No. S173972

IN THE SUPREME COURT
STATE OF CALIFORNIA

KIMBERLY LOEFFLER, et al.
Plaintiffs and Appellants

v.

TARGET CORPORATION
Defendant and Respondent

Appeal from the Court of Appeal, Second Appellate District, Division 3, Case No. BB199287; Los Angeles County Superior Court Case No. BC360004 (Honorable Michael L. Stern, Judge)

BRIEF OF *AMICUS CURIAE* CALIFORNIA STATE BOARD OF EQUALIZATION IN SUPPORT OF RESPONDENT TARGET CORPORATION

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On Appeal from an Order by the Court of Appeal,
Second Appellate District, Division Three, Case No. B199287,
Affirming Order Sustaining Demurrer;
Los Angeles County Superior Court, Case No.
BC36004 (Honorable Michael L. Stern, Judge)

APPLICATION OF THE CALIFORNIA STATE BOARD OF EQUALIZATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT TARGET CORPORATION

Pursuant to California Rules of Court, Rules on Appeal, Rule 8.200(c)(1), the California State Board of Equalization (hereinafter SBE) respectfully requests leave of this Court to file the attached *Amicus Curiae* Brief in support of the ruling of the Second District Court of Appeal affirming the trial court's decision to sustain the Demurrer of Defendant Target Corporation (hereinafter Target) without leave to amend.

The 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)).[1] As such, SBE is responsible for maintaining the uniformity and integrity of the sales and use tax system. Ensuring that its provisions 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. A ruling in favor of Appellant herein would greatly interfere with SBE's ability to accomplish its mission.

The plaintiffs in the case below, Appellants in this proceeding, attempted to litigate the issue of whether or not Target properly applied sales tax to sales of hot coffee. Appellants did not, however, either go first to SBE with their complaint to allow it to investigate whether or not tax was being properly applied or go to Target with their grievance or use any other remedy that may be available to them under the Revenue and Taxation Code. Appellants instead attempted to use statutes providing remedies to consumers for unlawful or unfair business practices to adjudicate what is in fact a matter regarding the proper application of sales tax.

The Attorney General ("AG") filed its *amicus curiae* brief in the Court of Appeal on October 14, 2008, and a letter brief supporting Appellants' Petition for Review on July 6, 2009. In the view of the SBE, the AG's brief asserts for the first time that consumers may be able to use consumer protection statutes to sue retailers in trial courts for alleged excess collection of sales tax reimbursement. The AG's brief in the Court of Appeal also asserted that consumers may have remedies directly against SBE under the Revenue and Taxation Code. The positions the AG espoused in the Court of Appeal run counter to tax cases that hold that

[1] Unless otherwise stated, all statutory citations are to the Revenue and Taxation Code.

remedies for alleged over-collection of sales tax reimbursement or use tax from customers must be consonant with the refund statutes contained in the SUTL. The AG's position is, in the view of the SBE, more akin to arguing what the AG would like the law to be rather than advising the court of its opinion as to what the law actually is. As the Legislature entrusted SBE with the administration and enforcement of the sales and use tax system 75 ago, SBE is in a much better position than the AG Consumer Section, which has no experience in tax matters, to advise this court on the nature of the sales and use tax system and the remedies provided by the Revenue and Taxation Code to resolve tax disputes.

SBE's review of the AG's Brief indicates that it did not take into account that the sales and use tax statutes provide a comprehensive system for administering and enforcing the SUTL. SBE proposes to demonstrate that the Legislature did not intend for consumer protection statutes designed to be broadly interpreted in order to effect remedies for a wide range of unfair or illegal business practices to be applied to revenue and taxation statutes which enforce and administer the tax obligations of persons who sell and who purchase tangible personal property. Tax statutes are strictly interpreted to protect the public fisc and to ensure that the taxing agencies have the maximum opportunity to resolve problems before the aggrieved party can go to court. The SUTL is an all-encompassing set of laws with its own principles and goals so that resort to consumer protection laws, which have different principles and goals, is neither authorized nor necessary. For these reasons, SBE requests permission to file an *amicus curiae* brief.

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INTRODUCTION AND ISSUES PRESENTED

SBE believes that Appellants' description of the allegations in their complaint and the procedural history of this case contained in Appellants' Opening Brief ("AOB") generally are correct.

SUMMARY OF ARGUMENT

1. The payment of sales tax and the collection of sales tax reimbursement are not "business practices" within the meaning of the consumer protection statutes at issue in this action. Consequently, the consumer protection statutes, by definition, do not apply and cannot be applied to the collection of sales tax reimbursement to be remitted to the State.

2. The Legislature did not intend that the consumer protection statutes at issue in this action be applied to regulate disputes between citizens and the government.

3. The California Constitution bars actions such as this one because they effectively restrain the state's collection of the sales tax.

4. Consumers have numerous other potential remedies, both formal and informal, under which the SBE will investigate their complaints and correct any allegedly improper practices, or under which the courts will review the SBE's regulations for validity. Consumers may also seek relief from the Legislature.

THE SALES AND USE TAX LAW

Appellants' description of the Sales and Use Tax Law ("SUTL") is generally correct. For the convenience of the court, however, SBE summarizes the applicable provisions of the SUTL as follows:

The SUTL is composed of two complementary albeit separate parts: the sales tax and the use tax. (*Bank of America v. St. Bd. of Equalization* (1962) 290 Cal. App. 2d 780, 791.) This case involves the sales tax. The sales tax is levied upon the retailer and not upon the retailer's customer, the consumer. (Rev. & Tax. Code, §§ 6007 & 6051.)[1] An agreement is implied in law in over-the-counter sales, such as the ones at issue here, that the retailer may reimburse itself from the customer for the tax the retailer must pay. (Civ. Code, § 1656.1.) As a result, the consumer is not the taxpayer and may not file a claim for refund. (§ 6902.)

The legal analysis is complicated, however, by the fact that some consumers purchasing tangible personal property in or for use in California have remedies under the refund statutes. First, federal law differs from California law as to the incidence of the sales tax. Under federal law, as applicable to sales to the United States or a federal instrumentality, the incidence of the sales tax is not considered as being upon the retailer, but instead upon the federal purchaser. (*Diamond National Corp. v. St. Bd. of Equalization* (1976) 425 U.S. 268 [96 S. Ct. 1530; 47 L. Ed. 2d 780]; *United States v. Cal. St. Bd. of Equalization* (9th Cir. 1981) 650 F. 2d 1127, 1132 ("*US v. SBE*").) Thus, federal law is contrary to California law in that it provides that the federal purchaser is the sales tax taxpayer and, thus, may itself file a claim for a sales tax refund.

Second, with respect to the use tax, the purchaser itself is the taxpayer, with the retailer being a mere collection agent. (§§ 6202 & 6203) As a result, in the use tax context, a purchaser may file a claim for refund of use tax (§ 6902), and consequently has administrative remedies it must first exhaust before it can file a refund action in court. (§ 6932.)

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[1] Unless otherwise stated, all statutory citations are to the Revenue and Taxation Code.

In this regard, the administrative and enforcement provisions of the SUTL (§ 6451 et seq.) apply equally to both the sales tax and use tax. Consequently, any ruling regarding the availability of consumer remedies to purchasers under the sales tax law also may be found to apply to use tax taxpayers and federal purchasers in sales tax transactions, both of whom already have available administrative remedies.

Appellants contend that the Revenue and Taxation Code "does not obligate the Board to investigate whether a retailer has imposed sales tax reimbursement charges when no sales tax was legally due, nor to ensure that that any wrongfully charged sales tax reimbursement is returned to customers." (AOB, p. 10.) This contention is simply wrong. This Court has already held that the Board has a vital interest in ensuring the integrity of the sales and use tax system. (*Decorative Carpets, Inc. v. St. Bd. of Equal.* (1962) 58 Cal. 2d 252, 255.) When SBE determines that sales tax refunds are due (§ 6901.5), SBE will withhold refunds unless and until the taxpayer-retailer demonstrates that it can and will return the excess tax reimbursement to its customers. (*Id.*; see also, Cal. Code Regs., tit. 18, § ("Regulation" or "Reg." and plurals) 1700(b)(3)).

ARGUMENT

I
THE APPLICABLE TAX STATUTES DO NOT PERMIT CONSUMERS TO SUE EITHER SBE OR THEIR RETAILERS FOR TAX REFUNDS.

A. The Power Of The Legislature In The Field Of Taxation Is Paramount.

Appellants ask this court to graft consumer protection statutes onto the Sales and Use Tax Law (§§ 6001-7176 ("SUTL").) The Constitution, however, gives the Legislature sole power to enact and amend tax laws. (Article XIII, section 33; *Steinhart v. County of Los Angeles* (2010) 47 Cal. 4th 1298, 1307 [2010 Cal. LEXIS 869].) "No power of supervision or control is lodged in either of the other departments of the government." (*Pacific Ins. Co. v. Soule* (1868) 74 U.S. (7 Wall.) 433, 443 [19 L. Ed. 95; 2 A.F.T.R. (P-H) 2233; 433].)

As a result, the "power of the Legislature in the area of taxation is paramount." (*Hoogasian Flowers v. St. Bd. of Equalization* (1994) 23 Cal.App.4h 1263, 1270 [28 Cal. Rptr. 2d 686].) The levy, administration, and enforcement of a tax must be found in express statutory authority, not in inference or implication. (*American Co. v. City of Lakeport* (1943) 220 Cal. 548, 564 [32 P. 2d 622].) Tax statutes cannot be extended to things not expressly named in the statutes "however great the hardship may appear to the judicial mind to be." (*Merced County v. Helm & Nolan* (1894) 102 Cal. 159, 166 [36 Pac. 399].) The definitions used in the tax statutes control for the purposes of taxation "whether they conform to definitions used for other purposes or not." (See, e.g., *Trabue Pittman Corp. v. County of Los Angeles* (1946) 29 Cal. 2d 385, 393 [175 P. 2d 512].) The Legislature determines the method that will be employed to enforce the collection of taxes, "since in prescribing the means by which taxes shall be collected, the power to the legislature is exclusive and discretionary." (85 C. J. S., Taxation, § 974, p. 191 (St. Paul, West Group, 2001), and cases cited therein.)

In this case, this Court is not dealing with a presumption that the Legislature is aware that consumers cannot file claims for refund. As this Court has recognized, the Legislature has actual knowledge of that fact. In *Javor v. State*

Board of Equalization (1974) 12 Cal. 3d 790 [527 P.2d 1153; 117 Cal. Rptr. 305] ("*Javor*"), this Court emphasized that the Legislature provided consumers the ability to recover excess sales tax reimbursements from retailers under former Section 6054.5 only where: (1) the money so collected has not yet been paid to the Board and (2) the retailer knowingly collected an excessive amount. Otherwise, the retailer has to pay the collected amount to the state. (*Ibid.* at p. 799.)[2] *Javor* also noted that the Legislature had at one time provided purchasers of automobiles a limited ability to sue their retailers for return of sales tax reimbursement in former Section 6454.5. (*Ibid.* at p. 802.) Justice Clark, writing in dissent, also noted that in the 1972 legislative session, AB 122, which would have given consumers the right to proceed against SBE, was introduced, but "died in the inactive file." (*Ibid.* at p. 803, Clark, J. diss.)

More recently, the Legislature has again addressed the issue and again provided consumers only limited rights to be applied in a specific situation. In 1993, the Legislature enacted Senate Bill 263 to enact a comprehensive legislative scheme for distributing transactions and use tax refunds where the tax was declared to be unconstitutional and the revenues had been impounded by the levying agency. (§§ 7275-7279.6 (Stats. 1993, ch. 1060, § 2).) In an uncodified section, the Legislature stated: "Current law . . . provides that only persons who directly pay a tax to state taxing authorities may file claims for refund. . . . [¶] As a result, under existing statutory provisions a substantial portion of the . . . taxes would not be refunded to the ultimate consumers who bore the direct economic burden of paying those taxes." (Stats. 1993, ch. 1060, §§ 4(b) & 4(c).)[3] The Legislature recognized that it was altering "the normal refund mechanism" by

[2] Former Section 6054.5 was the predecessor to current Section 6901.5.

[3] "An uncodified section is part of the statutory law." (*Carter v. Dept. of Veterans Affairs* (2006) 38 Cal. 4th 914, 925 [44 Cal. Rptr. 3d 223; 135 P.3d 637; 98 Fair Empl. Prac. Cas. (BNA) 531; 88 Empl. Prac. Dec. (CCH) P42, 414.)

giving consumers the ability to file claims for refund under specified circumstances in this instance. (Stats. 1993, ch. 1060, § 4(d).) Thus, the Legislature is well aware of the fact that consumers cannot file claims for refund and that, as a result, those who bear the economic burden of the tax may not be able to get back their money when it is determined that excess sales tax reimbursement has been collected. When the Legislature has provided a remedy, it has been on an extremely limited basis and under carefully defined circumstances.

None of the cases Appellants cite for the proposition that the courts have approved the use of consumer protection statutes to adjudicate sales tax disputes do any such thing. (AOB, pp. 17-18.) *Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal. App. 2d 156 [288 P. 2d 317] and *Botney v. Sperry & Hutchinson Co.* (1976) 55 Cal. App. 3d 49 [127 Cal. Rptr. 263] were both actions for declaratory relief, with the latter also alleging damages for fraud and alleged over-collection of sales tax reimbursements. Thus, the application of consumer statutes to sales tax disputes was not even an issue in these cases. SBE participated in only the latter, and there only as a cross-defendant.

Only one case Appellants cite even mentions this issue. In *Laster v. T-Mobile USA, Inc.* (S. D. Cal. December 4, 2009) No. 05CIV11167 (2009 U.S. Dist. LEXIS 116228), the defendants did raise the applicability of the UCL and CLRA. In view of this Court's grant of review in both *Loeffler* and *Yabsley v. Cingular Wireless LLC* (S176146), the court declined to address these issues. (*Ibid.* at * 7.)

Dell, Inc. v. Superior Ct. (2008) 159 Cal. App. 4th 911, upon which Appellants also rely (AOB, pp. 17, 47), specifically says that it does not address any issue other than the application of tax to the facts before it. (*Ibid.* at p. 920.)

Thus, no court has approved the proposition that the provisions of the UCL and CLRA may be used to adjudicate what are, at heart, sales tax disputes.

Under the above authority, then, the power to perform an act relating to taxes must be found within the applicable tax statutes. Though well aware that consumers cannot file claims for refund, the Legislature has not provided consumers a general remedy for improper collection of sales tax reimbursement. While the SBE must often borrow definitions from other statutes to implement and enforce the SUTL,[4] the courts are not empowered to force non-tax concepts and procedures on the SUTL to add principles the Legislature did not include. (*King v. St. Bd. of Equalization* (1972) 22 Cal. App. 3d 1006, 1010-1011 [99 Cal. Rptr. 802].) This Court should resist Appellant's invitation to amend the SUTL by importing into it principles and procedures derived from the UCL and CLRA, but instead, affirm the Court of Appeal's conclusion that it is the Legislature that must address these issues. (*Loeffler,* Slip Opn., p. 21.)

B. This Court Has Concluded That Courts May Not Expand the Provisions of the SUTL.

Appellants concede that the Legislature does not provide a remedy for consumers to sue either the SBE or retailers for alleged over-collection of tax. (AOB, p. 6.) Plaintiffs proffer numerous policy arguments to justify the court creating one. To do so, however, this court would have to reverse a policy of strict construction of tax statutes concerning sales tax refunds stretching back over 30 years.

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[4] For example, the SUTL defines a "sale" as a "transfer of title or possession for a consideration" but does not define "consideration." The SBE borrowed the definition of "consideration" from the Civil Code to determine when a sale takes place, as that issue is not addressed in the SUTL. (See, *Beatrice Co. v. St. Bd. of Equalization* (1993) 6 Cal. 4th 767 [863 P. 2d 683; 25 Cal. Rptr. 2d 438].)

Initially, this Court took an expansive view of its role in evaluating the sales tax refund process:

> "'Although [former Section 6054.5] was enacted after the overpayments were made in this case, the Legislature has never provided that customers are not entitled to recover from retailers amounts erroneously charged to cover sales taxes. *Thus it was left to the courts to define the rights of the parties in this respect and to adopt appropriate remedies. It is still left to the courts to adopt appropriate remedies when excessive reimbursements have been collected by mistake and paid to the state.*'"

(*Javor, supra,* 12 Cal. 3d. at p. 799, quoting from *Decorative Carpets, supra,* 58 Cal.2d at p. 256, italics in original.)

Since then, however, this Court has taken a more restrictive stance. In 1980, six years after *Javor* was issued, the Court handed down its ruling in *Pacific Gas & Electric Co. v. St. Bd. of Equalization* (1980) 27 Cal. 3d 277 [165 Cal. Rptr. 122; 611 P. 2d 463] ("*Pacific Gas & Electric*"). There, public utility companies filed an action for mandamus and declaratory relief after the Superior Court of the City and County of San Francisco upheld the California State Board of Equalization's refusal to adjust the assessment of plaintiffs' real property.

California Constitution, Article XIII, section 32 ("Section 32") provides as follows:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

This Court reviewed the policies behind Section 32 and issued its now-famous holding: "We hold that section 32 means what it says. Nothing in the policy underlying the section, its history, or the cases construing it, would support an

exception on the ground here claimed [a refund action was not an adequate remedy at law]." (*Ibid.* at p. 284.)

Five years after that, this Court handed down *State Board of Equalization v. Superior Court of Los Angeles County* (1985) 39 Cal. 3d 633 [217 Cal. Rptr. 238; 703 P. 2d 1131] ("*SBE v. SC*"). There, SBE challenged a superior court order overruling its demurrer and denying its motion to strike a taxpayer's complaint that sought a refund after only partially paying the taxes. This court found that under Section 32, the taxpayer had to pay the entire liability before filing a refund claim.

In reaching this conclusion, this court stated unequivocally the standard to be used in interpreting Section 32: "'Since the net result of the relief prayed for herein would be to restrain the collection of the tax allegedly due, the action must be treated as one having that purpose. [Citation.]' (*Modern Barber Col. v. Cal. Emp. Stab. Com., supra* [(1948) 31 Cal. 2d 720], 31 Cal. 2d at p. 723; see also *Aronoff v. Franchise Tax Board* (1963) 60 Cal. 2d 177, 178-180 [32 Cal. Rptr. 1, 383 P. 2d 409].)" (*Ibid.* at p. 639.) Surprisingly, Appellants argue that the Court of Appeal interpreted Section 32 over-broadly, but do not mention this passage, which forms the underpinning of the court's conclusion. (Slip Opn., p. 17.)

Here, SBE believes that the lower court was absolutely correct in applying this Court's standard to the facts before it. An attempt to interfere with the collection of sales tax reimbursement has, for the reasons discussed below, the effect of restraining the collection of the tax itself; therefore, it is barred by Section 32. The fact that Appellants have sued the retailer instead of SBE in no way alters the effect or impact of their action.

Later, in 1987, this Court expounded upon that principle: "Section 32 broadly limits in the first instance the power of the courts to intervene in tax collection matters; it does not merely make unavailable a particular remedy or preclude actions challenging the ultimate validity of a tax assessment." (*Western*

Oil & Gas Assn. v. State Bd. of Equalization (1987) 44 Cal. 3d 208, 213 [242 Cal. Rptr. 334; 745 P. 2d 1360], citations omitted; see *Loeffler*, Slip Opn., p. 16.)

Finally, in 1992, this court stated positively that the courts must adhere to the remedies provided in the tax statutes. In *Woosley v. State* (1992) 3 Cal. 4th 758 [13 Cal. Rptr. 2d 30; 838 P.2d 758], plaintiff Woosley filed a class action suit against the state, including the Department of Motor Vehicles (DMV) and the SBE, for a refund of license fees and use taxes imposed by the DMV through its practice of charging higher vehicle license fees and use taxes on passenger vehicles originally purchased in other states. This Court held that the class claim was not authorized by statute. In doing so, this Court concluded that the constitution intended for courts to play only a limited role in creating tax dispute remedies. "In sum, article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Ibid.* at p. 792.) The effect of *Woosley* was summed up by one court as follows:

> "The lesson of *Woosley* we take to be that statutes governing administrative tax refund procedures, backed as they are by a plenary constitutional authority, are to be strictly enforced. It is well established that the only remedy for recovering taxes asserted to have been incorrectly paid is to comply with statutory provisions for obtaining a refund."

(*Kuykendall v. St. Bd. of Equal.* (1994) 22 Cal. App. 4th 1194, 1203 [27 Cal. Rptr. 2d 783], internal quotes and citations omitted.) Another court was even more emphatic: "[n]either this court nor the trial court has unfettered discretion to fashion an equitable remedy on behalf of . . . retail consumers . . . . (*Woosley, supra,* 3 Cal. 4th at p. 789.)" (*Rider v. County of San Diego* (1992) 11 Cal. App. 4th 1410, 1421 , internal quotes omitted.)

The courts, including this Court, have, following *Woosley*, stated unequivocally that the only way to resolve a tax dispute is through the statutory refund process: "the validity of [tax] assessments is settled in tax refund litigation . . ." (*Yamaha Corp. v. St. Bd. of Equal.* (1999) 1 Cal. 4th 1, 14 [78 Cal. Rptr. 2d 1; 960 P. 2d 1031].) "It is a state constitutional requirement that actions for refund of allegedly illegal taxes be brought only in the manner prescribed by the Legislature. (Cal. Const., art. XIII, § 32 . . ." (*COD Gas & Oil Co., Inc. v. St. Bd. of Equal.* (1997) 59 Cal. App. 4th 756, 759 [69 Cal. Rptr. 2d 366].) "The only remedy for recovering taxes asserted to have been incorrectly paid is to comply with the statutory provisions for obtaining a refund. (*Willbarb Petroleum Carriers, Inc. v. Cory* (1989) 208 Cal. App. 3d 269, 278 [256 Cal. Rptr. 51].)" (*Lincoln Natl. Life Ins. Co. v. St. Bd. of Equalization* (1994) 30 Cal. App. 4th 1411, 1423-1424 [36 Cal. Rptr. 2d 397].)

Appellants seek to get around the strictures of the SUTL by couching their pleading as one for violation of consumer remedies laws. This court has already ruled that they may not do that. "A plaintiff may . . . not plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition." (*Cel-Tech, Commns., Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 182 [83 Cal. Rptr. 2d 548; 973 P. 2d 527; 1999-1 Trade Cas. (CCH) P72,495] ("*Cel-Tech*") (internal quotes and citations omitted).)

Justice Clark, writing in dissent in *Javor*, summed the principle up clearly:

> "The Legislature having specifically established a method for recovery of the taxes involved here and having failed to adopt [a procedure for customers to obtain sales tax refunds directly from the SBE], there is no basis for concluding the Legislature intended to leave it to courts to fashion a remedy, and this court should not do so."

(*Javor, supra,* 12 Cal. 3d at pp. 803-804, Clark, J., diss.)[5] Given this well-established precedential principle, this Court should not now reverse 36 years of established jurisprudence holding that, whether or not the state is named as a defendant, Section 32 prohibits any and all actions that have the effect of impeding tax collection.

A ruling in favor of Appellants would provide consumers a route to obtain indirectly what this Court has already said they cannot obtain directly. (*Javor, supra,* 121 Cal. 3d at p. 800.) Specifically, a consumer could sue his retailer under the UCL or CLRA, and the retailer would then cross-complain against the SBE (see, e.g., *Dell, supra,* 159 Cal. App. 4th at p. 917), or the trial court might order the SBE joined *sua sponte*. The consumer would then have indirectly obtained an action against SBE, which both this Court and the Legislature have said is not authorized by law. Thus, this Court should refuse Appellants' invitation to judicially amend the SUTL.

C. The Legislature Has Delegated the Management of the Sales and Use Tax System to SBE, Not to the Courts.

The Constitution has delegated the responsibility to manage the taxing systems of this state to the Legislature (Art. XIII, § 33), which in turn has designated the SBE as the agency with the power to administer, implement, and enforce one of those systems -- the SUTL. (§ 7051; *Ontario Community Foundation, Inc. v. St. Bd. of Equalization* (1984) 35 Cal. 3d 816 [201 Cal. Rptr. 165; 678 P. 2d 378].) The courts, of course, have the duty of reviewing SBE's actions to determine if it has "reasonably interpreted the legislative mandate." (*Id.*) But the Legislature has not delegated to the courts the power to manage the sales tax system.

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[5] Even in *Javor*, as noted above, this court stated that any remedy it adopted must be "consonant" with the refund statutes.

But, in essence, that is what Plaintiff is asking this Court to do here: authorize consumers to bypass SBE altogether and, instead, utilize consumer protection actions to judicially adjudicate tax disputes. If that approach were to be permitted, then decisions as to the application of tax could be made according to the courts' "own notions of the day as to what is fair or unfair" (*Cel-Tech, supra,* 20 Cal. 4th at p. 182), which may or may not coincide with the tax statutes and regulations. Management of the tax system thus would be transferred, in large part, from the SBE to the courts, thereby frustrating the Legislature's intent.

D. Taxpayers are not required to take advantage of every possible tax exemption.

In discussing the availability of their prayed-for injunction, Appellants assume that Target has a duty to conduct its operations in a way that takes advantage of every possible sales tax exemption. Again, that is not the law. "Anyone may waive the advantage of a law intended solely for his benefit." (Civ. Code, § 3513.) "It has been held many times in this state and the rule is universal that a party may waive the benefits specially conferred upon him by statute or constitution." (*People v. Ventura Refining Co.* (1928) 204 Cal. 286, 295 [268 P. 347].)

The SUTL is in accord: "Failure to file a claim within the time prescribed in this article constitutes a waiver of any demand against the State on account of overpayment." (§ 6905.) Failure to claim an exemption from tax waives the benefit of the exemption. (*John N. Scott v. St. Bd. of Equalization* (1996) 50 Cal. App. 4th 1597, 1603-1604 [58 Cal. Rptr. 2d 376]; *San Francisco Brewing Corp. v. Johnson* (1952) 110 Cal. App. 2d 479, 482 [243 P. 2d 53].) Mere inaction on the part of the taxpayer is enough to waive the exemption. (*Chesney v. Byram* (1940) 15 Cal. 2d 460, 469 [101 P.2d 1106].) Waiver might be one reason why a retailer would knowingly collect excess sales tax reimbursement. (See § 6901.5.)

Failure to keep proper records to justify the exemption also constitutes waiver of the exemption. A taxpayer might not take advantage of a given exemption or exclusion due to the overhead expenses incurred in keeping the detailed records necessary to support the exemption. (§ 7053; *Paine v. St. Bd. of Equalization* (1982) 137 Cal. App. 3d 438 [187 Cal. Rptr. 47] ["Plaintiffs are not entitled to an exemption merely because they say they are; they must offer some credible evidence of exemption entitlement."].) In such cases, the retailer will be found to have either expressly or impliedly waived the benefit of the exemption.

In this case, the overhead expenses Target would incur in order to differentiate "to go" sales from in-store sales could be quite large. "To go" sales generally imply that the customer leaves the store's premises – that is, the **entire** area within the command and control of the store. (See *Treas. Is. Catering Co. v. St. Bd. of Equalization* (1941) 19 Cal. 2d 181, 184-185 [120 P. 2d 1], emphasis added.) Target would have to distinguish sales of coffee where the customer bought the coffee and immediately left the store from those where the customer bought the coffee but continued to shop in the same store or drank the coffee at tables and chairs in the coffee sales area. In addition, since the analysis must be made on a location-by-location basis, Target would need to conduct investigations in each of its California locations. (See, Reg. 1603(c).) The amount of administrative expense incurred to obtain such figures and maintain the proper records would likely be passed on to Target's customers, in the form of higher prices.

The key point is that, under the above authority, Target need not take advantage of the "to go" sales tax exemption and cannot be forced to do so. However, plaintiff's prayed-for injunction would do just that: force Target to utilize the "to go" exemption even if it was less expensive for both the store and its customers to just pay the tax. Likewise, in order to issue the requested injunction,

the trial court would have to hold that Target was not entitled to waive the benefit of the exemption, which would be contrary to the above authorities.

E. Appellants' arguments violate the doctrine of separation of powers.

Appellants are essentially asking this Court to add language to the statutes that is not there. The California courts have said since the earliest days that they cannot do that: "It is within the legitimate power of the judiciary, to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of non-action. The Legislature being the creative element in the system, its action cannot be quickened by the other departments." (*Myers v. English* (1858) 9 Cal. 341, 349. disapproved on other grounds *Mandel v. Myers* (1981) 29 Cal. 3d 531, 551, fn. 9 [174 Cal. Rptr. 841; 629 P. 2d 935]; accord, *Friends of H Street v. City of Sacramento* (1993) 20 Cal. App. 4th 152, 165 [24 Cal. Rptr. 2d 607]; see also *Humane Society v. St. Bd. of Equalization* (2007) 152 Cal. App. 4th 349, 363 [61 Cal. Rptr. 3d 277] ["It is not the job of the judiciary to increase the breadth of laws passed by the Legislature."].) These holdings should also apply in this case.

Furthermore, the Legislature has let lapse or otherwise rejected statutes granting consumers a wholesale private right of action against either their retailers or the SBE concerning excess tax reimbursement. For this Court to create such a remedy itself without such an authorized statute would be to invade the province of the Legislature. (See Cal. Const., Art. XIII, § 33.) This Court should resist the invitation "to intrude so far into the legislative prerogative." (*Ibid.* at p. 364, internal quotes and citation omitted.)

II

BY DEFINITION, CONSUMER PROTECTION STATUTES DO NOT APPLY TO THE PAYMENT OF SALES TAX OR COLLECTION OF SALES TAX REIMBURSEMENT.

The Court of Appeal concluded that Section 6901.5 does not provide a private right of action on the part of consumers to contest the application of tax. (Slip Opn., p. 3.) Appellants do not appeal that portion of the court's ruling. (AOB, p. 13.) Therefore, Appellants have conceded that the Legislature has not provided a private right of action for non-taxpayers such as themselves to contest the application of sales tax to transactions in which they act as purchasers. Appellants instead ask this court to create a new private right of action out of whole cloth by grafting consumer protection statutes onto the SUTL.

As Appellants note, the UCL covers "business practices." (AOB, p. 5, citing *Cel-Tech, supra,* 20 Cal. 4th at p. 180.) Appellants also state that the CLRA "is a broad remedial statute aimed at protecting consumers from deceptive business practices," citing Civil Code section 1760 and this court's opinion in *Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066 [90 Cal. Rptr. 2d 334]. (AOB, p. 37.)

Appellants, however, cite no authority in support of the proposition that (1) payment of sales tax or collection of sales tax reimbursement constitute "business practices" within the meaning of the UCL and CLRA; or (2) the UCL and CLRA were intended to regulate tax collection. Why? There is no such authority.

A. The collection of sales tax reimbursement facilitates the payment of sales tax, a non-consensual legal obligation.

Target's practice of collecting sales tax reimbursement on sales of hot coffee is not a "business practice" within the meaning of either the UCL or CLRA.

As such, the collection of sales tax reimbursement cannot be termed "competition."

Furthermore, the definitions of "business" are different under the three laws. Section 6013 defines "business" as "any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect." "Gain," for sales tax purposes, however, does not mean "profit." (*Union League Club v. Johnson* (1941) 18 Cal. 2d 275, 278.) On the other hand, profit is part of the definition of "business" under the UCL/CLRA. "Business" is activity carried on "for the purpose of livelihood or profit on a continuing basis." (*Nakasone v. Randall* (1982) 129 Cal. App. 3d 757, 764 [181 Cal. Rptr. 324].) In construing the UCL, courts have focused upon the meaning of "business practices," and in so doing, have looked for evidence of activities undertaken for profit and/or evidence that the challenged activity was part of the defendants' primary business. (See, e.g., *Barquis v. Merchants' Collection Assn.* (1972) 7 Cal. 3d 94, 108-109 [101 Cal. Rptr. 745; 496 P. 2d 817] (collection agency's practice of filing lawsuits in the wrong forum to maximize the number of default judgments it obtained was a business practice where the filing of litigation is a primary part of the agency's business activity.)[6]

In addition, a "business practice" denotes some kind of relationship, usually contractual, among the parties. A tax, however, is not a consensual relationship between the government and the taxpayer. "A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and

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[6] The same analysis would apply to cases under the CLRA which, like the UCL, "is intended 'to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection" (Civ. Code, § 1760) . . . ." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal. App. 4th 1351, 1360 [8 Cal. Rptr. 3d 22].)

State; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer." (*Perry v. Washburn* (1862) 20 Cal. 318, 350.)

Paying sales taxes is a legal obligation (§ 6051), with interest and penalties and possible criminal prosecution awaiting the person who does not pay. (§§ 6591 & 7153.) The law permits retailers to reimburse themselves from their customers for the tax the retailers must pay rather than having to absorb the tax and operate at a loss. (Civ. Code, § 1656.1.) "The pertinent provisions of the [Sales Tax Act (Stats. 1933, ch. 1020)] indicate that the legislature recognized the obvious economic necessity of the retailer's recoupment of the tax from sales, and that some such method as that adopted by it for reimbursement was also necessary if the small and independent tradesman was to remain in business." (*DeAryan v. Akers* (1939) 12 Cal. 3d 781, 785 [87 P. 2d 695].) If the requirements of the sales tax reimbursement statutes are satisfied, "[i]t shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser . . . ." (Reg. 1700(a)(2).) No other method of reimbursement is permitted.

The sales tax system thus contemplates that retailers will routinely collect sales tax reimbursement from their customers, thereby passing the burden -- but not the incidence -- of the tax to them. (*DeAryan, ibid.* at p. 786.) Thus, the tax reimbursement effectively becomes part of the total retail price at which the property is sold to the consumer, especially when the property is sold on a tax-included basis. (*Western Lithograph Co. v. St. Bd. of Equalization (1938) 11 Cal. 2d 156,* 164 [78 P. 2d 731].) The Court of Appeal was thus correct when it concluded that sales tax reimbursement and sales tax were necessarily

"intertwined." (Slip Opn., p. 16.) Collecting sales tax reimbursement is no more a "business practice" than the payment of the sales tax itself.

Target's primary business is selling general merchandise to customers at retail. Target's need to collect sales tax reimbursement, on the other hand, is tied directly to its duty to pay sales tax on its taxable sales of tangible personal property. Despite Appellants' contention to the contrary (AOB, p.6, quoting Letter of Attorney General Edmund G. Brown dated July 6, 2009, in Support of Petition for Review), neither Target nor any other retailer may collect as much sales tax reimbursement as it wants. If the retailer does not pay tax, it cannot collect reimbursement. Sales tax reimbursement "is collected to reimburse the seller for what he must pay the state." (*DeAryan, supra,* 11 Cal. 2d at p. 787, internal quotes and citations omitted.) "The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the retailer of a tax on the amount of the tax." (*Western Lithograph, supra,* 11 Cal. 2d at p. 164.) Thus, collecting sales tax reimbursement facilitates the retailer's ability to carry out its legal obligation to pay sales tax and cannot reasonably be considered to be a "business practice."

Even if collecting sales tax reimbursement could somehow be considered for the sake of argument to be a "business practice," it cannot be considered "unfair." "[T]he word "unfair" in [Business and Professions Code section 17200] means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra,* 20 Cal. 4th at p. 187.)

Collecting sales tax reimbursement cannot fall into that category because, as noted above, the Legislature permits all retailers paying sales tax to routinely

collect sales tax reimbursement from their customers. If anything, it would be the failure to collect sales tax reimbursement that would, if done on a regular basis, arguably give a retailer an unfair competitive advantage over a retailer who could not afford to absorb such cost. (See *DeAryan, supra,* 12 Cal. 2d at p. 787 ["The law-makers deemed it unfair competition for the strong to absorb the tax and build up his trade at the expense of the weaker dealer who could not absorb it." (Internal quotes and citations omitted.)].) Thus, Target's collection of sales tax reimbursement from Appellants cannot be termed unfair competition, because it is neither a "business practice" nor "unfair."

B. Retailers do not and cannot collect sales tax reimbursement for their own profit or gain.

As noted above, both the Sales Tax Law and the UCL contemplate that for an activity to be considered a "business practice," a person must conduct such practice for the purpose of gain. Retailers cannot keep the sales tax reimbursement they collect, even if the amount collected arguably is excessive. 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 any reimbursement not remitted. (§ 6481.) A retailer who collects reimbursement but 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 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.) If a retailer paid excess tax and collected excess tax reimbursement on purpose, the retailer may not be granted credit interest on its refund. (§ 6908(a).) Finally, collecting sales tax reimbursement over and above the retailer's tax liability exposes the retailer to possible criminal liability. (§ 7153.) Thus, retailers have no incentive, and every

disincentive, to collect sales tax reimbursement over and above the amount of tax they report. No retailer profit is possible.

Appellants' speculations regarding "unscrupulous retailers" ignore not only the actual legal landscape regarding this issue but also economic reality. As noted above, sales tax reimbursement is part of the price that consumers pay for goods. "It is freshman-year economics that higher prices mean lower demand, and that consumers are sensitive to the full price that they must pay, not just the portion of the price that will stay in the seller's coffers." (*Buck v. American Airlines, Inc.* (1st Cir. 2007) 476 F. 3d 29, 36, quoted in *Sanchez v. Aerovias De Mexico, S.A. de C.V.* (9th Cir. 2010) 2010 U.S. App. LEXIS 136, *9.) Any retailer who tried to over-collect sales tax reimbursement from its customers would quickly find them going to another retailer whose prices were lower. Retailers are in effect placed at an economic disadvantage by having to pay tax and collect tax reimbursement. The tax becomes part of the total cost of the goods, thus increasing the price and shrinking the market for their goods, potentially reducing sales. On a similar note, with respect to adding a tourism tax to the price of airfare to Mexico, one court said something that applies equally well here: "Although the fees are in one sense separate from the base fare, the two are **inextricably intertwined**. In all events, an air traveler's concern is with the overall cost of his or her ticket. Thus, when an airline establishes the base fare, it must take cognizance of any surcharges that will be imposed by operation of law." (*McMullen v. Delta Air Lines, Inc.* (N. D. Cal. 2008) 2008 U.S. Dist. LEXIS 75720, *7, affd. *McMullen v. Delta Air Lines, Inc.* (9th Cir. 2009) 2010 U.S. App. LEXIS 150, emphasis added.)[7] Further, retailers

[7] See Slip Opinion, "Because the collection of sales tax by the state from a retailer and the collection of sales tax reimbursement by a retailer from a customer are **intertwined** (see § 6901.5; Civ. Code, § 1656.1; Reg. 1700), an injunction against the collection of sales tax reimbursement or a refund of sales tax reimbursement may affect the state's sales tax revenues." (Pp. 16-17, emphasis added.)

incur compliance costs in collecting tax reimbursement and remitting it to the state (e.g., personnel training costs, hardware and software programming and maintenance costs, return preparation and filing costs, etc.), further increasing the sales price.

With respect to hypothetical "unscrupulous retailers," Appellants' have not made any allegations in their briefs to even indicate that such actions have any basis in reality. This Court should not base its decision upon pure speculation.

It is difficult to imagine a situation in which the UCL or CLRA could apply to the collection of excess sales tax reimbursement. The Legislature has already provided a remedy for over-collection of tax reimbursement. No matter what the reason was for over-collection, or the amount over-collected, the retailer cannot keep the money. The retailer must either return it to the customer or remit it to the SBE. (§ 6901.5.) Under the above authority, the statutory remedy is paramount and occupies the field.

Therefore, the collection of sales tax reimbursement is neither a "business" within the meaning of the Sales Tax Law, nor a "business practice" within the meaning of either the UCL or the CLRA. Simply put, retailers collect sales tax reimbursement as part of the Legislature's overall scheme for the payment of sales taxes, not for their own "gain, benefit, or advantage." (§ 6013.) Collecting sales tax reimbursement directly impacts the taxes paid by supplying the money for retailers to satisfy their legally mandated tax obligations to the state. As the collection of sales tax reimbursement did not offer "profit" to the retailer and also is not a "business practice," Appellant did not lose any money through competition, fair or unfair. Thus, the UCL and the CLRA cannot apply to the collection of sales tax reimbursement.

C. The UCL and CLRA were not intended to regulate relationships between ordinary citizens and the State.

"The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Select Base Materials v. St .Bd. of Equalization* (1959) 51 Cal. 2d 640, 645 [335 P. 2d 672], citations omitted.) "Where the court must construe the statute, it 'turns first to the words themselves for the answer.' [Citation.]' The words used should be given their usual, ordinary meanings and, if possible, each word and phrase should be given significance." (*Young v. Gannon* (2002) 97 Cal. App. 4th 209, 223 [118 Cal. Rptr. 2d 187], citations omitted.)

An examination of the language of both the UCL and CLRA shows that the Legislature did not intend either law to apply to people's relations with the State. In the UCL, actions must be brought by "persons." (Bus. & Prof. Code, § 17203.) CLRA actions must be brought by "individuals." (Civ. Code, § 1780(a).). In both, actions must be brought against "persons." (Bus. & Prof. Code, § 17203; Civ. Code, § 1780(a).) Unfair and deceptive acts must be committed by "persons." (Bus. & Prof. Code, § 17203; Civ. Code, § 1770(a).) In both laws, the state and state agencies are not included in the definition of "person." (Bus. & Prof. Code, § 17201; Civ. Code, § 1761(c).)

The UCL permits a court to order restitution. (Bus. & Prof. Code, § 17203; see AOB, p. 35.) When the retailer collects sales tax reimbursement from its customers, however, it must remit the money to the SBE and cannot restore what is no longer in its possession. The UCL does not list proscribed actions, but the CLRA does not include collecting reimbursements for taxes or any other levied government charges. (See Civ. Code, § 1770.)

Thus, neither the state nor a state agency may be a plaintiff or a defendant in an action for relief under either the UCL or the CLRA. Disputes regarding transactions with the state or state agencies must be handled under laws covering those transactions. The Legislature cannot have intended to allow Appellants and

similarly situated persons to get around these statutory bars by the simple expedient of suing the retailer carrying out its statutory duties to the state in lieu of suing the state itself. Thus, the plain language of the UCL and CLRA demonstrate that the Legislature did not intend that they be used to regulate relations between citizens and government.

Appellants argue that the statement in Regulation 1700(b)(6) that "[t]he provisions of this regulation with respect to offsets do not necessarily limit the rights of customers to pursue refunds from persons who collected tax reimbursement from them in excess of the amount due" grants customers the right to pursue their retailers. (AOB, pp. 5, 10, 11, 30, 32.) This is an incorrect interpretation of the regulation. First of all, looking at the plain language of the regulation (*Johnson v. Udall* (E. D. Cal. 1968) 292 F. Supp. 738, 750), it merely says that, by providing for offsets of excess tax reimbursement against the existing tax liabilities of the retailer, the regulation does not necessarily limit customers' remedies to such offsets. What this means is that, if there are any other statutory remedies provided, customers may still pursue them. The regulation, however, does not provide such remedy. In addition, a regulation may not alter, amend, impair, or expand the scope of the statute it interprets. (*Ontario, supra,* 35 Cal. 3d at pp. 816-817.) Here, the statutes provide no such remedies and the regulation should not be interpreted to provide remedies the statutes do not provide.

Furthermore, the history of the regulation shows that Subdivision (b) was adopted in 1984, after *Javor* and prior to *State Board of Equalization v. Superior Court, Western Oil & Gas Association,* and *Woosley*. Reasonably construed, Subdivision (b)(6) merely reflects SBE's view of the state of the law at that time, nothing more. It cannot reasonably be interpreted as creating a new, extra-statutory remedy as no such remedy is provided.

The UCL and CLRA do not, even impliedly, repeal the provisions of the SUTL. (See *People v. Martin* (1922) 188 Cal. 281, 285.) As the Court of Appeal correctly ruled: "in this case, the UCL and CRLA and the policies they promote cannot take precedence over article XIII, section 32." (Slip Opn., p. 22.) This appeal should be rejected on this ground as well.

III

APPELLANTS' ACTION IS BARRED BY THE CALIFORNIA CONSTITUTION AND THE ANTI-INJUNCTION ACT

A. An action to impede the collection of sales tax reimbursement is a forbidden action against the state.

This is the centerpiece of Appellants' brief. Appellants argue, as plaintiffs in these kinds of actions often do, that it is not suing SBE. Rather, it is suing the retailer itself for allegedly improperly collecting sales tax reimbursement from Appellant. Therefore, it argues that is not suing the state as forbidden by Section 32 and Section 6931. (AOB, pp. 15-26, 27-30.) Although not articulated this way, Appellants are in reality arguing that sales tax reimbursement is a concept completely divorced from the sales tax itself. Thus, an action against a retailer regarding collection of sales tax reimbursement is not, in reality, an action against the state to impede the collection of sales tax. (AOB, p. 17.)

Regarding this issue, the lower court correctly ruled that the sales tax and sales tax reimbursement are not separate concepts. "Because the collection of sales tax by the state from a retailer and the collection of sales tax reimbursement by a retailer from a customer are **intertwined** (see § 6901.5; Civ. Code, § 1656.1; Reg. 1700), an injunction against the collection of sales tax reimbursement or a refund of sales tax reimbursement may affect the state's sales tax revenues." (Slip

Opn., pp. 16-17, emphasis added; see also, *McMullen, supra* ["Although the fees are in one sense separate from the base fare, the two are inextricably intertwined."].)

As discussed above, the propriety of collecting sales tax reimbursement cannot be divorced from the issue of the proper application of the sales tax because they are too closely related. The Court of Appeal noted that if Appellants obtained an injunction against Target's collection of sales tax reimbursement, "Target might rely on the court's decision to stop paying tax on these purchases." (Slip Opn., p. 19.) Such actions intimately involve state tax policies and statutes and, "[o]nly the Board has the authority to determine whether taxes have been erroneously or illegally collected or computed. (Rev. & Tax. Code, § 6901.)" (*City of Gilroy v. St. Bd. of Equalization* (1989) 212 Cal. App. 3d 589, 605 [260 Cal. Rptr. 723].) In addition, if this type of action is permitted, then the retailer-defendant likely will cross-complain against the SBE. (See, e.g., *Dell, supra,* 159 Cal. App. 4th at p. 917; *Botney, supra,* 55 Cal. App. 3d at p. 51.) Thus, such actions are no less against the state than if Appellants had directly named the state as a defendant. The nature of an action as one against the State should not turn upon the litigation strategy of either of the parties, but instead upon the substance of the relief sought and its ultimate impact. Consequently, despite Appellants' arguments, the Court of Appeal was correct that an action against a retailer regarding the collection of sales tax reimbursement constitutes an action against the state despite the fact that the SBE was not directly sued in the first instance.

Also, a ruling in favor of Appellants would force the SUTL to borrow concepts from consumer protection statutes in order to resolve tax disputes. The goals and methodologies of the two sets of laws are incompatible. Existing law holds that the SUTL is a self-contained law that cannot be constrained or compelled into borrowing concepts from other laws:

> Like many tax statutes, the sales tax law employs relatively artificial, relatively self-contained, concepts. If it utilizes popular meaning or concepts from other fields of law, it does so only by force of its own objectives and definitions . . . To pursue the will-o'-the-wisp of definitions, concepts and distinctions from other areas of law -- where they are shaped by purposes and by social and economic factors unrelated to sales taxation – leads to false goals. The coverage of the sales tax law is shaped by its own provisions and definitions and, where these are unclear, by applying its own perceived policies and concepts. (See Davis, The Purposive Approach to the Interpretation of Sales Tax Statutes (1966) 27 Ohio St.L.J. 429.)"

(*King, supra,* 22 Cal. App. 3d at pp. 1010-1011.)

1. Whether or not sales tax reimbursement can be collected depends on whether or not sales tax applies.

The issue of the collection of sales tax reimbursement cannot be separated from the issue of the application of tax. Since a retailer cannot collect sales tax reimbursement unless it engages in transactions subject to sales tax, it follows that a trial court must first decide if sales tax was properly applied before deciding if sale tax reimbursement was properly collected. As this Court has said, the only legislatively approved way to evaluate that issue is a sales tax refund action. (*Yamaha, supra,* 1 Cal. 4th at p. 14: "[T] the validity of [tax] assessments is settled in tax refund litigation . . . .") As also stated above, the only agency empowered to interpret the tax statutes is the SBE; thus, arguably making the SBE a necessary party to the action. The complaint then arguably could be subject to demurrer for failure to join a necessary party. (Code Civ. Proc., § 430.10(d).) The action would stop until the SBE was brought in some capacity; thus, converting the action against the retailer into an action against the State.

In order to grant any relief, the trial court would have to determine if the transactions at issue were subject to tax at the outset and if an exemption applied.

The court would then have to determine if the transactions truly were "to go" transactions. To do that, the court would have to decide, in the context of the sales tax, what "to go" means. Based upon the facts in Appellants' briefs, it is likely that some but not all of the sales at issue were exempt. The taxable sales may be taxable for many different reasons, and the court would have to differentiate among them. The court would then have to develop criteria to distinguish the taxable sales from the exempt sales. The court would also have to develop criteria to determine how much tax should not have been paid since Target would likely not have any records on "to go" coffee sales. The court would then have to develop criteria to measure whether or not its judgment was being followed and a mechanism for tracking progress, and then supervise Target's implementation of its orders. Thus, in order to rule on the propriety of Target's collection of sales tax reimbursement on the instant sales, a trial court would necessarily have to rule on numerous issues regarding the application of the sales tax and then exercise on-going supervision of the remedial process. But these are precisely the tasks that the Legislature delegated to the SBE.

In addition, the retailer is not empowered to determine whether or not transactions are taxable but must presume that they are subject to tax unless SBE informs it that they are not. (§ 6091.) The role of the retailer in paying sales taxes and collecting reimbursement is thus to apply SBE regulations and other administrative instructions to its operations to determine the proper application of tax. If it needs further guidance, it may obtain it from SBE. The Ninth Circuit concluded the retailer acts as a "conduit by forwarding collected taxes to the state." (*US v. SBE, supra,* 650 F. 2d at p. 1131.) The retailer thus stands in the shoes of the state in applying tax to particular transactions. It reports the tax liability and converts the tax reimbursement it has collected from its customers into the tax it must pay to the State. The Court of Appeal was thus correct that an

action to impede the collection of sales tax reimbursement has the same effect of an action against the State in impeding the collection of the tax itself. (See Slip Opn., p. 17.) As a result, the effect of this action would be to restrain the payment of the sales tax to the state. Since the net result of the relief prayed for herein would be to restrain the collection of the tax allegedly due, the action must be treated as one having that purpose. (*SBE v. SC, supra,* 39 Cal. 3d at p. 639.)

2. The statute regarding sales tax reimbursement is part and parcel of the sales tax itself.

Appellants effectively ask this court to sever the statute authorizing the collection of sales tax reimbursement from the SUTL and consider it as if it were a requirement independent of the tax. As explained above, the ability to collect tax reimbursement is inextricably tied to the duty to pay tax. In addition, the well-established rule of *in pari materia* prevents Civil Code section 1656.1 from being considered in isolation from the sales tax statutes of which it is a part:

> "Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. . . .
>
> [¶¶]
>
> "And particularly in the construction of statutes relating to revenue and taxation is the rule applicable and invariably invoked upon the theory that all such statutes constitute one law."

(*Old Homestead Bakery, Inc. v. Marsh* (1925) 75 Cal. App. 247, 259-260 [242 P. 749]. See also *Willbarb Petroleum Carriers, Inc. v. Cory* (1989) 208 Cal. App. 3d 269, 274 [256 Cal. Rptr. 51]; *Lucchesi v. St. Bd. of Equalization* (1934) 137 Cal. App. 478, 482 [31 P. 2d 800].) It does not matter that Civil Code section 1656.1 is

in a different Code than is the SUTL: "The rule, however, is that the separation of the various statutes into codes is for convenience only and the codes are to be read together and regarded as blending into each other thereby forming but a single statute." (*Fed. Employees Dist. Co. v. Franchise Tax Bd.* (1968) 260 Cal. App. 2d 937, 946-947, [67 Cal. Rptr. 696].)

The ability to collect sales tax reimbursement is in a separate Code due to a decision of the United States Supreme Court. Originally, it was contained in the SUTL itself as Section 6052. "Notwithstanding such legislative intent and decisions of California courts holding that the incidence of the California sales tax is upon the retailer and not upon the purchaser, the United States Supreme Court in *Diamond National Corp. v. State Board of Equalization*, 47 L. Ed. 2d 780, and the Court of Appeals for the Ninth Circuit in *United States of America v. State Board of Equalization*, 536 F. 2d 294, held that for federal purposes the incidence of the California sales tax is on the purchaser." (Stats. 1978, ch. 1211, § 19.) The Legislature repealed all of the statutes that addressed collection of sales tax reimbursement (§§ 6052, 6052.5, 6053, 6054.5) and replaced them with the Civil Code section to further emphasize the point. This fact does not mean, however, that the Legislature meant to consider the ability to collect reimbursement as something separate and apart from the duty to pay tax. The entire state taxation scheme and the context in which it operates, including the interaction of Civil Code Section 1656.1 with the SUTL, must be taken into account. (*US v. SBE, supra,* 650 F. 2d at p. 1131.) The retailer's ability to collect sales tax reimbursement is thus an integral part of the duty to pay sales tax and cannot be considered as an independent separate statute which may be interpreted on its own.

Appellants focus solely on tax-added sales, but any argument for using consumer protection statutes must also take into account the other approved

method of collecting tax reimbursement – namely, including tax in the sales price under Civil Code section 1656.1(a). When a retailer sells tangible personal property on a tax-included basis, every purchaser pays the same price, but that price includes tax only if tax is applicable.[8] As a result, the reimbursement cannot be separated from the charge for the property; thus, there can be no argument that included sales tax reimbursement is a "charge" separate and apart from the tax itself. Both methods of collecting tax reimbursement must thus be analyzed under the same principles. Tax-added sales tax reimbursement cannot be apportioned off from tax-included sales tax reimbursement and considered as a charge separate and apart from the price of the goods. Thus, properly considered, Target's collection of sales tax reimbursement from Appellants must be considered in the context of the SUTL, not the UCL or CLRA.

Appellants cite *Agnew v. State Board of Equalization* (1999) 21 Cal. 4th 310 [87 Cal. Rptr. 2d 423; 981 P. 2d 52] for the proposition that tax reimbursement cannot be included in the tax. (AOB, pp. 21-22.) The courts have, however, already concluded that in collecting sales tax reimbursement, the retailer is in actuality passing the tax on to its customers with their implied or actual consent. (*Market Street Ry. Co. v. St. Bd. of Equalization* (1955) 137 Cal. App. 2d 87, 102 [290 P. 2d 20].); *Livingston Rock, supra,* 136 Cal. App. 2d at p. 161; *Clary v. Basalt Rock Company, Inc.* (1950) 99 Cal. App. 2d 458, 461-462; 222 P. 2d 24].) *Agnew* thus is inapplicable to this case.

B. Appellants' agreement to pay sales tax reimbursement was not an arm's-length negotiated transaction but was implied in law.

[8] For example, sales of food products to students through vending machines at a school are exempt from tax, but sales to teachers from the same machines are not. (Reg. 1574(b)(2)(D).) The vending machine operator has no way of knowing if a particular sale is to a teacher or a student, so all sales include tax reimbursement.

The Legislature contemplates that retailers will routinely collect sales tax reimbursement with which to pay their tax liability. The Legislature recognizes, however, that in over-the-counter transactions like the ones involved in this case, the parties do not in fact enter into contract negotiations regarding whether or not the retailer will collect sales tax reimbursement. It is thus presumed that purchasers consent to the retailer collecting sales tax reimbursement from them. Since evidence of intent to contract is lacking in cases like the one at issue (i.e., over-the-counter sales), the statute "create[s] a rebuttable presumption as to the intention of the parties for use in the absence of evidence of other intention by those who have occasion to use this information." (Stats. 1978 ch. 1211, § 22.)

IV
A RULING IN FAVOR OF APPELLANTS WOULD CONSTITUTE A JUDICIAL REPEAL OF THE CALIFORNIA TAX REFUND STATUTES.

As discussed above, Section 6931, the so-called "anti-injunction" statute, applies to suits by consumers regarding collection of sales tax reimbursement. In addition, the Ninth Circuit considered this exact issue and concluded that customers could not use consumer remedy statutes to resolve the application of tax. (*Brennan v. Southwest Airlines, supra.*)[9] Southwest collected an excise tax on every airline ticket they sold in anticipation of an extension by Congress of the tax into subsequent years. Congress failed to extend the tax, so plaintiff passengers initiated an action against Southwest for unlawful business practices and breach of contract in the state court. (*Ibid.* at p. 1409.) The Ninth Circuit affirmed the grant of summary judgment in Southwest's favor, because the express

[9] *Brennan* does not specify the statutes used, but presumably they were the UCL and/or the CLRA. (See 134 F. 3d at p. 1408.)

language of 26 U.S.C. ("IRC") section 7422(a) established that plaintiff had filed, in essence and effect, a tax refund suit.

> IRC section 7422(a) read, in pertinent part, as follows:
>
> "No suit prior to filing claim for refund. – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary . . . ."

(Quoted in *Brennan*, *supra,* 134 F. 3d at p. 1409, fn. 4.) The court found as follows: "The statute makes clear, however, that a suit to recover either a 'tax' or a 'sum' constitutes a suit for a tax refund. Thus, the statute means that if someone wrongfully collects money as a tax, then a suit to recover the sum constitutes a tax refund suit, even if the sum did not literally constitute an 'internal revenue tax.'. (*Id.* at p. 1410.)

Similarly, Section 6932 provides that "[n]o suit or proceeding shall be maintained in any court *for the recovery of any amount* alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 (commencing with Section 6901)." (Emphasis added.) Thus, a suit to recover "any amount" or, in this case, "illegal sales tax reimbursement charges," (AOB, p. 4) is in fact a suit for refund of a tax. A ruling for Appellants here would provide them with an indirect route to sue the state for a tax refund that, in effect, repealing the protections for the public fisc erected by the Legislature in the tax refund statutes.

The Ninth Circuit's extensive discussion in *Brennan* applies equally to sales tax actions. "First, section 7422 is designed to confine suits for the refund of federal taxes to suits against the government in order to protect its private [collection] agents from being whipsawed." (*Ibid.* at p. 1411, internal quotation

marks, ellipses, and citations omitted.) The Ninth Circuit said that retailers act "as conduit[s] by forwarding collected taxes to the state," (*US v. SBE, supra,* 650 F. 2d at p. 1131.) Retailers collecting use tax also have been called "collection agents" for the state. (*Bank of America, supra,* 209 Cal. App. 2d at p. 793.)

Retailers collecting sales tax reimbursement or use tax need to be assured that the state speaks with one voice regarding tax matters. The purposes of the UCL and the SUTL are fundamentally in conflict.[10] The UCL is phrased in "broad, sweeping language" (*Cel-Tech, supra,* 20 Cal. 4th at p. 181.) On the other hand, "[s]tatutes granting exemption from taxation are to be strictly construed to avoid enlarging or extending the concession beyond the plain meaning of the language used in granting it." (*Associated Beverage Co. v. St. Bd. of Equal.* (1990) 224 Cal. App. 3d 192, 211 [273 Cal. Rptr. 639].) Given these fundamental differences in philosophy and interpretive approach, judicial rulings on tax issues under the UCL are likely to significantly differ from those under the SUTL. Thus, retailers collecting sales tax reimbursements would likely be whip-sawed between the courts and the SBE, the very evil the Ninth Circuit said should be avoided.

The Ninth Circuit also stated that "Plaintiffs' argument also militates against a second purpose of section 7422: to 'afford the Internal Revenue Service an opportunity to investigate tax claims and resolve them without the time and expense of litigation. '" (*Brennan, supra,* 134 F. 3d at p. 1411.) This Court has found a similar purpose for requiring compliance with the refund statutes: "The purpose of these statutory requirements is to ensure that the [SBE] receives

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[10]This analysis also applies to the CLRA as both have similar purposes – i.e., protection of consumers from unfair or unlawful business practices. (See Civ. Code, § 1760 ["This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection."].)

sufficient notice of the claim and its basis. The SBE then has an opportunity to correct any mistakes, thereby conserving judicial resources." (*Heather Preston v. St. Bd. of Equalization* (2001) 25 Cal. 4th 197, 206 [105 Cal. Rptr. 2d 407; 19 P. 3d 1148; 59 U.S.P.Q.2D (BNA) 1020], citations omitted.)

The Ninth Circuit also held that "[p]laintiffs' argument also contravenes a third purpose of section 7422: to protect the Treasury by providing strict limitations periods for tax refund suits." (*Brennan, supra,* 134 F. 3d at p. 1411, internal quotes and citations omitted.) This Court has set forth the same rule: "Appellant's citation of the general statute of limitations (Code Civ. Proc., § 338, subd. 1) and its application in tax cases can be of no assistance here, for the Use Tax Act contains its own specific provisions in that regard, and they are controlling." (*People v. West Publishing Co.* (1950) 35 Cal. 2d 80, 87 [216 P. 2d 441].) As regards the case before this court, the statute of limitations is four years under the UCL (Bus. & Prof. Code, § 17208) and three years under the SUTL. (§ 6487.) A ruling in favor of Appellants in this case would subject Target to radically different and enhanced liabilities in comparison with those under the SUTL.

SBE recognizes that, in *Brennan*, the plaintiff customers were the taxpayers, rather than conduits for the state. The policy reasons that the Ninth Circuit found for not applying consumer protection statutes to refunds of federal income tax, however, apply with equal force to attempts to adjudicate a state sales tax liability under the same laws. Accepting such an argument would effectively repeal the tax refund laws in such situations. (*Brennan, supra,* 134 F. 3d at p. 1410 ["[A]lmost every citizen who seeks a tax refund alleges that the tax was collected without authority."].) SBE urges this court to apply the reasoning of the Ninth Circuit to this case and affirm the trial court's judgment.

The tax statutes are clear. Only the SBE may determine if taxes have been erroneously or illegally collected or computed in the first instance. (§ 6901.) Only persons who must file sales and use tax returns may file claims for refund. (§ 6902(a).) Neither the State Constitution nor the SUTL gives the court system the authority to decide whether or not tax was properly applied to a given set of transactions except in a statutory tax refund action. (Art. XIII, §§ 32, 33; §§ 6933 & 6934.) This Court should decline Appellants' invitation to deviate from this system and instead hold that consumer protection statutes may not be used to adjudicate tax refund matters, either directly or indirectly.

Javor, supra, upon which Appellants rely (AOB, pp. 18, 41, & 44), does not provide authority for consumers to obtain redress from their retailers for sales tax reimbursements allegedly illegally or improperly collected, except under the "unique circumstances" of that case. In *Javor*, appellant consumer filed a complaint individually and on behalf of all consumer purchasers of certain new motor vehicles and accessories for money due and also for an accounting against SBE and retailers, for recovery of an erroneously collected excise taxes. The United States Congress on December 11, 1971, but retroactively to August 15, 1971, repealed the federal manufacturers' excise tax imposed on the sale of specified new motor vehicles and accessories. Congress at the same time required the manufacturers to refund the collected federal taxes to those persons who had purchased the vehicle or accessories during the above approximately four month period. This action, however, automatically reduced the total gross receipts from the sale of each car, thereby establishing that a greater sales tax had in fact been paid by the purchasers than was actually due. (*Ibid.* at pp. 792-793.) Thus, the plaintiffs' right to a return of their money and the individual amounts to be returned to each plaintiff were unquestioned. The issue was how to obtain the refund, since the plaintiffs were not taxpayers and could not file claims for refund.

The *Javor* court emphasized that a consumer's rights were limited:

> "[Former] Section 6054.5, as construed by this court in *Decorative Carpets*, generally created a right in customers to recover from their retailers the amount of any excessive sales tax reimbursements erroneously paid. However, it provided a specific remedy to effect this right only where two conditions occurred: (1) the money so collected had not yet been paid to the Board and (2) the excessive amount was knowingly collected. If these two conditions were met, then all retailers who failed to repay this excessive amount were obliged to pay this amount to the state."

(*Ibid.* at p. 799.)

As noted in *Javor*, however, once the retailers had paid the money to the state, as they are obligated to do (§ 6451), "to give customers a direct cause of action against the Board for all erroneously collected sales tax reimbursements which have already been paid to the Board by the retailer would neither be consonant with existing statutory procedures nor with the import of *Decorative Carpets*." (*Ibid.* at p. 800.) As a result, the court concluded that customers in sales tax transactions could require their retailers to file claims for refund which the SBE would process under the normal refund statutes: "We hold that under the **unique circumstances** of this case a customer, who has erroneously paid an excessive sales tax reimbursement to his retailer who has in turn paid this money to the Board, may join the Board as a party to his suit for recovery against the retailer in order to require the Board in response to the refund application from the retailers to pay the refund owed the retailers into court or provide proof to the court that the retailer had already claimed and received a refund from the Board." (*Ibid.* at p. 802, emphasis added.)

Javor does not provide a good model for this case. For one thing, *Javor's* facts are quite different from those before this Court. In *Javor*, the identities of the purchasers could be determined from the taxpayers' records, the purchasers' rights

to get back the tax reimbursement they had paid was undisputed, and as the amount of the return was measured by the amount of the excise tax (a known quantity), the amount of the return was easily calculated. In this case, the individual coffee customers, anonymous cash payors that they were, cannot be identified by the retailer and the actual amount of alleged excess tax reimbursement cannot be calculated. In fact, it has not been established that any excess tax reimbursements were ever collected.

Also, as noted above, since *Javor*, the law has changed. This Court's famous statement in *Woosley* that the Constitution "precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature[]" (*Woosley, supra,* 3 Cal. 4th at p. 792) runs directly counter to the *Javor* court's view that it was "still left to the courts to adopt appropriate remedies when excessive reimbursements have been collected by mistake and paid to the state." (*Ibid.* at p. 799, emphasis omitted.)

Finally, the statutory landscape has changed in two ways. As noted above, former section 6054.5 was repealed in 1978. That statute, in subdivisions (c) and (d), had contained enforcement provisions for the SBE regarding returning excess sales tax reimbursement to customers. In *Javor*, this court relied heavily on those provisions in issuing its ruling. (*Ibid.* at p. 802.) When it enacted Section 6901.5 four years later, the Legislature did not include equivalent provisions in the new statute. (Stats. 1982, ch. 708.) Thus, the Legislature pared the statute down to its essential provisions. If the SBE determines that the retailer has knowingly or mistakenly collected excess sales tax reimbursement and the retailer has not remitted the money to the SBE, the retailer must remit the money either to the specific customers from whom it was collected or, in the alternative, to the SBE. No other remedy is provided. Also, the Legislature passed SB 263, noting that it recognized that, under the normal refund mechanism, many customers would not

be able to obtain refund of alleged excess tax reimbursement, thus indicating that it had not left it to the courts to create refund mechanisms for consumers.

V
FINDING A PRIVATE RIGHT OF ACTION FOR CONSUMERS PURCHASING TANGIBLE PERSONAL PROPERTY IN TRANSACTIONS SUBJECT TO SALES TAX WOULD VIOLATE PUBLIC POLICY.

Appellants aver that Targets' collection of sales tax reimbursement in this situation "offends public policy[.]" (AOB, p. 6.) To the contrary, however, a ruling for Appellants would cause the "whip-saw" effect decried in *Brennan*. Retailers could be made subject to different sets of procedures and substantive laws if consumers, including use tax taxpayers, may choose between the consumer remedies laws or the SUTL. First, the UCL provides for the plaintiff's attorney to collect attorneys' fees, generally not available under Revenue and Taxation Code section 7156. Given this, plaintiffs' attorneys would naturally want to sue retailers under the UCL and CLRA rather than pursue the remedies available under the SUTL, effectively mooting both the refund statutes and the statutory limitation on attorneys' fees in SUT refund actions. Second, under the UCL, the court may grant declaratory relief regarding the retailer's business operation that gave rise to the allegedly improperly collected tax or tax reimbursement, effectively by-passing the anti-injunction provisions. (See *Pacific Gas & Electric, supra.*) Third, the UCL requirements to maintain a class action are greatly different than those required by Revenue and Taxation Code section 6904(b); thus exposing retailers, and, through them, the General Fund, to a much larger class of claimants than under the refund statutes and greatly increasing the potential for large attorneys'

fees awards.[11] Fourth, the SUTL requires that each claimant have records identifying the property purchased, the sales tax reimbursement collected, and the identity of the purchaser, evidence usually not available in over-the-counter transactions. The UCL and CLRA, on the other hand, do not require a transaction-by-transaction analysis. Fifth, cy pres recoveries are not permitted in tax actions – refunds must go to the persons who paid the money. (*Blue Chip Stamps*, *supra,* 18 Cal. 3d at pp. 386-387.) Sixth, as discussed above, the sweep of the UCL is broad, requiring liberal interpretation of the statutes in order to accomplish their purposes, while the refund statutes sometimes require narrow interpretation in order to protect the public fisc. Finally, this case appears to be an example of the typical situation, where the purchase that allegedly was improperly taxed was made in an over-the-counter transaction. If a judgment were entered against Target, the Board would not be able to approve a refund to Target, because Target could not specifically identify the buyers, determine the amount of tax improperly paid on a case-by-case basis, or return any refund to such anonymous buyers. (*Decorative Carpets, supra*, 58 Cal. 2d at 255.) Target would then have to itself absorb the loss, the every evil the sales tax reimbursement statutes were enacted to avoid. (*DeAryan, supra,* 12 Cal. 2d at p. 787.) Thus, public policy favors upholding the Court of Appeal in this case.

VI

CONSUMERS DO NOT LACK A REMEDY

Appellants allege that they will be left without remedies if this Court affirms the Court of Appeal's ruling. (AOB, p. 39.) In point of fact, Appellants

[11] "[W]hen the individual's interests are no longer served by group action, the principal – if not the sole – beneficiary then becomes the class action attorney." (*Blue Chip Stamps v. Sup. Ct.* (1976) 18 Cal. 3d 381, 386 [134 Cal. Rptr. 393, 556 P.2d 755].)

and similarly situated consumers have numerous remedies. Here, Appellants simply have not taken advantage of them.

A. The SBE provides numerous methods by which consumers can dispute the application of sales tax to their transactions.

SBE has provided numerous remedies that purchasers may invoke. State Board of Equalization Publication 51, "Resource Guide to Free Tax Products and Services," describes the services SBE makes available to help the general public and taxpayers with their tax questions. For example, a person with a problem regarding sales tax can call a toll-free telephone number for assistance (p. 5), visit SBE's Web site (p. 5), or write the SBE for advice (p. 6). Pamphlet 51 also lists the various publications BOE issues describing the application of tax in the various tax programs the BOE administers. (Pp. 19-22.) Publication 51 is readily obtainable from by SBE district office and is also available on SBE's web site at http://www.boe.ca.gov/pdf/pub51.pdf.

According to the State Board of Equalization 2007-2008 Annual Report, in Fiscal Year 2007-2008, the Taxpayer Information Center received over 470,000 calls from taxpayers, tax practitioners, and the general public. Approximately 89% of callers spoke with customer service representatives regarding their problem, while the other 11% took advantage of the toll-free system's automated features, which include a fax feature for selected forms and publications, recordings of sales tax rates, and an interactive seller's permit verification system. In addition to handling telephone calls, the Information Center responded to nearly 15,000 e-mails. (State Board of Equalization, 2007-2008 Annual Report ("Annual Report"), p. 48 <http://www.boe.ca.gov/annual/pdf/2008/7-needs08.pdf>.)

Also, the SBE conducts audits of taxpayers based on informant tips. (Audit Manual § 0101.85 (March 2001) http://www.boe.ca.gov/pdf/fam-01.pdf (as of

August 12, 2008).) Finally, through a link on SBE's web site, anyone can report suspected tax fraud.

Through these avenues, SBE can always provide prospective relief. For example, SBE can act to change a retailer's tax practices to correct issues revealed by an investigation. In transactions subject to use tax, the purchasers can usually be identified so that refunds of excess use tax can nearly always be made. If the transaction is subject to sales tax, and the customers who paid sales tax reimbursement can be identified, then the retailer will file a claim for refund, and the SBE will work with the retailer to ensure that any excess sales tax reimbursement will be returned to the customers who paid it.

Appellants now argue that SBE has not investigated their issue during the pendency of this case and so SBE cannot be expected to represent consumers' interests. (AOB, p. 45.) This argument is unfair, however, as the SBE first became aware of this issue during the litigation. Because of the litigation and its involvement in it, SBE determined it should not engage in a formal audit of Target's practices until the conclusion of the court proceedings, and after the courts have determined the applicable law to apply. In informal discussions, however, SBE has suggested that Target sell coffee at the stands in its stores on a tax-included basis. That way, only sales of coffee consumed on the premises would be subject to tax. Once this litigation has concluded, SBE can conduct audits in line with this Court's ruling.

Appellants' allegations that SBE is not obligated to follow up on complaints that consumers may file (AOB, p. 43) are contrary to law and sound policy. First, the Legislature, as noted above, has committed to SBE responsibility for maintaining the integrity of the sales and use tax system. The law presumes that SBE will fulfill that duty. (Civ. Code, § 3529.) Second, as stated in the Annual Report, "The mission of the State Board of Equalization is to serve the

public through fair, effective, and efficient tax administration." (< http://www.boe.ca.gov/annual/pdf/2008/08-cover-front.pdf>.) Appellants have not even alleged a single instance where SBE did not investigate a complaint filed by a member of the public.

B. Interested parties may contest the validity of SBE regulations.

Under Government Code section 11340.6, interested persons may petition SBE to either amend its regulations or promulgate new ones. Thus, Appellants could have asked SBE to address their issues in the form of a rulemaking proceeding. Had Appellants done so, SBE would have been required to either reject the petition or initiate a rulemaking proceeding. (Govt. Code, § 11340.7(a).)

Also, Government Code section 11350 permits interested parties to contest the facial validity of existing SBE regulations by bringing an action for declaratory relief. Appellants could have brought a declaratory relief action to determine if the provisions of Regulation 1603 regarding to-go sales comported with Section 6359. Appellants, however, also did not avail themselves of this remedy. Government Code section 11350 applies to sales and use tax regulations so long as the petitioner is not attempting to adjudicate an outstanding tax liability. (*Pacific Motor Transport Co. v. St. Bd. of Equalization* (1972) 28 Cal. App. 3d 230 [104 Cal. Rptr. 558].) Thus, the Legislature has provided at least two sets of remedies that Appellants could have used but chose not to.

C. Appellants could have invoked the power of the Legislature.

In his concurrence in *Yamaha*, the late Justice Stanley Mosk suggested that aggrieved persons could contact either their elected Board of Equalization Member or their legislator and request relief from what they believed to be erroneous Board staff interpretations. (*Yamaha, supra, 1 Cal.4th* at p. 23.) That is often done. For example, the Legislature recently enacted section 6018.3 (SB 809;

Stats. 2009, ch. 621) at the behest of several disabled veterans who are itinerant vendors in order to provide them a partial exemption from sales tax.

The fact that Appellants chose not to use the remedies available to them should not confer jurisdiction on this court to step into the legislative arena and create other remedies. Appellants are right that the remedies provided by SBE would not necessarily be subject to judicial review. (AOB, p. 46.) The remedies provided by the Government Code are, however, reviewable. Appellants have not alleged, except upon conjecture and speculation, why any of the available remedies would not have resolved their issue.

CONCLUSION

In this case, the Court will decide who will control the sales and use tax system – the Legislature or the courts. The constitution gives the Legislature paramount authority in the taxation arena. The collection, enforcement and administration of taxes must have clear statutory authority. Remedies not found in the tax statutes thus cannot be implied. The collection of sales tax reimbursement is not a business practice within the meaning of the UCL and CLRA, nor were the UCL or CLRA intended by the Legislature to govern citizens' relations with the state. The Court of Appeal was correct that, for retailer-taxpayers, paying sales tax and collecting sales tax reimbursement are so intertwined that the proper collection of tax reimbursement cannot be resolved without also resolving the proper application of tax itself. Thus, actions such as this one, which are, in essence and effect, actions against the state to restrain the collection of tax are barred by both the constitution and statute. A ruling in favor of Appellants would in essence repeal the statutory refund mechanisms and subject retailers to different statutory interpretations and processes. Finally, both the Legislature and SBE

provide numerous remedies to Appellants, which Appellants for their own reasons have not only decided not to utilize, but have actively avoided being ordered to utilize.

The Court of Appeal's ruling was correct and should be affirmed in full.

Dated: 30 MAR 2010

Respectfully Submitted,

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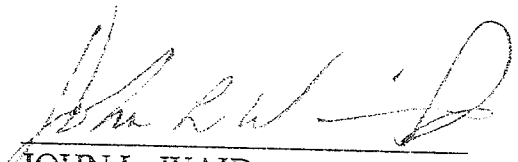
CERTIFICATE OF COUNSEL

I, John L. Waid, hereby certify pursuant to California Rules of Court, Rules on Appeal, Rule 8.204(c) that this *Amicus Curiae* Brief was produced on a computer, and that it contains 13,831 words, exclusive of tables, this certificate, and the proof of service, but including footnotes, as calculated by the word processing program used to prepare this brief.

Dated: March 30, 2010

Respectfully Submitted,



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DECLARATION OF SERVICE

Case Name: **Kimberly Loeffler and Azucena Lemus v. Target Corporation**

Case Number: Supreme Court Case No. S173972

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 April 1, 2010, I served the attached **BRIEF OF AMICUS CURIAE, CALIFORNIA STATE BOARD OF EQUALIZATION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, to the attached 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 April 1, 2010 at Sacramento, California.

Deborah Self
Declarant

Deborah Self
Signature

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Court of Appeal, Second Appellate District, Div. Three, Case No. B199287

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