Supreme Court Copy

S174507

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTUARDO ARDON, on behalf of himself and all others similarly situated,
Plaintiff and Appellant,
vs.
CITY OF LOS ANGELES
Defendant and Respondent.

After a Decision By The Court of Appeal
Second Appellate District, Division Three
Case No. B201035

Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC363959

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I. INTRODUCTION

Contrary to the City's assertion, Plaintiff Ardon is not seeking a "new remedy" under section 910 of the Government Code ("Section 910"). (Answering Brief ("Answer"), p. 1.) This Court held more than 35 years ago that the Section 910 claims procedure, which expressly states that claims may be filed "***by the claimant or by a person acting on his or her behalf,***" authorizes claims to be filed by a representative acting on behalf of a class of claimants. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 [115 Cal.Rptr. 797] (*City of San Jose*).) Despite being the only decision by this Court to construe Section 910, the *City of San Jose* decision is ***not*** mentioned in the City's Introduction.[1]

This Court has never overruled *City of San Jose.* Additionally, the City concedes by its silence that the Legislature has acquiesced in the *City of San Jose* holding for more than 35 years, even while amending Section 910 several times in other respects, including the very clause underlying the *City of San Jose* holding.

Although the City asserts that the term "claimant" should be given different meanings depending on the nature of the claim before a court, the City provides no example of a statute where a defined term is given different meanings depending on the nature of the claim. Moreover, the City's suggestion that this Court re-write Section 910 to impose different meanings on the term "claimant" runs directly counter to the goal of uniformity sought by the Legislature in adopting Section 910. Furthermore, the Legislature has already provided its own answer. In those instances where the Legislature has deemed it necessary to treat certain tax refund claims differently than provided for in Section 910, it has enacted specific refund statutes and expressly removed claims pursuant to those statutes from the reach of Section 910 by enactment of Government

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[1] Rather, the City attacks the unanimous decision in *Oronoz,* the only appellate decision other than that by the court below to construe Section 910, which permitted class claims under Section 910. (*County of Los Angeles v. Superior Court*, 159 Cal.App.4th 353 [71 Cal.Rptr.3d 485] (*Oronoz*).) Although the City asserts that *Oronoz*, which followed *City of San Jose,* is an "outlier," ***none*** of the cases relied upon by the City as the basis for that assertion either construes or applies Section 910. (See Answer, p. 1.)

Code section 905(a) ("Section 905(a)"). Therefore, Defendant's argument that all claims for tax refunds should be treated identically regardless of the applicable statute flies in the face of the Legislature's mandate in Section 905(a) expressly providing otherwise. The City's Introduction also fails to mention Section 905(a).

Woosley did not construe or apply Section 910. (*Woosley v. State of California* (1992) 3 Cal.4th 758 [13 Cal.Rptr.2d 30, 838 P.2d 758] (*Woosley*).) Instead, *Woosley* considered tax refund claims specifically excepted from application of Section 910 by Section 905(a). The Legislature deemed those claims should be covered by other statutes. Nothing in *Woosley* suggests that *City of San Jose* itself has been overruled or that the term "claimant" in Section 910 should be interpreted differently depending on whether the claim is for return of illegally collected taxes or some other refund or claim. (See *Oronoz, supra*, 159 Cal.App.4th at p. 365 ["*Woosley* did not disapprove *San Jose*"].)

The City's erroneous and overbroad assertion that *Woosley* requires "strict compliance" in all tax refund cases is undermined by the ***City's own admissions that the term "strict compliance" appears nowhere in Woosley***. (Answer, p. 12.)

Moreover, the City's argument starts from a false premise because the *City of San Jose* holding that the term "claimant" includes a class does ***not*** stem from application of a substantial compliance standard. In fact, the *City of San Jose* Court never reached the substantial compliance issue. Rather, the question posed in *City of San Jose* was whether Section 910 allowed class claims as a substantive matter. "In determining the sufficiency of such claims," the Court stated, "the more liberal test of substantial compliance has *not* been applied – the courts recognizing substantial compliance cannot be predicated on no compliance." (*City of San Jose, supra*, 12 Cal.3d at p. 456, internal quotations and citations omitted, emphasis added.) Likewise, the question presented here does not depend on whether substantial compliance is or is not permitted but, rather, whether Section 910 permits a class claim as a substantive right. This Court concluded in *City of San Jose* that it does.

Even assuming *Woosley* requires "strict compliance" with all claims statutes and that article XIII, section 32 of the California Constitution (hereafter "Section 32") applies

to actions against local governments, which this Court and other appellate courts have repeatedly held ***not*** to be the case[2], the Legislature has expressly provided that a ***substantial compliance*** standard applies to claim forms submitted pursuant to Section 910. (Gov. Code, §§ 910.6, 910.8, 911.) This Court cannot change that standard, particularly if Section 32 applies, as the City contends. Here, the City's brief pertaining to the nature and amount of information which must be submitted in conjunction with a Section 910 claim is inconsistent if not locked in circular reasoning: although it argues that under *Woosley* and Section 32 the express language of the Legislature must be strictly followed, it argues on this point that the Legislature's express language permitting substantial compliance with Section 910 should be given no effect since Section 32 requires strict compliance. But "strict compliance" with what, if not the express language of the Legislature permitting "substantial compliance"?

In reality, the question whether Section 32 applies to claims against local governments is a red herring. Even if we assume Section 32 applies to the claims here, at most it requires strict construction of tax refund claims statutes.[3] But even under a strict construction standard there is no escaping the fact that the plain language of Section 910 provides for claims to be filed "by the claimant *or* ***by a person acting on his or her behalf.***" That is more than adequate to allow class claims, even under a strict construction standard. Indeed, Section 910 is similar to section 382 of the Code of Civil Procedure itself, which simply says that "*one or more may sue or defend for the benefit of all.*" (Code Civ. Proc., § 382, emphasis added.) Neither Section 910 nor section 382 uses the words "class action," yet no one would suggest that section 382 does not authorize

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[2] Most recently, *Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825 [102 Cal.Rptr.3d 171] (*City of Anaheim*).

[3] Notwithstanding the City's attempt to conflate the two concepts, strict *construction* and strict *compliance* are two different things. In the context here, strict construction goes to the question whether class claims are permitted as a substantive right under Section 910, whereas strict (or, more accurately, substantial) compliance goes to the question whether a particular claim form sufficiently complied with Section 910's form requirements. The difference is substance versus form.

class actions because the Legislature did not use the words "class action." There is no magic language that must be invoked by the Legislature to provide for class claims. The words of Section 910 given their ordinary meaning provide it.[4]

Defendant's public policy arguments seeking to overturn *City of San Jose* and/or re-write Section 910 should more properly be directed to the Legislature, not this Court. In any event, the policy considerations which the City and the court below purportedly derive from *Woosley* have no application here since Section 32, by its express terms and as construed by multiple opinions of this Court, applies only to actions against the State. In fact, as the City argues, "*Woosley* reflects the requirements of Article XIII, Section 32." (Answer, p. 13.) If Section 32 does not apply here (and it does not), then, without more, the entire reasoning behind the holding in *Woosley* and the holding itself are inapplicable.

Furthermore, as to policy, the "pay first, litigate later" rule that reflects the true policy underlying Section 32 merely prevents courts from enjoining the collection of a tax prior to its payment, thus ***unnecessarily*** interrupting the State's revenue stream ***prior to any adjudication*** on the merits of the claim. Not only is this policy inapplicable here because Plaintiff Estuardo Ardon ("Plaintiff Ardon") paid the disputed tax before filing the claim at issue, but, as a general matter, this policy does not in any way touch on the availability of class actions, much less is it anti-class action. In essence, the court below has held that the interests of the City deserve greater deference than the interests of its citizens and that local governments should have immunity from meritorious class claims. No government, however, can have a legitimate expectation of continuing to receive or retain the proceeds of an illegally collected tax. Moreover, the claim filed by Plaintiff Ardon clearly put the City on notice of its potential liability, as did the numerous federal

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[4] "Moreover, treating the class as claimant is consistent with treatment of the class for purposes of filing the complaint. While section 422.40 of the Code of Civil Procedure requires a complaint to name the 'parties,' it is settled the pleading need only establish the existence of an ascertainable class rather than name each member of the class." (*City of San Jose*, *supra*, 12 Cal.3d at p. 457, citing *Daar* v. *Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 [63 Cal.Rptr. 724, 433 P.2d 732].)

court decisions finding the collection of such taxes to be illegal and the Internal Revenue Service ("IRS") refund of such moneys. Therefore, the City's potential liability cannot be said to be "***unplanned***".

Baldly stated, the City's position boils down to the proposition that since the City planned on keeping the telephone utility tax ("TUT") money, the taxpayers cannot be afforded any meaningful avenue for testing whether the TUT money was illegally collected or getting that money back. However, as this Court recognized long ago, the purpose of claims statutes such as Section 910 is not to prevent surprise or to thwart citizens' class claims, but rather to give the City an opportunity to investigate a claim and resolve it. (*Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 667 [177 P.2d 558].) The City was afforded that opportunity by Plaintiff Ardon. It is entitled to no more.

Finally, Defendant's argument that taxpayers should be limited to the non-judicial remedies of launching an initiative or voting people out of office ignores the requirement in *McKesson* that taxpayers must be provided with a "fair opportunity to challenge the accuracy and legal validity of their tax obligation." (*McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Bus. Reg. of Fla., et al.* (1990) 496 U.S. 18, 19, 39 [110 S.Ct. 2238, 110 L.Ed.2d 17] (*McKesson*).) Absent the class remedy provided for by Section 910, ordinary taxpayers would have no meaningful opportunity to do so. The individual refund claims here are small and the City has not provided ***any*** meaningful mechanism for non-exempt taxpayers to seek a refund of its illegally collected TUT. While certain corporations may have large enough refund claims to make individual litigation on their own behalf worthwhile, the vast majority of taxpayers are left without any meaningful remedy.

Plaintiff Ardon's class claim complies with the requirements of Section 910 as expressly stated by the Legislature and construed by this Court in *City of San Jose*. Accordingly, the decision of the court below should be reversed.

II. STATEMENT OF FACTS

Plaintiff Ardon's statement of facts rests, as it legally should, upon allegations contained in the four corners of the Complaint that must be accepted as true at this stage

of the litigation. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146].) Plaintiff's recitation does not attempt to "distort the equities" as the City claims (Answer, p. 4), but merely sets forth the facts described in the Complaint that are controlling in this proceeding. On the other hand, the City, in its purported effort to provide "a more complete context," impermissibly seeks to use the exhibits appended to its request for judicial notice beyond their appropriate use. Rather than using them to present indisputable or easily verified information, the City proffers them to have its counsel testify to and argue facts regarding, for example, the alleged intent of voters in approving Measure S, which are not part of the Complaint or properly before this Court on this appeal.

Moreover, the City's affirmative defense, that the TUT only incorporated the IRS's interpretation of the federal telephone tax ("FET") (26 U.S.C. § 4251) at the time the TUT was enacted in 1967 and not the IRS's subsequent reinterpretation of the FET in 2006, misconstrues Plaintiff's allegations. First, the TUT incorporated the FET, not the IRS' interpretation of the FET. The courts are charged with interpreting law. Second, Plaintiff does not allege that the IRS's change in position regarding the meaning of the FET rendered illegal the City's collection of the TUT. Rather, the FET was incorporated into the TUT and the FET has never applied to long distance and bundled services where charges were not computed based upon both time and distance.[5] Just like the City and

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[5] As the court in *National R.R. Passenger Corp. v. U.S.* (D.D.C. 2004) 338 F.Supp.2d 22, 23, affd. (D.C. Cir. 2005) 431 F.3d 374 held:

> When a defined term in the Internal Revenue Code..., 26 U.S.C. § 1 *et seq.*, fails to keep pace with technological advances and other changes in the commercial world, may the [IRS] nonetheless construe the Code to levy a tax arguably envisioned by Congress? This case concerns the proper interpretation and implementation of a federal excise tax on communications services. Finding that Congress meant what it plainly said in 1965, the Court concludes that only Congress, and not the IRS on its own, may update the statutory text.

(*Ibid.*)

the TUT here, the IRS illegally collected the FET for years and only decided to grant refunds after losses in multiple federal appellate and district courts.

Finally, the City makes the spurious argument based on claimed facts not presented in the Complaint that when the voters of the City of Los Angeles approved an amendment to the tax ordinance, removing reference to the FET, they ratified any improper past collection and signaled a desire for the City to keep any improperly collected tax. However, even a cursory review of the ballot refutes that argument. The title of the ballot was "Reduction of Tax Rate and Modernization of Communications Users Tax." The purportedly "Impartial Summary" described the measure as a reduction of the "existing TUT rate from 10 percent to nine percent" and a "moderniz[ation] to apply to current and evolving communications technologies." (See Ex. B to City's Mot. For Judicial Notice.) The ballot said nothing about the improper collection of the TUT, the right to refunds, or the City's intent to retain improperly collected taxes.

III. LEGAL DISCUSSION

A. Section 910 Of The Government Code Authorizes Class Claims And Does Not Require Individualized Information

Defendant's arguments that "Section 910 does not expressly authorize class claims" and that Section 910 requires "individual information" (Answer, p. 39) fly in the face of the plain language of Section 910 authorizing the filing of a claim by the ***"claimant or by a person acting on his or her behalf"*** and this Court's decision in *City of San Jose, supra*, 12 Cal.3d 447.

1. Section 910 Provides For Class Claims For Tax Refunds

In *City of San Jose, supra*, 12 Cal.3d at p. 457, this Court held that the term "claimant" in Section 910 included a class.[6] Furthermore, the unanimous opinion of the Court of Appeal in *Oronoz* correctly recognized that the meaning of Section 910 does not

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[6] Although it is true that *City of San Jose* was a split decision (4 to 3) with Justice Tobriner dissenting, the City falsely implies that the split was over the issue of whether the substantial compliance test applies to Section 910. (Answer, p. 12.) Justice Tobriner disagreed with the majority's decision to decertify the class on other grounds. (*City of San Jose, supra*, 12 Cal.3d at pp. 465-69) (dis. opn. of Tobriner, J.).) The holding that "claimant" includes a class, however, appears to have been unanimous.

depend on the type of claim presented and held that class claims could be filed in tax refund cases subject to the procedure specified in Section 910. (*Oronoz, supra*, 159 Cal.App.4th 353.) The meaning of the term "claimant" does not change based on whether or not the claim is for a tax refund.

Contrary to Defendant's assertion, *City of San Jose*'s holding that Section 910 allows class claims and that the definition of "claimant" includes a class does ***not*** turn on whether the concepts of "substantial compliance" versus "strict compliance" are applied. In fact, *City of San Jose* never reached the substantial compliance question presented as to the adequacy of the information on the claim form filed. Rather, the Court held that "to gauge the sufficiency of a particular claim, *two* tests shall be applied: Is there *some* compliance with *all* of the statutory requirements; and, if so, is this compliance sufficient to constitute *substantial* compliance?" (*City of San Jose, supra*, 12 Cal.3d at pp. 456-57, emphasis in original.)

The holding that the term "claimant" included the class and that class claims were permitted under Section 910 served as an antecedent to the first prong of the test – whether there was ***some compliance*** with all of the statutory requirements:

> To ascertain the quantity of information required in a class claim to satisfy the threshold 'some compliance' test, we must first determine the meaning of 'claimant' in Section 910 as it relates to a class. There are two alternatives: 'Claimant' can either be equated with each individual member of the class or with the class itself.

(*City of San Jose, supra*, 12 Cal.3d at p. 457.) The Court held that "claimant" "must be equated with the class itself." (*Ibid.*) In short, *"[i]t is … clear a class claim may satisfy [Section 910's] requirements."* (*Ibid*, emphasis added.)

Therefore, contrary to the City's argument that the "strict compliance" test *Woosley* purportedly derived from Section 32 should override the substantial compliance standard applied by *City of San Jose*, the *City of San Jose* Court did ***not*** address the definitional question of whether the term "claimant" included a class in the context of a "substantial compliance" standard. Rather, the Court expressly stated "[i]n determining the sufficiency of such claims, the more liberal test of substantial compliance has *not*

been applied – the courts recognizing substantial compliance cannot be predicated upon no compliance." (*Id.* at p. 456, internal quotations and citations omitted, emphasis added.)

The second half of the test under Section 910, to which the substantial compliance standard applies, is whether the claim form must identify each class member individually. The Court stated:

> [T]o satisfy the claims statutes, the class claim must provide the name, address, and other specified information concerning the *representative* plaintiff and then sufficient information to identify and make ascertainable the class itself. Because such information would meet the statutory requirements of name and address, *any* effort to identify the class would satisfy the *some compliance* test. Beyond this, the sufficiency of the identifying information must be measured by the *substantial compliance* test.

(*City of San Jose, supra*, 12 Cal.3d at p. 457, emphasis in original.)[7]

Further, it is interesting to note that the Supreme Court of Guam very recently interpreted this Court's decision in *City of San Jose* as the standard to use in conjunction with its own government claims act *exactly* in the manner Plaintiff characterizes here. (*Quan Xing He v. Gov. of Guam* (2009) 2009 Guam 20, 34 [" ... *City of San Jose* ... adopted a two-part test that requires both strict and substantial compliance"].)

In short, contrary to Defendant's argument, the decision in *City of San Jose* that the term "claimant" includes a class and that class claims are permitted under Section 910 does not rest on application of any "substantial compliance" standard but, rather, on the plain meaning of the words used by the Legislature. As a result, the purported conflict between what the City alleges to be *Woosley's* "strict compliance" standard (keeping in mind the City's admissions that *Woosley* never uses the term "strict compliance") and

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[7] The *City of San Jose* Court also described the substantial compliance test this way:

> Is there sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit?

(*City of San Jose, supra*, 12 Cal.3d at p. 456.)

City of San Jose's "substantial compliance" standard with respect to *City of San Jose*'s definition of the term "claimant" does ***not*** exist.

2. Applying Varied Meanings To The Term "Claimant" Runs Counter To The Goal of Uniformity Sought by The Legislature In Adopting Section 910

The City's argument that the definition of the word "claimant" should turn on the nature of the claim before the Court flies in the face of the Legislature's underlying purpose in adopting Section 910: ***uniformity***.

Section 910 is a general claims statute enacted by the California Legislature in 1959 in order to provide a uniform statewide procedure by which claims for money or damages should be presented against local and state government entities. The purpose of the default procedure was to create a uniform system for the presentation of claims and to eliminate the confusing patchwork of local and state procedures that had existed prior to 1959, which was "unduly complex, inconsistent, ambiguous and difficult to find, ... productive of much litigation and ... often result[ed] in the barring of just claims." (Recommendation and Study Relating to the Presentation of Claims Against Public Entities (Jan. 1959) 2 Cal. Law Revision Commission Rep. (1959) at p. A-7 (See Appellant's Opening Brief on the Merits ("Opening Brief"), App. B).) The Legislature went to great lengths to ensure that the procedures it enacted in the Government Claims Act would create a statewide, uniform system including, among other things, amending the State Constitution to ensure that the procedures would apply to charter cities and counties, and amending the Code of Civil Procedure to make clear that statutes of limitations would be governed by the Government Claims Act.

With respect to tax refund claims, the Legislature established a default procedure pursuant to which tax refund claims are governed by Section 910. To the extent that the Legislature believed that a particular tax required different treatment, it enacted a specific statute for that tax and enacted Section 905(a) to except refund claims covered by those specific statutes from the reach of Section 910. The Legislature frequently adopts refund

procedures tailored to the tax to which they apply.[8] As a result, Section 910 does not apply to all, or even most, tax refund claims.[9] Instead, it serves as the default procedure for the instances where the Legislature did not create a different procedure in a separate statute.

The City attempts to argue that allowing class claims for tax refunds under Section 910 will somehow destroy it financially because it will be subjected to class claims on much of its tax revenue. That argument is unsupported by the facts. First, although Section 910 provides the default procedure, many, if not most, taxes are subject to specific refund procedures pursuant to statutes excepted from Section 910's coverage. Furthermore, the City's argument is undercut once again by its own contradictory assertion that "the actual impact of [the refund Plaintiff claims is] at best difficult to calculate *and potentially inconsequential.*" (Answer, p. 6, emphasis added.) There is no evidence properly in the record on this appeal of the total refund amount at issue (and, in any event, the amount of the claim has no bearing on the interpretation of Section 910).

3. Accepting the City's Position Would Require This Court To Rewrite Section 910's Substantial Compliance Standard For Claim Forms

Although the City argues that *Woosley* "***unambiguously*** held ... that class claims

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[8] The Legislature has adopted specific procedures that preclude or restrict class claims for refund of certain taxes: property taxes (Rev. & Tax. Code, §§ 5097, 5140), franchise and income taxes (Rev. & Tax. Code, § 19322), vehicle taxes (Veh. Code, § 42231), advertising display fees (Bus. & Prof. Code, § 5499.14), weed and rubbish abatement taxes (see Gov. Code, § 39585) and abandoned excavation taxes (Gov. Code, § 50255), to name just a few. In some instances the Legislature has also delegated its authority to prescribe tax-specific refund claim procedures. (See, e.g., Ed. Code, § 17033 [delegating to the State Allocation Board authority to prescribe refund procedures for rent and fees charged in connection with the rental of school buildings].)

[9] It is notable that since *City of San Jose* was decided, there were no published decisions until *Oronoz* that decided whether tax refund claims subject to Section 910 could be filed as class claims, whereas numerous decisions evaluated whether tax refunds subject to *other* statutes could be filed as class claims. Tax refunds subject to Section 910 appear to be the exception rather than the rule.

for tax refunds require ... strict compliance with authorizing claims statutes" (Answer, p. 10; see also Answer, pp. 1, 11), the City ***admits twice*** that the ***term "strict compliance" never even appears in the Woosley opinion***. (Answer, p. 12.) In fact, *Woosley* never held that strict compliance with claims statutes was necessary, but even if *Woosley* had required strict compliance with the claims statutes before it, this Court cannot re-write the standard adopted by the Legislature for Section 910. In fact, if Section 32 of the Constitution applies as the City contends, giving the Legislature plenary control over tax refund claims procedures, then ignoring the substantial compliance standard for claim forms under Section 910 would violate the Constitution.

This Court has never held that tax refund claims which are permitted as a matter of substantive statutory law should be held to a standard of strict compliance with form requirements. Such a requirement would result in the denial of many just claims based on minor technical errors.

Some lower courts have mistakenly conflated *Woosley's* holding that tax refund statutes subject to Section 32 should be strictly *construed* with a requirement that taxpayers must be held to a standard of strict *compliance* with claims procedures.[10] (See, e.g., cases cited in Answer, p. 13.) One of the most cited of these is the First Appellate District's decision in *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 961 [46 Cal.Rptr.2d 266], which mistakenly stated that the Court in *Woosley* relied on the "strict compliance rule."

As the First Appellate District later acknowledged, despite the fact that *Neecke* "spoke in terms of requiring strict compliance with the administrative procedures established by the Legislature for tax refund claims[,] ... [t]he pertinent issue in both *Neecke* and *Woosley*, however, was one of standing, i.e., whether the plaintiffs in those

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[10] This unfortunate tendency might even be traced to some of the cases that *Woosley* expressly overruled. For example, in *Schoderbek* the court incorrectly stated that the decision in *City of San Jose* was based on a standard of substantial compliance with the statute. (*Schoderbek v. Carlson* (1980) 113 Cal.App.3d 1029, 1035-36 [170 Cal.Rptr. 400].) As discussed above, *City of San Jose* never even reached the substantial compliance issue.

cases could maintain class actions under the applicable tax code provisions." (*Mission Hous. Dev. Co. v. City & County of San Francisco* (1997) 59 Cal.App.4th 55, 70 [69 Cal.Rptr.2d 185] (*Mission Housing*), internal citations omitted.) Therefore, in *Mission Housing*, the court concluded that the claim was *substantively* permitted by the relevant statute, and did not require strict compliance with the *form* requirements of the tax refund claim. (*Ibid.*)

In any event, the Legislature specifically codified a substantial compliance standard with respect to the form requirements under Section 910. Government Code section 910.8 provides that if the board to whom a claim is submitted under the Act determines that "a claim as presented fails to ***comply substantially*** with the requirements of Sections 910," it may give written notice stating with particularity the defects or omissions in the claim. (Gov. Code, § 910.8, emphasis added.) Government Code section 910.6 states that a failure to amend the claim is not a defense so long as a court finds the claim "as presented ***complied substantially*** with Section 910 ...." (Gov. Code, § 910.6, emphasis added.) Moreover, even substantial compliance is waived if the board fails to give notice of any such deficiency. As provided in section 911, "[a]ny defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived ... " (Gov. Code, § 911.) Thus, even assuming that strict compliance might apply under other statutes, at a minimum, claims under Section 910 are subject to the substantial compliance standard codified by the Legislature.

Furthermore, Defendant's request on policy grounds that this Court disallow a class claim under Section 910 when the claim is for a tax refund implicates separation of powers problems. Imposition of Defendant's so-called "*Woosley* rule" to re-write and disallow class claims under Section 910 when those claims are for a tax refund would violate the separation of powers doctrine:

> The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function. (See, e.g.,

> *Werner v. Southern Cal. Associated Newspapers* (1950) 35 Cal.2d 121, 129-30 [216 P.2d 825].)

(*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53 [51 Cal.Rptr.2d 837].) Defendant's public policy arguments are directed to the wrong branch of government:

> A core function of the Legislature is to make statutory law, which includes ***weighing competing interests and determining social policy***. A core function of the judiciary is to resolve specific controversies between parties. As part of that function, the courts interpret and apply existing laws.... Separation of powers principles compel the courts to carry out the legislative purpose of statutes and limit the courts' ability to rewrite statutes where drafting or constitutional problems appear.

(*Perez v. Roe 1* (2006) 146 Cal.App.4th 171, 177 [52 Cal.Rptr.3d 762], citation omitted and emphasis added.)

City of San Jose was decided over 35 years ago. The Legislature has acquiesced in that holding and, even while amending Section 910 in other respects, has not amended it in any way to redefine the word "claimant" or to disallow class claims in tax refund cases not excepted by Section 905.

> If the Legislature has made a mistake, it has the (legislative) means to correct the mistake. And it does. As anyone familiar with the legislative process knows, the Legislature routinely passes legislation to clean up past mistakes. That is the legislative function. It should not be transferred to the judicial branch, which lacks that power.

(*California Correctional Peace Officers Assn. v. Dept. of Corrections* (1999) 72 Cal.App.4th 1331, 1340 [85 Cal.Rptr.2d 797].)

Woosley did not impose or attempt to impose a rule or standard upon all tax refund claims because the Supreme Court was fully aware that only the Legislature can determine the methods for seeking tax refunds.

4. Section 910 Does Not Require The Presentation Of Individualized Information

City of San Jose held that the word "'claimant' in Section 910 means the class itself" and "that an individual claim need not be filed for each member of the purported class." (*Oronoz*, *supra*, 159 Cal.App.4th at p. 367, citing *City of San Jose, supra,*

12 Cal.3d at p. 457.)

The only issue on this appeal is whether Plaintiff's class claim was permissible as a substantive matter under Section 910. The factual question whether Plaintiff's claim complied with the form requirements for claims under Section 910 has not been addressed by any lower court and is not at issue here. Nevertheless, the ***City argues without any supporting authority*** that Plaintiff's claim was deficient because it did not contain individual information for each member of the class. (Answer, pp. 46-47.)

Defendant's briefing reads as if the decision in *City of San Jose* was never rendered. Both *City of San Jose*, *supra*, 12 Cal.3d at p. 457, and *Oronoz*, *supra*, 159 Cal.App.4th at p. 367, expressly reject the need for individual information pertaining to each member of the class to be set forth in the claim on the basis that requiring such detailed information "would severely restrict the maintenance of appropriate class actions – contrary to recognized policy favoring them." (*City of San Jose*, *supra*, 12 Cal.3d at p. 457.) As this Court stated in *City of San Jose*, the claims statutes are ***not*** intended to thwart class relief. (*Ibid.*) In reaching its holding, the *City of San Jose* Court expressly rejected "defendant's contention that it is *impossible* for a class claim to satisfy the claims statutes and, therefore, the statutes *prohibit* the maintenance of such actions against governmental entities." (*Id.* at pp. 455-57, emphasis in original.)

As decided in *City of San Jose*, under Section 910 a "class claim [need only] provide the name, address, and other specified information concerning the *representative* plaintiff and then sufficient information to identify and make ascertainable the class itself." (*City of San Jose, supra*, 12 Cal. 3d at p. 457, emphasis in original.) Further, whether the claim form satisfied the requirements is to be judged by a substantial compliance standard. (See Gov. Code, §§ 910.6, 910.8.)

Moreover, the City never notified Plaintiff of any defect in the form of his claim within the time prescribed by section 911. If it had, Plaintiff would have had an opportunity to cure the defect under section 910.6. Section 911 prohibits the City from relying on a purported defect in the form of the claim that it failed to identify in time for Plaintiff to cure. So, as an example, to the extent the City now contends that Plaintiff's

claim should have listed the name and address of every person with a phone line in the City of Los Angeles, that argument has been waived.

Once the court has determined that the plaintiff has standing under the relevant claim statute to bring a claim, the question then becomes one of "substantial compliance" with the formal requirements regarding the manner of presenting a claim.

Here, there was clearly "sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit[.]" (*City of San Jose*, *supra*, 12 Cal.3d at p. 456; see also *Mission Housing, supra*, 59 Cal.App.4th at p. 70 [where city's objection that claim form was verified by plaintiffs' attorney rather than plaintiffs themselves was one of form, whereas "[t]he pertinent issue in both *Neecke* and *Woosley* ... was one of standing, i.e., whether the plaintiffs in those cases could maintain class actions under the applicable tax code provisions"].)

B. *Woosley* Does Not Prohibit A Class Action In This Case

1. *Woosley* Did Not Construe Or Apply Section 910, Nor Did It Disapprove *City of San Jose*

This Court's decision in *Woosley* does not bar a class action in this case. *Woosley* neither construed nor applied Section 910. Furthermore, as the Court of Appeal recognized in *Oronoz*, "*Woosley* did not disapprove [*City of*] *San Jose* or suggest that its holding with respect to claims under Government Code section 910 should be limited," it simply "refused to extend the holding in [*City of*] San *Jose* to tax refund claims governed by other statutes." (*Oronoz, supra*, 159 Cal.App.4th at p. 365; see also *Ardon v. City of Los Angeles* (2009) 94 Cal.Rptr.3d 245, 258-59 (dis. opn. of Croskey, J.) (*Ardon*).)

What the *Woosley* Court expressly took issue with is that lower courts had subsequently utilized *City of San Jose*'s holding regarding Section 910 to "extend" other statutes beyond their plain meaning, by way of "***analogy***" to *City of San Jose*, to permit class claims. (*Woosley, supra*, 3 Cal.4th at pp. 788-89; citing *Schoderbek, supra*, 113 Cal.App.3d at p. 1033; *Lattin v. Franchise Tax Board* (1977) 75 Cal.App.3d 377, 381

[142 Cal.Rptr. 130]; *Santa Barbara Optical Co. v. State Bd. of Equalization* (1975) 47 Cal.App.3d 244, 248-49 [120 Cal.Rptr. 609].)

The *Woosley* Court held only that it was necessary for a court to construe the statute(s) before it and where the Legislature provided a specific tax refund mechanism, "article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature." *Woosley, supra*, 3 Cal. 4th at p. 792. As Justice Croskey recognized in his dissent to the majority opinion below:

> *Woosley* did not limit or call into question the holding from *City of San Jose* as applied to claims under Government Code Section 910, but held only that the rule from *City of San Jose* should not be extended to claims governed by statutes prescribing procedures specifically for tax refunds.

(*Ardon, supra*, 94 Cal.Rptr.3d at p. 259 (dis. opn. of Croskey, J.).)

Contrary to the City's erroneous assertion that "the language of Section 910 is, for all practical purposes, identical to that of the Vehicle Code claiming statute at issue in *Woosley*" (Answer, p. 41), the language contained in Section 910 and in the Vehicle Code section analyzed by this Court in *Woosley* are materially different. Unlike Section 910, neither statute at issue in *Woosley* allowed a claim to be filed by the "claimant or *by a person acting on his or her behalf*." The vehicle license fee refund statute at issue in *Woosley* required a claim to be filed by "*the person* who has paid the erroneous or excessive fee or penalty, *or his agent on his behalf*." (*Woosley, supra*, 3 Cal.4th at p. 789, 790, emphasis added by the Court, internal quotations omitted.)

The difference, as this Court recognized in *Woosley, supra*, 3 Cal.4th at p. 790, is the agency language. Because Vehicle Code section 42231 required an agency relationship, this Court concluded that within the context of ***that statute***, the term "person" did not include a class. (*Woosley, supra*, 3 Cal. 4th at 790.) "The essence of an agency relationship is the ***delegation of authority*** from the principal to the agent which permits the agent to act 'not only for, but in the place of, his principal' in dealings with third parties. ... Thus, it has been said 'that the distinguishing features of an agency are representative character and ***derivative authority***.'" (*Channel Lumber Co., Inc. v. Porter*

Simon (2000) 78 Cal.App.4th 1222, 1227 [93 Cal.Rptr.2d 482], emphasis added.) Therefore, an agent necessarily acts "on behalf of" the principal, but a person acting "on behalf of" another is not necessarily that person's agent.[11]

The distinction involves knowledge, consent and authority. For example, the federal and state statutes governing class actions do not require the representative plaintiff to obtain authorization from each member of the class prior to initiating and prosecuting a class action. This is why Federal Rule of Civil Procedure 23(a) provides that "[o]ne or more members of a class may sue ... as representative parties ***on behalf of*** all members..." (*Id.*, emphasis added. See also Code Civ. Proc., § 382 ["one or more may sue or defend for the benefit of all"].) Similarly, Section 910 permits a claim to be filed "by the claimant or by a person acting ***on his or her behalf***." (Gov. Code, § 910, emphasis added; see also *Id.*, § 910.2 ["The claim shall be signed by the claimant or by some person on his behalf."].) This Court recognized this distinction in *Woosley*: "[A] class representative who files a claim on behalf of all others similarly situated, without the knowledge or consent of such other persons, is not the ***agent*** of the members of the class." (*Woosley, supra*, 3 Cal.4th at p. 790, citing Civ. Code, §§ 2299, 2300; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency & Employment, §§ 36-40, pp. 49-52, emphasis added.)

The second statutory scheme before the *Woosley* Court was for refund of sales and use taxes and was silent as to who could file a claim. (*Woosley, supra*, 3 Cal.4th at pp. 790-91.) The Court noted, however, that the refund procedures provided therein required that notice of any deficiency determination "must be given to each individual taxpayer," which would have been inconsistent with the use of a class claim where notice would

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[11] The Legislature routinely distinguishes between an "agent" and a person "acting on behalf" of another. (See, e.g., Bus. & Prof. Code, § 9880.1(j) [Distinguishing between an "employee *or agent* ***or*** *a person acting on behalf of* [a vehicle] dealer or insurer"], emphasis added.)

only be sent to the class representative.[12] (*Ibid.*) Since the Court could not expand the methods provided by the Legislature for seeking a refund of the tax, it refused to allow a class claim. (*Ibid.*)

The City's submission contains several additional inaccuracies about *Woosley*. First, nowhere in *Woosley* does this Court reject a "substantial compliance rule" for tax refund cases and therefore establish, even implicitly, a "strict compliance" rule. (Answer, p. 12.) As Defendant twice admits, *Woosley* never stated that "strict compliance" with tax refund claiming statutes is required. (Answer, p. 12.) Similarly, and again contrary to Defendant's argument, Section 32 says nothing about "strict compliance." (Answer, p. 14.) Furthermore, Defendant's argument that Woosley's "strict compliance" standard supersedes the purported "substantial compliance test" of *City of San Jose* for tax refund cases rests on a false premise. (Answer, p. 12.) As discussed, *supra*, at section III.A.1, *City of San Jose* did not hold that class claims were permitted under Section 910 because a standard of substantial compliance applied. Rather, that holding was rendered as an antecedent to the first prong of the test applied to Section 910 claims– whether there was ***some compliance*** with all of the statutory requirements. (*City of San Jose, supra*, 12 Cal.3d at p. 457.) The substantial compliance test, which the Court recognized to be applicable to the amount of identifying information provided in the claim form, was not applied.

Second, the language quoted by Defendant to support its express "legislative authorization" argument (Answer, p. 11) at most means that when Section 32 applies, courts are precluded from expanding upon the methods for seeking tax refunds expressly provided for by statute. Here, however, as discussed *infra*, Section 32 does not apply. But, even if it did, as discussed *supra*, unlike Revenue and Taxation Code section 6904, Section 910 does not remain silent on the issue but provides for the filing of class claims as this Court held in *City of San Jose*.

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[12] In stark contrast, Section 910 specifies that the claimant shall provide a "post office address to which the person presenting the claim desires notices to be sent." (Gov. Code, § 910(b).)

2. Neither Sentence Of Section 32 Applies To Actions Against Local Entities For The Refund Of Local Taxes

As Plaintiff argued in his opening brief (see Opening Brief, § III.A.), as Justice Croskey recognized in his dissent, and as this Court has held on a number of occasions, Section 32 is inapplicable to actions against local public entities for the refund of local taxes because "it applies only to actions against the state." (*Ardon*, 94 Cal.Rptr.3d at p. 259 (dis. opn. of Croskey, J.), citing *Pacific Gas & Electric v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 281, fn. 6 [165 Cal.Rptr. 122]; *Oronoz*, *supra*, 159 Cal.App.4th at p. 363, fn. 6; see also *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 822, fn. 5 [107 Cal.Rptr.2d 369, 23 P.3d 601] (*La Habra*) ["Article XIII, section 32... [does not] appl[y] to this action against two local governments."]; *Eisley v. Mohan* (1948) 31 Cal.2d 637 [192 P.2d 5] [a county assessment case that did not require any analysis of section 32; Section 32 "applies only to an action against the state"]; *City of Anaheim, supra*, 179 Cal.App.4th at p. 830. ["[C]ourts have limited [Section 32] to actions against the state or an officer of the state"], citations omitted; *Brown v. County of Los Angeles* (1999) 72 Cal.App.4th 665, 670 [85 Cal.Rptr.2d 414] [Section 32 "applies to actions against the State of California, not those involving assessments by local governments"].)

It is important to note that the majority opinion below did not even apply Section 32, but rather what it perceived to be the policy behind that provision. (*Ardon, supra*, 94 Cal.Rptr.3d at p. 259 (dis. opn. of Croskey, J.) ["Section 32 is inapplicable here" and "the majority does not assert otherwise"]; *Id.* at p. 256 ["We therefore join a line of Court of Appeal cases which have applied the policy underlying [Section 32]"].)

However, the public policy behind Section 32 is not "fiscal certainty" at the expense of justice and, where appropriate, class action remedies, but merely one that prevents courts from enjoining the collection of a tax prior to its payment, i.e., the "pay first, litigate later" rule, in order to avoid ***unnecessary*** disruptions prior to adjudications. Once the taxpayer pays the tax, he or she may then bring an action against the state for refund of the tax "in such manner as may be provided by the Legislature." (Cal. Const.,

art. XIII, § 32.)[13] There is no public policy against so-called ***unplanned*** disruptions as argued by the City. (Answer, p. 30.) In fact this Court has expressly stated that the purpose of claims statutes such as Section 910 is not to prevent surprise or to thwart citizens' class claims, but rather only to give the City an opportunity to investigate a claim and resolve it. (*Eastlick v. City of Los Angeles, supra*, 29 Cal.2d at p. 667.) The City has been given and rejected that opportunity here.

In one breath the City quotes this Court's mandate that Section 32's two sentences be read together, but then pulls the second sentence out of its context, arguing that the first sentence explicitly applies only to actions against the State, but the second sentence does not contain that restriction. (Answer, pp. 15-17, quoting *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638 [217 Cal.Rptr. 238] (*State Bd. of Equalization.*)[14] *State Bd. of Equalization* states:

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[13] A policy favoring the predictability of revenue forecasting "'is not a trump card that somehow requires the courts to countenance *ultra vires* or illegal tax practices.'" (*La Habra, supra*, 25 Cal.4th at p. 824.) No governmental entity is entitled to keep the proceeds of illegally collected taxes.

[14] The City notes as "interesting" that even the first sentence of Section 32, in spite of its plain language, has been applied to state and local taxes alike. (Answer, p. 16, fn. 5.) First, the issue is state versus local ***governments***, not state versus local ***taxes***. Second, *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 79, 84 [65 Cal.Rptr.3d 716] (*Batt*), in overbroad dictum, and *Rickley v. County of Los Angeles* (2004) 114 Cal.App.4th 1002, 1013 [8 Cal.Rptr.3d 406] rely on *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129 [113 Cal.Rptr.2d 690] (*Flying Dutchman*) and *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 483 [91 Cal.Rptr.2d 603] (*Writers Guild*) for the proposition that Section 32 is equally applicable to actions against local governments. *Flying Dutchman,* in turn, relies entirely on *Writers Guild* for that same extension of law. (*Flying Dutchman, supra*, 93 Cal.App.4th at pp. 1136-37 ["Until recently, no law existed on precisely this question"].) Yet the *Writers Guild* court recognized it could not cite to any authority, yet it extended the purported "public policy" underlying [S]ection 32 to an action against a local government simply because it "[saw] no reason why [it] should not." (*Writers Guild, supra*, 77 Cal.App.4th at p. 483.) This was a baseless departure from Section 32's plain language and this Court's precedent. *Macy's Dept. Store, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, fn. 23 [50 Cal.Rptr.3d 79] (*Macy's*) merely recognizes that *Flying Dutchman* rejected the argument that Section

> Article XIII, Section 32 provides that an action to recover an allegedly excessive tax bill may be brought "[a]fter payment of [that] tax ... ." Additionally, the section bars a court from issuing any "legal or equitable process ... against this State or any officer thereof to prevent or enjoin the collection of any tax." ***Read together***, these two portions of Section 32 establish that ***the sole legal avenue for resolving tax disputes is a postpayment refund action***. A taxpayer may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid.

(*State Bd. of Equalization, supra*, 39 Cal.3d at p. 638, emphasis added.) The limitation, therefore, to the State and its officers, applies to the whole section, not just to the second sentence. Moreover, the clear import of even the second sentence is that an action may be maintained to recover the tax paid, "with interest," "[a]fter payment" of the tax.[15]

Further, the City's contention that the provision at issue in *Eisley, supra*, 31 Cal.2d at p. 641, the predecessor to Section 32, was "grammatically and substantively different" (Answer, p. 19), is squarely contradicted by this Court's conclusion in *Pacific Gas & Electric, supra*, 27 Cal.3d at p. 280, fn. 3, that this constitutional amendment was one of "numerous minor revisions and renumberings" of essentially the same provision. This Court cited to *Eisley* in support of its holding in *Pacific Gas & Electric* that Section 32 "applies only to actions against the state." (*Pacific Gas & Electric v. State Bd. of Equalization, supra*, 27 Cal.3d at p. 281, fn. 6.) Therefore, the City's argument that this constitutional amendment somehow signifies a broadening of the protection of tax revenues from refund claims (Answer, pp. 20-21) lacks any basis.

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32 applies only to statewide taxes. Plaintiff does not dispute that the pay-first, litigate later principle has been codified by other statutes and ordinances that are ***inapplicable*** here.

[15] It is noteworthy that while the City (Answer, p. 24) in citing *Batt, supra*, 155 Cal.App.4th 65, went out of its way to point out that de-publication was denied there, the City makes no reference to its failed attempt here to have *Oronoz* de-published. Nor does the City mention that the County of Los Angeles' motion for reconsideration and Petition for Review in *Oronoz* were both denied. Moreover, *Batt* applied a dispositive ***local claiming ordinance*** barring class actions rendering the remaining language dictum, as recognized by the Court in *Oronoz*. (*Oronoz, supra*, 159 Cal.App.4th at p. 365, fn. 9.)

None of the cases cited by Defendant addresses whether the second sentence of Section 32 applies to actions against local governments for the refund of local taxes pursuant to Section 910.[16] The conflicting *Ardon* and *Oronoz* opinions are the only Court of Appeal decisions that have addressed the question of whether a class claim for the refund of taxes is permitted where Section 910 is the applicable refund statute.[17]

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[16] The only issue in *Todd Shipyards Corp. v. City of Los Angeles* (1982) 130 Cal.App.3d 222, 224 [181 Cal.Rptr. 652], which was not a class action, was whether "a taxpayer who recovers a city business tax paid under protest [may] also recover prejudgment interest under Civil Code section 3287, subdivision (a)." The issue in *Macy's, supra*, 143 Cal.App.4th at pp. 1456-57, also not a class action, was whether state law or a local ordinance provided the applicable rate of interest on a tax refund. The applicable tax refund claim statute in *Neecke, supra*, 39 Cal.App.4th at p. 951, *IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1300 [32 Cal.Rptr.3d 656, 661-62], and *Chase Bank N.A. v. City and County of San Francisco* (2009) 174 Cal.App.4th 1201, 1211 [94 Cal.Rptr.3d 906] was Revenue and Taxation Code Section 5097. *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194 [27 Cal.Rptr.2d 783] and *Cod Gas & Oil Co. v. State Bd. of Equalization* (1997) 59 Cal.App.4th 756, 760 [69 Cal.Rptr.2d 366] were each actions against the State Board of Equalization and concerned Revenue & Taxation Code section 7275, et seq. The court in *Batt, supra*, 155 Cal.App.4th 65, applied a dispositive local claiming ordinance barring class actions. *Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084 [62 Cal.Rptr.2d 185] and *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242 [93 Cal.Rptr.2d 742] did not concern Section 910 and did not even mention Section 32. *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1420 [14 Cal.Rptr.2d 885] concerned Revenue and Taxation Code Section 6901 et seq., was not a refund action and did not address the issue of whether class claims were permitted.

[17] The City's assertions that *Ardon* "unequivocally found that *Oronoz* was incorrectly decided" and that the "very Justices" who issued *Oronoz* "promptly" rejected it in *Ardon* are contradicted by the facts. (Answer, pp. 23, 28.) *Ardon* was decided 16 months after *Oronoz* and the panels were ***not identical***. Justice Croskey wrote the unanimous opinion in *Oronoz* and a strong dissent in *Ardon*, which was a split decision. Presiding Justice Klein wrote a concurring opinion in *Ardon* which stated: "[I]t would be helpful for the Supreme Court to grant review in this case in order to resolve the conflict between the *Oronoz* decision and the majority opinion herein." (*Ardon, supra*, 94 Cal.Rptr.3d at pp. 257-58 (conc. opn. of Klein, P.J.).) Justice Kitching, who was not on the *Oronoz* Panel, wrote the *Ardon* majority opinion. Similarly, the City asserts that the *Loeffler* Court unanimously rejected *Oronoz*, but the *Loeffler* opinion does not even

Section 32 does not apply to Plaintiff's claims. However, as discussed in Plaintiff's Opening Brief (see Opening Brief, § III.C.), the answer to whether Section 32 applies to Plaintiff's claims is not dispositive. Even if Section 32 does apply, at most it requires strict construction of Section 910, and Section 910, even strictly construed, permits class claims.[18]

3. The City's Suggested Alternate Ways For Plaintiff Ardon To Proceed Provide No Effective Remedy

The City offers a hodgepodge of purported public policy arguments concerning alternate avenues for a wronged taxpayer to proceed, none of which is an effective method of recovery.

First, Defendant's suggestion that "private tax collectors ... can file ... suit, seeking to recover TUT paid on behalf of their customers, the taxpayers" (Answer, p. 34), is particularly meaningless because it ignores Public Utilities Code section 799, which precludes taxpayers from requiring service suppliers to obtain refunds on their behalf. The carriers have absolutely no incentive to incur huge legal costs to bring an aggregated claim on behalf of taxpayers. (See *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790, 801 [117 Cal.Rptr. 305] [this Court found itself called upon to fashion a remedy since, "[u]nder the procedure set up by the [State] Board [of Equalization], the retailer is the only one who can obtain a refund from the Board; yet, since the retailer cannot retain

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mention *Oronoz*. See *Loeffler v. Target Corp.* (2009) 93 Cal.Rptr.3d 515, review granted Sept. 9, 2009, No. S173972, 216 P.3d 520.)

[18] As discussed more fully in Plaintiff's Opening Brief, "[t]he rule of strict construction does not require that the narrowest possible meaning be given." (*Cedars of Lebanon Hospital v. County of Los Angeles* (1950) 35 Cal.2d 729, 735 [221 P.2d 31].) Instead, a "fair and reasonable interpretation must be made of all laws, with due regard for the ordinary acceptation of the language employed. ... " (*Ibid.*) "[S]trict construction does not mean strained construction." (*Safeco Ins. Co. v. Gilstrap* (1983) 141 Cal.App.3d 524, 533 [190 Cal.Rptr. 425].) The fact that Section 910 does not use the word "class" does not change the plain, unstrained meaning of allowing a claim to be filed by a "claimant or ***by a person acting on his or her behalf***." (Gov. Code, § 910, emphasis added.) As noted above, section 382 of the Code of Civil Procedure also does not use the word "class."

the refund himself, but must pay it over to his customer, the retailer has no particular incentive to request the refund on his own"].) The fact that a handful of telecommunications carriers have filed suit seeking to recover the TUT they paid on behalf of their customers misses the point. These carriers have sought refunds only for ***themselves***. Individual taxpayers who have paid the illegally collected TUT will receive no benefit from these lawsuits.[19]

Second, the City's argument that allowing class claims under Section 910 will destroy revenue streams is mere inflammatory speculation. Section 910 has allowed class claims since at least 1974 and it has yet to bring about the downfall of any government entity. Indeed, as noted *supra* at § III.A.2, most tax refund claims are subject to specific refund statutes and not Section 910.

Third, the City's claim that it will face huge unexpected liabilities is unsupported. The City has been on notice that it was improperly collecting the tax since at least May 2006, when the IRS issued notice 2006-50, if not earlier based on the decisions of numerous federal district and circuit courts of appeal around the country.[20] At a

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[19] For instance, Nextel Boost of California is seeking return of $6,335,856.79 in TUT it paid on behalf of its customers from February 2007 to February 2008. (*Nextel Boost of California LLC dba Boost Mobile v. City of Los Angeles*, Los Angeles Sup. Ct. (Case No. BC406437) [see *Nextel* Complaint at ¶¶ 2, 12, 27, attached as Exhibit A to Plaintiff's Motion for Judicial Notice ("RJN") filed herewith].) Similarly, Tracfone Wireless, Inc., a vendor of prepaid telephone cards, is seeking return of $180,482.15 of TUT that the company itself paid between November 2004 and November 2005 because it was unable to collect the tax from its customers. (*Tracfone Wireless, Inc. v. City of Los Angeles*, Los Angeles Sup. Ct. (Case No. BC363735), RJN, Ex. B; see also *Tracfone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1362 [78 Cal.Rptr.3d 466] [similar suit against the County of Los Angeles seeking return of telephone users tax amounting to $120,151.11 that it paid and did not collect from consumers "because it was unable to do so, having no point of sale contact with the vast majority of ultimate consumers"].)

[20] See *Reese Bros., Inc. v. U.S.* (W.D. Pa., Nov. 30, 2004, No. 03-CV-745) 2004 WL 2901579, affd. (3d Cir. 2006) 447 F.3d 229; *Hewlett-Packard Co. v. U.S.* (N.D. Cal. Aug. 5, 2005, No. C-04-03832 RMW) 2005 WL 1865419; *Fortis, Inc. v. U.S.* (S.D.N.Y. 2004) 420 F.Supp.2d 166, affd. (2d Cir. 2006) 447 F.3d 190; *Am. Online, Inc. v. U.S.* (Fed.Cl. 2005) 64 Fed.Cl. 571; *Honeywell Internat., Inc. v. U.S.* (Fed.Cl. 2005) 64 Fed.Cl. 188;

minimum, the City was notified in October 2006 when Plaintiff made his claim pursuant to Section 910. Therefore, the City has had no less than three years and four months to engage in fiscal planning for repayment of the improperly collected taxes. Moreover, because the City has "the right to inspect at all reasonable times" the records of telephone service providers, it can easily make the determination of how much in refunds it owes. (See section 21.1.11 of the Los Angeles Municipal Code (Appendix A to Opening Brief).) Indeed, the City already knows exactly the extent of its potential liability (See Answer, p. 33 ["the TUT at issue here represents a $270 million annual revenue stream"].)[21]

Fourth, the City's argument that the important purposes and policies underlying class remedies do not apply to claims for tax refunds (Answer, p. 35) is not supported by the cases it cites. The decision in *Blue Chip Stamps* to decertify the class turned on the "unusual facts" of that case (i.e., the decline in popularity of the trading stamps and the lack of any meaningful overlap between the class of individuals injured by the defendant's conduct and the class of individuals who would benefit from a reduction in the tax rate), and not on the fact that the claims were for tax refunds. (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 388 [134 Cal.Rptr. 393] (conc. opn. of Tobriner, J.).) Moreover, *Blue Chip Stamps* is additionally distinguishable because, contrary to the facts presented here, the defendant in that case "did not profit from the alleged

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Nat. R.R. Passenger Corp. v. U.S., supra, 338 F.Supp.2d 22; *OfficeMax, Inc. v. U.S.* (N.D. Ohio 2004) 309 F.Supp.2d 984, affd. (6th Cir. 2005) 428 F.3d 583, rehg. en banc den. (Mar. 30, 2006) 428 F.3d 583; *Am. Bankers Ins. Group, Inc. v. U.S.* (11th Cir. 2005) 408 F.3d 1328.

[21] The City cites no authority in support of its argument that there are "compelling" reasons for allowing class actions in the context of a government's commercial activity but disallowing them in tax refund cases based upon some purported link between the source of funds and their use for "essential services" or not. As the City well knows, money is fungible, and a government does not differentiate between funds it expects to earn from proprietary activity and general tax revenues when calculating a budget for the provision of public services.

overcollection of sales tax." (*Ibid.*) Additionally, *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 726 [37 Cal.Rptr.3d 660] and Code of Civil Procedure section 384(a) are inapposite since they concern *cy près* distribution of unclaimed settlement funds, which can only occur after a majority of the settlement fund has been distributed to the class members, which has not yet occurred in this case.

Finally, while the federal cases cited by Plaintiff that found the IRS was illegally collecting the FET (see footnote 20) were not class actions, those taxpayers were large corporations that were seeking refunds in amounts ranging from thousands to millions of dollars.[22] Absent a class action remedy, however, the typical taxpayer, whose individual claim is likely less than $100 per year, has no meaningful opportunity to challenge the accuracy and legality of the TUT. Due process demands such an opportunity. (*McKesson, supra*, 496 U.S. at p. 39.)

IV. CONCLUSION

Plaintiff Ardon respectfully requests that the decision of the Court of Appeal below be reversed.

DATED: February 9, 2010

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[22] The City cites no authority for the conclusion that the federal courts "left the IRS to fashion a remedy." (Answer, p. 34.)

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I, Maureen Longdo, hereby certify that I am a citizen of the United States and a resident of the State of California, over the age of eighteen, and not a party to the within action.

On this 9th day of February 2010, I filed the original and 13 copies of the Plaintiff/Appellant's Reply Brief on the Merits in *Ardon v. City of Los Angeles*, No. BC 363959 (the "Brief"), with the Clerk of the Supreme Court of California via Federal Express Overnight Delivery, served one copy of the Brief via Federal Express Overnight Delivery on the Clerk of the Court of Appeal of California, served one copy on the Honorable Anthony J. Mohr, the trial court judge in the Los Angles Superior Court via Federal Express Overnight Delivery, and served one copy of the Brief via Federal Express Overnight Delivery on all parties on the attached service list.

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