What Is "Unfair" Conduct in a Franchise Case Under California's Unfair Competition Law?

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California's Unfair Competition Law (UCL)[1] is intended to foster "fair business competition" by curtailing "'anti-competitive business practices' as well as injuries to consumers."[2] At first glance, franchise practitioners may question the general applicability of the UCL to franchise disputes that involve *neither* antitrust *nor* consumer claims. However, California courts have found the UCL's scope to be intentionally broad with sweeping coverage.[3] In this vein, courts have found the UCL to apply to any "business act that is either fraudulent, unlawful, or unfair"—including intellectual property disputes, employment claims, and franchise cases, among others.[4] This broad interpretation and application of the UCL has made it one of the most frequently litigated statutes in California.

On its face, the UCL defines *unfair competition* to "include any unlawful, unfair or fraudulent business act or practice."[5] Each of these terms, *unlawful*, *unfair*, and *fraudulent*, represents a separate and distinct theory of liability and are each "independently actionable" under the UCL.[6]

1. Cal. Bus. & Prof. Code § 17200 *et seq*.
2. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 560 (Cal. 1999) (quoting Barquis v. Merchs. Collection Ass'n, 496 P.2d 817, 829 (Cal. 1972)). The UCL is commonly referred to in California as the "UCL" or "Section 17200."
3. *Cel-Tech*, 973 P.2d at 561.
4. Levine v. Blue Shield of Cal., 117 Cal. Rptr. 3d 262, 277 (Ct. App. 2010).
5. Cal. Bus. & Prof. Code § 17200.
6. *Cel-Tech*, 973 P.2d at 540; *see also* Lozano v. AT&T Wireless Servs., 504 F.3d 718, 731 (9th Cir. 2007) (citing S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 85 Cal. Rptr. 2d 301, 316–17 (Ct. App. 1999)); State Farm Fire & Cas. Co. v. Superior Court, 53 Cal. Rptr. 2d 229, 234 (Ct. App. 1996); People ex rel. Mosk v. Nat'l Research Co. of Cal., 20 Cal. Rptr. 516, 521(Ct. App. 1962) (stating "it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.").

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Case law defining the types of business acts and practices that are "unlawful" or "fraudulent" under the UCL is well-developed and relatively straightforward. An "unlawful" business practice "borrows violations of other laws and treats them as unlawful practices," independently actionable under the UCL.[7] Stated differently, "[v]irtually any state, federal, or local law can serve as the predicate" to a UCL "unlawful" claim.[8] On the other hand, a "fraudulent" business practice is one that is likely to deceive members of the public and is *actually relied upon* by the plaintiff to his or her detriment.[9] These legal standards are consistently applied to evaluate business conduct that is allegedly "unlawful" or "fraudulent." However, evaluating conduct under the UCL's "unfair" prong is significantly more convoluted.

There are at least *four* tests that have been unevenly applied by the courts to evaluate conduct under the UCL's "unfair" prong. The California Supreme Court, in the seminal case of *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone*, identified the proper test that the courts must use when evaluating claims of "unfairness" between *competitors*.[10] Still, the *Cel-Tech* court left open the question of which test controlled in cases involving consumers and other non-competitor relationships. The law in this area remains unsettled.[11]

Because the typical franchisor-franchisee dispute does not involve competitors or consumers, courts have analyzed UCL "unfairness" claims under a myriad of tests. This has led to mixed, and sometimes baffling, results, and has even caused some judges to openly question whether the UCL applies to disputes between franchisors and franchisees.

This article will provide franchise practitioners with some history and guidance on this complicated, and heavily litigated, area of California law. The article addresses whether the UCL "unfairness" prong has been (and can be) applied in franchise disputes, the controlling "unfairness" tests in both competitor and consumer actions, and the courts reconciliation and application of these tests in the typical franchise dispute, which involves neither competitors nor consumers. The article concludes with suggested approaches that franchise practitioners can pursue when litigating a claim under the "unfairness" prong of the UCL.

7. *State Farm*, 53 Cal. Rptr. 2d at 234.

8. Friedman v. AARP, Inc., 855 F.3d 1047, 1052 (9th Cir. 2017). The unlawful prong of the UCL can be especially useful to a plaintiff when the predicate law does not provide for a private right of action.

9. *See* Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 2016 WL 2643680 (N.D. Cal. May 5, 2016*); In re* Tobacco II Cases, 207 P.3d 20, 39 (Cal. 2009).

10. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 545 (Cal. 1999).

11. *In re* Qualcomm Litig., 2017 WL 5985598, at *6 (S.D. Cal. Nov. 8, 2017).

I. Can a Franchisee Pursue a UCL "Unfairnes" Claim Against the Franchisor?

As mentioned previously, the stated intent of the UCL is to protect both *consumers* and *competitors* by promoting fair competition in commercial markets for goods and services.[12] Still, courts routinely apply the UCL to cases that do not involve consumers or competitors so long as the alleged conduct involves "a business act or practice that is fraudulent, unlawful, or unfair."[13] This begs the threshold question: does a franchisee have standing to bring a UCL claim when the dispute is devoid of both competitor and consumer elements?

This issue was considered by the district court in *Prudential Insurance Company of America v. Herman*.[14] In that matter, defendant Herman, a franchisee, filed a counterclaim against its franchisor, Prudential Real Estate Affiliates, Inc., for violation of the UCL. The UCL claim was predicated upon the franchisor's alleged failure to provide the support and growth opportunities required by the parties' franchise agreement.[15] The franchisor moved to dismiss the UCL claim, arguing that "contract breaches do not rise to the level of 'unfair' within the meaning of the statute."[16] The trial court agreed.[17] As part of its ruling, the court, in a footnote, questioned whether a UCL claim was viable because the franchise dispute presented "neither a competitor nor a consumer suit, but rather a case involving franchisees complaining that their franchisor breached certain contractual obligations under their franchise agreement."[18] The court ultimately sidestepped the standing issue by dismissing the UCL claim on the merits following a full analysis of multiple UCL tests.[19]

Although the author could find no reported case holding that the UCL was inapplicable to non-consumer, non-competitor franchise disputes, several courts have found in other contexts that the dismissal of a UCL claim may be appropriate "when the plaintiff is neither a competitor nor a

12. *See, e.g.*, Kasky v. Nike, Inc., 45 P.3d 243, 249 (Cal. 2002), *as modified*, May 22, 2002, (stating "the UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. . . .").

13. *See, e.g.*, *In re* Pomona Valley Med. Grp., 476 F.3d 666, 675 (9th Cir. 2007) ("As the California courts have explained, the unfair competition statute is not limited to 'conduct that is unfair to competitors.'"); Drum v. San Fernando Valley Bar Ass'n, 106 Cal. Rptr. 3d 46 (Ct. App. 2010) (not questioning the plaintiff's standing to pursue a non-consumer, non-competitor UCL claim against state bar association); People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870 (Ct. App. 2001) (stating that the UCL is "intentionally broad to give the court maximum discretion to control whatever new schemes may be contrived, even though they are not yet forbidden by law.").

14. Prudential Ins. Co. of Am. v. Herman, 2009 WL 10674431 (C.D. Cal. Aug. 31, 2009).

15. *Id.* at *1.

16. *Id.* at *2.

17. *Id.* at *4.

18. *Id.* at *2 n.3.

19. *Id.* at *2.

consumer."[20] For instance, in *Linear Technology Corp. v. Applied Materials, Inc.*, the California Sixth District Court of Appeal upheld the trial court's dismissal of the UCL claim by a corporate plaintiff seeking indemnification in a patent dispute that did not involve consumer or competitor issues.[21] In its decision, the appellate court noted that "the alleged victims are neither competitors nor powerless, unwary consumers, but [plaintiff] and other corporate customers in Silicon Valley, 'each of which presumably has the resources to seek damages or other relief . . . should it choose to do so.'"[22]

Similarly, in the wage-and-hour class action case *Casas v. Victoria's Secret Stores, LLC*, the district court noted "that it remains extremely skeptical of plaintiffs' UCL unfairness theory" because plaintiffs are neither competitors nor consumers.[23] Still, the court allowed the UCL claim to survive a motion to dismiss, acknowledging that it will "consider whether Plaintiffs have satisfied UCL standing at a later time."[24]

Conversely, most courts have no trouble applying the UCL to non-consumer, non-competitor disputes.[25] For example, in *BladeRoom Group Limited v. Facebook, Inc.*, the district court found that "the UCL's comprehensive purpose" extends beyond disputes involving consumers and competitors.[26] "Instead, the UCL more broadly requires the plaintiff demonstrate a loss of money or property as a result of unfair competition."[27] *Power Quality & Electrical Systems, Inc. v. BP West Coast Products LLC* addressed this question in a franchise context after the franchisor moved at the onset of the case to dismiss the franchisee's UCL claim, arguing that the parties were not competitors and the franchisee was not a consumer within the meaning of the UCL.[28] The district court summarily rejected the franchisor's argument as "unavailing," finding that the term *unfair competition* "embrac[es] anything that can properly be called a business practice."[29] "Where an 'unlawful'

20. Dillon v. NBCUniversal Media LLC, 2013 WL 3581938, at *7 (C.D. Cal. June 18, 2013) (citing Linear Tech. Corp. v. Applied Materials, Inc., 61 Cal. Rptr. 3d 221, 237 (Ct. App. 2007) (upholding trial court's dismissal of UCL claim when "the alleged victims are neither competitors nor powerless, unwary consumers.")); Rosenbluth Int'l, Inc. v. Superior Court, 124 Cal. Rptr. 2d 844, 847 (Ct. App. 2002), *as modified* Sept. 11, 2002 (holding that the UCL does not apply to consumer claims of sophisticated corporations, each of which had the resources to seek damages or other relief should it choose to do so) (distinguished by *In re* Yahoo! Litig., 251 F.R.D. 459, 475 (C.D. Cal. 2008)).

21. *Linear Tech. Corp.*, 61 Cal. Rptr. 3d at 237.

22. *Id.* (citing *Rosenbluth*, 24 Cal. Rptr. 2d at 844); *see also* S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 85 Cal. Rptr. 2d 301, 305 (Ct. App. 1999) (holding that the UCL "is directed toward protecting the general public, not automotive dealerships aware of GMAC's use of [lending] method").

23. Casas v. Victoria's Secret Stores, LLC, 2015 WL 13446989 (C.D. Cal. Apr. 9, 2015).

24. *Id.* at *4 n.7.

25. *See, e.g.*, *In re* Pomona Valley Med. Grp., 476 F.3d 665, 675 (9th Cir. 2007); Drum v. San Fernando Valley Bar Ass'n, 106 Cal. Rptr. 3d 46 (Ct. App. 2010).

26. BladeRoom Grp. Ltd. v. Facebook, Inc., 219 F. Supp. 3d 984, 995–96 (N.D. Cal. 2017).

27. *Id.* at 996.

28. Power Quality & Elec. Sys., Inc. v. BP W. Coast Prods. LLC, 2016 WL 6524408, at *7 (N.D. Cal. Nov. 3, 2016).

29. *Id.* (citing *In re Pomona*, 476 F.3d at 675).

business practice is charged, actual injury to the consuming public or even to business competitors is not a required element of proof of a violation of [the UCL]."[30]

In short, although dismissal for lack of UCL standing in a franchisor/franchisee dispute may hold appeal with certain judges, it is not likely to dispose of the UCL "unfairness" claim in most circumstances. Thus, a deeper analysis is necessary.

II. What Is an "Unfair" Business Act or Practice Under the UCL?

The UCL does not define which business practices are "unfair," and unlike the "fraud" and "unlawful" theories of liability, courts have struggled to come up with a workable test to identify "unfair" conduct reliably.[31] As explained later, in the aftermath of *Cel-Tech*, courts now use as many as four tests to evaluate allegedly "unfair" business acts and practices.

A. "*Unfair*" *After* Cel-Tech

The California Supreme Court decided *Cel-Tech* in 1999. "Before *Cel-Tech*, courts held that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'"[32] However, the *Cel-Tech* court described the existing tests as "too amorphous and provide too little guidance to courts and businesses."[33] According to the California Supreme Court, California businesses need to know, "to a reasonable certainty, what conduct California law prohibits and what it permits."[34]

To that end, the court announced "a more precise test for determining what is unfair under the unfair competition law."[35] Under the new test, unfair business acts or practices are limited to that conduct which "*threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition*."[36]

In formulating this test, the *Cel-Tech* court relied upon Section 5 of the Federal Trade Commission Act and federal antitrust laws.[37] Appreciating that

30. *Id.* (citing People *ex rel.* Van de Kamp v. Cappuccio, Inc., 251 Cal. Rptr. 657, 663 (Ct. App. 1988)).

31. Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 393 (Ct. App. 2002).

32. Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012) (citing S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 85 Cal. Rptr. 2d 301, 316 (Ct. App. 1999)); *see also* Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018).

33. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 564 (Cal. 1999).

34. *Id.* ("[A]n undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair. In some cases, it may even lead to the enjoining of pro competitive conduct and thereby undermine consumer protection, the primary purpose of the antitrust laws.").

35. *Id.*

36. *Id.* at 565 (emphasis added).

37. *Id.* at 564 (citing 15 U.S.C. § 45(a)).

the purpose of these federal laws is "to foster and encourage competition," the court concluded that UCL claims of "unfair" conduct among competitors must either be "*tethered*" to a "legislatively declared policy" protecting competition, or based on "proof of some actual or threatened impact on competition."[38] The test articulated in *Cel-Tech* continues to be good law and controls UCL claims of "unfairness" between competitors.

B. *Express Limitation in* Cel-Tech

The universal application of *Cel-Tech* to both competitor and consumer UCL actions would provide consistency to the law and a certain level of predictability for California businesses (consistent with the rationale identified in *Cel-Tech*).[39] However, and unfortunately, the *Cel-Tech* court included the following caveat: "Nothing we say relates to actions by *consumers*. . . ."[40] This express limitation has caused much debate and confusion over the past twenty years.

The California appellate court's opinion in *Bardin v. DaimlerChrysler Corp*. perhaps best captures the confusion created by the limitation in *Cel-Tech*. In *Bardin*, the plaintiff brought a proposed class action against an automobile manufacturer claiming that the manufacturer's use of tubular steel, rather than the more expensive cast iron, in exhaust manifolds of certain vehicles violated the UCL.[41] The manufacturer demurred to the plaintiff's UCL claim on the basis that the use of tubular steel over cast iron was not "unfair" within the definition of the UCL.[42] Both the trial court and court of appeal agreed.[43] While analyzing the "unfairness" prong of the UCL, the *Bardin* court posed the question: "Did the Supreme Court limit its holding in *Cel-Tech* to UCL actions brought by competitors simply because the circumstance of a consumer UCL action was not before it, or because the definition of 'unfair' should be different depending on whether the action is brought by a consumer or a competitor?"[44] The *Bardin* court also "urge[d]

38. *Id*. at 565 ("These principles convince us that, to guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under [the UCL] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."); *see also* Power Integrations, Inc. v. De Lara, 2020 WL 1467406, at *23 (S.D. Cal. Mar. 26, 2020) (dismissing the UCL claim after finding that the plaintiff failed to allege that that the defendants "violated a public policy tied to an established constitutional, statutory, or regulatory provision").

39. *Cel-Tech*, 973 P.2d at 564, 566 n.12 (although criticizing consumer cases applying the former balancing test, the court nonetheless expressly limiting its holding to anticompetitive practices cases, stating that "[n]othing we say relates to actions by consumers").

40. *Id.*

41. Bardin v. DaimlerChrysler Corp., 39 Cal. Rptr. 3d 634, 636 (Ct. App. 2006).

42. *Id.*

43. *Id.* at 638, 649.

44. *Id*. at 647. Other related questions posed by the *Bardin* court included:

> Was the Supreme Court expressing the view that regulation of competitive conduct is contained in existing legislation, but there is no analogous law pertaining to consumers? Should a broader definition of "unfair" apply in consumer actions because consumers require more protection than competitors even though such a distinction between consumers and competitors is not reflected in the language of

the Legislature and the [California] Supreme Court to clarify the scope of the definition of 'unfair' under the UCL."[45] Unfortunately, they have provided no such clarity.

To date, neither the California Supreme Court nor the state legislature has identified a single test for use in evaluating unfair business acts and practices in consumer actions.[46] This lack of guidance has paved the way for a significant split of authority on which test to apply to *non-competitor* claims under the UCL.[47]

C. *Interpreting "Unfair" in Consumer Actions*

Despite *Cel-Tech*'s express limitation of its test to actions by competitors, many courts have still applied the *Cel-Tech* test in both competitor *and* consumer cases.[48] For instance, in *Herman*, the district court articulated "at least two reasons to prefer the *Cel-Tech* test" when evaluating a consumer action.[49] "First, the *Cel-Tech* court was construing the statutory language of 'unfair' as that term is used in [the UCL]. Because there is only one term 'unfair' used in the statute, the same word 'unfair' should mean the same thing for all purposes as a matter of statutory construction."[50] Second, "simple logic dictates that the *Cel-Tech* court's criticisms of the old test, as supplying a standard

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the statute? Is the *Cel-Tech* definition of "unfair" too narrow to sufficiently protect consumers? Is the definition of "unfair" applied in *Smith* too amorphous in the consumer context, and does it provide "too little guidance to courts and businesses?"

Id.

45. *Id.*

46. Aleksick v. 7-Eleven, Inc., 140 Cal. Rptr. 3d 796, 806–08 (Ct. App. 2012).

47. *See* Herron v. Best Buy Co. Inc., 924 F. Supp. 2d 1161, 1177–78 (E.D. Cal. 2013) ("Under the UCL's 'unfair' prong, the test for liability in consumer suits is 'in flux.'") (citing Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007)); Chang Bee Yang v. Sun Trust Mortg., Inc., 2011 WL 3875520, at *8 (E.D. Cal. Aug. 31, 2011) (applying multiple tests); Mlejnecky v. Olympus Imaging Am. Inc., 2011 WL 1497096, at *7 (E.D. Cal. Apr. 19, 2011) (adopting the balancing test); Jackson v. Ocwen Loan Servicing, LLC, 2011 WL 587587, at *4 (E.D. Cal. Feb. 9, 2011) (applying the tethering test); Yanting Zhang v. Superior Court, 304 P.3d 163, 174 n.9 (Cal. 2013) (describing the standard for determining what business acts or practices are "unfair" in consumer actions under the UCL as "unsettled"); Smith v. State Farm Mut. Auto. Ins. Co., 113 Cal. Rptr. 2d 399, 416 n.23 (Ct. App. 2001) (acknowledging that "we are not to read *Cel-Tech* as suggesting that such a restrictive definition of 'unfair' should be applied in the case of an alleged consumer injury").

48. *See In re* Firearm Cases, 24 Cal. Rptr. 3d 659 (Ct. App. 2005); Progressive W. Ins. Co. v. Superior Court, 37 Cal. Rptr. 3d 434 (Ct. App. 2005); Bernardo v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197 (Ct. App. 2004); Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 395 (Ct. App. 2002) ("Moreover, where a claim of an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions."); Walker v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 2d 79, 87 (Ct. App. 2002); Schnall v. Hertz Corp., 93 Cal. Rptr. 2d 439 (Ct. App. 2000).

49. Prudential Ins. Co. of Am. v. Herman, 2009 WL 10674431, at *3–4 (C.D. Cal. Aug. 31, 2009).

50. *Id.*

that is 'too amorphous and provide[s] too little guidance to courts and businesses,' would also extend to other cases, including consumer cases."[51]

Notwithstanding these arguments in favor of a single test for "unfair" conduct, the majority of courts read *Cel-Tech* to be inapplicable, and, to some degree unworkable, in consumer actions. The most prominent criticisms of the universal application of *Cel-Tech* to consumer UCL actions came from the California Second District Court of Appeal in *Camacho v. Automotive Club of Southern California*.[52] There, an uninsured motorist filed a purported class action against a collection agency and insurer alleging that the collection practices of the defendants were "unfair" under the UCL.[53] The trial court, on its own motion, granted judgment on the pleadings in favor of defendants.[54] The ruling was affirmed by the appellate court, but not without criticizing the application of *Cel-Tech* to consumer actions. Specifically, the appellate court articulated two distinct reasons why the *Cel-Tech* definition of "unfair" should *not* apply in consumer actions:

> First, "tethering" a finding of unfairness to "specific constitutional, statutory or regulatory provisions" does not comport with the broad scope of [the UCL]. "Tethering" the concept of unfairness to existing positive law undercuts the principle that a practice is prohibited as "unfair" or "deceptive," even if it is not "unlawful" or vice versa. . . . Second, anticompetitive conduct is best defined in terms of the policy and spirit of antitrust laws; the same cannot be said of a business practice that is "unfair" or "deceptive" in the terms of [the UCL]. That is, cases involving anticompetitive conduct move in a far smaller, and more clearly defined, universe than unfair or deceptive business practices. It is therefore possible to "tether" anticompetitive conduct to the antitrust laws, while the universe of laws and/or regulations that bear on unfair practices is so varied that it is not possible to achieve a consensus which of these laws and regulations might apply to define an unfair practice.[55]

As of this writing, there is no definitive test to determine whether a business practice is "unfair" in consumer actions.[56] *Cel-Tech* aside, three consumer tests have been unevenly applied by the courts.[57]

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51. *Id.* (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 564 (Cal. 1999)).

52. Camacho v. Auto. Club of S. Calif., 48 Cal. Rptr. 3d 770, 776–77 (Ct. App. 2006) ("Definitions that are too amorphous in the context of anticompetitive practices are not converted into satisfactorily precise tests in consumer cases. This squares with the fact that, in disapproving appellate court opinions defining 'unfair' in 'amorphous' terms, the Supreme Court did not hold that the old definitions were appropriate in consumer cases.").

53. *Id.* at 771.

54. *Id.*

55. *Id.*

56. Drum v. San Fernando Valley Bar Ass'n, 106 Cal. Rptr. 3d 46, 53 (Ct. App. 2010) (citing Davis v. Ford Motor Credit Co. LLC, 101 Cal. Rptr. 3d 697, 706–10 (Ct. App. 2009) (tracing post-*Cel-Tech* split in authority among California courts of appeal in consumer cases)); Bardin v. DaimlerChrysler Corp., 39 Cal. Rptr. 3d 634, 641 (Ct. App. 2006) (noting split of authority).

57. For simplicity, all three tests are summarized in *West v. JPMorgan Chase Bank, N.A.*, 154 Cal. Rptr. 3d 285, 305 (Ct. App. 2013).

1. The Balancing Test

Originally expressed by the *People v. Casa Blanca Convalescent Homes, Inc.*,[58] and followed by *State Farm Fire and Casualty Co. v. Superior Court*,[59] a business practice is "unfair" under the balancing test when (1) the alleged conduct "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," and (2) the utility of the alleged conduct is not outweighed by the gravity of harm to the alleged victim.[60]

2. The Tethering Test

This second consumer test was articulated by the First District Court of Appeal in *Gregory v. Albertson's, Inc.*,[61] and is viewed as an extension of the *Cel-Tech* test to consumer cases.[62] Under the tethering test, an "unfair" business practice is present when the public policy allegedly violated is tethered to a specific constitutional, statutory, or regulatory provision.[63] As a rationale for its test, the *Gregory* court explained:

> [*Cel-Tech*] may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be "too amorphous." Moreover, where a claim of an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.[64]

3. The Section 5 (or Federal Trade Commission) Test

The test applied in a third line of cases was first expressed by the *Camacho* court and draws on the definition of "unfair" in section 5 of the Federal Trade Commission Act.[65] Under the Section 5 test, an act or practice is "unfair" if (1) the consumer injury is substantial, (2) the injury is not outweighed by

58. People v. Casa Blanca Convalescent Homes, Inc., 206 Cal. Rptr. 164, 177 (Ct. App. 1984) (disapproved of by *Cel-Tech*, 973 P.2d at 543 (noting that the test advanced in *Casa Blanca* as "too amorphous and provide too little guidance to courts and businesses" in competitor actions)).

59. State Farm Fire & Cas. Co. v. Superior Court, 53 Cal. Rptr. 2d 229, 235 (Ct. App. 1996) (disapproved of by *Cel-Tech*, 973 P.2d at 543 (noting that the test advanced in *State Farm Fire* as "too amorphous and provide too little guidance to courts and businesses" in competitor actions)).

60. *See also Drum*, 106 Cal. Rptr. 3d at 53 (citing *Bardin*, 39 Cal. Rptr. 3d at 636); Ticconi v. Blue Shield of Cal. Life & Health Ins. Co., 72 Cal. Rptr. 3d 888, 895–96 (Ct. App. 2008); Progressive W. Ins. Co. v. Superior Court, 37 Cal. Rptr. 3d 434, 453 (Ct. App. 2005) (concluding "that the balancing test should continue to apply in consumer cases" post-*Cel-Tech*); Smith v. State Farm Mut. Auto., Ins. Co., 113 Cal. Rptr. 2d 399, 415 (Ct. App. 2001).

61. Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 392 (Ct. App. 2002).

62. *See, e.g.*, Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007) (explaining that the *Gregory* court extended the *Cel-Tech* definition to consumer cases).

63. *Gregory*, 128 Cal. Rptr. at 392; *see also In re* Anthem, Inc. Data Breach Litig., 162 F. Supp. 3d 953 (N.D. Cal. 2015); Drum v. San Fernando Valley Bar Ass'n, 106 Cal. Rptr. 3d 46, 53 (Ct. App. 2010); Scripps Clinic v. Superior Court, 134 Cal. Rptr. 2d 101, 116 (Ct. App. 2003).

64. *Gregory*, 128 Cal. Rptr. 2d at 395.

65. 15 U.S.C. § 45(n).

any countervailing benefits to consumers or competition, and (3) the injury could not reasonably have been avoided by the consumers themselves.[66]

In federal court, there is at least a little more clarity. The Ninth Circuit has directed the federal district courts within its jurisdiction to use either the balancing test or tethering test to define unfair conduct in consumer actions.[67] In *Lozano v. AT&T Wireless Services, Inc.*, the Ninth Circuit acknowledged that the UCL's unfairness prong, as it applies to consumer suits, "is currently in flux."[68] Attempting to make sense of California case law following *Cel-Tech*, the *Lozano* court declined to apply the Section 5 test—"in the absence of a clear holding from the California Supreme Court"—because Section 5 "clearly revolves around anti-competitive conduct, rather than anti-consumer conduct."[69]

Yet, these multiple tests along with the continued, intermittent use of the *Cel-Tech* test in consumer actions have significantly complicated the application of the "unfair" prong in non-competitor UCL actions.

III. Which Test of Unfairness Applies in Franchise Cases?

The elephant in the room, assuming the UCL applies to non-consumer, non-competitor franchise cases, is which test should be used to evaluate alleged violations of the "unfair" prong? Unfortunately, the answer is not clear. In predictable fashion, franchisee counsel generally advocate for the amorphous balancing test, while franchisor counsel push for the more definitive and restrictive *Cel-Tech* or tethering tests. These competing positions aside, both federal and state courts have been all over the map in their analysis of the "unfair" prong in franchise cases, leading to mixed and often illogical results.

For example, in *Ahussain v. GNC Franchising*, the plaintiff franchisees filed a class action lawsuit against GNC Franchising for, among other things, violation of the UCL for allegedly engaging in unlawful business practices designed to earn a profit at the expense of the franchisees' stores.[70] The court certified the class on the UCL claim as to the following five alleged GNC business practices: (1) requiring its franchises to carry poor selling products that could not be returned to GNC after expiration; (2) requiring franchised

66. Camacho v. Auto. Club of S. Cal., 48 Cal. Rptr. 3d 770, 776 (Ct. App. 2006); *see also* Aleksick v. 7-Eleven, Inc., 140 Cal. Rptr. 3d 796, n.5 (Ct. App. 2012); Davis v. Ford Motor Credit Co. LLC, 101 Cal. Rptr. 3d 697, 709–10 (Ct. App. 2009); Daugherty v. Am. Honda Motor Co., Inc., 51 Cal. Rptr. 3d 118, 130 (Ct. App. 2006).

67. Lozano v. AT&T Wireless Servs., 504 F.3d 718, 736 (9th Cir. 2007); *see also* Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1170 (9th Cir. 2012) (recognizing that California appellate courts are divided on the definition of "unfair" and whether the *Cel-Tech* standard should apply to UCL actions brought by consumers); Power Quality & Elec. Sys., Inc. v. BP W. Coast Prods. LLC, 2016 WL 6524408, at *8 (N.D. Cal. Nov. 3, 2016).

68. *Lozano*, 504 F.3d at 736.

69. *Id.*

70. Ahussain v. GNC Franchising, LLC, 2009 WL 10672353, at *1–2 (C.D. Cal. Mar. 18, 2009).

stores to purchase new or experimental products, effectively forcing franchisees to provide free market research; (3) using the "Gold Card" program to glean information on franchised store customers and then soliciting business from such customers; (4) underselling its franchise stores by selling products through the GNC website at prices below or close to the wholesale price, thereby forcing franchises to sell the same products at a loss; and (5) manipulating prices at which franchised stores can purchase products from third-party suppliers, so as to maintain GNC's favored position as a product wholesaler.[71] GNC moved for summary judgment and lobbied the court for the application of the *Cel-Tech* test, arguing that the frachisees should be considered competitors of stores owned by GNC for purposes of the UCL analysis in light of their claim that "[t]he greatest threat to the profitability and survival of franchised stores comes not from third-party competition, but from [the franchisor] itself."[72] The franchisees pushed for the less stringent balancing test.[73]

In deciding which test to apply, the district court took a unique approach by placing the burden on the franchisor to show that the parties were competitors in order for the *Cel-Tech* test to apply.[74] When the franchisor failed to cite to any authority showing "that a franchisor and its franchisees should be deemed competitors for purposes of the UCL," the court concluded (without any real analysis) that the consumer tests controlled and that GNC's alleged practices must be "unfair" under either the tethering test or balancing test for the UCL claim to survive summary judgment.[75] Ultimately, the court found that the franchisees failed to satisfy either consumer test. Applying the balancing test, the court found that the franchisees failed to show that "the alleged harm of [GNC's] practices outweigh their utility" and that the UCL did not grant the court the right to generally review the franchise agreements for "fairness."[76] Applying the tethering test, the court found that the franchisees failed to "put forth any constitutional, statutory or regulatory provisions that suggest that the business practices at issue are unfair."[77] Because the franchisees could not show that GNC's alleged practices were "unfair" under either consumer test, the court granted summary judgment in favor of GNC.[78]

The *Ahussain* court's imposition of a burden on GNC to show that the relationship was that of competitors before applying *Cel-Tech*—and corresponding treatment of the consumer tests as the *default* tests—is

71. *Id.* at *2.
72. *Id.* at *3.
73. *Id.*
74. *Id.*
75. *Id.* at *3–4 (citing to Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)).
76. *Id.* at *3–4 (citing Samura v. Kaiser Found. Health Plan, Inc., 22 Cal. Rtpr. 2d 20 (Ct. App. 1993)).
77. *Id.* at *4.
78. *Id.* at *6.

unprecedented. Inversely, why wasn't *Cel-Tech* the default test absent the showing of a consumer relationship? Perhaps, the court's preference for the consumer tests is best explained by its ultimate ruling in favor of the franchisor, finding that not even the consumer tests could be satisfied by the facts of the case. Still, the analysis leaves much to be desired.

Five months after *Ahussain* was decided, a different judge sitting in the same district faced with a franchisor-franchisee dispute noted that "the Court is not at all convinced that this case can be easily classified as a consumer suit as opposed to a competitor suit."[79] In *Prudential Insurance Co. of America v. Herman*, the franchisees claimed that Prudential violated the "unfair" prong of the UCL by (1) "fail[ing] and refus[ing] to provide the requisite training, support, or assistance to the [franchisees]" required by the franchise agreements, (2) "fail[ing] to equitably allocate to the [franchisees] business referrals," (3) "never present[ing] a single growth opportunity to the [franchisees]," and (4) "unreasonably refus[ing] to allow them to acquire an existing franchise or open a new franchise in these areas."[80] According to the franchisees, these alleged actions of Prudential were done in an effort to "drive [the franchisees] out of business" and to "generate business for Prudential by depriving [the franchisees] of their ability to engage in reasonable competition."[81] Prudential moved to dismiss the UCL claim, analyzing it under the *Cel-Tech* test. The franchisees argued that the balancing test controlled.[82]

Citing to the Ninth Circuit's decision in *Lozano*, the court recognized that it could "equally" apply either the tethering test or the balancing test when analyzing claims of "unfairness" under the UCL.[83] However, upon further examination, the court found "at least two reasons to prefer [the tethering test] over the old balancing test."[84] First, the *Cel-Tech* court's definition of the term *unfair* "should mean the same thing for all purposes as a matter of statutory construction."[85] Second, "simple logic dictates that the *Cel-Tech* court's criticisms of the old test, as supplying a standard that is 'too amorphous and provide[s] too little guidance to courts and businesses,' would also extend to other cases, including consumer cases."[86] In light of these considerations, the *Herman* court found that "the better view is that the same test for 'unfairness' applies in all cases," and that test is the tethering test.[87] Applying the tethering test, the court dismissed the franchisees' UCL claim with prejudice,

79. Prudential Ins. Co. of Am. v. Herman, 2009 WL 10674431, at *3 (C.D. Cal. Aug. 31, 2009).
80. *Id.* at *1.
81. *Id.* at *2, n.2.
82. *Id.* at *3.
83. *Id.* (citing Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)).
84. *Herman*, 2009 WL 10674431, at *3.
85. *Id.*
86. *Id.* (citing Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543 (Cal. 1999)).
87. *Id.* at *3.

finding that claim was improperly predicated upon contract breaches, and was not "tethered to any legislatively declared policy of the UCL."[88]

In the footnotes of its opinion, the court took its analysis a step further by suggesting that even if the *Cel-Tech* test—as extended by the tethering test—did not have universal application to both consumer and competitor cases, it still would apply it to the instant dispute because the franchisees' "substantive allegation posits a competitive relationship."[89] The court explained that "[t]he most natural reading of [the franchisees'] allegation is that Prudential acted unfairly by treating the [franchisees] like competitors, rather than mere consumers under the franchise agreement."[90] The court's comments suggest that, even if it did not have the flexibility to apply the *Cel-Tech* test to consumer disputes through the tethering test, it still would have applied *Cel-Tech* to the case as the underlying substantive allegations of the complaint support a competitor relationship.

Although *Herman* is not alone in its proposed methodology of reviewing the substance of the underlying allegations to determine the appropriate test of unfairness,[91] other courts, like that in *Ahussain*, have found that the type of allegations asserted in a complaint are not conclusive of the parties' relationship and merely "descriptive of the allegations that have given rise to the instant lawsuit."[92] Needless to say, the *Herman* and *Ahussain* opinions, originating from the same district, exemplify the difficulties confronting franchise practitioners when attempting to navigate the UCL.

The uncertainty surrounding the analysis of UCL claims in franchise cases continued with the California Second District Court of Appeal's opinion in *R.N.R. Oils, Inc. v. BP West Coast Products LLC*.[93] In that case, sixteen franchisees of BP West Coast Products LLC filed suit against the franchisor and its affiliate, Atlantic Richfield Company (ARCO), alleging that the defendants violated the UCL by engaging in various unfair business practices, including (1) implementing an automated gasoline delivery system in a manner that forced the franchisees to accept unnecessary fuel deliveries when fuel prices were decreasing and to experience fuel shortages when fuel prices were increasing and that caused the franchisees to bear the cost of fuel price changes while scheduled fuel deliveries were pending; (2) keeping vendor rebates and promotional allowances that belonged to the franchisees; and (3) delaying payment of refunds and reimbursements owed to

88. *Id.*
89. *Id.* at *2 n.2.
90. *Id.*
91. *See, e.g.*, *In re* Qualcomm Litig., 2017 WL 5985598, at *7 (S.D. Cal. Nov. 8, 2017) (describing Qualcomm and Apple as "far closer to a competitor relationship than a consumer relationship" as both "are sophisticated corporations with an ongoing business relationship"); Dillon v. NBCUniversal Media LLC, 2013 WL 3581938, at *8 (C.D. Cal. June 18, 2013) (examining the plaintiffs' allegations and concluding that the parties were competitors within the meaning of the UCL).
92. Ahussain v. GNC Franchising, LLC, 2009 WL 10672353, at *3 (C.D. Cal. Mar. 18, 2009).
93. R.N.R. Oils, Inc. v. BP W. Coast Prods. LLC, 2011 WL 37962 (Ct. App. Jan. 6, 2011).

the franchisees for erroneous gasoline charges.[94] The defendants' motion for summary adjudication of the UCL claim was granted by the trial court, and the franchisees appealed.[95] In a lengthy but unpublished opinion, the appellate court acknowledged, upfront, the difficulty identifying the appropriate test of "unfairness" because "[p]laintiffs are franchisees, not competitors of [the franchisor], and are distributors rather than consumers of the products sold by defendants."[96] The court then examined the current state of the law under the UCL before conceding that it was "unclear" which test of "unfairness" applies to the parties' franchise dispute.[97] Unable to justify the use of a single test, the court applied both the balancing test and *Cel-Tech* test (referred to as the "tethering test for competitor claims") before concluding that, "[r]egardless of the test applied," the franchisees failed to show an unfair business practice proscribed by the UCL.[98] Affirming the trial court's summary adjudication ruling, the appellate court found that the UCL claim failed under the *Cel-Tech* test because there was no constitutional, statutory, or regulatory basis for the franchisees' claimed relief, and the franchisees offered no proof that the franchisor's alleged conduct significantly threatened competition.[99] The court also found that the claim also failed under the balancing test because the franchisees presented "no evidence of any injury to the public" or that the purported injury outweighed the utility of the conduct.[100]

The U.S. District Court for the Northern District of California also expressed confusion over which "unfairness" test to apply to the UCL claim of a putative franchisee class in *Juarez v. Jani-King of California, Inc.*[101] In that case, franchisees of Jani-King sought to certify a class to advance numerous claims, including violation of the UCL's "unfairness" prong through Jani-King's alleged practice of (1) charging franchise fees that are "excessive and unfair," (2) including a non-compete clause in its franchise agreements, and (3) including a refund policy in the franchise agreement that allegedly rewards Jani-King for failing to satisfy its contractual obligations.[102] Although the court opened its analysis of the "unfairness" prong of the UCL claim by questioning which test to apply—that is, the balancing test, the *Cel-Tech* test, or the Section 5 test—the court ultimately failed to apply any of the three tests, instead, finding that the franchisees had failed to show common evidence of injury necessary to certify a class.[103]

94. *Id.* at *2.
95. *Id.* at *4.
96. *Id.* at *6.
97. *Id.*
98. *Id.* at *12.
99. *Id.* at *7, *9.
100. *Id.* at *7, *9.
101. Juarez v. Jani-King of Calif., Inc., 273 F.R.D. 571 (N.D. Cal. 2011).
102. *Id.* at 585.
103. *Id.*

Other courts have summarily applied only consumer tests to franchisor-franchisee disputes. For instance, in *Power Quality & Electrical Systems, Inc. v. BP West Coast Products, LLC*, the U.S. District Court for the Northern District of California rejected the franchisee's UCL claim after limiting its analysis to the tethering and balancing tests.[104]

In *Nagrampa v. MailCoups Inc.*, the U.S. District Court for the Northern District of California limited its analysis of the UCL claim to just the tethering test.[105] There, the franchisee claimed that the franchisor violated the "unfairness" prong of the UCL by seeking to enforce an arbitration agreement that was unconscionable and a violation of California law.[106] The franchisor moved to dismiss the UCL claim, arguing that the franchisee failed "to state a cognizable claim for violation of the [UCL]."[107] The court denied the franchisor's motion, finding that that the franchisee's UCL claim was tethered to a specific statutory provision under California law codifying unconscionability in California.[108]

Likewise, the U.S. District Court for the Central District of California limited its "unfairness" prong analysis to only the tethering test in the franchise dispute of *Flip Flop Shops Franchise Co., LLC v. Neb.*[109] In that case, franchisees sued their franchisor and its affiliates for alleged violations of the California Franchise Investment Law, violations of the Sherman Act, and fraudulent misrepresentations.[110] The franchisees loosely based their derivative UCL claim upon these other alleged violations of the law.[111] The franchisor moved to dismiss the UCL claim for failing to state a claim. The court agreed, finding, among other things, that to the extent the franchisees' UCL claim "is based on the unfairness prong, [the franchisees] have failed to allege sufficient facts to demonstrate that the [franchisor's] conduct either offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[112] No other test of "unfairness" was referenced in the opinion.

Finally, in the joint employment class action lawsuit *Aleksick v. 7-Eleven, Inc.*, the court summarily found that a UCL claim brought by employees of 7-Eleven franchisees against the franchisor triggered only the tethering test.[113] In that case, the employees of the franchisee brought a class action

104. Power Quality & Elec. Sys., Inc. v. BP W. Coast Prods. LLC, 2016 WL 6524408, at *1, *8 (N.D. Cal. Nov. 3, 2016) (holding that the franchisee's "unfairness" claim against the franchisor arising out of the purchase of two franchises to operate gasoline stations failed to articulate how the alleged wrongdoing was conduct tethered to any legislative policy).

105. Nagrampa v. MailCoups Inc., 2007 WL 2221028, at *2 (N.D. Cal. July 30, 2007).

106. *Id.*

107. *Id.*

108. *Id.* (discussing Cal. Civil Code § 1670.5).

109. Flip Flop Shops Franchise Co. v. Neb, 2017 WL 2903183, at *9 (C.D. Cal. Mar. 14, 2017) (applying the balancing test only).

110. *Id.*

111. *Id.*

112. *Id.*

113. Aleksick v. 7-Eleven, Inc., 140 Cal. Rptr. 3d 796, 807–08 (Ct. App. 2012).

against the franchisor for allegedly violating the UCL in the provision of payroll services to franchisees.[114] The trial court granted summary judgment of the UCL claim in favor of the franchisor, and the employees appealed.[115] On appeal, the California Fourth District Court of Appeal announced that it follows the *Gregory* line of cases and applies the tethering test to analyze allegations of "unfair" conduct under the UCL.[116] Applying the tethering test to the facts of the case, the court then rejected the employees' argument that the alleged misconduct by the franchisor was "'directly tethered to a legislatively declared policy,' the public policy in favor of full payment to employees for all hours worked."[117] The court explained that the underlying policy relied upon by the employees was the California Labor Code, but those statutes are inapplicable to the franchisor in this context as the franchisor "was not the class members' employer."[118] In affirming the trial court's ruling on summary judgment, the appellate court did not consider or reference any other test of "unfairness" under the UCL.

This inconsistent application of the "unfairness" tests in franchise disputes is seemingly impossible to reconcile. Unfortunately, *stare decisis* in California does not help to mitigate the confusion. The California Court of Appeal is comprised of six judicial districts spread across nine courthouses. Unlike many other jurisdictions, all published California appellate decisions are equally binding on all California trial courts, regardless of the judicial district in which the trial court sits.[119] Because the appellate courts have indiscriminately applied each of the UCL unfairness tests in non-competitor cases, California trial courts are essentially at liberty to select the precedent that they prefer to follow. Until the California Supreme Court or the California State Legislature clarifies which consumer test should be used in evaluating "unfair" conduct in UCL actions, all of the tests of "unfairness" remain *in play* for all appellate and trial courts in California.

114. *Id.* at 799–800.
115. *Id.* at 798.
116. *Id.* at 807 (citing to Gregory v. Alberton's, Inc., 128 Cal. Rptr. 2d 389 (2002)).
117. *Id.* at 808.
118. *Id.*
119. *See*, *e.g.*, Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937 (Cal. 1962). Conversely, federal district courts and many state trial courts are bound only by the appellate decisions from the particular circuit in which the trial courts sits (as well as those decisions of the U.S. Supreme Court or the applicable state supreme court). *See*, *e.g.*, *In re* Barakat, 173 B.R. 672, 677 (Bankr. C.D. Cal. 1994), *subsequently aff'd*, 99 F.3d 1520 (9th Cir. 1996) ("When no Supreme Court decision has been issued, the decisions of the court of appeals for a particular circuit are binding on all lower courts within that circuit. [. . .] Even if the circuits are split and the lower court disagrees with its own circuit, the lower court still must follow its court of appeals.") (Internal citations omitted.); 29 Holding Corp. v. Diaz, 775 N.Y.S.2d 807, 813 (N.Y. Sup. Ct. 2004) (recognizing that the appellate decisions of one judicial department are not binding in the lower courts of other judicial departments); *but see* Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (Florida Supreme Court made clear that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts.").

IV. Conclusion

Despite the muddied application of the UCL to franchise disputes, there is a *non-trivial* lesson that cannot be overlooked: the courts have almost unanimously ruled in favor of franchisors finding that the alleged conduct did not constitute "unfair" business practices under any test.[120] Yet, outlier rulings like those in *Nagrampa* (denying the franchisor's motion to dismiss the franchisee's "unfairness" claim under the tethering test) exist, meaning that dismissal of a UCL "unfairness" claim is far from automatic.[121]

Faced with UCL claims in franchise disputes, franchisor counsel should continue to advocate for the application of the *Cel-Tech* test and related tethering test in both federal and state courts. Depending on the facts of the case and the court, the franchisor may also benefit from concurrently raising and disposing of the UCL claim under the balancing test as well. This option would allow the franchisor to frame the argument from the onset and mitigate any potential that the court disagrees with the franchisor's choice of test, thereby undermining the franchisor's entire opening position. Conversely, franchisee counsel is best served by characterizing the case, from the initial pleadings, as a consumer dispute and pushing for the application of the balancing test. These competing approaches to franchise disputes under the UCL will likely continue to be the norm until either the California Supreme Court or the California State Legislature steps in to clean up this area of California law.

120. *See* Flip Flop Shops Franchise Co. v. Neb, 2017 WL 2903183 (C.D. Cal. Mar. 14, 2017); Power Quality & Elec. Sys., Inc. v. BP W. Coast Prods. LLC, 2016 WL 6524408 (N.D. Cal. Nov. 3, 2016); R.N.R. Oils, Inc. v. BP W. Coast Prods. LLC, 2011 WL 37962 (Ct. App. Jan. 6, 2011); Ahussain v. GNC Franchising, LLC, 2009 WL 10672353, at *3 (C.D. Cal. Mar. 18, 2009); Prudential Ins. Co. of Am. v. Herman, 2009 WL 10674431, at *3 (C.D. Cal. Aug. 31, 2009).

121. Nagrampa v. MailCoups Inc., 2007 WL 2221028, at *2 (N.D. Cal. July 30, 2007).