Case No. A109288 and
Case No. A110061

In The Court of Appeal, State of California

FIRST APPELLATE DISTRICT

DIVISION THREE

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MACY DEPARTMENT STORES, INC., an Ohio Corporation; aka MACY'S WEST, INC.; BROADWAY STORES, INC., a Delaware corporation; FEDERATED WESTERN PROPERTIES, INC. and Ohio corporation; FEDERATED SYSTEMS GROUP, INC., a Delaware corporation; and MACY'S.COM, INC. a New York corporation,

Plaintiffs and Respondents

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Appellant.

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Appeal From the Superior Court of the State of California
for the County of San Francisco, Case No. 306-723
Honorable Richard A. Kramer, Judge Presiding

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APPLICATION TO *FILE AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT CITY AND COUNTY OF SAN FRANCISCO

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 13(c) of the California Rules of Court, the League of California Cities respectfully requests permission to file the amicus curiae brief that is combined with this application. The applicant is an organization that represents municipalities that have a substantial interest in this case because the Court's opinion has the potential to substantially undermine the stability and predictability of municipal finances by overturning municipal regulatory schemes providing for tax refunds and expanding municipal liability for refunds. First, the decision compels a municipality to refund a tax in its entirety even though it is only partially invalid, rather than simply requiring a refund of only that portion of the collected tax that was invalid. Second, the decision invalidates local ordinances that regulate the amount of interest a local taxpayer may receive on a local tax refund from the municipality.

The applicant has a unity of interest with the appellant City and County of San Francisco and seeks to submit the attached brief as *amicus curiae* in the Court of Appeal in this matter.

The applicant's attorneys have examined the briefs on file in this case and are familiar with the issues involved and the scope of the presentations. The applicant respectfully submits a need exists for additional briefing regarding the potential impact of a decision by this Court on local governments throughout California as regards the proper amount of local tax refunds and the proper calculation of interest on such

local tax refunds. Applicant respectfully submits the following issues, addressed in the proposed brief combined with this application from the perspective of the impact of local governments throughout California, are important to the Court's determination of this matter:

1. When a tax fails the "internal consistency" test for discrimination against interstate commerce, must the taxing agency refund more than the maximum amount necessary to offset all potentially discriminatory effects?

2. Are all local tax ordinances that specify the rate of interest provided on local tax refunds invalid and preempted?

Therefore, and as further amplified in the Introduction and Interest of Amicus portion of the proposed brief, the applicant respectfully requests leave to file the amicus curiae brief that is combined with this application.

DATED: June 26, 2006

Respectfully submitted,

COLANTUONO & LEVIN, PC

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Attorneys for Applicant and *Amicus Curiae* League of California Cities

I. INTRODUCTION AND INTEREST OF AMICUS

The internal consistency test, derived from the Commerce Clause, asks the question of whether a tax would potentially prejudice the free flow of commerce if it were imposed in identical form in every other taxing jurisdiction. The test is of course hypothetical, and Respondents have not established any actual damages. This case presents two questions about how to calculate the amount of refund owed under this scenario.

First, this Court must determine the measure of damages when a local tax fails the "internal consistency" test for discrimination against interstate commerce.[1] The taxing agency in this case, the City of San Francisco (the "City"), is not asking the Court to limit the refund to actual damages (i.e., zero). Rather, the City contends that, as is the case with facially discriminatory taxes that result in an actual disadvantage to the non-local litigant, the established remedy is to provide a refund sufficient to place the non-local litigant on an even footing with local businesses. The only difference between this case and a case involving actual damages is that here the remedy must place Respondents on a even footing with local businesses in the ***hypothetical*** world of uniform taxation in all jurisdictions. In other words, here the remedy should be sufficient to place Respondents on an even footing with purely local San Francisco businesses, assuming that the tax at issue was identically imposed in every other taxing jurisdiction. It was undisputed in the trial court that the City's expert correctly calculated the hypothetical, maximum amount of tax that Respondents could have been required to pay over and above the amount

[1] The terms "interstate commerce" and "non-local commerce" are used interchangeably in this brief.

paid by a purely local San Francisco business, based upon the assumption that the identical tax was imposed in all taxing jurisdictions in which Respondents operate.

Nonetheless, Respondents argue that they should receive a refund of the entire tax paid -- a windfall well in excess of either the actual damage suffered or the hypothetical burden on interstate commerce.

The City's proposed remedy would, by contrast, place Respondents on an equal footing with local taxpayers. Indeed, it is inconceivable that this tax could have -- even in theory -- placed any unconstitutional burden upon Respondents in excess of the remedy proposed by the City. Notwithstanding the logic, the equities and United States Supreme Court authority clearly establishing the remedy as being limited to the portion of a tax that impermissibly burdens interstate commerce (dismissed by the trial court as out-of-state federal authority),[2] the court below ruled that Respondents are entitled to a refund of all taxes paid, including amounts that could not even ***theoretically*** involve discrimination against interstate commerce. Due process demands no such windfall.

Second, this Court is asked whether a charter city, which admittedly has the power to enact a comprehensive regulatory scheme regarding the payment, collection and refund of local taxes, is nevertheless prevented by general state law from setting the interest rate it will pay on local tax refunds requested pursuant to its own local ordinances. Of course, the answer is: it is not. Civil Code section 3287 does not specify a rate for prejudgment interest and, therefore, does not conflict with San Francisco's

[2] CT 860.

local ordinance at issue. Respondents offer this Court no persuasive evidence of a legislative intent to wholly occupy the field of prejudgment interest rates, let alone any intent to invalidate interest rate ordinances established by charter cities. Accordingly, Section 3287 cannot preempt San Francisco's valid local ordinance prescribing the interest rate it will pay on local tax refunds.

The League of California Cities ("League") is an association of 474 California cities united in promoting the general welfare of cities, both charter and general law cities, and their residents. The League is advised by its Legal Advocacy Committee, comprised of twenty-four city attorneys representing all sixteen geographical divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as this one, that are of statewide significance to all cities.

II. ISSUES PRESENTED – FACTS AND PROCEDURAL HISTORY

Amicus adopts the Statement of the Case set forth by the City and County of San Francisco in its Appellant's Brief.

III. RESPONDENTS ARE NOT ENTITLED TO A WINDFALL REFUND.

Respondents offer straw man arguments in support of a demand for a remedy that could not even theoretically reflect any injury to them or any prejudice to interstate commerce. Notwithstanding Respondents' attempt to frame the issue in terms of whether retrospective relief is available, this

case does not involve a failure by the City to offer meaningful, backward-looking relief in the form of a tax refund. All that is at issue is the amount of refund that is due.

Nor does this case involve any disparity between California and Federal due process standards for the refund of a discriminatory tax. The trial court therefore should have accepted controlling authority of the United States Supreme Court, which demands only a "clear and certain remedy" sufficient to put local and non-local taxpayers on an equal footing. Because it is inconceivable that Respondents could have even theoretically suffered any prejudice beyond the remedy proposed by the City, the clear and certain remedy proposed by the City satisfies due process.

A. The Trial Court Erroneously Ignored Federal Due Process Standards And Controlling Supreme Court Authority.

The guidelines for remedying a tax that discriminates against interstate commerce were established by the United States Supreme Court in *McKesson v. Division of Alcoholic Beverages* (1990) 496 U.S. 18. *McKesson* held that a tax discriminating against interstate commerce need only be refunded to the extent necessary to render the tax non-discriminatory. While Respondents state that *McKesson* "at most, establishes a standard of **minimum federal due process**, which the McKesson court itself, indicated the states are free to exceed,"[3] it is telling that Respondents do not explicitly argue (or offer any authority for the

[3] Respondents' Brief at 24. [Emphasis in original.]

proposition) that a standard beyond federal due process is, in fact, required in California. This highlighted, bold-font reference to "**minimum federal due process,**" which the states are "free to exceed" appears to be nothing more than an attempt to imply that federal and state standards somehow diverge. There is simply no support for this misleading implication.

The trial court was apparently persuaded that United States Supreme Court authority does not control this California due process dispute, as evidenced by its statement that "defendant's out-of-state federal authorities would at best relate to a refund of a tax that violated the Federal Constitution. Here, this court has found that the subject tax violated both the Federal and the California Constitutions."[4] Therefore, notwithstanding the fact that California follows the federal standard for due process with respect to taxes that discriminate against interstate commerce, the trial court inexplicably concluded that United States Supreme Court is an "out-of-state federal authority" that can be ignored! In fact, *McKesson* is squarely on point and controls the outcome of this controversy.

B. ***McKesson* Controls This Dispute.**

McKesson involved a challenge to a Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida-grown citrus and then bottled in state. While the Florida Supreme Court held that the tax violated commerce clause principles, it refused to order a refund. The United States Supreme Court reversed and provided guidelines for determining the duty to provide relief from a discriminatory tax.

[4] CT 860-61.

1. ***McKesson*** **Permits Partial Refunds Sufficient to Remove Discriminatory Effects.**

While the *McKesson* Court recognized that under some circumstances (described in the following section of this brief) an invalid tax must be refunded in full, it held that a tax discriminating against interstate commerce need only be refunded to the extent necessary to render the tax non-discriminatory. This point was unequivocally stated:

> "Florida may reformulate and enforce the Liquor Tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the state may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive petitioner of its property pursuant to a tax scheme that is *valid* under the Commerce Clause."[5]

Because *McKesson* involved actual discrimination in which the petitioner's competitors had received preferential treatment, the Court approved of the following "clear and certain" remedy:

> "More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received."[6]

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[5] *McKesson*, 496 U.S. at 40. [Emphasis in original.]
[6] Ibid.

This particular remedy cannot be applied in the case at bar, because the record reflects no actual discrimination against non-local commerce. The City's proffered remedy, which assumes that all other jurisdictions imposed an identical tax during the time period at issue and refunds the amount that would have been required to put Respondents on an equal footing with local taxpayers under those hypothetical circumstances, satisfies the *McKesson* directive to relieve discriminatory effects. With this relief in place, Respondents would no longer suffer from even a theoretical disadvantage *vis a vis* local taxpayers and the internal consistency test with respect to Respondents would therefore be satisfied.

The City's position that its proposed remedy reflects the ***maximum*** level of potential prejudice that could have theoretically existed is undisputed. Moreover, requiring a full refund under these circumstances would lead to anomalous (if not absurd) results, insofar as damages for theoretical discrimination would exceed damages for actual discrimination. This is particularly troubling to the amicus curiae cities because of the prospect that errors by municipalities in interpreting arcane areas of constitutional law could result in monetary awards vastly disproportionate to any actual injury, thus transferring money from the public coffers and taxpayers' pockets, to private individuals who have not even been harmed. Moreover, the lack of predictability would endanger municipal reserves, programs and services .

2. *McKesson* Distinguishes Respondents' Authorities.

Respondents quote *Ward v. Love County Board of Commissioners* (1920) 253 U.S. 17, *Carpenter v. Shaw* (1930) 280 U.S. 363 and *Atchison,*

Topeka & Santa Fe Railway Company vs. O'Connor (1912) 223 U.S. 280.[7] Yet, they conspicuously fail to note that these authorities were distinguished by the *McKesson* Court as involving taxes that were, in their entirety, beyond the power of the state to impose. In fact, immediately after citing these three cases as examples of situations where an unlawful tax must be refunded in full, the *McKesson* Court made the following observation:

> "Here, however, the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce."[8]

It is troubling that Respondents cite *Ward v. Love, Carpenter v. Shaw* and *Atchison v. O'Connor*, without recognizing that *McKesson* distinguished each of these cases. Likewise, Respondents do not address (much less refute) the City's argument that these three cases involved successful challenges to either an unapportioned tax or else a tax imposed upon immune parties. As noted by the *McKesson* Court, such taxes, which must be refunded in full, are distinguishable from a tax that discriminates against interstate commerce, which requires a refund only to the extent necessary to alleviate the discriminatory effect. By refusing to address the City's argument, Respondents have implicitly conceded this issue.

[7] Respondents' Brief at 11-12.
[8] *McKesson*, 496 U.S. at 39.

3. *McKesson* Allows A Taxpayer-Specific Remedy.

Perhaps recognizing that *McKesson* cannot be ignored, Respondents creatively contend that the *McKesson* Court "at all times" contemplated an overall remedy scheme applicable to all taxpayers, as opposed to a remedy applicable only to the litigant-taxpayer.[9] This contention is unequivocally refuted by the language quoted above, in which the *McKesson* Court approves of a remedy that would give the litigant-taxpayer the same preference that was enjoyed by local taxpayers. While the Court also approved of a remedy that would retroactively impose additional tax on local taxpayers, thereby eliminating the tax disparity between in-state and out-of-state businesses, this was held out merely as an alternative approach. In short, Respondents' view that *McKesson* contemplated ***only*** a global solution that would eradicate discriminatory effects as to all taxpayers flies in the face of the Supreme Court's unequivocal language approving a litigant-specific remedy and stretches the holding of that case beyond recognition. Respondents' creative attempt to distinguish *McKesson* should therefore be rejected.

C. The Trial Court Misconstrued *General Motors*.

The trial court erroneously concluded that the tax scheme at issue in this case is "substantively indistinguishable" from the tax involved in *General Motors v. San Francisco* (1999) 69 Cal.App.4th 448, where the court invalidated "a taxing scheme structured identically to that involved here."[10] The trial court thus concluded that "*General Motors v. San*

[9] Respondents' Brief at 24.
[10] CT 859.

Francisco is sufficient authority" for a full refund.[11] While the trial court is correct that *General Motors* invalidated a tax that discriminated against non-local commerce and awarded a full refund, its conclusion that the tax at issue in the case at bar is "structured identically" to the tax in *General Motors* is erroneous.[12] Moreover the basis for the full refund awarded in *General Motors* is absent here.

General Motors involved a tax that was imposed upon (1) persons who manufacture and sell goods within the City of San Francisco, or (2) persons who sell goods within the City (manufactured elsewhere). As to taxpayers who manufactured goods within the City (in-city taxpayers), the tax was a manufacturing tax. As to taxpayers who manufactured goods outside the City (out-of-city taxpayers) the tax was based on gross receipts from selling activities within the City. In other words, one of two distinct taxes would be imposed, depending upon whether a business was an in-city or out-of-city taxpayer. While it is true that the case at bar involves the imposition of two alternative taxes, based upon either gross receipts or payroll, the determination as to which tax applied was in no way based upon whether a business was in-city or out-of-city. Like an in-city taxpayer, an out-of-city taxpayer might be liable for either of the two taxes, depending upon the information reflected in their return. Unlike the General Motors tax, the tax at issue in the case at bar did not differentiate between in-city and out-of-city taxpayers.

Because an out-of-city taxpayer could be required to pay tax on both (1) manufacturing activities in another jurisdiction and (2) sales activities

[11] CT 861.
[12] CT 859.

within San Francisco, whereas an in-city taxpayer paid only one level of tax on goods manufactured in San Francisco, the *General Motors* court invalidated the tax. Under a similar taxing scheme invalidated by the Second Appellate District in *General Motors v. City of Los Angeles* (1995) 35 Cal.App.4th 1736, General Motors had in fact been required to pay manufacturing tax in Los Angeles and sales tax in San Francisco, and there was no question that General Motors had suffered actual prejudice as a result of these discriminatory tax rules.

The *General Motors* court rejected San Francisco's argument that discrimination in that case could be eliminated by refunding tax on the sale of goods with respect to which manufacturing tax had been assessed in another jurisdiction. The court concluded that this remedy would be inadequate on two grounds. First, the City's proposed remedy would ***not*** operate to place in-city and out-of-city taxpayers on an equal footing, because General Motors would have paid tax on goods sold in San Francisco, while in-city manufacturers would retain their effective exemption from the City's selling tax. (*General Motors*, 69 Cal.App.4th at 454-455.) Second, the court was persuaded by the unfairness of requiring General Motors to demonstrate double taxation going back to 1982. In support of its conclusion that a refund of the entire tax was warranted in that case, the court stated that "[i]t is unreasonable to require a taxpayer to produce documentation for 17 years ago that it was otherwise never required to maintain." (*General Motors*, 69 Cal.App.4th at 455.) Neither of these two issues is implicated in the case at bar, where the invalidated tax did not differentiate between in-city and out-of-city taxpayers, and there is no "unfair" burden involved in determining purely hypothetical damages.

Therefore, the trial court's conclusion that the tax at issue in this case is "structured identically" to the tax that was invalidated in *General Motors* is erroneous.

Furthermore, as noted by the City in its Reply Brief, the Trial Court's conclusion that the *General Motors* court based its decision on the language of the City's refund ordinance (providing for the full refund of all taxes "illegally collected") is simply incorrect.[13] The *General Motors* court in fact expressed no opinion as to whether the City's ordinance requires a full refund of illegally collected tax, as opposed to refunding to the extent of illegal collection. If the *General Motors* court had taken Respondents' view on this issue, it would have been unnecessary to evaluate whether San Francisco's proposed remedy in that case would have left local and non-local taxpayers on the same footing, or whether the burden of requiring General Motors to demonstrate double taxation was unfair under the circumstances.

Significantly, the *General Motors* court distinguished *Digital Equipment v. State Department of Revenue* (Wash. 1996) 129 Wash.2d 177, a case in which the Washington Supreme Court approved a retroactive tax credit for instances of double taxation, noting that "[t]he court's approval of the credit for taxes paid to others [sic] jurisdictions was also 'acutely academic' since the taxpayer challenging the credit conceded that it had not been double taxed and 'consequently suffered no injury under the former unconstitutional tax scheme.' " (*General Motors*, 69 Cal.App.4th at 456 [internal citations omitted].) While it may be fair to say that Respondents'

[13] CT 860.

damages in the case at bar are also "acutely academic," (given that there is no record of an identical tax ***ever*** having been imposed in ***any*** other jurisdiction) this court need not decide whether Respondents' refund should be limited to the extent of actual prejudice, because the City is not proposing any such limitation. All that the City asks is that the remedy be limited to the maximum amount of damages that Respondents could have ***theoretically*** incurred if an identical tax had been imposed in ***every*** other jurisdiction. *General Motors* did not consider this issue and does not control the remedy in this case. Amicus notes, however, that if the *General Motors* court had formulated a remedy equal to the maximum theoretical damage that could have been potentially incurred, the result would have been the same: a refund of the tax in its entirety.

D. The Trial Court Gave No Deference To The City's Interpretation Of Its Own Ordinance.

The authority for a refund in the instant case is the City's refund ordinance. In relevant part, the City's ordinance provides that "the Controller shall refund … the **amount** of any tax … that has been … **illegally collected**".[14] Respondents contend that the City's ordinance must be read as requiring a refund of the entire tax, not just the portion illegally

[14] San Francisco Business and Tax Regulations Code Article 6 § 6.15-1. [Emphasis added.] Respondents erroneously cite a provision they refer to as "§ 911 of the Payroll Expense Tax Ordinance" as authorizing a refund. That provision has been repealed and is not applicable to this dispute. There is no need to engage in a debate as to which provision applies, however, because both of these provisions refer to an "amount" that has been "illegally collected." The City's position that an "amount" is "illegally collected" only to the extent of illegality applies in either case.

collected. However, the City interprets the ordinance as stating that refunds will be given to the extent they were illegally collected.

The City's interpretation that an "amount … illegally collected" encompasses the extent of illegality, as opposed to the tax in its entirety (including amounts lawfully collected), is reasonable. In any event, if the City's interpretation is disputed, a court must give deference to the City in the interpretation of its own ordinance. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204.) The trial court decision reflects no such deference.

E. Respondents' Due Process Authorities Are Inapposite.

Respondents argue at length that due process requires the availability of a retrospective remedy, because California law forbids the prospective remedy of an injunction to prevent the collection of a tax. In other words, since Respondents were forced to abide by the "pay first, litigate later" rule, due process requires a refund remedy. This entire argument is nothing more than a red herring, because the City does not dispute (and has never disputed) the availability of backward-looking relief. Instead, the issue before this Court is the ***measure*** of the refund. Therefore, Respondents' reliance upon *Reich v. Collins* (1994) 513 U.S. 106 and *Newsweek v. Florida Department of Revenue* (1998) 522 U.S. 442 is merely a distraction.

F. Respondents Offer Straw-Man Policy Arguments.

The "parade of horribles" conjured by Respondents' expert, Dr. McLure, underscores the hypothetical nature of this case. Respondents rely

upon the following passage in Dr. McClure's report in their attempt to undermine the simplicity of the City's proposed remedy:

> "Suppose, for example, that tax liability were the greater of 10 taxes (or 20 taxes or 100 taxes) instead of the greater of only two. Suppose that one of the alternative tax bases were square feet of floor space devoted to sales (but not storage). Suppose one were the value of inventory on a given date other than the end of the taxpayer's fiscal year or the average of inventories at the end of the previous twelve months. Suppose that one were the value of specified types of capital assets depreciated using depreciation rates also specified in the law being challenged. This kind of information might not be readily available … especially for earlier years."[15]

Thus, Respondents argue that the simple remedy offered by the City would actually result in extreme complexity. This is, of course, another straw man argument, because the City does not take a position as to the appropriate measure of damages under the hypothetical taxing schemes outlined by Dr. McLure. Instead, the City's proposed remedy is applicable to the case at bar, where records are readily available and the maximum potential disadvantage resulting from the theoretical imposition of the City's tax in all jurisdictions is not only ascertainable, but undisputed by Respondents.

For all of these reasons, the City's proposed remedy should be applied.

[15] Respondents' Brief at 20.

IV. THE LOCAL ORDINANCE CONTROLS THE RATE FOR PREJUDGMENT INTEREST ON A LOCAL TAX REFUND

The trial court erred when it ignored Chapter 6, Section 6.15-2 of San Francisco's Business and Tax Regulations Code ("Section 6.15-2"), which provides the rate for prejudgment interest on local tax refunds. As a Charter City, San Francisco had, and has, the power to enact its own local ordinance regarding the assessment and administration of local taxes, long recognized as a municipal affair. By providing for prejudgment interest in its tax scheme, San Francisco's local ordinance addressed the principle in article XIII, section 32 of the California Constitution that a person who paid an "illegal" tax may recover such payments, plus interest. Therefore, unlike the situation in *Todd Shipyards Corp. v. City of Los Angeles* and *ITT Gilfillan, Inc. v. City of Los Angeles*, the trial court here did not need to use Civil Code section 3287 as a stop-gap measure to provide an interest rate where none was specified in the underlying local tax regulations. In fact, the trial court specifically erred when it did so.

Moreover, contrary to Respondents' argument, Civil Code section 3287 does not preempt 6.15-2. The laws do not conflict. And Respondents have cited no persuasive evidence of the Legislature's purported intent, either express or implied, to fully occupy the field of setting interest rates for prejudgment interest. Accordingly, Civil Code section 3287 does not preempt the properly enacted local ordinance of a Charter City setting the rate for prejudgment interest on local tax refunds. Section 6.15-2 of San Francisco's Business and Tax Regulations Code sets forth the applicable

rate for local tax refunds, and the trial court was not free to ignore this ordinance.

A. San Francisco, As A Charter City, Has The Power To Set Its Own Prejudgment Interest Rate Applicable To Local Tax Refunds, And Civil Code Section 3287 Does Not Apply

The California Constitution grants a Charter City broad authority to "make and enforce all ordinances and regulations in respect to municipal affairs. . .." (Cal. Const., art. XI, § 5, subd. (a).) This authority is so sweeping as to make properly adopted charters supersede all inconsistent state laws regarding municipal affairs. (*Id.*) And it is undisputed that "municipal affairs" includes imposing, collecting and enforcing purely local taxes. (See *Ex parte Braun* (1903) 141 Cal. 204, 209; *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 400; *Todd Shipyards Corp. v. City of Los Angeles* (1982) 130 Cal.App.3d 222, 227.) Over one hundred years ago, the California Supreme Court recognized that the home rule provision in the California Constitution explicitly secured to Charter Cities "the maintenance of . . . charter provisions in municipal matters, and to deprive the legislature of the power . . . to interfere in the government and management of the municipality." (*Ex parte Braun* at 209.)

San Francisco, under its authority as a Charter City, enacted Section 6.15-2 of the San Francisco Business and Tax Regulations Code. (CT 590.) Section 6.15-2 specifically provides that San Francisco will pay interest on local tax refunds: "at the rate of two-thirds of one percent per month or fraction thereof; or the average rate of interest computed over the preceding

six-month period, lawfully obtainable by the San Francisco Treasurer on deposits of public funds at the time refund is made, whichever rate is lower . . .." (CT 576.) This ordinance ensures the taxpayer receives interest on any refunded taxes.

Because a taxpayer is entitled to such interest, the trial court erred in resorting to Civil Code section 3287 to set the prejudgment interest rate. In disregarding San Francisco's prejudgment ordinance, the trial court cited *Todd Shipyards, supra,* and *ITT Gilfillan, Inc. v. City of Los Angeles* (1982) 136 Cal.App.3d 581. But neither of those cases is applicable here. In both *Todd Shipyards* and *ITT Gilfillan*, the City of Los Angeles had no local ordinance regarding prejudgment interest on local tax refunds. (*Todd Shipyards* at 229; *ITT Gilfillan* at 584-85.) And the City of Los Angeles specifically argued that because it has no such ordinance, it was not required to pay any interest at all. (*Todd Shipyards* at 225; *ITT Gilfillan* at 584-85.) In *Todd Shipyards*, the Court of Appeal specifically found this position contrary to the state's public policy.

> That the public policy of this state contemplates the payment of interest on wrongfully collected taxes is manifested by article XIII, section 32 of the California Constitution, which states in pertinent part: "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." [¶] Although the home rule provision clearly embraces taxation for local purposes and although such power is very broad [citation omitted], it does not include the

right to take property illegally or to escape the obligation to redress such wrongs once committed.[16]

Thus, far from holding that Civil Code Section 3287 preempts local ordinances, *Todd Shipyards*, expressly recognizes the existence and breadth of the home rule doctrine and its application to tax refunds.

Unlike the City of Los Angeles in *Todd Shipyards*, here San Francisco provided a method to redress illegally collected taxes, and that method includes payment of prejudgment interest. San Francisco's ordinance does not attempt to circumvent any obligation to correct a wrong. Rather, it provides a method for a taxpayer to claim a refund and a rate at which the City will pay prejudgment interest on any such refund. There simply is no authority for the proposition that a charter city may not make and enforce ordinances governing refunds of local taxes as a municipal affair, nor is there any need to disregard the home rule doctrine and apply a general state law under these facts. The Court of Appeal should reverse and order that any prejudgment interest be calculated in accordance with the City of San Francisco's valid local ordinance setting such rate.

B. Section 6.15-2 of the San Francisco Business and Tax Regulations Code Does Not Directly Conflict With State Law And, Therefore, Cannot Be Preempted By Civil Code Section 3287

In their effort to invoke the doctrine of preemption, Respondent's claim that the interest rate in Section 6.15-2 directly conflicts with Civil

[16] *Todd Shipyards* at 227.

Code section 3287. They argue that the only way to resolve the conflict is to find that Section 3287 preempts the local ordinance. But Respondents' arguments are misplaced and contrary to the specific language of the state statute. As set forth below, Section 3287 does not specify any interest rate and the various court decisions ***implying*** a rate of 7 percent based on article XV, section 1 of the California Constitution cannot establish the Legislature's intent to fully occupy the area of setting rates for prejudgment interest. Accordingly, Section 3287 cannot preempt Section 6.15-2, and the interest rate specified in Section 6.15-2 applies.

1. Section 3287 Does Not Specify An Interest Rate And, Therefore, No Actual Conflict Exists Between Section 3287 And Section 6.15-2

The California Supreme Court specifically cautioned that before a court resolves a putative conflict between state law and a charter city measure, it must ensure that an *actual* conflict exists between the two. (See *California Fed. Sav. And Loan Assoc. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16.) The sensitivity of balancing the state's interest against the charter city's interest requires careful scrutiny in this threshold examination.

> [M]any opinions purportedly involving competing state and local enactments do not present a genuine conflict. To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully

> insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.[17]

A careful examination of the ordinance at issue and Section 3287 reveals that no genuine conflict exists. Section 3287(a) states in relevant part:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Plainly, Section 3287(a) does not specify a particular interest rate to use in calculating the amount due, nor does it even provide direction as to how to select the interest rate to use for prejudgment interest.

By contrast, Section 6.15-2(a) provides a specific rate to use for local tax refunds.

> Any amounts refunded shall bear interest at the rate of two-thirds of one percent per month or fraction thereof; or the average rate of interest computed over the preceding six-monthly period, lawfully obtainable by the San Francisco Treasurer on deposits of public funds at the time refund is made, whichever rate is lower. . . .[18]

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[17] *California Fed. Sav. And Loan Assoc.* at 16-17.)
[18] CT 576.

Certainly, on their faces, Section 3287 and Section 6.15-2 do not conflict. Under *California Fed. Sav. And Loan Assoc.*, this Court need not resort to choosing between the state law and charter city ordinance under such circumstances. The local ordinance is valid and should be applied.

2. A Judicially Implied Rate Of 7 Percent For Section 3287 Does Not Reflect The Legislature's Intent To Fully Occupy The Field Of Setting Rates For Prejudgment Interest

Undeterred that no conflict exists in the plain language of the statute and ordinance at issue, Respondents argue that case law establishes, by implication, that "interest" in Section 3287 means 7 percent, which rate conflicts with Section 6.15-2. Admittedly, local legislation can conflict with state law if it "enters an area fully occupied by general law, whether expressly or by legislative implication'." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98.) However, the fact that *courts* relying on the stop-gap rate listed in the California Constitution, implied a rate of 7 percent does not constitute any sort of proof of the *Legislature's* intent in enacting Section 3287.

Because Section 3287 is silent as to the rate, cases interpreting that section have relied on article XV, section 1 of the California Constitution, which provides in relevant part:

> The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic

> indicators, or both. In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum.

Notably, article XV, section 1 contains no language regarding prejudgment interest. Courts have simply implied such a rate in the absence of more specific statutory provisions. (See, e.g., *May Dept. Stores Co. v. City of Los Angeles* (1988) 204 Cal.App.3d 1368, 1378.)

But a judicially inferred rate of 7 percent for pre-judgment interest, which Respondents admit is not contained in the language of either Section 3287 or the Constitution, hardly evidences the Legislature's intent to preempt valid local ordinances providing prejudgment interest rates for local tax refunds. The Court of Appeal recognized this by implication in its ruling in *May Department Stores*. In *May*, the plaintiff sought a refund of a portion of municipal business taxes it paid, claiming the City had not fairly apportioned those taxes. The Court of Appeal agreed that the City's apportionment of taxes was unfair and affirmed the trial court's award of a refund to May. As in *Todd Shipyards* and *ITT Gilfillan*, the City of Los Angeles had no ordinance specifying the rate for prejudgment interest on a tax refund. The trial court awarded interest using the same rate the City charged delinquent taxpayers. The Court of Appeal found this rate improper.

> While sauce for the goose may, in other contexts, be sauce for the gander, the only basis upon which the trial court may award prejudgment interest is embodied in Civil Code section 3287, subdivision (a). [Citation] As Civil Code section 3287

> does not state a specific interest rate, **and no provision of the LAMC specifically permits recovery of interest by a taxpayer at any other rate**, the legal rate of 7 percent is implied.[19]

The language of the ruling illustrates that had the City of Los Angeles provided an applicable interest rate in its tax ordinances, that rate would have controlled over the implied rate of 7 percent. The 7 percent rate was merely a stop-gap measure applied in the absence of a more specific ordinance addressing the issue. And notably in the present case, Respondents point to no case applying Section 3287 when a local ordinance set the interest rate applicable to a local tax refund.

Respondents also rely on article XIII, section 32 in their preemption argument. But, like Section 3287 and article XV, section 1, this provision is silent as to any specific interest rate applicable to tax refunds, and cannot support preemption of local tax ordinances. Article XIII, section 32 provides in relevant part:

> 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.

Clearly, article XIII, section 32 defers the specific rate to the discretion of the Legislature.

Neither the two constitutional provisions argued by Respondents, nor Section 3287, support preemption of all the interest provisions in all local tax refund ordinances. Preemption is warranted only if the state has

[19] *May Dept. Stores Co.* at 1378. [Emphasis added.]

clearly intended to occupy the field of setting the specific prejudgment interest rate applicable to governmental entities. The mere fact that a number of statutes, or in this case a statute and a constitutional provision, may address a shared topic does not evidence the Legislature's intent to occupy the field. "A field cannot properly consist of statutes unified by a single common noun." (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 860-62 ["The fact that there are numerous statutes dealing with guns or other weapons does not by itself show that the subject of gun or weapons control has been completely covered so as to make the matter one of exclusive state concern."]) A potentially preemptive field of state regulation is "an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject." (*Id.* at 862; see also *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707 -709.)

No such preemptive intent is expressed in or implied from Section 3287, or article XIII, section 32 or article XV, section 1 of the California Constitution. The silence of Section 3287 and the deferral in article XIII, section 32 hardly evidence the clear intent necessary to fully occupy the field. And the fact that article XV, section 1 fails to make any mention of prejudgment interest shows an absence of any patterned approach or intent by the Legislature to wholly occupy the field of setting rates for prejudgment interest. To hold otherwise would require the court to pile inference upon inference to the great detriment of charter cities and without any evidence that the Legislature intended to occupy the field to the exclusion of all other laws. As the Supreme Court cautioned in *California*

Fed. Sav. And Loan Assoc., a court should not lightly abrogate the home rule doctrine. (54 Cal.3d at 16-17.)

Moreover, if, as Respondents argue, the state interest in occupying the field of prejudgment interest truly extends to the specific rate charged, then one would expect uniformity of prejudgment rates paid by governmental entities throughout the state's own laws. But no such pattern of uniformity exists. Indeed, as to state property taxes, the Legislature set its own formula for calculating prejudgment interest on property tax refunds, which is different than 7 percent. (See *Cal. Rev. & Tax. Code § 5151*.) If the statewide concern articulated by Respondents is truly a uniform rate of prejudgment interest paid to taxpayers in all cases, it makes no sense that refunds to taxpayers under Section 5151 of the Revenue and Taxation Code would utilize one rate and refunds to local taxpayers under various municipal ordinances would utilize another under Section 3287. What is clear is that the statewide concern, as advanced by Respondents, is not the specific rate of interest used, but that the taxpayer is entitled to prejudgment interest in the first instance.

3. Applying San Francisco's Local Ordinance Regarding The Interest Rate Is Consistent With Precedent And Honors The Home Rule Doctrine

The above statutory interpretation should guide the Court of Appeal's decision here for two reasons. First, it is consistent with the principles stated in *Todd Shipyards* and *ITT Gilfillan*. In both of those cases, the local tax ordinance at issue did not specify that prejudgment interest would be paid on any tax refund. And the City of Los Angeles

argued that it was not required to pay such interest. The conflict with state law in those cases, unlike in this one, was actual. The City of Los Angeles' position conflicted with the public policy, as argued by Respondents, of permitting interest on tax refunds for taxes deemed illegal, as set forth in article XIII, section 32 of the California Constitution. As between prejudgment interest, and no prejudgment interest, those cases found that the City of Los Angeles could not avoid its obligation to redress the wrong to the taxpayer. And in the absence of a specific rate in the local ordinance, the courts used Section 3287 to fill the void. Because no void exists under San Francisco's local tax regulatory scheme, there is no need to imply a different rate.

Second, in accordance with the Supreme Court's caution in *California Fed. Sav. And Loan Assoc.*, such an interpretation forestalls making an unnecessary choice between state law and a valid charter city ordinance. The conflict present in *Todd Shipyards* and *ITT Gilfillan* is decidedly absent here. San Francisco has never claimed that it is exempt from paying prejudgment interest on the tax refund. In fact, San Francisco's ordinance directly satisfies the public policy argued by Respondents in permitting prejudgment interest on refunds of illegal taxes. Rather than conflicting with that statewide concern, it serves to address it head on. And because Section 3287 and article XIII, section 32 of the California Constitution are silent as to the rate charged, there is no genuine conflict. Accordingly, this Court should reverse the trial court and order that San Francisco's valid local tax ordinance prescribing the applicable prejudgment interest rate be enforced.

V. CONCLUSION

Amicus Curiae League of California Cities respectfully requests that this Court issue a decision that affirms the principle that a municipality is only obligated to refund that portion of discriminatory tax that would put the taxpayer on equal footing with local taxpayers. Amicus Curiae further respectfully requests this Court issue a decision that reaffirms the home rule doctrine and recognizes that municipalities have the right via local ordinances to set their own interest rates for refunds of local taxes.

DATED: June 26, 2006

Respectfully submitted,

COLANTUONO & LEVIN, PC

_____
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Attorneys for Applicant and *Amicus Curiae* League of California Cities

CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 14(c)(1)

Pursuant to California Rules of Court 14(c)(1), the foregoing *Amicus Curiae* Brief of the League of California Cities contains 8483 words (including footnotes, but excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on June 26, 2006, at Los Angeles, California.

COLANTUONO & LEVIN, PC

_____
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PROOF OF SERVICE

Macy Department Stores, Inc. v. City and County of San Francisco
Case Nos. A109288 and A110061

I, Sandra K. Sandoval, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 555 West 5th Street, 31st Floor, Los Angeles, California 90013. On March 26, 2012, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT CITY AND COUNTY OF SAN FRANCISCO** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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

Executed on March 26, 2012, at Los Angeles, California.

Sandra K. Sandoval

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