No. S184929

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

JAMSHID ARYEH,
Plaintiff and Appellant,

v.

CANON BUSINESS SOLUTIONS, INC.,
Defendant and Respondent.

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

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

FEDERAL CASE

CALIFORNIA STATUTES

OTHER AUTHORITY

I. INTRODUCTION: WHY REVIEW SHOULD BE DENIED

Plaintiff-Petitioner Jamshid Aryeh ("Plaintiff") is the owner of a copy shop in Los Angeles. He attempted to use this lawsuit, in which he asserted a single claim for recovery of, at most, several hundred dollars, as a vehicle for pursuing what he apparently hoped would be a lucrative class action under the Unfair Competition Law, Cal. Bus. & Professions Code §§ 17200 *et seq.* ("UCL"). Plaintiff acquired two Canon-brand copiers from Defendant-Respondent Canon Business Solutions, Inc. ("Canon") pursuant to written lease agreements providing, among other things, that he would be responsible for small additional payments to Canon, of pennies per copy or less, for copies made on his machines that exceeded certain specified monthly allotments ("excess copy charges"). Plaintiff claimed that, to the extent Canon imposed "excess copy charges" for copies made by Canon service technicians during the course of maintaining or repairing such machines (which Plaintiff refers to as "test copies"), such charges violated the UCL.

Having granted Plaintiff three opportunities to plead a sustainable cause of action, the trial court dismissed this lawsuit with prejudice where:

- Plaintiff alleged that Canon began to impose "excess copy charges" for "test copies" in early 2002, shortly after he commenced leasing his copiers, and that he fully understood that he was being charged for "test copies" at that time.
- Plaintiff alleged that he objected to such charges and immediately complained to Canon about them, and began to keep his own records of the number of copies made on his copiers.

- Plaintiff alleged that he incurred improper "excess copy charges" for "test copies" on seventeen (17) occasions beginning in February 2002 and concluding in November 2004. Yet, despite his allegation that he was aware from the start of the purported impropriety of such charges, Plaintiff never refused to pay them, nor did he take any other contemporaneous action to seek redress from Canon. Instead, he continued to enjoy the benefits of the agreements that he had entered into with Canon, the last of which, by its terms, expired in early 2007.
- Meanwhile, Canon commenced a lawsuit against Plaintiff in 2005, seeking payment for services and supplies that it provided for Plaintiff's copiers. That action, initially litigated in small claims court and later affirmed in a Superior Court trial *de novo* during which Plaintiff was represented by counsel, concluded with a final judgment in Canon's favor. Plaintiff apparently made no attempt to seek redress or setoff from Canon in that action, despite the fact that every allegedly improper "excess copy charge" for "test copies" for which he sought recovery in this action had already been incurred.
- Plaintiff finally sought redress by commencing this action in January 2008. This was (i) nearly six (6) years after Plaintiff learned that purportedly improper charges were being imposed by Canon; (ii) more than three (3) years after the last instance when Plaintiff allegedly was charged by Canon for "test copies"; (iii) more than two (2) years after Plaintiff was sued by Canon in the intervening 2005 lawsuit; and (iv) nearly a year after the second of the two lease agreements between Plaintiff and Canon expired by its terms.

- Despite being questioned by the trial court as to why he failed to act sooner, and despite having had several opportunities to explain his dilatory conduct, Plaintiff never gave any reason for his inordinate delay in asserting his claim against Canon.

The trial court sustained Canon's demurrer to Plaintiff's second amended complaint, dismissing the single UCL claim with prejudice on each of the four separate legal bases argued by Canon: (i) that Plaintiff's claim accrued in early 2002 and was barred by the four-year statute of limitations set forth in Cal. Bus. & Professions Code § 17208; (ii) that the doctrine of laches barred Plaintiff's claim because of his unexplained six-year failure to take action against Canon; (iii) that the doctrines of res judicata and/or collateral estoppel barred Plaintiff's claim as a result of the final judgment of the Superior Court entered in Canon's favor against Plaintiff in the intervening 2005 lawsuit; and (iv) that "excess copy charges" for "test copies" were neither "deceptive" nor "unfair," and, therefore, that Plaintiff's UCL claim did not allege a sustainable cause of action.

The Court of Appeal affirmed the trial court's judgment, holding that, on the authority of *Snapp & Associates Insurance Services, Inc. v. Robertson,* 96 Cal. App. 4th 884 (2002), Plaintiff's UCL claim accrued in early 2002 and thus was barred by the UCL's four-year statute of limitations. Plaintiff's Petition seeks review of this determination on the grounds that (i) the law is "unsettled" with respect to whether UCL claims based upon allegedly improper recurring charges beginning prior to the limitations period and continuing into it are barred by the statute of limitations, and (ii) a relevant "split in appellate authority" exists

concerning the "delayed discovery rule." Both of these contentions are erroneous.

First, the law on this point is *not* "unsettled." Only two reported decisions by California courts – *Snapp* and this case – address whether UCL claims based upon recurring charges commencing outside the limitations period and continuing into it are barred by the statute of limitations. Those decisions are entirely consistent. Plaintiff seeks to imply uncertainty in the law by arguing, for the first time, that a legal concept never applied by a California court to a UCL claim and not argued below – the "continuous accrual rule" – should be imported into the UCL to salvage his claim. Plaintiff offers no valid basis for this Court to alter the existing law relating to the accrual of UCL claims and thereby resurrect Plaintiff's stale cause of action.

Second, Plaintiff's attempt to manufacture a relevant "split in appellate authority" concerning the "delayed discovery rule" is inapposite. The "delayed discovery" rule has nothing to do with this case. As both parties argued below, and as the Court of Appeal held, the "delayed discovery rule" is not implicated in this action, since it is undisputed that Plaintiff "discovered" Canon's alleged misconduct contemporaneously with its commission. The Court of Appeal's references to Plaintiff's knowledge of Canon's purported misconduct emphasized the controlling fact mandating dismissal – that, despite Plaintiff's belief that he had been wronged by Canon, he inexplicably sat on his purported rights for nearly six (6) years before taking any action, and by doing so permitted his claim to lapse.

Accordingly, since Plaintiff has failed to cite any legitimate basis for review of the Court of Appeal's decision, the Petition should be denied.

II. RESPONSE TO PLAINTIFF'S SUMMARY OF THE CASE

The "Summary of the Case" contained in the Petition omits a number of important undisputed facts relevant to Plaintiff's request for review, as follows.

A. The Parties' Agreements and the Disputed Charges

In November 2001 and February 2002, Plaintiff entered into written agreements with Canon (an authorized retail dealer of and service provider for Canon-brand business equipment, including Canon-brand copiers) pursuant to which he leased two copiers for his copy shop business. (Appellant's Appendix of Documents on Appeal ("App.") 125-126, 134-139 (Second Amended Complaint ("SAC"), ¶¶ 12, 13 and Exs. 1, 2).) In the agreements, Plaintiff consented to specified monthly lease payments for each copier for the five-year duration of the agreements. Plaintiff also agreed to a "monthly copy allowance" for each copier (*i.e.,* a specified number of copies that could be made on each copier without incurring additional charges), and to a small, specified "excess copy charge" for each "excess copy" made over and above the "monthly copy allowance." (*Id.*)

Plaintiff alleged that, "shortly after" entering into his second agreement with Canon in February 2002, he realized that, in certain instances, Canon was including, as part of the "excess copy charges" imposed pursuant to the terms of the agreements, charges for "test copies" made by Canon service technicians while providing maintenance and repair services for Plaintiff's copiers. (*See* App. 4 (Original Complaint, ¶ 14).) Plaintiff alleged that he complained at that time to Canon about such charges, and began keeping his own record of the number of copies made on his machines. (*Id.*)

Plaintiff further alleged that "excess copy charges" for "test copies" were imposed on seventeen (17) separate occasions beginning in February 2002 and extending to November 2004. (App. 126-127 (SAC, ¶ 14).) Depending upon which of the two copiers were used to make the "test copies," the total amount of "excess copy charges" for "test copies" incurred could have been as little as $35.20, or as much as $615.43.[1] Importantly, Plaintiff did *not* allege that he refused to pay such charges, or that he took any other actions in furtherance of his purported objections to them. Nor did Plaintiff allege that Canon misrepresented to him at any time that "excess copy charges" would not, or did not, include charges for "test copies," or that Canon took any actions that hindered Plaintiff's ability to seek redress for Canon's purported misconduct.

Nevertheless, Plaintiff alleged that the imposition of "excess copy charges" for "test copies" constituted a UCL violation. Plaintiff essentially contended that the meaning of the word "copy" in the phrase "excess copy charges" as used in the parties' agreements was limited only to copies made by Plaintiff himself. Canon's position was that, if such charges in fact were imposed,[2] they were entirely proper and consistent with the parties' agreements. Those agreements contemplated "excess copy charges" for *any* copies made beyond the specified monthly allotments, including copies

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[1] Plaintiff never specified on which of his two copiers the relevant "test copies" were made, but the "excess copy charges" for the two copiers as set forth in the parties' agreements were $.007 per copy (for the Canon-brand model IR8500 "black and white" copier leased by Plaintiff) and $.1224 per copy (for the more expensive Canon-brand model CLC 1120 color copier leased by Plaintiff). (App. 134-139 (SAC Exs. 1, 2).)

[2] Canon did not concede that such charges were actually imposed, but, for purposes of its demurrers, assumed the truth of Plaintiff's allegations.

necessarily made by service technicians performing maintenance and repairs that benefited Plaintiff by keeping his copiers in good working order.

Notwithstanding Plaintiff's attempt to employ such facts as a basis for a class action, it is apparent that this dispute was nothing more than a disagreement concerning the meaning of the word "copy" in the contractual term "excess copy charges" – specifically, whether "copy" means *all* copies made on the copiers (Canon's position), or only *certain types* of copies made on the machines (Plaintiff's position).

B. The Parties' Intervening Litigation

In July 2005, Canon commenced a small claims lawsuit against Plaintiff. (App. 187-89 (Claim and Order to Go to Small Claims Court).) Canon sought recovery of $2,152.82 in unpaid charges for service and supplies that it provided for Plaintiff's copiers. (*Id.*) All of the "excess copy charges" for "test copies" alleged by Plaintiff in the instant action were incurred prior to Canon's commencement of the small claims action, yet Plaintiff did not assert a counterclaim against Canon, and apparently did not argue that he was entitled to setoff such charges against any judgment that Canon could obtain against him. The small claims proceeding resulted in a judgment in Canon's favor. (App. 190-91 (Notice of Filing Appeal and Notice of Appeal).) Plaintiff appealed, and in December 2005, a trial *de novo* was conducted before the Superior Court, at which Plaintiff was represented by counsel. (*Id.*) That proceeding resulted in a final judgment in Canon's favor for the full amount sought by Canon in its complaint. (App. 192 (Judgment After Trial De Novo).)

C. Proceedings Before the Trial Court

This action was commenced on January 31, 2008. (*See* App. 1-10 (Original Complaint).) The sketchy allegations asserted in the original complaint contended that Canon had violated the UCL by imposing unspecified "overcharges" upon Plaintiff beginning "[s]hortly after" the parties' agreements were executed in early 2002. (*Id.*) Canon's demurrer to the original complaint was sustained on the ground that Plaintiff's UCL claim was barred by the applicable four-year statute of limitations, but the trial court granted Plaintiff leave to file an amended complaint. (App. 52 (Minute Order).)

Plaintiff's amended complaint set forth more specific allegations establishing that Plaintiff was challenging Canon's imposition of "excess copy charges" for "test copies." (*See* App. 57-58 (First Amended Complaint, ¶¶ 14, 15).) Plaintiff sought to plead around the statute of limitations by improperly splitting the claim asserted in his original complaint. Plaintiff alleged that, although the imposition of the purportedly improper charges began in early 2002, he was now seeking recovery only for charges imposed in 2004 (*i.e.*, charges incurred less than four years prior to the commencement of the action). (*Id.*) Canon again demurred, arguing, among other things, that Plaintiff's claim was barred by the statute of limitations. (App. 66-87 (Demurrer to First Amended Complaint).) Plaintiff argued that the "continuing violations doctrine" should be applied to salvage his claim. (App. 93-97 (Opposition to Demurrer to First Amended Complaint); Reporters Transcript on Appeal ("Rptr. Trans.") B-9:12-B-12:2, B-21:13-B-23:2.)

During the demurrer hearing, the trial court inquired concerning Plaintiff's reasons for failing to commence his action sooner, something

that Plaintiff had not addressed in either of his two pleadings. (Rptr. Trans. B-11:20-27.) Plaintiff's counsel responded that "It doesn't matter" and "I don't know the answer to that." (Rptr. Trans. B-11-:28-B-12:2.) The trial court sustained Canon's demurrer, but again granted Plaintiff leave to replead, directing Plaintiff to attach copies of the parties' agreements to his second amended complaint (which Plaintiff had failed to do with respect to his first two pleadings). (Rptr. Trans. B-23:3-B-23:8.)

The second amended complaint was largely duplicative of the amended complaint, and again did not include an explanation for Plaintiff's delay in commencing his action. As had been the case in his prior pleadings, Plaintiff asserted only one claim, for violation of the UCL. (*See* App. 122-140 (SAC).) Canon again demurred, asserting four grounds for dismissal: (i) the expiration of the statute of limitations; (ii) the laches doctrine; (iii) the doctrines of *res judicata* and collateral estoppel; and (iv) failure to state a cause of action. (*See* App. 141-63 (Demurrer to SAC).) Plaintiff again argued that his claim was timely by reason of the "continuing violations doctrine." (App. 208-211 (Opposition to Demurrer to SAC); Rptr. Trans. C-3:17-C-9:10.) The trial court sustained Canon's demurrer with prejudice. Its order of dismissal cited all four grounds asserted by Canon as bases for its ruling. (App. 231-32 (Order Sustaining Demurrer by Canon to SAC).)

D. The Court of Appeal's Decision

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

in favor of affirmance, holding that Plaintiff's UCL claim was barred by the applicable four-year statute of limitations. Relying upon *Snapp & Assoc. Ins. Services, Inc. v. Robertson,* 96 Cal. App. 4th 884 (2002), the Court of Appeal held that: (i) Plaintiff's UCL claim accrued when Canon's imposition of "excess copy charges" for "test copies" began in early 2002; (ii) the "continuing violations doctrine," which Plaintiff had argued applied to his claim and mandated reversal, was not applicable; and (iii) Plaintiff's nearly six-year delay in commencing his action established that his claim was time-barred. *Id.*

III. LEGAL ARGUMENT

Based upon undisputed facts alleged by Plaintiff, the Court of Appeal correctly held that Plaintiff's UCL claim was barred by the statute of limitations. The two grounds that Plaintiff asserts as bases for review are without merit, since (i) the law applied by the Court of Appeal and resulting from its decision is in no way "unsettled," and (ii) there is no relevant conflict in appellate authority that could be resolved by this Court's acceptance of review. Moreover, even if this Court were to grant review, any potential revival of Plaintiff's claim would be short-lived because, in addition to the statute of limitations defense on which the Court of Appeal based its decision, each of the three other grounds cited by the trial court in its order dismissing Plaintiff's action is independently sufficient to mandate dismissal.

A. The Court of Appeal's Decision Was Correct

Plaintiff's UCL claim was doomed in both the trial court and the Court of Appeal by undisputed facts alleged by Plaintiff establishing that his claim was time-barred. The Court of Appeal's ruling that the claim

accrued in early 2002, but was not asserted until after the statute of limitations expired, plainly was correct and should not be disturbed.

As Plaintiff recognizes, a claim generally accrues "when the cause of action is complete with all of its elements." *Fox v. Ethicon Endo-Surgery, Inc.,* 35 Cal. 4th 797, 806 (2005). The Court of Appeal held that a UCL "cause of action accrues when the defendant's conduct occurs, not when the plaintiff learns about the conduct." 185 Cal. App. 4th at 1165 (citing *Snapp,* 96 Cal. App. 4th at 891); *accord, Salenga v. Mitsubishi Motors Credit of America, Inc.,* 183 Cal. App. 4th 986, 996 (2010). Thus, a UCL claim accrues when a defendant commits conduct sufficient to give rise to a sustainable UCL cause of action. *See Salenga,* 183 Cal. App. 4th at 996.

Relying on *Snapp,* the Court of Appeal held that Plaintiff's claim accrued in early 2002, at the time of Canon's alleged first imposition of "excess copy charges" for "test copies." 185 Cal. App. 4th at 1166-67. In *Snapp,* a UCL claim was asserted based upon an insurance agent's alleged diversion of accounts and insurance premium payments from the plaintiff insurance broker to a competing broker. The court held that, where the plaintiff had alleged that such diversions were "ongoing," the UCL claim nevertheless accrued at the time of the initial diversions. 96 Cal. App. 4th at 891-92. Citing this determination, the Court of Appeal held:

> The UCL claim asserted in *Snapp* was based upon essentially the same type of conduct at issue in the present case: the allegedly wrongful collection of fees on a recurring basis. In *Snapp,* the fees at issue were recurring insurance premiums collected over a period of time beginning outside the limitations period and continuing into the limitations period. In the instant action, the fees at issue are recurring "excess copy charges" imposed over a period of time beginning outside the limitations period and continuing into the limitations period. The court in *Snapp* held that the very first

> allegedly improper brokering charge, which became known to the plaintiff soon after its imposition, commenced the running of the four-year statute of limitations, barring the plaintiff's claim even though plaintiff asserted that the imposition of such charges was "ongoing." Here, [Plaintiff's] initial complaint alleged that [Plaintiff] began to notice that the meter readings taken by Canon's field service personnel did not appear to reflect the accurate number of copies "[s]hortly after" [Plaintiff] entered into the [written agreements between the parties]. [Plaintiff] thus admitted in the initial complaint that he knew of the alleged inaccurate readings and overcharge about February 2002, six years before filing his lawsuit.

185 Cal. App. 4th at 1166-67 (citation omitted). Having determined that Plaintiff's claim accrued nearly six (6) years prior to the commencement of the action, the Court of Appeal affirmed the trial court's ruling that the claim was barred by the UCL's four-year statute of limitations.

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

Yet Plaintiff failed to act, and instead (i) continued to pay the allegedly improper charges even as they were purportedly imposed on sixteen (16) additional occasions; (ii) continued to enjoy the fruits of his agreements with Canon for the leasing, use and service of his two Canon copiers; (iii) failed to assert a counterclaim or claim for setoff with respect to such charges in the intervening lawsuit commenced against him by

Canon in 2005; and (iv) waited nearly six (6) years before finally commencing this lawsuit in 2008. Under these circumstances, the Court of Appeal's affirmance of the trial court's determination that Plaintiff's claim was time-barred was amply supported by the facts and the law, and should not be disturbed.

B. The Relevant Law Is Not "Unsettled"

Plaintiff struggles to devise a basis for review, asserting two arguments that are supported neither by the undisputed facts nor the relevant law. First, Plaintiff contends that his Petition "presents an important and unsettled legal issue" with respect to the application of the UCL's statute of limitations to claims involving conduct beginning outside the limitations period and continuing into it. (*See* Petition for Review ("Petition") at 1.) But the law concerning this issue is *not* "unsettled." In fact, there are only two reported decisions by California courts addressing the matter – *Snapp* and the Court of Appeal's decision in this case – and they are entirely consistent with each other and dispositive.

Plaintiff admits that precedent "is sparse" with respect to whether a UCL claim based upon conduct beginning outside the limitations period and continuing into it is time-barred. (*See* Petition at 2.) 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*. Both this case and *Snapp* concerned alleged UCL violations based upon the purportedly wrongful collection of fees or charges beginning outside the limitations period and continuing into it. In both cases, consistent with this Court's direction that claims accrue

when "the cause of action is complete with all of its elements" (*see Fox,* 35 Cal. 4th at 806), the Court of Appeal held that the UCL claim accrued outside the limitations period, upon the imposition of the initial challenged charges. In both cases, the UCL claim was dismissed by reason of the expiration of the statute of limitations.[3] There is nothing "unsettled" about this controlling law.

Ironically, it was Plaintiff himself who sought to "unsettle" the relevant law by arguing, first on repeated occasions before the trial court and then again before the Court of Appeal, that his UCL claim should be preserved by application of a legal doctrine that had never been applied by a California court in reported UCL jurisprudence, and that would have produced a result in conflict with *Snapp.* Plaintiff contended that the "continuing violations doctrine," articulated by this Court in *Richards v.*

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[3] Plaintiff attempts to distinguish *Snapp* with arguments that he unsuccessfully made before the Court of Appeal. Plaintiff argues that *Snapp* "concerns the delayed discovery rule" (Petition at 17), when in fact the *Snapp* court held, as did the Court of Appeal in this case, that the plaintiff's claim in that case accrued at the time the initial purportedly wrongful conduct occurred, despite plaintiff's inapposite arguments concerning equitable tolling and delayed discovery (much like Plaintiff's inapposite arguments concerning the "continuing violations doctrine" in this case). *See* 96 Cal. App. 4th at 891-92. Plaintiff also attempts to distinguish the facts in *Snapp* by incorrectly asserting that the entirety of the misconduct giving rise to the plaintiff's claim was the misappropriation of client information and accounts by an insurance broker that occurred on a single occasion outside the limitations period, even though the defendant continued to collect insurance premiums on such accounts during the limitations period. (*See* Petition at 17-18.) The same assertion is made in the dissenting opinion in this case. *See Aryeh v. Canon Business Solutions, Inc.,* 185 Cal. App. 4th at 1170-78 ("Dissent"). However, the *Snapp* court observed that the plaintiff had alleged in that case "that [the defendant insurance agency's] wrongdoing *began in 1993* when [the defendant] *initially* began brokering the accounts," and was ongoing. 96 Cal. App. 4th at 892 (emphasis supplied).

CH2M Hill, Inc., 26 Cal. 4th 798 (2001), and applied by California courts only in the context of employment discrimination claims and other limited contexts involving lengthy and repeated harassing conduct (*see Komarova v. National Credit Acceptance, Inc.*, 175 Cal. App. 4th 324 (2009)), preserved his claim. *See* 185 Cal. App. 4th at 1161. But that argument was repeatedly rejected by the trial court, and again by the Court of Appeal. *See* 185 Cal. App. 4th at 1167-70. Even the Dissent in this case asserted that "the continuing violation rule . . . has little to do with this case." 185 Cal. App. 4th at 1171. Plaintiff has now finally abandoned the "continuing violations doctrine," and does not argue it in support of his Petition.

Plaintiff now contends, for the first time, that his claim should be resuscitated by reason of what he calls the "continuous accrual rule." (Petition at 10.) Plaintiff seeks to obscure the fact that he is asserting an entirely new argument by stating that he had previously merely "incorrectly labeled his theory." (*See* Petition at 10 n.3.) But it is readily apparent, as the Dissent states, that there is "more than a semantical difference" between the "continuing violations doctrine" that Plaintiff argued below and the "continuous accrual rule" that he now urges. *See* 185 Cal. App. 4th at 1174.

Having failed to even argue the theory below, Plaintiff adopts wholesale the Dissent's assertion that application of the "continuous accrual rule" would have preserved his claim.[4] But this argument is without merit, and deserves no further consideration from this Court, because (i) the "continuous accrual rule" has never been applied to a UCL

[4] Almost all of the case law cited by Plaintiff to the Court of Appeal in support of his "continuing violations doctrine" argument is absent from the Petition, replaced by case law cited in the Dissent.

claim in a reported California decision; and (ii) its application in this case would be fundamentally inconsistent with the nature of Plaintiff's UCL claim and the manner in which it was alleged.

Neither Plaintiff nor the Dissent disputes that the "continuous accrual rule" has never been applied to a UCL claim in a reported decision of a California court.[5] The only case law that Plaintiff cites in support of his argument addresses application of the "continuous accrual rule" to: (i) claims based upon statutory violations where the applicable law established that each act in violation of the statute gives rise to a distinct, independent statutory claim (*see Suh v. Yang,* 987 F. Supp. 783 (N.D. Cal. 1997) (federal trademark law infringement)); (ii) claims based upon statutory violations by public entities relating to repeated conduct that would continue indefinitely if not enjoined (*see Howard Jarvis Taxpayers Association v. City of La Habra,* 25 Cal. 4th 809 (2001) (city's levying of allegedly unconstitutional utility tax); *Hogar Dulce Hogar v. Community Development Commission of City of Escondido,* 110 Cal. App. 4th 1288 (2003) (redevelopment agency's payments to low income housing fund allegedly calculated in manner violative of state law); or (iii) claims for breach of contract involving a defendant's failure to make specific payments on specific dates as set forth in the relevant agreement (*see Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.,* 116 Cal. App. 4th

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[5] Plaintiff concedes that the authorities that he cites in support of his argument are, with the exception of one federal district court decision, "[o]utside of the UCL." (Petition at 12.) The Dissent's assertion that it perceived no reason for "treating UCL claims based on multiple acts differently" from the claims addressed in the case law authorities that it cited implicitly conceded that the cited case law did not involve UCL claims. 185 Cal. App. 4th at 1175.

1375 (2004) (breach of payment obligations under oil and gas production agreement); *Tsemetzin v. Coast Federal Savings and Loan Association,* 57 Cal. App. 4th 1334 (1997) (failure to make rental payments under lease agreement for commercial property).

None of these cases are analogous to the relevant facts or the applicable law in this action. Plaintiff's UCL claim is not based upon an alleged violation of statutory law by Canon, let alone a statute that has been interpreted as creating an independent cause of action based upon each instance in which it is violated. Moreover, Canon's alleged misconduct bears no similarity to a public entity's repeated conduct in violation of statutory law that threatens to continue without effective legal action.

Nor is Plaintiff's UCL claim comparable in nature to breach of contract claims based upon the failure to make payments as specified under an agreement. The contract cases cited by Plaintiff involve payments that were found to be "severable" from one another, and therefore independent of each other for purposes of accrual. The nature of Plaintiff's UCL claim, however, is fundamentally distinct from a claim for breach of a series of severable contractual obligations.

As alleged in each of Plaintiff's three successive pleadings, his UCL claim sounded in fraud, with Plaintiff contending that Canon fraudulently failed to disclose to him that he could incur "excess copy charges" for "test copies." (*See, e.g.,* App. 127, 130-131 (SAC ¶¶ 16, 28).) Thus, Plaintiff alleged that Canon's failure to disclose that "excess copy charges" would be incurred for "test copies" violated the UCL, with the result that such charges were imposed on multiple occasions. Accordingly, each instance in which Canon imposed "excess copy charges" for "test copies" was not "severable," but instead inextricably tied to Canon's alleged failure, at the

time the parties' agreements were executed, to disclose that such charges would be incurred.[6]

Plaintiff cannot legitimately contend that he was separately and independently deceived on each occasion that he incurred "excess copy charges" for "test copies," because he alleged that he learned of the nature of such charges at the time they were first imposed in February 2002. Plaintiff was indisputably aware of, and not deceived by, the nature of such charges on each successive occasion when they were imposed. Accordingly, Plaintiff's UCL claim can only be legitimately understood the way that the Court of Appeal understood it – as a single claim that accrued at the time that "excess copy charges" for "test copies" first were imposed, and that purportedly resulted in further harm to Plaintiff on each additional occasion when such charges were incurred.

Moreover, as demonstrated by his initial complaint, Plaintiff understood his UCL claim to be a single, integrated cause of action, and not seventeen (17) independent, severable claims. Plaintiff originally alleged his UCL cause of action as a single, undifferentiated claim for "overcharges" beginning in early 2002. (*See* App. 1-10 (Original

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[6] One of the cases cited by Plaintiff, *State ex rel. Metz v. CCC Information Services, Inc.*, 149 Cal. App. 4th 402 (2007), concerned claims analogous to Plaintiff's, even though they were not UCL claims. In *Metz,* the plaintiff asserted a series of fraud-based claims relating to the defendant's alleged violation of state insurance laws. The claims all related to a purportedly fraudulent transaction that occurred outside the limitations period, but plaintiff alleged that additional wrongful acts occurred within the limitations period. Rejecting the plaintiff's assertion that the "continuing accrual rule" should be applied to salvage his claims, the court affirmed dismissal on the basis of the statue of limitations, holding that "*every* fraudulent statement or omission [that plaintiff] alleges arose out of a single transaction" which had occurred prior to the limitations period. 149 Cal. App. 4th at 418 (emphasis in original).

Complaint).) It was only after the trial court sustained Canon's demurrer to the original complaint on the basis of the expiration of the statute of limitations that Plaintiff sought to improperly split his original claim into seventeen (17) separate claims for the imposition of "excess copy charges" for "test copies," disavowing those that occurred outside the limitations period.[7] But, as this Court has held, when a complaint "contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation." *Hendy v. Losse,* 54 Cal. 3d 723, 742 (1991); *see also Deveny v. Entropin, Inc.,* 139 Cal. App. 4th 408, 425 (2006) ("[P]laintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers"). Plaintiff cannot simply pretend that his original construction of his claim as a single, integrated UCL cause of action never happened.

In addition, Plaintiff's belated attempt to adopt the contract law principle of "severability" is fundamentally at odds with his repeated and intentional failure to allege a breach of contract claim. Despite the fact that interpretation of the parties' written agreements is clearly at the heart of this dispute, and despite Canon's repeated assertion to the trial court that this case was nothing more than a "garden variety contract dispute," Plaintiff

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[7] Plaintiff also deleted the reference to having realized "shortly after" he entered into the parties' agreements that "excess copy charges" for "test copies" were being imposed in furtherance of his attempt to plead around the statute of limitations. (*Compare* Original Complaint, ¶ 14 (App. 4) *with* SAC, ¶ 14 (App. 126-127).)

never sought to assert a breach of contract claim in any of his three pleadings.[8]

It is readily apparent that Plaintiff decided not to assert a breach of contract claim for two strategic reasons. First, a breach of contract claim would never have succeeded, given the absence of any provision in the parties' agreements that Plaintiff could have legitimately claimed was breached by Canon. Second, Plaintiff's primary goal in asserting his UCL claim was to create a basis for what he apparently hoped would be a potentially lucrative class action. For numerous reasons, Plaintiff would have had little or no chance of obtaining class certification if he had styled the action as a breach of contract dispute.

As the Court of Appeal held, quoting this Court's decision in *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 173 (2000), "[t]he UCL is not an 'all-purpose substitute' for a . . . contract action." 185 Cal. App. 4th at 1170. Plaintiff's decision to assert a fraud-based UCL claim, rather than a cause of action for breach of contract, eliminated his ability to rely on contract principles of severability, and the "continuous accrual rule," to save a portion of his claim from dismissal. Accordingly,

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[8] The Dissent cites Canon's "garden variety contract dispute" assertion in support of its position that Plaintiff's UCL claim should be analogized to contract claims in other cases where the "continuous accrual rule" was applied. *See* 185 Cal. App. 4th at 1173. But in asserting that contract principles of "severability" should have been applied to salvage Plaintiff's UCL claim, the Dissent ignores that (i) Plaintiff is bound by the allegations in his original complaint asserting a single, integrated fraud-based cause of action rather than seventeen independent, severable contract-based claims; (ii) Plaintiff clearly and repeatedly decided not to assert a breach of contract claim; and (iii) application of the contract principles urged by the Dissent would be fundamentally inconsistent with Plaintiff's allegations establishing that his UCL claim is based not upon breach of contract, but upon fraud.

setting aside the Dissent's conjecture that the "continuous accrual rule" might apply to UCL claims under different circumstances, that rule cannot legitimately be applied to revive Plaintiff's claim in this case, where the application of settled legal principles of accrual resulted in the correct determination that Plaintiff's claim was time-barred as a matter of law.

C. There Is No Relevant "Split in Appellate Authority"

Plaintiff's second basis for seeking review is as specious as the first. Plaintiff contends that this Court should grant review because of purported "confusion in the courts" regarding the "delayed discovery rule." But as Plaintiff himself conceded before the Court of Appeal, the "delayed discovery rule" has no application to this dispute, so any alleged "confusion in the courts" about it is entirely irrelevant.

The "delayed discovery rule" "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Grisham v. Philip Morris U.S.A., Inc.,* 40 Cal. 4th 623, 634 (2007). Plaintiff notes that there are conflicting rulings by the Court of Appeal as to whether the "delayed discovery rule" applies to UCL claims. *Compare Snapp,* 96 Cal. App. 4th at 891 ("delayed discovery rule" "does not apply" to UCL claims), *with Broberg v. Guardian Life Insurance Co. of America,* 171 Cal. App. 4th 912, 920-21 (2009) (fraud-based UCL claim accrues when "a reasonable person would have discovered the factual basis for a claim").

The Court of Appeal in this case, citing *Snapp,* held that a UCL "cause of action accrues when the defendant's conduct occurs, not when the plaintiff learns about the conduct." 185 Cal. App. 4th at 1165. But the portion of this statement concerning "when . . . plaintiff learns about the

conduct" was not germane to the Court of Appeal's ruling. The point at which a plaintiff learns about the conduct at issue, and the "delayed discovery rule," are irrelevant to this case because *it is undisputed that Plaintiff "discovered" Canon's alleged misconduct concurrent with its commission.* (*See* App. 4 (Original Complaint, ¶ 14); *see also* 185 Cal. App. 4th at 1167 ("In the present case, the uncontradicted facts are susceptible of only one legitimate inference: [Plaintiff] knew 'shortly after' he entered into the second contract in February 2002 of Canon's alleged overcounting of copies and overcharging for them"); Petition at 18-19 (affirmatively admitting "Plaintiff's knowledge of being charged for Test Copies in February 2002").)

Moreover, the irrelevance of the "delayed discovery rule" to this case was affirmatively asserted by *both parties* before the Court of Appeal. In his opening brief to the Court of Appeal, Plaintiff confirmed that he "***does not*** rely on or assert in this matter" the "delayed discovery rule." (*See* Plaintiff's Brief on Appeal at 20-21 (emphasis in original).) Plaintiff again disavowed the "delayed discovery rule" in his reply brief to the Court of Appeal, stating that "Plaintiff is not relying on delayed discovery – or any exception to the general rule of accrual of a cause of action . . ." (*See* Plaintiff's Reply Brief on Appeal at 12.) Likewise, in its opposition brief to the Court of Appeal, Canon asserted that the "'delayed discovery rule' . . . cannot apply here, since Plaintiff has alleged that he discovered the allegedly improper conduct when it began (*i.e.,* in early 2002), and his claim accrued at that time." (*See* Canon Brief in Opposition to Appeal at 12 n.4.)

Plaintiff appears confused by the Court of Appeal's references to his knowledge of the alleged misconduct. Plaintiff seemingly believes that the

Court of Appeal ruled that such knowledge determined when his claim accrued, despite the clear and unambiguous holding that Plaintiff's "cause of action accrues when the defendant's conduct occurs, not when the plaintiff learns about the conduct." 185 Cal. App. 4th at 1165.[9]

The Court of Appeal's references to Plaintiff's knowledge of the purported misconduct do not contradict its holding that Plaintiff's claim accrued when such conduct first occurred in February 2002. Instead, the Court of Appeal's references to Plaintiff's knowledge clearly were intended to emphasize that: (i) there was no legitimate basis, such as equitable tolling, available for Plaintiff to argue that his claim accrued later than when the first purportedly improper charges were imposed (*see, e.g.*, 185 Cal. App. 4th at 1170 ("The statute of limitations on a UCL action begins to run upon accrual unless equitably tolled. [Plaintiff] does not assert that equitable tolling applies to his action, nor does he allege any facts establishing [that] the doctrine applies" (citation omitted).).); and (ii) the undisputed facts conclusively demonstrate that Plaintiff simply had no excuse for failing to act to protect his interests for nearly six (6) years, given his stated belief that "excess copy charges" for "test copies" violated his rights the first time that such charges were imposed, as well as on each and every one of the sixteen (16) additional occasions that the charges were incurred in the ensuing years.

Accordingly, the "delayed discovery rule," and any "confusion in the courts" about it, is entirely irrelevant, and provides no basis for this Court

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[9] The Dissent confirms that the Court of Appeal majority did not apply the "delayed discovery rule," stating "I agree [with the majority] that the case does not rest on principles of delayed discovery or equitable tolling," and further confirms that Plaintiff "expressly disavows" application of those doctrines. 185 Cal. App. 4th at 1171.

to grant review, because neither party argued for its application, and the Court of Appeal did not apply it.

D. The Three Additional Grounds Cited by the Trial Court in its Order Dismissing Plaintiff's Action, But Not Reached by the Court of Appeal, Further Mandate that Review Be Denied

In affirming the trial court's order of dismissal, the Court of Appeal addressed only one of the four legal grounds argued by Canon and cited by the trial court, *i.e.,* that Plaintiff's claim is barred by the statute of limitations. But, as Canon argued to the trial court and the Court of Appeal, there were four separate and independent legal bases mandating dismissal. If this Court temporarily revives Plaintiff's UCL claim by granting review, such revival is destined to be short-lived because, in addition to the propriety of the dismissal of Plaintiff's claim on the basis of the statute of limitations, the other three grounds argued by Canon and cited by the trial court are each sufficient, standing alone, to merit dismissal.[10]

1. Plaintiff's UCL Claim Properly Was Dismissed By Reason of the Doctrine of Laches

Canon argued, both to the trial court and the Court of Appeal, that the doctrine of laches barred Plaintiff's claim, and the trial court cited laches as a basis for its order of dismissal. (*See* Brief in Opposition to Appeal at 28-32; App. 231-32.) The trial court's ruling clearly was correct, and would undoubtedly be upheld upon review.

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[10] The Dissent incorrectly implies that Canon argued only three grounds for affirmance of the trial court's dismissal of Plaintiff's UCL claim – the statute of limitations, the laches doctrine, and the doctrines of *res judicata* and collateral estoppel. *See* 185 Cal. App. 4th at 1178 n.6. In fact, there was a fourth ground cited in the trial court's order of dismissal that Canon argued to the Court of Appeal – that Plaintiff failed to state a viable UCL cause of action. (*See* App. 231-32 (Order Sustaining Demurrer by Canon to SAC).)

The equitable doctrine of laches requires dismissal of a claim where the facts demonstrate an "unreasonable delay" in its assertion "plus ***either*** acquiescence in the act about which plaintiff complains ***or*** prejudice to the defendant resulting from the delay." *Johnson v. City of Loma Linda,* 24 Cal. 4th 61, 68 (2000) (emphasis supplied), *quoting Conti v. Board of Civil Service Commissioners,* 1 Cal. 3d 351, 359 (1969). The undisputed facts manifestly establish Plaintiff's "unreasonable delay" in asserting his claim – Plaintiff has offered no explanation whatsoever as to why he waited nearly six (6) years to commence this action, despite Canon's repeated imposition of the same supposedly wrongful charges upon him over a period of years, as well as the prosecution by Canon of a lawsuit against him seeking payment for other charges relating to his two copiers. Moreover, Plaintiff's continued payment of such charges and continued enjoyment of the fruits of the parties' agreements establish his acquiescence in the alleged misconduct as a matter of law. *See In re Marriage of Burkle,* 139 Cal. App. 4th 712, 753 (2006) (in the context of an ongoing contractual relationship, acceptance of the benefits of the contract while failing to act on a purported claim establishes "acquiescence" for purposes of the application of the laches doctrine).[11] Accordingly, the trial court properly dismissed Plaintiff's claim on the basis of laches.

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[11] The Dissent incorrectly asserted that the laches doctrine is not applicable because "the second amended complaint does not show prejudice on its face." 185 Cal. App. 4th at 1178 n.6. But Canon did not argue to the Court of Appeal that laches applied because it had been prejudiced by Plaintiff's dilatory conduct. Instead, as it does here, Canon argued the alternative ground established by this Court's precedents – that laches applied because of Plaintiff's acquiescence as a matter of law to the purportedly wrongful conduct. (*See* Brief in Opposition to Appeal at 30-32.)

2. Plaintiff's UCL Claim Properly Was Dismissed by Reason of the Doctrines of *Res Judicata* and Collateral Estoppel

It is undisputed that (i) Canon sued Plaintiff in 2005 for unpaid charges for service and supplies that it provided for Plaintiff's copiers, (ii) the original small claims proceeding concluded with a judgment in Canon's favor, (iii) Plaintiff appealed, and a trial *de novo* was held before the Superior Court, at which Plaintiff was represented by counsel, and (iv) that proceeding concluded in a final judgment in Canon's favor for the entire amount sought by Canon in its complaint. (*See* App. 187-92 (Claim and Order to Go to Small Claims Court; Notice of Appeal and Notice of Filing Appeal; Judgment After Trial De Novo).)

These facts establish that Plaintiff's UCL claim is barred by operation of the doctrines of *res judicata* and/or collateral estoppel. "Res judicata bars the relitigation not only of claims that were conclusively determined in the first action, but also matter that was within the scope of the action, related to the subject matter, and relevant to the issues so that it could have been raised." *Burdette v. Carrier Corp.,* 158 Cal. App. 4th 1668, 1674-75 (2008). Collateral estoppel prohibits parties from re-litigating issues actually determined against them in a prior proceeding. *See Vandenburg v. Superior Court,* 21 Cal. 4th 815, 828 (1999). Both doctrines apply, in appropriate circumstances, to small claims court determinations. *See Perez v. City of San Bruno,* 27 Cal. 3d 875, 885 (1980); *Pitzen v. Superior Court,* 120 Cal. App. 4th 1374, 1381 (2004).

It is undisputed that the parties engaged in a small claims court dispute in 2005 concerning charges for service and supplies that Canon provided for Plaintiff's copiers. Plaintiff could have, and should have, raised at that time, either by counterclaim or as a setoff, his claim against

Canon based upon the alleged impropriety of "excess copy charges" for "test copies." But Plaintiff apparently failed to do so. Alternatively, if Plaintiff actually did raise the issue of the impropriety of such charges, the Superior Court clearly ruled against him, because it awarded Canon a judgment for the full amount sought. Accordingly, by reason of the parties' prior litigation, Plaintiff's UCL claim is barred by *res judicata* and/or collateral estoppel. *See Perez,* 27 Cal. 3d at 885; *Pitzen,* 120 Cal. App. 4th at 1385.[12]

3. Plaintiff's UCL Claim Properly Was Dismissed By Reason of Plaintiff's Failure to Allege a Cognizable Cause of Action

Canon contended before the trial court, and again before the Court of Appeal, that Plaintiff's pleadings failed to allege facts sufficient to establish a cognizable UCL claim, and the trial court agreed in citing this ground in its order of dismissal.[13] Although Plaintiff asserted that "excess copy charges" for "test copies" were "unfair" and "fraudulent" in violation of the UCL, the undisputed facts demonstrate the contrary.

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[12] The Dissent incorrectly asserted that the record before the trial court was insufficient to support dismissal on the basis of *res judicata* and/or collateral estoppel. *See* 185 Cal. App. 4th at 1178 n.6. On the contrary, the record before the trial court clearly established the subject matter of what was litigated in the small claims proceeding and its result, which facts alone are sufficient to warrant application of *res judicata* and/or collateral estoppel.

[13] The Dissent incorrectly stated that the trial court did not address "whether on the merits [Plaintiff] has stated a cause of action for violating the UCL," and that "no court has been called upon to determine whether . . . [Plaintiff] has adequately alleged a UCL claim." 185 Cal. App. 4th at 1173 n.4. On the contrary, Canon argued that Plaintiff had failed to adequately allege a UCL claim before both the trial court and the Court of Appeal, with the trial court agreeing and the Court of Appeal failing to reach the issue. (*See* App. 231-32 (Order Sustaining Demurrer by Canon to SAC); Brief in Opposition to Appeal at 39-47.)

Plaintiff's position essentially was that "excess copy charges" for "test copies" are self-evidently "unfair" and "fraudulent" because he did not believe he should have to pay them. Plaintiff did not cite, and could not have cited, any provision in the parties' written agreements in support of this position, because there are none. Plaintiff's UCL claim was nothing more than an attempt to convince the trial court to re-write the parties' contract to include a ban on "excess copy charges" for "test copies." But the UCL is not a mechanism enabling a contracting party to self-servingly declare a contract to be "unfair" or "fraudulent" simply because the party finds it to be onerous. *See Berryman v. Merit Property Management, Inc.*, 152 Cal. App. 4th 1544, 1555-56 (2007); *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999).

The undisputed facts establish that the purported imposition of "excess copy charges" for "test copies" was neither "unfair" nor "fraudulent." Such charges are entirely consistent with the terms of the parties' agreements, which expressly require Plaintiff to pay such charges for copies made on his copiers exceeding certain specified monthly allotments, without placing any limits upon the types of copies for which such charges would be incurred, or the manner in which such copies could be made. (*See* App. 134-139 (SAC Exs. 1, 2).) Moreover, the making of "test copies" by service technicians actually benefited Plaintiff by keeping Plaintiff's copiers in good working order. Given the minimal amount of the charges at issue, it is readily apparent that the benefits afforded Plaintiff by the service technicians' actions outweighed any alleged harm that Plaintiff suffered by purportedly having to pay the challenged charges.

Plaintiff alleged no facts, other than his own sense of grievance, supporting his contention that "excess copy charges" for "test copies" were

"unfair" or "fraudulent" in violation of the UCL. Accordingly, as the trial court correctly ruled, Plaintiff failed to allege a viable UCL cause of action. *See Berryman,* 152 Cal. App. 4th at 1555-56; *Puentes v. Wells Fargo Home Mortgage, Inc.,* 160 Cal. App. 4th 638, 645 (2008).

IV. CONCLUSION

For the foregoing reasons, review is not "necessary to secure uniformity of decision" or "to settle an important question of law." Cal. Rules of Court, Rule 8.500(b)(1). Accordingly, the Petition should be denied.

Dated: August 31, 2010

Respectfully Submitted,

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V. CERTIFICATION OF WORD COUNT

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

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

2. I certify that the number of words contained in this Answer to Petition for Review is 7,360, based on the Word Count feature of Microsoft Word (excluding tables, certificate, verification and supporting documents).

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

Executed on August 31, 2010 in Irvine, California.

KENT J. SCHMIDT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the City of Irvine, County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is 38 Technology Drive, Suite 100, Irvine, California 92618-5310. On August 31, 2010, I served the documents named below on the parties in this action as follows:

DOCUMENT(S) SERVED: **ANSWER TO PETITION FOR REVIEW**

SERVED UPON: **SEE ATTACHED SERVICE LIST**

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

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

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

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

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

Executed on August 31, 2010, at Irvine, California.

MARIA SANTOS

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