

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 20076391
KEN'S FOODS, INC.	)	
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	)	

OPINION

Representing the Parties:

For Appellant:	Kathy Freeman, Representative Marie Johnson, VP of Finance/Treasurer Benjamin Elliott, Representative Jessica Backer, Representative
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For Respondent:	Ryan Ivanusich, Attorney Katie Frank, Attorney Supervisor Delinda Tamagni, Assistant Chief Counsel
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For Office of Tax Appeals:	Andrew Jacobson, Attorney
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A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Ken's Foods, Inc. (appellant) appeals actions by respondent Franchise Tax Board (FTB) proposing to assess additional tax of \$79,120 and applicable interest for the tax year ended (TYE) April 30, 2012 (TYE 2012), and additional tax of \$104,655 and applicable interest for the TYE April 30, 2013 (TYE 2013).

Office of Tax Appeals (OTA) Administrative Law Judges Asaf Kletter, John O. Johnson, and Tommy Leung held an oral hearing for this matter in Sacramento, California, on August 20, 2024. On April 24, 2025, after the parties provided post-hearing briefing, the record was closed, and this matter was submitted for an opinion pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUE

Whether appellant's California activities exceeded Public Law (PL) 86-272 protection.

FACTUAL FINDINGSAppellant's General Operations, California Employees, and Broker

1. Appellant is a privately held company headquartered in Massachusetts. Appellant manufactures dressings, sauces, and marinades and its products are tangible personal property (TPP). For both TYE 2012, and TYE 2013 (Years at Issue), appellant elected to be taxed as an S corporation for federal and California income tax purposes.
2. During the Years at Issue, appellant operated a commercial kitchen in Massachusetts for research and development (R&D) purposes. Appellant had no facilities, warehouses, or inventory in California, and did not own or lease any California real property or TPP, except that appellant leased several automobiles that its California employees used.
3. During the Years at Issue, appellant sold products in California under two primary businesses. In the first business (the Retailer Business), retailers (appellant's direct customers), such as supermarkets, directly placed orders of TPP through an electronic data interchange (EDI) system. The retailers resold the TPP to end consumers. In appellant's second business (the Food Service Business), commercial food service establishments (appellant's indirect customers), such as chain restaurants, placed orders of TPP with third-party distributors (appellant's direct customer), which placed such orders of TPP with appellant using the EDI system. The distributors then resold the TPP to the commercial food service establishments for sale to end consumers.
4. For both the Retailer and Food Service Businesses, appellant's direct customers placed orders of TPP which were sent for approval to appellant's Massachusetts headquarters. Once approved, appellant shipped the TPP from outside of California to direct customers in the state via third parties.
5. During the Years at Issue, appellant employed two Retail Regional Managers (Retail Managers), two Senior National Chain Account Managers (Food Service Managers), and a Corporate Chef in California. During the Years at Issue, appellant engaged Acosta to be its non-exclusive third-party broker in California for the Retailer Business.

The Retailer Business

6. Appellant's Retail Managers were based in California and operated from home offices. The Retail Managers' daily job responsibilities focused on increasing sales and building relationships with retailer customers and Acosta.¹
7. The Retail Managers worked with Acosta. Acosta was a sales and marketing agency based in Florida that operated nationwide and maintained two California offices. Appellant paid Acosta a commission, which was computed as a percentage of appellant's net TPP sales to retail customers. Acosta maintained the direct customer relationship and was the intermediary with the customer. By maintaining strong relationships with direct customers, Acosta helped solicit direct customers to place orders for appellant's TPP with Acosta. Acosta also assisted with communicating appellant's trade programs and pricing to retailers and helped ensure that retailers followed the trade programs and pricing by maintaining regular, planned store visit coverage.
8. The Retail Managers performed various activities in California. They met major retail customers once every three months and went to supermarket stores about once every couple of weeks for "display compliance." "Display compliance," or price compliance, related solely to overseeing whether the store had put up a display or offered end consumers a deal that related to the store's "trade spend," which refers to appellant's reimbursement of retail customers for specific advertising of appellant's products, including advertising on shelves.
9. The Retail Managers occasionally performed "stock checks" of supermarket stores to "make sure things are correct, as agreed." "Stock checks" identified the retailer's needs or shortcomings of appellant's product. The Retail Managers did not take orders of TPP from retailers and never replaced any stock. Although appellant did not pick up or return product, if the Retail Managers identified any issues during a stock check, the Regional Managers contacted Acosta to resolve the issues. If a direct customer had a product issue, they addressed the issue with Acosta.
10. The Retail Managers' activities included setting up business reviews and "product plans." "Product plans" were a sales strategy on how to approach the retailer with a sales presentation to facilitate making a sale or increase product sales with the retailer.
11. The Retail Managers participated with varying frequency in "retail audits," which were a standard part of a market visit to verify distribution, promotions, shelving, and displays,

¹ It is undisputed that both Retail Managers' responsibilities and activities were identical.

and to ensure that stores were in compliance with the agreed-upon promotions. Retail audits took about one hour and were performed in conjunction with Acosta's visits. The Retail Managers and Acosta checked store shelving displays and pricing and ensured all authorized items were on the shelf. The Retail Managers created a "Retail Audit" form.

12. During FTB's audit of the Years at Issue, appellant prepared a document that detailed Acosta's regular activities within and without California (the Acosta Services Statement).² According to the Acosta Services Statement, Acosta used "planograms" to increase sales at the highest rate using Acosta's best effort to maximize and maintain product positions on the shelves. A planogram instructed retailers on how to properly shelve and display appellant's products in the retailer's stores, including product placement. Acosta's "Headquarter function" participated in the planogram discussion with appellant's sales team by considering appellant's current standards and planograms, and appellant's goals for the new planogram. Once the retailer approved the planogram, Acosta implemented it at the retailer store level.

The Food Service Business

13. The Food Service Managers had a job duty statement that included nine primary job functions.³ As relevant here, the Food Service Managers' primary job duties included:
- Developing and maintaining strong personal relationships with National Accounts' customers.
 - Developing relationships with National Accounts' culinary/R&D groups and becoming involved in projects during the ideation⁴ stage in order to assure opportunities for new products as they become LTO's⁵ or permanent menu items in order to solicit sales of new products.
 - Working closely with Corporate R&D and Chefs on National Account Proprietary Products.
 - Presenting menu ideations⁶ to top accounts to solicit sales and gain incremental volume.
 - Effectively interacting within the Corporate internal support team (R&D, supply chain management, purchasing, field sales, chefs, etc.)

² Appellant claims that no written contract with Acosta existed. FTB's contact during the audit was Ms. Johnson, Director of Finance and Accounting. At the hearing, Ms. Johnson, now appellant's VP of Finance/Treasurer, testified to the terms of the arrangement.

³ It is undisputed that both Food Service Managers' responsibilities and activities were identical.

⁴ "Ideation" is a disputed term discussed in the analysis below.

⁵ The record does not define the term "LTO's."

⁶ "Menu Ideation" is a disputed term discussed in the analysis below.

14. The Food Service Managers performed 95 percent of the work in California and operated from home offices. The Food Service Managers: (1) called on appellant's indirect customers (i.e., the commercial food service establishments, such as chain restaurants) and presented and solicited sales for new items, (2) identified new indirect customers by word of mouth and met with them approximately once every three months, and (3) presented appellant's corporate "Capabilities Presentation" to new customers.
15. The Food Service Managers met more frequently than once every three months with recurring indirect customers (i.e., the commercial food service establishments). To maintain the customer relationship with a recurring indirect customer, when the opportunity arose to take over a product in a chain restaurant's business (e.g., a sauce), the indirect customer told the Food Service Managers what products the indirect customer desired appellant to produce for them. When working on such a project, the Food Service Managers met with customers approximately once a week.
16. At the request of an indirect customer, e.g., a chain restaurant, the Food Service Managers met with the customer and picked up samples of appellant's competitor's products that the customer currently used. Appellant used these competitor samples to select and prepare product samples from its existing library of products. Appellant provided the product samples to the Food Service Managers to convince the indirect customer to replace the competitor-branded product with appellant's own comparable product (known as "product matching"). If product matching was unsuccessful because none of appellant's existing products were satisfactory, appellant created a new product based on the indirect customer's flavor profile (known as "product creation") and provided a product sample to the Food Service Managers to convince the indirect customer to replace the competitor-branded product with appellant's new product.
17. Appellant's R&D team in Massachusetts performed the R&D processes for product matching and product creation. The Food Service Managers would send appellant's R&D department or staff an "R&D request" form⁷ and "communicate back and forth [via email] between the [indirect] customer and [appellant's] R&D department or staff in order to produce [product] samples to the point they are accepted by the [indirect] customer." The Food Service Managers also met with commercial food service establishments related to a "business review," which focused on how appellant's business relationship with that customer was going.

⁷ A copy of an "R&D request" form is not in the record.

18. Appellant's Food Service Business also employed a Corporate Chef whose job duty statement listed five primary job functions. As relevant here, the Corporate Chef's primary job duties included:
- Conducting menu ideations to solicit incremental sales of existing products or solicit sales of new products with National and Regional chain restaurants in support of National Account sales while traveling accordingly within and out of California.
 - Working with National and Regional salespeople to promote and solicit sales of dressings and sauces.
 - Organizing the presentation and promotion of the seasonal sauce program.
 - Developing ongoing relationships with Chefs and Culinary support teams at restaurant chains to solicit additional dressing and sauce opportunities.
19. Appellant employed Chef D. as Corporate Chef for the TYE 2012, until approximately August 2011, and appellant employed Chef G. as Corporate Chef beginning around March 2012, primarily for the TYE 2013. Chef D. worked from home in California, performed 50 percent of the job in California and performed the same activities in California as in other states. Chef G. worked from a Texas home office but visited California for business purposes.
20. The Corporate Chef called on indirect customer accounts (e.g., chain restaurants) within the west coast sales region, which comprised half of the United States, including California.⁸ The Corporate Chef was involved in the "ideation of new dressings," which meant that if appellant created a new dressing, the Corporate Chef was then responsible for finding different uses for the dressing so that appellant could sell more of it.
21. The Corporate Chef visited the indirect customer accounts (e.g., chain restaurants) of the Food Service Managers to make presentations. The day before an indirect customer visit, the Food Service Managers typically met with the Corporate Chef while both employees shopped for ingredients to use at the presentation. During the indirect customer presentation, the Food Service Managers and Corporate Chef showed the customer "options for using a product [in] many different recipes to increase sales of that product." The Food Service Managers talked to the indirect customer while the Corporate Chef cooked. The Food Service Managers typed up notes, forwarded them to R&D, followed up with the indirect customer, and electronically communicated with the

⁸ Ms. Johnson confirmed at the hearing the responsibilities of the Corporate Chef were identical, stating that "the practical job function of [Chef D.] and [Chef G.] were substantially similar." (Hearing Transcript, p. 111, lines 12 through 15.) Accordingly, while the Corporate Chef's supervisor explained Chef D.'s duties, it can be reasonably presumed that Chef G. had the same job duties as well. Chef G. swore that function and territory of the role was the same in an affidavit prepared for this appeal.

- Corporate Chef.⁹ If an indirect customer had a recipe for a product, the Corporate Chef communicated the recipe to appellant's R&D staff. The R&D staff developed product samples and sent them to the customer.
22. The Corporate Chef also helped appellant's salespeople by "showing [indirect] customers how to use [appellant's] products in various ways . . . [t]he more uses, the best chance of increasing volume ordered/purchased by a particular [indirect] customer and/or the better chance of getting the [indirect] customer to change [its] menu to incorporate new items that utilize [appellant's] products." Additionally, the Corporate Chef organized uses for seasonal sauces and showed appellant's salespeople the various uses and ultimately the indirect customer would be shown the same uses for the sauces. The seasonal sauce presentations' purpose was to increase sales volume.
23. The Corporate Chef went to indirect customer accounts (e.g. chain restaurants) individually and met with the restaurant chef. The Corporate Chef "might go into the customer's kitchen with the other [c]hef and show th[e restaurant chef] how to use the sauce or dressings." The Corporate Chef did not train indirect customers.

Procedural History

24. For the Years at Issue, appellant filed California corporate tax returns claiming that it was protected from the S corporation net income tax based on PL 86-272, and thus it only reported and paid the \$800 minimum franchise tax.¹⁰
25. FTB audited appellant's corporate income tax returns and concluded appellant's California activities exceeded PL 86-272 protection. FTB therefore issued Notices of Proposed Assessment (NPAs) for the Years at Issue, which proposed to assess additional tax of \$79,120 for TYE 2012 and additional tax of \$104,655 for TYE 2013.¹¹ Appellant protested the NPAs, but FTB issued Notices of Action that affirmed the assessments.
26. This timely appeal followed.
27. On appeal, FTB provides, among other documentation, job descriptions from a later audit cycle, undated webpages and screenshots from appellant's and Acosta's current

⁹ Notes or reports typed up by the Food Service Managers or kept by the Corporate Chef are not in the record.

¹⁰ Copies of appellant's returns are not in the record.

¹¹ Copies of appellant's apportionment workpapers are not in the record.

and former websites, the Food Service Managers' performance evaluations, and expense reports for appellant's employees, excluding Chef G.'s expense reports.

28. On appeal, appellant provides, among other documentation, a sample retail audit form, an affidavit prepared for this appeal sworn by the second Food Service Manager for the Years at Issue (Food Service Manager Affidavit), an affidavit prepared for this appeal sworn by Chef. G. (Corporate Chef Affidavit), and Chef G.'s expense reports.

DISCUSSION

I. Burden of Proof

The burden of proof is generally on the taxpayer as to all issues of fact and except as otherwise provided by law, requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a), (b).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Smith*, 2023-OTA-069P.) FTB's proposed assessments of additional tax are presumed correct and the taxpayer bears the burden of proving them to be incorrect. (*Ibid.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determinations, the determinations must be upheld. (*Ibid.*)

II. Legal Background

A. PL 86-272

In 1959, Congress passed the Interstate Commerce Act of 1959, commonly known as PL 86-272, which is codified under 15 U.S.C. §§ 381 through 384. Under PL 86-272, a state cannot impose a tax on the net income derived within the state by a nondomiciliary corporation whose sole business activity in the state consists of the solicitation of orders of TPP that are approved, fulfilled, and shipped from out-of-state. Subsection (a) of PL 86-272 provides, in relevant part, the following:

(a) No State, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person . . . are either, or both, of the following:

(1) the solicitation of orders by such person, or [their] representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or [their] representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Subsection (a)(2) of PL 86-272 shields a manufacturer's so-called "missionary" request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's fulfillment by a subsection (a)(1) customer of the manufacturer, i.e., by a wholesaler fulfilling the orders of the retailer with goods shipped to the retailer from out-of-state. (*Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.* (1992) 505 U.S. 214, 233-234 (*Wrigley*).)¹²

Subsection (c) of PL 86-272 expands the immunity of subsection (a) to include not only solicitation of orders for sales of TPP, but also actual sales of TPP by the out-of-state seller's in-state "independent contractor." In addition, the independent contractor may maintain an in-state office where the contractor's activities consist solely of making sales, or soliciting orders for sales, of TPP. (*Wrigley, supra*, 505 U.S. 214, 224-225.) Subsection (d) of PL 86-272 includes within the term "independent contractor" a broker who is engaged in selling TPP, or soliciting orders for the sale of TPP, for more than one principal and who holds itself out as such in the regular course of its business activities.

B. Wrigley and the Articulation of the "Entirely Ancillary" and De Minimis Standards

The landmark *Wrigley* case construed the term "solicitation of orders" for purposes of PL 86-272. (*Wrigley, supra*, 505 U.S. at pp. 223-231.) The case concerned an Illinois-based company that manufactured and sold chewing gum nationwide. (*Id.* at pp. 216-219.) At issue

¹² In *Santa Fe Natural Tobacco Company v. Department of Revenue*, 372 Or. 509, 516 (*Santa Fe*), cert. den. (2024) 604 U.S. ___ [145 S.Ct. 989], the Oregon Supreme Court explained that subsection (a)(2) of PL 86-272 "functionally extends the same protections [of subsection (a)(1)] one additional step beyond direct customers." Subsection (a)(2) allows a business to also solicit orders from indirect customers—persons who will order, not from the business itself, but from the business's in-state direct customers." (*Ibid.*) In *Santa Fe*, the taxpayer was a company selling branded tobacco products to wholesalers, the direct customers, who in turn sold to retailers, the indirect customers. The company's Oregon employees solicited retailers to order from wholesalers. The court explained subsection (a)(2) of PL 86-282 allowed such activity, provided that (1) the solicitation was designed to "enable" the wholesalers to fill the orders, and (2) the wholesaler's orders are fulfilled and shipped from outside of the taxing state." (*Id.* at fn. 7.)

were the company's activities in Wisconsin between 1973 and 1978. (*Ibid.*) During that period, Wrigley did not own or lease real property in Wisconsin and had no manufacturing, training, or warehouse facilities in the state. (*Ibid.*) All Wisconsin orders were sent to Wrigley's Chicago location for acceptance and were fulfilled by shipment through common carrier from outside the state. (*Ibid.*)

Although Wrigley had employees who conducted business activities in Wisconsin during the period, it claimed it was immune from Wisconsin's franchise tax, measured by net income, under PL 86-272. (*Wrigley, supra*, 505 U.S. at pp. 216-219.) Wisconsin disagreed and assessed taxes. (*Id.* at p. 219.) Wisconsin primarily asserted that six activities performed in Wisconsin on behalf of Wrigley went beyond the "solicitation of orders": (1) the regional managers' recruitment, training, and evaluation of employees; (2) the regional managers' intervention in credit disputes; (3) the sales representatives' replacement of stale gum; (4) the sales representatives' supplying of gum through "agency stock checks"; (5) the sales representatives' storage of gum, racks, and promotional materials; and (6) one sales representative's rental of storage space. (*Id.* at p. 232.)

The U.S. Supreme Court first construed the statutory term "solicitation" to include not only explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order. (*Wrigley, supra*, 505 U.S. at p. 223.) The term "solicitation of orders" refers to a course of conduct and is not limited to actual requests for purchases, or to acts "essential" for making requests. (*Id.* at pp. 224-226.) However, at issue in *Wrigley* was whether, and to what extent, the term "solicitation of orders" covers activities that neither explicitly nor implicitly propose a sale. (*Id.* at p. 223.) The Court held that protected activities are those that are "entirely ancillary" to requests for purchases, i.e., those that serve no independent business function apart from their connection to the soliciting of orders of TPP. (*Id.* at pp. 228-229.)

The Court illustrated the distinction between protected and unprotected activities under the "entirely ancillary" standard. Protected activities under PL 86-272 include providing a car and stock of free samples to salespeople, because the only reason for those activities is to facilitate requests for purchases. (*Wrigley, supra*, 505 U.S. at pp. 229-230.) However, employing salespeople to repair or service the company's products is unprotected under PL 86-272 because it serves an independent business function, i.e., there is a good reason to do so regardless of whether the company has a sales force, and while the repair and servicing activity may help to "increase purchases," it is not ancillary to "requesting purchases," even if assigned to salespeople. (*Ibid.*)

In defining the “entirely ancillary” standard, the Court rejected Wisconsin’s argument that no “post-sale activities” can be included within the scope of covered “solicitation.” (*Wrigley, supra*, 505 U.S. at pp. 230-231.) While activities that take place after a sale will ordinarily not be entirely ancillary to solicitation, the Court was not prepared to say that will be invariably true. (*Ibid.*) The Court found Wisconsin’s presale/postsale distinction to be hopelessly unworkable. (*Ibid.*) The Court also rejected Wrigley’s broad “routinely-associated-with-solicitation” and “customarily-performed-by-salespeople” standards. (*Id.* at pp. 226-227.)

Applying the “entirely ancillary” standard, the Court found that Wrigley’s regional manager’s activities, i.e., the recruitment, training, and evaluation of employees, and the intervention in credit disputes, were protected activities because those activities were entirely ancillary to solicitation. (*Wrigley, supra*, 505 U.S. at pp. 234-235.)¹³ Concerning the credit disputes, the Court reasoned that the mediating function appeared unlikely to be assigned to some other employee, and served to ingratiate the salesperson with the customer, thereby facilitating orders for sales. (*Id.* at p. 235.)

However, the Court found that the activities of Wrigley’s sales representatives were not ancillary to requests for purchases and were therefore unprotected by PL 86-272. (*Wrigley, supra*, 505 U.S. at p. 233.) Regarding the sales representatives’ replacement of stale gum, Wrigley would wish to attend to the replacement of spoiled product whether or not it employed a sales force, and the activity served an independent business function separate from requesting orders. (*Ibid.*) Concerning “agency stock checks,” which involved sales representatives who furnished display racks to retailers which were filled from the representatives’ stock of gum, and which occurred in the context of missionary sales, the Court adopted an earlier decision stating that “advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation.” (*Id.* at pp. 233-234.) However, Wrigley made the retailers pay for the gum, which thereby provided an independent business purpose for supplying the gum apart from soliciting customers. (*Id.* at p. 234.) Finally, regarding the gum storage and rental of storage space, because the vast majority of gum was used in connection with unprotected stale gum swaps and “agency stock checks,” the activities were not ancillary to solicitation. (*Ibid.*)

Lastly, the Court concluded that PL 86-272 contains a de minimis exception, which provides that even if a nondomiciliary corporation engages in unprotected activity in the state, the company remains immune from the state’s net income tax if the activity does not establish a

¹³ The Court also held that the regional manager’s occasional use of hotels and homes on behalf of the company for sales-related meetings was a protected activity. (*Wrigley, supra*, at pp. 234, 232, fn. 7 [rejecting Wisconsin’s additional argument that the regional manager’s use of their residences caused Wrigley to maintain an in-state office in violation of PL 86-272].)

nontrivial additional connection with the taxing state. (*Wrigley, supra*, 505 U.S. at pp. 231-232.) Applying the exception, the Court found that the nonimmune activities were not de minimis because, taken together, they constituted a nontrivial additional connection with Wisconsin. (*Wrigley, supra*, 505 U.S. at p. 235.) As such, the Court stated that it was unnecessary to decide whether any of the nonimmune activities was de minimis in isolation. (*Ibid.*) In support of its finding, the Court noted that the sales representatives exchanged stale gum as a matter of regular company policy, on a continuing basis, and that the Company maintained a stock of gum worth several thousand dollars for the stale gum swamps and for “agency stock checks.” (*Ibid.*) The Court therefore concluded that Wrigley was unprotected under PL 86-272. (*Ibid.*)

III. Analysis

FTB primarily asserts that during the Years at Issue, appellant’s Retail Managers, broker, Food Service Managers, and Corporate Chef performed the following six California business activities unprotected by PL 86-272: (1) stock checks, retail audits and display compliance; (2) Acosta’s use, discussion, and implementation of planograms; (3) Acosta’s alleged stock replacement, quality control, and handling of customer complaints; (4) collecting competitor samples and customer information for product matching and product creation; (5) the Food Service Managers’ business reviews; and (6) the Corporate Chef’s menu ideation.¹⁴

A. Stock Checks, Retail Audits, and Display Compliance

FTB contends that the Retail Managers exceeded the scope of solicitation under PL 86-272 by performing stock checks, retail audits in conjunction with Acosta, and visiting supermarkets for display compliance.¹⁵ FTB analogizes display compliance to the agency stock checks in *Wrigley*. In *Wrigley*, the Court found the agency stock checks to be a “complicated question” because, while it might seem that setting up display racks would be protected activity, by itself, the company filled the racks with gum and made the retailers pay for the gum used to fill the display racks, which provided a business purpose for supplying the gum independent from solicitation. (*Wrigley, supra*, 505 U.S. at p. 234.) Here, the Retail Managers’ activities are distinguishable from the agency stock checks in *Wrigley* because the record does not show that

¹⁴ In this appeal, the parties made numerous assertions in voluminous briefing and during a lengthy hearing. This Opinion focuses on the parties’ primary contentions. To the extent all arguments raised by the parties are not explicitly addressed in this Opinion, OTA has considered them and found them not to be dispositive of the issue.

¹⁵ At audit, Ms. Johnson clarified that the terms display compliance and price compliance were synonymous. In briefing, FTB distinguishes between display compliance and price compliance. The source for FTB’s definition of price compliance is unknown.

the Retail Managers provided product or charged retailers for supplying product during retail audits or display compliance.¹⁶

In *Wrigley*, furnishing display racks to retailers was ancillary to *consumer* solicitation because section (a)(2) of PL 86-272 shields a manufacturer's "missionary" request that an indirect customer (i.e., the retailer in *Wrigley*) place an order that would be fulfilled by the manufacturer's direct customer (i.e., the wholesaler in *Wrigley*) by goods shipped from out of state. (*Wrigley, supra*, 505 U.S. at p. 233.) *Wrigley* adopted an earlier decision's statement that a manufacturer's "advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation." (*Ibid.*, quoting *Gillette Co. v. State Tax Comm'n* (N.Y. App. Div. 1977) 56 A.D.2d 475, 482, *aff'd* 393 N.Y.S.2d 186, 191.) Here, appellant ensured that the retailer had properly displayed appellant's product in the retailer's store or advertised a deal on appellant's product to solicit sales from end customers, i.e., consumer solicitation, which was designed to enable the retailer (appellant's direct customer) to place more orders with appellant, and thus, by itself, is entirely ancillary to missionary solicitation efforts.

Nevertheless, FTB claims that stock checks, retail audits, and display compliance served independent business functions, such as managing appellant's trade spend. In determining whether activity is protected under PL 86-272, it is appropriate to consider the decisions of other courts applying the federal law. (See, e.g., *Brown Group Retail, Inc. v. Franchise Tax Bd.* (1996) 44 Cal.App.4th 823 (*Brown*) [considering an Oregon PL 86-272 case in determining whether California activity was protected].) Other state court decisions have found inspection, checking, and refilling retail inventory to be protected activity.

In *Skagen Designs, Ltd. v. Commissioner of Revenue* (Minn. Tax. Ct. 2012), No. 8168-R, 2012 WL 1450008 (*Skagen*), the taxpayer was a Nevada-headquartered distributor of wristwatches and jewelry to retail stores. The taxpayer employed merchandisers, who were part-time employees responsible for visiting retail stores in Minnesota that sold the taxpayer's watches and jewelry to indirect retail customers. The merchandisers inspected, re-arranged, and re-filled the watch cases or towers that displayed the taxpayer's products using a corporate planogram prepared by the taxpayer. The Minnesota tax court found that this activity of the merchandisers was ancillary to solicitation, consistent with the statement in *Wrigley* that "advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation." The Minnesota tax court reasoned that since ensuring a full, well-displayed product

¹⁶ Acosta is an independent contractor and may sell TPP under subsection (c) of PL 86-272.

case is an essential component of enticing sales from indirect retail customers, the merchandisers' activity was ancillary to facilitating requests for purchases by indirect customers.

In *Blue Buffalo Company, Ltd. v. Comptroller of Treasury*, (Md. Ct. Spec. App. 2019) 243 Md.App. 693 (*Blue Buffalo*), the taxpayer was a nondomiciliary corporation in the business of formulating and selling premium pet food through national chains and local independent retailers. Employees of the taxpayer occasionally reworked product displays and checked retail inventories to ensure the taxpayer's products were in stock. (*Blue Buffalo, supra*, 243 Md.App. at p. 711.) The court cited the statement in *Wrigley* that "advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation" and found that filling empty shelves is ancillary to missionary solicitation efforts because a salesperson cannot persuade a consumer to purchase a product that is not on the shelf. (*Ibid.*)

Stock checks, retail audits, and price compliance are similar to the protected activities in *Skagen* and *Blue Buffalo*.¹⁷ In stock checks, the Retail Managers verified conditions at supermarket stores and identified the retailer's needs or shortcomings of appellant's products at the store. In retail audits, the Retail Managers and Acosta inspected and verified store distribution, shelving, promotions, and displays, and the Retail Managers used the retail audit forms to help solicit orders of TPP from retailers and indirect sales from end consumers through product promotions.¹⁸ In display compliance, the Retail Managers checked promotions and displays related to trade spend for appellant's products. These activities are ancillary to solicitation because they facilitated requests for sales from end consumers, for example, by ensuring that product deals were offered in store, which was designed to enable the retailer (appellant's direct customer) to place more orders of TPP with appellant. Therefore, stock checks, retail audits, and price compliance activities are protected activities.

FTB further contends that retail audits and display compliance were "post-solicitation" activities, citing two precedential cases issued by OTA's predecessor, the Board of Equalization,

¹⁷ Appellant cites FTB Publication 1050, Application and Interpretation of PL 86-272 (Pub. 1050), which lists protected and unprotected activities under PL 86-272, to support that retail audits were protected, as well as activities of the Food Service Managers and Corporate Chef. Following recent litigation in *American Catalog Mailers Ass'n v. Franchise Tax Bd.*, No. CGC-22-601363, Cal. Superior Ct., San Francisco, FTB removed this information from its website. Thus, Pub. 1050 is not discussed further.

¹⁸ On appeal, appellant provides a "sample" blank retail audit form for a certain retailer, which is fillable with information, such as the number of appellant's various products in stock, number of facings, dates and unit costs of various promotions, and so forth. Ms. Johnson testified that the retail audit form was representative of such forms for the Years at Issue, and FTB does not dispute the "sample" retail audit form's accuracy. At the hearing, appellant stated that the retail audit form helped the Retail Managers solicit additional orders of TPP from the retailer (appellant's direct customers) or sales from end consumers (appellant's indirect customers) through product promotions, in addition to verifying, placements, promotions, shelving, and displays.

Appeal of Aqua Aerobic Systems, Inc. (85-SBE-133) 1985 WL 15909, and *Appeal of Schwinn Sales West, Inc.* (88-SBE-14) 1988 WL 152322, which construed the solicitation standards prevailing in the courts at the time. However, both cases preceded the U.S. Supreme Court's decision in *Wrigley*, which as noted above, rejected the "post-sale" solicitation standard in favor of the "entirely ancillary" standard, which is the current standard that applies here. (*Wrigley*, *supra*, 505 U.S. at pp. 230-231.).

B. Acosta's use, discussion, and implementation of planograms

FTB asserts that Acosta "was significantly involved in [appellant's] planogram process from conception to implementation," which is not ancillary to the solicitation of orders. FTB also asserts that the planograms serve a variety of purposes, including "draw[ing] in consumers," "increasing impulse purchases," "maximiz[ing] space" and "improv[ing] inventory control," which "may ultimately increase sales but do not facilitate requests for orders." On appeal, FTB provides various undated webpages from Acosta's website, which FTB construes to support its contentions that Acosta's use of planograms was unprotected activity.

While the Acosta Services Statement mentions that Acosta participated in the planogram discussion with appellant's sales team, it does not demonstrate Acosta created or was significantly involved in appellant's planogram process. Concerning the webpages, even if they might show Acosta's general operations as a business, the webpages are not specific to Acosta's arrangement with appellant for the Years at Issue. Moreover, it is unclear whether the webpages refer to the same activities as in the Acosta Services Statement.

The parties disagree on whether *Skagen*, in which the merchandisers' use of corporate planograms to inspect, rearrange, and refill product displays was found to be protected activity, applies to Acosta's use, discussion, and implementation of planograms.¹⁹ FTB asserts that *Skagen* is distinguishable because Acosta's involvement in planogram discussions "went beyond" the planogram activity in *Skagen*. FTB speculates that the planogram discussion and implementation activities was "distinct from solicitation" because Acosta's "Headquarter

¹⁹ FTB analogizes Acosta's use, discussion, and implementation of planograms to the activities of the taxpayer in *Kennametal, Inc. v. Commissioner of Revenue of Massachusetts* (Sup. Jud. Ct. of Mass., Suffolk, 1997) 426 Mass. 39 (*Kennametal*). The taxpayer's salesforce's unprotected activities included: (1) using samples for testing performance of the taxpayer's products and preparing reports based on the results; (2) preparing inventory analyses as part of a broader tool standardization program; and (3) making frequent in-plant presentations (up to six hours in length and involving as many as 200 employees) on the use of the taxpayer's products. *Kennametal* is distinguishable. Those activities, which "relieved [the taxpayer] from having to produce lengthy and detailed product manuals for customers," are very different in scope and purpose than Acosta's use, discussion, and implementation of planograms.

function” participated in the planogram discussion, while Acosta’s “Retail function” implemented planograms. However, the Acosta Services Statement does not show that Acosta’s activity was more involved than the merchandisers’ activity in *Skagen*. *Skagen* applies to Acosta’s use, discussion, and implementation of planograms because in both cases, the planograms are advice to retailers on the art of displaying goods to the public. Acosta’s use, discussion, and implementation of planograms is a protected activity.²⁰

FTB argues that even if appellant provided the planograms to Acosta free of charge, it would demonstrate the value of the planograms to appellant. FTB cites an excerpt from *Brown*, which refers to the taxpayer’s argument in that case that the unprotected activity was de minimis because it was provided free of charge. (*Brown, supra*, 44 Cal.App.4th at p. 828.) *Brown* is distinguishable because that case determined that the independent retail distributor division representatives engaged in unprotected activities to help retailers develop new business opportunities and expand their business, with the hope that the taxpayer would benefit by means of increased sales.²¹ (*Id.* at pp. 828, 837.) Here, by contrast, FTB has failed to show that Acosta’s planogram use, discussion, and implementation was an unprotected activity.

C. Acosta’s alleged stock replacement, quality control, and handling of customer complaints

FTB disputes the nature, scope, and significance of Acosta’s involvement in appellant’s Retailer Business, and asserts that Acosta replaced stock, performed quality control or product servicing, and resolved customer issues and complaints. FTB asserts that the audit interviews with the Retail Manager and the Food Service Manager show that Acosta performed stock replacement.

²⁰ Appellant and FTB dispute whether Acosta provided planograms to or on behalf of appellant. This issue is unnecessary to decide as this panel finds Acosta’s use, discussion and implementation of planograms to be ancillary to solicitation.

²¹ The employees in *Brown*, beyond helping to arrange displays, provided services unrelated to solicitation such as store remodeling, providing a bookkeeping system, drawing up floorplans for potential new stores, and facilitating applications for loans from the taxpayer.

However, the cited language refers to *restocking*, not *stock replacement*.²² In *Wrigley*, stock replacement was an unprotected activity that referred to the sales representative's replacement of stale gum. (*Wrigley, supra*, 505 U.S. 214 at p. 232.) By contrast, restocking may refer to *asking the retailer* to refill inventory when a shelf or display is low, or to the out-of-state seller's employees restocking and pulling bad product from retailer shelves. (See *Skagen, supra*; *Blue Buffalo, supra*, 243 Md.App. 693 at pp. 711-712.) Evidence in the record contradicts FTB's assertion that Acosta performed stock replacement.²³

Under the "entirely ancillary" standard, restocking is an unprotected activity if it serves an independent business purpose. (*Wrigley, supra*, 505 U.S. 214 at pp. 228-229.) Here, no evidence in the record shows that Acosta charged retailers for restocking inventory. Evidence in the record suggests that Acosta did not restock stale or defective inventory, and the retail audit form provided on appeal suggests that Acosta restocked retailers' shelves for reorder purposes. Thus, the record does not establish an independent business purpose for restocking.

On appeal, FTB provides undated webpages from Acosta's website, and construes the scope of Acosta's retailer services based on the webpages, to demonstrate that Acosta

²² Question 11 of the Retail Manager's interview asks: "Who restocks store shelves for retailers? Perform[s] stock check? Replaces stock?" Three responses are provided to the question, as follows:

"The Acosta retail teams perform these activities for [appellant] in C[alifornia].

Occasionally, [the Retail Manager] will do a "stock check"if issues are identified, he will contact Acosta to resolve these issues . . .

[The Retail Manager] stated that he never replaces any stock. He further added that if there is a bad product, the [retailer] will send it to destruct. If Vons, for example, has an issue with a product, [Vons] address[es] the issue with [Acosta]. [Acosta] contact[s] [the Retail Manager], and then arrangements are made to have someone come pick up the product."

The second response provides information regarding stock checks, and the third response provides information about stock replacements. Thus, it appears the first response refers to restocking.

²³ According to question 11 of the Retail Manager's interview, see footnote 22 above, the retailer sent bad product to destruct and Acosta did not pick up products with which the retailer had an issue, which suggests that Acosta was not involved in activities related to replacing spoiled or defective product.

The Acosta Services Statement does not list stock replacement as part of the Acosta's regular activities. Question 10 of the Retail Manager's interview asks the Retail Manager to tell FTB about Acosta. The response states: "Acosta is a national broker. They are responsible for the day-to-day side of [appellant's] business in C[alifornia]. For example, [Acosta] goes into stores to make sure everything is as it should be. [Acosta] set[s] up appointments, [Acosta] give[s] presentations, and [Acosta] submits orders to [appellant]." The response does not mention that Acosta replaces stock as part of its daily activities. FTB also cites question 15 of the Food Service Manager's interview, however, the response states only that "[i]f there is an issue, it goes to [Acosta]. Someone is contacted." The response does not state that Acosta replaces product. Moreover, the response to question 11 indicates that the Food Service Managers did not work with any brokers and would not have been familiar with Acosta's activities.

engaged in unprotected quality control and product servicing. However, even if the webpages might show the operations of Acosta's retailer services, the webpages are not specific to Acosta's arrangement with appellant for the Years at Issue. Moreover, it is unclear whether the webpages refer to the same services as in the Acosta Services Statement. No other evidence in the record shows that Acosta engaged in quality control or product servicing activities.

FTB asserts that Acosta resolved customer issues and complaints, referencing the Food Service Manager's interview.²⁴ However, the full response to the question of how the retailer complaints are handled states that "someone is contacted," which suggests that Acosta did not resolve the complaints but only forwarded or transferred them. Moreover, according to the Retail Manager's interview, after the retailer addresses a product issue with Acosta, Acosta "contact[s] [the Retail Manager], and then arrangements are made to have someone come pick up the product," further suggesting that Acosta did not directly resolve the complaints but transferred them to the Retail Manager instead.

FTB claims that "investigating, handling, or otherwise assisting in resolving customer complaints" is an unprotected activity. However, in *Wrigley*, the regional manager's intervention in credit disputes between the customer and the taxpayer's credit department was a protected activity because it ingratiated the salesperson with the customer, thereby facilitating requests for sales. (*Wrigley, supra*, 505 U.S. at pp. 234-235.) In *Blue Buffalo*, the taxpayer employed "Pet Detectives," who were sales representatives stationed at retail locations where the taxpayer's products were sold. The court found that the Pet Detectives' reporting of complaints from customers attempting to return their products to the taxpayer's corporate headquarters, and refraining from handling returns, was protected activity because, consistent with other state decisions, reporting complaints is entirely analogous to the mediating function in *Wrigley* and ancillary to solicitation by virtue of its role in ingratiating the customer and facilitating continued requests for purchases. (*Blue Buffalo, supra*, 243 Md.App. 693 at pp. 711-712.)

Here, the evidence indicates that Acosta handled customer complaints as an intermediary between the retailer (the direct customer) and the out-of-state seller, as in *Wrigley* and *Blue Buffalo*, and therefore it was protected activity.

²⁴ Question 15 of the Food Service Manager's interview asks: "How do you handle customer/retailer complaints and/or returns? How Often?" The full response states: "If there is an issue, it goes to [Acosta]. Someone is contacted."

D. Collecting Competitor Samples and Customer Information for Product Matching and Product Creation

The parties dispute the nature, scope, and significance of the Food Service Managers' activities related to product matching and product creation. FTB asserts that as part of a product matching project, appellant used samples to match a competitor-branded product and that product matching involved the collection of both customer and competitor information, which is an activity independent from solicitation.

In *Kennametal, Inc. v. Commissioner of Revenue of Massachusetts* (Sup. Jud. Ct. of Mass., Suffolk, 1997) 426 Mass. 39 (*Kennametal*), the taxpayer was an out-of-state corporation engaged in the development, manufacture, and sale of cutting bits and related products for the machining of metals, alloys, and plastics. As relevant here, the taxpayer's sales employees, who were engineers, used samples for testing the performance of the taxpayer's products and preparing reports based on the test results. (*Id.* at p. 44.) The court found that the taxpayer's activities were designed not only to solicit orders, but to ingratiate customers and to assist buyers in knowing what to order. (*Id.* at p. 45.) The court found that the taxpayer had reasons independent of soliciting orders that motivated it to provide the activity in question. (*Ibid.*)

The Food Service Managers collected competitor samples to maintain the customer relationship with a recurring indirect customer in response to a product matching request, and to identify which of appellant's products was comparable to the competitor-branded product currently in use by the indirect customer. Collecting the samples served the same purposes as in *Kennametal* because the activity was "designed not only to solicit orders, but to ingratiate customers and to assist buyers in knowing what to order." (*Kennametal, supra*, 426 Mass. 39 at p. 45.) Appellant asserts that Food Service Managers did not participate in or handle R&D, product matching, or product creation, and that their activity was limited to referring customers to the development team or checking on product development status to determine when a product order could be placed. It is undisputed that appellant's R&D team in Massachusetts performed the R&D processes for product matching and product creation. However, several of the Food Service Managers' contemporaneous job duties refer to working closely with appellant's R&D team, and the record shows that the Food Service Managers collected competitor samples and customer information for the R&D team, and were intermediaries between the customer and appellant's R&D department or staff in order to produce product samples to the point they are accepted by the indirect restaurant customer. Moreover, appellant tested *competitor-branded products*, rather than its own products. Thus, the collection of samples for testing by the R&D team in Massachusetts supports a finding that appellant had

reasons independent of soliciting orders, beyond merely facilitating a customer inquiry or verifying a product could be ordered, for engaging in product matching and product creation.

Appellant asserts that the purpose of product matching was only to “sell [appellant’s] branded products.” However, the record shows that the indirect customer requested product matching because the indirect customer did not know which of appellant’s products was the comparable replacement product, and the Food Service Managers sent the competitor sample to appellant’s R&D team to facilitate the identification of appellant’s comparable product. Similarly, in product creation, the indirect customer was unable to identify an existing product that met their needs, and the Food Service Managers sent information such as the customer’s preferred flavor profile to appellant’s R&D team for the team to create a new product.

Appellant asserts that competitor samples were only received during sales presentations, and therefore, the samples were part of appellant’s sales process. On appeal, after the oral hearing, appellant now provides the Food Service Manager Affidavit, which states that the Food Service Managers “only receive[d] a competitor’s product if it was provided directly by the customer on the customer’s own initiative during a sales presentation meeting.” However, “*Wrigley* made clear that simply because a company makes a particular activity part of its sales process, that decision does not mean those activities are protected by [PL 86-272]. (See *Uline, Inc. v. Commissioner of Revenue* (Minn. 2024) 10 NW.3d 170, citing *Wrigley, supra*, 505 U.S. at p. 234 [italics omitted].)

The Food Service Managers also collected and shared customer and competitor information, activity which other cases have addressed. In *Blue Buffalo*, the Pet Detectives’ routine reports occasionally included comments on customer interactions, product suggestions, the activities of competitors, and issues encountered on the job, and the account managers collected competitive information during trainings and meetings with retailers. (*Blue Buffalo, supra*, 243 Md.App. 693 at p. 712.) The court found that providing the information in routine reports regarding market opportunities and competitor activities was unprotected activity because competitive advantage is a business objective distinct from the solicitation of orders, as the taxpayer would have reason to gather data about its competitor’s activities independently of whether it deployed a Maryland sales force. (*Ibid.*)

In *Uline*, the taxpayer was a Wisconsin-based company in the industrial and packaging product business that employed sales representatives that made in-person sales calls into Minnesota. (*Uline, supra*, 10 NW.3d at p. 172.) As relevant here, the representatives were required to record “Market News Notes,” which documented information including what products customers are buying from the taxpayer’s competitors, details about fringe benefits and

alternative payment arrangements offered by competitors, the scope of customer's accounts with national competitors, prices that competitors offered on products of which the taxpayer had comparable items, and the collection of samples of competitors' products for comparison and marketing purposes. (*Id.* at pp. 172-173, 176.) The court held that gathering and sharing information in the Market News Notes was unprotected activity because the competitive advantage it provided was apparent in how the notes were used. ((*Uline, supra*, 10 NW.3d at p. 177.) The taxpayer's sales representatives already recorded detailed notes for every customer visit, but they were required to record at least two notes per week containing information more relevant to *other* departments than to sales. (*Ibid* [italics original].)

Here, as in *Uline* and *Blue Buffalo*, appellant had good reason to collect competitor samples and customer information for a competitive advantage purpose beyond soliciting a sale to one specific indirect customer. During the audit, Ms. Johnson stated that product matching was "an opportunity for appellant to take over a [competitor's] product in [the indirect customer's] business," and that competitor samples are used to "match a [competitor-branded] product and take the [indirect] customer from the competitor, in turn increasing [appellant's] sales." The Food Service Managers collected a broad array of information from the indirect customer to facilitate product matching and product creation including, but not limited to, competitor samples, information in the customer's initial request and included with the "R&D request" form, customer feedback on product samples provided by appellant, the customer's flavor profile, and communication from the customer in the development of a product accepted by the customer, all of which was documented by the Food Service Managers and forwarded to the R&D department. The collection of competitor samples for comparison purposes, information on what products customers were buying from competitors, and product suggestions, as well as valuable market data about local and regional tastes, was relevant to appellant whether or not it employed a sales force.²⁵

One of the Food Service Managers' primary duties was to become involved in R&D projects – like product matching or product creation – to assure opportunities for new products. Where product matching was unsuccessful, the indirect customer might request product modification or product creation. Appellant had a library of 885 formulas, and over 2,000 products, including between 9 and 12 modified versions of a single product.²⁶ There was

²⁵ At the hearing, appellant's representative stated that in product matching, the customer engages appellant to buy appellant's comparable product for cheaper, which implies that appellant was informed, like in *Uline*, of the prices competitors offered on comparable branded products.

²⁶ Hearing Transcript, p. 85, lines 12 through 23; p. 92, line 6.

good reason to acquire competitor samples and collect customer information because this information assisted the R&D department in product matching, developing new products, and expanded appellant's library of formulas and products, information which the R&D department could use to engage future customers in product matching and product creation.

Appellant argues that *Uline* is distinguishable because the taxpayer did not impose any requirement "on the [Food Service Managers] to collect any competitor information, no competitor information was uploaded to a shared database, and no competitor information was shared with other departments, except for the very rare occasional sample product." The Food Service Manager Affidavit states that as part of product matching, the Food Service Managers "did not collect competitor information, except as relates to matching a particular flavor profile in order to identify a product to request orders from the customer."

However, as discussed above, the record indicates the Food Service Managers collected competitor samples and a broad array of other information serving a competitive advantage. Moreover, the shared database in *Uline* was relevant because it was "accessible by several departments other than the sales department." (*Uline, supra*, 10 NW.3d at p. 177.) That the Food Service Managers forwarded the information to the R&D department, rather than uploading it to a shared database, does not distinguish *Uline*. The R&D department used the information in product matching and product creation.

While product matching and product creation undoubtedly helped to increase sales, there was good reason to acquire the competitor samples and customer-provided information, whether or not appellant employed a California sales team. Thus, product matching was not entirely ancillary to solicitation.

E. The Food Service Managers' Business Reviews

FTB asserts, without evidence, that the Food Service Managers' business reviews provided a form of customer service that "enabled [appellant] to better address specific needs of certain customers and maintain customer loyalty and retention." FTB speculates that "[w]hile it is unclear what these meetings entailed, they likely involved discussions on customer expectations and [appellant's] performance, such as what it is doing well and what it can improve upon." No evidence in the record shows that the Food Service Managers provided customer service to indirect customers.

FTB also cites *Schwinn* for the proposition that the business reviews are unprotected "post-solicitation" meetings. However, as described above, *Schwinn* predates *Wrigley*, which

rejected the “post-sale” standard of solicitation in favor of the current “entirely ancillary” solicitation standard that applies here. (*Wrigley, supra*, 505 U.S. at pp. 230-231.)

In *Blue Buffalo*, the court found that the Pet Detectives’ conversations with customers about their shared appreciation for pets was ancillary to solicitation because the conversations were for the purpose of ingratiating the retail customer and did not serve an independent business purpose of “consumer goodwill.” (*Blue Buffalo, supra*, 243 Md.App. at pp. 706-707.) The court reasoned that the activity was “a classic solicitation technique” because when “such a conversation occurs in a retail setting, the consumer is directly – if not explicitly – invited to purchase the salesperson’s products from the wholesaler’s customer.” (*Ibid.*) The corresponding increase in sales eventually results in the retailer placing additional orders with the company. (*Ibid.*) The court found that requiring a salesperson to refrain entirely from building consumer relationships to avoid taxation would restrain any sales activity other than direct requests for orders, such as missionary requests for orders which are immunized by PL 86-272. (*Ibid.*)

Here, the Food Service Managers’ job duties included developing customer relationships and in furtherance of their job function, they met with indirect customers on a quarterly basis regarding the customers’ business relationship with appellant. As in *Blue Buffalo*, the business reviews served a customer goodwill purpose and were a “classic solicitation technique” to invite missionary requests for orders. Soliciting additional orders of TPP with commercial food service establishments (appellant’s indirect customers) was designed to enable third-party distributors (appellant’s direct customers) to place more orders of TPP with appellant to fill the indirect customer’s orders, which was missionary solicitation.

FTB argues that *Blue Buffalo* is distinguishable because the case involved employees who “frequently persuaded in-store customers to purchase [that company’s] products from retailers.” FTB misconstrues *Blue Buffalo*. The issue in *Blue Buffalo* was not the frequency that customers were persuaded to increase purchases, it was whether the employee’s conversations with customers about their shared appreciation for pets served an independent objective of consumer relations, which the court rejected. (*Blue Buffalo, supra*, 243 Md.App. 693 at pp. 706-707.) The Food Service Managers’ business reviews were protected solicitation.

F. The Corporate Chef’s menu ideation

The Corporate Chef was involved in the “ideation of new dressings” and seasonal sauces, which meant finding different uses for appellant’s products so appellant could sell more of it. The Corporate Chef’s primary job function included “conduct[ing] menu ideations.” The

record does not define “menu ideation,” however, the parties generally agree that it was a process in which the Corporate Chef: (1) researched each prospective or existing indirect customer (e.g., chain restaurant) from a home office prior to meeting with the customer, reviewed the customer’s existing menu and style, and utilized market research websites such as Mintel²⁷ to understand local and regional tastes and market trends; (2) met the indirect customers’ chefs and culinary staff to discuss the existing menu and the indirect customer’s preferences or flavor profile, and to identify or select which of appellants’ products would pair well with the flavor profile of the customer’s restaurant business and could potentially be integrated into the customer’s existing menu; (3) developed a sample menu of food samples for taste testing by the customer, using a variety of appellant’s products that were compatible with the customer’s potential product needs; and (4) prepared and presented the food sample to the customer at the customer’s location to demonstrate versatility of appellant’s products.

The burden of proof is generally on the taxpayer as to all issues of fact and, except as otherwise provided by law, requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a), (b).) Moreover, “*Wrigley* made clear that simply because a company makes a particular activity part of its sales process, that decision does not mean those activities are protected by [PL 86-272].” (*Uline, supra*, 10 NW.3d at p. 170, citing *Wrigley, supra*, 505 U.S. at p. 234 [italics omitted].)

On appeal, appellant provides the Corporate Chef Affidavit to refute that the Corporate Chef engaged in menu ideation.²⁸ In the affidavit, Chef G. swears that between May 1, 2012, and April 30, 2013, he travelled to California approximately 9 times as part of the sales team, and in connection with that travel, “I did not work with any customers in California to develop a holistic menu strategy or participate in menu ideation” However, the contemporaneous Corporate Chef’s job duty statement plainly states that the Corporate Chef conducted menu

²⁷ In post-hearing briefing, appellant described Mintel as a market research website that “provides market research, industry expertise, and data insights specific to the foodservice industry.”

²⁸ The Food Service Manager Affidavit states that Corporate Chef’s role *in attending a sales presentation* in California would be to prepare food samples for tasting during the sales presentation, and that to the Food Service Manager’s knowledge, the Corporate Chef did not meet with “my California accounts without my presence during the period May 1, 2011, through the [TYE] April 30, 2013.” It is undisputed that the Corporate Chef prepared food samples at the sales presentation.

ideation.²⁹ Moreover, in discussing the Corporate Chef's expense reports use of the term "ideation," the Corporate Chef Affidavit defines the term as referring to activities that include menu ideation, such as market research from Mintel and review of the customer's existing menu. Therefore, the Corporate Chef Affidavit does not rebut the proposition that the Corporate Chef conducted menu ideations in California.³⁰

Appellant also claims that the Corporate Chef only referred or facilitated any customer inquiries to the R&D team. However, the Food Service Manager's interview indicates that the Food Service Managers typed up notes related to the "ideation of new dressings" and forwards them to R&D.³¹ At the hearing, appellant explained that the Corporate Chef would provide ways to use product samples, and where a formula was not an exact match, the Corporate Chef would reach out to the R&D department with the customer's feedback and the R&D department would send samples from the library of formulas, and if that did not work, through discussions with the customer, a product might be modified to the customer's taste. Thus, the record does not show that the Corporate Chef only referred or facilitated the customer's inquiry.

FTB asserts that the Corporate Chef created recipes for customers and instructed them on uses of the product during the presentation. However, contemporaneous documentation clarified casual language in the Corporate Chef's interview to state that the Corporate Chef did not train indirect customers. No other evidence in the record indicates that the Corporate Chef created recipes for the customer or instructed customers on proper product use.

²⁹ On appeal, FTB submits job duty statements from an audit cycle of subsequent tax years, which it asserts should be substituted in place of the job duty statements for the Years at Issue because the latter job duty statements lack credibility and are inaccurate. FTB primarily refers to the Corporate Chef's job duty statement for the later audit cycle. However, each tax year stands on its own terms and must be separately considered. (See *Appeals of Kwon et. al*, 2021-OTA-296P.) FTB relies on differences between the job duty statements to demonstrate that those for the Years at Issue cannot be relied upon. However, the jobs or their descriptions may have simply changed. Lacking evidence, this panel declines to assume that appellant withheld information or provided inaccurate or unreliable job duty statements for the Years at Issue. Therefore, this panel declines to substitute the evidence.

³⁰ On appeal, FTB provides a screenshot of the culinary services page and various undated webpages from appellant's website, which FTB construes to determine the Corporate Chef's California menu ideation activity. However, even if the webpages might show appellant's culinary services and general operations, the webpages are not specific to the California menu ideation activity of appellant's Corporate Chef.

³¹ The Food Service Manager Affidavit defines "ideation" as used by appellant as referring to "the selection process for which of [appellant's] products would be presented to a customer during the sales solicitation process." However, this definition is an awkward fit with contemporaneous documentation, which mention the "ideation stage" of projects and the "ideation of new dressings" without referring to the selection of products. Moreover, the Corporate Chef's interview specifically refers to finding different uses for a product, rather than selecting an existing product.

As described above, *Uline* concerned “Market News Notes” which documented various information which the court held was competitive advantage because it detailed information more relevant to other departments in the company than to the sales department. (*Uline, supra*, 10 NW.3d at pp. 172-173, 176-177.) Although preparing the Market News Notes undoubtedly helped to increase sales, there was good reason for the company to get the market research done whether or not it had a sales force, and the Market News Notes was not entirely ancillary to the solicitation of orders. (*Id.* at p. 177.)

The parties dispute whether the menu ideation activity was entirely ancillary to a sale or whether it served an independent business purpose. Appellant characterizes the Corporate Chef’s role as the facilitation of sales “through the preparation of food samples for taste testing during the sales presentations at the restaurants visited by the sales team.” Elements of menu ideation, such as preparing and presenting food samples to the indirect customer, are clearly tied to a direct sale. Activities such as carrying samples and extolling the virtues of a product are clearly solicitation. (*Wrigley, supra*, 505 U.S. at p. 223, 226.) Demonstrating the versatility or many uses of a sauce or dressing is like carrying samples or extolling the virtues of a product because the goal is to entice the customer to buy the product.

However, other aspects of menu ideation serve an independent business purpose beyond soliciting a sale from one specific indirect customer, such as finding different uses for appellant’s products, market research on a customer, and discussions between the Corporate Chef and the restaurant Chef and culinary staff to assist the Corporate Chef in selecting which of appellant’s products would pair well with the flavor profile of the customer’s restaurant. Appellant argues that the “targeted food presentations” allowed existing or prospective customers to taste appellant’s products “to better understand the various ways in which [appellant’s] products could potentially be incorporated into their business and determine whether they wanted to order the specific product offering.” Where menu ideation was successful, the indirect customer changed its menu and incorporated new items that utilized appellant’s products. However, the Corporate Chef collected a broad variety of information in menu ideation, including market research on an indirect customer, the customer’s existing menu, and the customer’s preferences or flavor profiles. The information was used to find various ways to use appellant’s products to increase the sales volume, i.e., orders of TPP from the customer. Although demonstrating the sample menu undoubtedly helped to increase sales, there was good reason for appellant to collect the information whether or not it employed a sales force, and the menu ideation was not entirely ancillary to the solicitation of orders. (See

Uline, supra, 10 NW.3d at p. 177; see *Amgen Inc. v. Commissioner of Revenue*, 427 Mass. 357) Therefore, the menu ideation activity was unprotected.

G. Whether Taken Together, the Unprotected Activities Performed on Appellant's Behalf were De Minimis.

Unprotected activities are not de minimis where, taken together, the activities constitute a nontrivial additional connection with the state. (*Wrigley, supra*, 505 U.S. at p. 235.) Unprotected activity engaged in as a matter of regular company policy, on a continuing basis, and maintaining stock in the state worth several thousand dollars for unprotected purposes is a nontrivial additional connection with the state. (*Ibid.*)

Appellant has not shown that the unprotected activities, collecting competitor samples and customer information for product matching and product creation and the Corporate Chef's menu ideation, were de minimis. According to contemporaneous job duty descriptions, these activities are primary functions of the Food Service Managers and Corporate Chef, which supports that the activities were regular company policy. While appellant provided a Food Service Manager Affidavit that indicated that product matching was "rare," the contemporaneous Food Service Manager's interview does not indicate that it was rare, instead stating that product matching was how the Food Service Manager maintained the customer relationship with indirect customers, like chain restaurants. Moreover, the Food Service Manager met frequently with indirect customers, approximately once a week when working on a project, and facilitated communications between appellant's R&D department or staff and the customer until a product sample was produced that was accepted by the customer. Similarly, while the Corporate Chef Affidavit indicates that the Corporate Chef went to California only to make sales presentations, appellant employed a Corporate Chef based in California for the TYE 2012.

Appellant attempts to use various criteria, such as the number of sales meetings, the average amount of working days in one year the Corporate Chef spent in California, or whether employees' unprotected activities were required to be performed or not to show that they were de minimis, standards which neither the *Wrigley* nor *Uline* court adopted. (*Wrigley, supra*, 505 U.S. at p. 235; *Uline, supra*, 10 NW.3d at pp. 177-178.)

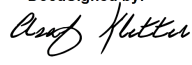
Here, collecting competitor samples and customer information for product matching and product creation, and menu ideation, were activities performed by appellant's employees in California as a matter of regular company policy, on a continuing basis, and establish a nontrivial additional connection to California. Therefore, appellant is unprotected by PL 86-272.

HOLDING

Appellant's California activities exceeded PL 86-272 protection.

DISPOSITION

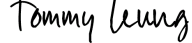
FTB's actions are sustained.

DocuSigned by:

D17AEDDCAAB043B...
Asaf Kletter
Administrative Law Judge

We concur:

DocuSigned by:

873D9797B8E04E1...
John O. Johnson
Administrative Law Judge

DocuSigned by:

0C90342BE68D4E7...
Tommy Leung
Administrative Law Judge

Date Issued: 8/1/2025