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October 29, 2009

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

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

Dear Chief Justice George:

Pursuant to California Rules of Court, Rule 8.500, subd. (g), *amicus curiae* California State Board of Equalization (SBE) submits this letter brief in opposition to the *Petition* for Review filed by Appellants on or about June 19, 2009. SBE urges this court to deny the petition on the grounds that this case does not qualify for review under Subdivision (b) of Rule 8.500. Review is not needed to resolve a conflict among the appellate circuits or to resolve an important question of law.

The SBE requests that this Court excuse the lateness of this letter brief. The SBE was not served with a copy of the *Petition* for Review. SBE only learned of the petition when it was served with the Answer of Respondent Cingular Wireless LLC that was filed on October 16, 2009. SBE received its copy too late to get this answer on file within the time limit specified in California Rules of Court, Rule 8.500, subd. (e)(4).

**1. SBE has a vital interest in this litigation.**

Pursuant to Rule 8.500(g)(2), SBE respectfully submits this statement describing its interest in this litigation. 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.). As such, SBE is responsible for maintaining the uniformity and integrity of the sales and use tax system. (*Decorative Carpets, Inc. v. St. Bd. of Equal.* (1962) 58 Cal.2d 252, 255 thereafter *Decorative Carpets*.)<sup>1</sup> 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. Granting review without SBE input would mean the court would be granting

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

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review without the input of the state agency charged with administering the Sales and use Tax Law.

**2. There are no conflicts of law regarding the issues decided in this litigation.**

Under Rule 8.500(a)(1), review may be granted “[w]hen necessary to secure uniformity of decision.” In this case, there are no contrary decisions. In *Yabsley v. Cingular Wireless LLC* (2009) 176 Cal.App.4<sup>th</sup> 1156 (“*Yabsley*”), the Second District Court of Appeal held that SBE regulations provide a safe harbor for retailers who advertise that they will collect sales tax reimbursement on their sales as required by law and regulation. Petitioners herein had relied on a footnote in a decision of the first district Court of Appeal, *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4<sup>th</sup> 924 [20 Cal. Rptr. 3d 485] (“*Krumme*”), wherein the court, without analysis or examination, stated that “our Supreme Court has held that only statutes can create a safe harbor” from allegations of violation of the Unfair Competition Law (“UCL”) and False Advertising Law (“FAL”). (*Ibid.* at p. 940, fn. 5.) In making this statement, the *Krumme* court relied on this court’s decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4<sup>th</sup> 163, 182 [83 Cal. Rptr. 2d 548, 973 P.2d 527] (“*Cel-Tech*”). *Yabsley* correctly noted that *Krumme*’s statement is dicta and unnecessary to its conclusion and nothing in *Cel-Tech* restricts its holding to statutes. (*Yabsley, supra*, 176 Cal.App.4<sup>th</sup> at p. 1167, fn. 5.) Therefore, the *Yabsley* decision is the only decision for which the role of agency regulations is necessary to its decision; thus, further review is not necessary here.

**3. Review is not necessary to settle an important question of law.**

The second criterion in Rule 8.500(b)(1) for granting of review is whether or not review is necessary to settle an important question of law. The *Yabsley* opinion did not hold that SBE regulations create a safe harbor that immunizes retailers of cellular telephones from liability under the FAL for false advertising, as alleged by Petitioner. Instead, the opinion held that retailers who conduct themselves according to the provisions of SBE regulations regarding the collection of sales tax reimbursement were entitled to the safe harbor for lawful conduct recognized in *Cel-Tech*.

Petitioner has never identified any conduct that Cingular supposedly engaged in that violated SBE regulations. Petitioner’s real issue appears to be that the court should have held that Cingular was required to advertise the specific amounts of sales tax reimbursement that it would collect from him rather than just advertising that sales tax reimbursement would be collected at the legal rate. In other words, Petitioner is arguing that the court should have found Cingular liable for not performing conduct it was not required to perform even though it properly acted within the regulation’s actual requirements. The court correctly held that Cingular properly performed the duties imposed on it by law, as interpreted and implemented by the regulation. For that reason, it was entitled to the *Cel-Tech* safe harbor.

In his briefs in the appeals court, Petitioner has not cited authority indicating that anything further was required from Cingular. Thus, the *Yabsley* decision is fully in line with the courts’ previous pronouncements regarding the *Cel-Tech* safe harbor. Review is not necessary as no important question of law is raised in this opinion. The Petition should be denied.

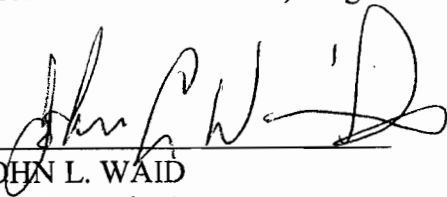
**4. *Yabsley* should not be taken up as a “grant and hold” case pending resolution of *Loeffler v. Target Corporation*.**

There is no need to take *Yabsley* up as a “grant and hold” case pending this court’s action in *Loeffler v. Target Corporation* (Sup. Ct. Case No. S173972). The main holding in *Yabsley*, that SBE regulations may provide a safe harbor from suits under the UCL, is of vital importance in maintaining the uniformity of SBE enforcement of the sales tax. This portion of the decision will not be impacted by this court’s action in *Loeffler*. Any portion of the decision that relied on *Loeffler* can be disapproved should this court reverse that opinion.

For these reasons, SBE urges this Court to deny the Petition for Review. There is no conflict among the circuits regarding this issue, nor is there an important question of law which must be resolved by the Court. Under Rule 8.500, then, this petition should be rejected.

Dated: October 29, 2009

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JOHN L. WAID  
Tax Counsel IV

cc: Mr. Ramon J. Hirsig  
Ms. Kristine Cazadd  
Mr. Randy Ferris  
Mr. Jeffrey Graybill  
Mr. Robert Lambert

**DECLARATION OF SERVICE**

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

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

I declare:

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

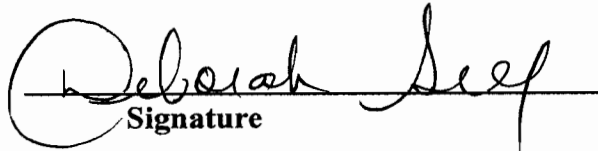
On October 29, 2009, I served the attached **AMICUS CURIAE OPPOSITION TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 29, 2009, at Sacramento, California.

Deborah Self

Declarant

  
Signature

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