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December 11, 2009

BY HAND DELIVERY

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

Re: *Cohen v. DIRECTV, Inc.*, No. B204986,
reported at 178 Cal.App.4th 966,
No. S177734 in this Court

Dear Mr. Chief Justice and Associate Justices:

Pursuant to California Rule of Court 8.1125(b), the Chamber of Commerce of the United States of America submits this timely response to the request for depublication filed on December 2, 2009, by Khorrami Pollard & Abir LLP.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations for every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts, and the Chamber frequently appears as an *amicus curiae* in the California Court of Appeal and Supreme Court.

The Chamber filed one of the six requests for publication of the Court of Appeal's decision in *Cohen*. There is no serious doubt that the opinion meets the standard criteria for publication. As explained more fully below after the response to Khorrami's contentions, the opinion provides a new clarification of class certification law as applied to the Unfair Competition Law (UCL) after Proposition 64. See Cal.R.Ct. 8.1105(c)(4). And the decision undeniably "involves a legal issue of continuing public interest." *Id.* 8.1105(c)(6).

The Court of Appeal's decision should not be depublished because to do so would deprive the trial courts of much needed guidance regarding class certification in UCL

actions after Proposition 64. Contrary to Khorrami's assertions, the decision does not conflict with this Court's recent decision in *Tobacco II Cases* (2009) 46 Cal.4th 298, nor is it "sweeping"; much less will it lead to confusion or misuse. Nor did the opinion state that *Tobacco II* was broadly "irrelevant" to class certification. Rather, in a proper exercise of incremental judging, the Court of Appeal simply recognized that *Tobacco II* had no application "*[i]n the contextual setting presented by Cohen's present case*," for the indisputable reason that "the issue of 'standing' simply is not the same thing as the issue of 'commonality.'" 178 Cal.App.4th at 981 (emphasis added).

To the contrary, the decision in *Cohen* takes an important, prudently limited, and correct step in the logical development of the law of UCL class actions after *Tobacco II*. And the decision is particularly important because it reaffirms that the requirements of C.C.P. § 382—which Proposition 64 intended to be applied to rein in the use of the UCL to make little disputes into huge ones—continue to have substantive force in the UCL context as elsewhere. While the ability to extract a class-wide settlement wherever one person may be found to claim injury from an alleged misrepresentation may benefit class action lawyers, class certification requires more than a single person's claim. California law does not permit—much less require—class certification where putative class members' exposure to a challenged communication is not subject to common proof, let alone their entitlement to relief. Although UCL liability in the abstract may arise from a statement's tendency to deceive—liability that might support an injunction against continuing the misleading statements in the future—a right to restitution or other relief aimed at prior conduct requires proof of causation, which may or may not be subject to common proof in a particular case.

The published opinion of the Court of Appeal accords with established principles under C.C.P. § 382. The Court of Appeal affirmed the trial court's refusal to certify a proposed class that included persons who were not exposed to the alleged false advertising that formed the basis of plaintiff's UCL claims. 187 Cal.App.4th at 979-80. Those putative class members accordingly could not possibly show actual injury-in-fact or any entitlement to restitution or other relief on their behalf. In a cogent analysis, the Court of Appeal considered the effect on class certification of this Court's holding in *Tobacco II* that a class could not be decertified merely because the absent class members had not proved standing under Proposition 64's standing requirements, so long as the class representatives had demonstrated actual injury and causation. *Id.* at 981.

Appropriately distinguishing standing to bring an action from the commonality and predominance requirements for class certification, the Court of Appeal explained that the resolution of the standing question in *Tobacco II* did not address (much less determine) whether the claims in fact were appropriate for adjudication using the class

action device. *Id.* The Court of Appeal properly concluded that the separate and distinct question whether a class meets the commonality requirement for certification cannot be resolved in favor of certification merely because the named class representative has demonstrated injury. *Id.* To the contrary, the court held, *Tobacco II* does not alter the need to determine whether class members' exposure to, and reliance on, alleged misrepresentations in false advertising UCL class actions presents a common issue of fact. *Id.* That is, it remains necessary to determine whether individualized inquiries into that exposure and reliance would prevent the proposed class from satisfying the commonality and predominance requirements. Proof of standing at the threshold does not resolve the question whether the issues can be determined through common proof in a class action. Section 382 requires more than a one-factor test.

Contrary to the request for depublication, the Court of Appeal in *Cohen* correctly held that this Court's decision in *Tobacco II* was limited to the threshold standing question directed to the trial court's jurisdiction over the cause of action. The Court of Appeal aptly discerned "no language in *Tobacco II* that suggests ... that the Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification." 178 Cal.App.4th at 981. At the outset of the *Tobacco II* opinion, this Court stated that its opinion was limited to two questions, including "who in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members, in order for the class action to proceed?" 46 Cal.4th at 306. This Court also noted its "reading of the trial court's order—that a 'showing of causation is required as to each class members' injury in fact . . . —is that the court meant that the absent class members in this action must individually establish standing." *Id.* at 319 n.12. And in answering this question, this Court clarified that the standing requirement imposed by Proposition 64 applies only to the class representatives and not to "absent class members in a UCL class action *where class requirements have otherwise been found to exist*." *Id.* at 324 (emphasis added).

The Court of Appeal was also correct in holding that the commonality requirement for class certification under Section 382 of the Code of Civil Procedure cannot be resolved in favor of certification merely because the named class representative has demonstrated injury. That is, contrary to the request for depublication, this Court did not establish the one-person-standing inquiry as a replacement for the trial court's duty to ensure that "class requirements have otherwise been found to exist." Rather, a failure to prove individualized standing of absent class members does not defeat certification when the other "class requirements" *have* "been found to exist."

This Court recognized in *Tobacco II* that in addition to adding the requirement that a representative UCL action comply with Code of Civil Procedure section 382, Proposition 64 amended Bus. & Prof. Code section 17204, "which prescribes who may sue to enforce the UCL, by deleting the language that had formerly authorized suits by any person 'acting for the interests of itself, its members or the general public,' and by replacing it with the phrase 'who has suffered injury in fact and has lost money or property as a result of such unfair competition.'" 46 Cal.4th at 314 (quoting *Californians for Disability Rights v. Mervyn's, LLP* (2006) 39 Cal.4th 223, 228-29). The second part of this Court's *Tobacco II* opinion addressed "the meaning of the phrase 'as a result of' in section 17204." *Id.* at 324-25. This Court did recognize that "*before* Proposition 64, California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance, and injury." *Id.* at 326 (emphasis added) (internal quotation marks omitted). The Court continued, however, that "because it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, we must construe the phrase 'as a result of' in light of this intention to limit such actions." *Id.* at 326 (citations omitted). Because "there is no doubt that reliance is the causal mechanism of fraud," this Court concluded that the phrase "as a result of" thus "*imposes an actual reliance requirement* on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Id.* (emphasis added).

Because a plaintiff bringing an individual claim under the UCL must show actual reliance, it necessarily follows that members of a UCL class action must also demonstrate reliance to prove liability and entitlement to restitution. As this Court has explained, "the UCL class action is a procedural device that enforces substantive law by aggregating many individual claims into a single claim . . . [and] does not change that substantive law." *Tobacco II*, 46 Cal. 4th at 313. Thus, where reliance and causation are subject to common proof, a class may be certified. Where common proof is impractical or unmanageable, the action must proceed on an individual basis.

Thus, the *Cohen* decision is entirely consistent with *Tobacco II* and reflects the logical development of the law in the wake of that decision. And contrary to the doomsday predictions in the request for depublication, the Court of Appeal's decision help dispels the confusion in both the state and federal court systems, rather than increasing it. It is the federal trial judges, not the Second Appellate District, Division Eight, that misconstrued California law.

As noted above, the decision fully warrants publication under the standards of Cal.R.Ct. 8.1105(c). The opinion's clarification of the relationship between C.C.P. § 832 commonality and UCL standing requirements meets the requirements of Rule

8.1105(c)(4). The consideration of *Tobacco II* in light of the commonality inquiry is the first published consideration of its kind, one necessary for the guidance of state and federal courts, and thus "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." Cal.R.Ct. 8.1105(c)(2). And the decision "involves a legal issue of continuing public interest." Cal.R.Ct. 8.1105(c)(6). The enactment of Proposition 64 resulted from deep public concern with the misuse of the UCL to bring collective actions where no injury had been demonstrated. If an action on behalf of thousands or millions may be brought whenever *one* person shows injury, the limits intended by Proposition 64 would be severely compromised, if not practically eliminated. Arguments for certification based on *Tobacco II* now arise in virtually every class certification proceeding in a UCL case. Access to published guidance in this and future decisions of the Court of Appeal is therefore highly desirable for the orderly administration of justice in this state.

For these reasons, the request for depublication should be denied. This letter has been served on all parties in this case, as reflected in the attached certificate of service.

Respectfully submitted,

Donald M. Falk/RC

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Cc: Counsel on attached proof of service

## CERTIFICATE OF SERVICE

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On October 19, 2009, I served the foregoing document(s) described as:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 2009, at Palo Alto, California.

Kristine Neale

Kristine Neale