IN THE SUPREME COURT OF CALIFORNIA

MICHAEL McCLAIN et al.,
Plaintiffs and Appellants,

v.

SAV-ON DRUGS et al.,
Defendants and Respondents.

AND CONSOLIDATED CASE.
S241471

Second Appellate District, Division Eight
B265011 and B265029

Los Angeles County Superior Court
BC325272 and BC327216

March 4, 2019

Justice Liu authored the opinion of the court, in which Chief Justice Cantil-Sakauye and Justices Chin, Corrigan, Cuellar Kruger, and O'Leary* concurred.

Justice Kruger filed a concurring opinion in which Justices Chin, Corrigan, and O'Leary concurred.

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* Presiding Justice of the Court of Appeal, Fourth Appellate District, Division Three assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

App. 2

McCLAIN v. SAV-ON DRUGS
S241471

Opinion of the Court by Liu, J.

California retailers are generally required to pay the state a sales tax on the retail sale of any "tangible personal property." (Rev. & Tax. Code, § 6051.) Retailers submit payment to the California Department of Tax and Fee Administration (CDTFA or Department) as a percentage of their gross receipts under a rebuttable presumption that all gross receipts are subject to the sales tax. (*Id.*, §§ 6051, 6091.) Retailers may charge customers a "sales tax reimbursement to the sales price" for sales subject to the tax, or they may absorb the tax and opt to build it into the price charged to consumers. (Civ. Code, § 1656.1; see *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103, 1117 (*Loeffler*).)

If a retailer believes it has paid sales tax in excess of the amount legally due, it can file an administrative claim with the Department for a refund of any amount not required to be paid. (Rev. & Tax. Code, § 6901.) If it "has been ascertained" that a customer has paid a retailer more sales tax reimbursement than the amount of sales tax the retailer owes, the retailer upon notice by the Department or the customer "shall . . . return[] the excess sales tax reimbursement to the customer; if the retailer "fail[s] or refuse[s] to do so," the retailer "shall . . . remit[] the funds to the state. (*Id.*, § 6901.5.) A customer who has paid excess sales tax reimbursement has no statutory remedy to obtain a refund from the Department directly. (See *Javor v. State Bd. of*

Equalization (1974) 12 Cal.3d 790, 800 (*Javor*).) (The Legislature created the CDTFA in 2017 and transferred to it most of the tax-related duties and powers previously vested in the Board of Equalization (Board). (Assem. Bill. No. 102 (2017–2018 Reg. Sess.) § 1.) In this opinion, the terms "Department" and "Board" refer to the same administrative entity.)

The question here is whether customers who have paid sales tax reimbursement on purchases they believe to be exempt from sales tax may file suit to compel the retailers to seek a tax refund from the Department when there has been no determination by the Department or a court that the purchases are exempt. In *Javor*, we authorized a customer suit where the Board, upon determining that certain retailers had collected excess sales tax reimbursement, had promulgated rules to provide refunds to overpaying customers. The trial court declined to extend *Javor* to authorize a similar judicial remedy in this case, and the Court of Appeal affirmed. (*McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684, 700–702 (*McClain*).) We agree with the courts below in refusing to extend *Javor* and affirm the judgment sustaining defendants' demurrer.

I.

Section 6369, subdivision (e) of the Revenue and Taxation Code exempts "[i]nsulin and insulin syringes" from sales tax if "furnished by a registered pharmacist to a person for treatment of diabetes as directed by a

physician." (All undesignated statutory references are to the Revenue and Taxation Code.) In 2000, the Board issued a regulation interpreting the exemption in section 6369, subdivision (e) to cover "[g]lucose test strips and skin puncture lancets furnished by a registered pharmacist" for use by a diabetic patient "in accordance with a physician's instructions." (Cal. Code Regs., tit. 18, § 1591.1, subd. (b)(5) (hereafter regulation 1591.1(b)(5)); see § 7051 ["The board . . . may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement" of the sales tax].) The Board's Final Statement of Reasons explained that the test strips and lancets are "so integrated with the operation of insulin and insulin syringes (the syringes cannot be used until the patient has first tested his blood sugar using the lancets and test strips) that the Legislature intended that their sales be exempt from tax as part and parcel of the exemption for sales of insulin syringes under section 6369(e)." (State Bd. of Equalization, Final Statement of Reasons/Plain English: Regulations 1591, 1591.1, 1591.2, 1591.3 & 1591.4 (Dec. 28, 1999) p. 4.)

In 2003, in response to "inconsistencies" in how regulation 1591.1(b)(5) was being applied, the Board's Program Planning Manager sent a letter to California retail pharmacies setting forth the conditions for when the sale of a test strip or lancet is exempt from tax. (State Bd. of Equalization Program Planning Manager Charlotte Paliani, letter to Albertson's re regulation 1591.1, June 18, 2003 (hereafter Paliani Letter).) The letter explained that the retailer must be provided

with a copy of the patient's physician instructions, that the retailer must maintain a copy of the instructions in its records, and that the lancet or test strip must be kept in a secure location and dispensed by a registered pharmacist. Only then, according to the letter, is the sale exempt from tax. (Paliani Letter, *supra* ["However, if your customers are able to remove the items directly off the shelf and pay for them at your store's registers, without a pharmacist's intervention, the sales are subject to tax."].)

Plaintiffs Michael McClain, Avi Feigenblatt, and Gregory Fisher bought glucose test strips and skin puncture lancets from retail pharmacies owned or operated by defendants Sav-On Drugs, Gavin Herbert Company, Longs Drug Stores Corporation, Longs Drug Stores California, Inc., Rite Aid Corporation, Walgreen Co., Target Corporation, Albertson's Inc., The Vons Companies, Inc., Vons Food Services, Inc., and Wal-Mart Stores, Inc. (collectively, pharmacy defendants). These defendants charged plaintiffs sales tax reimbursement on those sales and remitted the amounts they collected to the Department. Plaintiffs contended that their purchases of test strips and lancets were exempt from sales tax, and they filed a class complaint against the pharmacy defendants and the Department for a refund of the sales tax reimbursement they paid. In particular, plaintiffs maintained that all pharmacy sales of test strips and lancets were exempt and that the conditions for application of the exemption set forth in the Paliani Letter were void. In addition to claims alleging breach of contract, negligence, and

violations of consumer protection statutes, the operative complaint sought declaratory and injunctive relief compelling the pharmacy defendants to file a tax refund claim with the Department and ordering the Department to award refunds to be passed on to consumers. The pharmacy defendants and the Department demurred.

The trial court sustained the demurrer without leave to amend. Rejecting plaintiffs' reliance on *Javor*, the trial court said: "What was so unique about the *Javor* circumstance is, 'The Board has admitted it must pay these refunds to retailers.' That's something the Board has certainly not admitted in this case." The court explained that "[t]his case is more like *Loeffler* than *Javor*" because whether the sales at issue met or had to meet the conditions for tax exemption was "very hotly in dispute." The Court of Appeal affirmed, although it noted that the result "is not an entirely satisfying one. . . . [O]ur Constitution chiefly assigns the task of creating tax refund remedies to our Legislature, and our Legislature has yet to address the situation that arises when the legal taxpayer has no incentive to seek a direct refund and the economic taxpayer has no right to do so. It is a topic worthy of legislative consideration." (*McClain*, *supra*, 9 Cal.App.5th at p. 706.)

We granted plaintiffs' petition for review on the dismissal of their claims for breach of contract and relief under *Javor*.

II.

Article XIII, section 32 of the California Constitution states that a taxpayer may bring an action to challenge a tax only "[a]fter payment" and "in such manner as may be provided by the Legislature." The Legislature has enacted a comprehensive scheme "to resolve . . . tax questions and to govern disputes between the taxpayer and the [Department]." (*Loeffler*, *supra*, 58 Cal.4th at p. 1103.) A taxpayer may challenge the imposition of sales tax by paying the tax and then filing with the Department an administrative claim for a refund. (§ 6901.) In the context of the sales tax, "[t]he *retailer* is the taxpayer, *not* the consumer." *(Loeffler*, at p. 1104, fn. omitted; see *City of Pomona v. State Bd. of Equalization* (1959) 53 Cal.2d 305, 309 [sales tax is a tax on the "'privilege of conducting a retail business,'" not a tax on the goods sold].)

As noted, the Legislature has provided no mechanism for consumers to obtain directly from the Department a refund of excess sales taxes that retailers have paid and for which retailers have charged sales tax reimbursement to consumers. In *Javor*, *supra*, 12 Cal.3d 790, we addressed whether customers may bring suit to compel retailers to seek a refund of sales taxes paid in excess of the amount owed. In that case, the repeal of a federal excise tax on motor vehicles entitled retail car dealers to a partial refund of sales tax on cars sold because the excise tax had been included in the price of the cars on which sales tax had been assessed. (*Id.* at pp. 794, 801–802.) The Board agreed that a refund was due and promulgated rules to effectuate the

refunds. (*Id.* at p. 794.) But retail car dealers had "no particular incentive to request the refund" since they would have been required to pass on any refunds to customers. (*Id.* at p. 801.) We held that a customer suit against the retailer was an appropriate remedy, and we allowed customers to join the Board as a party to such suits. (*Id.* at p. 802.) In so holding, we observed that the Legislature had "provide[d] no procedure by which [the customers] can claim the refund themselves" (*id.* at p. 797) and that allowing such a lawsuit was "consonant with existing statutory procedures" (*id.* at p. 800). We further noted that this judicially crafted remedy was "based on broad principles of restitution" that took into account relevant equitable factors. (*Id.* at 797.) The remedy, we said, "is clearly mandated by the Board's duty to protect the integrity of the sales tax by ensuring that the customers receive their refunds. The integrity of the sales tax requires not only that the retailers not be unjustly enriched . . . , but also that the state not be similarly unjustly enriched." (*Id.* at p. 802, citation omitted.)

Javor authorized a judicial remedy in light of a prior determination by the Board that a refund was appropriate. As the Court of Appeal in this case correctly understood, the fact that the Board had already determined that consumers were entitled to a refund was a key premise of our reasoning in *Javor*. (*McClain*, *supra*, 9 Cal.App.5th at p. 700; see *Javor*, *supra*, 12 Cal.3d at p. 794.) The remedy we authorized in *Javor* was designed to facilitate a refund to consumers of excessive sales tax reimbursement that all parties

acknowledged was "erroneously collected" (*Javor*, at p. 795); it was not designed to facilitate resolution of *whether* sales tax reimbursement charged on a particular item was erroneously paid. Although additional factors may be relevant in determining the availability of a *Javor* remedy, we hold that in order to be eligible for a *Javor* remedy, plaintiffs must show, as a threshold requirement, that a prior legal determination has established their entitlement to a refund.

This requirement means that a judicially created remedy is available only when the issue of taxability has already been resolved. In *Javor*, "[t]he Board ha[d] admitted that it must pay these refunds to retailers." (*Javor*, *supra*, 12 Cal.3d at p. 802.) The customers were "unequivocally entitled" to the refunds; without a remedy, the state would have been unjustly enriched. (*McClain*, *supra*, 9 Cal.App.5th at p. 698.) "[I]t was the *certainty* of this unjust enrichment that offended the Board's 'vital interest in the integrity of the sales tax' and warranted judicial intervention." (*Ibid.*) Further, our characterization of this prerequisite as a threshold requirement underscores that even when it has been satisfied, additional legal and equitable hurdles still may lie between a consumer and a *Javor* remedy. It bears repeating that a *Javor* remedy is available "in limited circumstances" (*Loeffler*, *supra*, 58 Cal.4th at p. 1122)—in other words, only rarely. (Cf. *Javor*, at p. 802 [noting "the unique circumstances" before the court that justified crafting a judicial remedy].) This said, eligibility to pursue a judicially created remedy as a matter of law does not depend on a finding at the outset

that the particular person seeking the remedy is entitled to a refund. Whether any particular individual is entitled to a refund will require an evidentiary determination specific to that individual. (Cf. *Javor*, *supra*, 12 Cal.3d at p. 802 [recognizing the possibility that some retailers may have "already claimed and received a refund from the Board"]; *id.* at p. 794 [sales tax "will be refunded to the retailer, provided he also repays to the consumer the amount collected from him as sales tax reimbursement"].)

Plaintiffs do not dispute that no prior legal determination has been made as to whether sales tax was owed on the goods at issue here. Instead, they contend that *Javor* should not be read to require such a prior determination because *Javor* authorized a remedy where it was not certain but only "very likely" that the Board would "become enriched at the expense of the customer." (*Javor, supra*, 12 Cal.3d at p. 802.) But *Javor*'s use of the term "very likely" in no way suggested that the underlying issue of taxability was an open question. We repeatedly observed that the Board had already determined that a refund was due. (*Javor,* at pp. 794, 802.) "All that plaintiffs [sought in *Javor* was] to compel defendant retailers to make refund applications to the Board and in turn to require the Board to respond to these applications by paying into court all sums, if any, due defendant retailers." (*Id.* at p. 802.) The plaintiffs in *Javor* sought no ruling by the Board or the court on any taxability question. The terms "very likely" and "if any" simply signaled the possibility that some retailers "had already claimed

and received a refund from the Board," a factual issue that had not yet been determined in the suit. (*Ibid*.)

Plaintiffs further contend that foreclosing a *Javor* remedy where the taxability issue has not already been resolved is at odds with the Department's "duty to protect the integrity of the sales tax." (*Javor*, *supra*, 12 Cal.3d at p. 802.) Without any means of obtaining a determination on the taxability question, plaintiffs argue, the state will be unjustly enriched to the extent that the purchases at issue actually are not subject to sales tax.

But it is not clear that plaintiffs have no other recourse. "[C]onsumers who believe they have been charged excess reimbursement . . . may complain to the Board, which may in turn initiate an audit" or a "deficiency determination." (*Loeffler*, *supra*, 58 Cal.4th at pp. 1103–1104; see §§ 6481, 6483, 7054.) Consumers, as "interested person[s]," also have the ability to "obtain a judicial declaration as to the validity of any regulation" promulgated by the Department. (Gov. Code, § 11350, subd. (a); see also *id.*, § 11340.6 [generally providing that "any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation"].) Plaintiffs say they do not claim regulation 1591.1(b)(5) is invalid or that it should be amended or repealed. They say they "rely upon [the regulation] as the source of the tax exemption for test strips and lancets"; their objection is to the interpretation of the exemption contained in the Paliani Letter. But plaintiffs contend that the Paliani Letter itself qualifies as a "regulation" subject to the

Administrative Procedures Act, and they do not explain why they cannot seek a judicial declaration of its invalidity under Government Code section 11350. (See *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 334–335; Gov. Code, § 11342.600 [" 'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."].)

We have no occasion to express a definitive view on what qualifies as a prior legal determination for purposes of a *Javor* remedy because it is clear that no such determination has been made exempting the lancets and strips at issue here. We likewise have no occasion to consider what remedies might be available to a claimant who has been unable to obtain a determination about the taxability of particular transactions using the available avenues. The Court of Appeal here noted that many of the remedial options available to plaintiffs are "the practical equivalent of allowing them to tug . . . at the Board's sleeve." (*McClain*, *supra*, 9 Cal.App.5th at p. 706.) Even so, there is no indication in the record that plaintiffs have pursued any avenues other than this lawsuit for obtaining a resolution of the taxability question that underlies their claim for relief.

We see an important difference between circumstances like those in *Javor*, where the taxability issue had already been resolved, and the circumstances here, where the taxability issue remains disputed.

Where the taxability issue has been resolved, the avoidance of unjust enrichment is the primary concern with respect to ensuring the integrity of the sales tax. (See *Javor*, *supra*, 12 Cal.3d at p. 802.) Where the taxability issue is disputed, the avoidance of unjust enrichment remains a concern, but there is a countervailing interest in the orderly administration of the sales tax. In *Loeffler*, a case concerning the taxability of retail sales of hot coffee, we said "[t]he taxability question lies at the center of the Board's function and authority. . . . [T]he sales tax law is exceedingly comprehensive and complex; its application to specific types of transactions is debatable in innumerable circumstances. The Legislature has subjected such questions to an administrative exhaustion requirement precisely to obtain the benefit of the Board's expertise, permit it to correct mistakes, and save judicial resources." (*Loeffler*, *supra*, 58 Cal.4th at p. 1127.) We explained that allowing consumers to sue retailers under consumer protection statutes "based on a dispute over the taxability of a sale would require resolution of the taxability question in a manner inconsistent with this system, forfeiting these benefits." (*Ibid.*) In light of *Loeffler*, we reject plaintiffs' contention that limiting judicially created refund remedies to circumstances where the taxability issue has already been resolved would undermine the integrity of the sales tax.

For similar reasons, we do not agree with plaintiffs that the unavailability of a judicially created refund remedy in this case violates due process of law. As noted, plaintiffs may have other avenues to obtain a

determination of the taxability question at the heart of their complaint. (See *ante*, at pp. 9–10.) Moreover, although sales tax exemptions redound to the benefit of consumers, it must be remembered that "[t]he *retailer* is the taxpayer, *not* the consumer." (*Loeffler*, *supra*, 58 Cal.4th at p. 1104.) We are not presented here with a *taxpayer's* claim that no means of challenging an illegal imposed tax is available. (Cf. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18, 39 [due process requires states to "provide taxpayers with . . . a fair opportunity to challenge the accuracy and legal validity of their tax obligation" and a "'clear and certain remedy'"].) Nothing in the sales tax statutes establishes that consumers have a vested right to applicable exemptions. (See § 6901.5 [requiring retailers to return excess sales tax reimbursement to consumers or else remit it to the state].)

Javor does not suggest otherwise. There we said that when the taxability issue has already been resolved (which is not the case here), a judicially created remedy is "clearly mandated by the Board's duty to protect the integrity of the sales tax" (*Javor*, *supra*, 12 Cal.3d at p. 802); we did not say the remedy was constitutionally compelled. In enacting a "comprehensive" law of exemptions "governing every imaginable type of sales transactions" (*Loeffler*, *supra*, 58 Cal.4th at p. 1105), the Legislature did not run afoul of due process by choosing to establish an administrative framework for ensuring that retailers claim exemptions and for resolving disputes over the applicability of exemptions—even if that framework relies on market

mechanisms, agency initiative, and consumer influence short of lawsuits directly seeking sales tax reimbursement refunds. As the Attorney General explains, "the system is designed to ensure that, in general, the benefits of tax exemptions flow to consumers as a class (though not necessarily in a perfect manner, or in every possible transaction)." Given the competing interests involved in designing the system, due process does not require that tax exemptions flow to consumers in a more perfect manner.

Finally, plaintiffs contend that this tax refund system, by unjustly enriching the state at the expense of consumers, works an unconstitutional taking. But even if the state's retention of amounts that have been judicially or administratively determined to be excess sales tax reimbursement could be regarded as a taking, no such determination has been made here. And the absence of a legislatively or judicially created refund action to compel such a determination does not itself constitute a taking.

III.

Plaintiffs' complaint also alleged that the pharmacy defendants breached their contractual duties under Civil Code section 1656.1 by misrepresenting the sales tax owed on the purchases at issue. The Court of Appeal granted defendants' demurrer with respect to all claims in the operative complaint, and plaintiffs seek to revive this claim as well. Civil Code section 1656.1, subdivisions (a) and (d) establish a "rebuttable

presumption[]" that retailers and purchasers "agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser" if certain notice requirements are met. Plaintiffs argue that if they are not permitted to claim breach of contract on the ground that they agreed only to pay sales tax reimbursement on purchases *actually* subject to tax, then the rebuttable presumption will improperly become an irrebuttable presumption.

This argument is foreclosed by *Loeffler*. In that case, we held that consumers could not bring actions under the Unfair Competition Law or the Consumer Legal Remedies Act to challenge a retailer's alleged misrepresentation of the taxability of hot coffee. (*Loeffler*, *supra*, 58 Cal.4th at p. 1092.) We said "it is clear that a remedy that is directed at requiring the taxpayer to make a claim for refund from the Board, rather than one involving a direct claim by the consumer against the retailer, is the remedy that is consistent with the current governing statutory scheme." (*Id.* at p. 1133.) We explained that "a *Javor*-type remedy for consumers," which compels retailers to file a refund claim with the Department, is "an appropriate means to vindicate a consumer interest in a refund of a reimbursement charge" and that *Javor* "do[es] not suggest" that taxability issues "should be resolved in a consumer action" against the retailer. (*Ibid.*) *Loeffler*'s reasoning does not convert the rebuttable presumption set forth in Civil Code section 1656.1 into an irrebuttable presumption. It simply means that the avenues

available to plaintiffs for rebutting the presumption must be ones consistent with the tax code.

CONCLUSION

We affirm the judgment of the Court of Appeal.

LIU, J.

We Concur:

CANTIL-SAKAUYE, C.J.
CHIN, J.
CORRIGAN, J.
CUELLAR, J.
KRUGER, J.
O'LEARY, J.*

MCCLAIN v. SAV-ON DRUGS
S241471

Concurring Opinion by Justice Kruger

I agree with the majority that plaintiffs in this case do not have an equitable cause of action to compel the retailers to seek a refund of sales taxes paid to the state. Although we fashioned such a remedy in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, we did so with the recognition that the Legislature that enacted the sales tax laws had not provided a direct refund remedy for consumers (who are not, technically

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* Presiding Justice of the Court of Appeal, Fourth Appellate District, Division Three assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

speaking, the taxpayers under California's sales tax law). (*Id.* at p. 800.) We held, however, in the "unique circumstances" of that case—in which the State Board of Equalization had publicly announced that refunds were owed to consumers, thanks to intervening changes in federal tax law, but retailers had not stepped forward to facilitate their disbursement—that a judicially created remedy was necessary to ensure consumers actually received the refunds. Without such a remedy, we concluded, the state would be unjustly enriched. (*Id.* at p. 802.) Here there are no comparable "unique circumstances"; this is, rather, a more typical contest over the applicability of the sales tax to a particular category of transactions. To recognize an equitable *Javor*-type cause of action under the facts of this case would not comport with the basic structure of the refund procedure provided by statute.

I write separately to address the role that "taxability" determinations play in this analysis. (Maj. opn., *ante*, at p. 7.) As the majority notes, the law does provide avenues for plaintiffs to challenge the applicability of the sales tax to the transactions at issue here, such as seeking a judicial declaration of the validity of governing tax regulations. (Maj. opn., *ante*, at pp. 9–10.) The majority faults plaintiffs for failing to take that step, seeing "an important difference between circumstances like those in *Javor*, where the taxability issue had already been resolved, and the circumstances here, where the taxability issue remains disputed." (Maj. opn., *ante*, at p. 10; see *id.* at p. 11.)

I agree that plaintiffs' failure to pursue their available statutory options is relevant to the determination of whether to fashion an equitable remedy here. But while consumers may have alternative mechanisms to obtain an official determination that a transaction is exempt from sales tax (see maj. opn., *ante*, p. 9), I would not characterize these mechanisms as the functional equivalent of administrative remedies that plaintiffs must exhaust before pursuing a *Javor* action. The central difficulty with plaintiffs' claim, as I see it, is not that they have skipped any particular set of procedural prerequisites to suit. It is, rather, that any cause of action to compel retailer refund suits will create a certain amount of tension with a statutory scheme that presumes goods are taxable (Rev. & Tax. Code, § 6091), and empowers the retailer to waive a potentially applicable tax exemption if it so chooses (*id.*, § 6905). In such a system, the question becomes: under what circumstances can we say the state has been *unjustly* enriched by the retention of funds the retailers have turned over, such that consumers should be permitted to compel retailers to pursue restitution claims on their behalf? The answer to that question is not easily reduced to a simple formula. Accordingly, as the majority says, even when there has been a legal determination of some sort bearing on the taxability of a particular transaction, "additional legal and equitable hurdles still may lie between a consumer and a *Javor* remedy." (Maj. opn., *ante*, at p. 7.)

Javor itself did not involve an official determination that a particular transaction was not *taxable*; it

involved a determination that refunds were owed to consumers. Other claims of unjust enrichment, based on other types of determinations, might raise different administrative and other considerations. At present, however, given the policy choices embodied in the statutory scheme, plaintiffs have not demonstrated circumstances that counsel crafting a common law restitutionary remedy.

With these observations, I concur.

KRUGER, J.

We Concur:

CHIN, J.
CORRIGAN, J.
O'LEARY, J.*

* Presiding Justice of the Court of Appeal, Fourth Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICHAEL MCCLAIN et al., Plaintiffs and Appellants, v. SAV-ON DRUGS et al., Defendants and Respondents.	B265011 & B265029 (Los Angeles County Super. Ct. Nos. BC327216 & BC325272) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT (Filed Apr. 17, 2017)

THE COURT:*

It is ordered that the opinion filed herein on March 13, 2017, and modified on April 10, 2017, be modified as follows:

1. On page 28, line 1 of footnote 9, the word "review" is changed to "rehearing" so the sentence reads:

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* CHAVEZ, Acting P. J., HOFFSTADT, J., GOODMAN, J.†

† Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

> In their 73-page petition for rehearing, the customers thank this Court for "grappling with this difficult area of law" and, noting that briefing "may not have sufficiently anticipated and focused upon this [C]ourt's concerns," proceed to "supply the necessary focus" to their appeal by raising several new arguments that appear nowhere in their prior briefs—namely, that denying them a remedy violates the contract clause of our Constitution, that denying them a remedy violates due process because the collection of sales tax reimbursement by retailers effects an "escheat" to the state, that denying them a remedy effectively invalidates section 6597, and that they can rebut Civil Code section 1656.1's presumption of a contractual agreement with the retailers to collect sales tax reimbursement by showing actual fraud, constructive fraud, undue influence, mistake of fact, and mistake of law.

There is no change in the judgment.

CERTIFIED FOR PUBLICATION.

/s/ Chavez /s/ Hoffstadt /s/ Goodman

Filed 3/13/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICHAEL McCLAIN et al., Plaintiffs and Appellants, v. SAV-ON DRUGS et al. Defendants and Respondents.	B265011 & B265029 (Los Angeles County Super. Ct. Nos. BC327216 & BC325272)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

The Kick Law Firm, Taras P. Kick, G. James Strenio; McKool Smith Hennigan, Bruce R. MacLeod and Shawna L. Ballard for Plaintiffs and Appellants.

Reed Smith, Douglas C. Rawles, James C. Martin and Kasey J. Curtis; Morgan Lewis & Bockius, Joseph Duffy and Joseph Bias for Defendants and Respondents Walgreen Co. and Rite Aid Corporation.

Berry & Silberberg, Robert P. Berry and Carol M. Silberberg for Defendant and Respondent Wal-Mart Stores, Inc.

Morrison & Foerster, David F. McDowell and Miriam A. Vogel for Defendant and Respondent Target Corporation.

Holland & Knight, Richard T. Williams and Shelley Hurwitz for Defendants and Respondents CVS Caremark Corporation, Longs Drug Stores Corporation and Longs Drug Stores California, Inc.

Safeway, Inc., Theodore Keith Bell for Defendants and Respondents The Vons Companies, Inc. and Vons Food Services, Inc.

Hunton & Williams, Phillip J. Eskenazi and Kirk A. Hornbeck for Defendants and Respondents Albertson's Inc. and Sav-On Drugs.

Kamala D. Harris, Attorney General, Stephen Lew, Supervising Deputy Attorney General, and Nhan T. Vu, Deputy Attorney General, for Defendant and Respondent California State Board of Equalization.

* * * * * *

A customer buys skin puncture lancets and test strips used by diabetics to test blood glucose levels from a retail pharmacy store like CVS or Walgreens. The retail pharmacy is the one obligated to pay sales tax to the State of California (Rev. & Tax. Code,

§ 6051),[1] and accordingly charges the customer a "sales tax reimbursement" to cover the cost of the sales tax and remits that amount to the state. If the retail pharmacy subsequently believes no sales tax is owed, it—as the taxpayer—can file an administrative claim for a refund with the state Board of Equalization (the Board) and challenge any adverse ruling in court. (§§ 6901 & 6932.) But the retail pharmacy usually has no financial incentive to pursue such a remedy because any refund it obtains from the Board must be passed back to the customer. (§ 6901.5; *Decorative Carpets, Inc. v. State Board of Equalization* (1962) 58 Cal.2d 252, 254-255 (*Decorative Carpets*).) What is more, and as our Supreme Court recently reaffirmed in *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1123-1124 (*Loeffler*), the customer is not the taxpayer and thus cannot herself seek a refund from the Board.

May the customer obtain a court order compelling the retail pharmacy to file an administrative refund claim with the Board? Our Constitution strictly limits refund actions to those "provided by [our] Legislature" (Cal. Const., art. XIII, § 32), and no such statutory remedy exists. However, our Supreme Court in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 802 (*Javor*) held that the Legislature's authority in this regard is not exclusive and that courts retain a residual power to fill remedial gaps by fashioning tax refund remedies in "unique circumstances." *Loeffler* had no

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[1] All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

occasion to define those "unique circumstances." (*Loeffler*, *supra*, 58 Cal.4th at pp. 1101, 1133-1134.)

This case squarely presents this unanswered question. We conclude that a court may create a new tax refund remedy—and, accordingly, that the requisite "unique circumstances" exist—only if (1) the person seeking the new tax refund remedy has no statutory tax refund remedy available to it, (2) the tax refund remedy sought is not inconsistent with existing tax refund remedies, and (3) the Board has already determined that the person seeking the new tax refund remedy is entitled to a refund, such that the refusal to create that remedy will unjustly enrich either the taxpayer/retailer or the Board. Here, a group of customers filed a class action predicated on their ability to obtain an order compelling the retail pharmacies to file an administrative claim with the Board seeking a refund of the sales tax paid for skin puncture lancets and glucose test strips. Because the Revenue and Taxation Code does not provide for this remedy and because they have not established any of the three prerequisites to the exercise of the judicial residual power to fashion new remedies, the trial court correctly sustained demurrers to all of the claims in the customers' operative complaint without leave to amend. We consequently affirm the judgment below.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Plaintiffs and appellants Michael McClain, Avi Feigenblatt, and Gregory Fisher (collectively, customers) each bought skin puncture lancets and glucose test strips from retail pharmacy stores owned and/or operated by defendants and respondents Sav-On Drugs, Gavin Herbert Company, Longs Drug Stores Corporation, Longs Drug Stores California, Inc., Rite Aid Corporation, Walgreen Co., Target Corporation, Albertson's Inc., The Vons Companies, Inc., Vons Food Services, Inc., and Wal-Mart Stores, Inc. (collectively, the retail pharmacies). Skin puncture lancets (or lancets) and glucose test strips are used by persons living with diabetes to draw their blood and test its glucose level, which is critical to knowing when to inject insulin to reduce their glucose levels. When the customers purchased lancets and test strips from the retail pharmacies, the retail pharmacies charged them "sales tax" on those items. The retail pharmacies subsequently remitted the money they collected as sales tax to the Board.

II. Procedural History

In the operative fourth amended complaint filed in 2014,[2] the customers sued the retail pharmacies and

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[2] This litigation was initiated by different customers in two separate lawsuits filed in December 2004, and January 2005, the first seeking a refund for sales tax paid on lancets, and the second

the Board[3] for a refund of the "sales tax" they paid for lancets and test strips, alleging that these items have been exempt from sales tax since March 10, 2000, the date on which the Board made effective California Code of Regulations, title 18, section 1591.1, subdivision (b)(5) (Regulation 1591.1). This complaint sought to certify a class comprised of "all persons who were charged by and paid one or more of the [retail pharmacies] a sales tax on glucose test strips or skin puncture lancets in California when such should not have been charged."

The operative complaint alleges that the retail pharmacies collected sales tax reimbursement for lancets and test strips when no sales tax was due on these items and that this conduct (1) breached an implied term of the contract that is deemed by statute to exist whenever a retailer collects a sales tax reimbursement from a customer under Civil Code section 1656.1 and also breached the implied covenant of good faith and fair dealing; (2) constituted an unlawful, unfair and/or fraudulent business practice and thereby violates the unfair competition law (UCL) (Bus. & Prof. Code,

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seeking a refund for sales tax paid on test strips. The current customers were subsequently substituted in as the lead plaintiffs.

[3] Although the Board is not listed in the caption of the operative complaint, the Board is named in that complaint's claim for declaratory and injunctive relief, and the Board has appeared and actively litigated the demurrer that is the subject of this appeal. We consequently conclude that although the Board was initially brought into this litigation when the retail pharmacies filed cross-complaints against it for indemnity and declaratory relief, it is also now a defendant as to the claim for injunctive and declaratory relief in the main action.

§ 17200 et seq.); (3) constituted negligence; and (4) violated the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.) by misrepresenting the taxability of those items. The operative complaint further seeks declaratory and injunctive relief compelling the retail pharmacies to prosecute a tax refund claim with the Board and the Board to award such a refund.

The retail pharmacies and the Board demurred to the operative complaint. Following briefing, the trial court issued an oral ruling sustaining the demurrers to all of the claims in the operative complaint without leave to amend. The court reasoned that *Loeffler*, *supra*, 58 Cal.4th 1081 held that a customer could not seek a tax refund of sales tax from a retailer; that *Javor*, *supra*, 12 Cal.3d 790 allowed a customer to seek a refund of sales tax where the Board had already decided the question of taxability and concluded that a refund was due; and that "[t]his case is more like *Loeffler* than *Javor*" because the taxability of lancets and test strips was "very hotly in dispute."

Following entry of judgment, the customers filed this timely appeal.

DISCUSSION

I. Pertinent Legal Principles

A. Relevant tax law

1. Sales tax generally

In California, *retailers* are generally required to pay the state a sales tax on any "tangible personal

property" they sell "at retail." (§ 6051; *Loeffler*, *supra*, 58 Cal.4th at p. 1103 ["under California's sales tax law, the taxpayer is the retailer, not the consumer"]; *De Aryan v. Akers* (1939) 12 Cal.2d 781, 783 [same].) Retailers pay the sales tax as a percentage of their "gross receipts" (§ 6051), and it is rebuttably presumed that all "gross receipts" are subject to the tax (§ 6091). Retailers pay the sales tax they owe on a quarterly basis. (§§ 6451-6459; *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 640.)

2. Collection of sales tax reimbursement from the customer

Although retailers were in the past *required* to collect the money they had to pay as sales tax from their customers (former § 6052),[4] our Legislature altered that approach after the United States Supreme Court held that a retailer's mandatory collection of sales tax from customers rendered *the customer* the de facto taxpayer. *(Diamond National v. State Equalization Bd.* (1976) 425 U.S. 268, 268 [96 S.Ct. 1530, 47 L.Ed.2d 780].) Under our Legislature's current approach, it is up to each retailer to decide—as a matter of contract with its customers—whether to charge its customers a

[4] Many counties and municipalities still employ such mechanisms. (E.g., *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 93-95 (*Andal*) [so noting, and holding that retailer who collects such fees may seek a refund]; *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1361-1365 (*TracFone*) [same]; *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349, 358-362 (*Sipple*) [same].)

"sales tax reimbursement to the sales price" for items subject to the sales tax, or whether to pay the sales tax itself. (Civ. Code, § 1656.1, subd. (a).)[5] If a retailer "show[s]" a charge for sales tax on the receipt or "other proof of sale," or otherwise notifies a customer that it has or will charge sales tax, it is rebuttably presumed that the retailer and customer have contractually agreed that the retailer is collecting a sales tax reimbursement from the customer. (Civ. Code, § 1656.1, subds. (a) & (d).)

3. Pertinent exemptions

The retail sale of many items of tangible personal property is exempt from the sales tax. (§§ 6351-6380 [exemptions from sales and use taxes], 6381-6396 [exemptions from sales tax].) Since 1961, the sale of "medicines" has been exempt from sales tax if "[p]rescribed for the treatment of a human being by a person authorized to prescribe the medicines, and dispensed on prescription filled by a registered pharmacist in accordance with law." (§ 6369, subd. (a)(1).) A few years later, in 1963, our Legislature declared "[i]nsulin and insulin syringes" exempt from the sales tax if they were "furnished by a registered pharmacist to a person for treatment of diabetes as directed by a physician."

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[5] The retailer's decision affects the amount of the sales tax to be collected: If the retailer pays the tax itself, it owes sales tax on the full amount charged for the item; if the retailer charges its customer a "sales tax reimbursement," it owes sales tax on the amount charged for the item less the reimbursement amount collected. (§ 6012, subd. (c)(12).)

(*Id.*, subd. (e).) On March 10, 2000, the Board promulgated Regulation 1591.1, which expanded this statutory exemption from the sales tax to reach "[g]lucose test strips and skin puncture lancets" if they were "furnished by a registered pharmacist [and] used by a diabetic patient to determine his or her own blood sugar level . . . in accordance with a physician's instructions." (Cal. Code Regs., tit. 18, § 1591.1, subd. (b)(5); see generally § 7051 [conferring upon Board the power to "prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement" of the sales tax].) The Board expanded the sales tax exemption to these additional items because they "are an integral and necessary active part of the use of insulin and insulin syringes" expressly exempted by statute. (Cal. Code Regs., tit. 18, § 1591.1, subd. (b)(5).)

B. Relevant statutory tax refund procedures

1. For retailers

If a retailer believes it has paid the state sales tax "in excess of the amount legally due" (§ 6901), the retailer—as the taxpayer—has two options available to it by statute.

First, the retailer can file an administrative claim with the Board for a refund of any amount "not required to be paid." (§ 6901.) It has three years from the last day of the quarter in which it is seeking a refund to file such an administrative claim. (§ 6902, subd. (a).) If and only if the Board declines to issue a refund, the retailer may challenge that denial in court if it files

suit "[w]ithin 90 days" of the Board's mailing the notice of denial. (§§ 6932 & 6933; *State Bd. of Equalization v. Superior Court* (1980) 111 Cal.App.3d 568, 571 (*State Bd. of Equalization*) ["pending completion of . . . administrative proceedings [before the Board], [the] court lacks jurisdiction"].) Requiring the retailer to litigate its refund claim before the Board "in the first instance" is designed to "obtain the benefit of the Board's expertise, permit it to correct mistakes, and save judicial resources." (*Loeffler*, *supra*, 58 Cal.4th at pp. 1103, 1127.) If a refund is ordered (either by the Board or in subsequent judicial review), the retailer can either "return[]" the corresponding sales tax reimbursement it collected to "the customer" or leave the funds with the state. (§ 6901.5.)

Second, the retailer can elect to waive its right to a refund by declining to file a timely claim for administrative review. (§ 6905.)

2. For customers

If the customer believes it has paid a sales tax reimbursement for items on which no sales tax is due, the customer has no statutory tax refund available to her—either administrative or judicial—against the Board or the retailer. (See §§ 6901-6909 [no administrative refund procedure for person who did not "collect" or "pa[y]" the tax], 6931-6937 [no lawsuit "unless a claim for refund . . . has been duly filed"]; *Loeffler*, *supra*, 58 Cal.4th at pp. 1092, 1133 [customer may not sue the retailer for excess sales tax reimbursement];

Javor, *supra,* 12 Cal.3d at p. 800 [customer has no "direct cause of action against the Board for . . . erroneously collected sales tax reimbursements"]; see generally *Delta Air Lines, Inc. v. State Bd. of Equalization* (1989) 214 Cal.App.3d 518, 526 (*Delta*) ["Generally, persons who have not paid the tax in question are barred from bringing suits for refund of that tax"].)

C. Law governing demurrers and their review on appeal

In reviewing an order sustaining a demurrer without leave to amend, we must ask (1) whether the demurrer was properly sustained, and (2) whether leave to amend was properly denied. "'"The first question requires us to "'determine whether [that] complaint states facts sufficient to constitute a cause of action."'" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010 (*Centinela Freeman*), quoting *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) In undertaking this task, we accept as true all """material facts properly pleaded""" and consider any materials properly subject to judicial notice; we disregard any """contentions, deductions or conclusions of fact or law""" set forth in the operative complaint. (*Ibid.*; *Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1007.) We independently review the operative complaint and independently decide whether it states viable causes of action. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230.) The second question requires us to decide whether "'"there is a reasonable possibility

that the defect [in the operative complaint] can be cured by amendment. . . .”’” (*Centinela Freeman*, at p. 1010.)

II. The Demurrer Was Properly Sustained

The premise of every claim in the customers’ operative complaint is that the retail pharmacies erred in collecting sales tax reimbursement on lancets and test strips at a time when they were exempt from sales tax. Accordingly, the customers cannot state a cause of action unless they can establish their entitlement to a refund. This raises the preliminary procedural question that lies at the heart of this case: Can the customers seek a refund of the amount they paid as sales tax reimbursement through the lawsuit they have filed?

Relying on *Javor*, *supra*, 12 Cal.3d 790, the customers argue that this lawsuit is a viable means for seeking a refund of the sales tax reimbursement they paid for lancets and test strips. *Javor*, they argue, held that customers who wrongly paid the sales tax reimbursement could obtain injunctive relief compelling retailers to file administrative claims with the Board to obtain a sales tax refund that could be passed back to the customers. (*Id.* at pp. 802-803.) This result, the customers urge, preserves the Board’s ability to decide the taxability question in the first instance *and* prevents the state from being unjustly enriched by retaining sales tax to which it is not entitled. The retail pharmacies and the Board respond that the remedy sanctioned in *Javor* is limited to situations in which the Board has

already determined that a refund is due and in which the newly created tax refund remedy would not create inconsistencies with existing tax refund statutes; both prerequisites, the retail pharmacies and Board urge, are absent. The availability of a judicially created remedy to supplement existing statutory remedies is a question of law that turns in part on questions of statutory interpretation; accordingly, our review is de novo. (*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 956 [questions of law reviewed de novo]; *Department of Health Care Services v. Office of Administrative Hearings* (2016) 6 Cal.App.5th 120, 140-141 [statutory interpretation is a question of law].)

A. Governing law

Our state Constitution expressly entrusts to our Legislature the power to regulate *post*-payment actions for refunds. Specifically, article XIII, section 32 provides: "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.*" (Italics added; see also *Masi v. Nagle* (1992) 5 Cal.App.4th 608, 611 ["The Constitution . . . grants the power to the Legislature to prescribe the manner of proceeding in tax cases"].)[6] "This

[6] The Constitution also prohibits any *pre*-payment challenges to tax collection, establishing a "pay first, sue later" rule that guarantees the steady collection of taxes and thus the uninterrupted conduct of the government's business that relies on that

constitutional limitation rests on the premise that 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." (*Woosley v. State of California* (1992) 3 Cal.4th 758, 789 (*Woosley*); *Sprint Telephony PCS, L.P. v. Board of Equalization* (2015) 238 Cal.App.4th 871, 883 (*Sprint Telephony*).)

This constitutional mandate has two necessarily implied corollaries. First, the "[a]dministrative tax refund procedures [enacted by the Legislature] are to be strictly enforced"; "substantial compliance" with those procedures will not do. (*McCabe v. Snyder* (1999) 75 Cal.App.4th 337, 344; *Sprint Telephony*, *supra*, 238 Cal.App.4th at p. 883; *IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299 (*IBM*).) Second, and most pertinent here, courts may not "expand[] the methods for seeking tax refunds expressly provided by the Legislature." (*Woosley*, *supra*, 3 Cal.4th at p. 792; *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194, 1203 (*Kuykendall*).)

However, this second corollary is not an absolute one and courts have on occasion recognized "equitable exceptions" in "certain unique circumstances." (*IBM*, *supra*, 131 Cal.App.4th at p. 1305, fn. 16.)

The first case to do so was *Decorative Carpets*, *supra*, 58 Cal.2d 252. There, a retailer selling carpet

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steady stream of tax revenue. (E.g., *City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 827 (*City of Anaheim*).)

sought a tax refund of the sales tax from the Board. It was determined in a tax refund suit between the retailer/taxpayer and the Board that the retailer was entitled to that refund. The retailer nevertheless declared its intention to keep the refund for itself and not to return it to its customers, even though the retailer had charged them a sales tax reimbursement. (*Id.* at pp. 253-254.) The Board balked at issuing the refund, arguing that it would "unjustly enrich[]" the retailer at its customers' expense. (*Id.* at p. 254.) Our Supreme Court in *Decorative Carpets* agreed, holding that the Board's "vital interest in the integrity of the sales tax" gave it the authority to "insist as a condition of refunding overpayments to [the retailer] that [the retailer] discharge its trust obligations to its customers" by refunding to them the corresponding sales tax reimbursement they had paid. (*Id.* at p. 255.)

The next case was *Javor*, *supra*, 12 Cal.3d at page 790. There, the Board "admitted" that a recent retroactive repeal of the federal excise tax on motor vehicles entitled car dealers, as retailers, to a partial refund of the sales tax because the federal excise tax had been included in the price of the cars on which sales tax had been assessed. (*Id.* at pp. 794, 801-802.) The Board went so far as to promulgate rules to effectuate these refunds. *(Ibid*.) When car dealers did not apply for the tax refund money the Board had set aside, the customers themselves sued to compel the retailers to do so. (*Id.* at pp. 795-796, 802.) *Javor* held that this judicially created remedy—a lawsuit by customers to compel retailers to file administrative claims for refunds and

pass those refunds back to the customers—was appropriate "under the unique circumstances of this case." (*Id.* at pp. 797-803.) In reaching this conclusion, our Supreme Court placed weight on the facts that the Legislature had "provide[d] no procedure by which [the customers] [could] claim the refund themselves" (*id.* at p. 797); that its newly fashioned remedy was "consonant with existing statutory procedures" (*id.* at pp. 800, 802); and, drawing on *Decorative Carpets*, *supra*, 58 Cal.2d 252, that the newly fashioned remedy was necessary—given that the retailers themselves had "no particular incentive to request the refund" (because they would act solely as a pass-through for the refund money)—to ensure that the state would not be "unjustly enriched" by getting to keep the admittedly erroneous sales tax revenue (*Javor*, at pp. 800-802).

Although *Decorative Carpets* dealt with a "greedy" retailer and *Javor* dealt with unmotivated retailers, both cases share three commonalities that, in our view, define the "unique circumstances" to which *Javor* alludes and that are prerequisites to the judicial recognition of any new tax refund remedy. First, in both *Decorative Carpets* and *Javor*, the customers had no available statutory tax refund remedy. (*Decorative Carpets*, *supra*, 58 Cal.2d at pp. 255-256; *Javor*, *supra*, 12 Cal.3d at p. 797; see also *Loeffler*, *supra*, 58 Cal.4th at p. 1114 [noting that customers in *Javor* had "no direct statutory provision for . . . refunds"]; cf. *State Bd. of Equalization*, *supra*, 111 Cal.App.3d at p. 571 [declining to recognize new remedy because the "real party . . . does not lack a [statutory tax refund]

remedy"].) Second, in both *Decorative Carpets* and *Javor*, the judicially crafted remedies were "consonant" with the statutory tax refund procedures that our Legislature *did* provide. (*Decorative Carpets*, at p. 255; *Javor*, at pp. 800, 802; accord, *Kuykendall*, *supra*, 22 Cal.App.4th at pp. 1204-1205 [noting that the "equity" of judicially created remedies "will defer to statute"].) Lastly, in both *Decorative Carpets* and *Javor*, there had been a precursor determination—either by the Board on its own volition or through its acquiescence to a court ruling in a tax refund action between the retailer/taxpayer and the Board—that a tax refund was due and owing. (*Decorative Carpets*, at p. 254; *Javor*, at pp. 794, 802.) Such a determination left no question that the court's refusal to fashion a new remedy would result in either the retailer (in *Decorative Carpets*) or the state (in *Javor*) keeping money that the customers had paid as sales tax reimbursement and to which the customers were unequivocally entitled. And it was the *certainty* of this unjust enrichment that offended the Board's "vital interest in the integrity of the sales tax" and warranted judicial intervention. *(Decorative Carpets*, at pp. 254-255; *Javor*, at pp. 800-803.) Limiting a court's authority to fashion new tax remedies to situations involving all three of these requirements specifically reinforces the constitutional mandate, described above, that the *Legislature* have primacy in fixing the procedures by which tax refunds are obtained. (Cal. Const., art. XIII, § 32.)

The customers in this case do not dispute the necessity of the first two prerequisites, but dispute the

third and offer several reasons why courts should have the power to fashion new tax refund remedies even when the entitlement to that refund is yet to be decided.

To begin, they assert that *Javor* itself disclaims any requirement of a prior determination that the tax refund is due and owing because, at one point, *Javor* explains that the customers there sought an order "to compel defendant retailers to make refund applications to the Board and in turn to require the Board to respond to these applications by paying into court all sums, *if any*, due defendant retailers." (*Javor*, *supra*, 12 Cal.3d at p. 802, italics added.) The customers argue that the phrase "if any" means that the retailers' entitlement to a refund was still an open question in *Javor*. They are wrong. *Javor* makes clear that "[t]he Board ha[d] admitted that it must pay these refunds to retailers" (*ibid.*); the Court's use of the phrase "if any" simply acknowledged that some retailers might not have sold cars for which a refund is due—not that there were lingering questions about whether, as a legal matter, a refund was due.

Next, the customers argue that *Javor*'s "unique circumstances" exist whenever a court is confronted with a situation involving a "legal taxpayer" who has the right but no incentive to seek a refund (here, the retail pharmacies) and an "economic taxpayer" who has the incentive but not the right to seek a refund (here, the customers). As the customers frankly acknowledge, however, this division of "taxpayer" status is an inherent feature of "the peculiar structure of

California's retail sales tax" law, making that circumstance ubiquitous—not unique. More to the point, if courts could fashion new tax refund remedies simply because the Revenue and Taxation Code does not label the customer as the taxpayer, our Constitution's directive that the Legislature be the branch primarily charged with "provid[ing]" tax refund remedies would be rendered all but meaningless. (Cal. Const., art. XIII, § 32.) The customers urge that the risk to the state's coffers by virtue of new tax refund remedies is minimal given the statutory presumptions that customers agree to pay sales tax reimbursement (§ 1656.1, subd. (a)) and that all of a retailer's gross receipts are subject to the sales tax (§ 6051). But the affront to the constitutional mandate stems from the judicial creation of new tax refund remedies, whether or not the use of those remedies ultimately leads to a refund.

The customers further cite a number of cases in which courts have allowed one party to file a derivative action for another. These cases fall into three broad categories, each of increasing irrelevance. The first is *Delta*, *supra*, 214 Cal.App.3d 518. There, the Court of Appeal held that an airline that paid sales tax reimbursement to a retailer for fuel could sue for a sales tax refund, even though it was not the taxpayer. (*Id.* at pp. 526-528.) In so holding, the court cited *Javor* and ruled that the case involved a "unique circumstance" authorizing judicial recognition of a new remedy of a direct lawsuit for a refund—namely, that California's tax statutes "regard[] common carriers such as Delta as retailers as well as purchasers." (*Delta*, at p. 528)

Indeed, *Delta* expressly distinguished common carriers from "ordinary purchasers or consumers." *(Id.* at p. 526.) The customers here are ordinary consumers, not common carriers. The second category involves cases in which a retailer who collected county or municipal taxes from consumers was held to have standing to sue for a refund, even though the retailer was not technically the taxpayer. (See *Andal*, *supra*, 137 Cal.App.4th at pp. 93-95; *TracFone*, *supra*, 163 Cal.App.4th at pp. 1364-1365; *Sipple*, *supra*, 225 Cal.App.4th at pp. 358-362.) In so holding, these cases declined to recognize a "sharp distinction between a 'taxpayer' and a 'tax collector' " or to follow a "strict rule denying standing in all circumstances to 'tax collectors.' " (*Sipple*, at p. 359.) These cases are doubly irrelevant because they deal with the standing of a *retailer* who is a tax collector and not the standing of a *consumer* who is neither a tax collector nor a taxpayer, and because they deal with local taxes and thus are not constrained by article XIII, section 32's mandate which, as noted above, *does* require "strict" construction of tax refund statutes. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 822, fn. 5 [art. XIII, § 32 does not apply to "local governments"]; *City of Anaheim*, *supra*, 179 Cal.App.4th at pp. 830-831 [same].) The last category involves the right of a limited partner to file a derivative action on behalf of a limited partnership. (*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1449-1450.) Because it arises in a different context and involves a different statutory scheme, it is irrelevant.

The customers lastly contend that limiting judicially created remedies to cases in which there has been a prior determination that a tax refund is due will lead to absurd results. We agree that courts are loathe to interpret the law in a way that yields absurd results (*John v. Superior Court* (2016) 63 Cal.4th 91, 96), but disagree with the customers' prognostications. The customers assert that if consumers can sue for a tax refund only if there is a prior determination that a refund is due, then the same must be true for retailers seeking a refund from the Board, which will make it nearly impossible for retailers to obtain a tax refund. But the conclusion of this argument does not flow from its premise. The *reason* why a prior determination is required for consumers is because they are asking the court to create a new tax refund remedy when none exists by statute in order to avoid certain unjust enrichment; that reason has no application to retailers, who are authorized by statute to seek administrative and then judicial relief. The customers also argue the Board is not infallible because its rulings are sometimes overturned, such that placing limits on the power of courts to fashion new tax refund remedies makes it more possible for the Board's incorrect interpretations to go unreviewed. However, the question before us is to define the conditions that must be satisfied before the judiciary may fashion tax refund remedies notwithstanding our Constitution's primary commitment of defining remedies with the Legislature; it is not to afford maximum opportunities for judicial review. Moreover, retailers still have the right to directly

challenge the Board's rulings and, as we discuss below, consumers have a more diluted right to do so.

B. Application

As explained above, a court may create a new tax refund remedy—and, accordingly, *Javor*'s "unique circumstances" exist—only if (1) the person seeking the new tax refund remedy has no statutory tax refund remedy available, (2) the tax refund remedy sought is not inconsistent with existing tax refund remedies, and (3) the Board has already determined that the person seeking the new tax refund remedy is entitled to a refund, such that the refusal to create that remedy will unjustly enrich either the taxpayer/retailer or the Board. The trial court in this case ruled that it could not fashion a new judicial remedy to allow the customers to attack the Board's collection of sales tax on lancets and test strips. This ruling was correct because none of the three prerequisites is present in this case.

First, the customers do not have a statutory right to directly file for a refund of the sales tax from the Board or for a refund of sales tax reimbursement from the retailers, but they are not remedy-less. In fact, they have several other remedies available to them. They may urge the Board to initiate an audit of the retail pharmacies' practices in collecting sales tax or to conduct a deficiency determination of the retail pharmacies' sales tax payments (§§ 6481, 6483 & 7054; *Loeffler*, *supra*, 58 Cal.4th at pp. 1103-1104, 1123 [noting that "consumers who believe they have been

charged excess reimbursement . . . may complain to the Board, which may in turn initiate an audit" or a "deficiency determination"].) They can, as "interested person[s]," petition the Board under the Administrative Procedure Act to compel the Board to "adopt [], amend[], or repeal" Regulation 1591.1, subdivision (b)(5) and the collection of sales tax under that regulation. (Gov. Code, § 11340.6; *Loeffler*, at p. 1123.) And they can, as "interested person[s]," sue the Board under the Administrative Procedure Act, for declaratory relief "as to the validity of" Regulation 1591.1. (Gov. Code, § 11350; *Loeffler*, at p. 1123.)

Second, judicial recognition of a right of customers to sue retailers and the Board for a sales tax refund when the Board has yet to determine whether any refund is due is inconsistent with at least two provisions of the Revenue and Taxation Code. It is inconsistent with section 6905. That section allows retailers to waive their right to seek a tax refund; if consumers can compel a retailer to seek a refund when it would rather waive it, the retailer's right to waiver would be negated. (*Loeffler*, *supra,* 58 Cal.4th at p. 1129 [so noting].) The consumers assert that the retailers' power to waive their right to a refund is irrelevant because the retailers' power to collect sales tax reimbursement from consumers is a matter of contract under Civil Code section 1656.1. But the contractual nature of the right to collect sales tax reimbursement in no way affects the fact that a judicial remedy compelling a retailer to seek a refund overrides a retailer's election not to seek one.

Judicial recognition of a right of customers to sue retailers when the Board has yet to determine whether a refund is due is also inconsistent with section 6901.5. That section requires a retailer that obtains from the Board a sales tax refund collected from its customers to do one of two things: (1) return that money to the customers once its entitlement to the refund "has been ascertained"; or (2) leave that money with the state. (§ 6901.5; see also Cal. Code Regs., tit. 18, § 1700, subd. (b)(1) [containing identical language].)[7] In *Loeffler*, our Supreme Court read this section as providing a "safe harbor" or "safe haven" for any retailer/taxpayer "vis-à-vis the consumer" if the retailer/taxpayer "remits reimbursement charges [it collects] to the Board." (*Loeffler*, *supra*, 58 Cal.4th at pp. 1100, 1103-1104, 1119.) If consumers can sue retailers to compel them to seek a refund from the Board, then the "safe harbor" from suit erected by section 6901.5 is no safe harbor at all. (Accord, *Loeffler*, at p. 1126 [noting conflict].) Indeed, the customers concede as much when they raise the issue before us only to preserve it for challenge before the

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[7] In pertinent part, this provision provides: "When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person to this state." (§ 6901.5)

Supreme Court. To be sure, the regulation implementing section 6901.5 provides that it "do[es] not necessarily limit the rights of customers to pursue refunds from persons who collected tax reimbursement from them in excess of the amount due." (Cal. Code Regs., tit. 18, § 1700, subd. (b)(6).) But *Loeffler* held that this language did no more than "acknowledge[] that *if* other remedies are available, the regulation does not interfere with them." (*Loeffler*, at p. 1122.)

Third, the Board has yet to decide whether the retail pharmacies—and, by extension, the customers—are entitled to a refund. Regulation 1591.1 exempts the sales of lancets and test strips, but only when they are (1) "furnished by a registered pharmacist," and (2) "used by a diabetic patient . . . in accordance with a physician's instructions." (Cal. Code Regs., tit. 18, § 1591.1, subd. (b)(5).) It has yet to be determined whether those two conditions are legally valid or were factually satisfied as to the customers' purchases. In their reply brief on appeal, the customers argue that the Board has conceded that a refund was due because the Board, in its brief on appeal, did not address the merits of the taxability issue and admitted that a 2003 opinion letter sent by a Board staff member arguably setting forth additional prerequisites to application of Regulation 1591.1's exemption was not a "binding determination of the Board." There was no concession. The Board did not address the merits of the taxability issue because the chief issue in this appeal is not the merits, but *where* and *by whom* they may be litigated. And the validity or invalidity of the 2003 opinion letter

does not alter the undisputed fact that the Board has yet to determine that all of the sales the customers challenge fall within the ambit of Regulation 1591.1's exemption.

For these reasons, the customers have not established that this case involves the "unique circumstances" that empower a court to fashion a new tax refund remedy.[8] Absent such a remedy, there can be no judicial determination that the retail pharmacies' collection of sales tax reimbursement was improper. And absent that determination, none of the customers' claims—all of which are premised on the unlawful collection of sales tax reimbursement—state a viable cause of action. (*Centinela Freeman*, *supra*, 1 Cal.5th at p. 1010.)

C. Customers' further arguments

The customers level two further categories of arguments at our conclusion.

First, the customers note that courts must generally "construe . . . statute[s] in a manner that avoid[] doubts as to [their] constitutional validity." (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th

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[8] In light of our conclusion that the requisite "unique circumstances" have not been shown, we have no occasion to reach the Board's and retail pharmacies' further arguments that *Javor* also requires a showing that the consumers first demanded that the retail pharmacies file an administrative refund claim or a showing that the retail pharmacies have maintained records making it possible to remit any refund to the correct customers.

1045, 1048.) From this, they argue that we must not construe the Revenue and Taxation Code to deny them a judicially fashioned tax refund remedy because doing so will risk violations of the takings clause and due process. No such risks exist.

The federal and California Constitutions guarantee that "private property" shall not "be taken for public use, without just compensation." (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19, subd. (a).) Two types of "takings" are assured just compensation: (1) categorical or per se takings, which arise when the government physically occupies property or deprives its owner of all viable uses of the property (*Brown v. Legal Foundation of Wash.* (2003) 538 U.S. 216, 233 [123 S.Ct. 1406, 155 L.Ed.2d 376]; *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 462); and (2) regulatory takings, which arise when government regulation of a property's use sufficiently impairs its value (*California Building Industry Assn.*, at p. 462.) However, it is well settled that "'[t]axes and user fees . . . are not "takings."'" *(Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S., ___, ___ [133 S.Ct. 2586, 2600-2601, 186 L.Ed.2d 697]; *United States v. Sperry Corp.* (1989) 493 U.S. 52, 62, fn. 9 [110 S.Ct. 387, 107 L.Ed.2d 290]; accord, *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671-672 [noting that "the taking of money is different, under the Fifth Amendment, from the taking of real or personal property"].) Thus, the collection of sales tax reimbursement from consumers does not implicate the takings clause.

The federal and California Constitutions also provide that the state shall not deprive persons of their property "without due process of law." (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7.) This guarantee applies to the payment of taxes (*T. M. Cobb Co. v. County of Los Angeles* (1976) 16 Cal.3d 606, 617, fn. 6), but authorizes a state to relegate taxpayers to a "'postpayment refund action'" as long as they are afforded "'meaningful backward-looking relief to rectify any unconstitutional deprivation.'" (*River Garden Retirement Home v. Franchise Tax Bd.* (2010) 186 Cal.App.4th 922, 937-938 (*River Garden*), quoting *McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18, 31 [110 S.Ct. 2238, 110 L.Ed.2d 17] (*McKesson*); *City of Anaheim*, *supra*, 179 Cal.App.4th at p. 831.) A state provides "meaningful backward-looking relief" if it gives taxpayers (1) "a 'fair opportunity to challenge the accuracy and legal validity of their tax obligation,'" and (2) "a "'clear and certain remedy'" for the erroneous or unlawful tax collection." (*River Garden*, at p. 938, quoting *McKesson*, at p. 39.)

We conclude that our refusal to craft a judicial tax refund remedy for consumers does not risk a due process violation. To begin, it is not precisely clear how due process applies to them. The payment of sales tax alleged in the operative complaint entails two sequential transactions: Consumers pay sales tax reimbursement to retailers, and retailers pay sales tax to the state. The first transaction is ostensibly outside the reach of due process because it reflects a contractual arrangement between two private parties (§ 1656.1; *Coleman*

v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1112 ["Only those actions that may fairly be attributed to the state . . . are subject to due process protections"]), and the consumers are not parties to the second transaction. Further, our Supreme Court in *Loeffler*—although silent on this point—noted no constitutional impediment to its ruling that left consumers with no direct remedy for a refund and instead relegated them to urging Board inquiry and to filing claims or actions under the Administrative Procedure Act. (*Loeffler*, *supra*, 58 Cal.4th 1081.) Were we to come to a contrary conclusion, we would effectively overrule *Loeffler*, something we are not allowed to do except in narrow circumstances not present here. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456.)

Second, the customers assert that our ruling that we are powerless to craft a new judicial tax refund remedy does not warrant dismissal of their breach of contract claims or their second UCL claim. Specifically, the customers urge (1) that their breach of contract claims are grounded in Civil Code section 1656.1, which is effectively part of the Revenue and Taxation Code and is more specific than section 6901.5, and thus cannot be inconsistent with either the Code or section 6901.5, (2) their second breach of contract claim is premised on allegations that one of the retailers who charged sales tax reimbursement sometimes did not mean to do so because its corporate policy did not call for it, and (3) that their second UCL claim is based upon allegations that the retail pharmacies should

have informed them of the requirements to qualify for Regulation 1591.1's exemption.

We reject the customers' first argument because, as explained above, the premise of their breach of contract claims is that the retail pharmacies wrongly collected sales tax reimbursement *that was not due*, yet they have no means in this lawsuit of establishing whether it was due. We reject the customers' second argument because the only contract at issue is the one between the retailer and customer; because the express terms of that contract, which arise from the presumption in Civil Code section 1656.1 because the retailer showed a charge for sales tax on its receipts, are that the retailer is charging sales tax reimbursement; and because the retailer's unexpressed intention not to charge sales tax in some transactions cannot alter the express terms of the parties' contract or otherwise rebut the statutory presumption (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 352 [" 'The terms of the contract are determinable by an external, not by an internal standard' "]). We reject the customers' third argument because the pharmacies owed no duty to explain how to qualify for the exemption. (Accord, *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 987-988 [insurance company has no duty to explain to clients how to get the best deal]; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1136-1137 [same].)

III. Leave To Amend Was Properly Denied

The customers argue that the trial court erred in not allowing them to amend the operative complaint to add a claim that they were suffering an unconstitutional taking. Because, as explained above, such a claim lacks merit as a matter of law, the trial court's conclusion that there was no reasonable possibility the customers could amend their complaint to state a claim was correct.

* * * * * *

The result we reach in this case is not an entirely satisfying one. The retail pharmacies lack any financial incentive to challenge the Board's implementation of Regulation 1591.1 by seeking a refund, and the statutory remedies available to the customers—urging the Board to conduct an audit or filing a claim or lawsuit under the Administrative Procedure Act—while effective enough to satisfy due process, are nevertheless the practical equivalent of allowing them to tug (albeit persistently) at the Board's sleeve. However, this is the result we must reach because our Constitution chiefly assigns the task of creating tax refund remedies to our Legislature, and our Legislature has yet to address the situation that arises when the legal taxpayer has no incentive to seek a direct refund and the economic taxpayer has no right to do so. It is a topic worthy of legislative consideration. Because the prerequisites for making it a topic of judicial consideration are not present, we adhere to the statutes as they are written and affirm the order dismissing this case.

DISPOSITION

The judgment is affirmed. The Board and the retail pharmacies are entitled to their costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 311
HON. JOHN SHEPARD WILEY JR., JUDGE

TARAS KIHICZAK (MCCLAIN), Plaintiff, vs. SAV ON DRUGS, ET AL., Defendants.	SUPERIOR COURT CASE NO. BC 325272

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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* * *

[643] You've got a situation where the State has knowingly separated the taxpayer from the real party in interest in order initially and always to tax entities who were otherwise tax exempt.

The Supreme Court gradually liberalized the law to give taxpayers—or, excuse me, to give purchasers more right over time until the Diamond decision came down.

The Diamond decision looked, relying totally on a Massachusetts decision that was almost exactly on point, so here we have to switch and talk about the Massachusetts decision.

THE COURT: Counsel, I've read these pages.

MR. MacLEOD: This is just a quick summary for counsel.

THE COURT: No.

MR. MacLEOD: All right. I won't, your Honor. I'm fine.

THE COURT: I've read them. They're incorporated. I understand your points. Please don't repeat yourself.

MR. MacLEOD: Then the only point really that I had to make that wouldn't be repetition, your Honor, is that there is a constitutional claim that has not been ripe in this case up until this point.

As long as Javor was still in play, the class has an inchoate claim for just compensation under the takings clause of the U.S. Constitution and also a claim for violation of due process.

As long as Javor, which was designed to avoid the constitutional issues, was still in play, we didn't feel we [644] would bring that claim, but if it is to be the Court's decision that the Javor claim is dismissed, then we would like leave to amend to add the constitutional claims.

THE COURT: I understand that argument. You made that clear on the record.

Do you think the hot coffee buyers in Loeffler suffered the same unconstitutional taking?

MR. MacLEOD: In Loeffler there was no State defendant, so it couldn't be unconstitutional. They couldn't consider it.

THE COURT: They still lost money. They couldn't do anything about it.

MR. MacLEOD: But they couldn't have asserted the claim because the constitutional violation

was the State. Since they decided not to sue the State, there was no constitutional claim for the Court to consider in Loeffler.

THE COURT: So the buyers of the lancets here are out the money. The coffee buyers are out the money. In one case it's a constitutional violation and in the other it's not?

MR. MacLEOD: Well, it may have been a constitutional violation in Loeffler, but it didn't need to be considered by the Loeffler court because the plaintiff had chosen not to sue the BOE.

THE COURT: Okay. So you're saying it was an unconstitutional taking. It was just that the lawyer for the putative class failed to take the right steps to vindicate the class's rights, the constitutional rights?

MR. MacLEOD: Right. And he expressly refused to name [645] the Board of Equalization and expressly—

THE COURT: He, the lawyer?

MR. MacLEOD: Right.

THE COURT: I understand your argument. Anything further?

MR. MacLEOD: No. I have nothing further.

THE COURT: Is the matter submitted?

MR. KICK: The Court's given us a tremendous amount of time and I'm appreciative of that.

THE COURT: I don't think you're going to get this amount of time at the Court of Appeal.

MR. KICK: Well, the only thing I would say is if your Honor is not inclined to look at the unique circumstances, the language I pointed out on the fifth cause of action on the other two—

THE COURT: Counsel, you've repeated yourself in your oral argument. Please don't repeat your oral argument now that your colleague has finished his baton holding.

MR. KICK: I'm not going to repeat it.

On the leave to amend, the other reason I think it's important to give us leave to amend to add the constitutional claims is we don't want to have an argument later or an issue on how far back the class can go in terms of statute of limitations.

So if you don't give us leave to amend to add those, that might interject an additional issue that's avoidable at this time.

It would be a substantial amount of money should, you [646] know, we be proven to be right. We didn't get to frame those.

THE COURT: Very well.

So the matter is submitted?

MR. KICK: Yes, your Honor. Thank you very much.

THE COURT: All right. So plaintiff has submitted. I'm going to stand by my tentative.

I am not going to give leave to amend. Respectfully I disagree with counsel as to whether the proposed amendments that have been identified clearly on this record would do anything at all to salvage these claims.

Frankly the biggest service I can do the parties on a case of this magnitude—I've got 13 extremely well-dressed lawyers here—this is a hard fought case with extremely sophisticated counsel. The most efficient thing I can do is get you to 300 South Spring Street without delay.

So let's have clarity here as to what the timelines -what the deadlines are.

I think I should have a form of judgment tomorrow.

You should run this by Mr. Kick and his colleagues to make sure this have [sic] they agreed. This should be very precise.

So the entry of judgment should be tomorrow, possibly the next day if someone is taking a long time reading what should be a very, very brief document.

But get that to me. I'll sign it. That will trigger a timeline for the putative class's appellate recourse.

And however I had decided this demurrer, I venture someone was going to be taking it up.

So three independent legal analysts will go over the [647] very extensive record that counsel have preserved here.

I want to thank counsel for your agility and argument. It's tough to come in on the short end of a tentative and keep your cool. Both of you did that in admirable fashion.

I especially want to commend Mr. Kick for his extremely low key and appealingly understated manner of advocacy.

This is a case that counsel cares a great deal about. I know Mr. Kick over a course of years has been trying to get justice for this class. It would have been very easy for him, after almost a decade, maybe more than a decade of investment in the case and commitment to this people, to get a full head of steam, and I got just the opposite. There was no table pounding. There was low-key eye contact, a responsiveness of argument, a very appealing professionalism on display.

So counsel in the world of law and motion for trial lawyers, you can't win them all. It's not always the case, however, that by showing up and showing your stuff you burnish an already glossy reputation as counsel have today.

So, counsel, thank you for your service to your clients, to the Court, to the cause of justice.

If I've erred in this matter, I sorely regret it for having delayed a proper resolution of the case.

I will say I've done the best I can to interpret the governing law. This will now move into the appellate arena, which is where I think it belongs.

So notice is waived?

MR. RAWLES: From our part.

MR. BERRY: Yes, your Honor.

[648] THE COURT: Counsel, thank you very much.

And to our noble court reporter, who has dealt with unusual names and an appendix.

Thank you, again.

Thanks, everybody.

(End of proceedings.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 311

HON. JOHN SHEPARD WILEY JR., JUDGE

TARAS KIHICZAK (MCCLAIN),	)	
Plaintiff,	)	
vs.	)	SUPERIOR COURT CASE NO. BC 325272
SAV-ON DRUGS, et al.,	)	
Defendants.	)	

I, DAVID A. SALYER, Official Pro Tem Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 601 through 648, inclusive, comprise a true and correct transcript of the proceedings taken in the above-entitled matter reported February 24, 2015.

DATED September 16, 2015.

DAVID A. SALYER, CSR, RMR, CRR
Official Pro Tem Court Reporter
CSR No. 4410

APPENDIX OF CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The Due Process Clauses of the Constitution provide in relevant part: "no person [shall] be deprived of life, liberty, or property, without due process of law" (U.S. Const. amend. V), and "nor shall any State deprive any person of life, liberty, or property, without due process of law" (U.S. Const. amend. XIV, § 1.).

The Takings Clause of the Constitution provides that "private property [shall not] be taken for public use without just compensation." (U.S. Const. amend. V.) This guarantee is made applicable to the states by the Fourteenth Amendment. *See Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

California Revenue and Taxation Code § 6051 states:

> For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2 1/2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, * * * * and at the rate of 33/4 percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 43/4 percent thereafter.

California Revenue and Taxation Code § 6901.5 states:

> When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person to this state. Notwithstanding subdivision (b) of Section 6904, those amounts remitted to the state shall be credited by the board on any amounts due and payable under this part on the same transaction from the person by whom it was paid to this state and the balance, if any, shall constitute an obligation due from the person to this state.

California Revenue and Taxation Code § 6933 states:

> Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 (commencing with Section 6901), the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction

in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

California Civil Code § 1656.1 states:

(a) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. 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:

(1) The agreement of sale expressly provides for such addition of sales tax reimbursement;

(2) Sales tax reimbursement is shown on the sales check or other proof of sale;

(3) The retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

* * * *

d) The presumptions created by this section are rebuttable presumptions."