Case No. S184929

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

REPLY IN SUPPORT OF 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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SUMMARY OF ARGUMENT

Although Plaintiff Jamshid Aryeh ("Plaintiff") contends that the matter *sub judice* was wrongly decided, even more significant is the concern that the Court of Appeal's rationale has pervasive adverse ramifications for future UCL litigants. This Court should review the following rulings made by Court of Appeal in its published decision, *Aryeh v. Canon Business Solutions, Inc.* (June 22, 2010) No. B213104: 1) the UCL statute of limitations starts ***only once at the first occurrence*** of wrongdoing, irrespective of a defendant's independent and subsequent repeated wrongful acts. As a natural consequence, this means that after four years since the first occurrence lapses without suit, future repeated misconduct is immunized and the "continuous accrual" doctrine does not apply; 2) a plaintiff's ***knowledge*** of wrongdoing serves to ***extinguish*** otherwise actionable claims occurring independently four years after the first occurrence lapses. Here, the use of Plaintiff's knowledge of wrongdoing six years beforehand to bar his UCL claim arising from acts that occurred within the four year period preceding the litigation is an unprecedented sort of reverse "delayed discovery" rule; and 3) the "continuing violation" doctrine ***never*** applies in a UCL case.[1]

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[1] The proclamation by Defendant Canon Business Solutions, Inc. ("Defendant") that it would win on legal grounds ***not*** considered by the Court of Appeal had it considered them, and thus, this case should not be reviewed because it will be eventually dismissed, *see*, Answer, pp. 24-29, is self-serving and irrelevant.

The practical effect of the Court of Appeal's holding that the UCL statute of limitations accrues only once at the first occurrence of wrongdoing is to require litigants to run to the courthouse to preserve their rights against speculative future misconduct and grant immunity indefinitely to violators who "escape" the statutory time frame without suit. Additionally, the Court of Appeal's application of Plaintiff's knowledge to render a UCL claim untimely and its outright rejection of the "continuing violation" doctrine is unprecedented. The California Attorney General shares the position that the Court of Appeal's rulings warrant this Court's review explaining:

> The Attorney General respectfully requests that the Court grant the petition to ensure that timely consumer protection actions are allowed to proceed, and to address the important issues whether the delayed discovery rule and continuing violation doctrine apply to UCL cases. Without this Court's guidance, both private plaintiffs and public prosecutors will likely face obstacles in litigating against bad actors, in particular those who have been flouting the law for many years and who are the most effective at concealing their wrongdoing.

See, Letter Supporting Petition For Review Or, Alternatively, Supporting Request For Depublication, p. 5, dated August 30, 2010, signed by Deputy Attorney General Michele R. Van Gelderen. For the reasons discussed in the Petition and below, review should be granted.

ARGUMENT

1. Courts And Litigants Would Benefit From Review Because The Parties Agree That The Law Governing Application Of The UCL Statute Of Limitations To Conduct Occurring Within And Outside Of The Limitations Period Is "Sparse."

Plaintiff and Defendant agree that the law with respect to whether a UCL claim based upon conduct occurring within and outside the limitations period is time-barred is "sparse." *See*, Petition, at p. 2; Answer, at p. 13. In fact, Defendant suggests: "This is an ***understatement*** – there are only ***two*** reported decisions by California courts addressing the issue, and they are (i) the decision in ***this case, and*** (ii) the decision principally relied upon by the Court of Appeal in reaching its determination in this case, ***Snapp***." Answer, at p. 13. [emphasis added] Plaintiff disagrees that *Snapp* is controlling for the reasons discussed in his Petition and *infra*, and accordingly, this is a case of first-impression. Despite the dearth of precedent, the fact scenario of recurring acts of misconduct is familiar to the UCL statute that contemplates protecting consumers and competitors from recurring "unlawful, unfair, or fraudulent business practices" as well as single acts of "unlawful, unfair, or fraudulent business" misconduct. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.App.4th 553, 570, 71 Cal.Rptr.2d 731, 742.

2. Plaintiff, The Dissent, And The Ninth Circuit Disagree That The *Snapp* Case, The Court Of Appeal's Only Cited Supporting Precedent, Is Controlling.

Plaintiff's case involves separate and distinct repeated acts of alleged wrongdoing; while *Snapp* involves a single act of wrongdoing. 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 states that "We find *Snapp* to be controlling." Slip Opn., p. 8. But Defendant's and 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; Answer, p. 14, fn. 3. 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 & Associates Ins. Services, Inc. v. Robertson* (2002) 96 Cal.App.4th 884, 888-889, 117 Cal.Rptr.2d 331. 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. In fact, the Second District's own observation about *Snapp* that, "The trial court rejected the 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 (and misconduct more akin to misappropriation as opposed to collection of fees) occurred. That confusion is further compounded by the fact that the *Snapp* court in its discussion of the applicable statutes of limitations is actually addressing ***two (2) separate statues*** both with a four-years limitation period, but measured differently - the UCL ***and*** the fraudulent transfer claims. *Snapp, supra*, 96 Cal.App.4th at 891. Regardless, along with Justice Rubin's dissent and the Ninth Circuit, Plaintiff posits that *Snapp* does not discuss "multiple, continuous acts, some of which occurred inside the limitations period" and is silent as to the "continuing violation" and "continuing accrual" doctrines. *See, Betz v. Tranier Wortham & Co.* (9th Cir. 2007) 236 Fed. Appx. 253, 256; Slip Opn. - Dissent, p. 8. Thus, *Snapp* is not controlling and cannot support the Court of Appeal's decision.

A. *Snapp* Is Factually Inapposite.

There are persuasive factual and legal 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 former employee, Gwin. While defendant Robertson may have purchased all of former Snapp employee Gwin's "book of business," Snapp was interested in the wrongful conversion of its 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.

B. *Snapp* Is Legally Inapposite.

Legally, conversion is an intentional tort that consists of the wrongful exercise of dominion or control over personal property, which so seriously interferes with another's rights to control the property that the converter is required to pay the other the full vale of the property as damages for the conversion. *See*, Restatement 2d, Torts § 222A. 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 - *e.g.*, when defendant Robertson first began his brokering activity on the TRG accounts in 1993; when defendant Robertson purchased the TRG accounts from Gwin in 1994; or when the arbitrator adjudged the accounts property of Snapp in 1995? *Id.* at 891-892. 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, Civ. 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]

Even assuming *arguendo* that defendant Robertson's misappropriation could be construed as "continuing" or "on-going" conduct, for purposes of the statute of limitations, such is treated as a "single claim." Similar language is

noticeably absent from Section 17208 of the *Business & Professions Code* proscribing the UCL's four-years limitation 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-years statute of limitations on the ***fraudulent transfer claim*** (Uniform Fraudulent Transfer Act, Civil Code §3439.01), ***not the UCL***. As the *Snapp* court noted, the fraudulent transfer claim "must be brought 'within four years after the transfer was made or the obligation was incurred ***or***, ***if later***, within one year after the transfer or obligation ***was or could reasonably have been discovered by the claimant***." *Id.* at 891 (citing Civil Code § 3439.09(a) and *Monastra v. Konica Business Machines, U.S.A., Inc.* (1996) 43 Cal.App.4th 1628, 1645, [51 Cal.Rptr.2d 528]). [emphasis added, citation added] In other words, the limitations period for fraudulent transfer is four years from when the conduct occurs or one year after the transfer was or could reasonably have been discovered, whichever is later. Since the UCL also has a four-years statute of limitations, the *Snapp* court's observation that the UCL accrues irrespective of whether plaintiff knows of its accrual or not, can be understood as being distinguished from the fraudulent transfer claim discussed immediately

preceding it. Thus, because of the inclusion of the fraudulent transfer cause of action, the *Snapp* court was required to analyze when Snapp could have discovered its claims notwithstanding that a plaintiff's discovery is irrelevant to the UCL. Considered in connection with the factual conversion of accounts, along with the non-UCL claims alleged, *Snapp* is a single violation case, rather than a case of multiple, repeated violations occurring within and without the statutory period.

In contrast to *Snapp*, the UCL is the ***only*** claim alleged in Plaintiff's case. As a result, the Second District's ruling that the UCL statute of limitations starts only once at the first occurrence and that Plaintiff's knowledge bars independent wrongful acts occurring within the four-year statutory period is contrary to the rules governing accrual and is erroneous. Accordingly, *Snapp* is not analogous, should not dictate the result in the matter *sub judice*, and renders the question presented for this Court's review one of first impression.

3. While The Question Presented For Review Is Encapsulated By The "Continuous Accrual" Doctrine, The Second District's Outright Rejection Of The "Continuing Violation" Doctrine To The UCL Further Supports Review.

Through his Petition, Plaintiff asks whether the UCL statute of limitations begins to run on the first-occurrence of actionable wrong or runs anew with each subsequent time a defendant invades a plaintiff's rights and

causes injury? *See,* Petition, pp. 1-2. The notion that the statutory clock runs anew with each violation is encompassed by the "continuous accrual" doctrine - which is distinct from the "continuing violation" doctrine. Justice Rubin, writing his dissent, describes the distinction as follows:

> A careful parsing of "continuing violation" and "continuous accrual" reveals more than a semantical difference. The former describes what is essentially a fiction: a wrong committed sometime in the past will be deemed to have also been committed later if it is closely connected with more recent misconduct. The original violation will be treated as continuing even if the earlier act is completed. Continuous accrual is different. Rather than extending the impact of prior conduct, it 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***. Witkin describes the rule as follows: "In several types of cases it has been held that, where a right or obligation is continuing, successive causes of action to enforce it continuously accrue, and the bar of the statute can only be set up against those causes on which the period has run." (3 Witkin Cal. Procedure, *supra*, Actions § 669, p. 886) *See,* Slip Opn. - Dissent, p. 5. [emphasis in original]

Here, Plaintiff expressly stated, and the Second District acknowledged, that he seeks recovery for only the thirteen (13) charges occurring within the four years preceding the filing of the suit - not the entire seventeen (17) instances of charges beginning six years earlier. Slip Opn., p. 4. Plaintiff has never sought recovery for any charges outside the four-year statutory period. *See,* Appellant's Appendix Of Documents On Appeal ("App.") p. 127 (Second Amended Complaint ("SAC") ¶ 15. Further, Plaintiff consistently argued that

his UCL claim "does not require reliance on any acts outside of the statutory time frame because each violation within the limitations period is independently actionable and starts its own limitations clock." App., p. 209-210 (Opposition To Demurrer To SAC, p. 11-12). Significantly, the Court of Appeal understood Plaintiff's contention and considered it:

> 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., p. 6. [emphasis added]

By holding 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," *see*, Slip Opn., p. 6, the Second District ***considered and rejected*** Plaintiff's contention and by implication rejected, while not in name, at least in principal, the "continuing accrual" doctrine.

To be clear, Plaintiff requests review of whether the UCL statute of limitations runs only on the first-occurrence of an actionable wrong or runs anew with each subsequent free-standing violation - a question encapsulated by the "continuous accrual" doctrine. Nonetheless, 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. For example, as acknowledged by the Second District, in *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 345, 95 Cal.Rptr.3d 880, the court permitted recovery for acts outside the statutory period for unlawful debt collection practices pursuant to the "continuing violation" doctrine. The rationale was that because "the harassing phone calls were a continuing course of conduct that extended into the limitations period, plaintiff could recover under the continuing violations doctrine ***for all of the violations that occurred during those calls.***" *Komarova, supra*, 175 Cal.App.4th at 345. [emphasis added]

In rejecting application of the "continuing violation" doctrine to the UCL, the Second District commented 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 simply no authority to support the Second District's limiting of the "continuing violation" doctrine to "harassing and egregious" conduct and the Second District's outright refusal to apply it to the UCL is unjustified. On the contrary, it is quite conceivable that a UCL claim might be plead by plaintiffs in cases like *Komarova* or employment cases such as those where the "continuing violation" doctrine is recognized. *See, e.g., Yanowitz v. L'Oreal*

USA, Inc. (2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 111 Cal.Rptr.2d 87; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 19 Cal.Rptr.3d 29. The Second District's suggestion that application of the continuing violation doctrine to the UCL is only warranted if a heightened degree of egregious conduct is involved is inconsistent with the UCL's liberal consumer protections. *See, Community Assisting Recovery, Inc. v. Aegis Ins. Co.* (2001) 92 Cal.App.4th 488, 494, 99 Cal.Rptr.2d 721, 725 (recognizing that "the statute [section 17200] imposes strict liability. It is not necessary to show that the defendant intended to injury anyone.") Moreover, the Court of Appeal's statement that -

> The Legislature has expressed a goal that the UCL be a '***streamlined*** procedure for the prevention of ongoing or threatened acts of the unfair competition.' [citation omitted] A claim for recovery of past damages is not within the contemplation of the UCL, *see,* Slip Opn., p. 12 [emphasis in original]

- ignores the plain language of the 1992 Amendment that expressly states that the UCL reaches past conduct. Bus. & Prof. Code § 17203 (providing that "any person who engages, ***has engaged***, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction"). 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 conduct outside, but closely related to conduct

occurring within the statutory period that would be recoverable pursuant to the continuing violation doctrine except that a UCL claim is implicated.

4. The Second District's Holding Requires Litigants To Run To Court In Order To Preserve Their Rights Regarding Possible Future Misconduct That May Or May Not Occur.

The practical effect of the Second District's holding is 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. For those individuals who allow four years to lapse after being subjected to misconduct without filing suit, they have apparently given their consent to such an invasion of their rights by that actor indefinitely.

In the employment context, for example, a non-exempt employee who works in excess of eight (8) hours a day and/or forty (40) hours a week without receiving proper overtime compensation pursuant to California's 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 transgressions; or waive the ability to use the UCL to vindicate his rights if his employer violates those overtime statutes again some time four years into the future. These are not attractive options for an employee whose livelihood depends on wages and is counterintuitive to the broad protections

afforded by the UCL's prohibition against "unlawful, unfair, or fraudulent" business acts or practices.[2]

If contrary to the Court of Appeal's decision, however, the UCL's statutory clock runs anew ***each*** time a defendant invades a plaintiff's rights and causes separate injury, then the rights of a plaintiff to remedy and hold a defendant accountable each time it acts are balanced with the rights of a defendant to not have to defend against stale claims. Plaintiff's interpretation of the UCL's statute of limitations as applied to multiple, distinct, and repeated acts, is consistent with the "continuous accrual" doctrine, specifically, and the rules governing accrual of causes of action, generally.

CONCLUSION

For the reasons set forth herein and in the Petition, this Court should grant review.

Date: September 9, 2010

Respectfully submitted,

WESTRUP KLICK LLP

By: _____
Jennifer L. Connor
Attorneys for Plaintiff, Appellant, and Petitioner Jamshid Aryeh

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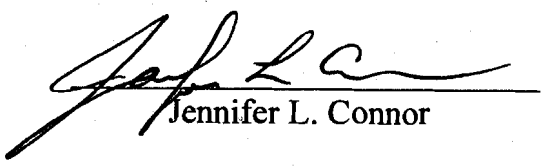
[2] Additionally, consumer cases like this Court's examination of *In re Tobacco II Cases* (2009) regarding standing in the UCL post-Proposition 64 would have dubious validity in light of the Second District's opinion, at least when the at-issue conduct is a long-standing practice. 46 Cal.4th 298, 305, 93 Cal.Rptr.3d 559 (alleging "decades-long campaign of deceptive advertising and misleading statements" about nicotine, tobacco use, and disease.)

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 Reply In Support Of 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 3,641 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 September 9, 2010 in Long Beach, California.



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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802-4524.

On September 9, 2010, I served the following documents described as **REPLY IN SUPPORT OF PETITION FOR REVIEW.** I served the documents on all interested parties, as follows:

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The documents were served by the following means (specify):

a. [X] **By United States Mail**. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above. I placed the envelope for collection and mailing, following our ordinary business practice. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county were the mailing occurred. The envelope or package was placed in the mail at Long Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: September 9, 2010

JAMES VELOFF