

December 11, 2009

VIA FEDERAL EXPRESS

LETTER IN OPPOSITION TO DEPUBLICATION REQUEST
California Rules of Court, rule 8.1125(b)

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California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Cohen v. DIRECTV*, No. S177734

Dear Honorable Justices:

I write on behalf of the Association of Southern California Defense Counsel ("ASCDC") to respectfully urge this Court to keep the opinion in this case published. The ASCDC is one of seven interested parties which requested publication in the Court of Appeal, a request that the Court of Appeal granted.

The ASCDC is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions. Comprised of approximately 1,300 attorneys in Southern and Central California, ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of

Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
California Supreme Court
December 10, 2009
Page 2

information and ideas. It has appeared numerous times as an amicus curiae in the California Supreme Court and Courts of Appeal.

ASCDC members regularly are involved in defending purported class actions, including ones involving claims under the Consumers Legal Remedies Act (Civ. Code, §§ 1750 et seq.) or the Unfair Competitions Law (Bus. & Prof. Code, § 17200). Such claims often involve assertions regarding what advertising or other representations may have been made or relied upon.

Those requesting depublication claim that the Opinion in this case conflicts with *In re Tobacco II Cases* (2009) 46 Cal.4th 298. It does not. The Court of Appeal got it right. The Court of Appeal intelligently addressed and distinguished *Tobacco II*. As the Opinion discussed, *Tobacco II* addresses one issue – standing – but did not purport to address the very distinct question of commonality. In *Tobacco II*, a previously certified class was decertified solely on the ground that it had not been demonstrated that every class member had standing under Proposition 64 (i.e., has suffered actual financial loss). This Court held that only the class representative need to establish such Proposition 64 standing (and that the class representative had to do so in a misrepresentation case by showing actual reliance). It did not address the other class certification grounds, e.g., ascertainability, commonality, etc. Those were not at issue in *Tobacco II*. Nothing in *Tobacco II* suggests that it sweepingly did away with the traditional criteria for class certification or with the trial court's discretion in determining whether those criteria had been met.


As the Court of Appeal correctly recognized in this case, standing is a different issue from commonality. After *Tobacco II*, a trial court does and should still have discretion to determine whether a class action is appropriate due to commonly or disparately applicable facts and law. The trial court in this instance determined that there were too many variables as to facts (multiple types of advertisements, variety of potential aspects regarding reliance) for common issues to predominate. That's inherently a balancing determination that a trial court has and should have broad discretion to make. And, critically, that's a *commonality* determination, not a standing one. The present case quite properly

Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
California Supreme Court
December 10, 2009
Page 3

addresses an issue outside the scope of what *Tobacco II* addressed. It should remain published.

Respectfully submitted,

ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL
Robert A. Olson

By: 

Robert A. Olson

RAO:afc

cc: Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5700 Wilshire Boulevard, Suite 375, Los Angeles, California 90036-3697.

On December 11, 2009, I served the foregoing document described as: **LETTER IN OPPOSITION TO DEPUBLICATION REQUEST** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the 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.

Executed on December 11, 2009, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


ANITA F. COLE

COHEN v. DIRECTV, INC.

[Case No. S177734]

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