

NO. S173972

SUPREME COURT  
FILED

JUL = 6 2009

Frederick K. Orlitch Clerk  
Deputy

**IN THE CALIFORNIA SUPREME COURT**

---

---

*et al*  
**KIMBERLY LOEFFLER, AND AZUCENA LEMUS,**  
*applicants*  
*Plaintiffs and Petitioners,*

v.

**TARGET CORPORATION,**  
*Defendant and Respondent.*

---

---

After a Decision by Division Three of the Second Appellate  
District, Case No. B199287

---

---

**TARGET'S ANSWER TO  
PLAINTIFFS' PETITION FOR REVIEW**

---

---

MIRIAM A. VOGEL (SBN 67822)  
DAVID F. McDOWELL (SBN 125806)  
SAMANTHA P. GOODMAN (SBN 197921)  
**MORRISON & FOERSTER LLP**

555 West Fifth Street, Suite 3500  
Los Angeles, California 90013-1024  
Telephone: 213.892.5200  
Facsimile: 213.892.5454

*Attorneys for Defendant and Respondent,*  
**TARGET CORPORATION**

NO. S173972

---

---

**IN THE CALIFORNIA SUPREME COURT**

---

---

**KIMBERLY LOEFFLER AND AZUCENA LEMUS,**

*Plaintiffs and Petitioners,*

v.

**TARGET CORPORATION,**

*Defendant and Respondent.*

---

---

After a Decision by Division Three of the Second Appellate  
District, Case No. B199287

---

---

**TARGET'S ANSWER TO  
PLAINTIFFS' PETITION FOR REVIEW**

---

---

MIRIAM A. VOGEL (SBN 67822)  
DAVID F. McDOWELL (SBN 125806)  
SAMANTHA P. GOODMAN (SBN 197921)  
**MORRISON & FOERSTER LLP**

555 West Fifth Street, Suite 3500  
Los Angeles, California 90013-1024  
Telephone: 213.892.5200  
Facsimile: 213.892.5454

*Attorneys for Defendant and Respondent,*  
**TARGET CORPORATION**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
LEGAL ARGUMENT .....	2
I. A FEW WORDS ABOUT SALES TAXES.....	2
II. THE CONSTITUTIONAL PROHIBITION AGAINST SUITS TO ENJOIN THE COLLECTION OF SALES TAXES TRUMPS AN ACTION UNDER THE UCL OR THE CLRA .....	4
A. Plaintiffs cannot sue Target for injunctive relief to prevent the collection of sales tax reimbursement.....	4
B. Plaintiffs cannot sue Target for a refund of sales tax reimbursement allegedly charged on exempt items.....	5
C. Consumers are not left without a remedy — but even if they were, article XIII, section 32, forbids judicial intervention .....	5
1. Customers do have remedies.....	6
2. The courts cannot in any event expand the available remedies.....	6
CONCLUSION .....	8
CERTIFICATE OF COMPLIANCE .....	9

TABLE OF AUTHORITIES

Page(s)

CASES

*Barnes v. State Board of Equalization*  
(1981) 118 Cal.App.3d 994 ..... 3

*California Logistics, Inc. v. State of California*  
(2008) 161 Cal.App.4th 242 ..... 4, 6

*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*  
(1999) 20 Cal.4th 163 ..... 4

*Cod Gas & Oil Co. v. State Board of Equalization*  
(1997) 59 Cal.App.4th 756 ..... 5

*Decorative Carpets, Inc. v. State Board of Equalization*  
(1962) 58 Cal.2d 252 ..... 7

*Dell, Inc. v. Superior Court*  
(2008) 159 Cal.App.4th 911 ..... 7

*Duffy v. State Board of Equalization*  
(1984) 152 Cal.App.3d 1156 ..... 2

*In re Marriage of Cornejo*  
(1996) 13 Cal.4th 381 ..... 7

*Javor v. State Board of Equalization*  
(1974) 12 Cal.3d 790 ..... 7

*Livingston Rock & Gravel Company, Inc. v. De Salvo*  
(1955) 136 Cal.App.2d 156 ..... 2

*Pacific Gas & Electric Co. v. State Board of Equalization*  
(1980) 27 Cal.3d 277 ..... 4

*Woosley v. State of California*  
(1992) 3 Cal.4th 758 ..... 1, 3, 5

**TABLE OF AUTHORITIES**  
**(continued)**

**Page(s)**

**CONSTITUTIONS**

California Constitution, article XIII, section 32 ..... passim

**STATUTES**

Business and Professions Code, section 17200 et seq. ....	2
Civil Code, section 1656.1 .....	2
Civil Code, section 1750 .....	2
Revenue and Taxation Code, section 6051 .....	2
Revenue and Taxation Code, section 6091 .....	2
Revenue and Taxation Code, section 6901 .....	3
Revenue and Taxation Code, section 6901.5 .....	3
Revenue and Taxation Code, section 6902 .....	3
Revenue and Taxation Code, section 6904 .....	3
Revenue and Taxation Code, section 6932 .....	3, 5
Revenue and Taxation Code, section 6933 .....	3

## INTRODUCTION

Section 32 of article XIII of the California Constitution provides that “[n]o legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.”

The Court of Appeal held in this case that section 32 of article XIII means what it says — that consumers may not do indirectly that which they are prohibited from doing directly, and thus may not in the guise of a class action alleging unfair competition or violations of the consumer remedies laws sue retailers for allegedly charging sales tax on exempt items. This case has always been much ado about nothing:

- No retailer benefits from charging more sales tax than is actually due because all collected sales taxes are paid to the State Board of Equalization (SBE). There is no financial gain for retailers, who do not get to keep any money charged as sales tax.
- There is no commercial motivation for any retailer to charge more sales tax than is actually due because retailers do more business when they charge less than their competitors, not when they charge more.
- Although the SBE’s decisions are subject to judicial review, only the Board can determine in the first instance whether a retailer’s sales tax computation is correct — and this Court has already held that California’s courts cannot expand the methods for seeking tax refunds. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 792.)

## STATEMENT OF THE CASE

Plaintiffs' operative pleading sought orders enjoining Target from continuing its "illegal practices" (that is, collecting sales tax on hot coffee to go when, allegedly, hot coffee is exempt) and for restitution (reimbursement of sales taxes in the amount collected) under the Unfair Competition Law (the UCL, Bus. & Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (the CLRA, Civ. Code, § 1750 et seq.). (Slip Opn., pp. 4-7.) The trial court sustained Target's demurrer without leave to amend, and the Court of Appeal affirmed. (Slip Opn., p. 23.)

## LEGAL ARGUMENT

### I. A FEW WORDS ABOUT SALES TAXES

Under California's Revenue and Taxation Code, retailers such as Target are taxed for the privilege of selling tangible personal property and must pay sales taxes on goods they sell in their California stores. (Rev. & Tax. Code, § 6051; *Livingston Rock & Gravel Company, Inc. v. De Salvo* (1955) 136 Cal.App.2d 156, 160.)<sup>1</sup> Although a retailer may pass on the tax to its customer (Civ. Code, § 1656.1; *Duffy v. State Board of Equalization* (1984) 152 Cal.App.3d 1156, 1165, fn. 4), the tax is imposed only on the retailer and the tax relationship is between the retailer and the state (*Livingston Rock & Gravel Company, Inc. v. De Salvo, supra*, 136 Cal.App.2d at p. 160), not the customer and the state. Until the exempt nature of a particular sale is established, all of a retailer's gross receipts are presumptively subject to sales tax. (§ 6091; Slip Opn., pp. 8-9.)

---

<sup>1</sup> Undesignated section references are to the Revenue and Taxation Code.

If a retailer erroneously or illegally collects sales taxes from consumers, the only remedy is that which is provided by the Legislature. (Slip Opn., p. 2; Cal. Const., art. XIII, § 32; *Woosley v. State of California* (1992) 3 Cal.4th 758, 789, 792 [“strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues”].)

The Legislature, in turn, has declared that it is the retailer who may seek a refund, not the consumer, and that the retailer must file an administrative claim with the SBE, after which the SBE ascertains whether there was an overpayment and, if so, the amount thereof. (§§ 6901, 6901.5, 6902, 6904, 6932, 6933.) If the SBE determines that a retailer erroneously or illegally collected sales taxes from a customer, the retailer either refunds the overpayment to its customer or remits the overpayment to the State of California. (§ 6901.5; Slip Opn., pp. 3, 8-10.)

But until the claim has been filed, “[n]o suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected . . . .” (§ 6932; *Barnes v. State Board of Equalization* (1981) 118 Cal.App.3d 994, 1001 [failure to exhaust administrative remedies is a jurisdictional defect barring court action]; Slip Opn., pp. 10-11.)

Given these constitutional and legislative restrictions, it is hardly surprising that the Court of Appeal rejected Plaintiffs’ contention that they have a private right of action against Target for injunctive relief and for a refund of sales tax reimbursement allegedly charged on exempt items. (Slip Opn., pp. 3-4.) As the Court of Appeal explained, a “determination by a court that sales tax is not due on ‘to go’ hot coffee purchases from

Target, and an injunction against the collection of sales tax reimbursement by Target on such purchases, is effectively an injunction against the collection of sales tax by the state” and, as such, prohibited by article XIII, section 32 of the California Constitution — because a court may not *directly or indirectly* enjoin or prevent the collection of a sales tax. (Slip Opn., pp. 4, 11-12; and see *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 248 [the “relevant issue is whether granting the relief sought would have the effect of impeding the collection of a tax”]; *Pacific Gas & Electric Co. v. State Board of Equalization* (1980) 27 Cal.3d 277, 284 [section 32 of article XIII means what it says and it is immaterial that the remedy at law is inadequate].)

## **II. THE CONSTITUTIONAL PROHIBITION AGAINST SUITS TO ENJOIN THE COLLECTION OF SALES TAXES TRUMPS AN ACTION UNDER THE UCL OR THE CLRA**

### **A. Plaintiffs cannot sue Target for injunctive relief to prevent the collection of sales tax reimbursement**

However broad the reach of the UCL and CLRA (Pet., pp. 12-16), no court has ever suggested that any consumer remedy can support the issuance of an injunction where, as here, injunctive relief is expressly prohibited by the California Constitution — and Target respectfully suggests that the statement of Plaintiffs’ proposition demonstrates its absurdity. (Pet., pp. 17-20; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 [a “plaintiff may not ‘plead around’ an ‘absolute bar to relief’ simply ‘by recasting the cause of action as one for unfair competition’”].) The Court of Appeal correctly rejected Plaintiff’s suit for injunctive relief.

**B. Plaintiffs cannot sue Target for a refund of sales tax reimbursement allegedly charged on exempt items**

Because there is no statutory or regulatory provision permitting consumers to file claims for sales tax refunds, and because a claim is a prerequisite to a suit for a sales tax refund, Plaintiffs cannot maintain this lawsuit for a refund or restitution. (Slip Opn., p. 12.) Plaintiffs offer no meaningful argument to contrary, contending only that they are free to sue because the Revenue and Taxation Code does not expressly bar consumers from filing claims. (Pet., p. 20.)

Plaintiffs are wrong. Section 6932 doesn't say that the *retailer* can't sue until a claim is filed — it says, quite plainly, that “[*n*]o *suit or proceeding shall be maintained* in any court” for the recovery of sales tax until a claim has been filed — a legislative bear hug embracing not just retailers but customers and anyone else who might think about suing for a refund. (Italics added; and see *Woosley v. State of California*, *supra*, 3 Cal.4th at p. 792 [courts may not expand the legislatively approved methods for seeking tax refunds; *Cod Gas & Oil Co. v. State Board of Equalization* (1997) 59 Cal.App.4th 756, 759.]) As we said, the Court of Appeal got it right.

**C. Consumers are not left without a remedy — but even if they were, article XIII, section 32, forbids judicial intervention**

Plaintiffs contend the Court of Appeal's opinion leaves consumers without an adequate remedy against retailers who wrongfully impose sales tax reimbursement charges. (Pet., pp. 22-30.) Plaintiffs are wrong, but the courts could not in any event expand their remedies.

## **1. Customers do have remedies**

Plaintiffs complained to the Court of Appeal that a decision against them would leave customers without a remedy when retailers charge excess sales tax reimbursement. The Court of Appeal correctly rejected this argument, explaining that customers may obtain a refund of excess sales tax reimbursement paid to retailers without litigation and without any need to incur attorney's fees. A legitimate complaint by a customer to the SBE will result in the SBE's examination of the retailer's tax returns and an audit of the retailer's books and records, and the SBE's conclusion that excess taxes were collected will result in a reimbursement to the customer. (Slip Opn., p. 21.) Plaintiffs now claim this remedy is unrealistic (Pet., p. 27) but do not explain why. Given the amounts at issue in this case — pennies per cup of hot coffee to go — this remedy seems perfectly appropriate. (AA 97.) It is free, easy, and efficient. What's wrong with that?

## **2. The courts cannot in any event expand the available remedies**

As the Court of Appeal explained, Plaintiffs' arguments about the insufficiency of the remedies available to dissatisfied consumers are in any event "better suited for the Legislature than the courts. Article XIII, section 32, prohibits the courts from expanding the remedies expressly provided by the Legislature for sales tax refunds and associated sales tax reimbursement. [Citation.]" (Slip Opn., p. 21; *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 250 [the "California Constitution is 'the supreme law of our state' [citation], subject only to the

supremacy of the United States Constitution”].) Here too, the Court of Appeal got it right.<sup>2</sup>

---

<sup>2</sup> Plaintiffs’ cases are inapposite. *Dell, Inc. v. Superior Court* (2008) 159 Cal.App.4th 911 does not hold that a consumer can sue a retailer and the SBE to recover disputed sales taxes (Pet., pp. 29-30); although it is true that consumers sued a non-registered retailer who cross-complained against the SBE, it is also true that all of the parties wanted a judicial determination of the sales tax issues and *no one objected to the trial court’s or the Court of Appeal’s jurisdiction*. (*Id.* at pp. 920-922.) *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790 is equally inapposite because the fact of the taxpayer’s overpayment to the SBE was *conceded* and the case does no more than authorize a suit to compel retailers to submit refund applications to the SBE. (*Id.* at pp. 802-803.) *Decorative Carpets, Inc. v. State Board of Equalization* (1962) 58 Cal.2d 252, was a suit by a retailer, not a customer, and was based on former section 6054.5, which at least by implication authorized a suit by the retailer to recover excess taxes so they could be repaid to the customer. (*Id.* at pp. 255-256.) *Dell, Javor* and *Decorative Carpets* have nothing to do with this case — where it is the customers suing to enjoin a retailer’s collection of sales tax reimbursement, and where both Target and the SBE have at all relevant stages of the proceedings objected to the courts’ jurisdiction. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [“It is axiomatic that cases are not authority for propositions not considered”].)

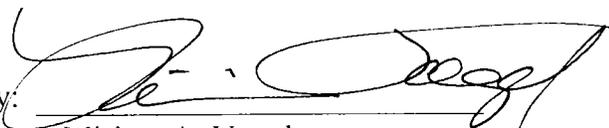
## CONCLUSION

In the end, Plaintiffs' plea to this Court to permit suits to recover sales tax reimbursement from retailers side-steps the Constitutional prohibition against such suits. For this reason in particular and, more generally, for all the reasons discussed above and in the Court of Appeal's well-reasoned opinion, Plaintiffs' Petition for Review should be denied.

Dated: July 6, 2009

Respectfully submitted,

Morrison & Foerster LLP

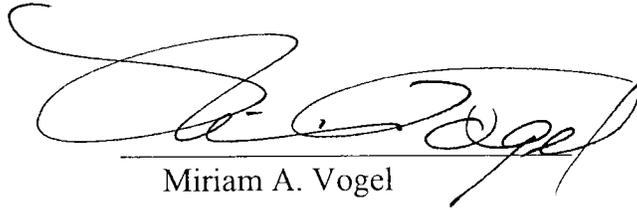
By:   
Miriam A. Vogel

*Attorneys for Defendant and  
Respondent, Target  
Corporation*

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d), counsel certifies that, according to the word-processing program used in preparing this brief, its text (including footnotes) contains 1,981 words.

Dated: July 6, 2009

A handwritten signature in black ink, appearing to read 'M. A. Vogel', written over a horizontal line.

Miriam A. Vogel

*Attorneys for Defendant and  
Respondent, Target Corporation*

**PROOF OF SERVICE BY MAIL**  
(Code Civ. Proc. secs. 1013(a), 2015.5)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

**TARGET'S ANSWER TO PLAINTIFFS' PETITION  
FOR REVIEW**

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 555 West Fifth Street, Los Angeles, California 90013-1024 , in accordance with Morrison & Foerster's ordinary business practices:

Leslie A. Bailey  
Trial Lawyers for Public Justice, P.C.  
555 Twelfth Street, Suite 1620  
Oakland, California 94607

*Attorneys for Plaintiffs and  
Appellants* Kimberly Loeffler  
and Azucena Lemus

(One copy of the Brief)

Joseph J. M. Lange  
Lange & Koncius LLP  
222 N. Sepulveda Blvd., Suite 1560  
El Segundo, California 90245

*Attorneys for Plaintiffs and  
Appellants* Kimberly Loeffler  
and Azucena Lemus

(One copy of the Brief)

Clerk of the Court  
Los Angeles Superior Court, Dept. 62  
111 N. Hill Street  
Los Angeles, CA 90012

(One copy of the Brief)

Attn: The Honorable Michael L. Stern

Clerk of the Court of Appeal  
Second Appellate District  
Division Three  
300 S. Spring Street, 2<sup>nd</sup> Floor  
North Tower  
Los Angeles, CA 90013-1213

(One copy of the Brief)

Ronald A. Reiter, Esq.  
Supervising Deputy Attorney General  
Office of the Attorney General  
Consumer Law Section  
455 Golden Gate Ave., Ste. 11000  
San Francisco, CA 94102-7004

(One copy of the Brief)

Davis S. Chaney, Esq.  
Matt Rodriguez, Esq.  
Al Shelden, Esq.  
Office of the Attorney General  
300 S. Spring Street  
Los Angeles, CA 90013-1230

(One copy of the Brief)

Joyce E. Hee, Esq.  
Deputy Attorney General  
Office of the Attorney General  
1515 Clay Street, 20<sup>th</sup> Floor  
P. O. Box 70550  
Oakland, CA 94612-0550

(One copy of the Brief)

Steve Cooley, Esq.  
District Attorney's Office  
County of Los Angeles  
210 West Temple Street, Suite 18000  
Los Angeles, CA 90012-3210

(One copy of the Brief)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Los Angeles, California, on July 6, 2009.

  
\_\_\_\_\_  
Janis Price