Case No.:_____

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

JAMSHID ARYEH,
Plaintiff and Appellant,

vs.

CANON BUSINESS SOLUTIONS, INC,
Defendant and Respondent.

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

PETITION FOR REVIEW

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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

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TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner Jamshid Aryeh seeks review of a published opinion by the Court of Appeal, Second Appellate District, Division Eight, filed June 22, 2010 (Exhibit "A"). No rehearing was requested.

QUESTION PRESENTED FOR REVIEW

This case presents the following question for review:

In a UCL case, where the same discrete wrongful act giving rise to damage occurs repeatedly, does the statutory clock start only once when plaintiff first discovers the wrong or does it run anew each time a defendant invades plaintiff's rights and causes injury?

WHY REVIEW SHOULD BE GRANTED

This case presents the important and unsettled legal issue about how to apply the statue of limitations in a *Bus. & Prof. Code* § 17200 *et seq*. (Unfair Competition Law ("UCL")) case involving multiple, repeated wrongful acts, whereby each separate discrete act produces immediate and separate injury, occurring both within and outside the statute of limitations. Review is warranted for two primary reasons: First, resolving the question of whether the UCL statute of limitations begins to run on the first-occurrence of actionable

wrong or runs anew with each subsequent free-standing violation greatly impacts the extent to which victims of unfair business practices can vindicate their rights. Although the issue is sparse in the context of the UCL, it is germane to contract disputes, infringement litigation, and actions governed by Cal. Code of Civ. Pro. § 338(a). It is also consistent with the UCL's consumer protection scheme that anticipates remedying recurring conduct, (i.e., "unlawful, unfair, or fraudulent business practices") as well as single-isolated offenses (i.e., "unlawful, unfair, or fraudulent business act").[1]

Second, conflicting precedent shows judicial confusion as to the role a plaintiff's discovery of wrongdoing should have, if any, in applying the UCL statute of limitations. In a case that disavowed application of equitable tolling and delayed discovery, the Court of Appeals still used Plaintiff's knowledge, not to extend accrual, but rather to bar claims based on independent conduct that occurred within the limitations period. Given that a UCL claim is not dependent on plaintiff's knowledge, the Second District's offensive use of a plaintiff's discovery of wrongdoing is unprecedented.

The impact of the Second District's holding that, when a defendant's

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[1]The 1992 Amendment to *Bus. & Prof. Code* § 17200 changed the formerly plural term "practices" to the singular term "act" preceded by the singular modified "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.)

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 will lose the ability to seek recourse forever. If the first violation is the only one that can be sued upon, then defendants who "escape" the statutory time frame will be given *carte blanche* to continue to invade a plaintiff's rights indefinitely. 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 newer 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.

As Justice Rubin wrote in his ten-page dissenting opinion, "The injunctive relief authorized by the UCL should not be automatically unavailable following recent mis-conduct merely because the first unfair practice took place several years earlier." Slip Opn.- Dissent, p. 7. Based on

the importance of the unsettled legal question raised and the need to secure uniformity of decisional authority applying the UCL's statute of limitations, Plaintiff respectfully requests that this Court grant review. CRC, Rule 8.500(b)(1).

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 preceding 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. 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

[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

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.

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.

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]

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 instructed 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 a continuing violations 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 "re-started" each distinct time Canon invaded Plaintiff's rights and caused injury, the Second District held Plaintiff's UCL claims untimely.

DISCUSSION OF THE LEGAL PRINCIPLES

1. Plaintiff Petitions This Court To Address How To Apply The UCL Statute Of Limitations When The Same Discrete Wrong Occurs Repeatedly Within And Outside Of The Statute Of Limitations

Statutes of limitations serve to protect entities and persons from having to defend against stale claims and essentially seek to put the past to rest. If individuals let too many years 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. Generally speaking, 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, 806, 27 Cal.Rptr.3d 661. With respect to the unfair competition laws, the four-year period begins to run when a putative plaintiff has been subjected "to an 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, the alleged wrongful act and the resulting sustained injury are the "triggering events" that start the running of the statutory clock. The question remains, however, whether in the context of a continuing wrong in which the same offending act is repeated, does the UCL statutory clock begin to run only

once or anew with each offending act?

A. *Does The Statutory Clock Start Once Or Re-Start Each Time A Defendant Invades Plaintiff's Rights And Causes Injury?*

In concluding that only the first-occurrence of the wrongful conduct triggers the statutory clock, the Court of Appeals renders free-standing conduct occurring within the preceding four years (which would otherwise be actionable, but for the prior conduct) unrecoverable. Such a rule departs from traditional principles of measuring the statute of limitations and the doctrine of continuous accrual. 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.[3] Regardless of name, however, the majority rejected the proposition that when an "unfair, unlawful, or fraudulent conduct" recurs, a cause of action accrues ***each*** time a wrongful act occurs.

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[3] To the extent Plaintiff incorrectly labeled his theory, such is not fatal to seeking review. See, Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, 84-85, 14 Cal.Rptr.3d 893 (observing that "appeal of a judgment of dismissal after sustaining a demurrer without leave to amend requires the consideration of whether the allegations state a cause of action under any legal theory. Under these circumstances, new theories may be advanced for the first time on appeal."); Jones v. Tracy School District (1980) 27 Cal.3d 99, 109, 165 Cal.Rptr. 100 (considering equitable tolling doctrine not previously raised stating "We have, on occasion, allowed consideration of issues not previously raised by the parties where the facts necessary for their resolution were on record.")

Plaintiff asserts that the statutory clock not only starts at 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. Applied to the matter *sub judice*, Canon engaged in a new violative act under the UCL each time it overcharged Plaintiff for Test Copies. As plead 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***.

Foreshadowing Plaintiff's theory, the Northern District of California in, Suh v. Yang (N.D. Cal. 1997) 987 F.Supp. 783, recognized the notion of multiple UCL claims, some of which occurred within the statute of limitations and some of which were outside the statute. Slip Opn.- Dissent, p. 9 (dissenting opinion that "Using legal jargon, the present case is on 'all fours' with Suh.") In Suh, the plaintiff alleged trademark infringement and unfair competition claims based on defendant's use of "Kuk Sool Won" and "World Kook Sool Association" logo marks that were first used approximately nine years prior to the filing of the complaint. Suh, supra, 987 F.Supp. 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 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.

Outside of the UCL, California courts have long acknowledged 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. This Court, for example, applied continuous accrual to 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 821-822

(stating that those causes of action are not barred merely because similar claims could have been made at earlier times as to earlier violations.) 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.

Likewise, the Courts of Appeal have recognized the applicability of continuous accrual in cases involving public entities and breach of contract. 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 the Fourth District found that plaintiff's claims were subject to the continuing accrual rule and held that the statute of limitations began to run on each date that the redevelopment agency's payments were actually due. Citing Howard, the appellate court held "[I]n instances of long-standing statutory violations, the continuing accrual rule effectively limits the amount of retroactive relief a plaintiff or petitioner can obtain to the benefits or obligations which came due within the limitations period." Id. at 1296. See also, Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004) 116 Cal.App.4th 1375 (affirming application of the continuous accrual rule to contractual arrangements with periodic payments, including an oil and gas operating agreement).

The Second District also recognized the continuous accrual doctrine in

State ex. rel. Metz v. CCC Information Services, Inc. (2007) 149 Cal.App.4th 402, 57 Cal.Rptr.3d 156 and Tsemetzin v. Coast Federal Savings And Loan Association (1997) 57 Cal.App.4th 1334, 67 Cal.Rptr.2d 726. In Metz, the Court observed that:

> When an obligation of liability arises on a recurring basis, ***a cause of action accrues each time a wrongful act occurs, triggering a new limitations period***. The continuing accrual rule has been applied in a variety of actions involving the obligations to make periodic payments under California statute or regulations. Metz, supra, 149 Cal.App. at 418. [emphasis added]

The Metz court, nonetheless, declined to apply continuing accrual to the facts before it because Metz's action did not involve recurring obligations, but rather fraudulent statements arising out of a single insurance claim resolved prior to the limitations period. Id. In Tsemetizin, the Court held 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. Tsemetzin, supra, 57 Cal.App.4th at 1344. 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.

Like traditional principles governing the statute of limitations, the

continuing accrual doctrine examines the same triggering events: the act and resulting injury. As Justice Rubin stated, continuous accrual "Acknowledges 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] Like any statute of limitations, it gives plaintiff a reasonable time to seek redress for his inflictions and holds defendant accountable ***each*** time it acts. Thus, continuous accrual is nothing more than the normal application of a statue of limitations measured against a series of acts, rather than one individual act.

B. *Does Plaintiff's Earlier Discovery Of The Wrong Outside Of The Limitations Period Bar Bringing Claims Arising From Conduct Within The Limitations Period?*

The Court of Appeal's pronouncement presents a paradox. On the one hand, the Second District disapproves of delaying accrual of a UCL cause of action until plaintiff has knowledge of the wrongful act giving rise to a claim. On the other hand, plaintiff's knowledge will cut short accrual and extinguish any UCL claim arising from a wrongful act after the statutory period runs upon acquiring that knowledge. Assuming *arguendo* that only defendant's conduct governs the accrual of a UCL cause of action, then knowledge should be irrelevant to calculating the statute of limitations - neither improving, nor

impeding a plaintiff's access to the courts. In addition, it is speculative of the Court of Appeals to impute 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.

According to the Second District, however, plaintiff's discovery of wrongdoing will serve akin to a statute of repose: once four years has run since discovering conduct giving rise to a claim, future offending conduct will not be actionable and resulting injury will be without remedy.

Relying on Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891, 117 Cal.Rptr.2d 331, the Second District states that "the [UCL] cause of action accrues when the defendant's conduct occurs, not when the plaintiff learns about the conduct." Slip Opn., p. 4 (quoting Snapp & Associates, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891). In application, however, the Second District explicitly reasoned that Plaintiff's cause of action accrued at the time of the initial wrongdoing, irrespective of subsequent repeated bad acts, ***because Plaintiff had knowledge*** of the wrongdoing. Slip Opn., p. 9. The Second District found it imperative that "Appellant ***knew*** 'shortly after' he entered into the second contract in February 2002 of Canon's alleged overcounting of copies and overcharging for them" and "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." Slip Opn., pp. 9 and 11-12. [emphasis added]

In reaching its conclusion that a cause of action for ongoing conduct accrues at the time of commencement, the Second District found Snapp controlling. Slip Opn., p. 8. But Snapp concerns the delayed discovery rule, not continuing violation or continuing accrual doctrines. Snapp, supra, 96 Cal.4th 884 (discussing delayed discovery, but no where using the terms "continuing violation" or "continuing accrual."); 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 case of Betz v. Trainer Wortham & Co., Inc. (9th Cir. 2007) 236 Fed. Appx. 253 is instructive. 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.

Thus, the Ninth Circuit also did not find Snapp controlling when presented with a UCL statute of limitations defense in a continuous misrepresentations case, some of which fell within the four-year period.

The conduct at-issue in Snapp was a former employee and competitor's

alleged misappropriation of trade secrets and client information that created a dispute over commissions earned from insurance brokered on those accounts. The "ongoing" wrongful conduct that is referred to in Snapp is "solicitation of [Snapp's] former employees and customers" - not the collection of recurring fees. Snapp, supra, 96 Cal.App.4th at 892. Significantly, 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. To the extent 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 - or any exception to the general rule of accrual of a cause of action - it is irrelevant.

Analogizing to Snapp, the Second District uses "knowledge" to cut short accrual and defeat claims that otherwise would be timely without it. Specifically, the Second District used Plaintiff's knowledge of being charged

for Test Copies in February 2002 to bar otherwise timely UCL cause of action for thirteen (13) instances of alleged misconduct falling within the statutory period. In short, the Second District has pronounced that the statutory clock for a UCL claim begins to run when the misconduct and injury occur ***or*** when Plaintiff learns of the misconduct - ***whichever happens first and irrespective of the later continuing misconduct.***

2. The Court Of Appeal's Decision Reflects Confusion In The Courts About The Role A Plaintiff's Knowledge Should Have, If Any, In Applying The UCL Statute Of Limitations

Although the Second District rejects use of the "delayed discovery" rule to extend the statute of limitations on a UCL claim, it proposes essentially to use a plaintiff's discovery to shorten the statute of limitations. The Court of Appeal's decision is unique in that it is a sort of ***reverse*** "delayed discovery" rule. 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. Pursuant to this theory, once four years after learning of a violator's wrongful act lapses, future misconduct is forever immunized.

Typically, the discovery rule is a doctrine used by plaintiffs to save claims in which the conduct occurred outside the statutory time frame. As this Court explained,

> Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' An important exception to the general rule of accrual is the 'discovery rule,' which ***postpones accrual of a cause of action until plaintiff discovers, or has reason to discover, the cause of action***. Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal.4th 623, 634, 54 Cal.Rptr.3d 735. [emphasis added]

The rationale for the delayed discovery rule is that, in certain circumstances where plaintiffs, through no fault of their own, are unaware of defendant's misconduct, then plaintiffs should not be penalized and barred from vindicating their rights. Delayed discovery provides an exception such that, for misconduct occurring outside of the statutory time period and for which plaintiff was unaware, the start of the clock is deferred until plaintiff gains actual knowledge (or reasonable notice) of defendant's wrongdoing.

This Court previously recognized the current split in appellate authority regarding use of the delayed discovery rule to the UCL. See, Grisham, supra, 40 Cal.4th at 635, fn. 7, 54 Cal.Rptr. 3d 735 (observing that the discovery rule is "currently not settled under California law.")[4] Recently, in Broberg v. Guardian Life Ins. Co. Of America (2009) 171 Cal.App.4th 912, the Second

[4] In Grisham, the Court assumed for purposes of its discussion that the delayed discovery rule applies to unfair competition claims, but noted the appellate split citing, Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891, 117 Cal Rptr.2d 331 (discovery rule does not apply) and Massachusetts Mutual Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 1295, 119 Cal.Rptr.2d 190 (discovery rule "probably" applies). Grisham, supra, 40 Cal.4th at 635, fn.7, 54 Cal.Rptr.3d 735.

District tackled the delayed discovery issue and held that a section 17200 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, supra, 171 Cal.App. 912, 921, 90 Cal.Rptr.3d 225.

In summary, the delayed discovery doctrine is a conflicted rule which may supplement, but does not govern traditional accrual standards. Moreover, a plaintiff's discovery has generally been used to toll the statute of limitations on earlier wrongful acts to enable a plaintiff to seek recovery for them. Here, however, where Plaintiff is not even seeking to recover for wrongful acts occurring outside of the statutory period, the Second District has employed an unprecedented sort of reverse discovery rule against plaintiff to preclude recovery entirely.

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, 837, 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, 1144, 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.[5]

Recently, the Fourth District examined the UCL limitations period in a case where appellant claimed the UCL cause of action accrued not in 2003 when she received an invalid Notice of Intent to Dispose of Motor Vehicle ("NOI"), but rather in 2007-2008 when creditors sought deficiency judgment against her. Salenga v. Mitsubishi Motors Credit Of America, Inc. (2010) 183 Cal.App.4th 986, 996, 107 Cal.Rptr.3d 836. In Salenga, appellant also disavowed reliance on delayed discovery or equitable tolling doctrines and alleged that she did not have a right to sue until an adverse action was brought against her. Id. at 997. Significantly, the creditors responded:

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[5] Since the UCL is an equitable doctrine, if a court believes a plaintiff sat on his or her rights, other equitable considerations and defenses, such as laches remain available, if properly asserted. Barndt v. County of Los Angeles (1989) 211 Cal.App.3d 397, 403, 259 Cal.Rptr. 372.

> The gist of the cross-complaint is the failure to send a proper NOI. The UCL cause of action ***accrued upon the first loss of money or property*** as a result and ***does not re-accrue*** upon later harm arising from the same wrong. Id. at 995. [emphasis added]

The Fourth District rejected the argument that the only relevant time period for assessing accrual of appellant's statutory cause of action is 2003, when the defective NOI was sent. Id. at 1001. Having found that appellant demonstrated the possibility of cure and should be allowed to re-plead, the Fourth District reversed the trial court's denial of leave to amend. Id. at 1002-1003.

Practically speaking, if the discovery rule could be used against plaintiffs, then a defendant could avoid liability for bad acts or practices that extend beyond four years so long as its conduct was not hidden. Assuming an 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 will be barred as untimely and he will be unable to recover unpaid wages - ***even for those very last pay checks which clearly fell within the statutory time frame.***

If a plaintiff's discovery of a wrong outside the statutory period will serve to extinguish otherwise actionable claims arising during the statutory

period, then the statute of limitations will insulate violators from suit simply because they have committed multiple violative acts continuously and notoriously for more than four years. Certainly, such an interpretation would be inequitable and turn the intent behind having the UCL statute of limitations on its head.

CONCLUSION

The Court should grant review to clarify that the traditional rules of accrual apply to the UCL statute of limitations. In a case that disavows delayed discovery and tolling doctrines, the Court of Appeal's decision presents a very real risk that knowledge will be used against plaintiffs to extinguish future claims arising from same repeated discrete acts and grant impunity to defendants who escape the statutory period. Petitioner respectfully asks the Court to grant review to resolve important questions and clarify conflicting decisional authority concerning the ability of California consumers to vindicate their rights under the UCL.

Date: July 29, 2010

Respectfully submitted,

WESTRUP KLICK LLP

By:_____
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Attorneys for Plaintiff, Appellant, and Petitioner Jamshid Aryeh

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 Petition For Review 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 8.504(d)(1) in that it is set in a proportionally-spaced 13-point typeface and contains 5,606 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 July___, 2010 in Long Beach, California.

_____
Jennifer L. Connor