Attorneys At Law

Shawn Khorrami
Dylan Pollard
Danny Abir
Launa Adolph
Bevin Allen
Matt Bailey
Maryam Danishwar
Bahar Dejban
Robert Drexler
Michael Forman
Abi Gnanadesigan
Deborah Gutierrez
James Kenna
Galorah Keshavarz
Deborah Khantamour
Katie McSweeney
Neda Sargordan
Roxanna Tabatabaeepour
Crystal Yagoobian
Of Counsel
Payum Banafshe
Todd Kelly
David Mallen
Daniel Woska

December 2, 2009

Honorable Ronald M. George, Chief Justice
and the Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, California 94102

Dear Honorable Justices:

Pursuant to California Rule of Court 8.1125(a), this letter is written to respectfully request depublication of the Court of Appeal's opinion in *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966 (2d Dist., 2009) (Case No. B204986). A petition for review of the *Cohen* opinion is currently pending before this Court. (Case No. S177734). A copy of the *Cohen* opinion is enclosed.

This request is timely filed. Pursuant to CRC 8.264(b)(3), the *Cohen* opinion became final on November 28, 2009 – 30 days after the Court of Appeal's subsequent Order changing its opinion from unpublished to published. Under CRC Rule 8.1125(a)(4), the deadline for filing a depublication request is December 27, 2009 (i.e. 30 days after finality).

I. Statement Of Interest

The law firm of Khorrami Pollard & Abir LLP is a 19 member civil law firm in California and is primarily engaged in representing consumers, employees, and businesses in California class action cases. Accordingly, Khorrami Pollard & Abir, on behalf of its clients, is interested generally in the development of the law relating to the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) ("UCL"), and in particular, the development of the UCL as it relates to class actions.

II. The *Cohen* Opinion Should Be Depublished Because The Court Of Appeal's Analysis And Conclusions Stand In Direct Conflict With The Decisional Authority Of This Court And Will Lead To Confusion And Misuse If Allowed To Remain As Precedent

The instant depublication request relates to the Court of Appeal's conclusion that a trial court may properly deny class certification of a UCL claim based on individualized issues relating to absent class member reliance. *See Cohen v. Directv*, 178 Cal. App. 4th 966, 981-82 (2009) ("*Cohen*"). This conclusion

stands in direct conflict with this Court's decision in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009) ("*Tobacco II*"), and will undeniably lead to confusion and misuse of *Cohen* as precedent to "reintroduce" the element of absent class member reliance in UCL class action litigation.

Although "[t]here are no fixed criteria for depublication" [*See* Eisenberg, Horvitz & Weiner, *California Practice Guide: Civil Appeals & Writs* §11:180.1 (The Rutter Group 2009)], it is generally accepted that depublication is an appropriate remedy in circumstances where an "opinion is wrong on a significant point" or where the opinion is "too broad and could lead to unanticipated misuse as precedent." *See id.*

As demonstrated in detail below, the *Cohen* opinion merits depublication under both criteria. Due to the importance of the issues resolved in *Tobacco II*, as well as the other decisional authority of this Court which *Cohen* stands to abrogate, depublication of the *Cohen* opinion is necessary to maintain consistency and coherence in applicable California class action law.

A. The *Cohen* Opinion Should Be Depublished, As *Cohen*'s Analysis And Conclusions Contradict This Court's Holding In *Tobacco II* And Will Ultimately Lead To Confusion And Misuse As Precedent

Examination of the Court of Appeal's holding in *Cohen* reflects that the Court – in no uncertain terms – held that a trial court has discretion to consider the issue of absent class member reliance when determining whether to certify a UCL claim as a class action:

> 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*.

Cohen, 178 Cal. App. 4th at 981-82 (emphasis added).

As reasoned by the Court of Appeal, this Court's holding in *Tobacco II* was limited to the issue of absent class member "standing" [*See id.*, at 981-82 ("*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")], which in the Court of Appeal's view, was distinct from the concept of "commonality." *See id.* In fact, the Court of Appeal reasoned that differences between "standing" and "commonality" were so great that the analysis of *Tobacco II* was deemed "irrelevant" to the issue of whether absent class member reliance could properly be

considered by a trial court. *See id*. ("[W]e find *Tobacco II* to be irrelevant because the issue of 'standing' simply is not the same thing as the issue of 'commonality.").

At the outset, it is important to highlight that *Cohen*'s sweeping conclusion that *Tobacco II* is irrelevant to a court's class certification calculus renders *Cohen* facially overbroad. In fact, the overarching issue present in *Tobacco II* concerned whether a court may deny class certification based on concepts of Proposition 64 standing, and as such, the *Tobacco II* opinion was inextricably linked to the class certification question. *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."). Significantly, the Court of Appeal in *Cohen* was presented with the same issue. *See Cohen*, 178 Cal. App. 4th at 973 (quoting trial court's order denying certification on the grounds that "[Proposition 64] amendments require the plaintiff to have suffered injury in fact and lost money or property" and "plaintiff has not shown class wide actual reliance or deception").

Thus, the Court of Appeal's sweeping conclusion that this Court's analysis of absent class member standing in *Tobacco II* is irrelevant to the issue of commonality is itself predicated upon a faulty premise. The overarching question presented in *Tobacco II* specifically concerned whether a trial court may properly consider class member reliance as part of the court's class certification analysis. By attempting to revisit this question anew, the Court of Appeal rendered an opinion that directly contradicts this Court's opinion in *Tobacco II* in several material respects.

First, *Cohen*'s conclusion that a trial court may properly deny class certification of a UCL claim based on individualized issues relating to absent class member reliance contradicts the holding of this Court in *Tobacco II*. In fact, this Court specifically concluded that a trial court may **not** condition class certification on inquiry into the factual circumstances of absent class member damage and/or causation, and held that doing so was 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 (emphasis added).

Importantly, as this Court's opinion makes clear, 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" [*See Tobacco II*, 46 Cal. 4th at 320], and that the failure of Proposition 64 to amend such language precludes a 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 320 (emphasis added).

Thus, this Court's analysis in *Tobacco II* confirms that reliance and actual injury are not part of an absent class member's substantive claim. Rather, "[t]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, '*it is necessary only to show that 'members of the public are likely to be deceived*.'" *See Tobacco II*, 46 Cal. 4th at 312, 324 (emphasis added).

Second, relevant to *Cohen*'s supporting analysis, this Court specifically considered and rejected efforts to draw a distinction between standing requirements and class certification principles as a justification for imposing 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 (emphasis added).

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 concerned only with the defendant's conduct:

> 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.) <u>*We disagree*</u>.
>
> 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 <u>*the focus of the statute is on the defendant's conduct*</u>. As we have already observed, the proponents of Proposition 64 told the electorate that the initiative <u>*would not alter*</u> *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 (emphasis added).

In sum, the Court of Appeal's analysis and conclusions in *Cohen* directly contradict this Court's foundational findings in *Tobacco II* that **(1)** the factual circumstances regarding reliance and/or damage are not permissible components of an absent class member's substantive UCL claim, and **(2)** that class certification principles cannot be used to impose an actual injury and causation requirement on the putative class.

Due to the significance of the issues resolved in *Tobacco II*, and the pervasiveness which the *Cohen* opinion conflicts with *Tobacco II's* analysis and conclusions, the *Cohen* opinion raises especially unique concerns warranting depublication. *Cohen*, if allowed to stand, will not simply lead to confusion, but rather, will negate the issues this Court resolved in *Tobacco II*.

B. *Cohen*'s Analysis, If Allowed To Stand, Will Also Unnecessarily Cause Confusion And Uncertainty With Regard To Settled Class Certification Standards

Even if it were assumed that *Cohen* was correct in its conclusion that *Tobacco II*'s

holding was limited to the issue of absent class member standing, *Cohen*'s sweeping conclusion that this Court's holding in *Tobacco II* is "irrelevant" to a trial court's analysis concerning the element of commonality nonetheless stands to negate several lines of longstanding precedent established by this Court.

First, contrary to *Cohen*'s conclusion, this Court's holdings regarding the boundaries of absent class member standing are not only relevant, but necessary components of a trial court's analysis of the element of predominance.[1] While it is true that "contentions based on a lack of standing involve jurisdictional challenges" [*Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 439 (1989)], *Cohen*'s analysis disregards the fact that this Court's conclusions with regard to standing invariably serve to define the elements that are necessary to state a claim for relief on the underlying claim.[2] *See e.g. Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, 1162 (2003) (rejecting the assertion "that a specific intent requirement is necessary to prevent potential plaintiffs with injuries remotely caused by a defendant's acts from maintaining standing to sue for [the tort of interference with prospective economic advantage]" on the grounds that "[s]uch a requirement would lead to absurd and unfair results."); *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 638 (2009) ("conclud[ing] that a plaintiff has no standing to sue under the CLRA without some allegation that he or she has been damaged by an alleged unlawful practice, an allegation plaintiffs do not sufficiently make here.").

This Court's findings in this regard are of material importance to a trial court's predominance analysis, as the applicable precedent of this Court requires that predominance be framed by the elements of the underlying claim. *See Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096, 1106 (2003) ("Addressing whether questions common to the class predominate over questions affecting members individually, therefore, *required* the trial court to consider … elements [of plaintiff's negligence claim]") (emphasis added).

---

[1] The terms "commonality" and "predominance" are used interchangeably herein to reference the class action element requiring that *questions common to the class predominate over questions affecting members individually*.

[2] Importantly, this Court has not only acknowledged that the issue of standing is related to the legal sufficiency of the underlying claim [*See McKinny v. Board of Trustees*, 31 Cal. 3d 79, 91 (1982) (concluding that "[i]t is elementary that a plaintiff who lacks standing cannot state a valid cause of action.")], but that a plaintiff may establish standing by pleading a legally valid claim for relief. *See Common Cause*, 49 Cal. 3d at 440 (concluding that the "purpose [of standing] is met when, as here, plaintiffs possess standing to have the underlying controversy adjudicated and the desired relief granted after a trial on the merits; no greater interest is required to seek the same relief on an interim basis.").

Thus, *Cohen*'s sweeping assertion that this Court's conclusions regarding class member standing are "irrelevant" to issues of predominance creates precedent permitting a trial court to evaluate predominance without regard to the elements necessary to state a claim. This proposition clearly contravenes the established holdings of this Court, and if allowed to remain published, *Cohen* will unnecessarily cause confusion as to this settled class certification standard.

Second, contrary to *Cohen*'s conclusion, the legal elements proscribed by this Court as being necessary to state a claim for relief cannot be expanded by the class action elements. This Court has long concluded that "[c]lass actions are provided only as a means to enforce substantive law" and as such "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends--to sacrifice the goal for the going." *See Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 919 (2001); *Granberry v. Islay Invs.*, 9 Cal. 4th 738, 749 (1995); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1103 (Cal. 1993); *City of San Jose v. Superior Court*, 12 Cal.3d 447, 462 (1974).[3]

With regard to the issue at hand, this Court's decision in *Mirkin* is instructive. In that case, this Court specifically declined the request of the plaintiff to "reshape the law of deceit simply in order 'to remove [an] unnecessary pleading barrier[] to the effective utilization of class action procedures.'" *See Mirkin*, 5 Cal. 4th at 1103. As this Court reasoned, actual reliance is an element of the tort of deceit, and as such, the Court could not dispense of this element to facilitate certification of a class by way of the class action device:

> The argument is misplaced in any event: Actual reliance is more than a pleading requirement; it is an element of the tort of deceit. As we have previously observed, "[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends--to sacrifice the goal for the going." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 [].)

Mirkin, 5 Cal. 4th at 1103.

Importantly, this Court's holding was not confined to limiting existing elements, as this Court also concluded that "[t]he same principle disposes of plaintiffs' argument that we should ***expand*** the law of fraud to afford them the benefit of other state procedural rules

[3] Similarly, as this Court noted in *Washington Mutual Bank*, "[t]he federal law on class actions is in accord[,]" as "Rule 23 was not intended to make a change in the substantive law []; and the federal courts have been criticized where they have made such changes." *See Washington Mutual*, 24 Cal. 4th 906, 919 n.9 (internal citations omitted).

that they perceive as more favorable than the corresponding federal rules…." *See Mirkin*, 5 Cal. 4th at 1103 n.11 (emphasis added). [4]

In sum, the longstanding precedent of this Court confirms that a trial court may neither expand nor diminish the substantive elements of a claim by way of the class action mechanism. Thus, *Cohen*'s sweeping assertion that this Court's specific conclusions regarding absent class member standing are "irrelevant" to issues of predominance improperly seeks to authorize a trial court to expand the substantive law through the class elements. This proposition clearly contravenes the established holdings of this Court, and will unnecessarily cause confusion on this issue if *Cohen* is allowed to remain as precedent.

Simply put, *Cohen*'s analysis is overly broad and poses a substantial risk of single handedly unwinding decades of class action precedent handed down by this Court. Based on this independent ground, *Cohen* merits depublication.

C. *Cohen* Conflicts With Existing Court Of Appeal Decisions Interpreting *Tobacco II*

Importantly, of the two published appellate decisions that have directly considered the import of *Tobacco II*'s absent class member analysis, both have adhered to this Court's holding that reliance is not an element of an absent class member's substantive claim.

In *Morgan v. AT&T Wireless Services, Inc*., 177 Cal. App. 4th 1235 (2d Dist., 2009), the court explained that *Tobacco II* not only expressly held that reliance was not an element of an absent class member's claim, but that reliance logically could not be considered because standards of UCL liability are focused solely on defendant's conduct:

> A claim based upon the fraudulent business practice prong of the UCL is "distinct from common law fraud. 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for … relief' under the UCL. [Citations.] This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of

[4] *Mirkin* is also noteworthy, as this Court deemed the plaintiff's request to alter the elements of fraud to achieve class certification unnecessary due to the fact that the plaintiff was able to "sue under the antifraud provisions of state securities law for misrepresentations that affect the market <u>without proving actual reliance</u>." *See Mirkin*, 5 Cal. 4th at 1102 (emphasis added). This Court reasoned, "[t]hese statutory remedies, which do not require plaintiffs to plead or prove actual reliance, can be asserted in a class action." *See id*., at 1103.

> protecting the general public against unscrupulous business practices." (*Tobacco II, supra,* 46 Cal.4th at p. 312.)
>
> As noted above, a fraudulent business practice is one that is likely to deceive members of the public. (*Tobacco II, supra,* 46 Cal.4th at p. 312.)

Morgan, 177 Cal. App. 4th at 1255.

Similarly, in *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (4th Dist. 2009), the Fourth District also concluded that under *Tobacco II* "relief is available on a class basis 'without individualized proof of deception, reliance and injury.'" *See Kaldenbach,* 178 Cal. App. 4th at 848 (quoting *Tobacco II,* 46 Cal.4th at 320).

In addition, the *Kaldenbach* court also recognized that *Tobacco II* precludes consideration of reliance as part of a trial court's predominance analysis, but subsequently affirmed the lower court's order denying class certification on other grounds:

> Relying upon *In re Tobacco II Cases, supra,* 46 Cal.4th 298, and *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282 [] (Massachusetts Mutual), Kaldenbach argues reversal is required because the trial court improperly premised its order denying class certification on the complexities of establishing each absent class member's reliance on the representations made and their injury. But that was only one of the individualized issues the court found predominated and could not be proven on a classwide basis. As we have already noted, we affirm the order denying class certification if any of the trial court's stated reasons are sufficient to justify the order. (*Lebrilla, supra,* 119 Cal.App.4th at pp. 1074–1075; *Caro, supra,* 18 Cal.App.4th at pp. 655–656.) There were myriad other individualized issues the court found to predominate including whether any given agent took Mutual's training, read its manuals, and routinely followed the training and materials; and what materials, disclosures, representations, and explanations were given to any given purchaser. These individualized issues go not to the injury suffered by a purchaser, but to whether there was in fact an unfair business practice by Mutual. Neither *In re Tobacco II Cases, supra,* 46 Cal.4th 298, nor *Massachusetts Mutual, supra,* 97 Cal.App.4th 1282, compel a different result.

Kaldenbach, 178 Cal. App. 4th at 848.

Importantly, numerous Federal district courts also have deemed class certification to be appropriate based specifically on this Court's ruling that reliance is not a

component of absent class member claims under the UCL. *See e.g. Plascencia v. Lending 1st Mortage*, 2009 U.S. Dist. LEXIS 79585, 31-32 (N.D. Cal. Aug. 21, 2009) ("Plaintiffs may prove with generalized evidence that Defendants' conduct was 'likely to deceive' members of the public. The individual circumstances of each class member's loan need not be examined because the class members are not required to prove reliance and damage. Common issues will thus predominate on the UCL claim."); *Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, 44-45 (C.D. Cal. Nov. 9, 2009) (concluding that "common issues predominate with regard to plaintiffs' claim of a common classwide omission under the 'fraudulent' prong of the UCL" because the "UCL claim will be adjudicated under the 'reasonable consumer' standard rather than by examining the individual circumstances of each plaintiff."); *Baghdasarian v. Amazon.Com, Inc.*, 258 F.R.D. 383, 388 (C.D. Cal. 2009)(reasoning that "[t]he California Supreme Court concluded that 'standing requirements are applicable only to the class representatives, and not all absent class members'" and as such "[p]laintiff does not need to show affirmative proof that each individual class member relied on Defendant's deceptive conduct.").

Thus, the *Cohen* opinion – which stands in direct conflict with the published authority following this Court's decision in *Tobacco II* – creates two distinct lines of authority on an issue already resolved by this Court. Based on this independent ground, *Cohen* merits depublication. In the alternative, this Court should grant the *Cohen* plaintiff's pending petition for review.

III. Conclusion

For the reasons discussed above, we respectfully request this Court to depublish the Court of Appeal's opinion in *Cohen v. DIRECTV, Inc.*

Respectfully Submitted,

Matt C. Bailey, Esq.
Khorrami Pollard & Abir, LLP