability to seek recourse forever. If the first violation establishes accrual without regard to subsequent, repeated violations, then defendants who "escape" the statutory time frame will be given *carte blanche* to continue to invade a plaintiff's rights indefinitely. The effects would be devastating on consumers, employees, the elderly, and other members of the public who are most vulnerable in our society.

For example, in the consumer context, if hypothetically, a creditor repeatedly charged fraudulent amounts to consumers' credit cards, and the first violation was the only one that could be sued upon, then consumers who paid the longest and suffered the most would be left without any remedy at all, while new consumers could recover for the violations they suffered. Both sets of consumers suffered the same violation ***during the limitations period***, but they will be treated differently in that those subjected to wrongdoing more than four years ago will be completely denied recovery while more recent victims can sue.

A. The Unprecedented Use Of Plaintiff's Discovery.

The Second District's ruling presents a paradox. Unwilling to recognize that a plaintiff's inability to discover wrongdoing "extends" the

running of the statutory clock, the Second District uses a plaintiff's discovery to "cut short" the running of the statutory clock. As a result, the Second District has employed an unprecedented sort of ***reverse*** "delayed discovery" rule against Plaintiff to preclude recovery entirely.

Assuming *arguendo* that the Second District properly refused to extend the delayed discovery doctrine to the UCL, then a plaintiff's knowledge should be irrelevant to calculating the statute of limitations - neither improving, nor impeding a plaintiff's access to the courts. In addition, the Court of Appeal speculatively imputes plaintiff's knowledge of a single wrongful act, coupled with the decision not to seek judicial recourse, as consent to unforseen repeated wrongful acts occurring more than four years into the future.

In the employment context, if a non-exempt employee worked off-the-clock for his employer during the entirety of his employment, but never received wages for all hours worked, a savvy defendant would argue that the employee learned of his claims when he received his first pay check. If that same employee waits until he is terminated six years later to assert claims for his off-the-clock hours, his claims would be barred as untimely and he would be unable to recover unpaid wages - ***even for those very last pay checks which clearly fell within the statutory time frame*** - clearly frustrating the purpose of the UCL.

California public policy affirms the fairness of allowing individuals to bring suit where they remain victims of unfair business practices. The UCL does not proscribe specific acts, but broadly prohibits "any unlawful, unfair or fraudulent business act or practice" and being framed in the disjunctive, a business act or practice need only meet one of the three criteria to be considered unfair competition. Daugherty v. American Honda Motor Co., Inc. (2006) 144 Cal.App.4th 824, 83, 51 Cal.Rptr.3d 118. A UCL action is equitable in nature; damages cannot be recovered. Under the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution. Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1133, 131 Cal.Rptr.2d 29. This distinction 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. Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 453, 153 Cal.Rptr. 28. Given that knowledge is not a required element, using plaintiff's discovery of wrongdoing to bar a UCL cause of action as untimely would be antithetical to its purpose.

B. The Practical Effect Of Accrual At The First Occurrence.

Reminiscent of this Court's pronouncement in Howard that causes of action are not barred merely because similar claims could have been made at

earlier times, Justice Rubin correctly opined in his dissent that "The injunctive relief authorized by the UCL should not be automatically unavailable following recent misconduct merely because the first unfair practice took place several years earlier." Slip Opn.- Dissent, p. 7.

Under the Second District's holding, the employee who works off-the-clock without receiving full and proper compensation pursuant to California wage laws would be required to make a choice: either file a lawsuit against his current employer immediately in order to protect his rights against the possibility of future transgression; or waive the ability to use the UCL to vindicate his rights if his employer violates those same wage laws some time four years into the future. These are not attractive options for an employee whose livelihood depends on wages and is incompatible with the broad protections afforded by the UCL's prohibition against "unlawful, unfair, or fraudulent" business acts or practices.

If the Second District's holding is affirmed, the practical effect will be to require litigants to run to court at the first instance of misconduct in order to preserve their rights for fear that failing to do so will result in waiver should the same conduct ever repeat itself over four years into the future. Under the Second District's rule, for those individuals who allow four years to lapse after being subjected to misconduct without filing suit, their consent to such an

invasion of their rights by that actor would be implied indefinitely.

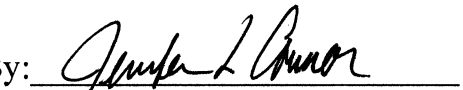
CONCLUSION

The complaint before this Court is timely and easily satisfies the UCL statute of limitations pursuant to traditional principles governing accrual of claims, generally, and the continuous accrual doctrine, specifically. Accordingly, Plaintiff respectfully asks the Court to reverse the judgment of the Court of Appeal and remand with directions to enter an order summarily overruling Defendant's demurrer. To the extent the operative complaint is held untimely or deficient, Plaintiff respectfully asks this Court to reverse the judgment of the Court of Appeal and remand with directions to allow Plaintiff to file an amended complaint in the trial court seeking to satisfy the guidelines announced in this Court's opinion.

Date: November 18, 2010

Respectfully submitted,

WESTRUP KLICK, LLP

By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1))

I, Jennifer L. Connor, an attorney at law duly admitted to practice before all the courts of the State of California and an associate attorney of the law offices of Westrup Klick, LLP, attorneys of record herein for plaintiff, appellant, and petitioner Jamshid Aryeh, hereby certify that this Opening Brief On The Merits document (including the memorandum of points and authorities, headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of Rule of Court 8.520(c)(1) in that it is set in a proportionally-spaced 13-point typeface and contains 11,810 words as counted by the Corel Word Perfect version 10 word-processing program used to generate this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed November 18, 2010 in Long Beach, California.

Jennifer L. Connor

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