PUBLIC JUSTICE

January 13, 2014

Hon. Tani Cantil-Sakauye, Chief Justice
Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Loeffler, et al. v. Target Corporation*
Supreme Court No. S173972

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to the Court's order of December 16, 2013, Plaintiffs-Appellants respectfully submit this letter brief to address the Court's questions about causes of action under the UCL (*see* Bus. & Prof. Code, § 17200 et seq.) and CLRA (*see* Civ. Code, § 1750 et seq.) based on an allegation that a retailer misrepresented that it was imposing a legitimate tax reimbursement charge.

I. A cause of action may be brought under the UCL and CLRA based on an allegation that a retailer imposed a tax reimbursement charge when in fact the sale was tax-exempt.

A. This allegation establishes a cause of action under the UCL's "fraudulent" prong as well as several of the CLRA's proscribed "misrepresentation" practices. A retailer that imposes a sales tax reimbursement charge makes two representations: (1) that the sale is subject to sales tax (*i.e.*, the retailer is *legally authorized* to charge that amount for tax reimbursement because it is *legally required* to pay that amount to the Board); and (2) that the retailer *will* pay that amount to the Board.

If the sale is not taxable, then the first representation is false, and a consumer who pays the reimbursement charge has a cause of action for fraud under the UCL and misrepresentation under the CLRA. First, by imposing a tax reimbursement charge and listing it as "tax" on a sales receipt, a retailer makes an affirmative representation that is likely to lead a reasonable consumer to believe that the sale is taxable under law. A business practice is "fraudulent" under the UCL if "members of the public are likely to be deceived." *Daugherty v. Am. Honda Motor Co., Inc.* (2006) 144

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Cal.App.4th 824, 838, 51 Cal.Rptr.3d 118; *see also McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471, 49 Cal.Rptr.3d 227 (UCL fraud cause of action "may be based on representations to the public which are untrue" or statements that "may be accurate on some level, but will nonetheless tend to mislead or deceive[,] . . . the consumer, such as by failure to disclose other relevant information"). CLRA misrepresentation claims are governed by the same "reasonable consumer" test. *See In re Sony PS3 "Other OS" Litig.* (9th Cir. Jan. 6, 2014), No. 11-18066, 2014 WL 31217 at * 2. For example, the retailer is "[r]epresenting" that the transaction "confers or involves" the retailer's "right[]" to charge tax reimbursement (and "obligation[]" to pay sales tax) on a particular good when there is in fact no such right or obligation. *See* Cal. Civ. Code § 1770(a)(14). Thus, the first element of a UCL fraud or CLRA misrepresentation cause of action is satisfied.

Second, a consumer who pays the charge based on the representation that the sale was taxable has suffered injury, satisfying the second element of a UCL and CLRA claim. *See Kwikset Corp. v. Super. Ct.* (2011) 51 Cal.4th 310, 327, 120 Cal.Rptr.3d 741, 755 (for fraud cause of action under the UCL, plaintiff "need only allege economic injury arising from [defendant's] misrepresentations"); *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 641, 88 Cal.Rptr.3d 859 ("'Any consumer who suffers any damage as a result of the use . . . by any person of a . . . practice declared to be unlawful by Section 1770 may bring an action' under the CLRA.") (quoting Civ. Code § 1780(a)).

If the retailer not only imposes a tax reimbursement charge on a tax-exempt sale but also fails to remit the amount to the Board (the scenario in the Court's first question), then that conduct is likewise fraudulent. However, as explained in Point II below, it is not necessary to allege that the retailer failed to remit the money to the Board in order to state a cause of action under the UCL and CLRA.[1]

B. This allegation establishes a cause of action under the UCL's "unlawful" prong and the CLRA's "unconscionable contract term" provision. Separate from any alleged misrepresentation, if the Legislature has decreed that sales of a particular item are exempt from tax, then a retailer's imposition of a tax reimbursement charge on the sale of that item violates the Tax Code and its accompanying regulations.[2]

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[1] While not at issue here, there are other ways in which a valid UCL or CLRA cause of action could arise from a retailer's imposition of tax reimbursement charges. For example, even if a sale *is* taxable and the retailer *does* remit, a consumer could claim fraud and misrepresentation if the retailer advertised that consumers would *not* be charged for "tax" and then charged them anyway. *See* Herr *Amicus* Brief 2-3.

[2] *See* Appellants' Response to Target's *Amici* 23-27 (discussing the specific tax exemption and regulations at issue in this case); *id.* at 26-27 (explaining that imposing tax

It also violates Code Civ. P. § 1656.1(b), which conditions a retailer's authority to seek reimbursement on the assumption that the sale is actually "subject to sales tax." The unlawful prong of the UCL "borrows" these violations and "treats them as unlawful practices that the unfair competition law makes independently actionable." *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196, 292 P.3d 871, 878 (quotations omitted). If a practice is "unlawful" under the UCL, it likely violates section (a)(14) of the CLRA as well. *See Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1023, 112 Cal.Rptr.3d 607. Likewise, if conduct is unlawful under the CLRA's proscribed practices, that violation can also serve as the predicate for UCL unlawfulness claim. *See Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1383, 108 Cal.Rptr.3d 669.

Additionally, section (a)(19) of the CLRA is violated. Under Code Civ. P. § 1656.1, the agreement of sale between a retailer and customer—normally the receipt—is a contract. By adding a false tax reimbursement charge to a sale that is tax-exempt, a retailer is effectively "inserting an unconscionable provision" into a contract, which is proscribed by Cal. Civ. Code § 1770(a)(19).

In sum, a cause of action may be brought under the UCL's unlawful prong and the CLRA based on the allegation that a retailer imposed a tax reimbursement charge on a tax-exempt sale.

II. It is not necessary to allege that the retailer failed to remit to the Board the money it acquires by imposing false sales tax reimbursement charges in order to state a cause of action under the UCL and CLRA.

While the Court's questions focus on the allegation that a retailer failed to remit the money to the Board, that allegation is not necessary for a valid cause of action under the consumer protection statutes. Furthermore, the mere fact that a retailer remits the money to the Board does not show that the charges were unintentional or that the retailer received no benefit by imposing them.

A. Neither profit nor intentional conduct on the part of the defendant is required for a cause of action under the UCL or CLRA. It is black-letter law that a plaintiff need not allege that the defendant reaped a profit to state a valid cause of action under the UCL. As this Court has made clear, "the economic injury that an unfair business practice occasions may often involve a loss by the plaintiff without any corresponding gain by the defendant." *Kwikset*, 51 Cal.4th at 336. Even eligibility for restitution—which is somewhat more onerous than standing—requires only that "money or property have been lost by a plaintiff, on the one hand, and that it have been *acquired*

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reimbursement charges on exempt sales undermines the legislative purpose of the exemptions, which is to provide relief to consumers—not retailers).

by a defendant, on the other," but not that the defendant *retain* the money it acquired. *Id.* (quoting Bus. & Prof. Code § 17203) (emphasis added). Like the UCL, liability under the CLRA simply requires that the plaintiff suffered some sort of injury as a result of the defendant's actions—not that the defendant profited. *See Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 640, 88 Cal.Rptr.3d 859 (CLRA's standing requirement that consumer have suffered "any damage" resulting from deceptive practices is satisfied even by allegation of transaction costs or opportunity costs to the consumer).

Indeed, in most cases, a consumer would have no way of knowing at the outset of a case what the retailer did with the money it acquired by imposing sales tax reimbursement charges and would be unable to allege a failure to remit in the initial complaint. This is true here as well.

Nor need a plaintiff allege that the defendant's conduct was intentional. "The UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 181, 96 Cal.Rptr.2d 518). Likewise, unless a specific proscribed practice under the CLRA expressly requires intent, it is not required. *Compare* Civ. Code §§ 1770(a)(2), (a)(3), (a)(14), and (a)(19) (no mention of intent) *with, e.g., id.* § (a)(9) ("[a]dvertising goods or services with intent not to sell them as advertised").

B. A retailer could profit from intentionally disregarding tax exemptions in order to save on overhead costs. While no discovery has taken place in this case, Target's briefing before this Court sheds light on its reasons for its conduct. Target has not denied that it imposes tax reimbursement charges on tax-exempt sales. Instead, it maintains that it simply charges its customers for everything that *might* be taxable when it believes doing so will benefit it financially. According to Target, it is "forced" to ignore the tax exemptions enacted by the Legislature in order to save itself the "overhead" costs of complying with the tax laws. *See* Target's Answer to *Amicus* Briefs 7-9 (complaining that the tax regulations are too complicated for it to follow and explaining that the "attendant expense" of compliance would be "obvious"); *id.* at 8 (arguing that retailers are not "obligated to claim" tax exemptions when doing so would mean the retailer must incur the "cost" of "keeping . . . records"); Target's Opening Brief 27 n. 21 (arguing that there is no cause of action for an "unfair" practice under the UCL because the only "unfairness" is in the "incomprehensible morass of the [Tax] Code," which "force retailers" to charge tax reimbursement on everything without regard to exemptions); *id.* at 29 n. 22 ("Target charges sales tax on hot coffee to go because everything Target sells is presumptively taxable and the regulations on this specific item are far from a model of clarity."); *see also* Appellants' Answer to Target's *Amici* 45-47 (responding to arguments that requiring retailers to comply with the law will harm consumers by driving prices up).

Of course, the practical effect of Target's decision to disregard tax exemptions is to shift the financial burden of its legal noncompliance to its customers. *Id.* at 5.[3]

In addition to the incentive of saving on overhead costs, a retailer can reduce its own tax burden by charging sales tax reimbursement on as many sales as possible. *See* Appellants' Reply Brief 25 n.7. In sum, it would be a mistake to conclude that a retailer's act of charging for tax reimbursement was unintentional, or that it did not benefit, based solely on evidence (not present here) that the retailer remitted the money it took from customers to the Board.

C. A retailer cannot transform an unlawful tax reimbursement charge into a lawful one by remitting the amount to the Board. Regardless of a retailer's reasons for imposing false charges, it stands to reason that where the Legislature has deemed certain items to be free from sales tax, a retailer cannot transform a tax-exempt sale into a taxable one—or change an unlawful charge into a legitimate tax reimbursement charge—simply by turning over its ill-gotten gains to the Board. As the Former State Legislators explain in their *Amicus* Brief (at 5-6):

> That [a] defendant may not retain for itself the wrongly charged 'sales tax reimbursement,' does not shield it from liability to its customers for having acted illegally in making them pay the 'reimbursement' in advance for an imaginary tax, one that is not owed. Whether the retailer . . . keep[s] these reimbursement charges for itself or turns them over to the state and merely reaps the more modest savings of not having to . . . account for 'exempt' from 'non-exempt items,' is beside the point. . . . The touchstone for redress under the[] consumer protection laws is 'injury' to the consumer, not benefit or profit to the business engaged in the unlawful conduct.

See also Attorney General *Amicus* Brief 20 n.8. Of course, if Target *has* paid the unlawfully obtained funds to the Board, then it can seek a refund of any tax overpayment by filing a refund claim with the Board. Appellants' Opening Brief 9; Reply 19-20. But the question of whether Target kept the money it acquired from customers or passed it on to the Board is not relevant to whether Target is liable to Plaintiffs under the UCL or CLRA.

Finally, regardless of the specific allegations in this case, it must be remembered that the Court of Appeal's decision is so sweeping that it immunizes retailers for violating

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[3] Notwithstanding Target's attempt to mislead the Court about the supposed complexity of the tax regulations by quoting nearly two pages of irrelevant regulatory text, the regulation that is relevant in this case is crystal clear. *See* Appellants' Reply Brief 27-28.

consumer protection laws as long as they claim that the allegedly wrongful charge was for tax reimbursement—regardless of how much the retailer charges and regardless of what it does with the money it acquires.

III. While Plaintiffs' second amended complaint (SAC) does not allege that Target failed to remit the amounts it acquired to the Board, it is not necessary to amend to add this allegation because the SAC currently states causes of action under both the UCL and CLRA.

Plaintiffs' SAC does not allege that Target failed to remit to the Board the money it acquired by imposing fake sales tax reimbursement charges. Because the complaint was dismissed on the grounds at issue in this appeal before any discovery was conducted, Plaintiffs do not have a sufficient factual basis for such an allegation. More importantly, as explained above, it is not necessary to allege that Target failed to remit the amounts to the Board in order to state a valid cause of action under the UCL and CLRA.[4]

The SAC alleges that Target "falsely . . . represented to . . . the public that it had the legal right to charge [sales tax reimbursement]," and that Plaintiffs suffered monetary loss as a result. AA088. Based on this allegation, the SAC states a cause of action for unlawful, fraudulent, and unfair business practices under the UCL.[5] AA090. This allegation also supports Plaintiffs' causes of action under the CLRA, Civ. Code. §§ 1770(a)(2), (a)(3), (a)(14), & (a)(19). AA091-92.

Plaintiffs have stated valid causes of action under the UCL and CLRA based on their allegation that Target imposed false tax reimbursement charges and represented that sales were taxable when they were not. There is no factual record on any other issue.

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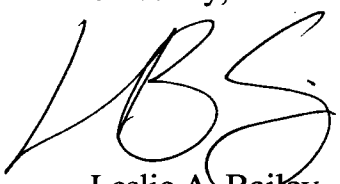
[4] The SAC does state that, "[i]n the event Defendant retained these monies it unjustly enriched itself at the expense of Plaintiffs, other Class members and the general public . . . ." AA090 at ¶ 25. The SAC also "seek[s] restitution of any monies wrongfully acquired *or* retained by any of the Defendants and disgorgement of their ill-gotten gains obtained by means of their unfair practices." AA091 at ¶ 27. But Plaintiffs have never premised their claims against Target on an assumption that Target kept the money.

[5] As the Court recently observed, "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled." *Yanting Zhang v. Super. Ct.* (2013) 57 Cal. 4th 364, 380, 159 Cal.Rptr.3d 672 (listing several alternative tests). In light of this observation and the concerns articulated in Plaintiffs' Response to Target's *Amicus* Briefs (at 38-39), Plaintiffs respectfully suggest that this appeal would be an inappropriate vehicle for determining the proper standard since the record is far from developed in this regard.

Therefore, if the Court resolves the issue in this appeal by holding that Target is not immune from liability under the State Constitution and the Tax Code, it should remand with instructions to permit the case to proceed on the merits. If discovery reveals that Target did indeed fail to remit to the Board the amounts it took from consumers, and this fact would support additional causes of action, Plaintiffs will request leave to amend the complaint at that time.

Sincerely,



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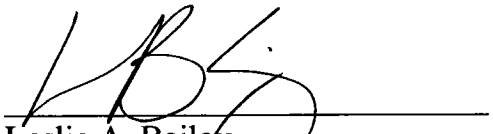
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Plaintiffs/Appellants is produced using 13-point Roman type including footnotes and contains approximately 2,788 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 13, 2014

By 

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PROOF OF SERVICE

I, Kathleen Morris, declare as follows:

I am employed in the County of Alameda, State of California. I am over the age of eighteen and not a party to the within action. My business address is 555 12th Street, Suite 1230, Oakland, California, 94607.

On January 13, 2014, I served the foregoing Supplemental Brief on the interested parties in this action as follows:

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[X] BY MAIL: By placing a true copy thereof enclosed in a sealed envelope addressed as above, with postage thereon fully prepaid in the United States mail, at Oakland, California. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, it would be deposited with the US Postal Service on the same day with postage thereon fully prepaid at Oakland, California, 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 the date of deposit for mailing contained in this affidavit. CCP § 1013a(3).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 13, 2014, at Oakland, California.

Kathleen Morris