No. _____

IN THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION 3

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

Defendants/Petitioners,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA *EX REL.* ORANGE COUNTY DISTRICT ATTORNEY TONY RACKAUCKAS,

Plaintiff/Real Party in Interest.

From the Superior Court of California, County of Orange
Superior Court Case No. 30-2016-00879117-CU-BT-CXC
Hon. Kim Dunning

PETITION FOR WRIT OF MANDATE OR PROHIBITION; MEMORANDUM IN SUPPORT THEREOF [EXHIBITS FILED UNDER SEPARATE COVER]

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rules of Court, rule 8.208, the undersigned certifies that the following entities have an ownership interest of 10 percent or more in any of the Petitioners or a financial interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2):

1. Petitioner Teva Pharmaceuticals USA is a wholly-owned subsidiary of non-party Teva Pharmaceutical Industries, Ltd., an Israeli corporation having its principal place of business in Israel.

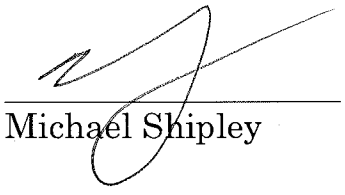
2. Petitioner Barr Pharmaceuticals, Inc., now known as Barr Pharmaceuticals, LLC, is an indirect, wholly-owned subsidiary of Teva Pharmaceutical Industries, Ltd.

3. Petitioner Duramed Pharmaceuticals, Inc., now known as Teva Women's Health, Inc., is a subsidiary of Barr Pharmaceuticals LLC.

4. Petitioner Duramed Pharmaceutical Sales Corp. is a subsidiary of Teva Women's Health, Inc., and is an indirect wholly owned subsidiary of Barr Pharmaceuticals LLC.

5. Capital Research Global Investors has an ownership interest of 10 percent or more in Petitioner AbbVie Inc.

Date: July 21, 2017



Michael Shipley

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ISSUE PRESENTED

Does Business & Professions Code section 17204 ("§ 17204") permit a county district attorney to bring a claim that seeks relief for alleged injuries to residents of California counties whom he or she does not represent, based on conduct occurring outside the county he or she serves?

INTRODUCTION

This case concerns the authority of a county district attorney to sue for statewide relief under the Unfair Competition Law, Business & Professions Code, § 17200 et seq. (the "UCL").

On October 14, 2016, Orange County District Attorney Tony Rackauckas (the "District Attorney") sued Petitioners Teva Pharmaceuticals USA, Inc., AbbVie Inc., and their predecessors in a one-count complaint filed in Orange County Superior Court.[1] To bring the complaint, the District Attorney retained Robinson Calcagnie, Inc. a private law firm with which he has had an extensive relationship, as well as additional private lawyers from as far afield as Georgia and Louisiana. The complaint alleges a violation of the UCL arising from a decade-plus old settlement of patent litigation—in the U.S. District Court for the Southern District of New York—concerning the marketing of a generic version of a dyslipidemia drug called Niaspan.

Despite being brought by a local district attorney, the complaint alleges statewide violations of the UCL and seeks statewide relief, including civil penalties for every single sale of Niaspan in California—including Orange County but also including other counties such as Los Angeles and Sonoma, which have no tie whatsoever to Orange County—under a theory that purchasers paid too much. Petitioners moved to strike the statewide allegations, but the superior court denied the motion.

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[1] Although the initial complaint also named Teva Pharmaceuticals Industries, Ltd., the District Attorney later dismissed Teva Pharmaceuticals Industries, Ltd. from the action without prejudice.

Although the case law in this area is not extensively developed, the general principles are clear. District attorneys lack plenary power to initiate civil litigation. The Supreme Court has held that district attorneys may litigate civilly only when expressly authorized by statute to do so. Nothing in the Government Code provisions outlining the authority of district attorneys permits them to file civil actions for statewide relief.

In seeking penalties under the UCL, the District Attorney purports to find authority in § 17204. But that interpretation of § 17204 was rejected in *People v. Hy-Lond Enterprises. Inc.* (1979) 93 Cal.App.3d 734. In *Hy-Lond*, the Court of Appeal permitted the Attorney General to vacate a settlement between a hospital chain and a local district attorney that purported to release UCL claims arising in twelve California counties. The Court of Appeal held that § 17204 precludes "the right of [a] district attorney to surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other counties under [the UCL]." (*Id.* at p. 753.)

That result makes sense, both as a legal matter and from the standpoint of basic democratic accountability. As a federal court explained in limiting the scope of a statewide nuisance action brought by a local city attorney: "To require that the 'will of the people of California' be placed in the hands of the City Attorney of Lodi when the elected Governor and Attorney General have decided not to exercise their authority, and, expressly oppose the City Attorney's assumption of such authority, seems a bizarre

notion." (*People of the State of California v. M & P Investments* (E.D.Cal. 2002) 213 F.Supp.2d 1208, 1214, emphasis omitted.)

In denying Petitioners' motion, the superior court distinguished *Hy-Lond* as limiting a district attorney's authority to settle statewide UCL claims but found that he or she has the authority to file such claims in the first place. This result makes little sense; if the District Attorney may not settle a case on behalf of the entire state, he may not initiate the action on behalf of the entire state to begin with. The disparity between settlement authority and filing authority implied by the superior court fails to recognize the essential fact that settlement is an integral part of litigation.

In support of this position, the superior court cites language that appears only in a footnote concerning a requirement that the agreement be enforced in Napa County. (See Ex. 15 at A240:22–A241:6.) But this note does not, however, cabin the reasoning of *Hy-Lond* as suggested by the superior court. Further, the superior court's decision appeared to rest just as much on its own disagreement with the case, referring to the decision as "kind of a stretch," and "shaky [in] the whole premise." Of course, as a superior court in the face of a binding appellate authority, that was not its judgment to make.

As discussed in further detail below, this issue—the authority of local officials to bring and settle UCL claims beyond their local area—has proven perplexing and resulted in inconsistent decisions from superior courts. Yet the issue has also stubbornly evaded review. No published case since the 1979 *Hy-*

Lond decision has addressed the issue. Because the issue is of significant statewide importance and has heretofore evaded appellate review, writ relief to correct the superior court's error is merited.

WRIT RELIEF IS NECESSARY

For several reasons, writ relief is crucial in this case.

First, the position of Attorney General, not the Orange County District Attorney, is elected by the voters of the State of California to provide statewide enforcement of California's consumer protection laws. For the district attorney of a single county to assume the authority to bring statewide claims under § 17204 implicates the scope of the superior court's jurisdiction. As the Supreme Court has held, for a superior court to permit a district attorney to prosecute an action outside the scope of "the statutorily authorized procedures for such proceedings and in excess of his authority" is in excess of the superior court's jurisdiction, and thus "establishes grounds for our issuance of a writ of prohibition." (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 242.)

Second, the scope of a local prosecutor's authority to bring statewide claims under § 17204 is an issue of widespread importance that has evaded review. (See *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 129 ["[T]he Supreme Court has repeatedly recognized the intervention of an appellate court may be required to consider instances of a grave nature or of significant legal impact, or to review questions of first impression and general importance to the bench and bar where general guidelines can be laid down for future cases." (footnotes omitted)].)

The UCL reserves monetary penalties for actions brought by public prosecutors. (See Bus. & Prof. Code, § 17206, subd. (a) [authorizing civil penalties of up to $2,500 for each violation].) This authority could be used to inflict ruinous penalties on entities

that do business in this state, out of any proportion to whatever harm has been alleged. The power to pursue these remedies should be limited to those who are politically accountable for their use. (See *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 204.) As the statewide official with the responsibility "to see that the laws of the State are uniformly and adequately enforced," it is the Attorney General, not a local district attorney, who has the discretion to decide when and the extent to which civil penalties should be sought outside of the local district attorney's jurisdiction. (See Cal. Const., art. V, § 13.) To place power to seek statewide relief in the hands of each of the fifty-eight district attorneys in this State[2]—each accountable only to his or her local constituency—risks inconsistency, unaccountability, and misuse of power. This is even truer where, as here, a district attorney turns to private counsel to prosecute claims on his or her behalf.

Superior courts—including courts in at least Los Angeles, San Francisco, and Orange Counties—have addressed this question, with mixed results. (See Exs. 10.B[3] at p. A157 [holding that city attorneys of Los Angeles, Santa Monica, and San Diego

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[2] Plus the city attorneys in the four California cities with populations over 750,000. (See § 17204.)

[3] Citations to "Ex." are to the appendix of superior court record materials submitted under separate cover. Page references beginning with "A" are to the pagination of the consecutively numbered appendix. Citations to "RJN Ex." are to additional exhibits submitted with Petitioners' Request for Judicial Notice, filed concurrently herewith. Page references beginning with "R" are to the pagination of the consecutively numbered exhibits to the Request for Judicial Notice.

lacked authority under § 17204 to bring statewide claims], 10.C at p. A175 [granting motion to strike statewide allegations because district attorneys of San Francisco and Los Angeles Counties lacked authority under § 17204 to bring statewide claims]; RJN Ex. 1 at p. R20–21 [holding that San Francisco city attorney had authority under § 17204 to bring statewide claims, but recommending under Code of Civil Procedure section 166.1 that the Court of Appeal review the matter by writ because "the import of the issue extends beyond this case" and "only an appellate opinion can resolve the issue"].)

Indeed, despite opposing plenary review by the Supreme Court of an order granted in its favor, the San Francisco City Attorney recently explained that "the issue nonetheless merits further review." (RJN Ex. 2 at p. R26.) The City Attorney explained that "[e]ven though the People believe that the trial court was correct, the issue is one of statewide importance, which would benefit from a Court of Appeal ruling on the merits." (*Id.* at p. R30.)

That this issue has persistently evaded review is as clear as the issue is important. As the City Attorney acknowledged "UCL claims brought by public prosecutors very commonly settle and very rarely are tried or otherwise resolved by dispositive motion." (RJN Ex. 2 at p. R30.) Thus, although the issue presented here has arisen in "thousands" of cases, "it may never be resolved by post-trial appeal, or such resolution may be unduly delayed." (*Ibid.*) Petitioners concur with these observations of the City Attorney.

Third, this case presents an ideal vehicle for the Court of Appeal to address the issue. The superior court denied Petitioner's

motion to strike on the merits. The District Attorney's opposition did not raise any procedural objection to the motion that could afford an alternative basis for denial.

Finally, writ relief is necessary to avoid irreparable injury to Petitioners. Orange County is home to less than 10 percent of California's residents. A statewide litigation that exceeds the authority of the District Attorney could subject Petitioners to (likely unrecoverable) additional litigation costs. Moreover, although Petitioners vigorously dispute the merits of the District Attorney's claims, an unmerited tenfold increase in the potential scope of this matter and potential liability will invariably have an unmerited and unfair effect on Petitioners. Petitioners are also entitled to certainty on the extent to which a judgment in their favor in this case purportedly brought by "the People" will have preclusive force outside of Orange County.

For all of these reasons, writ relief is appropriate—indeed necessary—in this case.

PETITION FOR WRIT OF MANDATE

Defendants/Petitioners Abbott Laboratories; AbbVie Inc.; Teva Pharmaceuticals USA, Inc.; Barr Pharmaceuticals, Inc.; Duramed Pharmaceuticals, Inc.; and Duramed Pharmaceutical Sales Corp. allege as follows:

1. The issue presented by this Petition is whether § 17204 authorizes a single county's district attorney to seek statewide relief for alleged violations of UCL that have no nexus to the county whose citizens elected him.

2. The superior court erroneously answered that question in the affirmative.

3. The issue is of widespread significance and has persistently evaded review. The answer to the question presented affects the scope of available relief in every UCL enforcement action brought by local officials (district attorneys, county counsel, city attorneys, etc.) under the caption of "the People."

I. THE PARTIES.

4. Petitioner Abbott Laboratories is an Illinois corporation with its principal place of business in Illinois. During a portion of the relevant period Abbott sold pharmaceuticals.

5. Petitioner AbbVie Inc., is a Delaware Corporation with its principal place of business in Illinois. AbbVie sells pharmaceuticals.

6. Petitioner Teva Pharmaceuticals USA, Inc., is a Delaware corporation with its principal place of business in Pennsylvania. Teva USA manufactures and distributes generic prescription drugs.

7. Petitioner Duramed Pharmaceuticals, Inc. is a Delaware corporation with its principal place of business in New Jersey. At this time, it is a wholly owned subsidiary of Teva USA.

8. Petitioner Duramed Pharmaceuticals Sales Corp. is a Delaware corporation with its principal place of business in New Jersey. At this time, it is a wholly owned subsidiary of Teva USA.

9. Petitioner Barr Pharmaceuticals Inc. is a Delaware corporation with its principal place of business in New Jersey. At this time, it is a wholly owned subsidiary of Teva USA.

10. The above-listed Petitioners are the current Defendants in the action below.

11. Respondent is the Superior Court of the State of California, County of Orange.

12. Real Party in Interest is the Orange County District Attorney purporting to act on behalf of the People of the State of California.

II. THE DISTRICT ATTORNEY'S CIVIL UCL CLAIM AGAINST PETITIONERS.

13. On October 4, 2016, the Orange County District Attorney filed a complaint against Petitioners in Orange County Superior Court, styled *People of the State of California, acting by and through Orange County District Attorney Tony Rackauckas v. Abbott Laboratories, et al.* (Super. Ct. Orange County, Oct. 4, 2017, No. 30-2016-00879117-CU-BT-CXC). (See Ex. 1.)

14. The complaint names "the People of the State of California" as being represented by both the District Attorney, as well as by several members of Robinson Calcagnie, Inc.—a plaintiff-side private law firm that, on information and belief, has

extensive political and financial connections to the District Attorney,[4] and in fact alerted the District Attorney to the purported claim asserted, as disclosed in discovery. Neither the Robinson Calcagnie firm nor the District Attorney has disclosed how the firm is being compensated.

15. A few weeks after the original complaint was filed, the Robinson Calcagnie firm filed *pro hac vice* applications for five additional attorneys to represent "the People of the State of California," including four attorneys licensed only in Georgia and one licensed only in Louisiana. (Exs. 2–6.) Neither these attorneys, nor the Robinson Calcagine firm, nor the District Attorney have disclosed how the private lawyers are being compensated.

16. On December 17, 2016, the District Attorney filed a First Amended Complaint in the action. (Ex. 7.) The First Amended Complaint is the operative complaint, and will be referred to as the "Complaint" herein. The District Attorney and his associated private attorneys continue to purport to bring this case on behalf of "the People of the State of California." (Ex. 7 ¶ 1.)

17. The Complaint alleges a single count claim for relief under the "unfairness" and "unlawfulness" prongs of the UCL, including as predicates, violations of federal and state antitrust laws, including the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), the Sherman Antitrust Act (15 U.S.C. §§ 1–7), the Clayton

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[4] *See generally* Sforza, *Sweetheart deal between DA and Newport Beach law firm*, Orange County Register (Apr. 9, 2010) *available at http://www.ocregister.com/2010/04/09/sweetheart-deal-between-da-and-newport-beach-law-firm/*.

Antitrust Act (15 U.S.C. §§ 12–27), and the Federal Trade Commission Act (15 U.S.C. § 45). (Ex. 7 ¶ 148.)

18. According to the Complaint, predecessors in interest of Teva USA and AbbVie conspired to prevent the marketing of a generic version of the dyslipidemia drug Niaspan by the terms of their settlement of federal court patent litigation between them. The Complaint alleges this conduct harmed California consumers and the California Medicaid Program by increasing the cost of treatment for dyslipidemia. (Ex. 7 ¶ 147.)

19. The Complaint challenges the harm allegedly caused by this conduct statewide, without any limitation to Orange County. (Ex. 7 ¶¶ 1–3, 17, 40, 114, 123, 132–40, 141, 151, 154–55, and 165 [all framing allegations in terms of "California users" or "in California" generally and without geographic limitation].)

20. The Complaint seeks injunctive relief, restitution, and civil penalties from Petitioners without any limitation based on whether the alleged victims reside outside of Orange County and whether the alleged pharmaceutical sales took place outside of Orange County. (Ex. 7 at Prayer for Relief ¶¶ A–E.) In particular, the Complaint alleges that "each sale of Niaspan in violation of Section 17200 constitutes a separate violation" and thus that the District Attorney seeks "civil penalties of up to $2,500 per violation," plus additional civil penalties of up to $2,500 per violation for each sale to a senior citizen or disabled person pursuant Business & Professions Code section 17206.1. (*Id.* at ¶ 152.)

21. The Complaint thus seeks from Petitioners—none of which is a citizen of California, much less Orange County—potentially tens or even hundreds of millions of dollars in civil penalties for sales of Niaspan to California consumers, roughly 90 percent of whom do not reside within the jurisdiction of the District Attorney.

III. PETITIONERS FILE A MOTION TO STRIKE.

22. On February 10, 2017, Petitioners filed a Motion to Strike Portions of Plaintiff's First Amended Complaint (the "Motion"). (Ex. 8.) The Motion sought to strike all references to "California Niaspan users" and "in California" generally, as improperly failing to limit the action to harm allegedly occurring to residents of Orange County or caused by purchases made within Orange County. (See *id.* at pp. A117–18.)

23. Concurrently with filing the Motion, Petitioners filed a request for judicial notice and accompanying declaration, seeking judicial notice of orders of two superior courts and an amicus brief filed by the Attorney General in another action related to the issues presented in the Motion. (Exs. 9 [request], 10 [declaration].)

24. Under the authority of Code of Civil Procedure section 436 subdivisions (a) and (b), the Motion sought to strike certain statewide references from the Complaint, in that they were "irrelevant," "improper matter," and "not drawn . . . in conformity with the laws of this state," because district attorneys have no jurisdiction to bring claims under the UCL "outside the geographic boundaries of their local jurisdictions." (Ex. 8 at pp. A117–19.)

25. Petitioners argued the California Constitution designates the Attorney General as the State's "chief law officer," and empowers him or her with "direct supervision over every district attorney . . ., in all matters pertaining to the duties of their respective offices," (*see* Cal. Const., art. V, § 13) and on the grounds that binding authority—*People v. Hy-Lond Enterprises. Inc.* (1979) 93 Cal.App.3d 734 ("*Hy-Lond*")—maintains that a local district attorney does not have the authority to "release claims belonging to the rest of the state, or to collect for himself amounts putatively owed to the State as a whole." (Ex. 8 at pp. A122–24.)

26. On March 27, 2017 the District Attorney filed an opposition to the Motion. (Ex. 11.) The District Attorney contended that the language and legislative history of § 17204 authorize district attorneys to "prosecute actions on behalf of the People of the State of California for the full range of remedies under the statutes." (See *id.* at p. A191.) The District Attorney's opposition addressed only the substantive merits of the motion. The District Attorney did not raise any procedural grounds for denial of the motion. The District Attorney also opposed Petitioners' Request for Judicial Notice. (Ex. 12.)

27. On April 17, 2017, Petitioners filed a reply brief in support of the Motion, (Ex. 13), and a reply to the District Attorney's opposition to Petitioners' Request for Judicial Notice, (Ex. 14).

IV. THE RULING OF THE SUPERIOR COURT.

28. The Motion was heard by the superior court on May 22, 2017. (Ex. 15 [May 22, 2017 transcript of hearing].)

29. At the hearing, the superior court rejected Petitioners' contention that *Hy-Lond* held that § 17204 does not authorize a District Attorney to bring claims outside of his geographical jurisdiction. The superior court instead read *Hy-Lond* as affecting only a district attorney's authority to settle statewide claims.

30. According to the superior court, *Hy-Lond* "had absolutely no problem with" civil penalties being included in the settlement agreement at issue in that action. (Ex. 15 at A240:19–21.) Instead, in the superior court's view, "the *Hy-Lond* settlement went awry" because—as the *Hy-Lond* court noted in a footnote (but nowhere else) in its opinion—the district attorney "said: we are going to protect this settlement at all costs. So before anybody, anywhere in the state, goes against any one of your convalescent homes, they have to come through the district attorney in Napa County first. That was the problem with *Hy-Lond*, and so that's why I don't see this as a problem." (*Id.* at A240:22–A241:6.)

31. The superior court found that it could deal with any issue in the current action relating to the Attorney General's authority by allowing the Attorney General to be heard in the action if he asks to do so, stating that "if the AG comes in and says I want to be heard on this, you bet I'm going to let them be heard on this; Okay?" (Ex. 15 at A241:8–10.)

32. The superior court further relied on the fact that some of the authority cited by *Hy-Lond* was older and in the superior court's view "was kind of a stretch" and therefore "kind of shaky." (Ex. 15 at A241:20–A242:10.) Thus, the superior court essentially limited *Hy-Lond* to its specific facts and determined that *Hy-*

Lond's holding would not come into play unless and until Petitioners' reached a settlement with the District Attorney. (*Id.* at p. A241:7–12; A242:16–23.)

33. On May 22, 2017, the superior court issued a minute order denying the Motion for the reasons stated on the record. (Ex. 16 at p. A252.) The court also denied the Request for Judicial Notice. (*Id.*)

V. BASIS FOR WRIT RELIEF.

34. Writ review is necessary and proper here for several reasons.

35. First, writ relief is appropriate when a trial court permits a district attorney to act in excess of his statutory authority, because when the court grants that sort of permission, it "exceed[s] its jurisdiction." (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 242). Here, Petitioners assert that the Superior Court of California, County of Orange has done just that by allowing the First Amended Complaint to proceed on behalf of residents of California statewide, as opposed to on behalf of residents of Orange County alone.

36. The scope of a local prosecutor's authority to bring statewide claims under § 17204 is an also issue of significant importance that has evaded review, despite inconsistent rulings in the Superior Courts of Los Angeles, San Francisco, and Orange Counties. (See Exs. 10.B at p. A157 [holding that city attorneys of Los Angeles, Santa Monica, and San Diego lacked authority under § 17204 to bring statewide claims], 10.C at p. A175 [granting motion to strike statewide allegations because district attorneys of San Francisco and Los Angeles Counties lacked authority under

§ 17204 to bring statewide claims]; RJN Ex. 1 at p. R20–21 [holding that San Francisco city attorney had authority under § 17204 to bring statewide claims].)

37. These inconsistent rulings mean that, currently, a district attorney's authority to bring statewide UCL claims varies from court to court, and even from department to department. This lack of uniformity in the law could be resolved by this Court's determination of this Petition on the merits.

38. Finally, writ relief is necessary to avoid irreparable injury to Petitioners. Orange County is home to less than 10 percent of California's residents. A statewide litigation that exceeds the authority of the District Attorney could subject Petitioners to (likely unrecoverable) additional litigation costs due to the vastly increased scope and complexity of the litigation. Moreover, although Petitioners vigorously dispute the merits of the District Attorney's claims, an unmerited tenfold increase in potential scope of this matter and liability will invariably have an unmerited and unfairly coercive effect on Petitioners' decisions in defending the case. Absent intervention by the Court of Appeal to correct this problem and clarify the law, parties—including some of these Petitioners, will continue to face similarly improper lawsuits. (See, e.g., *People of the State of California ex rel. Orange County District Attorney Tony Rackauckas v. Boehringer Ingelheim Pharms., Inc, et al.* (Super. Ct. Orange County, Apr. 11, 2017, No. 30-2017-00914599-CU-BT-CXC) [seeking statewide relief against, among others, Teva USA and several of its subsidiaries].)

39. Without writ review, Petitioners will not have certainty on the extent to which a judgment in their favor in this case purportedly brought by "the People" will have preclusive force outside of Orange County. In the event that Petitioners face multiple suits for multiple or overlapping liabilities in other jurisdictions asserted by other district attorneys or local prosecutors, any potential for lack of finality after a favorable judgment in the action asserted in Orange County is, in itself, irreparable injury that justifies writ relief here.

VI. THE PETITION IS TIMELY.

40. The superior court entered the order that is the subject of this Petition on May 22, 2017. (Ex. 16 at pp. A251–52.) Petitioners are filing this Petition within 60 days of that Order. Therefore, the Petition is timely. (*Cal. W. Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173 ["As a general rule, a writ petition should be filed within the 60-day period that applies to appeals."].)

VII. PRAYER FOR RELIEF

Petitioners respectfully pray that this Court:

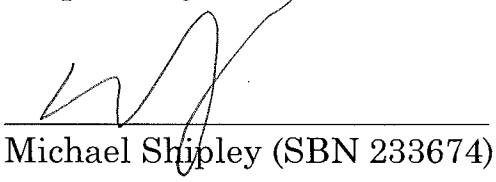
1. Issue a peremptory writ in the first instance directing the superior court to vacate its May 22, 2017 Order denying the Motion, and to enter an order granting the Motion.

2. Issue an alternative writ, order to show cause, or other order directing the superior court and the District Attorney to show cause before this Court, at a time and place specified by this Court, why a writ should not issue directing the superior court to vacate its May 22, 2017 Order denying the Motion to and to enter an order granting the Motion;

3. Award Petitioners their costs in this proceeding; and

4. Grant such other further relief as is just and equitable.

Respectfully Submitted,



Date: July 21, 2017 Michael Shipley (SBN 233674)

VERIFICATION

I, Michael Shipley, declare:

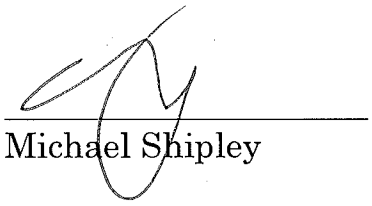
1. I am an attorney admitted to practice before the courts of the State of California, and I am counsel for Petitioners/Defendants Teva Pharmaceuticals USA, Inc.; Duramed Pharmaceuticals, Inc.; Duramed Pharmaceuticals Sales Corp., and Barr Pharmaceuticals Inc.

2. I have read the foregoing Petition for Writ of Mandate. I am better informed of these facts than Petitioners and thus I am in a better position to verify these facts than my clients. Except where stated to be based on information and belief, the facts alleged in this Petition are true of my own knowledge.

3. Filed concurrently with this Petition is Petitioners' Appendix of Exhibits and a Request of Judicial Notice that appends two additional exhibits. All filed documents are true and correct copies of what they purport to be.

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

Executed on July 21, 2017, at Los Angeles, California.



Michael Shipley

MEMORANDUM OF POINTS AND AUTHORITIES

This Petition addresses a clear and ripe question of statewide importance: Does Business & Professions Code section 17204 ("§ 17204") permit a county district attorney to bring a claim that seeks relief for alleged injuries to residents of California counties whom he or she does not represent, based on conduct occurring outside the county he or she serves? The answer is no; the superior court erred in holding otherwise.

I. IN CALIFORNIA, DISTRICT ATTORNEYS HAVE LIMITED AUTHORITY TO PURSUE CIVIL CLAIMS.

A "district attorney is a 'public prosecutor'[.]" (*Pac. Gas & Elec. Co. v. Cty. of Stanislaus* (1997) 16 Cal.4th 1143, 1151 ("*PG&E*") [citing Gov. Code, § 26500].) "The district attorney is a county officer who is authorized by statute to prosecute those crimes committed within the geographic confines of his or her county." (*People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 13, citing Gov. Code, §§ 2400, 26500, 26502.) "When prosecuting crimes, the district attorney acts as an officer of the state," (*id.*) and his or her authority is "subject to the 'direct supervision' of the state Attorney General." (*PG&E, supra,* 16 Cal.4th at p. 1151, citing Cal. Const., art. V, § 13.)

When it comes to civil actions, however, a district attorney's authority is more closely "circumscribed[ ] by statutes." (*In re Dennis H.*, 88 Cal.App.4th 94, 100 ("*Dennis H.*").) Government Code section 26500, which authorizes district attorneys to prosecute *crimes*, does not "give district attorneys plenary authority to pursue any and all" civil penalties. (*People v. Superior Court (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th

33, 43 ("*Solus*").) The authority to pursue civil penalties and remedies on behalf of the People of California is generally within the purview of the Attorney General,[5] (see *D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 14), not individual district attorneys. It is, after all, the Attorney General's constitutional duty "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.)

In contrast, a district attorney "has no authority to prosecute civil actions absent specific legislative authorization[.]" (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753.) Thus, actions for "collection of civil penalties by the district attorney . . . must be expressly authorized" by statute. (*Hy-Lond, supra,* 93 Cal.App.3d at p. 751.) In California, "the Legislature's traditional practice has been to affirmatively specify the circumstances in which a district attorney *can* pursue claims in the civil arena, not the circumstances in which he *cannot*." (*Solus, supra,* 224 Cal.App.4th at p. 42, emphasis original.) The "types of civil cases in which the district attorney may participate" has been "narrow[ly] enumerated" by the Legislature. (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 237 (1975) ("*Safer*").) "By the specificity of its enactments the Legislature has manifested its concern that the district attorney exercise the power of his office

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[5] Under certain circumstances, a different state actor can act under a delegation of authority from the Attorney General. (See, e.g., *California Air Res. Bd. v. Hart* (1993) 21 Cal.App.4th 289, 293.) The District Attorney does not assert that he is acting under any statewide delegation of authority here. (*Cf.* Ex. 7 ¶ 4 [addressing "Plaintiff's authority"].)

only in such civil litigation as that lawmaking body has, after careful consideration, found essential." (*Id.* at p. 236.)

Courts have thus held that, lacking statutory authorization, a district attorney may not bring a civil contempt claim "stemming from private civil litigation." (*Safer, supra*, 15 Cal.3d at p. 237.) A district attorney may not "participate in the juvenile dependency proceedings to represent state interests unless there is express statutory authorization." (*Dennis H., supra*, 88 Cal.App.4th at p. 102.) She may not represent third-parties in writ proceedings related to criminal discovery. (*Bullen v. Superior Court* (2008) 204 Cal.App.3d 22, 25.) And this Court recently held that this district attorney could not bring an action seeking civil penalties for certain occupational safety violations when the action was not authorized by any statute. (*Solus, supra*, 224 Cal.App.4th at p. 43).

In addition to these subject-matter limitations, "the district attorney's authority is territorially limited[.]" (See *Pitts v. Cty. of Kern* (1998) 17 Cal.4th 340, 361.) Both the State Constitution and the Government Code make a district attorney an elected *county* official, politically accountable to the citizens who elect him. (See Cal. Const., art. XI, § 1 ["The Legislature shall provide for . . . an elected district attorney . . . in each county."]; Gov. Code, § 24009 ["the county officers to be elected by the people are the . . . district attorney"].) "[A] district attorney is a county officer in at least a geographic sense—that is to say, that the exercise of his powers as such is limited territorially to the county for which he has been elected." (*Singh v. Superior Court* (1919) 44 Cal.App. 64, 65–66; see also *Hy-Lond, supra*, 93 Cal.App.3d at p. 751.)

The geographic limitations on the power of district attorneys in civil actions are both commonsensical and in furtherance of basic tenets of democracy. Because district attorneys are elected by county citizens, not citizens of the whole of the state, their accountability and authority ends at the county line.

In *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203 ("*Younger*"), the Court of Appeal addressed the inverse question of when a court could force the Attorney General to use his supervisory authority (*see* Gov. Code, § 12550) to take over an otherwise local criminal prosecution due to disqualification of the entire district attorney's office. (86 Cal.App.3d at p. 203.) In explaining why courts should be wary of doing so, the Court of Appeal noted that it is the local district attorney—not the Attorney General—who "has been chosen by vote of the electorate as the person to be entrusted with the significant discretionary powers of the office of district attorney and he is accountable to the electorate at the ballot box for his performance in prosecuting crime within the county." (*Ibid.*) If the "Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county." (*Ibid.*) "The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county." (*Ibid.*)

Younger's point is just as true in the inverse. Because the District Attorney is "accountable at the ballot box *exclusively* to the electorate of the county," (*Younger, supra*, 86 Cal.App.3d at p. 203, emphasis added), unlike the Attorney General, he lacks democratic accountability to exercise prosecutorial discretion over civil litigations on behalf of residents of other counties in the state. For example, the residents of Sonoma County have no vote for or against the tactics employed by the Orange County District Attorney.

Consistent with these principles, although the Government Code expressly permits district attorneys to conduct *some* extra-territorial civil litigation activities, it imposes conditions on their doing so and it does *not* authorize them unilaterally to file civil actions seeking civil penalties statewide. For instance, a district attorney may "act jointly [with district attorneys for other counties] in prosecuting a civil cause of action of benefit to his own county in a court of the other jurisdiction[.]" (Gov. Code, § 26507.) And a district attorney may provide "legal or investigative services, or both, pertaining to the prosecution of a civil cause of action in the other county by the district attorney of that county[.]" (Gov. Code, § 26508.) Notably, both provisions require, at minimum,[6] the affirmative consent of the district attorney in the other jurisdiction. (Gov. Code, §§ 26507, 26508.)

In contrast, *no* provision in the Government Code authorizes a district attorney to bring civil claims seeking statewide relief for

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[6] Government Code section 26508 also requires the consent of "the boards of supervisors of both affected counties[.]"

conduct and injuries occurring outside of his or her jurisdiction. The Legislature "knows how to grant [a district attorney] such power when it wishes to do so[.]" (*Safer*, *supra*, 15 Cal.3d at p. 238.) Indeed, in light of *Safer*, this Court has explained that it was "clear that the Legislature's traditional practice has been to affirmatively specify the circumstances in which a district attorney *can* pursue claims in the civil arena, not the circumstances in which he *cannot*[.]" (See *Solus*, *supra*, 224 Cal.App.4th at p. 42, emphasis original.) Under that rule, absent an affirmative and specific grant of extraterritorial authority in some other statute, the Government Code's omission of any authority for the District Attorney to seek statewide relief is dispositive, and he lacks authority to do so. (*Ibid.*)

II. SECTION 17204 DOES NOT AUTHORIZE THE DISTRICT ATTORNEY OF A SINGLE COUNTY TO SEEK STATEWIDE PENALTIES FOR ALLEGED VIOLATIONS OF THE UNFAIR COMPETITION LAW.

There is no dispute that § 17204 authorizes various state and local officials, including district attorneys, to prosecute actions for relief under the UCL. (§ 17204.[7]) The UCL does not, however,

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[7] Section 17204 says, in full: "Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered

expressly permit a district attorney to "commence, when appropriate, actions in other counties." (Cf. *Hy-Lond*, *supra*, 93 Cal.App.3d at p. 753.) In the superior court, the District Attorney argued that § 17204 authorizes him to bring an action for *statewide* relief, including civil penalties for alleged violations having no factual nexus to Orange County, the only geographic territory in which he was elected. The superior court agreed. But the argument is incorrect and contrary to law.

People v. Hy-Lond specifically addressed the geographic limits on a district attorney's authority under § 17204. In *Hy-Lond*, the Napa County District Attorney entered into a statewide settlement of UCL claims against a chain of eighteen hospitals in twelve different counties, including but not limited to Napa. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 740.) Defendant entered a stipulated settlement with the district attorney, settling all claims statewide for $40,000 in penalties and various injunctive relief, in return for "absolution for all its past sins, whether fancied or actual, in all 12 counties in which it owned facilities." (*Id.* at pp. 741–42 & fn. 2, 749 & fn. 7.)

After judgment had been entered, the Attorney General—acting in the interests of the state Department of Health Services—moved to intervene and vacate the settlement under Code of Civil Procedure section 663. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 742.) The Attorney General argued that the "district attorney exceeded his authority in stipulating away

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injury in fact and has lost money or property as a result of the unfair competition."

certain rights and duties reserved to the office of the Attorney General and the Department respectively." (*Id.* at p. 745.) Because "there was an alleged lack of authority [by the district attorney] to effect the settlement on the terms embodied in the judgment," (*id.* at p. 747), the Attorney General asked the superior court to vacate the judgment in its entirety, or at least to amend the judgment "to the extent that it purports to bind governmental officials and agencies who were not parties to the action." (*Id.* at p. 743.) The trial court denied the motion and the Attorney General appealed.

The Court of Appeal rejected defendant's threshold argument that the Attorney General lacked standing to challenge the judgment. (*Hy-Lond*, *supra*, 93 Cal.App.3d at pp. 743–51.) Moving to the merits, it explained that it was specifically "called upon to determine the authority conferred on the district attorney by . . . § 17204[.]" (*Id.* at p. 752.[8]).

The Court first dispensed with the argument that merely identifying the plaintiff as the "People of the State of California"—as also occurred here—had any significance to the question at hand. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 751.) It did not. Government Code section 100 requires all process to be styled in that matter. But that styling did not delimit "who is authorized to represent 'The People of the State of California' in any particular action, or the limits to which such authority extends." (*Ibid.*)

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[8] *Hy-Lond* also addressed a nearly identical provision in Business & Professions Code section 17535, which is not at issue here and has no bearing on the relevant analysis. (*See Hy-Lond*, *supra*, 93 Cal.App.3d at p. 747.)

Instead, as discussed above, the question turned on the district attorney's statutory authority—that is, whether § 17204 authorized him to bring and compromise a statewide action, which would have the effect of binding the Attorney General, other state agencies, and other district attorneys. (*Hy-Lond*, *supra*, 93 Cal.App.3d at pp. 751–752.) Again, it did not. As the court explained, the fact that § 17204 authorized a district attorney to prosecute some action under the UCL did not afford him "uncircumscribed authority" to "restrain the the powers of other officials and agencies." (*Id.* at 752.) Section 17204 did not permit "the district attorney to surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other counties under [the UCL][9]." (*Id.* at 753, discussing *Sacramento Cty. v. Cent. Pac. R. Co.* (1882) 61 Cal. 250, 255.)

Finally, the *Hy-Lond* court expressly noted the conflict of interest that would result from "putting the initiating district attorney in the position of bargaining for the recovery of civil penalties that would flow into his county's coffers, at the expense of surrendering the rights and duties of the state to control the respondent's activities generally through the powers of the Attorney General (other district attorneys) and the Department." (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 753.) This concern is especially prescient where, as here, a district attorney relies on a

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[9] During the pendency of the appeal in *Hy-Lond*, the UCL was moved from its original location in the Civil Code to the Business & Professions Code. (*See Hy-Lond*, *supra*, 93 Cal.App.3d at p. 739.) The recodification does not effect the analysis.

cadre of private attorneys to press claims under an unknown compensation structure, adding yet another layer of potential conflicts. (Cf. *Cty. of Santa Clara v. Superior Court* (2006) 50 Cal.4th 35, 62 ("*Santa Clara*") [recognizing the "possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary reward"].)

The federal court's decision in *People of the State of California v. M & P Investments* (E.D.Cal. 2002) 213 F.Supp.2d 1208 ("*M&P*"), is similarly instructive. Like § 17204, Code of Civil Procedure section 731 ("§ 731") "permits a city attorney to bring an action to abate a public nuisance *under state law* 'in the name of the people of the State of California.'" (*M&P, supra,* 213 F.Supp.2d at p. 1212.) As the District Attorney does here, in *M&P*, the City Attorney of Lodi asserted that § 731 permitted him to sue "on behalf of the 'State Sovereign'—the 'people of the State of California.'" (*Id.* at p. 1214.)

The City Attorney further explained his position: "In the Plaintiff People's view, when a city attorney acts pursuant to [§ 731] he is acting to abate a public nuisance on behalf of the public at large; in doing so he is exercising the 'sovereign' will of the 'people,' not the will of the 'Executive Branch of State government." But the Attorney General—invited to appear by the court—disagreed, explaining that "it is the City that is the plaintiff in this suit. To the extent the City represents the 'people' as well by virtue of [§ 731], that representation extends no further than those persons who reside in the City of Lodi." (*M&P, supra,* 213

F.Supp.2d at p. 1214, alternation in *M&P* omitted.) "Relying primarily on [*Hy-Lond*] the Attorney General contends that the geographical boundaries of the city represent the jurisdictional limits of a city attorney; therefore, a city attorney cannot represent the State or the 'people of the State' as a separate party apart from the city." (*Ibid.*; see also Ex. 10.A [Amicus Curiae Memorandum of Points and Authorities of the California Attorney General in *State of California v. Whole Foods Market California, Inc.* (Super. Ct. L.A. County, May 25, 2016, No. SC122679) at p. at A142 ("[The California] Constitution did not establish a system in which scores of local elected prosecutors representing their own constituents may bind the entirety of California, to the exclusion of other local prosecutors and the State's chief law enforcement officer. Moreover, *while the UCL . . . vest[s] local prosecutors with important consumer authority, that power extends only as far as the general police power to the borders of each locality, and no further, Local UCL lawsuits address local violations of the law.*") (emphasis added)].)

The court agreed with the Attorney General's view of the law. As it explained, "[t]o *require* that the 'will of the people of California' be placed in the hands of the City Attorney of Lodi when the elected Governor and Attorney General have decided not to exercise their authority, and, expressly oppose the City Attorney's assumption of such authority, seems a bizarre notion." (*M&P*, *supra*, 213 F.Supp.2d at p. 1214, emphasis original.) "[D]espite being granted the authority to bring an action *in the name of the People of the State,* a city attorney does not represent the State

with the full power accorded that position." (*Id.* at 1215, emphasis original.) "Thus, the only acceptable interpretation of [§ 731] is that when suit is brought to abate a public nuisance under the statute, a city attorney acts only as the legal representative of his city's residents." (*Id.* at 1214.)

The limitations addressed in *Hy-Lond* and *M&P* make eminent sense as applied to the facts and law of this case, where the District Attorney purports to sue not only on behalf of California consumers outside of Orange County, but also apparently on behalf of state-run benefits programs such as the California Medicaid Program. (See Ex. 7 ¶¶ 134–140.) As *Hy-Lond* explained with respect to the Department of Health Services, it is the Attorney General, not a local district attorney, who has the authority to represent the interests of these agencies.

Notably, the predicate statutory "unlawfulness" violations alleged in the complaint are purported statewide violations of antitrust laws: violations of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), the Sherman Antitrust Act (15 U.S.C. §§ 1–7), the Clayton Antitrust Act (15 U.S.C. §§ 12–27), and the Federal Trade Commission Act (15 U.S.C. § 45). (Ex. 7 ¶ 148.) To the extent that state-level enforcement is permitted by a *parens partrie* suit on behalf of the people of a state, each of these Acts foresees such an action being brought only by or under the direction of the state's attorney general. Given those limits, in construing § 17204, courts should require explicit authorization for a district attorney to sue for relief beyond the county that he or she represents

For instance, Business & Professions Code section 16760, subdivision (a) "permits the Attorney General to bring 'a civil action in the name of the people of the State of California, as *parens patriae* on behalf of natural persons residing in the state' for treble damages arising from violations of the Cartwright Act." (*PG&E*, *supra*, 16 Cal.4th at p. 1148.) And although subdivision (g) permits actions by a district attorney, such actions are expressly limited to "whenever it appears that the activities giving rise to the prosecution or the effects of the activities occur primarily within that county." (Bus. & Prof. Code, § 16760, subd. (g).)

The federal antitrust laws are even more restrictive. As a matter of both statute and common law, *parens patriae* enforcement of the Sherman and Clayton acts is limited to state attorney generals in their capacity as representatives of the sovereign states: "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*." (*City of Rohnert Park v. Harris* (9th Cir. 1979) 601 F.2d 1040, 1044, quotation omitted; 15 U.S.C. § 15c; *cf. PG&E*, *supra*, 16 Cal.4th at p. 1151 [permitting county to sue on its own behalf to recover for *its own* antitrust injury].[10]) As for the Federal Trade Commission Act, enforcement is expressly reserved for federal authorities; no state level actions are authorized. (See *In re Gen. Motors Corp. Engine Interchange Litig.* (7th Cir. 1979) 594 F.2d 1106, 1128 [FTCA not enforceable in *parens patriae* suits because

[10] The District Attorney's complaint in this case does not allege any particular antitrust injury to the District Attorney himself or any person or county agency whom the District Attorney is permitted to represent in a civil action. (*See* Ex. 7 ¶¶ 117–124.)

the FTCA "does not leave protection of the public interest up to the Attorneys General of the fifty states"].)

Moreover, as specifically discussed in *Hy-Lond*, permitting the Orange County District Attorney to sue on behalf of California residents statewide and state agencies as well would present an acute conflict of interest. The UCL dictates that any recovery of penalties by a district attorney flow 100 percent into county coffers, (Bus. & Prof. Code, § 17206, subd. (c)), motivating the Orange County District Attorney to prioritize recovery of penalties rather than other relief in litigation or settlement. That could result in the recovery for the coffers of Orange County—and its unilaterally selected private law firms—disproportionately for wrongs allegedly visited on a public benefits program serving Californians throughout the state, as well as on California consumers who have no connection to Orange County. While an award of restitution would restore to these persons any money or property acquired by means of the alleged unfair competition (*see* Bus. & Prof. Code, § 17203), the District Attorney is incentivized to pursue penalties over restitutionary relief, as only the former would result in a direct financial benefit to the county whose residents elect him.

Despite the authority and the compelling rationale of Petitioners' position, the superior court declined to limit the District Attorney's authority to the borders of Orange County. According to the superior court, "the *Hy-Lond* settlement went awry" because—as footnoted in the *Hy-Lond* opinion—the district attorney "said: we are going to protect this settlement at all costs.

So before anybody, anywhere in the state, goes against any one of your convalescent homes, they have to come through the district attorney in Napa County first. That was the problem with *Hy-Lond*, and so that's why I don't see this as a problem." (Ex. 15 at A240:22–A241:6.)

The superior court further took issue with some of the authority cited by *Hy-Lond* because—in the superior court's opinion—it "was kind of a stretch" and thus "kind of shaky." (Ex. 15 at A241:20–A242:10.) Thus, the superior court essentially limited *Hy-Lond* to its specific facts and determined that *Hy-Lond*'s holding would not come into play unless and until Petitioners' reached a settlement with the District Attorney. (*Id.* at p. A241:7–12; A242:16–23.)

The superior court's reading of *Hy-Lond* was wrong. Nothing in the rationale of that opinion suggests that it should apply only in the context of a statewide settlement agreement. (Cf. *Hy-Lond*, *supra*, 93 Cal.App.3d at p. 741 fn. 1.) On the contrary, *Hy-Lond* expressly stated its concern with the "right of the district attorney to surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other counties under [the UCL]." (*Id.* at p. 753.)

Indeed, the superior court's holding—that the geographic limitations on a district attorney's authority apply only to the authority to settle cases—lacks support in either practicality or the case law.

First, the scope of settlement authority cannot practically be separated from the authority to prosecute a case. The nature and

scope of the claims a plaintiff may assert in a given matter shape the entirety of any litigation, most notably the scope of discovery and concomitant burden placed on a defendant. These factors directly shape a defendant's litigation strategy, including whether to mount a vigorous defense or resolve a matter through settlement. Permitting a plaintiff to assert claims on which that plaintiff is not authorized to recover, or that are far beyond the scope on which that plaintiff is authorized to recover, necessarily prejudices a defendant's ability to defend against and resolve the litigation.

Moreover, Petitioners are also entitled to certainty on the extent to which a judgment in their favor in this case purportedly brought by "the People" will have preclusive force outside of Orange County, which could implicate Constitutional concerns. (Accord *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 370 (dissenting opn. of Bedsworth, J.) ["There are few concepts in the law as vital—as sacrosanct—as the finality of judgments. It is not hyperbole to say that assuring litigants of the finality of judgments is a sine qua non of an effective system of civil justice."]; see also *W.U. Tel. Co. v. Com. of Pa., by Gottlieb* (1961) 368 U.S. 71, 75).)

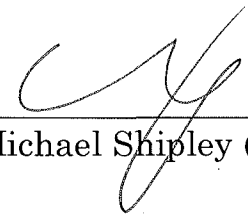
Regardless of whether the practice of local district attorneys hiring private attorneys is permissible, the risk of deviating approaches to prosecutorial discretion is heightened if multiple district attorneys and their private counsel are permitted—and financially incentivized—to prosecute claims on behalf of the State. (See generally *Santa Clara, supra*, 50 Cal.4th at p. 62.)

Second, the core principle addressed in *Hy-Lond*—the limitation on whom a district attorney represents—has been recognized outside of the settlement context, including in the context of acts taken in active litigation. (See, e.g., *In re Stier* (2007) 152 Cal.App.4th 63, 74 [when the San Francisco "District Attorney did not represent the interests of the state, and was not acting under the direction of the Attorney General . . . the District Attorney represented only the City and County of San Francisco" and thus the Attorney General could not be bound to a waiver made by the district attorney].") For example, *M&P* was not limited to the settlement context.

III. CONCLUSION

For the foregoing reasons, the Court should issue a preemptory writ ordering the superior court to vacate its decision, or an alternative writ or order to show cause requiring the superior court to explain why the Court should not do so.

Respectfully Submitted,



Date: July 21, 2017

Michael Shipley (SBN 233674)

CERTIFICATE OF COMPLIANCE WITH RULE OF COURT 8.204(c)(1) & 8.486(a)(6)

I, Michael Shipley, counsel for Petitioners/Defendants Teva Pharmaceuticals USA, Inc.; Duramed Pharmaceuticals, Inc.; Duramed Pharmaceuticals Sales Corp., and Barr Pharmaceuticals Inc., herby certify that the text of this brief contains 8,427 words, excluding the cover, tables, certificates, signature blocks, verification, and supporting documents, as counted by the Microsoft Word program used to generate this brief.

Date: July 21, 2017

Michael Shipley (SBN 233674)

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 333 South Hope Street, 29th Floor, Los Angeles, California 90071.

On July 21 2017, I served the document(s) described as:

PETITION FOR WRIT OF MANDATE; MEMORANDUM IN SUPPORT THEREOF

[EXHIBITS FILED UNDER SEPARATE COVER]on the parties below by placing a true copy thereof in a sealed envelope as follows:

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Joe D'Agostino, Senior Assistant District Attorney (SBN 115774)
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CLERK OF COURT

Superior Court of California for the County of Orange
Civil Complex Center
751 West Santa Ana Boulevard
Santa Ana, CA 92701

ROBINSON CALCAGNIE, INC.

Mark P. Robinson, Jr. (SBN 054426)
Kevin F. Calcagnie (SBN 108994)
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[X] FEDEX: I placed the document(s) listed above in a sealed overnight courier envelope addressed to the parties below and routing the envelope for pick up within our offices by Federal Express. I am familiar with the firm's practice of routing for daily pick up in our offices by Federal Express on that same day with charges thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the delivery date is more than one day after date of deposit with Federal Express in this affidavit.

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

Executed on July 21, 2017, at Los Angeles, California.

Keith Catuara