

PUBLIC JUSTICE**SUPREME COURT COPY**SUPREME COURT
FILED

JAN 27 2014

January 27, 2014

Frank A. McGuire Clerk

Deputy

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 in reply to Target's Supplemental Brief of January 10, 2014 ("Target Jan. 10 Brief").

I. The allegations in Plaintiffs' operative complaint establish causes of action under the UCL and CLRA.

Notwithstanding Target's protestations that it has done nothing wrong, the central allegations in the operative complaint are to the contrary. Plaintiffs have alleged that Target systematically misrepresented to customers the taxability of a tax-exempt retail good, and that it unlawfully imposed sales tax reimbursement charges on such goods. As a result, Plaintiffs and the class they represent were harmed by virtue of the fact they paid more money to Target than they otherwise would have been willing to pay. *See Kwikset Corp. v. Super. Ct.* (2011) 51 Cal. 4th 310, 330, 120 Cal.Rptr.3d 741 (economic injury exists where misrepresentation in label caused consumer to pay extra money). As explained in Plaintiffs' opening letter brief, those allegations, if true, are more than sufficient to state a cause of action under the UCL and CLRA. When reviewing an order sustaining a demurrer, the Court "is obliged to accept as true all well-pleaded allegations of the complaint." *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1189, 151 Cal.Rptr.3d 827.

If the case is allowed to go forward, Target will have ample opportunity to prove its now bald assertion that it has remitted "every penny" of the money it acquired by imposing false sales tax reimbursement charges to the Board. Target Jan. 10 Br. 1. But even if that turns out to be true, it would not defeat

National Headquarters
1825 K Street NW, Suite 200
Washington, DC 20006
ph: 202-797-8600
fax: 202-232-7203

West Coast Office
555 12th Street, Suite 1230
Oakland, CA 94607
ph: 510-622-8150
fax: 510-622-8155

www.publicjustice.net

the Plaintiffs' causes of action. Regardless of whether Target kept the money or remitted it to the Board, it has violated the UCL and CLRA if it made misrepresentations to its consumers about whether its sales were subject to sales tax and imposed sales tax reimbursement charges that are unauthorized under the law. As explained in Plaintiffs' January 13 letter brief, whether Target in fact profited or stood to gain economically from its violations is legally beside the point at this stage of the case. *See Kwikset*, 51 Cal.4th at 336 (unfair business practices "often involve a loss by the plaintiff without any corresponding gain by the defendant").¹

In any event, Target's repeated unsupported claims that it is an "honest business" that has engaged in "no wrongful conduct," and that there is thus "no need for a consumer protection statute" (Target Jan. 10 Brief 8) would never be valid grounds for sustaining a demurrer. *See Appellants' Reply Brief 22-23*. It is black-letter law that "[t]he unsworn statements, factual assertions, and arguments of counsel are not evidence." *Penick v. Most Worshipful Prince Hall Grand Lodge F & A M of Ala., Inc.* (Ala. 2010) 46 So. 3d 416, 431 (citation omitted); *see also* Cal. Rule of Court 8.204(a)(1)(C). "The only issue involved in a demurrer [] is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." *SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905, 200 Cal.Rptr. 497. At this early stage of the case, a court is not concerned about how the plaintiff might prove the allegations contained in the complaint, nor that the facts may not be clearly stated or may be intermingled with irrelevant facts. *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572, 108 Cal.Rptr. 480. Indeed, if all that was required for dismissal of a case was an unsupported statement that the defendant has done nothing wrong, no cases would ever proceed past demurrer.

In sum, Target has failed to make a single argument that calls into question the validity of Plaintiffs' claims under the UCL and CLRA.

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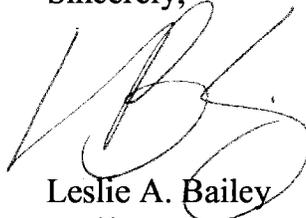
¹ At most, Target's unsupported assertion that it did not profit amounts to an attempt to assert a type of equitable defense. *See Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 179, 96 Cal.Rptr.2d 518. Equitable defenses may not wholly defeat a UCL claim, and may only "guide the court's discretion in fashioning [] equitable remedies" under the statute. *Id.*

II. The Court of Appeals decision, if permitted to stand, would also wipe away cases involving a so-called “charlatan” retailer that keeps money it acquires by imposing tax-reimbursement charges on tax-exempt items.

Although much of Target’s brief (at 8-11) repeats verbatim points made in its Answer Brief on the Merits (at 24-31), Target now takes the remarkable position that the opinion of the Court of Appeal “says nothing about the situation posed by this Court’s current questions about a dishonest retailer who claims to be charging sales tax reimbursement but in fact does not remit the charged amount to the Board” (Target Jan. 10 Brief 2). That is dead wrong. The lower court’s sweeping interpretation of Article XIII, section 32 of the California Constitution and Tax Code § 6931 would render those provisions an absolute bar to consumer protection lawsuits alleging wrongful sales tax reimbursement charges. *See Loeffler v. Target Corp.* (2009) 93 Cal. Rptr.3d 515, 529 n.11. Cases involving retailers who illegally pocketed the purported sales tax reimbursement, as well as those involving retailers who paid it as tax to the State, would be equally barred by that rule.

Notably, Target now concedes that a cause of action *may* be brought by consumers under the UCL and CLRA based on an allegation that a retailer did *not* remit to the State the money it acquired by charging sales tax reimbursement. (Target Jan. 10 Brief 1.) This position is a stark departure from Target’s central argument in this case: that Article XIII, section 32 gives retailers complete immunity from liability under consumer protection laws in all cases concerning purported sales tax reimbursement charges.

Sincerely,



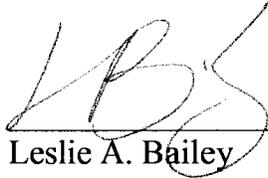
Leslie A. Bailey
Staff Attorney
Public Justice
Counsel for Plaintiffs/Appellants

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 1,009 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 27, 2014

By



Leslie A. Bailey
Counsel for Plaintiffs/Appellants

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 27, 2014, I served the foregoing letter brief in reply to Target's Supplemental Brief on the interested parties in this action as follows:

Miriam Vogel
Morrison & Foerster, LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017-3543
Attorneys for: Target
Corporation, Defendant and
Respondent

Samantha Perrette Goodman
Morrison & Foerster, LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017-3543
Attorneys for: Target Corporation, Defendant
and Respondent

David Frank McDowell
Morrison & Foerster, LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017-3543
Attorneys for: Target
Corporation, Defendant and
Respondent

Benjamin Israel Siminou
Thorsnes Bartolotta McGuire LLP
2550 Fifth Avenue, 11th Floor
San Diego, CA 92103
Carmen Herr, Amicus curiae
Heidi Spurgin, Amicus curiae
Mark Hegarty, Amicus curiae
Joseph Thompson, Amicus curiae

Phillip Jon Eskenazi
Hunton and Williams LLP
550 W. Hope Street, Suite 2000
Los Angeles, CA 90071
Albertson's, Inc., Amicus
curiae

J. Bruce Henderson
Attorney at Law
4294 Kendall Street
San Diego, CA 92109
Association of Concerned Taxpayers, Amicus
Curiae

Barry Dion Keene
Attorney at Law
1047 - 56th Street
Sacramento, CA 95819
William T. Bagley, Amicus
curiae; Barry Dion Keene,
Amicus curiae

John Lee Waid
California State Board of Equalization
450 N. Street, MIC 82
Sacramento, CA 95814
Board of Equalization, Amicus curiae

Sharon J. Arkin
The Arkin Law Firm
333 S. Grand Avenue, 25th
Floor
Los Angeles, CA 90012
Consumer Attorneys of
California, Amicus curiae

Pamela Pressley
Foundation for Taxpayer and Consumer
Rights
1750 Ocean Park Boulevard, Suite 200
Santa Monica, CA 90405
Consumer Watchdog, Amicus curiae
Consumeraffairs.com, Amicus curiae
National Association of Consumer
Advocates, Amicus curiae
Public Good, Amicus curiae

Richard Thomas Williams
Holland and Knight LLP
633 W. Fifth Street, 21st Floor
Los Angeles, CA 90013
CVS Caremark Corp, Amicus
curiae
CVS Pharmacy, Inc., Amicus
curiae

Andrew Eugene Paris
Alston and Bird LLP
333 S. Hope Street, 16th Floor
Los Angeles, CA 90071
DirecTV, Inc., Amicus Curiae

Thomas Alistair Segal
Taras Peter Kihiczak
The Kick Law Firm APC
201 Wilshire Boulevard, Suite
350
Santa Monica, CA 90401
Avi Feigenblatt, Amicus curiae
Gregory Fisher, Amicus curiae
Michael McClain, Amicus
curiae

Albert Douglas Mastroianni
Mastroianni Law Firm
633 West Fifth Street, 28th Floor
Los Angeles, CA 90013
Jason Frisch, Amicus curiae

Alexandra Robert Gordon
Office of the Attorney General
455 Golden Gate Avenue, Suite
11000
San Francisco, CA 94102
Kamala Harris, Amicus curiae

Joyce E. Hee
Office of the Attorney General
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612
Kamala Harris, Amicus curiae

Albert Norman Shelden
Office of the Attorney General
110 West "A" Street, Suite
1100

Frederick W. Kosmo
Theresa Osterman Stevenson
Wilson Turner Kosmo LLP
550 West "C" Street, Suite 1050

San Diego, CA 92101
Kamala Harris, Amicus curiae

San Diego, CA 92101
PETCO Animal Supplies Stores, Inc., Amicus
curiae

Judith Esther Posner
Reed Smith LLP
355 S. Grand Avenue, Suite
2900
Los Angeles, CA 90012
Rite Aid Corp., Amicus curiae

Margaret Anne Grignon
Reed Smith LLP
355 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071
Walgreen Company, Amicus curiae

[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 27, 2014, at Oakland, California.


Kathleen Morris