No. S249895

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

ABBOTT LABORATORIES; ABBVIE INC.; TEVA PHARMACEUTICAL INDUSTRIES, LTD.; TEVA PHARMACEUTICALS USA, INC.; BARR PHARMACEUTICALS, INC.; DURAMED PHARMACEUTICALS, INC.; DURAMED PHARMACEUTICALS SALES CORP

*Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF ORANGE,

*Respondent.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

*Real Parties in Interest.*

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division 1, No. D072577

Superior Court, County of Orange
Civil Case No. 30-2016-00879117-CU-BT-CXC
Honorable Kim G. Dunning

# REPLY BRIEF ON THE MERITS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Other Authorities**

## I. INTRODUCTION

In their Opening Brief, the People set forth the express and unambiguous terms of the UCL that grant district attorneys standing to bring UCL actions on behalf of the public and authorize "any court of competent jurisdiction" to award all appropriate relief for the benefit of the public in such actions.[1] (Opening Brief at pp.2-31.) There is no language in the UCL that limits the trial courts' powers to afford complete relief to the public when these cases are properly brought in a court of competent jurisdiction by a district attorney. (Opening Brief at pp.24-31.) Defendants do not dispute these points in their Answering Brief.

Nevertheless, Defendants steadfastly contend there must be a geographic limitation that prevents full "statewide" relief in UCL actions brought by district attorneys. Yet, Defendants fail to point to any language in the UCL or the history of the UCL (because there is none) that indicates any intent to adopt an artificial county-wide wall that would shield wrongdoers from the full force of the UCL's contemplated remedies in such actions. Defendants do not even attempt to explain how these supposed geographic barriers to relief could possibly comport with the intent of the UCL to protect all California businesses and consumers from unlawful,

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[1] Unless otherwise defined herein, all capitalized terms shall have the same meaning as described in the People's Opening Brief on the Merits (the "Opening Brief"). The "Answering Brief" refers to the Answering Brief on the Merits in this matter.

unfair or fraudulent business practices. Of course, this is because the proposed restrictions find no support in the law and would do nothing but frustrate the clear and manifest purpose and intent of the UCL to end unfair competition in an efficient streamlined fashion.

Unable to cite to any affirmative language or history that supports the geographic obstacles to relief adopted by the Fourth District Majority below, Defendants spend most of their Answering Brief arguing in various ways that the "UCL does not provide the district attorney the specific and express authorization" that the "*Safer* rule" requires "to convey statewide authority" to district attorneys. (Answering Brief at pp.17-59.) Defendants contend that without a more detailed specification of prosecutorial power in the UCL, only the Attorney General has "plenary authority" to bring UCL actions that can provide complete relief to all of the People of the State. (Answering Brief at pp.17-59.) As explained in the Opening Brief and in further detail below, this is not the law.

## II. THE UCL EXPRESSLY AUTHORIZES DISTRICT ATTORNEYS TO BRING REPRESENTATIVE PUBLIC ACTIONS

In the same way the Fourth District Majority relied on the "*Safer* rule" in its Opinion, the Defendants argue that the district attorney's powers under the UCL are limited *per se* to seeking relief for constituents within their respective geographic territories under the "*Safer* rule." (*See* Answering Brief at pp.17-59.) As explained in the Opening Brief, however, there is no

basis for application of the "*Safer* rule" in the analysis required here. (*See* Opening Brief at pp.34-39 [arguing to the extent the Fourth District Majority relied on the "*Safer* rule" in its analysis, its holding is based on a "false legal premise"].)

## A. The "*Safer* Rule" Is Inapplicable

In *Safer v. Superior Court* (1975) 15 Cal.3d 230, this Court held that a district attorney lacked statutory authority to "intervene in a contempt proceeding stemming from private civil litigation in order to enforce an injunctive order granted at the behest of one of the [private] litigants." (15 Cal.3d 230, 235.) This Court expressed concerns in that case with "imposing the weight of [public] office and the advantages of the public purse" on one side of a private civil dispute because the "weight of the government tends naturally to tilt the scales of justice in favor of the party whom the government sponsors." (*Id.* at pp.238 & 242.) Finding no statute authorizing a district attorney to file a private civil action under the Code of Civil Procedure, this Court further reasoned:

> The absence of any statute empowering the district attorney to appear in private litigation such as the instant case demonstrates, moreover, legislative awareness that our legal system has long depended upon the self-interested actions of parties to pursue a dispute to its conclusion or to decide alternatively, that further time-consuming litigation serves no one's best interest. Thus the district attorney's intrusion into this area of conflicting private interests serves neither the public interest nor the statutory intent.

(*Id.* at p.238.)

The "*Safer* rule" derived from this decision says nothing about the scope of the authority of a district attorney to pursue relief on behalf of the public when the district attorney is expressly authorized to bring a civil action for public offenses as here. To be sure, the *Safer* decision says nothing at all about the remedies a district attorney may seek in a properly authorized civil action, be it "statewide" or not. The rationale behind the *Safer* rule concerns improper government influence in civil litigation between private parties, not the amount of monetary relief that may be afforded in a statutorily authorized action to benefit the public. Since this is a public prosecution on behalf of the People of the State, and not a private civil action, there is no basis for the application of the "*Safer* rule" or its rationale to the analysis required in this case. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524 fn.2 [confirming "an opinion is not authority for a proposition not therein considered"].)

**B. The District Attorney Has Express Authority To Seek All Of The Statutory Remedies Under The UCL**

Nevertheless, even if the "*Safer* rule" was intended to extend to all civil prosecutions, the express "authorization" for a civil action contemplated by *Safer* exists in the UCL because it expressly authorizes the district attorney to bring civil actions for unfair competition and to seek all of the statutorily authorized remedies therein on behalf of the public. (*People v. McKale* (1979) 25 Cal.3d 626, 633 [holding the district attorney is "expressly authorized to maintain a civil action for either injunctive relief or civil

penalties for acts of unfair competition" under the *Safer* rule]; *People v. Superior Court [Solus I]* (2014) 224 Cal.App.4th 33, 42-43 [noting the UCL "explicitly confer[s] standing on district attorneys to pursue the specified civil penalties" and other relief as required by *Safer*]; *see also Pacific Gas & Electric Co. v. Stanislaus* (1997) 16 Cal.4th 1143, 1155-1156 [recognizing express legislative authority for a district attorney to bring a civil action under the Cartwright Act in compliance with *Safer*].) The "*Safer* rule" does not require any more specific authorization to grant civil standing to prosecutors to seek all statutorily authorized remedies.[2] Thus, even if the *Safer* rule did apply, it provides no support to the holding by the Fourth District Majority Opinion at issue here.

## III. THE ATTORNEY GENERAL IS NOT THE CHIEF "PUBLIC PROSECUTOR" FOR THE PEOPLE

At the heart of Defendants' argument is the idea that the Attorney General "has plenary authority to litigate civil claims of statewide interest" on behalf of the People of the State. (Answering Brief at p.12.) Despite the

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[2] In a public prosecution, Government Code section 26500 expressly authorizes the district attorney to act as the "public prosecutor, except as otherwise provided by law." (Cal. Gov. Code § 26500; *see also Board of Supervisors v. Simpson* (1951) 36 Cal.2d 671, 674-675 [noting the duty of the district attorney to act as the public prosecutor in a civil public nuisance action under Government Code section 26500 when a civil action "is in aid of and auxiliary to the enforcement of criminal law"].) Rather than the common law *Safer* rule, the standard set forth in Government Code section 26500 provides the proper interpretative cannon to review prosecutorial standing for public offenses today. (*See* Opening Brief at pp.36-38.)

obvious statewide importance of the Attorney General's "chief law officer" role, however, there is no legal authority that actually supports Defendants' overbroad characterization of the prosecutorial powers of the Attorney General.

### A. The Attorney General Does Not Have "Plenary Authority" Under The UCL Or Otherwise

First, the Attorney General clearly does not have "plenary authority" to prosecute civil actions under the UCL. "Plenary" power is "complete in every respect: absolute, unqualified." (Merriam-Webster Dictionary Online *available at* https://www.merriam-webster.com/dictionary/plenary [last visited January 2, 2018].) On its face, the UCL grants standing not only to the Attorney General, but also to all district attorneys and certain city attorneys to prosecute actions on behalf of the public. The only consent required for further prosecutorial standing (by other city or county counsel) is consent by the district attorneys, not the Attorney General. (Cal. Bus. & Prof. Code §§ 17204 & 17206.) There is nothing in the State Constitution, statutory codes, or any other authority that grants the Attorney General absolute "plenary authority" over representative UCL actions on behalf of the People.

In fact, the term "plenary authority" is entirely misplaced in this context. The term is typically used to describe Congressional powers or the State Legislature's absolute power to make laws, unless expressly prohibited

by the State Constitution. (*See, e.g., California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253-273.) Unlike the legislative branch of government that has "plenary authority" as a whole, the Attorney General is but one elected official in the executive branch of government that answers as counsel to the Governor of the State. (Cal. Const. art V, §§ 1 & 13.) The Attorney General does not have "plenary authority" over the executive branch of government, or the actions of any of its officers, let alone over every civil action that may be brought on behalf of the People of the State.

**B. The District Attorneys Are The Chief Public Prosecutors**

Second, if anything, it is the district attorney that has the foremost "authority" to act as the "public prosecutor" on behalf of the People of the State, not the other way around.[3] (Cal. Gov. Code §§ 26500-26501; *Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203 [noting the "district attorney is the exclusive statutorily designated public prosecutor"].) The UCL makes an "exception" to this general rule by specifically granting prosecutorial authority to the Attorney General and certain city attorneys to

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[3] Contrary to Defendants' contention otherwise, when acting as the public prosecutor, the district attorney acts not as a representative of their county, but as a state executive branch officer and a representative of the public. (*See* Opening Brief at pp.30-34.) In both criminal and civil law enforcement actions, the district attorney is also inherently empowered to investigate unlawful conduct as a law enforcement officer of the state. (75 Ops.Cal.Atty.Gen. 223 (1992) at pp.4-5 [citing *Simpson, supra*, at pp.674-675, noting the authority to prosecute consumer fraud and unfair competition in a civil action necessarily also includes the power to investigate such conduct because such actions are "essentially law enforcement in nature"].)

also act as public prosecutors. (*See, e.g.*, 65 Ops.Cal.Atty.Gen. 330 (1982).) In examining the question as to "who is the public prosecutor under California law," the Attorney General has long recognized that:

> Section 26500 provides the general answer to this question by declaring that "[t]he district attorney is the public prosecutor, except as otherwise provided by law." A number of laws "otherwise provide" in certain situations. Without attempting an exhaustive listing, we shall refer briefly to the *principle exceptions*.
>
> Article V, section 13 of the California Constitution provides, inter alia, ["Whenever in the opinion of the Attorney General any law of the state is not being adequately enforced"] "... it shall be the duty of the Attorney General to prosecute any violation of law of which the superior court shall have jurisdiction, and in such cases *the Attorney General shall have all the powers of a district attorney.*" ...
>
> Section 36900(a) provides that city ordinance violations are misdemeanors or infractions which "may be prosecuted by city authorities in the name of the people of the State of California. ...

(*Id.* at pp.4-5 [emphases added]; *see also People v. Brophy* (1942) 49 Cal.App.2d 15, 27-29 [noting prosecution by the Attorney General is the "exception" rather than the rule, and the attorney general acts under the powers of the district attorney "whenever 'in the opinion of the Attorney General any law of the State is not being adequately enforced in any county'"...].)

### C. As The Chief Law Officer, The Attorney General Has Many Other Functions Other Than Acting As Public Prosecutor

Third, as the "chief law officer" of the State, unlike district attorneys, the Attorney General has many important functions other than

acting as the lead public prosecutor.[4] According to the Attorney General's website:

> The Attorney General is the state's top lawyer and law enforcement official, protecting and serving the people and interests of California through a broad range of duties. The Attorney General's responsibilities include safeguarding the public from violent criminals, preserving California's spectacular natural resources, enforcing civil rights laws, and helping victims of identity theft, mortgage-related fraud, illegal business practices, and other consumer crimes.
>
> Overseeing more than 4,500 lawyers, investigators, sworn peace officers, and other employees, the Attorney General:
>
> - Represents the People of California in civil and criminal matters before trial courts, appellate courts and the supreme courts of California and the United States.
> - Serves as legal counsel to state officers and, with few exceptions, to state agencies, boards and commissions.
> - Assists district attorneys, local law enforcement and federal and international criminal justice agencies in the administration of justice.
> - Strengthens California's law enforcement community by coordinating statewide narcotics enforcement efforts, supporting criminal investigations and providing forensic science services, identification and information services and telecommunication support.

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[4] Although it may be a common "public perception" that a state attorney general is the "Top Cop," in reality, "the primary function of the attorney general" is often "to provide legal advice and representation to [the] state government." (William F. Gary & Alison K. Gary, *The Frohnmayer Method: Advocacy, Legal Policy, and the United States Supreme Court*, 94 Or. L. Rev. 589, 591-594 (2016) [discussing the role of the Oregon attorney general as "chief law officer," who has authorization, similar to California's Attorney General under the UCL, along "with the state's thirty six district attorneys," to enforce the state's Unlawful Trade Practices Act, but noting that "[i]n fact, Oregon's attorney general has less to do with criminal prosecutions and consumer protection than most Oregonians imagine"].)

- Manages programs and special projects to detect and crack down on fraudulent, unfair and illegal activities that victimize consumers or threaten public safety.

("About the Office of the Attorney General," *available at* https://oag.ca.gov/office [last visited Dec. 10, 2018].)[5] Rather than the Attorney General, consumers are directed to contact their "local district attorney's office or [their] City Attorney" as their first point of contact if they "think a business has committed fraud or a crime." ("Protecting Consumers," *available at* https://oag.ca.gov/consumers [last visited Dec. 10, 2018].)

While the Attorney General has a duty to supervise law enforcement officers to ensure the laws are "uniformly and adequately enforced," unlike district attorneys, the Attorney General has no absolute duty to act as public prosecutor unless "in the opinion of the Attorney General any law of the State is not being adequately enforced." (Cal. Const. art. I, § 13; *see also* Tyler Quinn Yeargain, *Discretion versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 Emory L.J. 95, 121-124 (2018) [evaluating the powers of state attorney generals over prosecutorial powers and noting in four states, including California, that "a

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[5] Given the many hats of the Attorney General, the Attorney General is more likely to encounter a conflict of interest when acting as a public prosecutor, particularly in the enforcement of consumer protection laws which many times involve policies and regulations of state agencies. (*See generally People v. Brown* (1981) 29 Cal.3d 150; Justin G. Davids, *State Attorney General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J.L. & Soc. Probs. 365 (2005).)

prosecutor's inaction is the only circumstance that would allow for supersession" by the state attorney general over the prosecution].)

Rather than "plenary power" to act as the state's prosecutor, therefore, the role of the Attorney General in litigating actions on behalf of the People of the State (while undoubtedly an important additional source of consumer protection under the UCL) is typically secondary to that of the district attorneys of the State.

**D. The UCL Intentionally And Expressly Uses A Decentralized Law Enforcement Model, Not A Hierarchy Of Prosecutors**

Finally, rather than a "hierarchy" of prosecutors under the UCL led by a superior prosecuting Attorney General as Defendants suggest, the UCL expressly adopts a "decentralized" and/or "disaggregated civil law enforcement" structure that has been commended for encouraging expanded enforcement of consumer protection laws by "pushing more power to the local level." (Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 Fordham Urb. L.J. 1903, 1904-1919 (2013) [citing California's UCL as a "flexible and powerful" model for a potential national disaggregated enforcement program using city and county prosecutors as additional "local watchdogs" to enhance consumer protection]; *see also* Arthur D. Gunther, *Enforcement in Your Backyard: Implementation of California's Hazardous Waste Control Act by Local Prosecutors*, 17 Ecology L.Q. 803, 807-808 (1990) [noting the similarly

"decentralized" law enforcement structure of "California's hazardous waste laws with responsibilities shared by the Attorney General, the fifty-eight district attorneys and city and local prosecutors"]; Robert C. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's On First*, 15 WTR Cal. Reg. L. Rep. 1, 1-4 (1995) [noting that the "liberal and perhaps unique standing provisions" of the UCL that authorize "a myriad of public prosecutors" to "bring to the courts possible violations carries with it some clear enforcement advantages" including "early detection and action, and more likely response" as "important elements in an effective system of disincentives" to unfair competition].) Under these approaches, "[t]here is no question that allowing localities to enforce ... consumer protection laws will weaken higher-level control. It is an inevitable trade-off of all disaggregation" models of enforcement. (Morris, *supra,* 40 Fordham Urb. L.J. 1903, 1926.) The UCL expressly adopts a decentralized enforcement model, placing local prosecutors with jurisdiction in equal positions to bring cases to protect the public.

In sum, there is no legal basis in the UCL, or otherwise, for the notion that the Attorney General has absolute plenary authority over civil actions of statewide impact under the UCL. The "chief law officer" role of the Attorney General does not supersede the Legislative grant of authority to the courts and other authorized prosecutors to ensure consumers obtain the full relief contemplated by the UCL in actions brought on behalf of the general public.

## IV. ANY COURT OF COMPETENT JURISDICTION HAS POWER TO AWARD COMPLETE RELIEF TO THE PUBLIC

In their Opening Brief, the People argued that the framing of the issue in terms limited to the "authority" of the prosecutor is improper because it ignores the fact that the *courts* have the express power and authority to assess the appropriate penalty and make all necessary orders to prevent the continued violations and/or return property to victims of unfair competition under the UCL. (Opening Brief at pp.18-28.) Defendants largely ignore this argument in their Answering Brief, brushing off the express powers of the courts under the UCL as words that "simply reflect a common drafting practice employed to authorize courts to award remedies to a plaintiff" with standing. (Answering Brief at p.46.) Defendants then assert that when a plaintiff lacks standing to seek statutorily authorized relief, this could strip the court of jurisdiction to order such relief. The problem with this argument is simple: it has no bearing on the circumstances of this case. Here, there is no doubt the district attorney has standing to seek all of the UCL's remedies here. The question in this case concerns solely the extent to which the *court* may award the full relief it is expressly authorized to grant under the UCL after the case is properly brought by a district attorney with standing to seek such relief.

Defendants argue that the courts are necessarily restricted to ordering only partial relief in cases brought by district attorneys under the UCL if the

offending conduct extends beyond the county borders. Yet, "[i]t is fundamental that equity, having taken jurisdiction, will grant complete relief." (*Hunt v. Smyth* (1972) 25 Cal.App.3d 807, 830.) Not only does the UCL grant the courts express authority to order all necessary relief under the UCL, but the courts' inherent authority to do "complete justice" in a case in equity also broadly supports a court awarding complete relief in a properly brought UCL action regardless of the prosecutor that files the case. (*Id.*) Defendants cite no law or authority to the contrary.

Hence, unless the law says otherwise in a particular case, the courts equitable powers under the UCL are "broad" -- permitting the courts to enter any order as may be necessary to afford complete relief without any geographic limitations. (*See, e.g. People v. Jayhill* (1973) 9 Cal.3d 283, 287 [confirming: "In the absence of such a restriction a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved"]; *Wong v. Stoler* (2015) 237 Cal.App.4th 1375, 1389 [noting: "the powers of a court of equity are so broad as to adequately meet the exigencies of the case and render a decree which will justly determine the rights of the respective parties" *quoting Arthur v. Graham* (1923) 64 Cal.App. 608, 612]; *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1208 [noting: "From the very nature of equity, a wide play is left to the conscience of the chancellor in formulating his decrees; it is of the very

essence of equity that its powers should be so broad as to be capable of dealing with novel conditions." *quoting Bechtel v. Wier* (1907) 152 Cal. 443, 446]; *Armstrong v. Picquelle* (1984) 157 Cal.App.3d 122, 129 [noting that while "equitable relief is flexible and expanding," courts do "not have the power to disregard or set aside the express terms of legislation" that forbid certain relief].)

Accordingly, since there is no geographical restriction in the UCL, the courts' express authorization to order all appropriate relief means what it says: courts have the power to award statewide injunctions, restitution for "any person" and civil penalties for "each violation" -- without geographic limitation. (Cal. Bus. & Prof. Code §§ 17200, 17203, 17204 & 17206, subd. (a).)

## V. THE DISTRICT ATTORNEY DOES NOT NEED "CONSENT" TO PERMIT THE COURT TO GRANT COMPLETE RELIEF

In their Opening Brief, the People challenged the Fourth District's holding that a district attorney must have "written consent" from the Attorney General before the Court may award statewide relief in this case. (Opening Brief at pp.47-50.) In response, Defendants first appear to concede that there is no written consent requirement in the UCL. (Answering Brief at p.59 [stating the "brief passage ... is just a summary of a later section of the Opinion" that addresses "available procedural avenues for a local prosecutor" to seek consent].) "But the form in which the Attorney General

(or other district attorneys) should consent to the extraterritorial enforcement of the UCL," the Defendants continue, "has no bearing" in this case because the "District Attorney has never obtained any consent, whether in writing, orally or implicitly." (Answering Brief at p.59.) This circular argument misses the point entirely.

In the Opinion, the Fourth District held that consent is required to grant district attorneys/courts the power to effectuate statewide relief in a UCL action. This consent requirement -- in any form -- is not found anywhere in the UCL. Defendants offer no other authority or analysis to support the Fourth District's broad legislative policy pronouncement mandating *any* form of consent as a prerequisite before full UCL relief may be granted. Of course, this is because there is none. (Opening Brief at pp.47-50.) By adopting a consent procedure out of whole cloth, the Fourth District engaged in a legislative function in excess of its authority.

**A. The Present Case Is Not "Extraterritorial"**

Defendants suggest that consent is required because the present case is "extraterritorial." (Answering Brief at pp.20-21, 33 & 59.) Once again, Defendants' argument is not tied to the circumstances of this case. This is not an "extraterritorial" case as the Defendants contend. The alleged unlawful and unfair business practices occurred in Orange County and affected consumers in Orange County. Under well-settled laws governing

jurisdiction and venue, this case is thus properly brought in Orange County.[6] (Cal. Code Civ. Proc. §§ 393, 395, 395.5 & 410.10.) The mere fact that consumers throughout the entire state and nation were also harmed does not transform the case into an "extraterritorial" case where the district attorney may need some form of consent to litigate the case in another jurisdiction. (*See, e.g.*, Cal. Gov. Code § 26507 [confirming, upon "agreement" with other prosecuting offices, that a district attorney "*may* ... act jointly in prosecuting a civil cause of action of benefit to his own county in a court of the other jurisdiction" (emphasis added)]; Cal. Gov. Code § 26508 [authorizing a district attorney, with consent, to provide legal services "pertaining to the prosecution of a civil cause of action" in another jurisdiction].)[7]

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[6] This is not a case where a "Humboldt County District Attorney" is seeking to extraterritorially prosecute violations in or from another county. (*See* Answering Brief at p.43.) Why a district attorney would waste their own valuable resources on an "extraterritorial" action that does not substantially impact their own constituents makes no sense. Moreover, if the action was truly "extraterritorial," the district attorney would lack jurisdiction and venue in their own county to bring such a case in any event. (*See e.g.*, Cal. Civ. Proc. Code §§ 393, 395, 395.5.)

[7] Jurisdictional rules in criminal cases similarly provide that "when a public offense is committed in part in one jurisdictional territory and in part in another jurisdictional territory, or the acts or effects thereof constituting or requisite the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction for the offense is in any competent court within either jurisdictional territory." (Cal. Pen. Code § 781; *see also* Pen. Code § 777 [confirming "jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed."]; *see also People v. Betts* (2005) 34 Cal.4th 1039, 1057-1059; *People v. Crew* (2003) 31 Cal.4th 822, 836; *Brock v. Superior Court of Stanislaus County* (1974) 29 Cal.2d 629, 633-635; *People v. Sering* (1991) 232 Cal.App.3d 677, 684-685.) The same is true even if part of the criminal acts occur outside the state

## B. *Hy-Lond* Does Not Support The Fourth District's Written Consent Mandate

In an attempt to support the Fourth District's holding, the Defendants rely heavily on a 1978 decision of the First District in *People v. Hy-Lond Enterprises, Inc.* for the notion that district attorneys are limited to obtaining relief under the UCL only to protect constitutes within their county borders unless they obtain consent from the Attorney General and other district attorneys to proceed.[8] (Answering Brief at pp.38-41.) Yet, it is worth repeating that according to the Attorney General's own briefing in the *Hy-Lond* case, as quoted in the Opening Brief: "A district attorney does not need authorization from ... anyone ... to bring an action for 'unfair competition' pursuant to" the UCL. (*See* Opening Brief at p.49 [citing Appellant's Opening Brief in *People v. Hy-Lond* by the Attorney General].) In concluding their opening brief in *Hy-Lond*, the Attorney General repeated the point, confirming: district attorneys "do not need the permission of any State agency, the Attorney General or any other district attorney" to pursue a UCL action "seeking injunctions and penalties." (*Id.*) Nothing in *Hy-Lond*

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entirely, in which case "the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state." (Cal. Pen. Code § 778a.)

[8] Contrary to the assertion that the "Opening Brief does not mention this case, let alone discuss it," the Opening Brief does indeed cite to and discuss the inapplicability of the *Hy-Lond* decision to the question presented in this case. (*Compare* Answering Brief at p.41, fn.18 *with* Opening Brief at pp.48-50 & fn.13.)

supports the idea that consent in *any* form is required in this case, and Defendants make no showing under *Hy-Lond* or otherwise to the contrary.[9]

The fact that local prosecutors have a practice of working with the Attorney General and other prosecutors to share resources in statewide matters does not mean that any consent or authorization is statutorily or constitutionally required as a pre-requisite for the court to grant full relief to California consumers in a properly filed UCL action in the district attorney's own county.

## VI. DEFENDANTS' CONSTITUTIONAL AND PUBLIC POLICY ARGUMENTS DO NOT SUPPORT A GEOGRAPHIC SHIELD

Although framing their arguments in terms of "constitutional concerns," Defendants concede there is no basis for a constitutional challenge and assert that they "have never argued ... that the UCL violates the State Constitution." (Answering Brief at p.54.) The Fourth District Majority, however, expressly based their holding on an interpretation that

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[9] Defendants cite language from *Hy-Lond* suggesting there could be a conflict of interest if a district attorney represents the public in a statewide action. (*See* Answering Brief at p.41.) *Hy-Lond*, is not good law for this point. The discussion in that case is not only pure dicta, but it predated and is now superseded by an important change to the penalty statutes under Proposition 64 in 2004. Specifically, with the enactment of Proposition 64, Section 17206 was amended to require "that the penalty funds [from law enforcement UCL actions] 'shall be for the exclusive use by the Attorney General [and other public prosecutors] for the enforcement of consumer protection laws.'" (*State v. Altus Finance* (2005) 36 Cal.4th 1284, 1307.) The funds may not, therefore, improperly be used to line the "coffers" of the district attorney.

was presumably required to avoid rendering the UCL unconstitutional due to the expressed "constitutional concerns." (Opinion at pp.4-5 & 38). The People argued the Majority's holding -- limiting the permissible penalties in cases brought by local prosecutors -- was not required under the State Constitution. (Opening Brief at pp.39-46.) In response, Defendants note the constitutional analysis in the Opening Brief "spills much ink," but offer no substantive rebuttal to any of the constitutional arguments raised. (Answering Brief at p.54.) For all of the unrebutted reasons set forth in the Opening Brief, there is no State Constitutional requirement necessitating a limit to the amount of civil penalties that may be awarded in a UCL case properly brought by an authorized local prosecutor. (Opening Brief at pp.39-46.)

The other "prudential concerns" and legislative policy arguments raised by Defendants likewise do not support the Majority's holding below.

**A. Legislative Intent Would Be Frustrated By An Artificial Geographic Boundary Line That Prevents Complete Relief**

As an initial matter, notably absent from the Answering Brief's discussion of legislative history is any analysis of the purpose and intent of the UCL -- to protect consumers and competing business from unfair competition -- and how that intent would be furthered by limiting the remedies in a properly filed UCL action to the county line. This is because the intent of the UCL would certainly be frustrated by a geographical

barricade to granting the full relief contemplated in UCL actions, especially when the violating conduct (as here) stretches far beyond those artificial boundaries. (*See* Opening Brief at pp.28-31 [arguing "geographic limitations are contrary to the express intentions and enforcement objectives of the UCL].)

Skipping over the letter and spirit of the UCL, Defendants answer these arguments by listing certain amendments to the UCL and, without any discussion or analysis related thereto, asking the Court to take judicial notice of 2073 pages of legislative history supporting the amendments to the UCL and other laws. (Answering Brief at pp.51-53; Request for Judicial Notice in Support of Defendants' Answering Brief on the Merits (the "RJN").) Again adopting an inapplicable "*Safer* rule" interpretative approach, Defendants assert there is nothing in the history of the UCL that "expressly says a district attorney can bring statewide claims." (Answering Brief at p.52.) "The deafening silence in the legislative record," according to Defendants, "weighs strongly against the District Attorney's construction of the UCL." (Answering Brief at p.53.) Defendants reading of the UCL is not a proper interpretation of either the express language of the UCL or its history.

## B. The UCL Is Not Silent With Respect To Its Intent To Authorize Complete Relief To Protect Consumers

First, on its face, the UCL expressly grants standing to district attorneys to bring UCL actions and empowers "any court" of competent jurisdiction in the State to assess penalties for all violations, order restitution and enjoin acts of unfair competition. The UCL is not at all "silent" in this regard. When the statute on its face is clear and unambiguous, there is no need to look to the extensive history of the statutes to properly interpret and effectuate the intent of the law. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250 [confirming: "Only when the statute's language is ambiguous or susceptible to more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation"].) It is thus not necessary to turn to the lengthy legislative history to resolve the issues here.

## C. The Text And History Of The UCL Show Intent To Expand Enforcement Powers And Remedies, Not Limit Their Reach

Second, rather than a "deafening silence," the legislative history of the UCL confirms the increasingly important role of district attorneys and the courts in the enforcement of the unfair competition laws expressly set forth in the UCL. (*See* Opening Brief at pp.15-17 [discussing the expanding breadth of the UCL]; Fellmeth, *supra*, 16 WTR Cal. Reg. L. Rep at pp.2-3 [detailing the "origin and history of section 17200"].) In the early years of

enforcement under the predecessor statutes, the district attorney's role was primarily to prosecute criminal misdemeanor cases involving unfair competition. (RJN at pp.82-101 [addressing the district attorney's opposition to A.B. 429 to amend Civil Code Section 3370 in 1949 which would have extended the power of the district attorneys (at p.83) "by giving civil remedies provided by the Act to district attorneys"].) In 1949, there was an initial concern over the "burden of long and costly litigation" on county prosecutorial offices, and an initial view that civil "enforcement by a single state agency ... [was] far more desireable than piece-meal enforcement among the fifty eight counties." (RJN at p.83-84.) By the mid-1900s, the UCL had already become "important to business, particularly small business" to prevent unfair competition; according to the California Grocers Association in 1949: "It has been helpful over the years and is a law and remedy we would not care to lose, particularly the remedy and assistance afforded through the help of a public enforcement officer." (RJN at p.88.)

"Despite its broad definition of unfair competition, public prosecutors did not rely upon the statute as a consumer protection provision until the late 1950s." (Note, Mathieu Blackston, *California's Unfair Competition Law – Making Sure the Avenger is Not Guilty of the Greater Crime*, 41 San Diego L. Rev. 1833, 1837.) Private plaintiff actions under the UCL "did not become widely used ... until the 1970s after the seminal decision of Barquis v. Merchants Collection Ass'n." (*Id.*)

In 1972, the Attorney General proposed legislation (A.B. 1937) that was enacted to enhance civil enforcement remedies under the UCL to "increase the protection for legitimate and honest businessmen while protecting consumers in the process." (RJN at p. 140; *see generally* RJN at pp.116-148.) In pertinent part, the bill included "deceptive advertising in [the] definition of unfair competition" and permitted the Attorney General, district attorneys and "specified others" to seek injunctive relief and a civil penalty "for each violation." (RJN at p.148.) The reason the bill was adopted, according to the Attorney General, was "to permit extension of the protections presently available ... and take some burden off the hard-pressed offices which presently must bring these actions." (RJN at p.124.) Additionally, the Attorney General explained:

> [T]he civil penalty provisions of this section have been an incentive to the establishment of consumer fraud units in district attorneys' offices. It may be anticipated that this incentive would also extend to city attorneys and counties in which district attorneys place their priorities elsewhere. Thus, it could result in substantial extension of consumer legal protections.

(RJN at p.124; *see also* RJN at p.139 [attaching the "floor statement" confirming the purpose of A.B. 1937 to "increase the degree of consumer protection available through civil actions brought by district attorneys and the Attorney General"].) At that time, the need for civil penalties as an enhanced deterrent was noted to be necessary because "the injunctive remedy [alone] often proves ineffective as a deterrent to the resumption of such

unlawful acts of fraudulent or unfair business practices." (RJN at p.137 [indicating: "It is felt that the allowance of civil penalties, in addition to the requested injunctive relief, will provide a sufficient deterrent to the resumption of these unlawful practices"].)

In 1974, city attorneys having a population in excess of 750,000, were added to the list of authorized public prosecutors with authority to seek penalties and injunctive relief under the UCL pursuant to A.B. 1725. (RJN at pp. 149-192.) The purpose was to "allow city attorneys to prosecute" UCL actions as "a logical extension of present law ..." (RJN at p.153; *see also* RJN at p.405 [noting the addition of city prosecutors has "the effect of increasing government resources for combatting consumer fraud"].) The City of Los Angeles identified the primary need for the amendment was to address a lack of resources to prosecute UCL actions by the Attorney General and the Los Angeles District Attorney's Office. (RJN at pp.167 & 180.) The reason the 750,000 population limit was added was "to ensure that this authorization was extended only to [full-time city attorney offices] with adequate staffing capabilities." (RJN at pp.180-181; *see also* RJN at p.399 [noting a later finding of "competence" in the San Jose City Attorney's Office similarly justified granting that City Attorney standing to enforce the UCL in order to enhance enforcement under the Act].)

In 1976, the UCL was amended to clarify any questions with respect to the district attorneys' authority to prosecute remedies "both civilly and

criminally" and to "conform the Civil Code to the Business and Professions Code." (RJN at pp.197-220.) Once again, the purpose of the bill (A.B. 4079) was to "broaden the power of district attorneys" so they "can be free to vigorously prosecute, without question as to their standing, actions against large business enterprises trying to drive smaller competitors out of business." (RJN at pp.215 & 217.) AB 4079 was intended to "clarify the standing of district attorneys to pursue any appropriate form of relief -- whether criminal fines, civil penalties, or injunctions -- against violations of the Unfair Practices Act." (RJN at p.207.)

At the same time, in 1976, AB 3279 was enacted to codify the inherent broad equitable powers of the court to "make whatever orders or judgment as may be necessary to prevent further acts of unfair competition or to restore property to those who lost it as a result of the unfair competition." (RJN at p.227 [citing *People v. Jayhill*, 9 Cal.3d 283]; & p.269 [confirming "AB 3279 would extend the court's authority ... to protect similar victims of unfair business practices and honest businessmen who must compete against those businesses"].) The purpose of the bill in this regard was to clarify "the remedies available to the court" to prevent unfair competition and to expedite the end to unfair competition by removing "protracted pre-trial motions" in cases brought by district attorneys against "very large corporations which ... usually make it a practice to protract the litigation ... thus enabling the company to continue to engage in the unfair and deceptive business

practices." (RJN at pp.231-232 & 247.)

AB 3279 also codified the intent that civil penalties for unfair competition were to be "cumulative to each other and to all other laws of this state." (RJN at pp.221-292.) The bill was adopted to foreclose a "loophole by which some businesses [sought] to avoid the imposition of the more severe 'unfair competition' penalties by" arguing that the lesser sanctions under other laws were applicable instead. (RJN at p.228.) Recognizing the increased potential liability for violations created by this enactment, it was noted that "there is no substantial danger of the imposition of penalties which are unduly harsh, as the penalty to be imposed is still at the discretion of the judge." (RJN at p.243.)

AB 3279 was heralded by proponents as a bill making "the courts a more visible ally of the public in the fight against unfair business practices." (RJN at p.233.) In addition to AB 3279, another bill was enacted in 1976 "to give county district attorneys greater muscle in prosecuting consumer fraud cases," including AB3280 (enhancing penalties for violations of injunctions against unfair competition). (RJN at pp.253-254.) The collection of 1976 bills were intended to "empower the court ... to apply the strongest penalty it deems appropriate under the circumstances" and "streamline prosecution by eliminating time-consuming legal wrangling." (RJN at pp.253-254.)

Shortly thereafter, in 1977, the UCL was re-codified without substantive change from the Civil Code to the Business and Professions Code

where the applicable code sections reside today. (RJN at pp.293-318.) Other than restricting the standing of private persons to bring UCL actions on behalf of the public under Proposition 64 in 2004, all non-technical subsequent amendments to the UCL further clarified the intended allocation of penalty awards from UCL actions and/or added additional local prosecutors to the list of attorneys with standing to bring unfair competition actions for the same policy reasons above. (*See e.g.* RJN at p.471 [noting the "increasing burdens on staff and resources of the district attorney" when authorizing county counsel to bring UCL actions in certain instances in 1991].)

Nowhere in the text of the UCL or the entire legislative history of the UCL set forth in Defendants' RJN, is there any discussion about geographically curtailing the remedies available in a UCL action brought by district attorneys, or any other authorized prosecutor, so as to fully remedy acts of unfair competition in a single action. If anything, the legislative history makes clear the intent to use the resources of all authorized prosecutors in the State to bring actions (against often times "large corporations" that operate in multiple jurisdictions) to the courts, and to empower the courts to order all appropriate relief to ensure an end to unfair business practices as quickly as possible on behalf of the public. Authorizing increasing enforcement and enhancing public prosecutions under the UCL has been the only common theme to be gleaned throughout the decades of

history of the UCL.[10]

## D. Defendants' Legislative Policy Arguments Are Better Vetted By The Legislative Process

Apparently recognizing as such, Defendants argue that "Prudential Concerns" other than those supporting the text of the UCL should guide the Court in interpreting the UCL instead. (Answering Brief at pp.54-58.) Specifically, Defendants contend "territorial limitations . . . are both commonsensical and in furtherance of basic tenants of democratic accountability."[11] (Answering Brief at p.54.) It is not clear how the proposed territorial limits make sense, nor how accountability plays any role in adequate law enforcement under the UCL. At best, these "concerns" are legislative policy arguments that should be addressed in the State Legislature. As such, the professed concerns with the disaggregated framework of the

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[10] By enacting a decentralized law enforcement framework under the UCL, the Legislature did not "drastically" and "fundamentally" change "the law without expressing any clear intent to do so" as Defendants suggest. (Answering Brief at p.28.) The expansion of the authority of the courts and the district attorneys to afford complete efficient relief to combat unfair competition is express and clearly set forth in the legislative history.

[11] Defendants also mention "Due Process concerns" in passing, but do not explain how or why such concerns could possibly arise in this context. There is no doubt Defendants have full notice and an opportunity to be heard in this case. Defendants also express a vague concern over the binding nature of a UCL judgment, but again, cite no law or authority to explain how that supposed concern is relevant to what remedy may be authorized in a binding judgment. Whether and to what extent an unspecified future judgment is binding is a complex question governed under principles of res judicata and collateral estoppel that is far beyond the scope of the issues presented here.

UCL do not, and cannot, support the judicially created geographical shield to the scope of permissible authorized remedies adopted by the Fourth District Majority below. (*See* Opening Brief at pp.47-48 [arguing that by engaging in a legislative policy making analysis, the Fourth District encroached on the jurisdiction of the Legislature].)

## VII. THE STATEWIDE IMPACT OF THE VIOLATIONS ARE PROPERLY PLED IN THIS CASE

Finally, Defendants argue that their "motion to strike was the appropriate procedural vehicle" to challenge the number of violations that may be assessed at the penalty phase of this case. (Answering Brief at p.60.) Specifically, Defendants contend that any factual allegations regarding the "statewide" reach of the alleged violations are "irrelevant" matter "because [the allegations] address relief that the District Attorney cannot obtain as a matter of law." (Answering Brief at p.61.)

Defendants concede, however, that the allegations they sought to strike are "truthful factual allegations" about the alleged misconduct. (Answering Brief at p.61, fn.25.) There is also no dispute that the OCDA has standing to seek each of the UCL's statutorily authorized remedies prayed for in the Complaint. (Cal. Bus. & Prof. Code §§ 17200, 17203, 17204 & 17206, subd. (a).) The "truthful factual allegations" about the breadth of Defendants' misconduct that were subject to the Motion are important allegations that support the lawful prayer for injunctive relief,

restitution and civil penalties in this case. (*See, e.g.* Cal. Bus. & Prof. Code § 17206, subd. (a) [requiring the trial court to consider all "relevant circumstances" about the alleged misconduct when entering an order for civil penalties].) Hence, there is nothing "irrelevant, false or improper" about these allegations to support a Motion to Strike, and the Respondent Court did not abuse its discretion in so holding.[12]

Defendants' argument that the OCDA lacks authority to seek all "*state-wide* UCL violations" is not a basis to strike the well pled facts in the Complaint. (Answering Brief at p.63 [emphasis added].) None of the authorities cited by Defendants support their arguments otherwise. (*See* Answering Brief at p.60 [citing *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393 [reviewing an anti-SLAPP motion not at issue here]; *PH II, Inc. v. Superior*

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[12] Although arguing that the "irrelevance" of the allegations supports the Fourth District's ruling, Defendants suggest that the factual relevance of the allegations was not raised in the lower courts on the merits of the Motion. (Answering Brief at pp.61-63 [arguing the relevance of the statewide allegations is an "after-the-fact" argument and "A late-developed contrivance"].) This is not so. Indeed, the Respondent Court's denial of the Motion was primarily based on the fact that there was no dispute that a statewide injunction could be ordered in this case, which renders the statewide allegations relevant to the prayer for injunctive relief. (*See* A.244-245.) The argument was also briefed in the Court of Appeal. (*See* People's Return to Petition for Writ of Mandate at pp.33-34, 43-44; Real Party in Interest's Petition for Rehearing in re May 31, 2018 Opinion at pp.10-11; AG Amicus Brief, at fn.2 [confirming that "a local prosecutor's allegations of statewide (or even nationwide) misconduct in a complaint may be entirely proper" because such facts "may help to show, for example, 'the nature and seriousness of the misconduct' or 'the willfulness of defendant's misconduct' and thus have bearing on the court's setting of penalties for each violation occurring within the city or county (Bus. & Prof. Code § 17206, subd. (b)."].)

*Court* (1995) 33 Cal.App.4th 1680, 1682-1683 [holding a motion to strike proper to remove a "substantive defect" in the factual basis for a claim of right to relief not presented here]; *Pacific Gas & Elec. Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 27 [holding a motion to strike a prayer for an insurance deductible proper when party lacked standing to seek any portion of the alleged deductible]; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 385 [holding a motion to strike an entire claim for civil penalties proper because plaintiff did not comply with pre-filing notice and exhaustion requirements]; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220 [upholding the denial of an improper motion to strike a prayer for punitive damages].)

## VIII. CONCLUSION

On March 1, 1976, California Assemblyman Vic Fazio declared: "good consumer protection laws, aggressively enforced, are in the interests of the general public and the business community as well. Good business is built upon a climate of trust. Weeding out those who betray that trust is in the best interests of all Californians." (RJN at p.255.) Based on these noble ideals, the UCL expressly codifies the collective powers of both prosecutors and the courts to protect the public against unfair competition. Such protections were as needed then as they are today. There is no rational basis for limiting the statutorily authorized remedies to the geographical boundaries of any particular area of the State if these objectives are to be

achieved as they are intended -- to expeditiously end the unfair competition. No law, policy or other authority supports such a restrictive reading of the UCL.

For all of the foregoing reasons, and those more fully detailed in the Opening Brief, the Fourth District's mandate to the contrary should be reversed and the matter remanded to the Fourth District with instructions to enter a new order denying the Petition for Writ of Mandate.

Dated this 4th day of January, 2019.

Respectfully submitted,

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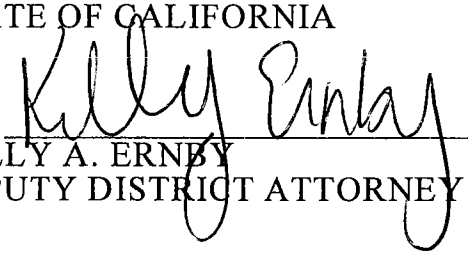
BY: 
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## CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 8.520(c)(1)]

The text of this Opening Brief on the Merits (excluding tables and caption pages) consists of 8393 words as counted by the word-processing program used to generate this brief.

Dated this 4th day of January, 2019.

Respectfully submitted,

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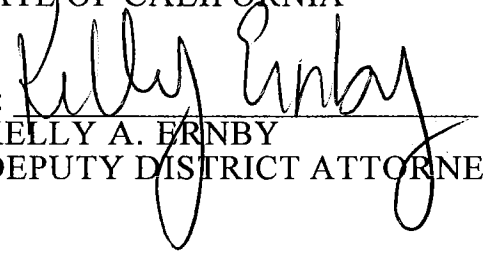
BY: 

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## CERTIFICATE OF SERVICE

COURT: Supreme Court of the State of California

Case Nos.: Court of Appeal, Fourth Appellate District, 1st Division D072577

Orange County Superior Court Case No. 30-2016-00879117-CU-BT-CXC *People of the State of California vs. Abbott Laboratories, et al.*

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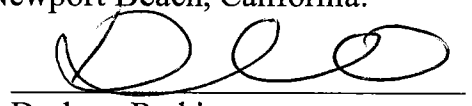
Executed on January 4, 2019, at Newport Beach, California.



Darleen Perkins