NO. S173972

IN THE SUPREME COURT OF CALIFORNIA

KIMBERLY LOEFFLER et al.,

Plaintiffs and ~~Petitioners~~ Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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After Decision by the Court of Appeal of the State of California, Second Appellate District, Division Three, Case No. B199287, Affirming a Judgment of the Superior Court, Los Angeles County, Case No. BC30004, The Honorable Michael L. Stern

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INTRODUCTION

Petitioners have set out four reasons why this case falls within the prong of Rule 8.500(b)(1) which provides for review of cases by this Court where it is "necessary to secure uniformity of decision or to settle an important rule of law." First, the Court of Appeal created a new and sweeping exception to California's two most important consumer protection statutes, the Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), and the Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 *et seq.*), for cases involving wrongfully imposed sales tax reimbursement charges. Pet. at 11-17. This concern was also emphasized by the Attorney General of California in its filing in support of this Petition. *See* Letter of Albert Norman Shelden, Deputy Attorney General, in Support of Petition for Review, July 6, 2009 ("Attorney General Letter"), at 2-4.

Second, the Petition points out that the Court of Appeal's decision would strip consumers of any effective remedies for illegal charges so long as the retailer labels the charge "sales tax." *See* Pet. at 22-24 (retailers have no incentive to seek refunds on behalf of consumers), and at 25-27 (State Board of Equalization, "SBE," does not provide an adequate remedy to consumers). *See also* Attorney General Letter at 4-5.

Third, the Petition points out that the Court of Appeal's decision will greatly undermine the traditional role of courts in determining the legality of taxes, Pet. at 27-30, by making it very unlikely that disputes will ever reach the courts.

Finally, the Petition points out that the Court of Appeal's decision creates a split of decisions, by conflicting with at least four prior cases applying California law. Pet. at 29-30.

Target's Answer to Plaintiffs' Petition for Review seeks to minimize the significance of this case in several unpersuasive ways. Target begins with a legal argument that this case is unimportant, asserting that the Court of Appeal's decision is "right," Answer at 4, 5, and 7, because California's Constitution mandates the result reached by the Court of Appeal. While this is really an argument that goes to the merits of how this Court should rule rather than whether the legal issue is important and review is appropriate (the sole issue now before this Court), Target's constitutional argument is easily dispensed with. As the Petition recites, at 10, and 17-20, article XIII, section 32 only limits lawsuits "against this State or any officer thereof . . . ." As the underlying case here does not involve either the State or any officer thereof, Target's constitutional analysis in this regard is without merit. The Attorney General Letter reaches the same conclusion. Attorney General Letter at 5. Notwithstanding clever language about how the Constitution also prohibits "indirect" suits against the State, Target

never articulates a theory under which it – a private corporation – is an agency, subdivision or officer of "this State." For all of Target's excited endorsement of article XIII, section 32, it never comes to terms with that section's clear language limiting its applicability to the State and State officers, and the fact that Target fails to fit into either category.

Target's second line of defense is that the issues posed in the Petition are not legally important for economic reasons. First, Target argues that it and other retailers have no incentive to overcharge consumers, because they supposedly always remit all the money collected to the State. Answer at 1. In fact, there is no evidence in the Record whatsoever that this is true in this case, let alone in all cases. But in any event, it is not a very principled response to say that consumers should be stripped of core statutory protections and that courts should be effectively stripped of their role in determining the legality of taxes, because it is supposed that not many retailers will intentionally overcharge consumers. Target's suggestion that California's strong consumer protection laws are unnecessary because retailers can be trusted to act in their customers' best interests is unpersuasive—and flies in the face of the very purpose of the UCL. If businesses always acted in the best interests of consumers there would be no reason for the UCL in the first place. Target's argument in this regard is baseless.

Second, Target points out that the "amounts at issue in this case" amount only to "pennies per cup of hot coffee to go. . . ." Answer at 6. However, Rule 8.500 does not call for this Court to review only cases involving large sums of money per person; it speaks in terms of *important rules of law*. Petitioners respectfully suggest that re-writing the UCL and the CLRA to create new exceptions and undermining the role of courts are important issues per se, without respect to the dollar figures involved. Indeed, this Court has recognized that justice is not dependent on how much money is involved: "we have affirmed the principle that defendants should not profit from their wrongdoing simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 445, 97 Cal. Rptr. 2d 179.

Finally, with respect to the lack of uniformity in the law, Target argues that the numerous cases where California courts have decided cases filed by consumers involving questions of sales tax reimbursement are all supposedly distinguishable because the parties had agreed that the cases could be in court, or because it was clear that the taxes were improperly charged. Answer at 7 n. 2. Target's first proposed distinction ignores the core rule that parties may not create jurisdiction for a court by agreement where the court does not properly have jurisdiction. In order for those four courts to have addressed the question that Target says no court may

address, they necessarily had to decide that they had jurisdiction to do so – the parties could not confer that upon them. Target's second distinction assumes that jurisdiction depends upon the outcome – that courts may hear certain categories of disputes only when one side will definitely win – which is a concept without any support in the law of jurisdiction or common sense.

This Court should hear this case to resolve both the important issues of law and to resolve the split in the law created by the decision below.

I. THIS PETITION DOES POSE IMPORTANT QUESTIONS OF LAW.

A. The Creation of an Exception to California's Consumer Protection Laws Is an Issue of Great Significance.

Plaintiffs allege that Target violated the UCL and the CLRA by charging them for sales tax reimbursement on transactions that are tax-exempt under California's Tax Code. The UCL provides that courts may order restitution of "any money . . . which may have been acquired by means of such unfair competition." Bus. & Prof. Code § 17203. The Petition notes that until the decision of the Court of Appeal below, no authority had suggested that either the UCL or the CLRA contains an exception to courts' broad authority to remedy and enjoin unlawful and deceptive practices for situations when businesses cheat consumers by falsely imposing "sales tax" where no such tax is due. Pet. at 3, 19.

Petitioners respectfully suggest that the creation of such a new exemption from the UCL and CLRA is a matter deserving of this Court's review.

Target's response to this issue is to argue that there is nothing startling about the decision of the Court of Appeal below, because there are a number of cases that have held that *taxpayers* may not sue the *State of California*. *See* Answer at 3-4. Again, however, that argument is of no moment, as every case cited by Target involved a lawsuit against ***the State*** which is obviously addressed by the explicit prohibition in the Constitution noted above. *See* Answer at 3, citing *Woosley v.* ***State of California*** (1992) 3 Cal. 4th 758, 13 Cal. Rptr. 2d 1; *Barnes v.* ***State Board of Equalization*** (Ct. App. 1981) 118 Cal. App. 3d 994, 173 Cal. Rptr. 742 (emph. added); Answer at 4, citing *California Logistics, Inc. v.* ***State of California*** (Ct. App. 2008) 161 Cal. App. 4th 242, 73 Cal. Rptr. 3d 825 (emph. added); *Pacific Gas & Elec. Co. v.* ***State Board of Equalization*** (1980) 27 Cal. 3d 277, 165 Cal. Rptr. 122 (emph. added). Target's problem is simple and insurmountable – no amount of argument will change the fact that it is *not* a part of the government of the State of California, and thus it does not fall within the plain language of Article XIII, section 32. Target is not a State actor, it is not the State or a part of the State and it is not a State official merely because it collects from consumers sales tax reimbursements. Simply, Target is inescapably a private corporation, not protected by Article XIII, section 32. Moreover, as set forth in detail in the Petition,

section 32 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 disputed tax. Plaintiffs here – non-taxpayers – do not seek any injunction against the State, and an award of restitution, damages, or injunctive relief against Target for imposing unlawful charges on its customers would in no way prevent the State from collecting tax.

In short, the issue presented in the Petition is legally significant notwithstanding the existence of Article XIII, section 32.

B. Review Is Necessary to Secure Uniformity of Decision.

The Petition established this Court's review is necessary to secure uniformity of decision. The Petition pointed out a conflict between the decision below and such cases as, *e.g.*, *Dell, Inc. v. Super. Ct. (Mohan)* (Ct. App. 2008) 159 Cal. App. 4th 911, 71 Cal. Rptr. 3d 905 (in consumer class action under UCL and CLRA, determining that retailer's service contracts were not subject to sales tax); *Laster v. T-Mobile USA, Inc.* (S.D. Cal. Aug. 11, 2008) No. 05cv1167 DMS (AJB), 2008 WL 5216255 (declining to dismiss consumer claims for deceptive sales tax reimbursement charges); *Livingston Rock & Gravel Co. v. De Salvo* (Ct. App. 1955) 136 Cal. App. 2d 156 (in dispute between retailer and customer, holding that customer was not contractually obligated to pay retailer sales tax reimbursement); and *Botney v. Sperry & Hutchinson Co.* (Ct. App. 1976) 55 Cal. App. 3d 49

(deciding merits of consumer class action against retailer for allegedly imposing wrongful sales tax reimbursement charges).

Target's Answer does not even acknowledge, let alone dispute, that the holdings of *Laster*, *Livingston*, and *Botney* conflict with that of the court below. As for *Dell*, Target relegates it to a single footnote and attempts to distinguish that case on grounds that the parties "wanted a judicial determination of the sales tax issues." Answer at 7 n. 2. Target's argument that this case presents a unique scenario is nothing more than wishful thinking, and fails to refute Plaintiffs' argument that this Court's review is necessary to resolve this split of authority.

Target's response to the division between the Court of Appeal below and *Dell* also ignores a core rule of appellate law – parties may not confer appellate jurisdiction upon a court by agreement. *See People v. Burns* (Ct. App. 1993) 20 Cal. App. 4th 1266, 1270, 25 Cal. Rptr. 2d 230 (noting that "parties cannot by their agreement confer upon this Court the jurisdiction to hear an issue which is not appealable"). If the Court of Appeal below was correct that California's Constitution barred it from hearing plaintiffs' claims, then the *Dell* court necessarily committed an error in hearing similar claims regardless of whether the parties wanted it to hear the case or not. Accordingly, should this Petition not be granted, litigants will be left with the question of "Which Court of Appeal was correct?" Only *this*

Court can resolve this split in authority and only *this* Court can bring uniformity to California law on this question.

II. TARGET'S POLICY ARGUMENTS DO NOT STRIP THIS CASE OF LEGAL SIGNIFICANCE.

As the Petition points out, under the Court of Appeal's holding, a consumer has no right to recover wrongfully charged sales tax reimbursement from a retailer unless ***the retailer*** first seeks a refund of overpaid sales tax from the SBE. Pet. at 4, 8. The Petition explains that, therefore, under the Court of Appeal's reasoning, even if a consumer has been wrongfully charged sales tax reimbursement, as a realistic matter such a consumer still would never be able to recover the overpayment. Pet. at 22-28. The Petition explains how this Court rejected a similar system as unworkable in *Javor v. State Board of Equalization* (1974) 12 Cal. 3d 790, 117 Cal. Rptr. 305, among other cases. Pet. at 22-25.

In response to these points, Target offers only a few unpersuasive policy attacks. First, it asserts that there is no reason to be concerned with consumers being wrongly charged, because retailers have no incentive to do so. Answer at 1. This argument assumes something never proven in this case, though – that Target (and all other retailers) always remit 100% of wrongful sales tax reimbursements proceeds to the SBE. Moreover, even in cases where that is true, as this Court has recognized, the SBE has "no statutory obligation to voluntarily refund" wrongly imposed tax

reimbursement charges to non-taxpayers, and has "no financial interest in doing so." *Javor*, 12 Cal. 3d at 795. Rather, as this Court has noted, the far likelier outcome is that the retailer or the SBE would become "enriched at the expense of the consumer to whom the amount of the excessive tax belongs." *Id.* at 801-02. Indeed, Target's reasoning in this regard flies in the face of consumer protection statutes like the UCL and CLRA which were enacted to prevent wrongful conduct by businesses – which of course would be unnecessary if businesses always looked out for their customers in the first instance.

Target next claims – without any factual or legal support whatsoever – that a "legitimate complaint by a customer to the SBE . . . will result in a reimbursement to the customer." Answer at 6. Target states that Plaintiffs "do not explain why" this "remedy" is unrealistic. *Id.* But as the Petition explains in detail (at 25-27), this Court long ago concluded that non-taxpayers have no realistic remedy if they must depend on the SBE to voluntarily act on their behalf. *See Javor*, 12 Cal. 3d at 795, 801-02 (explaining that the SBE is neither obligated nor equipped to protect the interests of non-taxpayers).[1] Target's casual dismissal of this Court's well-

[1] *See also* Attorney General Letter at 5 n. 1 (explaining that a retailer that wrongfully imposes sales tax reimbursement charges may, under the Tax Code, remit the overcharged sums to the State rather than refunding its customers).

reasoned decision in *Javor* is puzzling, given that the same concerns that motivated the Court in that case are present here.

Lastly, Target scornfully suggests that the Plaintiffs' claims here are trivial because they are individually small. Answer at 6 (referring to "pennies per cup of hot coffee"). However, Target ignores that the importance of this Court resolving important issues of law and principle (such as whether a new exception should be created to the UCL and the CLRA, whether courts should be effectively divested of most of their jurisdiction over tax disputes, and whether this Court should resolve conflicts between the Courts of Appeal) does not depend on the dollar amounts involved. Rule 8.500 makes plain that this is a Court charged with resolving important issues of *law*. Indeed, one of this Court's widely cited and influential decisions came in a case where the Court explicitly addressed the issue of how to deal with situations where a corporation "wrongfully extracts a dollar from each of millions of customers." *See Discover Bank v. Super. Ct. (Boehr)* (2005) 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76 (citation omitted). Under Target's theory, this Court should never have bothered hearing the *Discover Bank* case because the individual size of the claims there was small – but, of course, this Court took a broader and more principled view of the matter. Petitioners respectfully urge this Court to take the same approach here.

CONCLUSION

Rule 8.500 charges this Court with resolving cases that involve important legal issues and which have created a split in the law. This case plainly involves both sorts of questions and this Court should grant the Petition.

Dated: July 16, 2009

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204(c) and 8.500(d)(1), the undersigned counsel hereby certifies that the foregoing REPLY IN SUPPORT OF PETITION FOR REVIEW is double-spaced, printed in Times New Roman 13 point text, and contains 2,746 words. The above word count was determined using the Word Count function of the Microsoft Word program, and excludes words in the Table of Contents and Table of Authorities.

Dated: July 16, 2009

Respectfully Submitted,

LANGE & KONCIUS, LLP

By: _____

JOSEPH M. LANGE

Attorney for Petitioner

PROOF OF SERVICE

I, **Joseph J. M. Lange**, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 222 North Sepulveda Boulevard, Suite 2000, El Segundo, California 90245.

On July 16, 2009, I served the foregoing document described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

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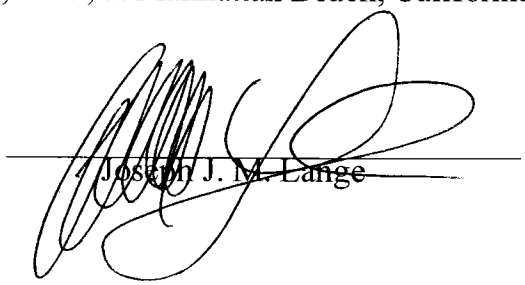
[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope addressed as above, with postage thereon fully prepaid in the United States mail, at El Segundo, California. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under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

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

Executed on July 16, 2009, at Manhattan Beach, California.



/s/ Joseph J. M. Lange