Albany
Atlanta
Brussels
Denver
Los Angeles

McKenna Long
& Aldridge LLP
Attorneys at Law

New York
Philadelphia
San Diego
San Francisco
Washington, D.C.

Suite 3300 • Symphony Towers • 750 B Street • San Diego, CA 92101
Tel: 619.595.5400 • Fax: 619.595.5450
www.mckennalong.com

ROSS H. HYSLOP
(619) 595-5461

EMAIL ADDRESS
rhyslop@mckennalong.com

September 23, 2009

VIA U.P.S. OVERNIGHT DELIVERY

Hon. Ronald M. George, Chief Justice
And the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re:
- *Richard A. Yabsley v. Cingular Wireless LLC*
  California Court of Appeal - Second Appellate District - Division Six
  Case No. B198827 (Appeal of Santa Barbara Superior Court Case No. 1221332)
- Opposition to Request for Depublication

Dear Chief Justice George:

I write on behalf of AT&T Mobility LLC ("ATTM"), formerly known as Cingular Wireless LLC ("Cingular"), in opposition to *amicus curiae* Consumer Attorneys of California's ("CAOC") request to depublish the Court of Appeal's recent opinion in *Yabsley v. Cingular Wireless LLC*, 176 Cal. App. 4th 1156 (2009) ("*Yabsley*").

Statement Of Interest

ATTM has an interest in the continued publication of *Yabsley* for several reasons, the most important being that it is a named party to the action (i.e., defendant and respondent Cingular). Furthermore, as a retailer of cellular phones in the State of California, ATTM has a vital interest in the continued publication of *Yabsley* as it clarifies that wireless retailers are entitled to safe harbor protection from consumer class actions under California's Unfair Competition and False Advertising Laws when they collect sales tax calculated in accordance with regulations promulgated by the California State Board of Equalization ("CSBE"). Indeed, ATTM alone has been named as a defendant in two such additional lawsuits within the past several months. As for *Yabsley*, there are no other published cases precisely on point so *Yabsley's* direction is much needed in this area of the law.

Yabsley Should Stay Published As It Creates Certainty In A Heavily Litigated Area Of Law

ATTM, like most if not all wireless retailers, sells cellular phones at discounted prices to consumers when they sign up for "bundled" multi-year cellular service plans. Because these consumers are actually receiving a cellular phone worth significantly more than they pay, the CSBE requires wireless retailers to calculate sales tax on a bundled cellular phone based on the phone's unbundled or full retail price. 18 Cal. Code Reg. § 1585(b)(3). Moreover, the CSBE specifically permits wireless retailers to collect this sales tax from their customers based on the unbundled price of their cell phones. *Id.* And, as is customary of most California retailers and specifically permitted by California law, ATTM chooses to collect this sales tax from its customers, and its consumers are presumed by law to agree to the payment of this sales tax as evidenced by their receipt. *See* Cal. Civ. Code § 1656.1.

Nevertheless, despite this legal presumption, and the presumption that individuals know the governing law, ATTM and other wireless retailers are consistently named as defendants in consumer class actions alleging that this practice, in one way or another, violates California's Unfair Competition and False Advertising Laws. *See, e.g., Laster, et al. v. T-Mobile USA Inc., et al.*, United States District Court, Southern District of California, Case. No. 05-CV-01167-DMS; *Smith et al. v. AT&T Mobility LLC*, Los Angeles Superior Court, Case. No. BC412856; *Carney v. Verizon Wireless Telecom Inc.,* Los Angeles Superior Court, Case. No. BC413529; *Bower v. AT&T Mobility LLC, et al.*, Los Angeles Superior Court, Case. No. BC418113, and, of course, *Yabsley* itself.

By clarifying that retailers are entitled to safe harbor protection from lawsuits in this and analogous situations, *Yabsley* provides retailers operating in California with greater certainty that they will not be exposed to frivolous lawsuits simply because they are in compliance with California sales tax law. Depublication of *Yabsley* would obscure the clarity that now exists, and is far greater than necessary to address the grievances of the CAOC.

CAOC's Arguments For Depublication Are Unavailing

The CAOC is requesting depublication of *Yabsley* based on two rather unremarkable statements from the opinion (one being in a footnote) that the CAOC claims are misleading and could be misused as precedent. Neither argument has merit.

The first statement, having to do with a plaintiff's standing to sue under the "unlawful" prong of the UCL, is according to the CAOC "plainly wrong and misleading because it could lead other courts to hold that the 'unfair' and 'fraudulent' prongs essentially do not exist, and that the only UCL cases that may proceed are those that derive from violations of some other statute or regulation." This hypothetical worst-case scenario is highly unlikely to unfold considering both: (1) the ample appellate and Supreme Court authority that has evolved throughout the years analyzing and applying the "unfair" and "fraudulent" prongs of the UCL

without challenging their very right to exist; and (2) the fact that it takes a very strained reading of *Yabsley* to glean such an outlandish conclusion from what is clearly dicta.

The second statement (in a footnote), having to do with a plaintiff's standing to bring CLRA claims absent a pre-filing demand, is most likely an innocent misstatement. Notably, as referenced by the CAOC in its letter, a very similar misstatement apparently occurred in *Vasquez v. State of California*, 45 Cal. 4th 243, 252 (2008). Yet, whereas the Court simply modified its original opinion in *Vasquez* to the apparent satisfaction of the CAOC, the CAOC believes that the entirety of *Yabsley* should be depublished to achieve the same goal. Such a drastic measure is surely not called for, when the Court of Appeal could just as easily modify its opinion had plaintiff/appellant Yabsley raised the issue following its publication (he still may, but has chosen not to thus far).

In any event, the mere possibility that a litigant or court could be mislead by these two innocuous statements, regardless of ample Supreme Court authority to the contrary, should not lead to the drastic remedy of depublication as proposed by the CAOC. As indicated above, *Yabsley*'s core holding provides important clarity to a heavily litigated area of law, and its important benefits outweigh the hypothetical possibility that its dicta could be intentionally misused as precedent by errant litigants.

The Court Should Not Issue A "Grant And Hold"

As a preliminary matter, non-party CAOC lacks standing to seek a petition for review. *See* Cal. Ct. Rule 8.500(a)(1). And while the CAOC could seek to submit an *amicus curiae* letter in *support* of a petition for review by plaintiff/appellant Yabsley under California Rule of Court 8.500(g)(1), to date plaintiff/appellant Yabsley has filed no such petition. Consequently, the Court should disregard the CAOC's request on this ground alone.

As for the merits of the CAOC's position, there is simply no authority supporting the request that *Yabsley* be "taken up" as a "Grant and Hold" merely because it involves the discussion of legal issues addressed in other cases currently pending before the Supreme Court. Indeed, were that the case, the vast majority of appellate cases would be subject to review notwithstanding the limitations imposed by California Rule of Court 8.500(b), which outlines the four situations where "The Supreme Court may order review of a Court of Appeal decision."

CAOC makes no attempt to explain why or how its request meets the relevant legal standard for granting review. But of these four situations, the only one that is even a remote possibility for the granting of review, is the granting of review "When necessary to secure uniformity of decision or to settle an important question of law." Cal. Ct. Rule 8.500(b)(1). This situation, however, is not applicable to *Yabsley*. First, *Yabsley's* conclusions regarding standing under the UCL were in the context of sales taxes—an issue that *Kwikset Corp. v. Super. Ct.* does not address. More importantly, the standing issue was not necessary to the determination

Yabsley's core holding as CAOC concedes in its letter. Second, *Yabsley's* analysis under *Loeffler v. Target Corp.*, and its reliance thereon, was secondary to its core holding regarding the UCL's safe harbor protections. *Yabsley*'s safe harbor analysis is an important stand-alone holding that should not be depublished merely because *Loeffler v. Target* is currently on review and might be reversed one day. And if that is the case, the Court could easily disapprove *Yabsley* to the extent it is in conflict, while keeping intact its important core holding for the benefit of current and future litigants.

* * *

For the foregoing reasons, the Court should neither depublish nor issue a "Grant and Hold" of *Yabsley*.

Very truly yours,

MCKENNA LONG & ALDRIDGE LLP

Ross H. Hyslop

RHH/gkb

cc: all counsel (see attached proof of service)

SD:22175657.2

Yabsley v. The California State Board of Equalization
California Court of Appeal - Second Appellate District - Division Six, Case No. B198827
(Appeal of Santa Barbara Superior Court Case No. 1221332)

PROOF OF SERVICE

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 750 B Street, Suite 3300, San Diego, California 92101.

On **September 23, 2009**, I caused to be served a copy of the within document(s)

- **LETTER TO CALIFORNIA SUPREME COURT IN OPPOSITION TO REQUESTS FOR DEPUBLICATION**

on the interested parties in this action as indicated below:

☒	***U.S. Mail*** as indicated below – by placing the document(s) listed above in a sealed envelope addressed as set forth below. I am readily familiar with the firm's procedures for mail collection and processing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
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☐	***E- Mail*** - by e-mailing the document(s) listed above to the e-mail addresses as set forth below.

William D. Pettersen, Esq. Pettersen & Bark 1620 Union Street San Diego, CA 92101 Tel: (619) 702-0123 / Fax: (619) 702-0127	*Attorneys for Plaintiff* *RICHARD A. YABSLEY*
James H. Smith, Esq. Grokenberger & Smith 1004 Santa Barbara Street Santa Barbara, CA 93101 Tel: (805) 965-7746 / Fax: (805) 965-3545	*Attorneys for Plaintiff* *RICHARD A. YABSLEY*
Michele R. VanGelderen, Esq. Deputy Attorney General Office of the Attorney General 300 South Spring Street, Suite 500 Los Angeles, CA 90013 Tel: (213) 897-2000 / Fax: (213) 897-4951	*Attorneys for Amicus Curiae* *Attorney General*

John L. Waid, Esq. California State Board of Equalization 450 N Street (MIC:82) Sacramento, CA 95814 Tel: (916) 324-3828 / Fax: (916) 323-3387	*Attorneys for Amicus Curiae* *California State Board of Equalization*
Office of the District Attorney Attn: B. Allan Kaplan, Esq. Deputy District Attorney 1112 Santa Barbara Street Santa Barbara, CA 93101 Tel.: (805) 568-2437 / Fax: (805) 560-1077	
Clerk of the Court Court of Appeal for the State of California Second Appellate District - Division Six 200 East Santa Clara Street, Suite III Ventura, CA 93001	
Attn: Dept. 5 Courtroom Clerk Santa Barbara County Superior Court Anacapa Division 1100 Anacapa Street Santa Barbara, CA 93121-1107	
Kimberly A. Kralowec, Esq. Schubert Jonckheer Kolbe & Kralowlec LLP Three Embarcadero Center, Suite 1650 San Francisco, CA 94111 Tel.: (415) 788-4220 / Fax: (415) 788-0161	
Taras P.Kick, Esq. The Kick Law Firm 900 Wilshire Boulevard, Suite 230 Los Angeles, CA 90017 Tel.: (213) 624-1588 / Fax: (213) 624-1589	
Albert Norman Shelden, Esq. Deputy Attorney General Office of the Attorney General 110 West A Street, Suite 1100 San Diego, CA 92101 Tel: (619) 645-2001 / Fax: (619) 645-2062	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Dated: **September 23, 2009**

Jamie L. Hornsby

SD:22175698.1