NO. S173972

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIMBERLY LOEFFLER, ET AL,

Plaintiffs and Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

Petition for Review of a Decision of the Court of Appeal,
Second Appellate District, Division Three, No. B199287

TARGET'S SUPPLEMENTAL BRIEF

MIRIAM A. VOGEL (SBN 67822)
DAVID F. McDOWELL (SBN 125806
MORRISON & FOERSTER LLP
707 Wilshire Boulevard, Suite 6000
Los Angeles, California 90017-3543
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorneys for Defendant and Respondent,
TARGET CORPORATION

NO. S173972

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIMBERLY LOEFFLER, ET AL,

Plaintiffs and Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

Petition for Review of a Decision of the Court of Appeal,
Second Appellate District, Division Three, No. B199287

TARGET'S SUPPLEMENTAL BRIEF

MIRIAM A. VOGEL (SBN 67822)
DAVID F. McDOWELL (SBN 125806
MORRISON & FOERSTER LLP
707 Wilshire Boulevard, Suite 6000
Los Angeles, California 90017-3543
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorneys for Defendant and Respondent,
TARGET CORPORATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

Revenue & Taxation Code

INTRODUCTION

In short form, here are Target's answers to the Court's current questions:

1. May a cause of action be brought under the UCL or CLRA based on an allegation that a retailer misrepresented that it was collecting an amount as tax reimbursement when in fact the retailer failed to remit the amount to the Board of Equalization? ***Yes, of course, but that isn't this case.***

2. If so, do the allegations in Plaintiffs' second amended complaint state a cause of action under the UCL or CLRA on this theory? ***No.***

3. If not, should Plaintiffs be afforded an opportunity to amend their complaint to state such causes of action? ***No, because they could not truthfully allege any such thing — they have known from the outset that Target has remitted every penny of the sales tax reimbursement collected from its customers to the Board of Equalization.***

Target submits there is nothing in the Court of Appeal opinion to prevent an injured consumer from suing an unscrupulous retailer who purports to charge sales tax reimbursement but fails to remit a like amount to the Board. But as we have said, that isn't this case. Hence, we respectfully submit that this Court should dismiss review as improvidently granted and order republication of the Court of Appeal's opinion, leaving for another day and another case a decision about the propriety of a UCL or CLRA lawsuit against a dishonest retailer.

SUMMARY OF THE PERTINENT FACTS

Plaintiffs' second amended complaint alleges that Target improperly collected sales tax reimbursement from its customers who purchased hot coffee drinks to go — but in none of its iterations did Plaintiffs' pleading ever allege that Target failed to remit the collected sales tax reimbursement to the Board. (AA 1-11, 13-23, 85-114.) The trial court sustained Target's demurrer to the second amended complaint without leave to amend.

On Plaintiffs' appeal, Division Three of the Second Appellate District held that where, as here, the dispute is about whether sales tax reimbursement should have been charged on a particular product, California's Constitution prohibits suits against the retailer, and that the comprehensive statutory system for sales tax refunds and associated sales tax reimbursement refunds do *not* authorize a private cause of action by a customer seeking a refund of sales tax reimbursement. (*Loeffler v. Target Corp.* (2009) 173 Cal.App.4th 1229; Slip Opn., pp. 8-13.) The essence of the Court of Appeal's opinion is that it would undermine the legislative scheme to permit a customer to unilaterally ascertain when excess sales tax had been collected (*id.* at p. 14). Implicit in the Court of the Appeal's opinion is the assumption that it is talking about a retailer that remits its sales tax obligations to the Board.

The opinion says nothing about the situation posed by this Court's current questions about a dishonest retailer who claims to be charging sales tax reimbursement but in fact does not remit the charged amount to the Board. That has never been the point of this case.

LEGAL ARGUMENT

I. PLAINTIFFS HAVE KNOWN FROM THE OUTSET THAT TARGET REMITS EVERY PENNY OF SALES TAX REIMBURSEMENT TO THE STATE.

California's sales tax is an excise tax imposed on retailers for the privilege of selling tangible personal property in this state. (Rev. & Tax. Code, § 6051.)[1] Retailers must file quarterly sales tax returns and make quarterly payments to the state, and are subject to civil and criminal penalties for wrongfully evading sales taxes. (§§ 6451-6459, 7152-7155.) Sales tax is imposed on the seller, not the buyer (*General Electric Co. v. State Board of Equalization* (1952) 111 Cal.App.2d 180, 185), and the seller is authorized to seek sales tax *reimbursement* from the customer. (Civ. Code, § 1656.1, subd. (a).) Until the tax-exempt nature of a particular sale is established by the Board, all gross receipts of a retailer are presumptively subject to the sales tax. (§ 6091.)

It is undisputed that Target has at all relevant times paid all collected sales tax reimbursements to the Board — and, a fortiori, that it obtains no benefit from collecting sales taxes in excess of those required by statute.

Plaintiffs' assertion that Target "has not argued in this case that it has remitted to the State the money it collected from Plaintiffs as sales tax reimbursement" (OB 42, fn. 11) is just plain wrong. This point has been crystal clear from the outset.

---

[1] Undesignated statutory references are to the Revenue and Taxation Code.

First, Plaintiffs did not allege anywhere in any of their complaints that Target had failed to remit to the Board the money it collected as sales tax reimbursement. (AA:1-11, 13-23, 85-95.)

Second, Target's demurrer to Plaintiffs' first amended complaint (filed in May 2006) highlighted Plaintiffs' failure to allege that Target had used the sales tax reimbursement for its own benefit, noting the Plaintiffs could "not make such a claim as sales tax collected in Target stores is merely a pass through to the [Board of Equalization]." (AA:51.) We reiterated the point in our reply in support of our demurrer. (AA:76.) *Plaintiffs' subsequently-filed second amended complaint, the operative pleading,* ***did not allege a failure to remit.***

Third, Target's Respondent's Brief in the Court of Appeal (p. 11) noted Plaintiffs' failure to allege that Target had retained the sales tax reimbursement it collected from its customers.

Fourth, the point was made in Target's Answer to the Attorney General's Court of Appeal amicus brief (pp. 14, 18, fn. 12), where we said it was "undisputed that Target has already paid all sales taxes it collected (including those that, allegedly, were not due) to the state."

Fifth, Target's Answer to Plaintiffs' Petition for Review by this Court (at p. 1) stated quite clearly that "[n]o retailer benefits from charging more sales tax than is actually due because all collected sales taxes are paid to the State Board of Equalization . . . . There is no financial gain for retailers, who do not get to keep any money charged as sales tax."

Sixth, Target's Answer Brief on the Merits repeatedly emphasized the point, asking (pp. 2-3), "What's in this supposed scam for Target?

Nothing. Every penny collected by Target as reimbursement for sales tax appears as exactly that on its books and records, and is regularly paid over to the State Board of Equalization (Plaintiffs do not allege otherwise)." We said the same thing on page 7 ("It is undisputed that Target has at all relevant times paid all collected sales tax reimbursements to the Board — and, *a fortiori*, that it obtains no benefit from collecting sales taxes in excess of those required by statute"), page 18 ("Where (as here) the funds have already been remitted to the state, the consumer's remedy is to complain to the State Board of Equalization"), page 23 ("Where (as here) the funds have already been remitted to the state, consumers who believe they have paid excess sales tax reimbursement may complain to the State Board of Equalization and obtain refunds without the need for litigation"), and again on page 24 ("When a business charges sales tax reimbursement on a presumptively taxable sale and remits the tax to the Board, there is no unscrupulous conduct").

Seventh, we repeated our refrain in Target's Consolidated Answer to Amicus Curiae Briefs filed in this Court, where we said (p. 3) that Plaintiffs, the Attorney General, and Plaintiffs' other amici "ignore the undisputed fact that Target has at all relevant times paid all collected sales tax reimbursements to the Board — and, a fortiori, that it obtains no benefit from collecting sales taxes." We said it again in the same brief (p. 7, fn. 5) in response to Consumer Watchdog's amicus brief, explaining that "every penny of sales tax reimbursement collected is paid to the state . . . ."

Eighth, we said it most recently in our answer to Carmen Herr's Amicus Brief (p. 1), where we emphasized that "a retailer has nothing to gain (but does have customers to lose) if it charges *more* than its competitors — and that, by charging sales tax reimbursement qua sales tax

reimbursement (and reflecting that charge on every receipt), Target creates a record for the State Board of Equalization to audit to make sure Target pays every cent due to the state. What's in it for Target? Nothing." And, finally, on page 4 of that brief, we explained that, even assuming "Target charged sales tax reimbursement on a non-taxable item, there is no benefit to Target — because every penny collected for sales tax reimbursement is paid to the State Board of Equalization. [¶] No one has ever tried to explain why Target would intentionally charge sales tax reimbursement that isn't due. It wouldn't."

Wouldn't you think that if Plaintiffs had *any* evidence to the contrary they would have said so by now? Of course they would, but the point is they cannot truthfully allege that Target failed to pay every penny of sales tax to the Board.

For this reason, a decision by this Court that leave to amend should be granted would do nothing more than delay the inevitable — because Target would answer, then move for summary judgment on the ground that all collected sales tax reimbursement has been paid to the Board (as can be shown by Target's receipts and filings with the Board).

This is not the case contemplated by this Court's current questions.

II. THE REVENUE AND TAXATION CODE AND THE COURT OF APPEAL'S OPINION GOVERN REPUTABLE RETAILERS WHO PAY SALES TAX TO THE BOARD.

Section 6901.5 compels a retailer who has collected *excess* sales tax reimbursement to return the money to the customer who paid it or, if the

customer cannot be identified, to remit the funds to the state.[2] Where (as here) the funds have already been remitted to the state, the consumer's remedy is to complain to the Board of Equalization — which has every reason to act on a legitimate complaint, and no reason at all to ignore it. The Court of Appeal opinion likewise assumes an honest retailer with established record-keeping procedures, sales receipts that reflect sales tax reimbursement charges to customers, and reports filed with the Board (along with sales tax payments) that can be reconciled with the receipts.

None of this has anything to do with the hypothetical situation posed by this Court's current question. If a charlatan opens a widget business, claims to be charging sales tax reimbursement, but fails to set up an account with the Board and pockets the amounts charged as "sales tax reimbursement," the charlatan can be sued six-ways to Sunday — for fraud, violations of the UCL and CLRA, and probably for various criminal offenses. So what?

That's not this case.

---

[2] 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."

III. IN THE CONTEXT OF THIS CASE, THERE IS NO NEED FOR A CONSUMER PROTECTION STATUTE.

In a July 6, 2009 amicus letter in support of review in this case, the Attorney General insisted the Court of Appeal's decision "opens a loophole that would allow *unscrupulous businesses* to take advantage of consumers and collect greater sums from them than the consumers actually owe, free from the worry that they can be held accountable under California's consumer protection statutes and subject to the remedies provided by these laws." (Italics added.) Implicit in the Attorney General's letter was the erroneous assumption that this case involves the situation now posed by this Court's questions — an unscrupulous business that isn't paying its sales tax obligation to the state, and thus is defrauding its customers when it claims to be collecting "sales tax reimbursement." Where (as here) we are dealing with an honest business, there is no wrongful conduct, no fraud, and (significantly) no benefit of any kind to the retailer — who pays every penny collected to the state and thus does not benefit in any way.

A business is unscrupulous when its wrongful conduct gives it an economic advantage, not where (as here) it is compelled to charge *more* for the benefit of a taxing agency, not for itself. When a business charges sales tax reimbursement on a presumptively taxable sale and remits the tax to the Board, there is no unscrupulous conduct. There is no loophole in the consumer protection laws. There is no wrong without a remedy because there is no wrong. Target is not, as the Attorney General suggests, the perpetrator of an illegal scheme. There are no ill-gotten gains for Target to retain. Target has not cheated Plaintiffs or anyone (as Plaintiffs suggest) in any manner. With respect, it appears as though Plaintiffs and the Attorney

General — and now this Court — have in mind some other lawsuit, not this one.[3]

In this case, Plaintiffs' right to complain to the Board about any perceived mistake (such as charging sales tax on hot coffee to go if, in fact, it is not taxable) provides a perfectly adequate remedy. The Board has every reason to respond to consumer complaints and the law presumes that a governmental agency complies with its legislative mandate. (Civ. Code, § 3529; *Board of Permit Appeals v. Central Permit Bureau* (1960) 186 Cal.App.2d 633, 642.)

The State Board of Equalization is the agency charged by the Legislature with administering and maintaining the integrity and uniformity of the sales tax system. (§ 6001 et seq.; *Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal.2d 252, 255-256.) The Board has the expertise to apply the relatively artificial and self-contained concepts spelled out in the Revenue and Taxation Code, and there is no reason to

---

[3] In their July 10, 2009 amicus letter in support of review (p. 6), Michael McClain, Avi Feigenblatt and Gregory Fisher, plaintiffs in a similar case pending in the trial court (*McClain v. Sav-On Drugs, et al.*, Los Angeles Superior Court Case No. BC 325272), offer essentially the same conclusory assertions as those made by the Attorney General, adding a claim that, by "collecting unlawful sales tax reimbursement on non-taxable purchases, dishonest retailers *can increase their profit margins by 8.25%*, not only harming consumers but also *giving themselves an unfair advantage over honest retailers* . . . ." (Italics added.) They do not explain how it is competitively advantageous for a retailer to charge *more* than its competitors, nor do they explain how "dishonest retailers increase their profit margins" by any amount when every penny charged for sales tax reimbursement is directly related to another penny paid to the state to satisfy the retailer's tax obligation. There is no "profit."

assume that, given the opportunity to respond to a complaint, it would do nothing.

On the real facts of this case, there is no unlawful, unfair or fraudulent business act or practice, and no need for a remedy under the UCL, the CLRA, or any other statute or common law cause of action. (*Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal.App.4th 875, 884 [where the conduct alleged is not illegal or wrongful, there is no claim under the UCL]; cf. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561.)

Not to put too fine a point on it, but the *raison d'être* of this lawsuit and others like it is attorneys fees.[4] Target recognizes this Court's general support of legitimate UCL and CLRA actions but suggests this case is nothing of the kind. To the contrary, this is a case in which the trial court and Court of Appeal saw *no* beneficial purpose, only a substantial danger of injustice where a defendant bound to follow the law was sued by two people who paid sales tax reimbursement on allegedly exempt drinks. Since Target has done nothing deserving of punishment and since the plaintiffs have essentially nothing to gain even if they win, the only possible beneficiaries of this lawsuit are the plaintiffs' lawyers.

As this Court put it in the context of a class action in which the recovery to the individuals could at best be *de minimus*, "when the

[4] The two grant and holds pending before this Court, *Yabsley v. Cingular Wireless, LLC*, S176146, and *Apple v. Superior Court (Herr)*, S209295, are factually indistinguishable from *Loeffler v. Target* vis-à-vis the new issue raised by the Court's request for supplemental briefing.

individual's interests are no longer served by group action, the principal — if not the sole — beneficiary then becomes the class action attorney. To allow this is 'to sacrifice the goal for the going,' burdening if not abusing our crowded courts with actions lacking proper purpose." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 386; and see *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

CONCLUSION

For all the reasons explained above, Target submits that this lawsuit is entirely lacking in merit, that the trial court correctly sustained Target's demurrers, that Plaintiffs could not truthfully amend to allege that Target has failed to remit its sales tax obligations to the Board of Equalization, that the Court of Appeal opinion is correct, and that this Court should dismiss review as improvidently granted and order the republication of the Court of Appeal opinion.

Dated: January 10, 2014

Respectfully submitted,

Morrison & Foerster LLP

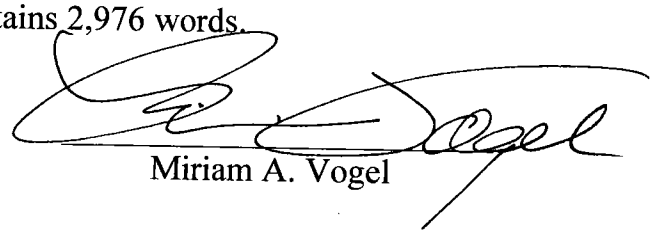
By: _____
Miriam A. Vogel

Attorneys for Defendant and Respondent,
Target Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the computer program used to prepare this brief, counsel certifies that the text of this brief (including footnotes) was produced using 13 point Roman type and contains 2,976 words.

Dated: January 10, 2014



Miriam A. Vogel

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 707 Wilshire Boulevard, Los Angeles, California 90071-3543. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on January 10, 2014, I served a copy of:

TARGET'S SUPPLEMENTAL BRIEF

BY U.S. MAIL [Code Civ. Proc sec. 1013(a)] by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 707 Wilshire Boulevard, Suite 6000, Los Angeles, California 90017-3543 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document described above will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Please see attached Service List.

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

Executed at Los Angeles, California, January 10, 2014.

C. Bibeau
(typed)

C Bibeau
(signature)

SERVICE LIST

Loeffler. v. Target Corporation
California Supreme Court Case No. S173972

Joseph J. M. Lange Lange & Koncius, LLP 222 North Sepulveda Boulevard Suite 1560 El Segundo, CA 90245	*Attorneys for Plaintiffs and Appellants* Kimberly Loeffler, et al. Via U.S. mail
Jeffrey Alan Koncius Kiesel & Larson, LLP 8648 Wilshire Boulevard Beverly Hills, CA 90211	*Attorneys for Plaintiffs and Appellants* Kimberly Loeffler, et al. Via U.S. mail
Leslie A. Bailey Arthur H. Bryant Public Justice, P.C. 555 12th Street, Suite 1230 Oakland, CA 94607	*Attorneys for Plaintiffs and Appellants* Kimberly Loeffler, et al. Via U.S. mail
Benjamin Israel Siminou Thorsnes Bartolotta McGuire LLP 2550 Fifth Avenue, 11th Floor San Diego, CA 92103	*Amicus Curiae* Carmen Herr, Heidi Spurgin, Mark Hegarty, Joseph Thompson Via U.S. mail
Phillip Jon Eskenazi Hunton & Williams, LLP 550 W. Hope Street, Suite 2000 Los Angeles, CA 90071	*Amicus Curiae* Albertson's, Inc. Via U.S. mail
J. Bruce Henderson Attorney at Law 4294 Kendall Street San Diego, CA 92109	*Amicus Curiae* William T. Bagley Via U.S. mail
Barry Dion Keene Attorney at Law 1047 - 56th Street Sacramento, CA 95819	*Amicus Curiae* Barry Dion Keene Via U.S. mail

La1207611

SERVICE LIST

Loeffler. v. Target Corporation
California Supreme Court Case No. S173972

John Lee Waid California State Board of Equalization 450 N Street, MIC: 82 Sacramento, CA 95814	*Amicus Curiae* State Board of Equalization Via U.S. mail
Sharon J. Arkin The Arkin Law Firm 333 S. Grand Avenue, 25th Floor Los Angeles, CA 90012	*Amicus Curiae* Consumer Attorneys of California Via U.S. mail
Pamela Pressley Foundation for Taxpayer & Consumer Rights 1750 Ocean Park Boulevard, Suite 200 Santa Monica, CA 90405	*Amici Curiae* Consumer Watchdog, Foundation for Taxpayer & Consumer Rights, National Association of Consumer Advocates, Public Good Via U.S. mail
Richard Thomas Williams Holland & Knight, LLP 633 West Fifth Street, 21st Floor Los Angeles, CA 90013	*Amici Curiae* CVS Caremark Corporation, CVS Pharmacy, Inc. Via U.S. mail
Andrew Eugene Paris Alston & Bird, LLP 333 S. Hope Street, 16th Floor Los Angeles, CA 90071	*Amicus Curiae* DIRECTV, Inc. Via U.S. mail
Thomas Alistair Segal The Kick Law Firm, APC 201 Wilshire Boulevard, Suite 350 Santa Monica, CA 90401	*Amici Curiae* Avi Feigenblatt, Gregory Fisher and Michael Mcclain Via U.S. mail

SERVICE LIST

Loeffler. v. Target Corporation
California Supreme Court Case No. S173972

Taras Peter Kihiczak The Kick Law Firm, APC 900 Wilshire Boulevard, Suite 230 Los Angeles, CA 90017	*Amicus Curiae* Michael McClain Via U.S. mail
Albert Douglas Mastroianni Mastoianni Law Firm 633 West Fifth Street, 28th Floor Los Angeles, CA 90013	*Amicus Curiae* Jason Frisch Via U.S. mail
Alexandra Robert Gordon Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102	*Amicus Curiae* Kamala Harris Via U.S. mail
Joyce E. Hee Office of the Attorney General 1515 Clay Street, Suite 2000 P.O. Box 70550 Oakland, CA 94612	*Amicus Curiae* Kamala Harris Via U.S. mail
Albert Norman Shelden Office of the Attorney General 110 West "A" Street, Suite 1100 San Diego, CA 92101	*Amicus Curiae* Kamala Harris Via U.S. mail
Frederick W. Kosmo Wilson Turner Kosmo LLP 550 West "C" Street, Suite 1050 San Diego, CA 92101	*Amicus Curiae* PETCO Animal Supplies Stores, Inc. Via U.S. mail
Theresa Osterman Stevenson Wilson Turner Kosmo LLP 550 West "C" Street, Suite 1050 San Diego, CA 92101	*Amicus Curiae* PETCO Animal Supplies Stores, Inc. Via U.S. mail

SERVICE LIST

Loeffler. v. Target Corporation
California Supreme Court Case No. S173972

Judith Esther Posner Reed Smith, LLP 355 S. Grand Avenue, Suite 2900 Los Angeles, CA 90012	*Amicus Curiae* Rite Aid Corporation Via U.S. mail
Margaret Anne Grignon Reed Smith, LLP 355 S. Grand Avenue, Suite 2900 Los Angeles, CA 90071	*Attorneys for Amicus Curiae* Walgreen Company Via U.S. mail
Clerk of the Court California State Court of Appeal Second Appellate District Division Three 300 South Spring Street, 2nd Floor North Tower Los Angeles, CA 90013-1213	Via U.S. mail Four copies
Clerk of the Court Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012 Attn: The Honorable Michael L. Stern	Via U.S. mail