CASE NO. S241471

IN THE SUPREME COURT OF CALIFORNIA

Michael McClain, et al.,
Plaintiffs and Appellants,

v.

Sav-On Drugs, et al.,
Defendants and Respondents.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division 2
Appeal Nos. B265011 and B2655029
On Appeal from the Los Angeles County Superior Court,
Case Nos. BC325272 and BC327216
Honorable John Shepard Wiley, Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND ERRATA BRIEF OF AMICUS CURIAE LARRY LITTLEJOHN

Daniel Berko (Bar No. 94912)
LAW OFFICE OF DANIEL BERKO
819 Eddy Street
San Francisco, CA 94109
(415) 771-6174

Attorney for Larry Littlejohn

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to California Rules of Court, Rule 8.520, LARRY LITTEJOHN who currently has pending an appeal of a judgment sustaining without leave to amend a complaint seeking to compel COSTCO WHOLESALE CORPORATION to utilize the remedy authorized by *Javor v. State Board of Equalization* (1974) 12 Cal.3d 390 (*Javor)* and *Loeffler v. Target Stores* (2014) 588 Cal.4th 1081 (known as the *Javor* remedy) to obtain a refund of sales tax reimbursement he paid COSTCO WHOLESALE CORPORATION seeks permission to file an amicus brief. His complaint also seeks to enforce a written contract he had with COSTCO which he alleged prevented it from collecting sales tax reimbursement from him unless sales tax was due to the State of California from COSTCO upon sale of the product for which it sought sales tax reimbursement (The complaint also seeks other relief from ABBOTT LABORATORIES.) His case is before the First District Court of Appeal, Division Three and is set for oral argument on April 25, 2018.

LITTLEJOHN has an interest in the current case being decided correctly as a result of his case being on file and yet to be determined. LITTLEJOHN is filing this brief to bring to the court's attention several legal issues and arguments not adequately addressed in any filed brief and to bring to the court's attention the impact of any decision it makes. LITTLEJOHN'S case also has substantially different facts than the case at bench and he respectfully seeks to ensure that this court has considered how its ruling may effect persons such as he.

No person contributed any monetary contribution to this brief other than LITTLEJOHN'S counsel.

DATED: April 16, 2018

LAW OFFICE OF DANIEL BERKO

Daniel Berko
Attorney for Amicus Curiae
Larry Littlejohn

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In both *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081 (*Loeffler"*) and *Javor v. State Board of Equalization* (1974)12 Cal.3d 390 (*Javor) t*he California Supreme Court made clear that:

""The integrity of the sales tax requires not only that the retailers not be unjustly enriched [citation] but also that the state not be similarly unjustly enriched.""

Loeffler at p. 1116 quoting *Javor* at p. 802.

It also noted that:

"[I]n the context of a refund claim filed by a taxpayer, the Board would be able to determine whether the state should refund excess tax to the taxpayer (conditioned on refund to customers) in order to avoid unjust enrichment of the ***state.***

Loeffler, supra, at p. 1130 (Emp. in orig.)

"[T]he Board cannot use the use the refund procedure to abdicate its responsibility to the consumer, particularly where the Board stands to unjustly profit under such circumstances.."

Loeffler at p. 1114 citing *Javor* at p. 800 which was discussing *Decorative Carpets* as so holding.)

There is nothing in *Loeffler* that supports the state's current position that it is only unjustly enriched when it has decided in advance that the money it has possession of was not owed. It is a simple and undeniable fact that this court in *Loeffler* made clear that **whether** the state was unjustly enriched would be determined or ascertained in the refund proceeding compelled by the *Javor* remedy.

"Finally, we have recognized that in certain circumstances a consumer may bring an action to require a taxpayer to seek a refund from the Board, **a proceeding in which the Board would ascertain whether excess reimbursement had been charged** and, assuming any excess had

been remitted by the taxpayer to the state, issue a refund to the taxpayer conditioned on its, in turn, making a refund to the consumer".

Loeffler at p. 1103-1104 (emp. added.)

The regulation reasonably may be interpreted to refer to our recognition that, when neither the Board nor the taxpayer has an interest in "ascertaining" **whether** excess reimbursement has been charged, in limited circumstances consumers may file an action to require the taxpayer to seek a refund (see *Javor, supra, 12 Cal.3d 790*), leading to a refund to the taxpayer conditioned on an appropriate refund to consumers. (See *Decorative Carpets, supra, 58 Cal.2d 252.*)

Loeffler at p. 1122-1123 (emp. added.)

In *Loeffler,* where the taxability question was clearly in dispute, the defendant retailers argued that:

"[P]laintiffs may do no more than was authorized in our *Javor* decision (see *Javor, supra, 12 Cal.3d 790*), in which we permitted consumers to bring an action to require retailers to seek a sales tax refund from the Board."

Loeffler at p. 1097 citing Target's position.

This was the very position the *Loeffler* majority adopted.

""Concerns of fairness require the courts to ensure the taxing authority is not unjustly enriched at the expense of persons left without a remedy""

Sipple v. City of Hollywood (2014) 225 Cal.App.4th 349, 360, (review denied July 23, 2014, just 75 days after *Loeffler* was decided.) quoting *Tracfone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1365

Is it not exasperating to write an opinion in which the court multiple times states that **whether** the product is taxable will be determined in the

refund proceeding compelled by the *Javor* remedy, and yet the court will need to state that yet again in this case?

In fact, in *Loeffler* one cannot get past the second paragraph before the majority states "the tax code provides the exclusive remedy by which plaintiff's **dispute** over the taxability of a retail sale may be resolved." *Loeffler,* at p. 1092 (emp. added.)

In addition, anyone who actually reads the *Loeffler* majority decision with any care cannot mistake that the reason why the State Board of Equalization/California Department of Tax and Fee Administration ("SBE/CDTFA") gets to "ascertain" the "taxability question" before a court can determine the "taxability question" is because of its expertise in ascertaining the correct answer.[1] But if the decision has to be made before the lawsuit is filed, as the state argues, why is that expertise needed in the refund proceeding? A ruling that the taxability question must have been decided in favor of non-taxability as a condition precedent to the lawsuit undermines a central tenet of the *Loeffler* decision that it is the need for CDFTA'S expertise in resolving the issue raised by the consumers' claim that underlies the rule that it must first be given a chance to rule in the first instance on the dispute raised by the consumers' claim. Indeed, a detour to and through the CDFTA would be pointless as the trial court would know for certain how it would rule on the taxability issue. And no expertise is

[1] The taxability question, whether a particular sale is subject to or is exempt from sales tax, is exceedingly closely regulated, complex, and highly technical. A comprehensive administrative scheme is provided to resolve these and other tax questions and to govern disputes between the taxpayer and the Board. Under these administrative procedures, it is for the Board in the first instance to interpret and administer an intensely detailed and fact-specific sales tax system governing an enormous universe of transactions. Administrative procedures must be exhausted before the taxpayer may resort to court. *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103

needed to determine amounts due. If the Board has already issued a decision that a product is not taxable, the amount due is nothing but a mathematical calculation which multiplies that items sold by the tax paid.

Since the decision must be made in the refund proceeding, it is not possible, as the state argues in this case, that the decision has to be preordained. Indeed, it is completely inconsistent with *Loeffler* to argue that the state must have ascertained the refund is due before the remedy may be applied because it is when the state has no interest or incentive in allowing the refund that the *Javor* remedy can be utilized. This court stated:

> Of significance to the present case, we also recognized that under existing procedures, "the retailer is the only one who can obtain a refund from the Board," but observed that because the retailer cannot retain the excess tax amount for itself, but must undertake some procedure to make refunds to customers, it may have no particular interest in pursuing a tax refund.
>
> (*Javor, supra,* 12 Cal.3d at p. 801, 117 Cal.Rptr. 305, 527 P.2d 1153.)
>
> Similarly, the ***Board*** may lack incentive to examine returns on its own initiative to determine whether retailers have remitted excess taxes to it—that is, whether taxes have been ***overpaid.*** (*Ibid.*) We observed that the Board "is very likely to become enriched at the expense of the customer to whom the amount of the excessive tax actually belongs."
>
> *Loeffler* at p. 1115 (emp. in orig. citing *Javor* at p. 802)

Besides the fact the state's vital interest in the integrity of the sales tax would make it inconceivable for it to have "ascertained" that the tax was not owed and yet have no incentive to see the money refunded to the rightful owner, it would be pointless for the Board to examine returns... "to determine **whether** retailers have remitted excess taxes to it" if it has already determined that the tax was not owed.

In this case, this court must consider and answer the showing required of consumers to demonstrate their entitlement to the *Javor* remedy.

"The integrity of the tax system and avoidance of unjust enrichment, possibly of the retailer, but more probably of the state, in certain circumstances may support a *Javor*-type remedy for consumers. Plaintiffs, however, declined to pursue such a remedy, and we need not consider the exact showing required of consumers to demonstrate their entitlement to the *Javor* remedy."

Loeffler at p. 1133-34.

There are three possibilities.

First, all consumers who file a lawsuit seeking the *Javor* remedy are entitled to have taxability determined in a compelled refund proceeding. This is not at all consistent with the majority opinion because it states that the remedy is available in "certain" circumstances or "limited" circumstances. No one would use the words "certain" or "limited" if the word "all" was intended.

Second, - that the remedy is only available in the "unique" circumstances found in *Javor* - that taxability was determined by regulation or statute in advance is equally inconsistent with *Loeffler*. That is the view advanced by the state.[2]

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[2] For example, in briefing in the Court of Appeal in this case, the State said the *Javor* remedy is "unique" to *Javor* since the remedy is available "only in 'unique' circumstances' meaning 'being the only one' 'without a like or equal.'" (See SBE Brief on Appeal at p. 37.) Obviously, if the remedy is unique to *Javor* and that is the "only one" the right to the remedy will never reoccur or be utilized again. Later in the same brief, (p.38, f.n. 12) the SBE now CDFTA says the remedy is available "only rarely, **if ever**" and it is only because it can't say "**never**" in light of *Loeffler* that it says *"rarely, **if ever.**"* It must also be borne in mind that the State opposed the *Javor* remedy in the Supreme Court case of *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, ("Javor 1") opposed the refund yet again in *Javor v. State Bd. Of Equalization* (1977) 73 Cal.App.3d 939 [2]and argued in its amicus briefs in *Loeffler* that *Javor* had been overruled by *Woosley v. State*

This possibility is no more consistent with *Loeffler* than the first possibility for four reasons. First, as noted above, **whether** the product is taxable is determined in the refund proceeding. Second, also stated above, if the state has no incentive or interest in providing a refund, it is not possible that the SBE/CDTFA has already passed a regulation that the product is not taxable. Third, no disrespect intended, but surely this court would not use the words "certain" or "limited" if it meant "unique." Indeed, the state proves our point because it points out that if the remedy is only available in "unique" circumstances and it was already found available in *Javor* then it cannot be available again because it would no longer be found only in unique circumstances. Just as a remedy allowed in "all" circumstances is clearly not intended by the use of "certain" and "limited" equally a remedy only available in "unique" circumstances is not intended where the court says "certain" or "limited" circumstances.

That leaves the only commonsense answer being that the trial court considers the facts of the case before it to determine whether the consumers have made a sufficient showing to allow the court to order the retailer to proceed with a refund application. This is no different than proceedings which happen dozens of times a day in California courts where trial courts determine whether or not to issue a preliminary injunction or other provisional remedies.

The trial court should consider the views of the SBE/CDTFA, the consumers, and the retailers and use discretion to determine whether to allow the consumers to compel a refund proceeding to have the

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of California (1992) 3 Cal.4th 1992 (See SBE amicus brief in *Loeffler* at 2012 WL 1866435 at p. 38) claiming that this court's decision in *Woolsley* was "directly counter" to its holding in *Javor* 1 and effectively overruled it.

SBE/CDTFA "determine" whether the product is subject to tax. This is in no way a "determination" by the trial court that the product is or is not taxable, nor does the trial court "ascertain" whether the product is taxable, but only whether the consumers have shown that they should be allowed to compel a retailer to seek the refund. The trial court also would be able to impose appropriate conditions just as in any equitable proceeding.

Trial courts use this procedure on many occasions including whether or not to allow a *Lis Pendens* to be expunged, Code of Civil Procedure § 405.30 *et seq*. Courts also often make preliminary determinations as to whether or not an attachment should issue. See Code of Civil Procedure § 484.010-484.110 (plaintiff must prove the "probable validity of its claim"- CCP § 484.090, but the court's determination of the issue has no effect whatsoever on future proceedings in the action or otherwise. This is also true of proceedings for issuance of a preliminary injunction. See CCP § 512.010- 512.120 - see especially CCP § 512.010 where courts determine in a myriad of circumstances whether or not a preliminary injunction should be issued. See *Witkin, California Procedure,* Fifth Edition, section 291, listing 18 different statutes that permit issuance of a preliminary injunction. These 18 different statutes are specific instances where an injunction can be issued but are in addition to the general authority found in CCP § 526. A preliminary injunction *must not* be issued unless it is "reasonably probable that the moving party will prevail on the merits." *San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller)* (1985) 170 CA3d 438, 442, 216 CR 462, 464. See also *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678. The standard for issuance of a preliminary injunction – a reasonable probability that the plaintiff will prevail - should be used, but this court can, of course, set a different standard such as the

need to show likelihood of the refund proceeding prevailing by clear and convincing evidence.

It should not be all or nothing. Under certain circumstances denial of the request to compel the remedy is appropriate. But what if the SBE/CDTFA has already effectively agreed with the consumers, but not necessarily in a formal regulation? Often times a ruling by staff is tantamount to a regulation. See *Yamaha Corp. of America v. State Board of Equalization* (1999) 19 Cal.4th 1, 22-23 (three justices concurring opinion) - under certain circumstances staff opinions are entitled to "especially great weight" equal to interpretive regulations.

What if the retailer was grossly negligent in paying the sales tax and obtaining sales tax reimbursement? What if the retailer flat out lied to the consumers and claimed it had researched the taxability question before charging sales tax reimbursement, but it had not? One court's answers to these questions will be available on or before July 24, 2018, which is the current deadline for the First District Court of Appeal, Division Three, Case A14440 (*Larry Littlejohn v. Costco Wholesale Corporation et al.*) to rule whether amicus Larry Littlejohn is entitled to compel the *Javor* remedy where the SBE/CDTFA had ruled in a Legal Ruling of Counsel (Gov't. Code 11340.9(b) and 18 CCR 5700(a)(2)) that the tax on the product he bought was **not** owed, retailers for six years (other than Costco) relied on that ruling in not paying tax or collecting sales tax reimbursement, Costco flat out lied to him and told him it spent "much time" and made "every effort" to determine taxability before collecting sales tax reimbursement on the exact product he purchased before collecting it when it in fact spent no time at all researching the issue and erroneously paid the tax to the state and charged sales tax reimbursement to consumers for almost six years before it

finally actually checked on the issue and stopped paying the sales tax and charging sales tax reimbursement. As noted at the onset, this court in both *Loeffler* and *Javor* made clear that unjust enrichment of the state from receipt of money allegedly due as sales tax that was not due was an evil that California courts will act to prevent in certain or limited circumstances? If that remains the court's position, which *Javor* (at p. 798) noted was a "fundamental" principle and this court emphasized in *Loeffler* at p.1130, 1133-1134, an absolute rule that the remedy is only available where the state authorizes it in the first place allows the fox to guard the henhouse. Indeed, the state, by not providing in advance that the refund is due, prevents the judiciary from having the final word and effectively nullifies and violates the California constitution. *Yamaha Corp. supra* at p. 4. See also *Bodinson Mfg. Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 325-326.[3]

ARGUMENT

I. CALIFORNIA LAW PROVIDES A SAFE HARBOR FOR TAXPAYERS THAT ALLOWS THEM TO AVOID ANY LIABILITY FOR TAXES IF THE SEEK THE OPINION OF THE SBE/CDTFA AND ARE ADVISED THE PRODUCT IS NOT TAXABLE

A little cited regulation allows any taxpayer to seek the opinion of the SBE/CDTFA as to whether a product is taxable. If the SBE/CDTFA in a written opinion advises the taxpayer that the product is not taxable, the taxpayer is relieved of all liability for taxes (not just penalties and interest.) 8 CCR § 1705. Although the regulation uses the words "may be relieved

[3]The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. Calif. Const., Art. VI, sec. 1 *Bodinson Mfg. Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 326

from the liability for the payment of sales and use taxes..." the context makes clear that relief will be granted if the taxpayer meets the detailed conditions outlined in the regulation. Black's Law Dictionary notes that courts have broad leeway in such interpretation: "Courts not infrequently construe 'may' as 'shall' or 'must' to the end that justice may not be the slave of grammar." At a minimum, the trial court can consider whether the retailer used that regulation to determine whether tax was owed in determining whether to compel a refund application. But that should be the true safe harbor allowed retailers and not Revenue and Taxation Code §6901.5. However, assuming this court remains convinced that Revenue and Taxation Code §6901.5 can be a safe harbor, there is confusion as to what the court meant in *Loeffler* by that. For example, the dissent at p. 1138 of the official citation[4] inaccurately cites the majority opinion at 171 Cal.Rprtr.3d at p. 215 states that Revenue and Taxation Code section 6901.5 provides a safe harbor. But that citation is inaccurate because what the majority is discussing at that reference and page is the **Board's** view as expressed in its Business and Taxes Law Guide and not the majority's own opinion. The actual view of the majority is expressed at page 220 of the Cal. Rptr.3d citation and page 1126 of the official citation as follows:

> Retailers reach a safe harbor once they remit any excess reimbursement amount to the state – and of course follow any ensuing orders by the Board with respect to consumer refunds.

Loeffler v. Target Corp. (2014) 58 Cal.4th 1081, 1126.

Thus, the majority opinion contemplates that section 6901.5 is a safe harbor, but nevertheless if there is a refund application, (compelled by

[4] Page 230 of the California reporter citation.

consumers or otherwise), and the SBE/CDTFA issues an order that the tax was not owed and the consumers are to be refunded their money "**of course**" the retailer must comply with that order. Otherwise, the majority opinion would not make sense. The only time the *Javor* remedy is available or needed is if the retailer has paid the money over to the state. If that act alone created a safe harbor, then the remedy is not available in any circumstance whatsoever.

II. THE 2016 AMENDMENTS TO THE CODE OF REGULATIONS SUPPORT THE CONCLUSION THAT THE *JAVOR* REMEDY IS AVAILABLE REGARDLESS OF WHETHER THE SBE/CDTFA HAS PASSED A REGULATION AUTHORIZING THE REMEDY OR NOT

Effective March 1, 2016,[5] 18 CCR §5237 was amended to provide that staff determinations by the Deputy Director on an assigned section that a product is not taxable are the final word. The taxpayer can appeal a ruling that the product is taxable, but the ruling that the product is not taxable is the final word. (There is no known time in history when the elected board overruled a staff recommendation that the product was not taxable even before this regulation was passed.) We ask the SBE/CDTFA to state otherwise - if they respond to this brief. Because staff decisions are now the final word, a regulation should never be needed. An already legally authorized Legal Ruling of Counsel deserves even more weight that the decision of a section deputy director due to the strict requirements required to issue a Legal Ruling of Counsel and it must be on behalf of senior ranking officials. A regulation is never needed anymore because it is now by staff action that the product is determined not taxable.

[5] Pursuant to Government Code section 11343.4(b)(3) (Register 2014, No. 6)

III. THE 2017 AMENDMENT TO THE REVENUE AND TAXATION CODE FURTHER SUPPORTS ALLOWANCE OF THE *JAVOR* REMEDY

In 2017, (see Revenue and Taxation Code 15570.22 *et seq.*) the Legislature removed from the State Board of Equalization essentially every function it had that was not constitutionally mandated. Other than those changes, there was only one further aspect of the amendment that any review by the superior court of the SBE/CDTFA's rulings "shall be review de novo." This further limits the binding effect of a ruling by the agency and allowance of a remedy for consumers which might allow a court to rule after the SBE/CDTFA rules in the first instance on taxability. The *Loeffler* court stated one reason for the CDFTA to determine the issue first was the intensively fact specific nature of the inquiry. That calculation has not disappeared, but it is greatly diminished in importance now that courts give that determination no deference and rehear the issue de novo.

IV. THE CONTRACT CLAIM IS INDEPENDENT OF THE *JAVOR* REMEDY

The state has passed a statute that provides that whether sales tax reimbursement is owed is "purely" a matter of contract. See *Loeffler* at p. 1108 citing Civil Code 1656.1.)[6] If the consumer and retailer want to contract that sales tax reimbursement is not owed unless the tax is actually due to the state, can that they not do that? If they want to agree that the retailer cannot seeks sales tax reimbursement unless it has acted reasonably is assessing whether the tax is due, can they not do that? If they want to agree that a ruling on whether a breach has occurred will be determined by a court or arbitrator, can they now do that? Respectfully, if this court meant

[6]As with any sales agreement, the terms must not misrepresent what the purchaser is paying for. *Loeffler* dissent at 1135.

what it said and if the statute means what it says, the answer to all these questions must be yes. There is no way around the plain language of the statute - whether sales tax reimbursement is owed "depends solely upon the terms of the agreement of sale." Either whether sales tax reimbursement is owed depends on the agreement of the parties, or it does not. This court should not and actually cannot second guess the legislature's choice to provide explicitly for such a contract. Regardless of the *Javor* remedy, a contract choice must be allowed to be enforced. Where statutory text "is unambiguous and provides a clear answer, we need go no further." (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758, 47 Cal.Rptr.3d 216, 139 P.3d 1169.) *Scher v. Burke* (2017) 3 Cal.5th 136, 148, *as modified on denial of reh'g* (Aug. 9, 2017) The court need not and should not go further. It is this court's obligation to abide by and enforce an explicit statutory mandate as to the right to contract whether sales tax reimbursement is owed.

CONCLUSION

The Court of Appeal decision should be reversed in the interest of justice.

DATED: April 16, 2018

LAW OFFICE OF DANIEL BERKO

Daniel Berko
Attorney for Amicus Curiae
Larry Littlejohn

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of the Court 8.520(c), I certify that according to the word-count feature in Microsoft Word, this Brief of Amicus Curiae Larry Littlejohn contains XXXX words, including footnotes, but excluding the application and the content identified in rule 8.540(c)(3).

Dated: April 16, 2018

Respectfully submitted,

Daniel Berko
Attorney for Larry Littlejohn

PROOF OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Francisco, California, and not a party to the subject cause. My business address is 819 Eddy Street, San Francisco, California 94109.

On April 16, 2018, I caused a true and correct copy of the attached Brief of Amicus Curiae Larry Littlejohn to be served by first-class mail on each party and person required to be served, as follows:

Taras Peter Kick.
The Kick Law Firm
201 Wilshire Blvd, Ste. 350
Santa Monica, CA 90401

Bruce Russell MacLeod
McKool Smith Hennigan, P.C.
255 Shoreline Dr. Ste. 510
Redwood City, CA 94065

Phillip Jon Eskenazi
Hunton & Williams LLP
550 S. Hope St. Ste. 2000
Los Angeles, CA 90071

Joseph Duffy
Morgan Lewis & Bockius LLP
300 S. Grand Ave. 22nd Flr.
Los Angeles CA 90071

James C. Martin, et al.
Reed Smith LLP
355 S. Grand Ave. Ste. 2900
Los Angeles, CA 90071

Robert Paul Berry
Berry & Maxson LLC
16150 Main Cir Dr Ste 120
St. Louis, MO 63017

David F. McDowell
Morrison & Foerster
707 Wilshire Blvd. Ste. 6000
Los Angeles, CA 90017

S. Gershon Hurwitz
Holland & Knight LLP
400 S. Hope St. 8th Flr.
Los Angeles, CA 90071

Theodore Keith Bell
Safeway Inc
5918 Stoneridge Mall Rd
Pleasanton, CA 94588

Nhan Thien Vu
CA Dept of Justice Atny Gen.
300 S. Spring St. #1702
Los Angeles, CA 90013

Ofc. of Attorney General
ATTN: Consumer Law Section
455 Golden Gate Ave. Ste. 11000
San Francisco, CA 94102

Ofc. of District Attorney
ATTN: Appellate Division
320 W. Temple St. #540
Los Angeles, CA 90012

Mark A. Chavez
Chavez & Gertler, LLP
42 Miller Avenue
Mill Valley, CA 94941

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at San Francisco, California, on April 16, 2018.

Zach Garinger