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

REPLY BRIEF ON THE MERITS

R. DUANE WESTRUP, ESQ. (58610)
MARK L. VAN BUSKIRK, ESQ. (190419)
JENNIFER L. CONNOR, ESQ. (241480)
WESTRUP KLICK, LLP
444 Ocean Boulevard, Suite 1614
Long Beach, California 90802-4524
(562) 432-2551 Telephone
(562) 435-4856 Facsimile

LINDA GUTHMANN KRIEGER, ESQ. (148728)
TERRENCE B. KRIEGER, ESQ. (162399)
KRIEGER & KRIEGER
249 East Ocean Boulevard, Suite 750
Long Beach, California 90802
(562) 901-2500 Telephone
(562) 901-2522 Facsimile

Attorneys for Plaintiff, Appellant and Petitioner Jamshid Aryeh

COUNSEL PRESS · (800) 3-APPEAL

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SUMMARY OF ARGUMENT

This case seeks to answer the fundamental question of: When do claims asserted under the Unfair Competition Law ("UCL"), California Business and Profession Code, Section 17200 *et seq*. accrue? To answer that question, this Court, like the Court of Appeal, must grapple with whether such a claim can accrue multiple times and what considerations, if any, delay or accelerate that accrual? In its decision affirming dismissal of Plaintiff's lawsuit as time-barred, the Court of Appeal rendered new and pervasive declarations of law about those issues that undoubtedly implicate the rights of future victims of unfair competition. All three of the statute of limitations doctrines presented for review - continuing violation, continuous accrual, and delayed discovery - were explicitly discussed by the Court of Appeal in formulating the majority and dissenting opinions. Aryeh v. Canon Business Solutions, Inc. (2010) 185 Cal.App.4th 1159, 111 Cal.Rptr.3d 211. Significantly, all three of the legal doctrines are discussed because they embody answers to the fundamental question of when UCL claims accrue. Thus, the analysis of this Court likewise requires consideration of all three legal doctrines.

Despite this Court's formulation of the three designated questions to be addressed and Plaintiff's Opening brief discussing them, Defendant's Answer brief's most striking feature is its failure to address the accrual doctrines.

First, Defendant focuses on its ambiguously drafted lease agreement so as to falsely frame Plaintiff's complaint as a "single, integrated, fraud-based UCL claim." Answer Brief On The Merits ("Answer Brief") p. 1. In so doing, Defendant ignores thorny issues of multiple accrual events and the continuous accrual doctrine. Irrespective of the extraneous contractual allegations raised by Defendant, Plaintiff challenges the recurring predicate acts of Canon charging him for Test Copies. Plaintiff unambiguously pleads that each time Canon invoiced him for "excess copy charges" that included Test Copies, it constituted a separate and distinct "unfair" business practice. (Appellant's Appendix "A.A.," pp.126-127, Second Amended Complaint ("SAC") ¶¶ 14, 16-17)) Here, wholly unrelated to contractual disclosures, Plaintiff's UCL claim alleges that Canon's "unfair" business practice of charging for Test Copies continued to re-accrue until November 2004.

Seeking to distance itself from the continuous accrual doctrine, Defendant's newly-minted factual interpretation has the disadvantage of also distancing it from the favorable judgment it secured from the trial and appellate courts. Underlying the Second District's ruling that a UCL cause of action accrues at the time of ***initial*** conduct, along with rejection of the continuing violation doctrine, is the assumption that the alleged conduct was on-going and covered a period of time. Aryeh, supra, 111 Cal.Rptr.3d at 216.

The Second District correctly articulated Plaintiff's contention that the statutory clock started not only at the time of the first occurrence, but re-started each time Defendant invaded Plaintiff's rights and caused injury. Id. Then, the Second District rejected Plaintiff's contention. Id. While review of that determination is important, it is the potentially far-reaching implications of the rationale used by the Court of Appeal that compellingly warrant this Court's consideration.

Defendant also urges that the Court refrain from addressing the continuing violation and delayed discovery doctrines because the Court of Appeal adopted sweeping pronouncements about their applicability to the UCL beyond the confines of Plaintiff's facts. Ironically, Defendant's position is ***precisely*** why Plaintiff urges that this Court's review is necessary. Contrary to Defendant's assertion, this Court is not being asked to render an advisory opinion as to any of the doctrines ordered for review. All three accrual doctrines - the continuing violation doctrine, the continuous accrual doctrine, and the delayed discovery doctrine - are presented by, and necessary to analyze, this case. Although Plaintiff asserts that the continuous accrual doctrine renders his lawsuit timely, the Court of Appeal makes pervasive pronouncements about the ability (or, inability) to apply the continuing violation and delayed discovery doctrines to UCL claims. Aryeh, supra, 111

Cal.Rptr.3d at 219 (denoting an entire section as "No Continuing Violation") and 216 (citing Snapp for the proposition that delayed discovery does not apply to the UCL). Each of these doctrines is explicitly and necessarily discussed in the Second District's decision. In any event, the Court can decide an issue not previously raised so long as the case presents the issue and the parties had reasonable notice and opportunity to brief and argue it. Cal. Rules of Court 8.516(b)(2); Cedars-Sinai Med. Center v. Superior Court (1998) 18 Cal.4th 1, 5-7, 74 Cal.Rptr.2d 248.

Another significant reason these doctrines should be addressed in unison is because the Court of Appeal has sanctioned use of knowledge in a whipsaw manner that can bar Plaintiff's claims as untimely. For example, on the one hand, Plaintiff learned of the purported fraud, but having failed to act on that knowledge and bring suit within four years, the Second District, citing Snapp, responded that Plaintiff's claim arising from recently repeated acts is untimely. Aryeh, supra, 111 Cal.Rptr.3d at 217-218. If the Court of Appeal's decision is not reversed, Defendant would be allowed to retain money paid by Plaintiff attributable to Test Copy charges, even though most of those charges were collected within four years preceding the lawsuit.

On the other hand, had Plaintiff lacked knowledge of the fraud and unwittingly paid for Test Copies for six years, and then, upon discovering the

deceit, had Plaintiff raced to court the next day to file his complaint, the Second District explains that Plaintiff's claim would also be untimely because, citing Snapp, the delayed discovery rule does not apply to the UCL. Aryeh, supra, 111 Cal.Rptr.3d at 216. Accordingly, Defendant would be allowed to retain the money attributable to Test Copy charges because Plaintiff had four years from when the conduct first occurred and lack of knowledge is no excuse. In short, if Plaintiff knows of the wrongdoing, Defendant prevails; and if Plaintiff does not know of the wrongdoing, Defendant prevails. Defendant receives a windfall and its unfair practice is rewarded under either approach. In light of the Court of Appeal's ruling, the ability of Plaintiff, along with other potential litigants, to invoke significant accrual doctrines when seeking judicial redress of a UCL claim has been eliminated.

ARGUMENT

I. Plaintiff's UCL Claim Is Premised On The Factually Recurring Act Of Defendant Charging For Test Copies.

The Second District correctly stated, "In the instant action, the fees at issue are ***recurring 'excess copy charges' imposed over a period of time*** beginning outside the limitations period and ***continuing into the limitations period.***" Aryeh, supra, 111 Cal.Rptr.3d at 217. [emphasis added] In rendering its decision, the Court of Appeal observed that ***"routinely billing and collecting for 'test' copies*** is not the type of harassing and egregious ***conduct***

the continuing violation doctrine is designed to deter." Id. at 220. [emphasis added] Finally, the Second District concluded that "[i]n the present case, the uncontradicted facts are susceptible to only one legitimate inference: appellant knew 'shortly after' he entered into the second contract in February 2002 of Canon's alleged ***overcounting of copies and overcharging for them***." Id. at 218. [emphasis added] While Plaintiff disagrees with the Second District's application of the law, the underlying facts are properly set forth.

Notwithstanding that the trial and appellate courts applied their analyses to the recurring acts of charging for Test Copies, Defendant presents a hypothetical case whereby Plaintiff challenges a "single, integrated, fraud-based UCL claim" derived from a purported omission in the parties' copier lease agreements. Answer Brief, p. 3. Defendant mischaracterizes Plaintiff's grievance as a drafting error in its written lease agreements, in which Canon failed to disclose that the contractual term "excess copy charges" may include Test Copies. Defendant's goal is obvious: avoid the issue of multiple accrual events and the continuous accrual doctrine by selecting conduct that only occurred once and outside the statutory period - *viz.*, when the parties entered into lease agreements. According to the well-pleaded complaint rule, however, ***Plaintiff, not Defendant, is "master of his complaint"*** and the claims and allegations asserted. Applera Corp. v. MP Biomedicals, LLC (2009) 173

Cal.App.4th 769, 781, 93 Cal.Rptr. 3d 178; Webster v. Reproductive Health Services (1989) 492 U.S. 490, 492, 109 S.Ct. 3040, 106 L.Ed.2d 410. Plaintiff did not plead any theory based upon acts occurring at the time of the execution of the contracts.

Here, Plaintiff unambiguously pled that the offensive conduct giving rise to his litigation was Canon's recurring conduct of counting and charging for Test Copies. For example, the Second Amended Complaint states:

- Plaintiff further alleges that, as a result ***inaccurate meter readings*** recorded by defendants, Plaintiff and other members of the class who entered into copy rental agreements for lease of defendants' products ***were charged for copies that were made by Defendants' servicemen*** and were not properly credited against Plaintiff's account. (A.A., p. 123, SAC ¶ 1) [emphasis added];

- In other words, ***each*** date that Defendants ***serviced or maintained Plaintiff's products and ran Test Copies*** resulted in a ***separate and distinct violation*** giving rise to separate and distinct damage. (A.A., p. 126, SAC ¶ 14) [emphasis added];

- As evidenced by the correspondence between Plaintiff and Defendants, Defendants knew, or should have known, that ***Defendants were charging Plaintiff for excessive copies*** on each of the lease products ***due to the inaccurate meter readings***. The meter readings were inaccurate since the meters would ***count, and not subtract, the Test Copies used by Defendants' servicemen*** when the products were repaired and/or maintenance was performed. (A.A., p. 127, SAC ¶ 16) [emphasis added]; and

- Despite Plaintiff's attempts to correct the ***excessive copying charges***, Defendants have failed, and continue to fail, to reimburse Plaintiff ***for all overcharges relating to the Test***

> ***Copies run by Defendants***, including the late fees resulting from the excessive charges. (A.A., p. 127, SAC ¶ 17). [emphasis added]

Importantly, the individuals who Plaintiff seeks to represent as part of the putative class action are ***not all lessees of Defendant's copiers***, but rather those persons who were ***charged and paid for Test Copies***. The putative class is defined as,

> All persons residing in the State of California that, during the four-year period prior to the filing of this complaint through the date of judgment in this action ***paid Defendants for Test Copies*** that were made within the State of California. (A.A., p. 127, SAC ¶ 19) [emphasis added]

Beyond entering into lease agreements, there is the additional affirmative act by Defendant that is a predicate to Plaintiff's and putative class members' claims: ***Defendant bills and charges for Test Copies.*** Had Defendant disclosed in its lease agreements that "excess copy charges" can include Test Copies, but then neither run a Test Copy, nor charged for one, then Plaintiff would not have brought this litigation.[1]

Further, Plaintiff does not allege that his injury flows automatically from entry into the lease agreements. Rather, Defendant's "unfair and

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[1] Plaintiff might have lacked standing to bring such a case since he would have been seeking redress from a contractual provision that Defendant never sought to enforce and that did not impose additional transactional costs. Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, 643, 88 Cal.Rptr.3d 859.

fraudulent" acts of running and charging for Test Copies are the necessary factual predicates that induced Plaintiff to pay money and sustain injury. Even Defendant acknowledges that Plaintiff is not seeking restitution of his monthly lease payments (or even a diminution of those lease payments), but rather seeks recovery of the additional monies paid that are attributable to invoiced "excess copy charges" based on meter readings that included Test Copies. Answer Brief, p. 6, fn. 2. Contrary to Defendant's assertion, the charges and payments for Test Copies are not a passive accumulating injury, see, Answer Brief, pp. 20-21 and 29, but, rather, are the predicate affirmative acts and corresponding losses that comprise Plaintiff's UCL claim. Since these affirmative acts and corresponding losses are recurring, the question of whether a UCL claim is subject to multiple, continuous accrual, is implicated.

II. Plaintiff's UCL Claim Is Premised On The Legal Theories For Both "Unfair And Fraudulent" Business Practices.

Further, Defendant's mischaracterization of Plaintiff's case as a "single, integrated, fraud-based UCL claim," wholly ignores Plaintiff's legal theory based on the unfair prong of the UCL. Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition - acts or practices which are unlawful, ***or*** unfair, ***or*** fraudulent. Cel-Tech Communications, Inc., et al. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180 (explaining that "a practice is prohibited as 'unfair'

or 'deceptive' even if not 'unlawful' and vice versa.") The disjunctive nature of the UCL is significant because if Plaintiff's allegations suffice under any one of three prongs - unlawful, ***or*** unfair, ***or*** fraudulent - then Plaintiff presents a viable UCL cause of action.

Incredibly, Defendant asserts that Plaintiff did not even attempt to plead a UCL claim based upon the "unfairness" of charging for Test Copies. Answer Brief, p. 39.[2] This contention is confounding because Defendant devoted several pages of its demurrer, along with its Answer brief, to establishing that Plaintiff's pleading does not state a claim for "unfair" conduct as a matter of law. Demurrer To SAC, p. 6-8 (Section entitled "Plaintiff Does Not State A Claim For 'Unfair Conduct'")(A.A., p. 152-154); Reply ISO Demurrer To SAC, p.3-4(A.A., p. 219-220); Answer Brief, p. 37-41.

Plaintiff's Second Amended Complaint is replete with allegations that Defendant's recurring conduct is both an "unfair" and a "fraudulent" business practice. With respect to the alleged "unfair" business practice, Plaintiff alleges:

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[2] Explaining "Had Plaintiff attempted to plead his UCL claim as one based upon the allegedly inherent 'unfairness' of his 'excess copy charges' for 'test copies' without reference to Canon's alleged fraud (which he did not), such claim would have been subject to dismissal for failing to state a cognizable cause of action." Answer Brief, p. 39.

- This is a consumer action brought by Plaintiff...based upon defendants' ***unfair*** and fraudulent business practice of overcharging its customers for excess copies made through the lease of defendants' products, including defendants' copiers, scanners, printers, fax machines, etc. (A.A., p. 123, SAC ¶ 1);

- The common questions of law and fact which exist as to all members of the Class and which predominate over the questions, if any, affecting only individual members of the Class include, but are not limited to, the following:

  * * *

  (c) whether Defendants' conduct constitutes an ***unfair*** business act or practice within the meaning of *Business and Professions Code* section 17200;

  (A.A., p. 129, SAC ¶ 24(c)) [emphasis added];

- Defendants' policy and practice of charging their customers for amounts associated with Defendants making Test Copies in ***unfair*** and fraudulent manner, as set forth above, constitutes an ***unfair business practice because Defendants' practice is unethical, unscrupulous, and substantially injurious to their customers because customers should only be charged for the actual number of copies made by the customer. The harm to Plaintiff, all others similarly situated, and to members of the Class, outweighs the utility, if any, of Defendants' policy and practice***. (A.A., p. 130, SAC ¶ 28 (a)) [emphasis added]; and

- The ***unfair*** and fraudulent business practices, by Defendants, as described above, present a continuing threat to members of the public, including Plaintiff and members of the Class, in that their customers have suffered and continue to suffer monetary loss as a result of Defendants' unfair acts or practices. (A.A., p. 131, SAC ¶ 31) [emphasis added]

With respect to the alleged "fraudulent" business practice, Plaintiff alleges:

- Plaintiff further alleges that, ***as a result of inaccurate meter readings recorded by defendants***, Plaintiff and other members of the class who entered into copy rental agreements for the lease of defendants' products were charged for copies that were

made by Defendants' servicemen and were not properly credited against Plaintiff's account. (A.A., p. 123, SAC ¶ 1) [emphasis added];

- The common questions of law and fact which exist as to all members of the Class and which predominate over the questions, if any, affecting only individual members of the Class include, but are not limited to, the following:

  * * *

  (d) whether Defendants' conduct constitutes a ***fraudulent*** business act or practice within the meaning of *Business and Profession Code* section 17200;

  (A.A., p. 129, SAC ¶ 24(d)) [emphasis added]

- Defendants' policy and practice of charging their customers for amounts associated with Defendants making Test Copies, as set forth above, constitute a ***fraudulent*** business practice because Defendants' practice is ***likely to mislead*** Plaintiff, all others similarly situated, and members of the Class, and ***by deceiving and leading their customers to believe, among other things, that they would only be charged for the actual number of copies made by Plaintiff and the Class***. (A.A., p. 130, SAC ¶ 28(b)) [emphasis added]; and

- The subsequent acts of Plaintiff and the Class were consistent with ***reliance upon Defendants' representations*** in that they were induced to use Defendants' products, ***without knowing that they would be charged an amount associated with copies not made by Plaintiff and the Class***. (A.A., p. 131, SAC ¶ 29) [emphasis added]

A plain reading of the Second Amended Complaint leaves no doubt that Plaintiff alleges two of the three separate and distinct prongs of the UCL - the "unfair" and the "fraudulent" prongs.

III. The Continuous Accrual Doctrine Applies To Plaintiff's UCL Claim And Thirteen (13) Of The Seventeen (17) Separate And Distinct "Unfair" Business Practices Render His Lawsuit Timely.

The parties agree that the general standard for accrual of a cause of action is both "upon the occurrence of the last element essential to the cause of action" and "when a suit may be maintained."

> Ordinarily, this is when the wrongful act is done and the obligation or the liability arises, but it does not 'accrue until the party owning it is entitled to begin and prosecute an action thereon.' Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809, 815, 107 Cal.Rptr.2d 369.

C.f., Opening Brief, p. 13 (citing Howard Jarvis, supra); Answer Brief, p. 16-17 (quoting the identical statement in Howard Jarvis, supra). But when translating that accrual standard for purposes of the UCL, the parties' positions diverge.

The next sentence in Defendant's Answer brief following the agreed upon Howard Jarvis cite is, "Consistent with these principles, causes of action based upon fraud accrue when all of the conduct constituting fraud has occurred ***and*** upon 'the discovery, by the aggrieved party, of the facts constituting the fraud." Answer Brief, p. 17 (citing CCP § 338(d)). [emphasis in original] While the statement is correct for accrual of common law fraud claims, it is not the accrual standard applicable for the UCL. A UCL claim accrues when the unfair competition - any "unlawful, unfair or fraudulent

business act or practice" - occurs and, for a private party plaintiff, an economic injury is sustained.

Even acknowledging that Plaintiff alleged, in part, fraudulent business practices, there are two significant *caveats*. First, a plaintiff's discovery of a fraudulent business practice, does not meaningfully inform UCL claims premised on "unfair" or "unlawful" conduct. Second, Plaintiff did not allege a common law fraud claim and the Court's directive that Proposition 64 did not alter the substantive elements of the UCL to equate with common law fraud must be borne in mind. Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal.4th 223, 232, 46 Cal.Rptr.3d 57. While common law fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages, the UCL fraud prong requires only that "members of the public are likely to be deceived." In re Tobacco II Cases (2009) 46 Cal.4th 298, 312, 93 Cal.Rptr. 3d 559.

A. Plaintiff Pleads Seventeen (17) Separate And Distinct Acts Of "Unfair" Business Practices

The "unfair" standard, the second prong of section 17200, on which Plaintiff relies, offers an independent basis for relief. South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 876-878. This standard is intentionally broad to allow courts maximum discretion to prohibit

new schemes to defraud. Id. In general, the "unfairness" prong has been used to enjoin deceptive or sharp practices. Id. Here, Plaintiff pleaded that Defendant engaged in "unfair" business practices of charging for Test Copies, and each act of invoicing Plaintiff for Test Copies (and Plaintiff's payment thereof) accrued an independently actionable UCL claim. (A.A., pp. 126, 130, SAC ¶¶ 14, 28(a)). Although one claim accrued in February 2002, Defendant engaged in further unfair acts resulting in continuing accrual of Plaintiff's claim until November 2004. Thirteen (13) of those unfair acts occurred within the four-year statutory period.

Courts have formulated different standards for assessing what constitutes an "unfair" practice under the UCL. For example, one formulation of "unfair" involves an examination of the practice's impact on the alleged victim balanced against the reasons, justifications, and motives of the alleged wrongdoer. South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 886-887, 85 Cal.Rptr.2d 301 (weighing the utility of defendant's conduct against the gravity of the harm to the victim.) An "unfair" business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718-719,113 Cal.Rptr.2d 399. C.f., Cel-Tech

Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548 (referring to incipient violations of antitrust laws in non-consumer cases); Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 48 Cal.Rptr.3d 770 (rejecting application of Cel-Tech to consumer cases and adopting the guidelines defining "unfairness" as set out in Section 5 of the FTC Act). Here, Plaintiff pled a *prima facie* case having its genesis in an "unfair" business practice, see, (A.A., p. 130, SAC ¶ 28(a)), and Defendant should be made to present its side of the story. Motors, Inc. v. Time Mirror Co. (1980) 102 Cal.App.3d 735, 740, 162 Cal.Rptr. 543.

In its efforts to avoid the continuous accrual doctrine, Defendant erroneously posits that "Plaintiff contends that he was deceived by Canon's alleged failure to inform him of a single purported fact, *i.e.*, that 'excess copy charges' could include charges for 'test copies.'" Answer Brief, p. 28. But each instance of Defendant's conduct (charging for Test Copies) is "unfair" and gives rise to a supportable UCL claim even if those charges had been disclosed in the lease agreements (which they were not), and even if Plaintiff had agreed to them (which he did not).

In Aron v. U-Haul Co. Of California, the plaintiff had entered into a rental agreement that required that customers return the vehicle with the same

amount of fuel as upon receipt or pay a $20 fee and $2 per gallon for fuel estimated to have been used. Aron v. U-Haul Co. Of California (2007) 142 Cal.App.4th 796, 49 Cal.Rptr.3d 555. Moreover, despite that the vehicle's gas gauge was the only instrument approximating usage, the contract specified that defendant does not reimburse for excess fuel purchased by customers. Id. at 800-801. Plaintiff was thus presented with the two unappealing options of either incurring the service and gas fees or overfilling the tank at his cost. Id. at 802-803. Notwithstanding that the rental agreement explicitly disclosed and plaintiff consented to these terms, the Aron court found that plaintiff had presented an unfair business practice and stated a claim under the UCL. Id. at 805-807.

Here, the notion that the alleged misconduct would be cured if only Canon had disclosed its intent to charge for Test Copies is unpersuasive. The argument is analogous to a landlord disclosing to a tenant in a residential lease agreement that, if the plumbing leaks or needs repair, the landlord has the right to charge the tenant all costs for maintenance and repair service. Regardless of the disclosure, it is an "unfair" business practice to require a lessee to pay additional consideration to ensure continued use and enjoyment of real property or chattel because that is precisely what the lessee is already paying for as part of the installment payments. Contrary to Defendant's assertion that

the Test Copies are made by technicians providing repairs that "benefitted Plaintiff by keeping ***his*** copiers in good working order," see, Answer Brief, p. 7 [emphasis added], Plaintiff already paid Canon for the benefit of using the copiers as part of the approximately $550 and $600 monthly lease fees for copiers that, incidentally, Canon, not Plaintiff, owned. (A.A., p. 125, SAC ¶¶ 12-13).

B. Breach Of Contract Is Not A Prerequisite To Alleging An "Unfair" Business Practice

Although Plaintiff does not allege a breach of contract claim, Defendant conflates Plaintiff's allegations under the "unfair" prong of the UCL with a requirement that Plaintiff prove a breach of contract. Answer Brief, p. 37. But breach of contract is not required to challenge a practice as "unfair" (or "fraudulent" or "unlawful") pursuant to the UCL. While courts have entertained different standards for measuring what constitutes an "unfair" practice, breach of contract is not a prerequisite according to any standard previously articulated. C.f., Cel-Tech, supra, 20 Cal.4th 163; South Bay Chevrolet, supra, 72 Cal.App.4th 861; Camacho v. Automobile Club of Southern California, supra, 142 Cal.App.4th 1394.

As exemplified in Aron, supra, defendant's rental practice of requiring patrons to choose between paying fuel fees or overfilling the gas tank at their expense was found to sufficiently state an "unfair" practice, even though

defendant was acting ***in accordance with*** its explicit contractual terms. Aron, supra, 142 Cal.App.4th at 807. Like Aron, Plaintiff had the choice of either paying the additional Test Copy charges or paying for the "benefit" of non-functioning copiers. We know that Plaintiff could not avoid injury because refusing to pay the disputed charges resulted in Canon hauling him into small claims court. Regardless, Plaintiff is not required to allege a breach of contract as a predicate to stating an "unfair" business practice, specifically, or to stating a UCL claim, generally.

C. Continuous Accrual Applies And Thirteen (13) Acts Of Of "Unfair" Business Practices Are Timely

The continuous accrual doctrine applies to the UCL generally, and ***each*** time Defendant "unfairly" charged Plaintiff for Test Copies (and Plaintiff made payment) his UCL claim accrued. In an effort to avoid this result, Defendant distinguishes each of the "continuous accrual" doctrine cases on its assertion that Plaintiff's facts present a single, one-time failure to disclose a contractual term (*viz.*, that Canon interprets the term "excess copy charges" to include Test Copies), while the cited cases involve multiple, recurring acts of wrongdoing. Plaintiff will not reiterate, but incorporates his prior argument that, ***each*** time Defendant ran and billed Plaintiff for Test Copies, it was an independent actionable wrong pursuant to the "unfair" prong of the UCL. See, Section III.A., supra.

The only case discussing continuous accrual that Defendant relies upon is State ex rel. Metz v. CCC Information Systems, Inc., which is a distinguishable single-accrual case that highlights the reason why Plaintiff's lawsuit actually involves multiple-accrual events. State ex rel. Metz v. CCC Information Services, Inc. (2007) 149 Cal.App.402, 57 Cal.Rptr.3d 156. In Metz, the plaintiff alleged that defendant violated section 1871.7(b) of the *Insurance Code* by making a "false and misleading" valuation of his total-loss vehicle. Id. at 408-409. The actionable conduct, the alleged fraudulent valuation in Metz, occurred ***once*** at the time of the valuation in 1999 and for the purpose of inducing an unfair insurance settlement. Id. at 419. While further fraudulent statements were made by defendant, such statements were not additional independent valuations, but rather affirmations or denials of the original *mis*-valuation made in 1999. Id. at 419 (explaining that "Metz merely alleges that in response to his investigation, CCC either made admissions of- or failed to admit- the allegedly wrongful manner in which it conducted its 1999 valuation.")

While the parties agree that Metz is a single-accrual case, the subsequent statements made by defendant affirming its prior valuation on an insurance claim in that case differ from the billing statements for Test Copies made by Canon in critical respects. Unlike Plaintiff, Metz's exposure to defendants' subsequent fraudulent statements were not inducements to action

and did not cause any additional injury or loss. The Metz court observed that,

> In any event, the most recent acts alleged ***do not qualify as overt acts*** because they were ***made after*** the primary purpose of the alleged conspiracy had been realized - ***the inducement of an unfair insurance settlement on Metz's Gallant***. Id. [emphasis added]

Thus, the subsequent statements made by the insurance evaluator did not cause Metz any further injury, cumulative or otherwise, because the economic loss had already been sustained. By contrast, here, ***each*** invoice Plaintiff received that included Test Copy charges was an unfair act that caused Plaintiff to pay an additional amount above and beyond the monthly lease fees he was already paying. Since the total-loss vehicle in Metz was valued once and the insurance claim settled, it is not analogous to a case where recurring invoices prompted Plaintiff's corresponding payment and recurring economic loss.

D. Plaintiff's Discovery Is Irrelevant To His "Unfair" Business Practice Allegations

Here, Plaintiff discovered the deceptive practice of being charged for Test Copies "shortly after" entering into the lease agreements. In discussing multiple-accrual principles, Defendant argues that a fraudulent business practice alleged under the UCL does not continue to accrue after discovery of that fraud. Defendant asserts that once a plaintiff has "unmasked" a purported fraud, he or she can not be defrauded over and over again. Answer Brief, pp. 3-4. But Defendant feebly relies on "logical impossibilities," rather than legal

challenges to make that argument. Answer Brief, p. 29. The bald statement that Plaintiff "could not have been deceived by the imposition of such [Test Copy] charges after having discovered in February 2002 that they were being imposed" meaningless on demurrer. Regardless of whether they are ultimately proven, material facts alleged in a complaint are taken as true for purposes of ruling on demurrer. Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572, 108 Cal.Rptr. 480. Here, Plaintiff alleges that Defendant's recurring conduct of charging for Test Copies is "likely to deceive" him and members of the public and, since actual deception is not required for the UCL, it is actionable.

Nor is Plaintiff's refusal to invoke the delayed discovery doctrine determinative. The delayed discovery doctrine is an equitable doctrine that delays running the statutory clock for ***past*** claims until a plaintiff has actual or constructive knowledge of facts giving rise to those claims. Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 807-808, 27 Cal.Rptr.3d 661. While it is likely that the same underlying facts that inform application of delayed discovery also inform the ability of a plaintiff to allege reliance on substantially similar conduct, such is not a foregone conclusion. There is not a perfect syllogism between the doctrine of delayed discovery and the

requirement of reliance.[3] The scope of a plaintiff's knowledge and the similarity of the alleged misconduct is factually determinative.

Here, the continuous accrual doctrine applies, but the factual record is not sufficiently developed to analyze the scope of Plaintiff's discovery as it impacts Canon's subsequent acts of deceptive conduct. Although Defendant oversimplifies the effect of Plaintiff's discovery of its Test Copy practices, if the fraud prong were the only variant being asserted, then the timeliness of Plaintiff's UCL claim might be legitimately questioned. However, because Plaintiff alleges that Defendant's practice of charging for Test Copies also constitutes an "***unfair***" business practice, Plaintiff has stated a viable and timely UCL claim irrespective of his discovery.

IV. The Second District's Rejection Of The Application Of The Delayed Discovery Doctrine To The UCL Is Without Merit

While Defendant protests that, because Plaintiff does not rely on the delayed discovery doctrine, any discussion would be purely advisory, Defendant has, in its own Answer brief, essentially advocated application of the "delayed discovery" doctrine to the UCL accrual analysis. Answer Brief, p. 17 (stating, "Due to the deception inherent in the commission of a fraud, an action for fraud '***may be maintained***' ***only after*** the victim of the fraud ***knows,***

---

[3] The gap, for example, is noticeable where a plaintiff has constructive knowledge, as opposed to actual knowledge, and should have suspected facts giving rise to a claim, but nonetheless pleads reliance on subsequent similar misconduct.

or should know, that a fraud has occurred"). [emphasis added] Plaintiff agrees and, likewise, advocates that, while a UCL claim normally accrues irrespective of a plaintiff's knowledge, there are circumstances in which it is appropriate to invoke an equitable exception. Under no circumstance, however, should the delayed discovery doctrine be used to import a 'knowledge' element into the UCL and bar claims that would otherwise be timely, but for plaintiff's discovery.

Delayed discovery is an exception to the traditional standard governing accrual (*e.g.*, Howard Jarvis, supra) based on the equitable principle that a plaintiff, blamelessly ignorant of a claim, should not be penalized and barred from vindicating his or her rights. While the ability to apply the delayed discovery doctrine to the UCL is currently the subject of an appellate court split, Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal.4th 623, 635, fn. 7, 54 Cal.Rptr. 3d 735, it should be resolved in favor of allowing application when it is factually appropriate to do so. Since a UCL claim is presented to courts sitting in equity, it is appropriate then to equip the courts with ***all*** of the equitable tools and devices that enable them to achieve substantial justice for the litigants before them.

A. *Snapp* Is An Irrelevant And Controversial Delayed Discovery Case

As previously explained, Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891, 117 Cal.Rptr.2d 331 is a factually and legally irrelevant case that, at best, only concerns application of the delayed discovery doctrine. While Defendant now agrees that Snapp involves a single act of misappropriation occurring outside the statutory period, Answer Brief, p. 23, it is factually inapposite to the recurring "unfair and fraudulent" acts by Defendant of counting and billing for Test Copies, some occurring within the statutory period.

Legally, to the extent Snapp implicates plaintiff's knowledge, it is apparent that the court was not addressing the UCL claim. In concluding that Snapp knew of his potential claims against defendant more than four years before it filed its complaint, see, Snapp, supra, 96 Cal.App.4th at 891, the court was addressing the four-year statue of limitations on the fraudulent transfer claim, 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 § 3429.09(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 year statute of limitations, the Snapp court's observation that the UCL accrues irrespective of whether plaintiff knows of its accrual or not, is best 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 knew or should have known of his claim notwithstanding its holding that a plaintiff's discovery is irrelevant to the UCL.

B. The Appellate Court Split Should Be Decided In Favor Of Applying The Delayed Discovery Doctrine To The UCL

This Court has already identified the appellate split between the Second District's Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884, 891, 117 Cal Rptr.2d 331 (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 (discovery rule "probably" applies). Grisham, supra, 40 Cal.4th at 635, fn.7. But where victims of unfair competition are blamelessly ignorant, the UCL statutory clock should not begin to run until those victims know or should have known

of the facts giving rise to their claim. It would be manifestly unjust to deprive victims of a cause of action before they are aware that they have been victimized.

Even the U.S. Supreme Court recognizes that the 'discovery rule' is an equitable tolling doctrine that delays accrual of a cause of action until the plaintiff has "discovered" it. Merck & Co., Inc. v. Reynolds (2010) 559 U.S. ___, 130 S.Ct. 1784, 1793, 176 L.Ed.2d 582. In Merck, the U.S. Supreme Court explained that,

> This Court long ago recognized that something different was needed in the case of fraud, where a ***defendant's deceptive conduct may prevent a plaintiff from even knowing*** that he or she has been ***defrauded***. Otherwise, 'the law which was designed to prevent fraud' could become 'the means by which it is made successful and secure.' Id. at 1793-1794. [emphasis added]

The Court also acknowledged that, "More recently, both state and federal courts have applied forms of the "discovery rule" to claims other than fraud." Id. at 1794.

The public policy reasons that have induced California courts to adopt the delayed discovery doctrine and toll accrual of a litany of claims outside the UCL context - *e.g.*, professional malpractice; underground trespass; personal injury from negligently manufactured products; invasion of the right to privacy; libel; latent defects in real property; and breaches of fiduciary duty, see, Opening Brief On The Merits, p. 26, fn. 3 - are equally compelling to a

UCL claim. Likewise, it is incongruous for "discovery" to delay accrual of these legal claims, which often serve as predicates to unlawful prong claims, but not delay the equitable UCL doctrine that incorporates them. Ultimately, this appellate court split should be resolved in favor of allowing invocation of the delayed discovery doctrine to the UCL where equity dictates.

V. The Second District's Rejection Of The Application Of The Continuing Violation Doctrine To The UCL Is Without Merit

Like the delayed discovery doctrine, 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 those 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. The California district court in Lauter v. Anoufrieva (C.D. Cal. 2007) characterized the continuing violation doctrine as follows:

> [T]he doctrine comes into play ***when a defendant's unlawful conduct begins, but continues into, the statutory period.*** *Id.* (citing Richards v. CH2M Hill, Inc. 26 Cal.4th 798, 823, 111 Cal.Rptr.2d 87, 29 P.3d 175 (2001)). For continuing violations, a statute of limitations does not begin to run until the violation or series of violations ends. [citations omitted] ***The theory of continuing violations is an equitable doctrine that 'prevent[s] a defendant from using its earlier conduct to avoid liability for later illegal conduct of the same sort.'*** Lauter, supra, 2009 WL 2192362, at *25. [emphasis added]

Typically, the continuing violation doctrine applies to situations where a "totality of acts" is required to render the cause of action accrued.

While the continuing violation doctrine is most frequently applied in discrimination cases, California federal and state courts have intermittently applied it in other contexts, including: 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, 32 Cal.Rptr.3d 436); 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 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, 157 Cal.Rptr. 392); 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). Since the facts that give rise to these claims frequently overlap with unfair competition claims, the Second

District's outright rejection of the continuing violation doctrine to the UCL is unjustified.

VI. If *Aryeh* Is Not Reversed, Victims Of Unfair Business Practices May Be Severely Limited In Their Ability To Use The UCL To Vindicate Their Rights

While it is undisputed that Plaintiff could have commenced a lawsuit against Canon on or about February 2002, the fact that his claim could have been asserted earlier does not bar action on independent acts that occur at later points in time. Defendant would read out of existence this Court's statement in Howard Jarvis that "[c]auses of action are not barred merely because similar claims could have been made at earlier times as to earlier violations." Howard Jarvis, supra, 25 Cal.4th at 821-822. Defendant's proposal would allow defendants to 'game the system' by simply allowing four years to pass before engaging in further acts of unfair competition with impunity.

Here, Plaintiff only seeks to apply the traditional rules governing accrual of causes of action to a factual pattern that involves repeated separate and distinct recurring violative acts and injuries. If *Aryeh* is not reversed, the danger is that courts will begin using a victim's 'knowledge' (or lack thereof) in measuring accrual of a UCL claim, even under traditional accrual principles. This would invite error because 'knowledge' is not a substantive element of the UCL and, thus, is irrelevant to traditional accrual. To the extent

'knowledge' is used in connection with an equitable tolling doctrine - *e.g.*, delayed discovery or continuing violation, such is an exception that delays running the limitations period, not hasten it. No precedent or public policy sanctions the Court of Appeal's approach.

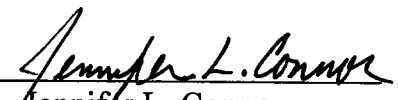
CONCLUSION

Based on the foregoing, Plaintiff's lawsuit is timely pursuant to traditional principles governing accrual of claims, generally, and the continuous accrual doctrine, specifically. 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 deficient, Plaintiff respectfully asks this Court to reverse the judgment 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: February 18, 2011

Respectfully submitted,

WESTRUP KLICK LLP

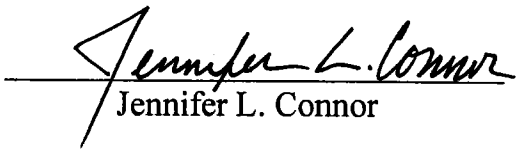
By: 
Jennifer L. Connor
Attorneys for Plaintiff, Appellant,
and Petitioner Jamshid Aryeh

CERTIFICATE OF WORD COUNT

Cal. Rules of Court, Rule 8.520(c)(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 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 7,183 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 February 18, 2011 in Long Beach, California.



Jennifer L. Connor

State of California)
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350 McAllister Street
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Signature: Stephen Moore

SERVICE LIST

Kent Schmidt
DORSEY & WHITNEY LLP
38 Technology Drive, Suite 100
Irvine, California 92618-5310

Attorney for Canon Business Solutions

Richard H. Silberberg
Robert G. Manson
DORSEY & WHITNEY LLP
250 Park Avenue
New York, New York 10177-1500

Attorney for Canon Business Solutions

Consumer Protection Division
Los Angeles District Attorney's Office
201 North Figueroa Street, Suite 1600
Los Angeles, California 90012

Office of the Clerk
CALIFORNIA COURT OF APPEAL
Second Appellate District, Division Eight
Ronald Reagan State Building
300 South Spring Street, Second Floor
Los Angeles, California 90013

Office of the Clerk
SUPERIOR COURT OF CALIFORNIA
County of Los Angeles (Central District)
Stanley Mosk Courthouse
111 North Hill Street (Department 24)
Los Angeles, California 90012

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
Ronald Reagan State Building
300 South Spring Street
Los Angeles, California 90013-1230