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VIA FEDERAL EXPRESS ONLY

The Honorable Ronald M. George, Chief Justice
and the Associate Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Subject: *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 1442
California Courts of Appeal Case No. B204986

Dear Mr. Chief Justice and Associate Justices:

Pursuant to California Rules of Court 8.1125 and 8.500(g)(1), I write on behalf of Initiative Legal Group APC (ILG) to request depublication of the Courts of Appeal's opinion in *Cohen v. DIRECTV, Inc.*, Case No. B204986, 178 Cal. App. 4th 1442 (September 28, 2009). A copy of the opinion is enclosed ("*Slip Opinion*").

Cohen v. DIRECTV, Inc. should be depublished (or, alternatively, reviewed) because it contradicts this court's *In Re Tobacco II Cases* holding and will lead to confusion and misuse as precedent.

I am the co-founder of ILG, a twenty-two attorney law firm dedicated to representing employees and consumers. The firm has taken a role in advancing and protecting the rights of consumers and employees in both the courts and the California Legislature. ILG regularly represents plaintiffs in cases alleging violations of the Unfair Competition Law, or UCL (Cal. Bus. & Prof. Code §§ 17200 *et seq.*). Accordingly, ILG is interested in UCL case law, particularly in the context of UCL class actions.

This request relates to the Courts of Appeal's conclusion that a trial court may deny class certification of a UCL claim based on individualized issues relating

to reliance by absent class members – a conclusion that conflicts with this Court's *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) ("*Tobacco II*") decision.

Although "[t]here are no fixed criteria for depublication" (Eisenberg, Horvitz & Weiner, *California Practice Guide: Civil Appeals & Writs* § 11:180.1 (The Rutter Group 2009)), it is generally accepted that depublication is appropriate when an "opinion is wrong on a significant point" or the opinion is "too broad and could lead to unanticipated misuse as precedent." *Id.* Review is warranted "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1). Because *Cohen* gives rise to each of these circumstances, its depublication is warranted.

Tobacco II addressed whether a court may deny class certification based on the lack of standing under Proposition 64. *See Tobacco II*, 46 Cal. 4th at 306 (explaining that, "[A]fter Proposition 64 was approved, the trial court granted defendants' motion to decertify the class on the grounds that each class member was now required to show an injury in fact, consisting of lost money or property, as a result of the alleged unfair competition."). Following the initial grant of class certification, the trial court granted the defendants' motion to decertify the class. *Id.* at 310. The Courts of Appeal affirmed. *Id.*

This Court reversed and explained:

> [T]he trial court construed the text of Proposition 64 as requiring absent members to affirmatively demonstrate that they met Proposition 64's standing requirements --injury in fact and the loss of money or property as a result of the unfair practice. We conclude that the trial court's construction of Proposition 64 was erroneous.

Tobacco II, 46 Cal. 4th at 315.

This Court held that, "the absent class members, on whose behalf such relief is sought" need not "meet the same standing requirements as are imposed upon the class representative." *Id.* at 320.

Accordingly, absent class members are not required to show that they satisfy each element of a cause of action. *Id.* It naturally follows, therefore, that an absent class member's posited lack of standing cannot be a basis for denial of class certification, under commonality analysis or otherwise.

Cohen, however, held that absent class members' reliance *is* properly considered in determining whether to certify a UCL claim as a class action, and specifically under the rubric of commonality analysis:

> In short, the trial court's concerns that the UCL and the CLRA claims alleged by Cohen and the other class members would involve factual questions associated with their reliance on DIRECTV's alleged false representations was a proper criterion for the court's consideration when examining 'commonality' in the context of the subscribers' motion for class certification, even after *Tobacco II*.

Slip Opinion at 16.

Cohen thus re-cast the *Tobacco II* holding and effectively imposed an actual injury requirement on absent class members. *Slip Opinion* at 15 ("*Tobacco II* held that, *for purposes of standing* in context of the class certification issue in a 'false advertising' case involving the UCL, the class members need not be assessed for the element of reliance. Or, in other words, class certification may not be defeated *on the ground of lack of standing* upon a showing that class members did not rely on false advertising" (emphasis added)). The Court of Appeal's analysis directly conflicts with this Court's opinion in *Tobacco II* in several material respects.

First, the conclusion in *Cohen* that a trial court may deny class certification of a UCL claim based on individualized issues relating to absent class member reliance contradicts *Tobacco II*, which held that doing so is an abuse of discretion:

> As noted, in granting defendants' motion for decertification, the trial court concluded that 'the simple language of Prop[osition] 64' required each class member to show injury in fact and causation. Thus, the trial court construed the text of Proposition 64 as requiring absent members to affirmatively demonstrate that they met Proposition 64's standing requirements – injury in fact and the loss of money or property as a result of the unfair practice. We conclude that the trial court's construction of Proposition 64 was erroneous.

Tobacco II, 46 Cal. 4th at 314-315.

Moreover, the *Tobacco II* opinion makes clear that the "may have been acquired" language of Section 17203 "has led courts repeatedly and consistently to hold that relief under the UCL is available without individualized proof of deception, reliance and injury" (*id.* at 320), and that the failure to amend such language precluded the trial court from imposing an actual injury and causation requirement on absent class members:

> Accordingly, to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have 'lost money or property as a result of the unfair competition' (§ 17204) would conflict with the language in section 17203 authorizing broader relief – the "may have been acquired" language – and implicitly overrule a fundamental holding in our previous decisions, including *Fletcher*, *Bank of the West* and *Committee on Children's Television*. Had this been the intention of the drafters of Proposition 64 – to limit the availability of class actions under the UCL only to those absent class members who met Proposition 64's standing requirements – presumably they would have amended section 17203 to reflect this intention. Plainly, they did not.

Tobacco II, 46 Cal. 4th at 314.

Finally, *Tobacco II* specifically considered and rejected efforts to impose requirements of actual injury and causation on absent class members:

> At argument, defendants acknowledged that the text of Proposition 64 does not apply the standing requirements to unnamed class members. Defendants maintained, rather, that application of these requirements to absent class members is mandated by class action principles, specifically, that a class member must have standing to bring the action individually and that the aggregation of individual claims into a class action cannot be used to transform the underlying claim. We reject these arguments.

Tobacco II, 46 Cal. 4th at 321.

As this Court reasoned, class certification principles cannot be used to impose an actual injury and causation requirement on absent class members, as this would substantively alter the UCL itself, the focus of which is on the *defendant's conduct*, not the discrete experiences of absent class members:

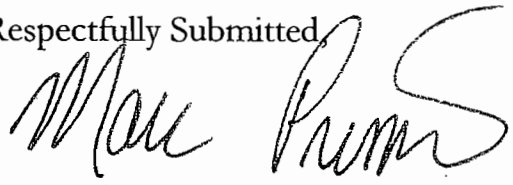
> Defendants also argue that Proposition 64's standing requirement must be applied to all class members because otherwise the class representative would be permitted 'to assert 'claims' that the absent class members do not have.' According to defendants this would violate the principle that the aggregation of individual claims into a class action 'does not serve to enlarge substantive rights or remedies.' (*Feitelberg v. Credit Suisse First Boston, LLC.*, supra, 134 Cal.App.4th at p. 1014.) We disagree. [¶] The substantive right extended to the public by the UCL is the "'right to protection from fraud, deceit, and unlawful conduct"' *(Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1137 []), and the focus of the statute is on the defendant's conduct. As we have already observed, the proponents of Proposition 64 told the electorate that the initiative would not alter the statute's fundamental purpose of protecting consumers from unfair businesses practices. Rather, the purpose of the initiative was to address a specific abuse of the UCL's generous standing provision by eliminating that provision in favor of a more stringent standing requirement. That change, as we observed in Mervyn's, did not change the substantive law. (*Mervyn's*, supra, 39 Cal.4th at p. 232.)

Tobacco II, 46 Cal. 4th at 324.

In sum, *Cohen* directly contradicts *Tobacco II*. *Cohen* does not comport with the *Tobacco II* holding – that the factual circumstances regarding reliance and/or damage are not permissible components of an absent class member's substantive UCL claim. Nor does *Cohen* abide by *Tobacco II's* holding that class certification principles cannot be used to impose an actual injury and causation requirement on the putative class.

Accordingly, I respectfully request that the Supreme Court depublish *Cohen* or, in the alternative, grant review to the opinion.

Respectfully Submitted,



Marc Primo
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I declare that I am over the age of eighteen (18) and not a party to this action. My business address is: Initiative Legal Group APC, 1800 Century Park East, 2nd Floor, Los Angeles, California 90067.

On November 20, 2009, I served the within documents described below as:

REQUEST FOR DEPUBLICATION OF OPINION

on the interested parties in this action by placing true copies thereon enclosed in sealed envelopes address as follows:

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

EXECUTED this document on November 19, 2009, at Los Angeles, California.

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