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VIA HAND DELIVERY

December 23, 2009

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Boulevard
San Francisco, CA 94102

Re: Depublication Request
Cohen v. DIRECTV, Inc., 178 Cal.App.4th 966 (Sept. 28, 2009)
(pub. ord. Oct. 28, 2009), Case Nos. B204986, S177734

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, I write on behalf of Consumer Attorneys of California ("CAOC") to request depublication of the Court of Appeal's opinion in *Cohen v. DIRECTV, Inc.*, 178 Cal.App.4th 966 (2009), which was decided on September 28, 2009 and ordered published on October 28, 2009 (no. B204986). A petition for review and two other depublication requests have previously been filed (no. S177734). A copy of the opinion is enclosed.

This request is timely filed "within 30 days after the decision is final in the Court of Appeal." Cal. Rules of Court, Rule 8.1125(a)(4). In this case, due to the change in the opinion's publication status, the date of finality was extended to Saturday, November 28, 2009 (thirty days after the opinion was ordered published). *See id.*, Rule 8.264(b)(3). Hence, depublication requests are timely if filed by Monday, December 28, 2009 (thirty days after finality).

I. Statement of Interest and Summary of Reasons Why the *Cohen* Opinion Should Not Be Published

CAOC, founded in 1962, is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Many CAOC members represent individuals subjected to unlawful and harmful business practices, including consumer fraud. Many CAOC members attempt to obtain relief for such individuals, as well as others similarly situated, by use of the class action mechanism.

CAOC has regularly participated as an amicus curiae in cases before this Court relating to the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) ("UCL"), including *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006), *In re Tobacco II Cases*, 46 Cal.4th 298 (2009) ("*Tobacco II*"), and, most recently, *Clayworth v. Pfizer, Inc.*, no. S166435. CAOC has a strong interest in participating as an amicus curiae in cases, like this one, impacting the interpretation of Proposition 64 and *Tobacco II*.[1]

CAOC seeks depublication of *Cohen* for two reasons.

First, *Cohen* should be depublished because it is inconsistent with this Court's opinion in *Tobacco II* and therefore could be misused as a precedent.

From a procedural standpoint, *Tobacco II* is indistinguishable from *Cohen*, yet the two opinions reached different outcomes. In *Tobacco II*, an order *granting* class certification of a UCL "fraudulent" prong claim was reinstated, whereas in *Cohen*, an order *denying* class certification of a UCL "fraudulent" prong claim was affirmed. As a result, the body of California decisional law now includes two conflicting opinions, decided on the same procedural posture and on virtually identical operative facts, but reaching different conclusions.

If the conflicting opinions had both come from the Court of Appeal, review by this Court would have been warranted.[2] Instead, one of those decisions is by a lower appellate court that should have been bound by this Court's ruling in *Tobacco II*.[3] This state of affairs "could lead to unanticipated misuse [of *Cohen*] as precedent" in the lower

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[1] In addition, the undersigned, a CAOC Board member, is the author of *The UCL Practitioner* (www.uclpractitioner.com), an online treatise written in the form of a Web log, which has closely followed developments in the law relating to the UCL and Proposition 64 for more than six years. As such, the undersigned has a substantial academic and professional interest in participating in the evolution of that law.

[2] *See* Cal. Rules of Court, Rule 8.500(b)(1) (review of a Court of Appeal opinion may be ordered "[w]hen necessary to secure uniformity of decision").

[3] *See, e.g.*, *McClung v. Employment Development Dept.*, 34 Cal.4th 467, 473 (2004) ("Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court."); *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962) (same).

courts by giving them a basis to depart from *Tobacco II*'s binding dictates. *See* Eisenberg, Horvitz & Weiner, *California Practice Guide: Civil Appeals & Writs* §11:180.1 (The Rutter Group 2008); *see also California Civil Appellate Practice*, §21.17 (CEB 3d ed. 2009) (depublication appropriate where an "opinion … unnecessarily creates a conflict"). It is *Tobacco II*, not *Cohen* (whatever *Cohen* might hold), that declares the law in California. Depublication of *Cohen* will ensure uniformity of decision and eliminate the possibility of confusion among the lower courts.

Second, *Cohen* should be depublished because it either misinterpreted or misapplied *Tobacco II*. As a result, its holding is incorrect. *See California Civil Appellate Practice*, *supra*, §21.17 (depublication warranted where "the opinion is incorrect"). *Cohen*'s reasoning is inconsistent not only with *Tobacco II*, but also with important precedents of this Court pre-dating *Tobacco II*, including the unanimous opinion in *Mervyn's*, as well as *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal.4th 360 (2007), and *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462 (1981)—all of which acknowledge the importance of the class action device to the effective enforcement of California's remedial laws.

Tobacco II refused to require unnamed class members to prove "reliance" in UCL cases because (among other reasons) doing so "would effectively eliminate the class action lawsuit as a vehicle for the vindication of [consumer] rights." *Tobacco II*, 46 Cal.4th at 321. That would, in turn, contravene the assurances to voters in the Prop. 64 ballot materials that "the initiative would not undermine the efficacy of the UCL as a means of protecting consumer rights." *Id.*

Cohen would import a "reliance" element into UCL claims—not at the standing stage, but at the class certification stage, as "a proper criterion for the court's consideration when examining 'commonality.'" *Cohen*, 178 Cal.App.4th at 982. According to *Cohen*, this is proper because *Tobacco II* only addressed "standing," not "commonality." *Id.* at 981.

This is a false distinction. If a "reliance" element is imported into UCL class claims at *any* stage of the analysis—standing, class certification, or liability at trial—the effect is the same: elimination of the class action device in UCL consumer protection cases because common questions would not predominate.[4] As discussed in more detail

[4] In some consumer fraud cases, a presumption of classwide reliance would arise under *Vasquez v. Superior Court*, 4 Cal.3d 800 (1971), and class certification would be appropriate. Having held that unnamed class members need not prove reliance in UCL

below, such a result is contrary to *Tobacco II* (whose discussion of "standing" was necessarily intertwined with "commonality"), as well as the Proposition 64 ballot materials and longstanding California principles of class action law. *Cohen* critically misinterpreted *Tobacco II*, leading to a misguided analysis and an incorrect outcome.

For either or both of these reasons, the *Cohen* opinion should be depublished.

II. From A Procedural and Factual Standpoint, *Tobacco II* Is On All Fours With *Cohen*, so the Outcomes Should Have Been the Same

Tobacco II and *Cohen* are not meaningfully distinguishable, either factually or procedurally. As a factual matter, the plaintiffs in both cases raised claims under the UCL's "fraudulent" prong based on the defendants' alleged misrepresentations about the characteristics of their products—cigarettes and other tobacco products in *Tobacco II* (46 Cal.4th at 307) and high definition television services in *Cohen* (178 Cal.App.4th at 969).

Plaintiffs in both cases sought class certification of their UCL "fraudulent" prong claims. In both cases, the lower courts concluded that, after Proposition 64, each absent class member would have to prove "reliance," and that as a result, common questions did not predominate. *Compare Tobacco II*, 46 Cal.4th at 311 (lower courts: "post-Proposition 64, individual issues of exposure to the allegedly deceptive statements and reliance upon them, predominated over class issues") *with Cohen*, 178 Cal.App.4th at 973 (lower court: "[a] conclusion may be drawn that class members must have actu[a]lly been deceived" and that "plaintiff has not shown class wide actual reliance or deception").

In both cases, the plaintiffs appealed.[5] The *Tobacco II* and *Cohen* courts thus faced the task of reviewing identical rulings.

Given the procedural and factual parallels (not to mention *Tobacco II*'s status as the binding precedent of a superior tribunal), it would be reasonable to expect identical

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"fraudulent" prong cases (at any stage of the case), this Court did not reach that issue in *Tobacco II*.

[5] The plaintiff in *Tobacco II* also successfully sought this Court's review. "[S]upreme court 'review' lies from the *court of appeal's* decision," which, in *Tobacco II*, was the same as the trial court's decision in *Cohen*. *California Practice Guide: Civil Appeals & Writs*, *supra*, §13:4 (emphasis in original).

outcomes on appeal. However, in *Tobacco II*, this Court reversed the trial court's order decertifying the class, whereas in *Cohen*, the Court of Appeal affirmed the trial court's order denying class certification. *Tobacco II*, 46 Cal.4th at 306, 329; *Cohen*, 178 Cal.App.4th at 982.

Cohen should have been a *pro forma* application of *Tobacco II* in an unremarkable (and unpublished) opinion. Instead, because it reached a different result from *Tobacco II*, *Cohen* became a watershed published case (after six publication requests were filed) and the subject of significant attention among practitioners.[6]

The *Cohen* court declined to follow *Tobacco II* because it considered the case "irrelevant." 178 Cal.App.4th at 981. According to the *Cohen* court, *Tobacco II* supposedly addressed only Prop. 64 "standing," and not the "commonality" element of class certification. *Id.*[7] Hence, *Cohen* held, "reliance [was] a proper criterion for the court's consideration when examining 'commonality'" (*id.*)—notwithstanding *Tobacco II*'s holdings that: (1) imposing a "reliance" requirement on the unnamed class members "would effectively eliminate the class action lawsuit as a vehicle for the vindication of [consumer] rights" (*Tobacco II*, 46 Cal.4th at 321); (2) proposition 64 "was not intended to have any effect at all on unnamed members of UCL class actions" (*id.*); and (3) "relief under the UCL is available without individualized proof of deception, reliance and injury" (*id.*).

Tobacco II certainly did address standing. As will be seen, however, it also addressed the "commonality" element of class certification. And it clarified that, post-Proposition 64, the elements of a UCL "fraudulent" prong claim have not changed, as the Court had previously held in *Mervyn's*.

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[6] *See*, *e.g.*, H. Scott Leviant, "When Courts Disagree," *Daily Journal* (Nov. 12, 2009) (discussing inconsistencies between *Tobacco II* and *Cohen*); Michael Cypers and Joshua Stokes, "Attacking Class Certification Motions," *Daily Journal* (Dec. 15, 2009) (discussing *Tobacco II* and *Cohen*); Professor Shaun Martin, "Cohen v. DIRECTV (Cal. Ct. App. – Oct. 28, 2009)," *California Appellate Report* ("[*Cohen*'s] holding seems profoundly pernicious") (available at: http://calapp.blogspot.com/2009/10/cohen-v-directv-cal-ct-app-oct-28-2009.html (viewed 12/22/09)).

[7] What *Cohen* terms the "commonality" element is more accurately described as the "predominance" element. *Tobacco II*, 46 Cal.4th at 313 ("[T]he 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact ….'" (quoting *Fireside Bank v. Superior Court*, 40 Cal.4th 1069, 1089 (2007)).

III. In *Tobacco II*, Standing Was Relevant Only Because of Its Potential Impact On Commonality

Cohen asserts: "*Tobacco II* held that, *for purposes of standing*, in context of the class certification in a 'false advertising' case involving the UCL, the class members need not be assessed for the element of reliance." 178 Cal.App.4th at 981. On the contrary, standing was a relevant issue in *Tobacco II* only because, if all class members had to prove standing by showing "reliance," common questions would not *predominate*.

In *Tobacco II*, the trial court originally *granted* class certification, holding that factors such as reliance, causation, and actual injury did not "defeat the … finding of substantial *commonality* as such issues are wholly outside the purview of [the UCL]." 46 Cal.4th at 309 (emphasis added). Post-Proposition 64, the defendant moved to decertify the class, arguing that the new standing requirement applied to all class members, required proof of "reliance," and "[t]herefore, *numerous individual issues predominate*." *Id.* at 310 (emphasis added). The trial court agreed. It decertified the class, holding that "a showing of causation is required as to each class member's injury in fact," which meant that "significant questions then arise *undermining the purported commonality among the class members*, such as" "reliance." *Id.* at 311 (emphasis added).

In other words, the lower court's rulings were tied not only to "standing," but to the impact on *commonality* that importing a classwide "reliance" element into the UCL (whether for "standing" purposes or for any other purpose) would have. The Court of Appeal "agreed with the trial court that, post Proposition 64, individual issues of exposure to the allegedly deceptive statements and reliance upon them, *predominated over class issues*." *Id.* (emphasis added).

That is the holding that this Court reversed in *Tobacco II*. This Court then remanded the case for further proceedings on the sole issue of "whether *the class representatives* in this case have, or can demonstrate, standing." *Id.* at 306 (emphasis added). Notably, it did not instruct the trial court to conduct further proceedings on whether non-common questions remained because the class members might have to prove "reliance" at some later stage of the case, such as a hypothetical later "commonality" stage. *See id.* That is because, given Proposition 64's plain language, standing is the *only* stage of a UCL case at which *anyone*—either class representative or unnamed class member—would ever have to prove "reliance." After holding that the unnamed class members did need not prove "reliance" for standing purposes, there was no need for the Court to engage in any further analysis.

Cohen also asserts that *Tobacco II* held that "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." 178 Cal.App.4th at 981 (emphasis in original). But in *Tobacco II*, the class was *not* decertified because the unnamed class members lacked standing. Rather, the class was decertified because of the non-common questions that would have resulted if each class member had to prove "reliance." 46 Cal.4th at 309-11.

The opponents of depublication assert that *Tobacco II* addressed "standing," but "did not purport to address the very distinct question of commonality." Association of Southern California Defense Counsel, Letter in Opposition to Depublication Request (Dec. 11, 2009) at 2; *see* Chamber of Commerce of the United States of America, Letter in Opposition to Depublication Request (Dec. 11, 2009) at 3 (same). But lack of "commonality" was why the class was decertified in *Tobacco II* in the first place. Hence, this Court's analysis of "standing" necessarily reached the question of "commonality." If it had not, the opinion would have needed to include several additional sections, including a separate discussion of "commonality" as well as one discussing the argument (which the parties extensively briefed) that presumed reliance applied under *Vasquez*.

Cohen and the depublication opponents overlook these critical aspects of *Tobacco II*. If *Cohen* remains published, it will only foster uncertainty in the lower courts.

IV. *Cohen* Undermines *Tobacco II* Because it Treats Reliance as an Element of a UCL "Fraudulent" Prong Claim, Whereas *Tobacco II* Held That it Was Not

As the Supreme Court explained in *Tobacco II*, "[t]he substantive right extended to the public by the UCL is the 'right to protection from fraud, deceit and unlawful conduct.'" 46 Cal.4th at 324 (quoting *Prata v. Superior Court*, 91 Cal.App.4th 1128, 1137 (2001)). The UCL "focus[es] on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *Id.* at 312 (citing *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 453 (1979)). Its "concern" is that "wrongdoers not retain the benefits of their misconduct." *Id.* at 320 (citing *Fletcher*, 23 Cal.3d at 452).

From these guiding principles, this Court has consistently concluded that "*relief* under the UCL is available without individualized proof of deception, reliance and injury." *Id.* (citing *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267 (1992); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983)) (emphasis added); *see id.* at 320 n.14 ("restitution may be ordered 'without

individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice'" (quoting *Bank of the West*, 2 Cal.4th at 1267)).

The UCL's "fraudulent" prong, in particular, requires proof only "that 'members of the public are likely to be deceived." *Id.* at 312 (quoting *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951 (2002)). Unlike common-law fraud, the UCL's "fraudulent" prong does not require proof of actual reliance or actual deception, or, indeed, proof that anyone has been actually injured. *See id.*

In *Tobacco II*, this Court took pains to emphasize that Proposition 64 did not change any of these rules. First of all, as a textual matter, "the references in section 17203 to one who wishes to pursue UCL claims on behalf of others are in the singular," so "the conclusion that must be drawn from these words is that only this individual—the representative plaintiff—is required to meet the standing requirements" in which the "reliance" element resides. *Id.* at 315-16. Likewise, the ballot materials show "that Proposition 64 did not propose to curb the broad remedial purpose of the UCL or the use of class actions to effect that purpose …." *Id.* at 317.

Also, Proposition 64 "left intact provisions of the UCL that support the conclusion that the initiative was not intended to have *any effect* on absent class members." *Id.* at 319 (emphasis added). The most important unchanged provision was section 17203's restitution language:

> [**T**]**he language of section 17203 with respect to those entitled to restitution**—"to restore to any person in interest any money or property, real or personal, which *may have been acquired*" (italics added) by means of the unfair practice—**is patently less stringent than the standing requirement for the class representative**—"any person who has suffered injury in fact and has lost money or property *as a result of* the unfair competition." (§ 17204, italics added.) ….
>
> 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*.**

Id. at 320 (italics original; bold added). The Court declined to hold that Proposition 64 changed any of the UCL's longstanding, basic elements—including the rule that "relief under the UCL is available without individualized proof of deception, reliance and injury"—without a clearer expression of the electorate's intent, such as plural language or an amendment to the restitution language quoted above. *See id.*

Three years ago, in *Mervyn's*, this Court held that "[t]hese procedural modifications to the statute … 'left entirely unchanged the substantive rules governing business and competitive conduct.'" *Id.* at 314 (quoting *Mervyn's*, 39 Cal.4th at 322). In *Tobacco II*, this Court stayed true to *Mervyn's* by refusing to hold that Proposition 64 changed anything other than the standing requirement for the named class representatives. *See id.* at 320, 324. What the class members must show at trial—and, indeed, what the class representatives must show at trial—has not changed. *See id.*, *passim*. "Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." *Id.* at 314 (quoting *Mervyn's*).

Instead of following *Tobacco II*, *Cohen* attempts to make "reliance" part of the "commonality" analysis. But that would change the substantive elements of a UCL claim even more than importing classwide "reliance" into the standing analysis would have done. It would also contravene the rule that the class action statute is a procedural device that is not to be employed to alter the underlying claim's substantive elements. *See, e.g.*, *id.* at 312 ("Class actions are provided only as a means to enforce substantive law.") (citing *City of San Jose v. Superior Court*, 12 Cal.3d 447, 462 (1974)). The *Cohen* opinion attempts to use the class action device to impose a "reliance" element that this Court has now *twice* held Proposition 64 did not impose and is not part of the UCL.

It makes no sense to treat "reliance" as "a proper criterion for the court's consideration when examining 'commonality'" at the class certification stage (*Cohen*, 178 Cal.App.4th at 981), when, under *Tobacco II* and *Mervyn's*, "reliance" will never have to be proven at trial. If allowed to stay on the books, *Cohen* will "implicitly overrule a fundamental holding in [this Court's] previous decisions, including *Fletcher*, *Bank of the West* and *Committee on Children's Television*." *Tobacco II*, 46 Cal.4th at 320. *Cohen* should be depublished.

V. If Allowed to Stand, *Cohen* Will Undermine the Efficacy Of The Class Action Device Even More Than The Lower Court's Holdings In *Tobacco II* Would Have

"[T]he proponents of Proposition 64 told the electorate that the initiative would not alter the statute's fundamental purpose of protecting consumers from unfair business

practices." *Tobacco II*, 46 Cal.4th at 324. To weaken the class device in UCL cases, as *Cohen* threatens to do, would strip away any real consumer protection power that the statute has. As mentioned above, that was another rationale for this Court's holding in *Tobacco II*. *See id.* at 321.

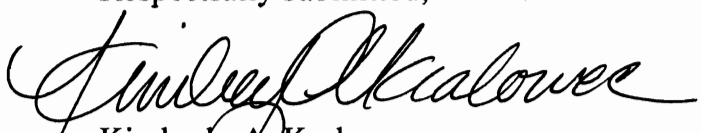
Tobacco II is consistent with a long line of cases in which this Court took pains to preserve the efficacy of the class action device in a variety of contexts. *See, e.g., Pioneer Electronics*, 40 Cal.4th at 374 (declining to adopt Court of Appeal analysis that "could ... reduc[e] the effectiveness of class actions as a means to provide relief in consumer protection cases"); *see also Gentry*, 42 Cal.4th at 462 ("[By preventing 'a failure of justice in our judicial system,' the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights.") (quoting *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434 (2000)); *Richmond*, 29 Cal.3d at 469 ("Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.").

Cohen thwarts these principles by adopting a rule that threatens the viability of class proceedings in UCL false advertising cases. The decision should be depublished.

VI. Conclusion

For the reasons discussed above, this Court is respectfully asked to depublish the Court of Appeal's opinion in *Cohen*. Alternatively, the Court is respectfully asked to grant the petition for review and take up the issues raised in *Cohen*.

Respectfully submitted,



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Enclosure

cc: See attached proof of service

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PROOF OF SERVICE

Cohen v. DirecTV, Inc.
___ Cal. App. 4th ___
San Diego Superior Court Case No. BC324940;
aff'd by California Court of Appeals Second Appellate District, Division 8, Appeal No. B204986: pub. ord. Oct. 28, 2009;
Petition for Review before the Supreme Court of the State of California, Case No. S177734.

I am employed by Schubert Jonckheer Kolbe & Kralowec LLP, in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. By business address is Three Embarcadero Center, Suite 1650, San Francisco, California 94111.

On December 23, 2009, I served the foregoing document described as **LETTER REQUESTING DEPUBLICATION** on the person(s) listed below by placing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mailbox at San Francisco, California, addressed as follows:

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of December, 2009 in San Francisco, California.

Sarah Strickland

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