No. S176146

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD A. YABSLEY, ~~on behalf of himself, a class of persons similarly situated, and the general public,~~

Plaintiffs-~~Petitioners,~~ appellant

vs.

~~THE CALIFORNIA~~ STATE BOARD OF EQUALIZATION, an agency of ~~the~~ STATE OF ~~CALIFORNIA~~; CINGULAR WIRELESS, LLC, ~~a limited liability company, and DOES 1 through 20, inclusive,~~

Defendants-Respondents.

PETITION FOR REVIEW AND REQUEST FOR GRANT AND HOLD REVIEW PENDING OUTCOME IN *LOEFFLER V. TARGET CORP.*, CASE NO. S173972

Re: Decision by the Court of Appeal
Second Appellate District, Division Six
Court of Appeal No. B198827
Santa Barbara Superior Court Case No. 1221332
The Honorable J. William McLafferty, Judge

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Service on California Attorney General and Santa Barbara District Attorney required by Business & Professions Section 17209)

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PETITION

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Petitioners respectfully petition for review of the opinion by the Court of Appeal, Second Appellate District, Division Six (Perren, J., with Yegan, acting P.J. and Coffee, J., conc.) The Court of Appeal's opinion, published at *Yabsley v. Cingular Wireless, LLC*, Case No. B198827 (Ct. App. 2009) ___ Cal. Rprt. ___ ("*Yabsley*"), affirmed the order sustaining Cingular's demurrer. A copy of the decision is attached as an exhibit to this petition.

ISSUES FOR REVIEW

1. Does Article XIII, Sec. 32 of the California Constitution bar consumers from filing lawsuits against retailers under California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code, §§ 17200, et seq.), False Advertising Law ("FAL") (Cal. Bus. & Prof. Code, §§ 17200, et seq.) and Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code, §§ 1750 et seq.) for false advertising? (No.)

2. Do a tax regulation that determines the amount of sales tax owed by the retailer and an evidentiary provision of the California Civil Code create a safe harbor that immunizes retailers of cellular telephones from liability for false advertising? (No.)

3. Does a plaintiff lack standing under the UCL if he does not allege a predicate law violation? (No.)

4. Does the CLRA's pre-filing demand requirement apply to an action for injunctive relief? (No.)

I. INTRODUCTION

California Rule of Court 8.500(b) sets forth the grounds for review by this Court. Rule 8.500(b)(1) provides for review where it is "necessary to secure uniformity of decision or to settle an important question of law." Both of these criteria are present here. Review of the Court of Appeal's decision is warranted because the legal issues posed by this case are of vital importance to California consumers. Further, the Court of Appeal's decision rested largely on the decision of another appellate court, *Loeffler v. Target Corp.*, which was accepted for review by this Court on September 9, 2009. In light of this development, review at least on a "grant and hold" basis pursuant to California Rules of Court, Rule 8.512(d) is warranted.

Petitioner Yabsley alleges Cingular violated the UCL, FAL and CLRA by advertising phones at a discount, then charging customers sales tax on another price without adequately disclosing that practice. Despite these allegations, Respondent Cingular successfully persuaded the court below that this case, like *Loeffler*, challenges the amount of sales tax owed to the state by the retailer and, therefore, like *Loeffler*, is precluded by Article XIII, Section 32 of the California Constitution.

California's strong and sweeping consumer protection statutes were enacted in order to deter businesses from engaging in unfair and deceptive conduct. The UCL, for example, provides that courts may order restitution of "any money . . . which may have been acquired by means of such unfair competition." (Bus. & Prof. Code, § 17203.) As this Court said with respect to the UCL, "Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 ("*Cel-Tech*"), internal quotations omitted.) The UCL not only covers illegal practices, it also covers unfair and fraudulent practices. (*Id.* at p. 180.)

Until the decisions of the Court of Appeal below and *Loeffler* no authority had suggested that the UCL contains an exception to courts' broad authority to remedy and enjoin unlawful and deceptive practices for situations when businesses cheat consumers by imposing a charge under the auspice of a "sales tax." Two days after the *Loeffler* opinion was filed Respondents notified the Court of Appeal of that opinion, resulting in a request by the court below for supplemental briefing from the parties and *amicus*. In response, Respondents and *amicus* State Board of Equalization submitted letter briefs continuing their mischaracterization of this case as a challenge to the amount of taxes owed by the retailer to the state and arguing that the Appellant's claims were barred under Article XIII, Section

32 of the California Constitution in the same manner that the *Loeffler* court determined the claims in that case were barred.

Failing to recognize the difference in the claims presented in *Loeffler* and this case and the flaws of the now depublished *Loeffler* opinion, the Court of Appeal held that the trial court lacked authority under the state's consumer protection statutes to address Cingular's false advertising practices because of an unrelated constitutional provision. The text of that provision contains no language limiting the rights of consumers against companies that mislead them. It simply limits the ability of courts to prevent or enjoin the state from collecting tax, and mandates that taxpayers may seek a tax refund only after paying the tax. (See Cal. Const., art. XIII, § 32.) As in *Loeffler*, Petitioner Yablsey does not seek any injunction against the state. He seeks merely an award of restitution, damages, or injunctive relief against Cingular for its false advertising. His claims in no way threaten or interfere with the state's ability to collect sales tax.

Further, the Court of Appeal's opinion (parroting language of its original opinion, which had been depublished as a result of the California Attorney General's involvement and objection to its holding) also incorrectly applies the safe harbor doctrine delineated by this Court's seminal opinion *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at p. 180 to find that Regulation 1585 and Civil Code section 1656.1 protected Cingular from liability for its

violations of the UCL, FAL and CLRA. To provide a safe harbor the legislation must be "specific" to the defendant's conduct (*id.* at 182) and must "clearly permit" the challenged conduct or pose an "absolute bar" to relief. These provisions do not address the conduct complained of by the Plaintiffs and, therefore, do not immunize the Defendants from liability under California's consumer protection statutes.

Finally, the Court of Appeal's opinion contains additional clear errors in its interpretation of the UCL, FAL and CLRA. In its discussion of Yablsey's standing, the court below cited *Cel-Tech* for the proposition that "'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable" and held that "[t]he 'legally protected interest' for standing purposes must be an interest that is protected by a source other than the remedial provisions of the UCL or FAL." (*Yabsley*, slip op. at p. 8.)

This holding eviscerates the fraudulent and unfair prongs of the UCL. As this Court observed in *Cel-Tech*:

> [T]he [UCL] does more than just borrow. The statutory language referring to "any unlawful, unfair or fraudulent" practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.'"

(*Cel-Tech*, *supra*, 20 Cal.4th at p. 180, quoting *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647.) Yabsley's proposed second amended complaint clearly indicated that the legally protected interest he alleged was violated by Cingular was the well established right not to be exposed to deceptive advertising. No predicate law violation is required in order to maintain suit for this claim.

The Court of Appeal's standing discussion, also relying on *Loeffler*, indicated that Yabsley did not satisfy the lost money or property requirement under the UCL and FAL because the tax board had not determined that he was "eligible for restitution of the alleged excess sales tax he paid at the time he purchased the phone." (*Yabsley*, slip op. at p. 8.) However, there is simply no determination for the tax authority to make in this case – Yablsey's claims concern Cingular's advertising practices and the relationship between Cingular and its consumers, not the money owed by taxpayer Cingular to the State of California.

The causation argument made by the court below likewise does not address the false advertising allegations at issue in the case. The court states, in essence, that since the consumer had to pay the tax whether it was disclosed or not, there is no causation. (*Yabsley*, slip op. at p. 9 ["Cingular's alleged nondisclosure of the amount of sales tax to be collected on the purchase did not affect the amount of sales tax due on the sale of the phone because Regulation 1585 permits Cingular to collect sales

tax from the consumer based on the non-sale price of the phone."].) The court failed to recognize that Regulation 1585 does not require Cingular to pass on the sales tax and assumes away entirely the question of whether Cingular engaged in deceptive advertising.

Finally, in a footnote the opinion incorrectly states that "[t]he CLRA requires that before an action is filed, the consumer make demand on the retailer to rectify the alleged deceptive practice." (*Yabsley*, slip op. at pp. 7-8, fn.4 [citing Civ. Code, § 1782].) The CLRA, however, requires a pre-filing demand only in actions in which damages are sought. (See Civ. Code, § 1782(a) ["Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following . . . ."].) Additionally, the CLRA expressly permits an action for injunctive relief to be filed without any pre-filing demand, followed by a later amendment to the complaint to seek damages. (Civ. Code, § 1782(d).)

This Court should grant review because the Court of Appeal's interpretation stands in contradiction to this Court's clear pronouncements of the law and robs California consumers of any remedy for retailers' deceptive business practices under the vital protections afforded to them by California's consumer protection statutes. Under the Court of Appeal's holding consumers are denied the right to recover for Cingular's false advertising practices on the basis of unrelated tax laws. Further, the Court of Appeal's opinion contains additional plain errors of law in its

interpretation of the UCL, FAL and CLRA. At the very least, given the Court of Appeal's heavy reliance on *Loeffler*, review should be accepted on a grant and hold basis pending this Court's determination of *Loeffler*.

II. STATEMENT OF THE CASE

A. Factual Background and Procedural History

The facts of this case, as pleaded in the First Amended Complaint and the proposed Second Amended Complaint are straightforward. On March 27, 2006, Petitioner Yablsey went to a Cingular store in the County of Santa Barbara to purchase a new wireless phone. A particular phone was advertised at a price of $299.99. The ad offered, however, that if the phone was purchased with a calling plan, the price would be reduced to $149.99. Petitioner purchased the advertised phone in connection with a calling plan and was charged $149.99. The receipt provided to Petitioner after he purchased the phone represented that sales tax was charged at the rate of 7.75% on the sales price of $149.99. The amount of tax charged, however, was $23.25 – 7.75% of $299.99, and not 7.75% of the $149.99 price that was advertised and paid by Petitioner.

On August 2, 2006, Petitioner filed his initial class action complaint in the Santa Barbara Superior Court against the California State Board of Equalization ("Board") on the grounds that the Board's regulation applying tax to the unbundled sales price of the phone violates California Revenue and Taxation Code sections 6051, et seq., which requires sales tax to be

calculated upon the "gross receipts of any retailer from the sale of all tangible personal property sold at retail . . . ." This initial complaint did not include Cingular as a defendant.

On October 12, 2006, Petitioner simultaneously filed his First Amended Complaint (FAC), adding the claims against Cingular now at issue, and voluntarily dismissing the Board from the case. In response to the FAC, Cingular demurred, inter alia, on the ground that its failure to disclose that it collects sales tax pursuant to Regulation 1585 falls within the "safe harbor" recognized by this Court in *Cel-Tech*, *supra*, 20 Cal.4th at pp. 182-183. At the same time that the Petitioner filed his opposition to the demurrer, he also moved for leave to file a second amended complaint removing the Board as a party, clarifying the allegations against Cingular, which were intertwined with those against the Board in the FAC, and adding an allegation that Cingular's conduct constituted a violation of the Consumer Legal Remedies Act, Civil Code sections 1750, et seq.

On February 26, 2007, the trial court adopted its tentative ruling, and sustained Cingular's demurrer without leave to amend. The trial court found that because Cingular's "conduct was in complete compliance with what it was expressly authorized to do by Regulation 1585" it had established a safe harbor from liability under the UCL and FAL. Petitioner timely appealed on May 7, 2007.

The Court of Appeal affirmed the judgment of the Superior Court on August 18, 2008, finding that Cingular's compliance with Regulation 1585 and Civil Code section 1656.1 precluded any liability under the UCL and FAL. By letter on September 16, 2008, the Attorney General of California notified the Court of Appeal that the parties had failed to comply with Sections 17209, 17536.5 of the California Business and Professions Code and California Rules of Court, rule 8.29(a), which require that in appellate proceedings involving the UCL and FAL notice and copies of the briefing be provided to the Attorney General and district attorney of the county in which the case originated to allow them to file as amicus curiae brief. The Attorney General's letter expressed strong concern with the Court of Appeal's application of the narrow safe harbor doctrine to preclude liability in the case.

In its letter, the Attorney General noted that

> the sales tax regulation in question [Regulation 1585] only seems to tell the retailer what sales tax she or he must pay to the State, it does not deal with how a retailer advertises. Accordingly, it does not appear to address what disclosures, if any, must be made concerning the sales tax to be charged.

The Attorney General further noted that the Court of Appeal's "reliance on Civil Code section 1656.1 . . . could cause unnecessary future problems for law enforcement" and that this provision

> merely says that consumers and retailers can agree by contract to pay sales tax, and it is presumed they have if sales tax is shown on the sales receipt. The presumption, however,

> is rebuttable and, because it is a contract question as to what the consumer and the retailer agreed to, it seems the consumer should have all the rights which any consumer challenging the validity of any contract has.

As a result of the letter on September 17, 2008, the court ordered rehearing of its decision. The Attorney General submitted an *amicus curiae* brief. The court also granted the State Board of Equalization's application to file an *amicus curiae* brief and provided the parties with the opportunity to respond.

On February 18, 2009 the Court of Appeal requested supplemental briefing from the parties and amicus curiae discussing *Yabsley*'s standing to pursue claims under the Unfair Competition Law and False Advertising Law. Additionally, as noted above, in response to Cingular's notification of the decision in *Loeffler*, on May 19, 2009 the court below notified the parties that they should be prepared to discuss *Loeffler* at oral argument and provided the opportunity to submit letter briefs.

On August 19, 2009 the Court of Appeal reissued its opinion affirming the judgment of the Superior Court and expanding its earlier opinion on the basis of *Loeffler*. The opinion contains a lengthy summary of the *Loeffler* decision and then summarily concludes with no analysis of the claims in this case that

> [w]e agree with the *Loeffler* court's reasoning and its conclusion that the UCL and FAL and the policies they promote cannot take precedence over article XIII, section 32 and the orderly administration of the tax laws require strict

> adherence to statutory procedures for the administration of the sales tax law.

(*Yabsley*, slip op. at p. 7.) The Court also found that Yabsley lacked standing for various reasons and reaffirmed its prior holding that Cingular's conduct was protected from liability under the UCL, FAL and CLRA by a legislative safe harbor under Regulation 1585 and Civil Code section 1656.1. (*Id.* at pp. 7-13.)

This Petition follows.

B. Overview of Sales Tax and Sales Tax Reimbursement

1. Sales Tax

The State of California imposes sales tax on all retailers "[f]or the privilege of selling tangible personal property at retail." (Cal. Rev. & Tax. Code, § 6051.) In other words, sales tax is "imposed on the seller, not upon the buyer." (*General Electric Co. v. State Board of Equalization* (1952) 111 Cal.App.2d 180, 185.) Retailers, not their customers, are "taxpayers" for purposes of sales tax.

In the event a retailer has remitted sales tax to the SBE that was not owed, or has paid more sales tax than was owed, the retailer may seek a refund from the state. To seek such a refund, the retailer must first file an administrative claim with the Board under the provisions in Chapter 7, Article 1 of the Tax Code. (See Rev. & Tax. Code, §§ 6901, et seq.) If the Board denies the administrative claim, the retailer may bring a suit against

the Board for a sales tax refund under Chapter 7, Article 2 of the Tax Code. (See Cal. Rev. & Tax. Code, § 6932.)

2. Sales Tax Reimbursement

California law does not require retailers to charge their customers for sales tax. Retailers are permitted, however, to pass the costs of sales tax on to customers by imposing a "sales tax reimbursement" charge on taxable transactions. Whether a retailer may add a sales tax reimbursement charge to a particular transaction depends "solely upon the terms of the agreement of sale" between the retailer and the customer. (Cal. Civ. Code, § 1656.1(a).) See *Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal.App.2d 156, 162 ["Since the tax is levied upon the retailer and his right of reimbursement is optional and may be waived by him . . . reimbursement of the amount of the tax rests upon the contractual arrangements of the parties."].) As stated in the legislative history of Civil Code section 1656.1 "the incidence of the California sales tax is upon the retailer for the privilege of selling tangible personal property at retail and is not upon the purchaser." (Historical note, citing Cal. Stats. 1978 c. 1211 § 19 at 3925.)

The Tax Code provides that if a retailer has imposed a sales tax reimbursement charge on a customer for an amount that is not taxable, that amount "shall be returned by the person [the retailer] to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained." (Rev. & Tax. Code, § 6901.5.) If the retailer

fails or refuses to return the amount to a customer who has paid it, the Tax Code provides that "the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable . . . shall be remitted by that person to this state." (*Ibid.*)

III. ARGUMENT

A. The Court of Appeal Erred By Holding California's Consumer Protection Statutes Unconstitutional As Applied to Plaintiff's Claims

1. Courts Have Broad Authority Under California's Consumer Protection Statutes to Provide Restitution

The Petitioner raises claims under California's landmark consumer protection laws: the UCL, FAL, and CLRA. Each of these statutes provides remedies for the wrongs alleged in this case, and none of them have any exception for deceptive acts simply because they relate to sales taxes.

Under the UCL, a plaintiff is entitled to injunctive relief and restitution where an "unlawful, unfair or fraudulent" business act or practice has occurred. The sweeping nature of the UCL is clear from its extremely broad language. It specifically provides that courts may order restitution of "*any money* . . . which may have been acquired by means of such unfair competition." (Bus. & Prof. Code, § 17203, emphasis added.) The UCL does not say "any money except for funds wrongfully charged for sales tax reimbursement" or contain any other such limitation. Instead, the statute uses the broadest term imaginable: "any."

As this Court has explained,

> [b]ecause Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa.

(*Cel-Tech*, *supra*, 20 Cal.4th at p. 180, internal quotations omitted.) In *Cel-Tech*, this Court eloquently explained the expansive scope of the statute:

> [T]he unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather . . . it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." Its coverage is sweeping, embracing anything that can properly be 'called a business practice and that at the same time is forbidden by law. It governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition."
>
> The unfair competition law . . . has a broader scope for a reason. The Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, . . . the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive.

(*Id.* at pp. 180-181, internal citations and quotations omitted.)

This Court recently reaffirmed the importance of UCL actions:

> [C]onsumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. [They] make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest

> money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

(*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313, internal quotations omitted.)

The law protects the public from false advertising in a wide range of circumstances. Both the FAL and the "fraudulent" prong of the UCL have been broadly construed "to embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) Thus, advertising that has the capacity to be misleading is actionable, and "[a]llegations of actual deception, reasonable reliance, and damage are unnecessary." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211; *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876; *People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 129.) Even the intent of the disseminator of the untrue statements is irrelevant. (See *Chern*, at p. 876; *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1102.)

Moreover, a statement may be rendered misleading by the omission of information. As this Court has observed, "[w]here, in the absence of an affirmative disclosure, consumers are likely to assume something which is

not in fact true, the failure to disclose the true state of affairs can be misleading." (*Ford Dealers Ass'n v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 363-64 [upholding advertising regulation implementing anti-false advertising provisions of Vehicle Code, §11713, subdivision (a) which parallels section 17500].) Accordingly, even a "perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information," is actionable under sections 17200 and 17500. (*Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332-333.)

As set forth above, Petitioner here alleges that Cingular falsely advertised phones at a discounted price, then charged customers sales tax on another price without adequately disclosing that practice. Seeking restitution of such wrongfully charged sums is a classic type of UCL and FAL claim. The broad scope of the UCL and FAL encompasses a wide range of unfair, deceptive and illegal acts. The Court of Appeal's reliance on *Loeffler* to find a major exception to these statutes in this case stands in sharp contrast with this Court's long history of recognizing the essential protections afforded to consumers by the UCL and FAL. (See, e.g., *Cel-Tech, supra*, 20 Cal.4th at pp. 180-181; *Leoni v. State Bar* (1985) 39 Cal.3d 609, 626; *Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d at p. 211; *Chern v. Bank of America, supra*, 15

Cal.3d at p. 876; *Stop Youth Addicition, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560.)

> The UCL empowers a court to make
>
> > such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

(Bus. & Prof. Code, § 17203.) The court's equitable imperative "is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149.) Restitution under Section 17203 "is not solely intended to benefit the [victims] by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations." (*People ex rel. Kennedy v. Beaumont Investments, Ltd.* (2003) 111 Cal.App.4th 135, internal quotes and citations omitted; see also *Korea Supply Co.*, at p. 1149 [UCL's remedy provisions serve the purpose of "returning to the plaintiff funds in which he or she has an ownership interest."].)

The CLRA, likewise, is a broad remedial statute aimed at protecting consumers from deceptive business practices. As the preamble to it states:

> 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.

(Civ. Code, § 1760; *see also Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077 ["The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices. . . ."].) The CLRA prohibits nearly twenty different deceptive practices, including misrepresenting the source, characteristics, use, benefits or status of goods and services, falsely advertising goods or services, etc. (See Civ. Code, § 1770.)

The CLRA contains expansive liability and remedial provisions designed to broaden liability and impose comprehensive legal and equitable remedies for scores of separate types of misrepresentation. For example, it contains relaxed class certification provisions, as well as a prohibition against summary judgment motions. (See Civ. Code, § 1781.) The remedies available under the CLRA include compensatory damages, punitive damages and special penalties, as well as injunctive relief and restitution. (See Civ. Code, § 1780; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437-438.)

The remedies of the CLRA are expressly "not exclusive" but rather are "in addition to any other procedures or remedies . . . in any other law." (Civ. Code, § 1752.) The statute also includes a strong anti-waiver provision. Civil Code section 1751 provides that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." The expanse of the CLRA is a large part of

the reason courts have recognized that "California's consumer protection laws are among the strongest in the country." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 242.)

B. The Constitution Does Not Bar Plaintiffs' Claims Because This is Not a Tax Refund Case and Would Not Enjoin or Prevent the State from Collecting Any Tax

In spite of the breadth of California's consumer protection statutes, and in complete reliance on *Loeffler* without any analysis of the facts of this case, the court below held that the UCL, FAL and CLRA are unconstitutional as applied to Yablsey's claims because the particular wrongful charges at issue here were imposed under the guise of sales tax reimbursement. *Loeffler's* creation of this new exception is based on article XIII, section 32 of the California Constitution, which provides:

> 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.

(Cal. Const., art. XIII, § 32.) This constitutional bar is plainly inapplicable to Yabsley's claims.

First, by its terms, section 32 "applies only to actions against the *state*." (*Pacific Gas & Electric Co. v. State Board of Equalization* (1980) 27 Cal.3d 277, 281 fn.6, emphasis added.) "When the language of a statute or constitutional provision is clear and unambiguous, judicial construction

is not necessary and the court should not engage in it." (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 323.) Here, Petitioner has simply brought claims against a private corporation for false advertising. He has no standing to file a tax refund claim or lawsuit against the state, since he is not the taxpayer of sales tax, the state is not a party to this action, and his claim does not seek return of sales tax but rather restitution for Cingular's deceptive advertisements.

Second, section 32 is irrelevant here because it bars only actions that would "prevent or enjoin the collection of any tax" before that tax is paid. As this Court has explained, section 32 is intended to prohibit "judicial declarations or findings which would impede the prompt collection of a tax." (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at p. 638-639.) As such, "a *taxpayer* may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid." (*Id.* at p. 638, emphasis added; see also *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247 [section 32 effectively imposes a "pay first, litigate later" requirement on taxpayers].) Until *Loeffler* no appellate court in California had previously held that section 32 bars a person who is indisputably not a taxpayer from gaining access to court. Further, in this case, unlike the plaintiffs in *Loeffler*, Petitioner's claims do not concern a dispute about the amount of sales tax owed to the state by the taxpayer, i.e. Cingular.

To the extent that "[t]he policy behind section 32 is to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted," (*Pacific Gas & Electric Co. v. State Board of Equalization, supra*, 27 Cal.3d at p. 283), that policy is not undermined in any way by this lawsuit. A determination of the merits of this case will not affect the State Board of Equalization's ability to collect taxes owed by Cingular.

Finally, section 32 also does not apply because this case is not "an action . . . to recover the tax paid" by a taxpayer. (Cal. Const., art. XIII, § 32; see also *Woosley v. State of California* (1992) 3 Cal.4th 758, 789 [explaining that section 32 "provides that actions for *tax refunds* must be brought in the manner prescribed by the Legislature"], emphasis added.) Petitioner does not seek a tax refund. He merely seeks restitution for the deceptive advertisements of Cingular. Thus, a court decision in favor of Yabsley would in no way "expand[] the methods for seeking *tax refunds* expressly provided by the Legislature." (*Woosley*, at p. 792, emphasis added.)

In sum, a court decision enjoining Cingular's deceptive advertising practices and requiring Cingular to pay restitution and damages to customers who are victims of this deception would not prevent the state from collecting taxes nor expand the Legislature's remedies for tax refunds. Petitioner's claims are in no way barred by the California Constitution or its

corollary in Tax Code Section 6931. (See *Agnew v. State Bd. of Equalization, supra*, 21 Cal.4th at p. 327 [section 6931 does not bar claim not barred by Constitution].)

C. The Court of Appeal Erred in Holding that Regulation 1585 and Civil Code 1656.1 Create a Safe Harbor that Immunizes Retailers from Liability Under the UCL, FAL and CLRA

1. "Safe Harbors" May Only Be Found in Legislation That Specifically Applies to the Defendant and Which Expressly and Clearly Permits the Challenged Conduct

Because the Legislature intentionally gave the UCL such a broad sweep, courts have carefully scrutinized claimed exemptions. For example, in *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283-284, this Court rejected arguments that conduct that violated both the Unfair Insurance Practices Act (UIPA) and the Cartwright Act could not form the basis of a UCL claim. The court acknowledged that private causes of action for violations of the UIPA were barred, and that plaintiffs could not "plead around" that bar merely by characterizing their claim as one under the UCL. (*Ibid.*) Because the same conduct also violated the Cartwright Act, however, nothing precluded plaintiffs from suing under the UCL, despite arguments that allowing such cases to proceed would "seriously compromise" the bar against private causes of action under the UIPA. (*Ibid.*)

> The UIPA nowhere reflects legislative intent to repeal the Cartwright Act insofar as it applies to the insurance industry, and the Legislature has clearly stated its intent that the remedies and penalties under the [UCL] are cumulative to other remedies and penalties.

(*Id.* at p. 284, citing Bus. & Prof. Code, § 17205; see also *People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 473-475 [overturning trial courts finding that "Cartwright Act violations were not intended to be included within the unfair competition statutes because it 'made little practical sense' where the Cartwright Act provides for civil damages of a punitive nature" and holding that section 17200 applied on its face].)

The broad construction of the UCL and FAL and the attendant reluctance to create exceptions form the legal and policy backdrop against which this Court in *Cel-Tech* delineated the so-called "safe harbor" defense to a section 17200 claim, recognizing that a legislatively created safe harbor could bar a UCL cause of action challenging the conduct as "unfair" under the UCL.[1] "If . . . the Legislature considered certain activity in certain circumstances and determined it to be lawful, courts may not override that determination under the guise of the unfair competition law." (*Cel-Tech, supra*, 20 Cal.4th at p. 183.)

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[1] The opinion below also appears to be the first case to accept a safe harbor defense in a false and deceptive advertising case.

Taking pains not to invite other courts to pare back the scope of 17200 by judicial implication, this Court has established rigorous requirements to assert a "safe harbor" defense: The legislation that provides the safe harbor must be "specific" to the defendant's conduct. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 182.) Further, the legislation must "clearly permit" the challenged conduct, or pose an "absolute bar" to relief. (*Id.* at pp. 182-183; see also *id.* at p. 187 [safe harbor must "affirmatively" permit the conduct]; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 828 [challenged conduct must be "expressly allowed"]; *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 790 [finding a safe harbor in Health and Safety Code section 1371.4(e) because it "*specifically allows* a delegation of payment responsibilities to contracting medical providers"], emphasis added; *California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1133 [same].)

As a corollary to these requirements, courts may not create "implied safe harbors" because they are "contrary to the approach adopted by [this] Court." (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 940 fn.5.) The courts cannot infer a safe harbor because "[t]he power to create and define an exception to the UCL is committed to the Legislature." (*Aron v. U-Haul Co. of California* (2007) 143 Cal.App.4th 796, 804 [holding that safe harbor applicable to passenger vehicles rentals did not apply to truck rentals, despite the similarities between the two].) (See also

Rambus, Inc. v. Infineon Techs. AG (E.D. Va. 2004) 304 F.Supp.2d 812, 824 ["[T]he California Legislature, not the California courts, is to be the source of any safe harbor exceptions to Section 17200."].) The safe harbor doctrine, then, is a narrow one. It bars an action challenging conduct as "unfair" or "unlawful" under the UCL only where all of the above criteria have been met.

2. Regulation 1585 Does Not Provide a Safe Harbor Against Allegations that a Retailer Violated the Fraud Prong of the UCL or Engaged in False Advertising

California tax regulation 1585 requires retailers to pay sales tax on the full retail, or "unbundled," price of a cell phone, even if the consumer paid a lower price because he purchased the phone in a "bundle" with cell phone service. (18 C.C.R. § 1585 (Regulation 1585).) Because Cingular collected the correct amount of sales tax, the court below concluded that Regulation 1585 provides a "safe harbor" to allegations that Cingular violated the UCL. (*Yabsley*, slip op. at 12.) Regulation 1585, however, does not mandate that the retailer collect sales tax from its customers. Rather, as in any sales transaction, the collection of sales tax reimbursement is a matter of agreement between the retailer and the customer. Regulation 1585(b)(3) ["The retailer of the wireless telecommunications device is required to report and pay tax measured by the unbundled sales price of the devise and *may* collect tax or tax

reimbursement from its customer measured by the unbundled sales price."], emphasis added.)

Any safe harbor must affirmatively, specifically and expressly permit the challenged conduct; the court cannot infer that the safe harbor extends beyond the law's express terms. (*Ante* at pp. 24-27.) Accordingly, a statute or regulation that makes certain conduct lawful does not provide a safe harbor to a UCL or FAL cause of action alleging that the defendant misled consumers about that conduct. In *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, for example, the plaintiff brought a UCL cause of action challenging Hertz's fuel service charge. Hertz imposed that charge on customers who declined to purchase fuel from Hertz at the commencement of the rental but brought back the car without replenishing the used fuel; customers could avoid the charge by agreeing at the outset to purchase fuel from Hertz. (*Id.* at pp. 1149-1150.) The plaintiff alleged that the charge was excessive and that Hertz fraudulently concealed the charge on the rental agreement. (*Id.* at p. 1149.)

Hertz argued that its conduct fell within the safe harbor of Civil Code section 1936, subdivision (m). (*Schnall v. Hertz Corp., supra*, 78 Cal.App.4th at pp. 1154-1155.) That statute permits rental car companies to impose additional charges for optional services if the renter could have avoided incurring the charge. Such charges include

> charges for refueling the vehicle at the conclusion of the rental transaction in the event the renter did not return the vehicle with as much fuel as was in the fuel tank at the beginning of the rental.

(*Id.* at p. 1155, quoting Civ. Code, § 1938, subd. (m)(2), emphasis omitted.)

On appeal, the court held that the plaintiff could not challenge the amount of the charge under the UCL's "unfair" prong, as that would invade the legislatively created safe harbor. (*Schnall v. Hertz Corp.*, *supra*, 78 Cal.App.4th at p. 1163.) The plaintiff, however, could challenge under the UCL's "fraudulent" prong the "allegedly deceptive manner in which Hertz induces its customers to incur the charge." (*Ibid.*) According to the court,

> the conduct we found lawful under Civil Code section 1936, subdivision (m)(2), which relates solely to the imposition of an avoidable charge for an optional service and the amount of that charge, is very different from the allegedly deceptive conduct appellant independently challenges under the UCL, which relates to confusing and misleading portions of the rental agreement and rental record which purports to disclose and explain the charge.

(*Ibid.*) The court concluded, "[a]uthorization of avoidable charges for optional services hardly amounts to permission to mislead customers about such charges." (*Ibid.*)

Applying the rationale of the court in *Schnall* to this case, a cellular phone retailer's authorization to collect from its customers the sales tax on the undiscounted price of the phone "hardly amounts to permission to mislead customers" that it is doing so. (*Schnall v. Hertz Corp.*, *supra*, 78 Cal.App.4th at p. 1163.) Regulation 1585 creates a safe harbor preventing

a challenge to the amount of sales tax that the retailer passes on its customers, but does not prevent consumers from challenging the allegedly deceptive manner in which the retailer induces customers to pay that tax. (*Ibid.*) In fact, the regulation does not address advertising at all. Indeed, as this Court recognized, Regulation 1585 is silent on the issue of disclosure on the amount of sales tax charged. (*Yabsley*, slip op. at p. 12.)

3. Civil Code Section 1656.1 Does Not Foreclose a UCL or FAL Cause of Action

Petitioner received a receipt at the time of his purchase that disclosed the amount of the sales tax, which, under Section 1656.1, creates a rebuttable presumption that Yabsley agreed to pay that tax. (*Yabsley*, slip op. at p. 12.) In his proposed second amended complaint, Petitioner alleges that the disclosure on the receipt itself was misleading because it represented that the sales tax charged by 7.75% of the discounted price of the phone. Even if the information on the receipt is true and not misleading, Petitioner's claim is still viable if Cingular's advertising was likely to mislead consumers. Cingular's inclusion of correct information on the receipt does not cure the earlier violation of the UCL and the FAL.

The law is violated "if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." (*FTC v. Munoz* (9th Cir. 2001) 17 Fed.Appx. 624, 626 [FTC Act violated by misleading ad for sale of investments although sales brochures

contained truthful information], citing *Resort Car Rental System, Inc. v. FTC* (9th Cir. 1975) 518 F.2d 962, 964.) Indeed, to permit later disclosures in effect to defeat a cause of action under the UCL or FAL would not deter, but would in fact encourage, violations of the law by rewarding the wrongdoer; the defendant that makes misleading statements to lure consumers into its store wrongfully generates foot traffic and leads and so has an advantage in the marketplace over the competitor whose ads are truthful. This is unfair competition in both senses, in that consumers and honest competitors are harmed. Thus, Petitioner's allegations that Cingular's advertising was likely to mislead consumers adequately state a cause of action under the UCL and FAL. Cingular's disclosure on the receipt, even if true and not misleading, cannot cure the violations.

4. The Consumer May Rebut the Presumption of Agreement that Section 1656.1 Creates

"[W]hether a retailer may add sales tax reimbursement to the sales price [of the item sold] depends solely upon the terms of the agreement of sale." (Civ. Code, § 1656.1, subd. (a).) Under subdivision (a)(2), if the sales tax reimbursement is included on the "sales check or other proof of sale," there exists a rebuttable presumption that the consumer agreed to pay the tax. On the sales invoice that Cingular gave to Petitioner, Cingular included the sales tax on the unbundled sales price. (*Yabsley*, slip op. at

p. 12.) The court concluded that the invoice created a contract between Cingular and Yabsley. (*Ibid.*)

Civil Code section 1656.1, however, creates only a rebuttable presumption that the purchaser has agreed to pay sales tax if he or she receives a document showing the sales tax reimbursement. (Civ. Code, § 1656.1, subds. (a)(3), (d).) The plaintiff, then, is entitled to present evidence to rebut that presumption. (See, e.g., *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 674, 682 [terminated employee alleging breach of employment contract entitled to present evidence to rebut statutory presumption of at-will employment; demurrer improperly sustained]; *Masterson v. Sine* (1968) 68 Cal.2d 222, 229 [parol evidence admissible to rebut presumption that option agreement is assignable].)

Permitting the plaintiff to present such evidence is particularly appropriate in UCL and FAL cases where the gravamen of the complaint is that the defendant made misleading statements to induce consumers to enter into the contract. (See, e.g., *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856 [reversing summary judgment for defendant on UCL cause of action; plaintiff permitted to present evidence that car dealer induced plaintiffs to sign a lease by misrepresenting the agreement's terms and their significance].)

Here, Petitioner pleaded that he did not agree to Cingular's terms. Yabsley should be afforded the opportunity to offer evidence to prove as

much. Unlike in the typical transaction, Petitioner was charged sales tax on a price other than the sales price of the phone. He alleges that Cingular's advertising was likely to mislead consumers in that it failed to disclose that sales tax would be charged on the full retail price of the phone. In his proposed second amended complaint, he elaborates that the receipt itself was misleading in that it indicated that this was the case in that it shows a subtotal of $149.99 (the discounted price of the phone), sales tax of 7.75%, or $23.25, and a total amount due of $173.24. Yabsley was required to calculate the amount himself to discover the tax was actually imposed on $299.00 (the full retail price of the phone) and not the price charged on the phone. When coupled with the alleged misleading advertising and receipt, Yabsley's allegations rebut the presumption afforded by Civil Code section 1656.1 that he agreed to pay sales tax on the undiscounted phone price. The Court of Appeal erred by denying Petitioner's motion to amend and in precluding him the opportunity to present evidence to support his claims.

D. The Court of Appeal Erred in Finding that Yabsley Lacked Standing

In its discussion of Yabsley's standing, the Court of Appeal below cited *Cel-Tech* for the proposition that "'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable" and held that "[t]he 'legally protected interest' for standing purposes must be an interest

that is protected by a source other than the remedial provisions of the UCL or FAL." (*Yabsley*, slip op. at p. 8.)

This holding eviscerates the fraudulent and unfair prongs of the UCL. As this Court observed in *Cel-Tech*:

> The statutory language referring to "any unlawful, unfair or fraudulent" practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.

(*Cel-Tech, supra*, 20 Cal.4th at 180, quoting *Podolsky v. First Healthcare Corp., supra*, 50 Cal.App.4th at p. 647.) Yabsley's proposed second amended complaint clearly indicated that the legally protected interest he alleged was violated by Cingular was the well established right not to be exposed to deceptive advertising. The law is clear that no predicate law violation is required in order to maintain suit for this claim.

The Court of Appeal's standing discussion, also relying *Loeffler*, indicated that Yabsley did not satisfy the lost money or property requirement under the UCL and FAL because the tax board had not determined that he was "eligible for restitution of the alleged excess sales tax he paid at the time he purchased the phone." (*Yabsley*, slip op. at p. 8.) As discussed above there is simply no determination for the tax authority to make in this case – Yablsey's claims concern Cingular's advertising practices and the relationship between Cingular and its consumers, not the money owed by the taxpayer Cingular to the State of California. To the

extent the Court of Appeal's opinion determined the Petitioner lackes standing on this ground it was also error.

The causation argument made by the court below likewise does not address the false advertising allegations at issue in the case. The court states, in essence, that since the consumer had to pay the tax whether it was disclosed or not, there is no causation. (*Yabsley*, slip op. at p. 9 ["Cingular's alleged nondisclosure of the amount of sales tax to be collected on the purchase did not affect the amount of sales tax due on the sale of the phone because Regulation 1585 permits Cingular to collect sales tax from the consumer based on the non-sale price of the phone."].) The court failed to recognize that Regulation 1585 does not require Cingular to pass on the sales tax and assumes away entirely the question of whether Cingular's engaged in deceptive advertising.

E. The Pre-Filing Demand of the CLRA Does Not Apply to an Action for Injunctive Relief

In a footnote the opinion incorrectly states that "[t]he CLRA requires that before an action is filed, the consumer make demand on the retailer to rectify the alleged deceptive practice." (*Yabsley*, slip op. at pp. 7-8, fn.4, citing Civ. Code, § 1782.) The CLRA, however, requires a pre-filing demand only in actions in which damages are sought. (See Civ. Code, § 1782(a) ["Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the

following . . . ."].) Additionally, the CLRA expressly permits an action for injunctive relief to be filed without any pre-filing demand, followed by a later amendment to the complaint to seek damages. (Civ. Code, § 1782(d).)

IV. CONCLUSION

For the foregoing reasons, this Court should grant review of this Petition and reverse the decision of the Court of Appeal.

DATED: September 28, 2009

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RULE 8.204(c)(1) CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that **PETITION FOR REVIEW AND REQUEST FOR GRANT AND HOLD REVIEW PENDING OUTCOME IN LOEFFLER V. TARGET CORP., CASE NO. S173972** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises 8,376 words according to the word count provided by Microsoft Office Word 2007 word-processing software.

WILLIAM D. PETTERSEN
Counsel for Plaintiffs-Petitioners

Exhibit A

Filed 8/19/09 Opinion on rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RICHARD A. YABSLEY, Plaintiff and Appellant, v. CINGULAR WIRELESS, LLC, Defendant and Respondent.	2d Civil No. B198827 (Super. Ct. No. 01221332) (Santa Barbara County) OPINION ON REHEARING

Respondent Cingular Wireless, LLC (Cingular) advertised a cellular phone for sale at half the retail price if the purchaser also enrolled in a calling plan package. The California Code of Regulations requires that sales tax be computed on the non-sale price of the product. The regulation permits, but does not require, that the charge be passed on to the customer. Cingular did so without informing the customer prior to sale that the tax would be based on the full price of the cell phone. The amount of tax is shown on the sales invoice furnished to the customer at the time of sale.

Appellant Richard Yabsley alleged that Cingular engaged in unfair competition in violation of Business and Professions Code section 17200[1] and misleading advertising in violation of section 17500 by failing to inform the consumer that the tax would be imposed on the full price of the cell phone. The trial court sustained Cingular's demurrer to Yabsley's first amended complaint without leave to amend finding that the

[1] All statutory references are to the Business and Professions Code unless otherwise stated.

provisions of California Code of Regulations, title 18, section 1585 (Regulation 1585)[2] requiring that the sales tax be calculated based on the non-sale price of the phone and permitting the retailer to collect this amount from the customer provided a "safe harbor" from such claims. We affirm on that basis and also for the reasons stated in the recent decision of *Loeffler v. Target Corporation* (2009) 173 Cal.App.4th 1229.

FACTUAL AND PROCEDURAL HISTORY

Cingular advertised a cell phone for $149.99, a 50 percent reduction in the phone's retail price, if the purchaser enrolled in a Cingular wireless calling plan. Yabsley saw the advertisement and purchased the cell phone with the calling plan. When he received the sales receipt, he noticed that the sales tax was imposed on the regular price of the cell phone, $299.99, rather than the discounted price of $149.99, resulting in the payment of $11.62 more in sales tax than he had anticipated.

Yabsley filed a class action complaint for declaratory relief against the State Board of Equalization (Board), asserting that Regulation 1585, governing taxation of sales of wireless communication devices, was invalid because it conflicted with Revenue and Taxation Code section 6051 imposing a sales tax on gross receipts.

Yabsley filed a first amended complaint (FAC), naming the Board and Cingular as defendants, but dismissed the Board the same day. The FAC alleges that Cingular's advertising practices were deceptive under sections 17200 and 17500 by failing to apprise prospective customers that sales tax would be charged on the undiscounted price of the cell phone.

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[2] Regulation 1585, subdivision (b) provides: "Application of Tax. [¶] (1) In General. Tax applies to the gross receipts from the retail sale of a wireless telecommunication device. The retailer of the wireless telecommunication device is required to report and pay the tax. . . . [¶] (3) Bundled Transactions. Tax applies to the gross receipts from the retail sale of a wireless telecommunication device sold in a bundled transaction, measured by the unbundled sales price of that device. Tax applies to the unbundled sales price whether the wireless telecommunication device and utility service are sold for a single price or are separately itemized in the context of a sale or on a sales invoice. The retailer of the wireless telecommunication device is required to report and pay tax measured by the unbundled sales price of the device and may collect tax or tax reimbursement from its customer measured by the unbundled sales price. Tax does not apply to the charges in excess of the unbundled sales price made for telecommunication services."

Cingular filed a demurrer asserting it has immunity from such a claim under the safe harbor provided by Regulation 1585. This regulation requires that sales tax on a "bundled" cell phone sale, i.e., a cell phone purchased with a call plan, be calculated based on the phone's higher, unbundled price.

Prior to a hearing on Cingular's demurrer, Yabsley sought to file a second amended complaint (SAC). The proposed SAC added a claim that Cingular violated the Consumer Legal Remedies Act (CLRA), Civil Code section 1750 et seq. The trial court denied the motion for leave to file the SAC and, after hearing on the FAC, the court sustained Cingular's demurrer without leave to amend and entered a judgment of dismissal.

After we filed a published opinion affirming the trial court's judgment, we were informed by the California Attorney General that the parties were required to notify it of any lawsuit involving the Unfair Competition Law (UCL) and False Advertising Law (FAL). (§§ 17209, 17536.5; Cal. Rules of Court, rule 8.29.) We granted the Attorney General leave to intervene and ordered a rehearing. We granted requests by Cingular to file a supplemental brief and by the State Board of Equalization to file an amicus curiae brief.

Subsequently, we requested and received supplemental briefing by the parties on the issue of whether Yabsley had standing to bring this action. Prior to oral argument, our colleagues in Division Three of this court decided *Loeffler v. Target Corporation, supra,* 173 Cal.App.4th 1229. We invited supplemental briefing from the parties as to whether *Loeffler* is applicable.

DISCUSSION

Standard of Review

"When reviewing an order sustaining a demurrer, we review the trial court's ruling de novo, exercising our independent judgment to determine whether the complaint states a cause of action under any legal theory. [Citation.] We accept as true the properly pleaded allegations of facts in the complaint, but not the contentions, deductions or conclusions of fact or law." (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782,

788.) It is the validity of the trial court's action in sustaining the demurrer, not its reasons, which is reviewable. (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.)

The Revenue and Taxation Code Provides the

Exclusive Method for Obtaining Sales Tax Reimbursement

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." (§ 17200.) California's FAL (§ 17500) "prohibits advertising property or services with untrue or misleading statements or with the intent not to sell at the advertised price." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 52.) The remedies for violation of the UCL and FAL are equitable in nature, i.e., injunction and restitution. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 812, 819.)

The holding in *Loeffler* precludes Yabsley's claim for a refund or reimbursement of sales tax collected by Cingular. In that case, the plaintiffs filed a complaint seeking reimbursement of sales tax collected by Target on coffee they purchased "to go." They alleged that Target was precluded from collecting sales tax on food items by Revenue and Taxation Code section 6359. Among other remedies, they sought restitution and injunctive relief under the UCL and CLRA. With respect to the UCL, plaintiffs alleged that Target was engaged in unfair and unlawful business acts or practices by imposing sales tax on the purchase of coffee ("to go" and for "take out"). They sought to enjoin Target from improperly charging sales tax to consumers and restitution of the sales tax paid. With respect to the CLRA, plaintiffs alleged Target misrepresented that it had the legal right to charge consumers sales tax on coffee purchased to go or for take out. They sought reimbursement from Target for the amount of sales tax wrongfully collected.

The Court of Appeal affirmed the trial court's dismissal of the action after a demurrer was sustained without leave to amend. The court ruled that the action was barred by article XIII, section 32, of the California Constitution and that the administrative remedies in the Revenue and Taxation Code were the exclusive means by which to recover sales taxes wrongfully collected.

Article XIII, section 32 of the California Constitution states: "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." In compliance with this constitutional mandate, the Legislature has adopted a comprehensive system permitting retailers to file administrative claims with the Board and lawsuits challenging imposition of sales taxes and obtaining sales tax reimbursement. (Rev. & Tax. Code, §§ 6901-6908, 6931-6937.)

The Legislature has provided that filing a claim with the Board is a prerequisite to maintaining a suit for a refund of sales taxes. Revenue and Taxation Code section 6932 states: "No 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)." "The purpose of requiring a taxpayer to file a claim with the Board before commencing a tax refund lawsuit is to give the Board an opportunity to correct any mistakes." (*Loeffler v. Target Corporation, supra,* 173 Cal.App.4th at p. 1240, citing *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 206.)

The statutory scheme provides a remedy for consumers such as Yabsley. Revenue and Taxation Code section 6901.5 requires a retailer who has collected excess sales tax reimbursement from a customer to return the money to the customer who paid it or remit the funds to the state.[3]

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[3] Revenue and Taxation Code section 6901.5 states: "When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person to this state."

After careful consideration of these statutes and related administrative regulations and cases construing these provisions, as well as the law relating to standing and private rights of action, the *Loeffler* court concluded that plaintiffs' lawsuit was barred because the regulatory scheme enacted by the Legislature was the sole means by which to obtain reimbursement of wrongfully collected sales tax.

In rejecting the assertion that claims brought pursuant to the UCL and CLRA are not subject to the administrative remedies in the Revenue & Taxation Code, the court noted: "Plaintiffs cannot plead around article XIII, section 32 and [Rev. & Tax. Code] section 6931 by recasting their causes of action as violations of the UCL and the CLRA. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 ['A plaintiff may not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition"'].)" (*Loeffler v. Target Corporation, supra*, 173 Cal.App.4th at p. 1248, fn. 11.)

The court reasoned: "[P]laintiffs here seek an injunction, damages and restitution without providing the Board with an opportunity to administratively determine the merits of plaintiffs' interpretation of the sales tax laws. This is not permitted by the sales tax statutes and their underlying policies. Although the Board's interpretation of the tax laws does not bind the courts, the Board has expertise regarding sales tax issues that is entitled to consideration and respect. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 11.) Further, circumventing the claims process could result in involving the Board, retailers and customers in unnecessary litigation. This undermines the policy underlying section 6932, which is to give the Board an opportunity to correct any mistakes, thereby avoiding the cost of litigation and the consumption of judicial resources. (See *Preston [v. State Bd. of Equalization], supra*, 25 Cal.4th at p. 206.)" (*Loeffler v. Target Corporation, supra*, 173 Cal.App.4th at p. 1248.)

Yabsley asserts that *Loeffler* was wrongly decided, as it is contrary to the Supreme Court's opinion in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790. We disagree. As noted in *Loeffler*, the *Javor* case presented "'unique circumstances.'" (*Loeffler*

v. Target Corporation, supra, 173 Cal.App.4th at p. 1245.) One of those circumstances, not present here, was that the customers' entitlement to a tax refund was not in question.

We agree with the *Loeffler* court's reasoning and its conclusion that the UCL and FAL and the policies they promote cannot take precedence over article XIII, section 32 and the orderly administration of the tax laws require strict adherence to statutory procedures for the administration of the sales tax law.

Yabsley Does Not Meet the Standing Requirements of the UCL and FAL

Yabsley and the Attorney General assert that *Loeffler* does not preclude an action seeking to enjoin false or deceptive advertising by a retailer. Assuming this argument is correct in the abstract, it does not help Yabsley. The FAC does not seek to enjoin Cingular from engaging in a deceptive advertising practice. The FAC seeks a declaration that Revenue and Taxation Code section 6051 requires a retailer to collect sales tax based on the actual retail price of the product and that Cingular's practice of charging sales tax based on the undiscounted price of the product violates section 6051. The second cause of action against Cingular based on the UCL and FAL does not ask for injunctive relief, but for "special damages in the sum of $11.62," attorney fees and costs. The only injunctive relief sought is in connection with the declaratory relief cause of action and seeks to enjoin "the Board from engaging in the above-referenced practice."

The proposed SAC requests an injunction against Cingular "prohibiting all unlawful practices of defendant as alleged herein" as well as restitution. Yabsley describes the alleged unlawful practice as the "taxation process" but also alleges that he was induced to purchase the phone because Cingular's advertising failed to advise him that sales tax would be calculated on the undiscounted price of the phone rather than the actual purchase price. Although the proposed SAC seeks an injunction against false or deceptive advertising, it would not survive demurrer because Yabsley fails to satisfy the standing requirements of the consumer remedy laws.[4]

[4] In the SAC, Yabsley alleges a cause of action under the CLRA. This addition does not save the complaint. The CLRA requires that before an action is filed, the consumer make

The right to maintain a claim is essential to the existence of a cause of action. (*Buckland v. Threshold Enterprises, Ltd., supra*, 155 Cal.App.4th at p. 813.) The issue of a plaintiff's standing may be raised at any time during the pendency of an action. (*Ibid.*) To have standing under the UCL, a person must allege """. . . injury in fact and has lost money or property as a result of such unfair competition.""" (*Id.* at p. 812.)

An "injury in fact" is "'an invasion of a legally protected interest which is . . . concrete and particularized . . . .'" (*Buckland v. Threshold Enterprises, Ltd., supra*, 155 Cal.App.4th at p. 814.) Yabsley has not alleged the invasion of a legally protected interest. He argues that he has a legally protected interest in receiving truthful advertising under the consumer remedy laws. This is insufficient. The "legally protected interest" for standing purposes must be an interest that is protected by a source other than the remedial provisions of the UCL or FAL. (See, e.g., *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* 20 Cal.4th at p. 180 ["'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable"].) The only independent statute Yabsley cites is Revenue and Taxation Code section 6051. That section requires that a retailer pay sales tax based on gross receipts. That statute neither expressly nor impliedly creates in Yabsley any legally cognizable right to avoid paying sales tax on the undiscounted price of the phone. As discussed below, the opposite is true. Regulation 1585 expressly authorizes Cingular to collect sales tax based on the undiscounted price of the phone and to collect that amount from the customer.

Yabsley also fails to meet the "lost money or property" requirement. "[T]he UCL and FAL's 'lost money or property requirement 'limits standing to individuals who suffer losses . . . that are eligible for restitution.'" (*Buckland v. Threshold Enterprises, Ltd., supra,* 155 Cal.App.4th at p. 817.) There has been no determination by the Board that he is eligible for restitution of the alleged excess sales tax he paid at the time he purchased the phone. (*Loeffler v. Target Corporation, supra*, 173 Cal.App.4th at p. 1248.)

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demand on the retailer to rectify the alleged deceptive practice. (Civ. Code, § 1782.) The SAC does not allege that Yabsley complied with this requirement.

Lastly, Yabsley cannot meet the causation requirement. "'[T]here must be a causal connection between the harm suffered and the unlawful business activity. The causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law.'" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1348-1349.) Cingular's alleged nondisclosure of the amount of sales tax to be collected on the purchase did not affect the amount of sales tax due on the sale of the phone because Regulation 1585 permits Cingular to collect sales tax from the consumer based on the non-sale price of the phone.

Even if the *Loeffler* case and standing requirements were not fatal to Yabsley's complaint, the trial court correctly determined that it has no substantive merit. Although section 17200 broadly prescribes "any unlawful, unfair or fraudulent business act or practice," it does not apply when specific legislation provides a "safe harbor" for the conduct at issue. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 182.) When specific legislation provides a "safe harbor," a plaintiff may not use the general UCL to assault that harbor. (*Ibid.*) If the Legislature has permitted certain conduct or considered a situation and concluded that no action should lie, courts may not override that determination. (*Ibid.*)

Cingular asserts, and the trial court agreed, that Regulation 1585 provides a safe harbor for the conduct Yabsley asserts violates the UCL. Regulation 1585, subdivision (a)(3) states: "Bundled Transaction. The retail sale of a wireless telecommunication device which contractually requires the retailer's customer to activate or contract with a wireless telecommunications service provider for utility service for a period greater than one month as a condition of that sale. A transaction is a bundled transaction within the meaning of this regulation without regard to the method in which the price is stated to the customer. Also, it is immaterial whether the wireless telecommunication device and utility service are sold for a single price or are separately itemized in the context of a sale or on a sales invoice. A transaction is a bundled transaction if goods and services are sold as a single package, whether wireless telecommunication service is supplied to the customer by the retailer or by

an independent service supplier. In such transactions, wireless devices may be sold at a 'discounted' price, as an inducement for the customer to enter into an extended service contract. The fact that a wireless telecommunication device, such as a PCS (Personal Communication Service) telephone, may, because of its technological specifications, be subject to activation with only one service supplier, does not alone mean that the sale of the device will be treated as a bundled transaction."

Relying on *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, Yabsley contends that statutes can provide a safe harbor, but administrative regulations cannot. In *Krumme*, the appellate court rejected an insurance company's argument that regulations adopted by the Insurance Commissioner provided a safe harbor. Citing *Cel-Tech* as authority, the *Krumme* court said in a footnote: "These materials are not germane to our analysis because our Supreme Court has held that only statutes can create a safe harbor." (*Id.* at p. 940, fn. 5.) *Cel-Tech*, however, dealt with statutes enacted by the Legislature and the safe harbor they created. There was no reference to regulations. Like the trial court here, we conclude that there is nothing in the *Cel-Tech* decision purporting to limit the safe harbor doctrine to statutes enacted by the Legislature.[5]

The Legislature has delegated to the Board the job of promulgating regulations relating to the administration and enforcement of the tax statutes. (Rev. & Tax. Code, § 7051; Gov. Code, §§ 11342.1, 11342.2.) The Administrative Procedure Act (APA) subjects proposed agency regulations to certain procedural requirements as a condition to their becoming effective. (Gov. Code, §§ 11340 et seq.) Pursuant to the APA, "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual,

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[5] The discussions in *Krumme* pertaining to the role of regulations in an action under section 17200 are dicta and unnecessary to its conclusion. In any event, our reading of *Cel-Tech* suggests precisely the opposite conclusion. First, a regulation specifically makes lawful the very conduct that Yabsley contends constitutes an unfair competition and, second, *Cel-Tech* refers to regulations of a federal regulatory agency (Federal Trade Commission) as an example of a safe harbor. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at pp. 185-186.)

instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State . . . ." (*Id.*, at § 11340.5, subd. (a).) If a rule constitutes a regulation within the meaning of the APA (other than an emergency regulation, which may not remain in effect more than 120 days), it may not be adopted, amended or repealed except in conformity with "basic minimum procedural requirements." (*Id.* at § 11346, subd. (a).)

The status of regulations promulgated by the Board was described by our Supreme Court in *Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at page 7: "[R]egulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves . . . ." The rule that valid administrative regulations have the force and effect of law has been reiterated in dozens of California cases. (See, e.g., *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401; *California Teachers Ass'n v. California Com'n on Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1008.) Many cases also have upheld safe harbors created by administrative regulations. (See, e.g., *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 918 [regulation adopted under Proposition 65 providing safe harbor for consumer product warning labels]; *Environmental Law Foundation v. Wykle Research, Inc.* (2005) 134 Cal.App.4th 60, 62 [same]; *In re Vaccine Cases* (2005) 134 Cal.App.4th 438, 448 [same]; *People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal.App.4th 1373, 1377-1378 [same]; *Ingredient Communication Council, Inc. v. Lungren* (1992) 2 Cal.App.4th 1480, 1485-1486 [same]; *Pulaski v. California Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1332-1333 [upholding validity of safe harbor regulation regarding standards for employers to reduce repetitive motion injuries]; see also *Marshall v. Bankers Life & Casualty Co.* (1992) 2 Cal.4th 1045, 1054-1055 [discussing safe harbor provided by ERISA regulation].)

"'. . . Because agencies granted such substantive rulemaking power are truly "making law," their quasi-legislative rules have the dignity of statutes. . . .'" (*Bolsa Chica*

Land Trust v. Superior Court (1999) 71 Cal.App.4th 493, 503-505.) Regulation 1585 has the "force and effect" and the "dignity" of a statute. Therefore, it may, and does, provide a safe harbor to Cingular.

Yabsley argues that even if Regulation 1585 provides a safe harbor, it does not immunize Cingular's conduct in failing to disclose to purchasers that sales tax would be charged on the retail price of the phone. Regulation 1585 is silent as to the retailer's duty to disclose the amount of sales tax charged on a sale and Yabsley cites no statute or other law requiring an advertisement for a wireless communications device, or any other consumer product, to contain information on the sales tax to be applied to the sale.

The duty of a retailer to disclose the sales tax imposed on the sale of tangible personal property is governed by Civil Code section 1656.1.[6] That section creates a rebuttable presumption that a purchaser agrees to pay the sales tax shown on the sales receipt.

The sales invoice Cingular gave to Yabsley stated the amount of the sales tax imposed on the sale. It not only gave Yabsley notice of the amount of sales tax that would be imposed, it constituted a contract of sale between Cingular and Yabsley. As with any

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[6] Civil Code section 1656.1 states:

"(a) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. It 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 if:

"(1) The agreement of sale expressly provides for such addition of sales tax reimbursement;

"(2) Sales tax reimbursement is shown on the sales check or other proof of sale; or

"(3) The retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

"

. . . . . .

"[(c)](2) Reimbursement on sales prices in excess of those shown in the schedules may be computed by applying the applicable tax rate to the sales price, rounded off to the nearest cent by eliminating any fraction less than one-half cent and increasing any fraction of one-half cent or over to the next higher cent.

"(3) If sales tax reimbursement is added to the sales price of tangible personal property sold at retail, the retailer shall use a schedule provided by the board, or a schedule approved by the board.

"(d) The presumptions created by this section are rebuttable presumptions."

other contract, Yabsley had the right to refuse to enter into the contract for the price stated. Because Cingular complied with all applicable regulations, Yabsley's claims under sections 17200 and 17500 fail. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 182 ["If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination"]; see also *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861 [car dealership's contention that automobile financing company's business practice of calculating interest under the 365/360 method was unlawful as contrary to sections 17200 and 17500 was without merit because California has no law or regulation requiring a lender to use a 365-day year in computing interest or quoting annual interest rates on commercial loans].)

The trial court did not err in sustaining the demurrer without leave to amend. The question before us is one of statutory interpretation, a pure question of law. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310.) The FAC and the parties' briefs on demurrer set forth the relevant statutes and regulations and contain the parties' arguments concerning the interpretation of those statutes and regulations. Thus, no purpose would be served by permitting a further amendment.

The judgment of dismissal is affirmed. Respondent shall recover costs.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

J. William McLafferty, Judge

Superior Court County of Santa Barbara

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PROOF OF SERVICE

Richard A. Yabsley v. The California State Board of Equalization, et al.
Supreme Court Number: S176146

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action. I am employed in the County of San Diego, State of California. My business address is: 525 B Street, Suite 760, San Diego, CA 92101.

That on September 28, 2009, I served the following document(s) entitled: **PETITION FOR REVIEW AND REQUEST FOR GRANT AND HOLD REVIEW PENDING OUTCOME IN LOEFFLER V. TARGET CORP., CASE NO. S173972** on ALL INTERESTED PARTIES in this action:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in San Diego, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be contained in an overnight envelope and to be deposited in a **Federal Express** box located at 525 B Street, San Diego, California, for delivery to the above address(es).

☐ **BY FAX:** I transmitted a copy of the foregoing document(s) this date via telecopier, pursuant to California Rules of Court, Rule 2008, to the facsimile numbers shown on the attached service list. The facsimile machine I used complied with Rule 2003 and no error was reported by the machine. Pursuant to Rule 2008, I caused the machine to print a transmission record of the transmission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 28, 2009, at San Diego, California.

Anita Villanueva
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