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

BRIEF AMICUS CURIAE

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I. INTRODUCTION

The Santa Cruz County District Attorney is but one of fifty-eight District Attorneys in California and is not a county of the size of many of its neighbors, with a population of approximately 250,000. None the less, the Santa Cruz District Attorney Consumer Affairs Unit has been a material contributor to Consumer protection, not only locally, but impacting consumers statewide and nationwide. The Santa Cruz District Attorney was a material contributor to the prosecution team that resulted in the judgment against Overstock.com Inc. (*People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064), and numerous other judgments that have enforced consumer rights statewide including but not limited to judgments against: Sysco Corporation for the unsafe storage of food in locations throughout California; against eHarmony Inc. the online dating site for failing to adhere to automatic renewal and dating service contract laws, correcting their practices throughout California; Stamps.com for false advertising to California consumers; and against In Shape Health Clubs where relief for unlawful collections of "void" contracts led to the forgiveness of over $22,000,000 in past debt of California Consumers. These are but a few of the

consumer protection cases enforced by Santa Cruz County in combination with task force groups of other District Attorneys and City Attorneys, and without participation by the Attorney General.

The current decision of the Honorable Court of Appeal, Fourth Appellate District, Division One, sounding in "jurisdictional" limitations jeopardizes all of these and many more judgments by potentially rendering them "void" as without "jurisdiction."

Contrary to the position of the California District Attorneys Association (CDAA), before the Court of Appeal adverse to Orange County District Attorney, Santa Cruz District Attorney advances what we believe is the proper and somewhat neutral legal position, i.e. that restrictions upon prosecution of Unfair Competition Law (UCL), and False Advertising Law (FAL), violations that occur outside of a district attorney's county sound in directory restrictions upon venue and joinder, not territorial jurisdictional restrictions. Concerns of loss of control of prosecutorial discretion over violations in Santa Cruz County prosecuted by other counties

are protected by principles of venue and joinder.[1] Decisions often cited to support so called extra-territorial jurisdictional limitations such as *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, and *Safer v. Superior Court* (1975) 15 Cal.3d 230, arise from subject matter limitations upon jurisdiction, not territory.

The Santa Cruz District Attorney is an active and supportive member of the CDAA. However, we are compelled by good conscience to differ from what has been advocated so far by the defendants and even the CDAA in this

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[1] Fear of prosecutions by "rogue" counties attempting to control statewide policy are illusory. Comity between local prosecutors has by itself prevented a "rogue" county district attorney from usurping control of any statewide prosecutions without the knowing consent of other prosecutors. Since the enabling of local prosecutors to enforce the UCL, the need for intervention has been limited to one or two cases in decades, *People v. Hylond* (infra), being the principal example. Further and although collateral to this case, one of the issues that inspires anxiety about local empowerment, is not extra territorial standing, but the pressure created by the growing use of private counsel retained upon a contingency. The use of private counsel which when motivated by contingent fees may interfere with the proper exercise of restraint in applying the considerable power of the prosecution. The case of *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, which arises from nuisance prosecution, not UCL or FAL, is often used to support such prosecutions. This is an issue that raises the concerns about prosecutors that embark alone upon statewide issues through the use of contingency counsel, but is not before the Court in this case.

case.

The opinion of the divided Fourth District Court of Appeal in finding "jurisdictional" limitations on prosecutions of the California Unfair Competition Law ("UCL"), raises serious questions regarding past, current and prospective prosecutions in the name of the People of the State of California under the UCL. At page 33 of the majority's opinion the Court plainly addresses District Attorney prosecution of UCL violations as a "jurisdictional" limitation, where the Court states, "We therefore construe the authority conferred on the District Attorney by the UCL as subject to the constitutional and statutory *jurisdictional* limitations..." (emphasis added). Ascribing a limitation upon fundamental jurisdiction impugns the integrity of existing judgments as well as creating unnecessary limitations upon prosecution of violations of the UCL by multiple counties. Instead, such prosecutions are properly addressed, as in criminal prosecutions, by the doctrines of joinder and venue.

In embarking upon announcing what appears to be fundamental jurisdictional limitations on District Attorney UCL prosecutions, the Appellate Court fails to answer essential questions raised by its proclamation, such as: the

Court refrained from ruling upon injunctive relief, and although the parties all agreed the jurisdictional limitation does not apply to injunctive relief, one must ask, if it is a "jurisdictional" limitation, how could it distinguish between remedies of restitution, penalties and injunctive relief? If it is a "jurisdictional" limitation, is a violation of that limitation a void act, i.e. going to fundamental jurisdiction, or a voidable act, in excess of statutory limitations? If it is an issue of fundamental jurisdiction, as it would seem from the opinion, does this impact existing judgments awarding penalties for statewide violations, and if it is merely directory does it impact judgments less than six months old?

Not addressed in the opinion is the statutory extra territorial jurisdiction set forth in the FAL, B&P 17500, i.e. false advertising, "...disseminated from this state...". Does this mean that a district attorney can get penalties for violations based upon publications to Nevada residents and the rest of the country but not other California counties?[2]

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[2] In making its broad policy declaration as to the "jurisdictional" limitations upon District Attorneys, the Appellate Court completely fails to address the circumstance where a UCL/FAL prosecution is brought for false advertising disseminated from the County where the prosecution is brought.

Such uncertainties along with many others are unnecessarily caused by the extraordinary extension of the extreme limitations founded in "jurisdiction", instead of looking to rather ordinary restrictions upon interference with other prosecutor's discretion through normal and factually based considerations of whether offenses are properly joined with the ones occurring within the county where the prosecution is filed. Here the Court did not await the development of such factual circumstances.

II. THERE IS NO NEED TO ADD A LIMITATION ON THE STANDING OF A DISTRICT ATTORNEY TO BRING A UCL OR FAL ENFORCEMENT ACTION

Just as "...the language of section 17208 admits of no exceptions..." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179; *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1075), neither does the language of Business and Professions Code §17204.[3]

[3] The investigative powers of a District Attorney that support the prosecution of UCL/FAL violations are statutorily the same as the Attorney General. "All those powers granted to the Attorney General as a head of a department under Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code shall be granted to the district attorney of any county when that district attorney reasonably believes that there may have been a violation of Article 2 (commencing with Section

There is no justification to interpret into Business and Professions Code §17204, territorial limitations to District Attorney prosecution where the legislature has stated no such exception. That is not to say that a UCL or FAL action brought by a District Attorney is not subject to other limitations, such as proper venue of the primary right to be litigated. Neither does any recognition of the local prosecutor's role in representing the People of the State of California in any fashion impede the general supervisory capacity of the Attorney General (Cal Const, Art. V § 13), nor suggest that the Attorney General should fail to intervene or otherwise address an abuse by any local prosecutor. Clearly the Attorney General has such power and the responsibility to exercise it (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63). However, the presence of such authority lends no

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16720) or Article 3 (commencing with Section 16750) of this chapter, or a violation of Chapter 4 (commencing with Section 17000) of this part, or a violation of Chapter 5 (commencing with Section 17200) of this part, and shall be subject to the provisions of Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the Government Code.... Court orders sought pursuant to this section shall be sought in the superior court of the county where the district attorney seeking the order holds office." (Bus & Prof Code § 16759). However, subpoenas may be served in any county or out of state (Government Code §11185).

restriction upon District Attorney standing. Indeed, its existence is a safeguard against abuse that suggests less need for formal restrictions.[4]

Of course, the standing of a local prosecutor derives solely from constitutional and statutory authority (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 242; *People v. Superior Court* (2014) 224 Cal.App.4th 33, 43–44; *Oakland v. Brock* (1937) 8 Cal.2d 639, 641-642). In the matters of the prosecution of violators for a public nuisance, the standing of a District Attorney is expressly limited to prosecution in the county, "...in which the nuisance exists..." (Code of Civil Procedure §731). No such limitation is expressed in Business and Professions Code §17204, as distinguished from many other expressly limited statutory empowerments. *Expressio unius est exclusio alterius*, which means "the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 13; quoted in: *In re Sabrina H.* (2007) 149 Cal.App.4th

[4] The grant of power imposes the duty to exercise it; "...A refusal to exercise discretion is itself an abuse of discretion." (*Morris v. Harper*, ibid.)

1403, 1411-1412). Business and Professions Code §17204, reflects no limitation on territorial standing. Normal statutory construction suggests such a lack of limitation was intentional.[5]

District Attorneys have standing to bring criminal actions based upon conduct outside the boundaries of their respective county constrained not by jurisdiction, but upon procedural rules of joinder and venue (Penal Code §781; *People v. Crew* (2003) 31 Cal.4th 822, 836; *People v. Betts* (2005) 34 Cal. 4th 1039, 1057-1059; *Brock v. Superior Court of Stanislaus County* (1947) 29 Cal.2d 629, 633-635; *People v. Simon* (2001) 25 Cal.4th 1082, 1095-1097). In both Criminal and Civil prosecutions, venue is not an issue of fundamental jurisdiction. (ibid.)

By statute, venue of exterritorial criminal violations may be proper in a single county prosecuting the local violation and the exterritorial violation. "Section 781 provides that when a public offense is committed in part in one jurisdiction and in part in another jurisdiction 'or the acts

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[5] Cal Bus & Prof Code § 16754, cited by the Court in *Safer v. Superior Court,* contains express venue terms further exemplifying that the absence thereof is an intentionally broad grant of subject matter standing.

or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories,' venue is proper in either jurisdiction. Section 781 is liberally construed to permit trial in a county where only preparatory acts occurred." (*People v. Crew* (2003) 31 Cal.4th 822, 836) (emphasis added).

"In analyzing the procedural requirements governing venue, it is important to recognize at the outset that although the applicable California statutes generally employ the terms "jurisdiction" and "jurisdictional territory" in designating the proper venue for the trial of a criminal proceeding (citations omitted), **the issue of venue in criminal as well as in civil cases does not involve a question of "fundamental" or "subject matter" jurisdiction over a proceeding**. As a leading treatise explains: 'If the crime is one over which California can and does exercise its legislative jurisdiction because it was committed in whole or in part within the state's territorial borders, California courts have jurisdiction to try the defendant. ... Moreover, if the charge is brought in a competent court..., *that court, no matter where located in the state*, may have subject matter jurisdiction of the offense. ... Thus, *venue is not jurisdictional in the fundamental sense*; and, both in **civil and criminal cases**, a change of venue from the superior court of one county to the same court in another county does not affect its jurisdiction over the subject matter of the cause.' " (*People v. Simon* (2001) 25 Cal.4th 1082, 1095-1096; quoting from: 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) *Jurisdiction and Venue*, § 45, p. 135) (italics added by the Supreme Court; bold added by the undersigned).

Standing, although referred to as "jurisdictional" in some cases involving the UCL (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345; *Californians for*

Disability Rights v. Mervyn's, LLC (2006) 39 Cal.4th 223, 232-233), is not in the fundamental sense. Defects in "standing" do not deprive the Court of fundamental jurisdiction (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13; *The Rossdale Group, LLC v. Walton* (2017) 12 Cal. App. 5th 936, 944-945; *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248; *National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 761). "Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248)

The Superior Court has fundamental jurisdiction to grant the relief provided for in the UCL and FAL on behalf of the People of the State of California, regardless of the prosecutor. The geographical locus of violations is a venue and joinder consideration in a single prosecution and can be waived.

To the extent there exist territorial limitations to prosecutor standing, they arise as a directory limitation, subjecting the resulting judicial action to being set aside as

voidable, but do not impugn the fundamental jurisdiction of the Court to render judgment (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 665). Standing issues, similar to venue, raise matters that are directory, but do not deprive the Court of fundamental jurisdiction.[6]

"The consequences of an act beyond the court's jurisdiction in the fundamental sense differ from the consequences of an act in excess of jurisdiction." (*People v. Ruiz* (1990) 217 Cal. App. 3d 574, 584). As noted, fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's jurisdiction in the fundamental sense is null and void. Therefore, a claim based on a lack of a fundamental jurisdictional may be raised for the first time on appeal. (*People v. Chadd* (1981) 28 Cal. 3d 739, 757.) "In contrast, an act in excess of jurisdiction is valid until set aside, and

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[6] "In particular, here we need not rely on estoppel principles, but simply on the rule that collateral attack on a voidable but final judgment is not available absent unusual circumstances, not present in this case, that precluded earlier challenge of the judgment. Rather, a voidable judgment must be challenged while the trial court or Court of Appeal can still correct the mistake." (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 665).

parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time. [Citations.]" (*People v. Williams* (1999) 77 Cal.App.4th 436, 447; citing to: *People v. Ruiz* (1990) 217 Cal.App.3d 574, at p. 584; *In re Andres G.* (1998) 64 Cal. App. 4th 476, 482) (see also the discussion in: *Torjesen v. Mansdorf* (2016) 1 Cal.App.5th 111, 117-118).

***III. PEOPLE V. HYLOND* AND *SAFER V. SUPERIOR COURT* ADDRESS SUBJECT MATTER AND PERSONAL JURISDICTION NOT TERRITORIAL JURISDICTION**

The contention that the case of *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal. App. 3d 734 ("*Hy-Lond*"), addresses extra territorial jurisdiction illustrates the problems caused by inarticulate use of the concept of "jurisdiction". The jurisdictional defects addressed in the *Hy-Lond* decision arose from mandates in the stipulated judgment made clearly in excess of the court's jurisdiction. It was to this that the Attorney General and Director of the Department of Health objected.

> "The Attorney General and the Department contend that the stipulation and judgment is erroneous and void insofar as it severally precludes both the Attorney General and the Department from performing statutory duties." (*Hy-Lond*, p. 739) (emphasis added).

According to the opinion of the Court, the stipulated judgment purported to provide to Hy-Lond, "... immunity for future actions for unfair competition with respect to future alleged violations of the law and regulations...", and limit all other civil and administrative enforcement proceedings, "...to an action to enforce the judgment by ordinary civil contempt." (*Hy-Lond*, p. 749) (emphasis added but italics in the original).[7]

The Court in *Hy-Lond* describes the improper invasion of subject matter and personal jurisdiction involving the role of the state administrative agency. "It puts restraints on the institution of such proceedings, and delegates supervision of any such proceedings to the Napa County District Attorney." (ibid) (emphasis added). Although there was gratuitous reference to other district attorneys and out of county

[7] The language to which specific objection was made is found in footnote 2, of *Hy-Lond*. "...No proceedings to suspend or revoke the license of defendant or defendant's participation in any government programs arising out of facts as set forth in plaintiff's first amended complaint herein shall be brought or maintained by the State of California, including any State administrative agency in connection with any acts, conduct or omissions occurring at any of defendant's facilities referred to herein."(*People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, 741, fn. 2).

facilities, that issue was not before the Court.[8] Comments upon abridgement of enforcement by other prosecutors were not essential to the holding. Such comments on extra territorial jurisdiction made in a void of facts to show whether other violations were properly joined with the matters prosecuted by Napa mirrors the void of facts as to whether the violations of consumer rights in other counties are properly joined in this action.

It was the objection to the overreach of subject matter in the judgment that invaded the province of the Attorney General and the Director of the Department of Health. The Director of the Department of Health has specific enforcement duties legislatively proscribed. The exercise of those duties was not a subject matter before that trial court

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[8] "There is no kinship between *stare decisis* and *obiter dictum*. Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum... The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of *stare decisis* to be followed" (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61-62; citing to: *Brown v. Brown*, 83 Cal.App. 74, 81; *Hills v. Superior Court*, 207 Cal. 666, 670; *Laguna L. & W. Co. v. Greenwood*, 92 Cal.App. 570, 574; *Harris v. Industrial Acc. Com.*, 204 Cal. 432, 438; *Norris v. Moody*, 84 Cal. 143, 149; *Cardenas v. Miller*, 108 Cal. 250, 252). Accordingly, the *Hy-Lond* case provides no precedent regarding the territorial reach of a UCL or FAL action brought by a District Attorney or other local prosecutor.

and the Director of the Department of Health had never appeared before the trial court prior to judgment. The fact that neither the Attorney General nor the Director were parties was the basis upon which the Attorney General and the Director sought intervention to modify the judgment. The standing to intervene was the issue before the *Hy-Lond* Court. "...[W]e conclude that both the Attorney General and Department had standing to attack the judgment and that the court erred on the merits in denying their motion." (*Hy-Lond*, at p.739).

Similarly, the decision in *Safer v. Superior Court*, supra, 15 Cal.3d 230, addressed the subject matter able to be prosecuted by a district attorney. There was no statutory enablement of a district attorney, "... to appear in private litigation..." to enforce the injunctive order therein (*Safer v. Superior Court,* supra, 15 Cal.3d 230, 238). The absence of statutory authority enabling such enforcement being an impediment to the ability of the court to allow the district attorney to proceed is a product of the statutory enablement or lack thereof. At bar, Business and Professions Code §17204, specifically enables a district attorney to prosecute UCL actions without restriction, except that it be brought in a

"court of competent jurisdiction". This enablement makes no comment upon whether a given violation is properly joined in the court where it is prosecuted, nor does it address what the proper venue should be for discrete violations. For those issues, existing principles of venue and joinder should apply.

Neither of these decisions provides any authority to determine whether a given UCL violation is properly joined or venued. The general subject matter is properly before the trial court which is a court of "competent jurisdiction" to consider UCL violations.

IV. LITIGANTS IN UCL AND FAL ACTIONS SHOULD VIEWED IN THE LIGHT OF THE DOCTRINE OF "PRIMARY RIGHT"

Since the UCL and FAL have been prosecuted by District Attorneys, literally hundreds of judgments purporting to assess penalties for statewide conduct have been entered in California. Usually those judgments are prosecuted by combinations of local prosecutors. Of the hundreds of judgments developed by stipulation with a single or with groups of District Attorneys, nearly all refrain from overreaching inclusions of primary rights not within the authorized UCL and FAL claims. Adjudication of a primary

right should resolve that "cause of action."

> "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904; see also: *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795).

Should not those judgments that may encompass violations arising in more than one venue, if properly joined, be resolved in a single action? Should they not be accorded preclusive effect against other prosecutions arising from the same primary right? That is not to suggest that a judgment that erroneously attempts to exceed the jurisdiction framed by the subject matter before the Court would be given issue preclusive effect. (*Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 316-17; *People v. Superior Court of Los Angeles County* (1967) 248 Cal.App.2d 276, 282; *State Board of Equalization v. Superior Court of San Francisco* (1935) 5 Cal.App.2d 374, 378; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-289), and actions that impermissibly join disparate claims into a single class in a single case would be subject claims of error and voidable (See

generally: *Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 626; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1084). However, defendants should be subject to providing the relief to offended consumers only once arising upon a single primary right (*California v. IntelliGender, LLC* (9th Cir. 2014) 771 F.3d 1169, 1180-1182.)

IV. CONCLUSION

The divided opinion of the Fourth Appellate District declares unfortunate limitations on fundamental jurisdiction that interferes with both the prosecutor and court in adjudicating UCL and FAL cases when such broad declarations are unnecessary to determine proper limitations upon the joinder of out of county violations. There is no basis upon which to conclude that local prosecutors are facially precluded from obtaining statewide relief upon UCL and FAL prosecutions. Such actions are limited by normal restrictions upon joinder and venue and local prosecutors may not by stipulation add nor detract from statutory and constitutional powers of other government officials. Rules of issue preclusion may bar subsequent prosecutions for the same conduct prosecuted in the name of the People of the State of

California, when that conduct was properly merged into a judgment. Proceeding with this case in the complete absence of facts to consider proper joinder has led the Appellate Court to improperly declare impairment of fundamental jurisdiction that is unnecessary to the resolution of the question. Accordingly, the decision of the Court of Appeal should be reversed, and the matter returned to the trial court to determine the factual basis upon which discrete violations of the UCL are premised.

Respectfully submitted on behalf of,
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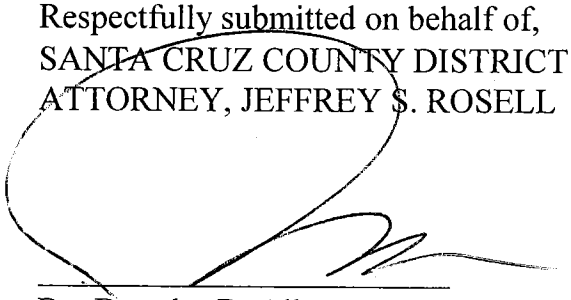

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PROOF OF SERVICE
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I, Angela Derendinger, am employed in the County of Santa Cruz, State of California. I am over the age of eighteen years and not a party to this action. My business address is 701 Ocean Street, Room 200, Santa Cruz, CA. 95060.

I am familiar with the business practice of the Santa Cruz County District Attorney's Office for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the mail system at the Santa Cruz County District Attorney's Office is deposited with the United States Postal Service with postage thereon fully prepaid the same day in the ordinary course of business.

On February 6, 2019, I served copies of the foregoing

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on the parties and entities below by placing a true copy thereof in a sealed envelope as addressed as follows:

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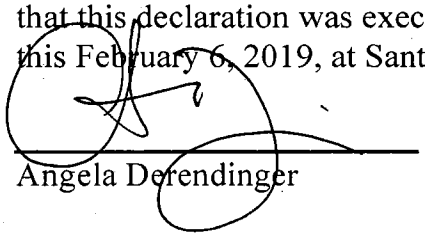
Sacramento, CA. 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed under the laws of the State of California, this February 6, 2019, at Santa Cruz, California.



Angela Derendinger