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September 17, 2009

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Schubert Joncinher Kolbe & Kralowec LLP

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

Re: *Yabsley v. Cingular Wireless LLP*
Santa Barbara County Superior Court Case No. 01221332
Second Dist. Ct. of Appeal No. B198827
Opposition to *Amicus Curiae* Request for Depublication

Dear Chief Justice George:

Pursuant to California Rules of Court, Rule 8.1125, subd. (b), *amicus curiae* California State Board of Equalization (SBE) submits this letter brief in opposition to the requests of *amicus curiae* The Kick Law Firm (“Kick”), Consumer Attorneys of California (“CAOC”), and the Attorney General (“AG”) to depublish the above opinion, published as *Yabsley v. Cingular Wireless LLC* (2009) 176 Cal. App. 4th 1156 (“*Yabsley*”). SBE urges this court to deny the requests on the grounds that this case does not lead to confusion and is vitally necessary to provide California retailers, who are the taxpayers in sales tax transactions, the subject of this case, uniformity, and consistency in the application of tax.

1. SBE has a vital interest in this litigation.

Pursuant to Rule 8.1125(b)(1), SBE respectfully submits this statement describing its interest in this litigation.¹ SBE has a vital interest in this case as it has been charged by the Legislature to administer the California Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq. (“SUTL”). As such, SBE is responsible for maintaining the uniformity and integrity of the sales and use tax system. (*Decorative Carpets, Inc. v. St. Bd. of Equal.* (1962) 58 Cal.2d 252, 255 (hereinafter *Decorative Carpets*.) Ensuring that the provisions of the tax code are administered and enforced in accordance with the intent of the Legislature in enacting the sales and use tax statutes is thus of critical significance to SBE.² Depublication of this case would greatly interfere with SBE’s ability to accomplish its mission.

¹ This request is timely under the rule. Although the AG’s request for depublication was filed, according to the court’s web site, on July 7, 2009, Kick’s letter is dated September 8, 2009, and CCOA’s letter is dated September 11, 2009. Kick’s letter incorporates a portion of the AG’s letter. Thus, SBE’s letter is timely as to all *amici* depublication requests of which it is aware.

² “A tax measure imposing a tax for revenue must, in order to be valid, lay its burdens uniformly upon all those who come within a proper classification of the persons to be subjected to the burden of the particular tax. (1 *Cooley* on Taxation, 3d ed., p. 4; *Kansas City v. Whipple*, 136 Mo. 475 [58 Am. St. Rep. 657, 35 L. R. A. 747, 38 S. W. 295].)” (*People v. Yosemite Lumber Co.* (1923) 191 Cal. 267, 276 [216 P. 39].)

2. The opinion creates certainty in the area of collection of sales tax reimbursement.

a. A retailer may not collect greater sums of sales tax reimbursement than the amount of tax the retailer owes and retain the excess.

Very briefly for the court's understanding, in sales tax transactions, the retailer of the tangible personal property is the taxpayer. (Rev. & Tax. Code, § 6051.)³ By agreement with its customer, the consumer of the property (§ 6007), the retailer may collect sales tax reimbursement from the customer. Such agreements, in over-the-counter transactions as are involved here, are generally implied in law. (Civ. Code, § 1656.1.)

Yabsley does not raise the specter that retailers may collect greater sums of sales tax reimbursement than is owed for their own enrichment. Retailers cannot keep the sales tax reimbursement they collect. A retailer must file a return and pay tax when the return is due, usually each quarter. (§§ 6451 & 6454.) If the retailer does not timely remit to the SBE tax reimbursement it has collected, the SBE will issue a notice of determination for the reimbursement not remitted. (§ 6481.) A retailer who collects tax reimbursement and does not turn it over to the SBE is subject to a 40% penalty of the amount not timely remitted. (§ 6597.) A retailer who collects tax reimbursement over and above the amount that should have been collected must either return the excess to the customer or remit it to the SBE. (§ 6901.5.) No amount of the excess tax reimbursement can inure to the retailer's benefit except as it goes to pay the retailer's obligations to the state.

Yabsley in fact provides greater certainty to retailers and consumers both by holding that SBE regulations provide a safe harbor from suits under the Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq. ("UCL")) by prescribing how a retailer collects sales tax reimbursement and the amount the retailer must collect. Depublication would work the opposite effect and remove the clarity that now exists.

b. *Yabsley* should not be taken up as a "grant and hold" case pending resolution of *Kwikset Corporation v. Superior Court (Benson)*.

Yabsley's conclusions regarding the "lost money or property" and causation requirements of the Unfair Competition law were rendered in the context of the SUTL and will not be reviewed in *Kwikset Corporation v. Superior Court* (Cal. App. 4th Dist., Mar. 18, 2009) 2009 Cal. App. LEXIS 467 (review granted June 10, 2009). A review of the Fourth District Court of Appeal's opinion indicates that *Kwikset* presents no issues of sales tax reimbursement. This court would have to render an advisory opinion outside the facts of *Kwikset* to deal with the issues contained in *Yabsley*. Therefore, as advisory opinions are disfavored, *Yabsley's* discussion of these requirements in the context of collection of sales tax reimbursement will not be affected by this court's action in *Kwikset*.

³ Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.

c. *Yabsley* should not be taken up as a “grant and hold” case pending resolution of *Loeffler v. Target Corporation*.

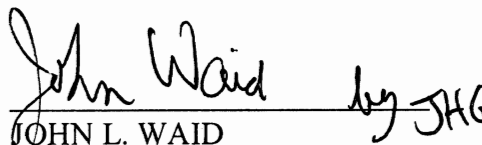
There is also no need to take *Yabsley* up as a “grant and hold” case pending this court’s action in *Loeffler v. Target Corp.* (Cal. App. 2d Dist., May 12, 2009) 2009 Cal. App. LEXIS 739 (review granted Sept. 9, 2009). *Yabsley* is a stand-alone decision. The Appellant’s allegations in *Yabsley* involve only whether or not the Respondent, Cingular Wireless, violated the provisions of the False Advertising Law (Bus. & Prof. Code, §§ 17500 et seq. (“FAL”), a sub-set of the UCL, when it advertised that sales tax reimbursement would be collected on all sales of cellular phones. The opinion in *Yabsley* was decided upon two factors, a discussion of the *Loeffler* decision which was followed in *Yabsley*, and a holding that SBE regulations provide the retailer a safe harbor from this action under the UCL. Because of the safe harbor analysis and holding, the validity of the opinion will not be impacted by this court’s action in *Loeffler*. Any portion of *Yabsley* that relies on *Loeffler* can be disapproved should this court reverse *Loeffler*.

3. Summary.

In sum, the *Yabsley* decision should be left undisturbed. It stands on its own merits. It follows an unbroken line of cases of this court and the appeals courts that the provisions of the UCL do not apply to conduct sanctioned by state law, which includes regulations as well as statutes. It provides certainty not only to retailers selling cellular telephones, the factual context of *Yabsley*, but also to other businesses engaging in conduct sanctioned by regulations of the government agency that regulates such conduct. If this court reverses *Loeffler*, any portion of *Yabsley* in conflict with that opinion can be disapproved. The California Supreme Court should deny the requests of certain of the *amici curiae* that *Yabsley* be depublished.

Dated: September 17, 2009

KRISTINE CAZADD
Chief Counsel
ROBERT W. LAMBERT
Assistant Chief Counsel, Litigation Division



JOHN L. WAID
Tax Counsel IV

cc: Mr. Ramon J. Hirsig
Ms. Kristine Cazadd
Mr. Robert Lambert

DECLARATION OF SERVICE

Case Name: **Yabsley v. Cingular Wireless**

Case Number: Court of Appeal Case No. **B198827**

I declare:

I am employed in the Office of the Board of Equalization, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 450 N Street, Sacramento, CA 95814.

On September 17, 2009, I served the attached **LETTER TO SUPREME COURT REQUESTING DEPUBLICATION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 17, 2009, at Sacramento, California.

Deborah Self

Declarant



Signature

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