Case No. S176146

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

RICHARD A. YABSLEY, on behalf of himself, a class of persons similarly situated, and the general public,

Plaintiffs-Petitioners,

v.

THE CALIFORNIA STATE BOARD OF EQUALIZATION, an agency of the STATE OF CALIFORNIA; CINGULAR WIRELESS, LLC, a limited liability company; and DOES 1 through 20, inclusive,

Defendants-Respondents.

ANSWER TO PETITION FOR REVIEW AND REQUEST FOR GRANT AND HOLD REVIEW PENDING OUTCOME IN *LOEFFLER V. TARGET CORP.*, CASE NO. S173972

Re: Decision by the Court of Appeal
Second Appellate District, Division Six
Court of Appeal No. B198827
Santa Barbara Superior Court Case No. 1221332
The Honorable J. William McLafferty, Judge

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Service on California Attorney General and Santa Barbara District Attorney Pursuant to Business & Professions Code § 17209

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I. INTRODUCTION

Petitioner seeks review of four issues that were supposedly decided by the Court of Appeal incorrectly. Petitioner does so by misstating the holdings of the Court of Appeal in an effort to create the impression that there are important issues of law that need to be resolved when, in fact, the Court of Appeal did not issue such rulings and instead issued a fairly non-controversial, well-reasoned, and specifically tailored opinion after substantial briefing. The opinion should stand on this basis alone.

Review should also be denied because there is simply no important question of law in need of resolution, nor is there any need to secure the uniformity of decisions. Cal. Ct. Rule 8.500(b)(1). Indeed, at least half of the issues presented for review involve the desired correction of supposed minor misstatements of law, which as a matter of policy is not the function of the Supreme Court—especially when Petitioner failed to ask the Court of Appeal for a rehearing on these minor issues. *Id.* at 8.500(c)(2).

Finally, Petitioner's alternative request for a "grant and hold," pending the Court's decision in *Loeffler v. Target Corp.* (Case No. S173972) is groundless. Although the Court of Appeal's decision in this case partially relied on *Loeffler*, it nonetheless foreclosed Petitioner's claims on several additional, independent grounds. Included among these grounds is its core holding that applies safe harbor immunity to retailers when they calculate and charge consumers sales tax in full compliance with California tax law. This much-needed holding is the only published opinion on point and brings certainty to an area of law that has experienced increasing litigation in the past few years. The opinion should not disappear simply because another section of the same opinion relies, in part, on *Loeffler*.

Accordingly, the Court should deny Petitioner's request for review and alternative request for a "grant and hold."

II. FACTUAL BACKGROUND

Petitioner purchased a cellular phone with a retail price of $299.99 from Cingular in May 2006. Because he purchased the phone as part of a "bundled" transaction with a multi-year calling plan like the majority of consumers, Petitioner received a 50% discount off of the full retail or "unbundled" price of the phone. The crux of Petitioner's case is that Cingular's advertising and sales receipts are ostensibly misleading because they do not explicitly state that consumers who buy cellular phones at discounted prices along with "bundled" calling plans must nevertheless pay sales tax on the phone's full retail or "unbundled" price. Thus, although he received a phone priced at $299.99 for $149.99 and paid 7.75% sales tax ($23.25) on the phone's retail price, Petitioner believes that he should have instead been charged 7.75% sales tax ($11.62) on the discounted or "bundled" price of $149.99.

Several undisputed facts are critical to understanding Petitioner's purported causes of action. First, Petitioner admits that Cingular fully disclosed both the "unbundled" and "bundled" prices of the phone he purchased. Second, Petitioner admits that the California State Board of Equalization ("CSBE") has enacted regulations that require wireless retailers like Cingular to calculate a cellular phone's sales tax based on its full retail or "unbundled" price, and explicitly permit wireless retailers to pass on this sales tax to consumers. And third, Petitioner admits that Cingular's sales receipt correctly calculated his sales tax based on the full retail or "unbundled" price of his cellular phone, as opposed to some other fictional or higher price.

Simply put, Petitioner paid $149.99 for a phone he knew had a retail price of $299.99, his sales tax was required by law to be calculated based on the full retail price, and his receipt showed that he agreed to pay sales tax on the full retail price—a rather unremarkable transaction.

III. PROCEDURAL BACKGROUND

On February 26, 2007, the Trial Court sustained Cingular's demurrer to the First Amended Complaint with prejudice and without leave to amend. The Trial Court found that Cingular's allegedly unfair and deceptive practices were in "complete compliance" with sales tax regulations promulgated by the CSBE, and that it was therefore entitled to safe harbor immunity from liability under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL"). The Trial Court also denied Petitioner's request to file a Second Amended Complaint, which would have added an action under the California Legal Remedies Act ("CLRA"), on the grounds that any amendment would have been futile since they would not have cured the defects asserted by Cingular. Petitioner appealed.

On August 18, 2008, the Court of Appeal, Second Appellate District, affirmed the judgment of the Trial Court. *Yabsley v. Cingular Wireless, LLC*, 165 Cal. App. 4th 1526 (2008). Like the Trial Court, the Court of Appeal also held that Cingular's compliance with California sales tax regulations was a complete bar to Petitioner's claims. Yet, this decision would not remain published, since the parties inadvertently failed to serve copies of their briefs on the California Attorney General's Office, as required by Business and Professions Code § 17209. As a result, and at the behest of the Attorney General's Office ("AGO"), the Court of Appeal decided to invite additional briefing and rehear the merits of the appeal.

On August 19, 2009, after *amicus* briefing by the AGO and the CSBE, two additional rounds of letter-briefing requested by the Court of Appeal, and a second oral argument (that the AGO inexplicably failed to attend), the Court of Appeal reissued a published opinion again affirming the judgment of the Trial Court. *Yabsley v. Cingular Wireless, LLC*, 176 Cal. App. 4th 1156 (2009). In addition to reaffirming its original opinion

that Cingular was entitled to safe harbor immunity from suit, the Court of Appeal expanded on its original opinion on two additional grounds by holding that: (1) Petitioner's lawsuit for the restitution of sales tax reimbursement paid to Cingular was barred by Article XIII, Section 32, of the California Constitution; and (2) Petitioner lacked standing to bring his UCL and FAL action.

Now, Petitioner recycles the same legal arguments rejected by the Trial Court and Court of Appeal (twice), and raises additional issues with the Court of Appeal's opinion on rehearing which would not change the overall outcome of the case in any event. The Court should deny Petitioner's request for a fourth bite at the apple.

IV. PETITIONER RAISES NO ISSUE WORTHY OF REVIEW

California Rule of Court 8.500(b) specifies four situations where "The Supreme Court may order review of a Court of Appeal decision." Of the four circumstances outlined by the rule, the only one even remotely applicable to this case—and the only one addressed in the Petition for Review—permits discretionary review of an appellate court decision "When necessary to secure uniformity of decision or to settle an important question of law." Cal. Ct. Rule 8.500(b)(1). As indicated below, there is simply no important question of law within the meaning of Rule 8.500(b)(1) in need of resolution, nor is there any need to secure uniformity of decision.

A. Petitioner's First Issue For Review Re: Article XIII, Section 32 Of The California Constitution

Petitioner's first issue for review asks: "Does Article XIII, Sec. 32 of the California Constitution bar consumers from filing lawsuits against retailers under California's [UCL, FAL, and CLRA] for false advertising?" Not surprisingly, the answer to Petitioner's question as phrased is obviously no. Article XIII, Section 32, by its own terms, obviously does not bar

consumers from filing consumer protection lawsuits for false advertising. Yet, the Court of Appeal's decision in the present case makes no such finding. Rather, the Court of Appeal, relying in part on *Loeffler v. Target Corp.* (Case No. S173972), merely held that no mater how artfully plaintiffs are able to craft their complaints, so long as plaintiffs seek to recover sales tax reimbursement payments from retailers in the form of restitution or damages and/or seek injunctions against a retailer's sales tax collection practices, their consumer class action lawsuits (e.g., the UCL, FAL, or CLRA) are barred by Article XIII, Section 32, because such lawsuits would impede the State of California's orderly administration of its sales tax laws and collections. Consequently, because Petitioner's first issue for review does not address the actual holding in the present case, the Court should deny Petitioner's request for review on this ground alone.

To the extent the Court determines that there is an important question of law regarding whether Article XIII, Section 32, bars sales tax reimbursement refund actions cleverly disguised as consumer class actions, that issue is already properly before the Court in *Loeffler v. Target Corp.*, and need not be settled here. Accordingly, the Court should deny Petitioner's request for review to the extent it raises any issues potentially addressable during the Court's review of *Loeffler*. If the Court reverses *Loeffler*, then the portion of the *Yabsley* opinion that relies on *Loeffler* will be disapproved, but the remainder of the opinion will stand, as often occurs when the Court issues opinions that change the law.

B. Petitioner's Second Issue For Review Re: The Applicability Of Safe Harbor Immunity

Petitioner's second issue for review asks: "Do[es] a tax regulation that determines the amount of sales tax owed by the retailer and an evidentiary provision of the California Civil Code create a safe harbor that immunizes retailers of cellular telephones from liability for false

advertising?" Like Petitioner's first issue for review, the answer to this question as phrased is obviously no. But not surprisingly, the Court of Appeal's decision made no such finding.

As a preliminary matter, Petitioner has never identified any advertising that he contends is false. Rather, it is Petitioner's contention that he was supposedly misled by Cingular's alleged failure to inform him that Cingular would: (1) calculate the sales tax applicable to his bundled cellular phone in accordance with California sales tax law; and (2) seek sales tax reimbursement from him for that full amount, as is expressly permitted by California sales tax law.

In response to this supposed misrepresentation by omission, the Court of Appeal correctly determined that Cingular was entitled to safe harbor immunity from suit under the well-established and uncontested principle of law that bars plaintiffs from asserting that they were deceived by a defendant's lawful conduct. *Cel-Tech Commc'ns., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999); *see also Bourgi v. W. Covina Motors, Inc.*, 166 Cal. App. 4th 1649, 1660 (2008) (applying "safe harbor" protection in CLRA action); *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382 (2005) (applying "safe harbor" protection in FAL action).[1] Although not necessary to this outcome, in support of the Court of Appeal's decision on this point are two legal presumptions that devastate Petitioner's false advertising by omissions claim.

The first is the "general presumption that each person knows the governing law." *City of W. Hollywood v. Beverly Towers, Inc.*, 52 Cal. 3d 1184, 1194 (1991). This includes the governing tax law. *See, e.g., Estate of Carley*, 90 Cal. App. 3d 582, 587 (1979) ("[S]ince the decedent is presumed to have known the California law (including the statutory

[1] Contrary to Petitioner's claim (Petition at 24, n. 1), the *Yabsley* opinion is not the first case to apply safe harbor immunity in FAL cases.

definition of 'estate') when he drew his will . . ., the conclusion is inescapable that by directing the payment of all estate and inheritance taxes out of his estate the decedent meant that the tax burden be borne by his entire taxable estate . . . ."). As a result, Petitioner cannot claim that he was misled by Cingular's alleged failure to disclose or explain the governing sales tax law presumably already known to (or obtainable by) him.

The second is the presumption that Petitioner agreed to pay Cingular for the sales tax reimbursement appearing on his receipt. *See* Cal. Civ. Code § 1656.1(a)(2) ("It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if . . . Sales tax reimbursement is shown on the sales check or other proof of sale . . . ."). Thus, not only did Petitioner have notice of the amount of the sales tax that would be imposed at his point of purchase, and specifically agreed to pay that amount at the time of the transaction (as evidenced by his receipt), but he had ample opportunity to refuse to purchase the cell phone for the price stated. As a result, Petitioner cannot claim that he was misled by Cingular's alleged failure to inform him of the amount of sales tax that he would have to pay prior to his actual purchase.

In summary, the Court of Appeal's safe harbor decision (rendered twice), which affirmed the Trial Court's demurrer on the same grounds, is a correct and uncontradicted statement of law. Therefore, there is no important question of law in need of resolution, nor is there any need to secure the uniformity of decisions. Cal. Ct. Rule 8.500(b)(1). The Court should deny Petitioner's request for review.

C. Petitioner's Third Issue For Review Re: Standing Under The UCL

Petitioner's third issue for review asks: "Does a plaintiff lack standing under the UCL if he does not allege a predicate law violation?"

Like Petitioner's first and second issues for review, the answer to this question as phrased is obviously no. But yet again, the Court of Appeal's decision made no such finding.

Petitioner takes issue with the following phrase from the Court of Appeal's decision: "The 'legally protected interest' for standing purposes must be an interest that is protected by a source other than the remedial provisions of the UCL or FAL." Petitioner makes the leap from this isolated phrase to the unsupported argument that the Court of Appeal intended to "eviscerate" the unfair and fraudulent prongs of the UCL. Not so. The Court of Appeal's decision was based on the facts and allegations before it. Specifically, the Court of Appeal noted: "Yabsley describes the alleged unlawful practice as the 'taxation process' but also alleges that he was induced to purchase the phone because Cingular's advertising failed to advise him that sales tax would be calculated on the undiscounted price of the phone rather than the actual purchase price."

As indicated above, because Cingular complied with all aspects of California's sales tax laws, the Court of Appeal found that Cingular was entitled to safe harbor protection from Petitioner's claim that he was misled. Thus, all that remained to address was Petitioner's claim that he was victimized by Cingular's "taxation process" under the unlawful prong of the UCL. It was during this analysis that the Court held that the unlawful prong of the UCL could not be satisfied by alleging a separate violation of the UCL itself, and that there needed to be an alleged violation of law apart from the UCL—a violation that Petitioner did not and could not allege given that Cingular fully complied with California sales tax law.

At no time did the Court of Appeal hold that a plaintiff lacks standing under the UCL in every circumstance unless he alleges a predicate law violation. Nor is it plausible to argue that the Court of Appeal so held, given that there are myriad Supreme and Appellate Court cases that address

the first and third prongs of the UCL without requiring that there be a predicate law violation. Consequently, the Court should deny Petitioner's request for review under Rule of Court 8.500(b)(1).

To the extent that Petitioner feels that the Court of Appeal should have made this point clearer (perhaps with a footnote), Petitioner had ample opportunity to request that the Court of Appeal modify its decision. Yet, Petitioner failed to do so, and as a matter of policy, the Court should not grant review in this case, since any desire for clarification could have been easily addressed by a petition for rehearing. Cal. Ct. Rule 8.500(c)(2).

D. Petitioner's Fourth Issue For Review Re: The Consumer Legal Remedies Act's Pre-Filing Demand Requirement

Petitioner's fourth issue for review asks: "Does the CLRA's pre-filing demand requirement apply to an action for injunctive relief?" Petitioner contends that the Court of Appeal made an incorrect statement of law in a footnote to this effect. Regardless of whether or not the Court of Appeal erred in a footnote, it is not the Supreme Court's job to correct minor misstatements of law. The Supreme Court's function is to review cases where there is an important question of law in need of resolution, or a need to secure the uniformity of decisions. Cal. Ct. Rule 8.500(b)(1). This is why, as a matter of policy, the Court should not grant review in cases where any perceived error could have been easily addressed by a petition for rehearing—which Petitioner failed to attempt. Cal. Ct. Rule 8.500(c)(2). Had Petitioner so attempted, the Court of Appeal could have easily addressed this perceived error in the same manner that the Supreme Court remedied a very similar misstatement in *Vasquez v. State of California*, 45 Cal. 4th 243, 252 (2008). Petitioner's request for review should be denied.

* * *

In summary, there is simply no issue raised by Petitioner that is worthy of review under California Rule of Court 8.500(b), and the Petition for Review should be denied.

V. THE COURT SHOULD NOT ISSUE A "GRANT AND HOLD"

The following issue is presently pending before the Court in *Loeffler v. Target Corp.* (Case No. S173972): "Does article XIII, section 32 of the California Constitution or Revenue and Taxation Code section 6932 bar a consumer from filing a lawsuit against a retailer under the [UCL or CLRA] alleging that the retailer charged sales tax on transactions that were not taxable?"[2] Apparently believing that the Court's forthcoming decision on this issue in *Loeffler* seriously impacts the Court of Appeal's decision in this case, Petitioner requests, in the alternative, that the Court issue a "grant and hold" in this case pending its decision in *Loeffler*. This request should be denied for at least three reasons.

First, the issue presented for review in *Loeffler* does not squarely apply to the facts of the case at hand. Indeed, while the issue for review in *Loeffler* involves lawsuits "alleging that the retailer charged sales tax on transactions that were not taxable," as Petitioner is ultimately forced to concede in his Petition (although his initial Complaint contested the issue), the full retail or "unbundled" value of his cellular phone is appropriately taxable under California law. Therefore, even if *Loeffler* is modified or reversed, such an eventuality would not necessarily impact the Court of Appeal's decision in this case.

Second, even if *Loeffler* is modified or reversed, and even if this somehow undermines the Court of Appeal's decision in the present case, the Court of Appeal's ultimate affirmation of the Trial Court's demurrer ruling would not change since the Court of Appeal foreclosed Petitioner's

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[2] http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id= 1911472&doc_no=S173972.

right to relief on multiple and independent grounds not addressed in *Loeffler*—the most important of which is the safe harbor analysis.

Third, the Court of Appeal's safe harbor analysis is an important stand-alone holding that should remain published and binding authority even though *Loeffler* is currently on review and might be modified or reversed one day. This is especially true considering that the Court of Appeal's decision in this case is the only opinion on point to clarify that wireless retailers are entitled to safe harbor immunity from consumer class actions under the UCL, FAL, and CLRA when they collect sales tax reimbursement from consumers calculated in accordance with regulations promulgated by the CSBE. This opinion brings certainty to an area of law that has seen much litigation in the past few years. *See, e.g., Laster, et al. v. T-Mobile USA Inc., et al.*, United States District Court, Southern District of California, Case. No. 05-CV-01167-DMS; *Smith et al. v. AT&T Mobility LLC*, Los Angeles Superior Court, Case. No. BC412856; *Carney v. Verizon Wireless Telecom Inc.,* Los Angeles Superior Court, Case. No. BC413529; *Bower v. AT&T Mobility LLC, et al.*, Los Angeles Superior Court, Case. No. BC418113, and, of course, the present case itself.

Consequently, the Court should not issue a "grant and hold," because even if *Loeffler* is modified or reversed, the Court could always easily disapprove *Yabsley* to the extent it is in conflict, while keeping intact its important core holding for the benefit of current and future litigants.

VI. CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Review and the alternative request for a "grant and hold."

Dated: October 16, 2009

Respectfully submitted,

McKenna Long & Aldridge LLP

By: _____

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,927 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief. The brief has been typeset with one-and-a-half line spacing and 13-point Times New Roman font.

Dated: October 16, 2009 McKenna Long & Aldridge LLP

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Richard A. Yabsley v. The California State Board of Equalization
Supreme Court Number: S176146

PROOF OF SERVICE

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 750 B Street, Suite 3300, San Diego, California 92101.

On **October 16, 2009**, I caused to be served a copy of the within document(s)

- **ANSWER TO PETITION FOR REVIEW AND REQUEST FOR GRANT AND HOLD REVIEW PENDING OUTCOME IN *LOEFFLER V. TARGET CORP.*, CASE NO. S173972**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Dated: **October 16, 2009**

Lucy Valdez

SD:22176161.1