

Memorandum

To: Honorable Betty T. Yee, Chairwoman
Honorable Jerome E. Horton, Vice Chair
Honorable Bill Leonard
Honorable Michelle Steel
Honorable John Chiang

Date: January 11, 2010

From: Kristine Cazadd
Chief Counsel



Subject: **Other Chief Counsel Matters – January 27, 2010**
Item Number M 2
Update: Supreme Court Grant of Review of Court of Appeal Decision,
Amicus Curiae Brief

Yabslev v. Cingular Wireless LLC

Santa Barbara County Superior Court Case No. 01221332

Second Dist. Ct. of Appeal No. B198827

Supreme Court No. S176146

This is to inform you that on November 19, 2009 the California Supreme Court granted review of the appellate court decision that ruled in favor of the Board's position in *Yabslev v. Cingular Wireless LLC*. Pursuant to the authority previously granted by the Board to participate in this case as an *amicus curiae*, the Legal Department intends to file an Application to File an *Amicus* Brief and the brief itself with the California Supreme Court.

In this case, Appellant purchased a cell phone bundled with communications services for a price reduced from the un-bundled price of the phone. As a result, he paid the advertised sale price for his phone. Cingular collected sales tax reimbursement measured by the un-bundled price of the phone, as it is required to do by Regulation 1585. Cingular argued that its application of the sales tax to its sale of the cell phone was specifically authorized under the Board's regulation, so it could not be held liable for engaging in unfair business practices or violating the Unfair Competition Law (UCL). The trial court agreed, granting Cingular's demurrer without leave to amend.

The Appeals Court also agreed, ruling that Board regulations had the force and effect of law, therefore business activities permitted by the Board's regulation could not be unlawful or unfair under the UCL. The Appeals Court opinion was published on August 18, 2008, as 165 Cal. App. 4th 1526. On September 17, 2008, however, the court vacated its opinion at the request of the California Attorney General, who had not been served with the briefs as required by the UCL. (2008 Cal. App. LEXIS 1633.)

When briefing was renewed, the Attorney General filed an *amicus* brief reflecting DOJ's own position that consumer protection laws could be used to adjudicate matters relating to sales taxes. For that reason, the Board authorized the Legal Department to file an *amicus* brief opposing the positions taken by the DOJ, as contrary to the Board's regulations.

The Attorney General informed the Legal Department that a potential conflict of interest existed and that the Board should obtain counsel other than the DOJ. Rather than contracting with outside counsel, the Legal Department assigned Tax Counsel IV, John L. Waid, to brief and argue the case in support of the Board's position in the re-hearing before the Appeals Court. After oral argument in which all parties, including the DOJ, presented their respective positions, the court issued an opinion affirming its previous ruling and also concluding that consumer protection statutes could not be used to adjudicate tax issues. Therefore, the appellant was required to remit the sales tax as required by Regulation 1585.

This opinion was published on August 19, 2009 as 176 Cal. App. 4th 1156. Upon grant of review by the California Supreme Court, the published decision was vacated. The Supreme Court further ordered, however, that the calendaring of this case would be deferred, pending its consideration of its hearing of a related issue in *Loeffler v. Target Corporation* (S 1723972). Briefing is thus deferred, pending order of the Supreme Court.

As a result, no action is required of the Board at this time. However, the Legal Department will file an Application to File an *Amicus* Brief and the brief itself with the California Supreme Court when the Court permits.

If you have any further questions or concerns, please contact Tax Counsel IV, John Waid at (916) 324-3828 or Assistant Chief Counsel, Robert W. Lambert at (916) 708-1030. A brief summary of this matter will be presented by Mr. Waid and Mr. Lambert at the meeting on January 27, 2010.

Approved:



Ramon J. Hirsig
Executive Director

KC:JLW:gm

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| cc: Ms. Joyce Hee, Deputy Attorney General, Oakland | Mr. Robert W. Lambert | MIC: 82 |
| Mr. Ramon J. Hirsig | Mr. Jefferson Vest | MIC: 85 |
| Ms. Randie Henry | Mr. John Waid | MIC: 82 |
| Ms. Freda Orendt | Mr. Robert Buntjer | MIC: 32 |
| Mr. Stephen Rudd | Mr. Jeffrey McGuire | MIC: 92 |

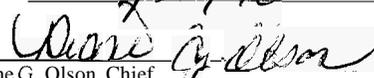
STATE BOARD OF EQUALIZATION



BOARD APPROVED

No Action

At the 1/27/10 Board Meeting



Diane G. Olson, Chief
Board Proceedings Division