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April 26, 2005

VIA U.S. MAIL

Honorable Presiding Justices and Associate Justices of the
California Court of Appeal
Fourth Appellate District, Division Three
P.O. Box 22055
Santa Ana, CA 92702-2702

Re: *Schulz v. Neovi Data Corp.*, case no. G033879
Request for Partial Publication of Opinion issued April 11, 2005

Dear Honorable Justices:

Pursuant to Rule of Court 978(a), I write on behalf of The Furth Firm LLP to request partial publication of this Court's opinion filed on April 11, 2005 in *Schulz v. Neovi Data Corp.*, case no G033879. Specifically, we request publication of the section entitled "Facts" (slip op. at 2-5) and the section entitled "Sufficiency of Allegations Against Ginix" (slip op. at 7-12).¹ These portions of the opinion address an issue of ongoing concern to ourselves, our clients, and the general public respecting the scope of California's Unfair Competition Law (Bus. & Prof. Code §§17200 et seq.).

The portions of the opinion of which publication is requested clearly meet the standards for publication of Rule of Court 976(c)(1). That Rule permits publication of an opinion that "establishes a new rule of law"; "applies an existing rule to a set of facts significantly different from those stated in published opinions;" or "modifies ... an existing rule." Cal. Rules of Ct., Rule 976(c)(1). *Schulz* is, in part, such an opinion.

The portions of *Schulz* that should be published address whether a defendant can be liable under the UCL if it aided and abetted others in committing an unfair business practice. In those portions of its opinion, this Court held that *Emery v. VISA International Service Assn.*, 95 Cal.App.4th 952 (2002), did *not* stand for the proposition that the UCL precludes aider and abettor liability. (Slip op. at 10-11.) However, *Emery* has been read by some as holding that aiding and abetting is *not* a viable theory of UCL liability. See, e.g., "California's Secondary-Liability Limits Appear Likely to Spread," *Los Angeles Daily Journal*

¹ We do not request publication of any other portions of the opinion.

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(March 11, 2004) (citing *Emery* for proposition that the UCL precludes all theories of secondary liability); *see also Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146 (C.D. Cal. 2002) (distinguishing *Emery* on its facts and holding that, despite *Emery*, “application of secondary liability principles is particularly applicable for claims of unfair competition [under California law]”). This Court’s opinion in *Schulz* confirms that such a reading of *Emery* is incorrect—a significant contribution to developing California caselaw in the area of UCL aider and abettor liability that will be useful to other courts as well as practitioners.

Schulz also “applies an existing rule to a set of facts significantly different from those stated in published opinions.” Cal. Rule of Court 976(c)(2). In *Schulz*, unlike *Emery*, the Court held that the plaintiff had alleged sufficient facts to proceed under an aiding and abetting theory. *Schulz* is the only recent opinion in which a Court has found the alleged facts sufficient to proceed under such a theory. Other recent cases touching upon this area involved facts that the Courts found to be *insufficient* to state a UCL claim. *See, e.g., In re Firearm Cases*, 126 Cal.App.4th 959, 983 (2005); *Casey v. U.S. Bank Nat’l Assn.*, ___ Cal.App.4th ___, 26 Cal.Rptr.3d 401, 413 (2005). Indeed, there is only one other published case in which the Court found the facts sufficient to support an aiding and abetting theory of UCL liability. In twenty-year old *People v. Toomey*, 157 Cal.App.3d 1 (1984), an individual and his wholly-owned company were held to be “one and the same” for purposes of UCL liability. *Id.* at 6 n.1. *Schulz*, by contrast, involves aiding and abetting by corporate entities that are completely unrelated to each other, and whose aiding and abetting would presumably be more difficult to prove. Due to this key factual distinction, the legal analysis of *Schulz* differs markedly from that of *Toomey*, and represents a meaningful contribution to UCL aiding and abetting jurisprudence.

For these reasons stated above, the identified portions of the *Schulz* opinion either “establish[] a new rule of law”; “appl[y] an existing rule to a set of facts significantly different from those stated in published opinions;” or “modif[y] ... an existing rule.” Cal. Rule of Court 976(c)(1). The Furth Firm LLP therefore respectfully requests that the Court issue an order certifying those portions of the opinion (the parts entitled “Facts” and “Sufficiency of Allegations Against Ginix” only) for publication. *Id.*, Rule 978(a).

Sincerely,

Kimberly ~~A.~~ Kralowec