No. D072577

IN THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION 1

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

PETITIONERS' CONSOLIDATED ANSWER TO AMICUS BRIEFS

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PETITIONERS' CONSOLIDATED ANSWER TO AMICUS BRIEFS

Petitioners Abbott Laboratories, AbbVie Inc., Barr Pharmaceuticals Inc., Duramed Pharmaceuticals, Inc.; Duramed Pharmaceuticals Sales Corp., and Teva Pharmaceuticals USA, Inc. ("Petitioners") submit this consolidated answer to the amicus briefs filed by: (1) Attorney General Becerra; (2) the California District Attorneys Association ("CDAA"); (3) the United States and the California Chambers of Commerce (the "Chambers") (4) four city attorneys, one county counsel, and the California State Association of Counties (the "City Attorneys"); and (5) the Consumer Attorneys of California (the "Consumer Attorneys").

Petitioners concur in the core points made by the Attorney General and the CDAA—that constitutional, statutory, structural, and accountability concerns all merit the conclusion that "when a local public prosecutor brings a UCL law-enforcement action in the name of the People, he or she exercises the State's sovereign police powers, but does so only within the boundaries of that prosecutor's represented geographic territory." (Attorney General Br. at p. 6; CDAA Br. at p. 12.) These briefs articulate the views of the Attorney General as chief law enforcement officer of the state and the collective understanding of the State's 58 elected district attorneys, over whom he has supervisory authority. The well-stated arguments of these amici are entitled to significant weight.

Similarly well taken are the arguments of the two Chambers, who show that affording district attorneys authority to assert statewide claims unilaterally would raise troublesome constitutional concerns, including calling into question the

fundamental structure of the California State government's executive branch, and frustrating the ability to settle UCL lawsuits brought by local prosecutors. (Chambers Br. at pp. 23–26.)

Further response is merited, however, to several of the assertions in the City Attorneys' Brief—which states the views of four city attorneys, one county counsel, and a lobbying organization for county governments.[1] The City Attorneys' argument that the UCL "unambiguously" grants local prosecutors the authority to sue for statewide UCL violations rests on the flawed premise that the absence of an express geographic limit on their authority means no limit at all. The law is just the opposite. Similarly unconvincing are the City Attorneys' efforts to distinguish controlling precedent and to equate the court's power to grant equitable relief with a local prosecutor's standing to seek it.

The policy arguments raised by the City Attorneys and the Consumer Attorneys are also unpersuasive, particularly in light of the Attorney General's statewide mandate to ensure the uniform enforcement of state law, and his position in this case (and others) that both California law and sound policy deny local prosecutors the authority to pursue state-wide UCL claims.

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[1] *See* http://www.counties.org/about-csac (describing the "primary purpose" of amicus California State Association of Counties "to represent county government before the California Legislature, administrative agencies and the federal government" and emphasizing its focus on "educating the public about the value and need for county programs and services.")

I. THE LONGSTANDING AND WELL-REASONED VIEWS OF THE ATTORNEY GENERAL AND THE CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION ARE ENTITLED TO SIGNIFICANT WEIGHT.

The Court should afford significant weight to the reasons articulated in the Attorney General's brief—his office's well-reasoned and longstanding view that local district attorneys do not have authority under the UCL to bring statewide claims.

At its core, Petitioners' writ addresses the allocation of civil prosecutorial power within the executive branch of the State government. When it comes to the enforcement of the State's laws, the Attorney General sits at the apex of that branch. (*Steen v. Appellate Div., Superior Court* (2014) 59 Cal.4th 1045, 1053 ["The state Constitution, in an article defining the powers and responsibilities of the executive branch and its principal officers, appoints the Attorney General as "the chief law [enforcement] officer of the State" with "direct supervision over every district attorney . . . ."].) Moreover, the proper interpretation of the UCL "is a cause of particular concern to the Attorney General." (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 503.)

Thus, when Attorney General Becerra cogently argues that a UCL claim brought by a California district attorney is limited to that local prosecutor's jurisdiction, (Attorney General Br. at p. 6), his view merits significant weight. (See generally *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 71.) That is especially true when the views of his office have been longstanding and consistent throughout many administrations, (See *Napa Valley Educators' Ass'n. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251.) On this issue in particular,

the Attorney General's position has been consistent for nearly forty years. (See, e.g., *People v. Hy-Lond Enterprises. Inc.* (1979) 93 Cal.App.3d 734, 738 (*Hy-Lond*) [describing consistent views of former Attorney General Deukmejian]; *California v. M&P Investments* (E.D. Cal. 2002) 213 F.Supp.2d 1208, 1214 (*M&P*) [describing consistent views of former Attorney General Lockyer]; Brief Amicus Curiae of the California Attorney General in *People v. Alquist*, (9th Cir. 2003) No. 03-15205, 2003 WL 22716161 [same]; Ex. 10-A at pp. A139–144 [consistent views of former Attorney General Harris]).

The California District Attorneys' Association, which "is composed of the 58 elected district attorneys, numerous city attorneys, and their respective deputies," and acts as "the principal spokesperson[ ] for California's local prosecutors," (CDAA's Br. At p. 9) agrees with the Attorney General that local prosecutors' authority to prosecute UCL violations does not extend beyond the boundaries of their local jurisdiction. The Orange County District Attorney is the lone district attorney who claims in this case that he has the authority to prosecute violations statewide. In this case, he is joined in his view only by five other local prosecutors (four city attorneys and one county counsel), a lobbying organization for county governments, and an organization of California plaintiff attorneys. As discussed further below, these amici offer no persuasive response to the legal and prudential arguments articulated by the Attorney General, the Orange County District Attorneys' fellow local prosecutors, the California and United States Chambers of Commerce, and in Petitioners' merits briefs.

II. THE CITY ATTORNEYS' STATUTORY ARGUMENTS DO NOT SUPPORT DENYING A WRIT.

A. The UCL Does Not, in Its Silence, Authorize Statewide Enforcement by Local Prosecutors.

The principal argument recycled throughout the City Attorneys' Brief is that because the text of the UCL does not specifically "impose[ ] a limitation on the geographic scope" of a district attorney's authority, no limitation exists. (City Attorneys' Br. at pp. 11, 12, 14, 17, 18, 22 fn. 4, 23, 29, 30.) But the City Attorneys have the rule precisely backwards.

As Petitioners' explained in their merits briefs, it is the Attorney General who has plenary "power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests." (*Pierce v. Superior Court* (1934) 1 Cal.2d 759, 762; see also Gov. Code, § 12511.) District attorneys have similar authority in the criminal context, (Gov. Code, § 26500) subject to the supervisory authority of the Attorney General, (Gov. Code, § 12550). But the Supreme Court has held that district attorneys lack plenary authority when it comes to civil litigation. (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 237 (*Safer*)). Thus, the California Supreme Court has held that if and when the Legislature intends to authorize a district attorney to prosecute civil claims, it must enact a statute that specifically says so; 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; *Safer, supra*, 15 Cal.3d

at p. 237; *People v. Superior Court (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th 33, 43 (*Solus*).)

In this context, Legislative authorizations are not liberally construed—the Legislature "countenance[s] the district attorney's participation' with 'specificity' and 'narrow perimeters." (*Safer, supra*, 15 Cal.3d at p. 236.) Thus, when the scope of a district attorney's authority to prosecute civil claims is at issue, California courts apply a strict interpretive rule: they expect the Legislature 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.) Under that rule, the Court will "infer the district attorney's lack of authority to proceed where no authority is granted." (*Id.* at p. 43) Legislative silence, in other words, is interpreted *against* district attorney authority, not in its favor.

The City Attorneys make no effort to grapple with this well-established rule; they do not so much as cite any of the relevant cases, even though they are addressed at length in the merits briefing. The City Attorneys nonetheless make two meritless arguments that textual silence conveys statewide authority. First, they suggest that by permitting District Attorneys and certain city attorneys to bring actions on behalf of "the People," the Legislature expressed an intent for that authority to be "coextensive" with that of the Attorney General. (City Attorneys' Br. at pp. 11–13.) And second, they claim that when the Legislature intends to "limit local government prosecutions to the jurisdictional boundaries of their

counties or cities" it includes specific language that does so. (*Id.* at p. 16.) Neither argument has any support.

1. An Authorization to Represent "The People" Does Not, in Itself, Convey Statewide Enforcement Authority on District Attorneys.

As in prosecuting a crime, when a district attorney, (or for that matter, a city attorney like amici), pursues civil penalties under the UCL, he or she exercises the authority of the State as a sovereign, on behalf of the "People of the State of California." (See Gov. Code, § 100; Bus. & Prof. Code, § 17204.) It has long been settled law that in prosecuting crimes, a district attorney "acts by the authority and in the name of the people of the state." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 359, quoting *County of Modoc v. Spencer* (1894) 103 Cal. 498, 501.) The district attorney "represents the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 122, quoting *Fleming v. Hance* (1908) 153 Cal. 162, 167.) And when the Legislature permitted the Attorney General, district attorneys, and certain city attorneys to *civilly* enforce the UCL by authority and in the name of "the People of the State of California," it authorized bringing that sovereignty to bear. That alone, however, does not answer any question pertinent to this case.

"[T]he state may, through its Legislature, and in the exercise of its sovereign power . . . apportion and delegate to the counties any of the functions which belong to it." (*Sacramento County v. Chambers* (1917) 33 Cal.App. 142, 149.) But a delegation of some sovereign power to be exercised by local public servant does not—

as the City Attorneys seem to assume—automatically convey an unlimited license to exercise that power anywhere and everywhere throughout the State. Indeed, the City Attorneys cite nothing to support such a radical assumption, which pervades their brief.

To the contrary, *Hy-Lond* determined that the fact that a district attorney wields a piece of the State's sovereignty is not dispositive of anything. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 751.)[2] A district attorney's authority to bring claims on behalf of "the People" "does not tell us 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.*)

2. Express Geographic Limits on District Attorneys in Two Non-UCL Statutes Do Not Mean that District's Attorneys Have Authority to Bring Statewide UCL Claims.

The City Attorneys' reliance on other statutes containing express geographical limits on district attorneys' authority is likewise misplaced.

The City Attorneys invoke "the principle of construction that if a statute contains a certain provision regarding one subject, that provision's omission in the same or another statute regarding a

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[2] The City Attorneys suggest various parts of *Hy-Lond*, including this determination, are "dicta." In *Hylond*, had the Napa County District Attorney been correct that his authority to bring claims on behalf of "the People" permitted him to bring and settle claims statewide, there is little doubt that *Hy-Lond* would have come out the other way. This statement thus is clearly more than a dictum. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1047 fn.3 [defining dictum as a comment "unnecessary to the decision in the case"]; *People v. Yarbrough* (2012) 54 Cal.4th 889, 894 [reiterating *Vang*'s definition].)

related subject is evidence of a different intent." (*See In re Alonzo J.* (2014) 58 Cal.4th 924, 934.) In particular, the City Attorneys contend that because a public nuisance statue, (Code Civ. Proc., § 731 (§ 731)), and the Cartwright Act, (Bus. & Prof. Code, § 16760, subd. (g)), contain what the City Attorneys characterize as geographic limitations, the absence of limits in the text of the UCL means that the Legislature intended District Attorneys' authority to be geographically unbounded. The argument is erroneous, for several reasons.

First and foremost, this argument is irreconcilable with the rules the Supreme Court has set out for interpreting statutes that address the authority of district attorneys to participate in civil litigation. These rules dictate that the legislature's silence regarding the scope of a district attorney's authority means that no such authority has been granted. (See *Solus*, *supra*, 224 Cal.App.4th at p. 43 [noting that courts will "infer the district attorney's lack of authority to proceed where no authority is granted."].) The fact that the Legislature has chosen in a few rare instances to limit the enforcement authority of district attorneys expressly does not somehow alter the default rule—set by binding Supreme Court precedent—that applies when the Legislature is silent.

The City Attorneys also misconstrue the Cartwright Act, which permits a district attorney to bring a *parens patriae* claim on behalf of citizens "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).) This language certainly sets a limit, but it is a limit broader than the default rule that a "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[.]" (See *People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 13). Indeed, to some degree, the Cartwright Act *expands* district attorneys' authority by permitting them to act as *parens patriae* for citizens of counties outside their constituencies, but so long as the extraterritorial activities and effects are secondary or incidental to those occurring "primarily within that county." (Bus. & Prof. Code, § 16760, subd. (g).)

The Cartwright Act's rare permission for district attorneys to address anticompetitive conduct occurring only "primarily" within their home counties can hardly be read to mean that every single statute that permits a district attorney to seek a civil penalty on behalf of "the People" silently vests 58 different locally elected prosecutors with statewide enforcement authority. Indeed, while the City Attorneys speak only to the UCL, the formulation that an action to recover a civil penalty "may be brought in any court of competent jurisdiction in the name of the people of the State of California by the Attorney General or by any district attorney . . . ."—without any specific "geographical limitation"—is replete in California's codes.[3] It would make no sense at all for

[3] See Bus. & Prof. Code, §§ 6980.10 [violations of locksmith licensure laws]; 6980.13 [same]; 6980.14 [same]; 7502.1 [violations of repo man licensure laws]; 7502.2 [same]; 7502.6 [same]; 7523 [violations of private investigator licensure laws]; 7523.5 [same]; 7582.3 [violations of security guard licensure laws]; 7582.4 [same]; 19214 [unlawful practices in the sale of furniture]; 22442.3

courts to interpret that silence, in every single one of these provisions, to mean that the San Francisco City Attorney has civil enforcement authority over, for instance, pool heater pilot lights in the San Fernando Valley, (see Pub. Res. Code, § 25967, subd. (a)), or video store customer records in Sacramento, (see Civ. Code, § 1799.3, subd (d)(1)). Neither the Cartwright Act's moderate expansion of civil enforcement authority to address secondary anticompetitive effects that cross county lines nor § 731's referencing that an action to abate a nuisance can be brought by "the district attorney . . . of any county in which the nuisance exists,"[4] can or should change that.

The City Attorneys are also wrong because the interpretive canon they invoke is not nearly as broad as they suggest it is. The "presumption of consistent usage can hardly be said to apply across

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[unlawful practices by immigration consultants]; 22442.6 [same]; 22445 [same]; 22500 [ticket sellers without a physical address]; Civ. Code, §§ 52.1 [deprivations of civil rights]; 1716 [unlawful solicitations posing as bills]; 1745 [art forgeries]; 1785.10.1 [violations of credit reporting laws]; 1789.5 [unlawful electronic transactions]; 1799.3 [invasion of privacy in video rentals]; 1812.33 [commercial discrimination against women]; 2944.7 [unlawful mortgage collection practices]; Food & Agric. Code, § 59246 [violations of agricultural marketing laws]; Gov. Code, §§ 4216.6 [unlawful underground excavation]; 8314 [unlawful use of public resources for political purposes]; 54964.5 [unlawful activities by non-profit organizations]; Health & Safety Code, §§ 25422 [mishandling landfill gas]; 116840 [misuse of water treatment devices]; Lab. Code, §§ 1309.5 [sexual exploitation of minors]; 3820 [violations of workers' compensation laws]; Penal Code, § 653.59 [unlawful practices by immigration consultants]; Pub. Res. Code, § 25967 [violations of energy efficiency laws].

[4] Code Civ. Proc., § 731.

the whole *corpus juris*." (Antonin Scalia & Brian Garner (2012) *Reading Law: The Interpretation of Legal Texts*, at p. 172; (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 751.).) Indeed, "the application of this statutory construction tool to an entire code is questionable." (*In re Sabrina H.* (2007)149 Cal.App.4th 1403, 1411.) Thus, it "is only when different terms are used in parts of the *same* statutory scheme that they are presumed to have different meanings." (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 364, emphasis original.) That is reflected in the two cases applying the tool that are cited in the City Attorneys' brief. One addressed two subsections of the same statute. (*People v. Sinohui* (2002) 28 Cal.4th 205, 213.) The other addressed two bills concerning an identical appropriation in two consecutive years. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 94.) Because the UCL is not part of the same statutory scheme as either the public nuisance statute or the Cartwright Act, the canon is simply inapplicable.[5]

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[5] As the Chambers Brief points out, (Chambers Br. at pp. 22–23), there is a statute in the UCL's scheme that does convey authority for district attorneys to act extra-jurisdictionally. Business & Professions Code section 17207, subdivision (b), permits a district attorney (among others) to enforce an existing UCL injunction "without regard to the county from which the original injunction was issued." (Bus. & Prof. Code § 17207, subd. (b).) Because the consistent usage canon invoked by the City Attorneys can apply within the same statutory scheme, one could arguably draw the negative implication that given the rest of the UCL's silence on the issue, the Legislature meant to imbue district attorneys with extraterritorial powers only in connection with enforcing injunctions, but not in seeking UCL remedies in the first instance.

And even within the same statutory scheme, the "interpretive principle" invoked by the City Attorneys "applies only when the Legislature has intentionally changed or excluded a term by design." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 126.) The City Attorneys offer nothing to suggest that, by enacting and amending the UCL while remaining silent on the geographic scope of district attorneys' authority, the Legislature deliberately chose to depart from the geographic limits set out in the other statutes cited in the City Attorneys' brief.

B. No Court Has Ever "Confirmed the Ability of Local Prosecutors to Obtain Statewide UCL Remedies."

Although the City Attorneys brief includes a bold title that "Courts Have Confirmed the Ability of Local Prosecutors to Obtain Statewide UCL Remedies," (City Attorneys' Br. at p. 19), it is bereft of any citation to any case that actually stands for that proposition, whether as a holding, a rationale, or even in dicta. Instead, the City Attorneys devote this section to (1) incorrectly claiming that two cases cited in Petitioners' briefs—*Hy-Lond*, *supra*, 93 Cal.App.3d 734 and *M&P*, *supra*, 213 F.Supp.2d 1208—are distinguishable on their facts or otherwise dicta; and (2) arguing that *People v. Mendez* (1991) 234 Cal.App.3d 1773 (*Mendez*) somehow "undermine[s]" *Hy-Lond*. (City Attorneys' Br. at pp. 26–27.) They are wrong on both counts.

The City Attorneys' arguments about *Hy-Lond* largely parrot the trial court's ruling, and are thus extensively addressed in Petitioners' merits briefing. In particular, the City Attorneys claim that *Hy-Lond* is authoritative only for the extremely limited

proposition that a local prosecutor "cannot bind *a state agency* to a settlement, nor waive liability for *future* UCL violations." (City Attorneys' Br. at 19, emphasis original.) But their argument turns on ignoring key parts of *Hy-Lond* and labeling inconvenient language as "dicta."

For instance, *Hy-Lond*—in language quoted in the City Attorneys' brief—does hold that there "is no power in the court to restrain the exercise of" the State Health Department's licensing authority "on the stipulation of the district attorney." (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 753. But the very next sentence, which City Attorneys omitted, explains that "[s]imilar reasoning applies to 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 and False Advertising Law]." (*Ibid.*) So it is hardly fair to read *Hy-Lond* as applying only to jurisdictional conflicts between local district attorneys and state agencies, as the Court was also concerned with conflicts between district attorneys and the Attorney General, as well as conflicts between district attorneys of different jurisdictions.

Similarly misguided is the City Attorneys' claim that *Hy-Lond* addressed only a release of future UCL violations. (City Attorneys' Br. at pp. 20-21.) In another sentence that abuts a selective quotation in the City Attorneys' brief, the court explained that, through the district attorney's settlement, the defendant "received absolution for all its past sins, whether fancied or actual, in all 12 of the counties in which it owned facilities[.]" (*Hy-Lond*,

supra, 93 Cal.App.3d at p. 749.) Why the City Attorneys believe "absolution" for "past sins" is a waiver of liability for "future UCL violations" is difficult to understand.

To be clear, Petitioners do not contend—and have never contended that *Hy-Lond* addressed exactly the same facts as those in this case. (See Reply at pp. 12–13 & fn. 5.) But *Hy-Lond*'s rationale nonetheless guides the question at hand and confirms that Petitioners are correct about the scope of the District Attorney's authority. A list of immaterial factual and procedural distinctions and a bare declaration that any reasoning that proves inconvenient to the District Attorney's argument is "dicta" do not establish otherwise.

The City Attorneys also take issue with Petitioners' citation to *M&P*, because *M&P* was a nuisance, not a UCL case, and because, in the City Attorneys' view, *M&P* incorrectly decided that the City of Lodi, not the State of California, was the real party in interest. (City Attorneys' Br. at pp. 23–26.) Neither of these points, however, is germane to the proposition for which Petitioners cited *M&P*—that following *Hy-Lond,* a statutory authorization for a local prosecutor to sue on behalf of "the People" is not a license for local prosecutors to bring statewide claims. (Pet. at pp. 38–40.)

As to first point, the Petition conceded that the *M&P* addressed a public nuisance claim under Code of Civil Procedure section 731, not a UCL claim. (Pet. at p. 38.) Unlike the UCL, section 731 facially limits local prosecutors' authority to bring claims on behalf of the "the People" to the district or city attorneys for any county, city, or town "in which such nuisance exists." (See

M&P, supra, 213 F.Supp.2d at 1212 fn. 11 [citing text of § 731 in force at the time].[6]) But *M&P* did not rely on that language in reaching its decision—indeed, it is not cited anywhere in the opinion except for a footnote in which section 731 is block-quoted. (*Ibid.*) Instead, *M&P* specifically read *Hy-Lond* to "indicate . . . that a city attorney's authority is limited to the geographical boundaries of the constituency which he or she represents." (*Id.* at p. 1216.)

It is that reading of *Hy-Lond*—an interpretation at odds with the District Attorney's and the trial court's—that is the precise point for which Petitioners rely on *M&P*. (Pet. at p. 40.) Whether or not section 731 might have provided an additional argument that the *M&P* defendants might have raised has no bearing on whether the federal court's stated reasoning is persuasive for the points cited in the Petition. (See *Johnson v. Am. Standard, Inc.* (2008) 43 Cal. 4th 56, 69 [federal decisions on state law only authority to the extent their reasoning is persuasive].)

Similarly, *M&P*'s ultimate conclusion about whether the city or the State was the real party in interest is irrelevant to whether the court's reading of *Hy-Lond*—a reading advanced by the Attorney General here and in *M&P*—is highly persuasive. As discussed above and in the merits briefs, Petitioners do not dispute that when a case is brought on behalf of "the People," the sovereignty of the State is brought to bear. But that, in itself, does

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[6] In 2010, the Legislature amended Code of Civil Procedure section 731 to "authorize the county counsel to bring a civil action to abate a public nuisance." (Stats. 2010, ch. 570, Legislative Counsel's Digest.)

not mean that local prosecutors can wield that authority without regard to the jurisdiction that elected them. Thus, although the City Attorneys' brief cites other federal cases that take issue with *M&P's* conclusion that only the city is the true plaintiff when "the People" bring a claim, the dispute is irrelevant to the point for which Petitioners rely on *M&P.*[7]

Finally, the City Attorneys cite to *Mendez, supra,* 234 Cal.App.3d 1773, claiming that its statement that "[t]he People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the District Attorney" somehow tacitly abrogates *Hy-Lond.* (City Attorneys' Br. at p. 27.) The City Attorneys admit that Petitioners' Reply distinguishes *Mendez* from *Hy-Lond* on the basis that *Mendez* is a criminal case. (*Ibid.*) They falsely claim, however, that the Reply failed to "provide any justification for why a district attorney should be able to bind the state in criminal matters, but not in UCL cases." (*Ibid.*) Petitioners' Reply contains an extensive discussion explaining that "[i]n contrast to the authority granted to a district attorney in a criminal case, Government Code section 26500 does not 'give district attorneys plenary authority to pursue any and all such [civil] penalties,'"

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[7] The cited cases each address federal diversity jurisdiction, for which, unlike here, the ultimate identification of the real party plaintiff—city or state—is the determinative factor. (See *People v. Universal Syndications, Inc.* (N.D.Cal., June 16, 2009) 2009 WL 1689651 at *6 (*Universal Syndications*); *People v. Time Warner Inc.* (C.D.Cal., Sept. 17, 2008) 2008 WL 4291435, at *2 & fn.1; *People ex rel. Herrera v. Check 'n Go of Cal., Inc.* (N.D.Cal., Aug. 20, 2007) 2007 WL 2406888, at **4-7 (*Check 'n Go*).)

because that authority is reserved to the Attorney General. (Reply at p. 13–15, quoting *Solus*, *supra*, 224 Cal.App.4th at p. 43.) To pretend that argument does not exist is not to answer it.

The City Attorneys also cite to a federal district court opinion, which they say applies *Mendez*'s statement about district attorneys binding the state to civil UCL cases. (City Attorneys' Br. at p. 27, citing *People of State of Cal. v. Steelcase Inc.* (C.D.Cal. 1992) 792 F.Supp. 84 (*Steelcase*).) But like the federal cases the City Attorneys claim disagree with *M&P*, *Steelcase* was concerned only with deciding whether the plaintiff in a case captioned "the People of the State of California" was the State or a local government for the purpose of assessing federal diversity jurisdiction. (*Steelcase*, 792 F.Supp. at p. 85.) In any event, *Steelcase* contains only a single unreasoned sentence, citing *Mendez* for the proposition that "[t]he People are the same party as the State of California (State) and the district attorney has the authority to bind the State." (*Ibid.*) That non-analysis is hardly a persuasive rebuttal to the extensive explanation of the civil/criminal distinction put forward in the reply. (See *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 254 [federal district court cases that "at most . . . indicate without discussion" are unpersuasive authority in the Court of Appeal].)[8]

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[8] The City Attorneys likewise cite *California v. IntelliGender, LLC* (9th Cir. 2014) 771 F.3d 1169, 1177, fn. 7 as recognizing that "actions brought by local civil prosecutors are 'state enforcement action[s] rather than an action brought by the City for individual relief.'" (City Attorneys' Br. at pp. 27–28.) As discussed several times, *supra*, that the State is formally the plaintiff in a civil

C. The City Attorneys' Arguments About Injunctive Relief Are Based on a False Premise.

Like the District Attorney, the City Attorneys also argue that California courts' authority to enjoin UCL-violating conduct on a statewide basis somehow means that local prosecutors can seek and obtain UCL remedies based on violations occurring outside of their home jurisdictions. But as explained more extensively in Petitioners' reply brief, no authority supports that proposition.

Like the District Attorney, the City Attorneys' "statewide injunctions" argument erroneously conflates a plaintiff's standing to seek redress with the Court's jurisdiction to create remedies. Practically every sentence in this section of the City Attorneys' brief mentions the powers of the "courts" to provide equitable remedies. On the other hand, the few sentences addressed to the authority of local prosecutors to *seek* those remedies are but bare conclusions unsupported by any authority whatsoever. But courts' remedial powers and prosecutors' charging authority are by no means co-extensive or the same thing. (See generally *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 330 fn. 15 [distinguishing the question of a plaintiff's standing to sue under the UCL from the "trial court's role to exercise its considerable discretion to determine which, if any, of the various equitable and

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enforcement action brought by a local prosecutor on behalf of "the People" "does not tell us who is authorized to represent 'The People of the State of California' in any particular action, or the limits to which such authority extends." (*Hy-Lond, supra,* 93 Cal.App.3d at 751.)

injunctive remedies provided [under the UCL] may actually be warranted in a given case"].)

As a matter of equity, courts' remedial power under the UCL is unquestionably broad. When an injured plaintiff with standing proves that a defendant violated the UCL, courts can and will enjoin the conduct giving rise to the violations, including conduct that might occur extraterritorially. That is because "[i]n granting injunctive relief the court act[s] *in personam* against the defendants, and it is immaterial that the control it asserts over their actions extends beyond the boundaries of California." (*People ex rel. Mosk v. Nat. Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 776.) A "court of equity having jurisdiction of the person of defendant may render any appropriate decree acting directly on the person, even though the subject matter affected is outside the jurisdiction." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 399–400, quoting *Allied Artists Pictures Corp. v. Friedman* (1977) 68 Cal.App.3d 127, 137.)

Thus, were the District Attorney to prove violations that occurred within his jurisdiction, the trial court could enjoin Petitioners from conduct that would continue to violate the UCL. Under *Mosk* and *Pines*, because the court has personal jurisdiction over the defendants, it would not necessarily exceed the Court's authority[9] were that injunction to prohibit conduct that occurs outside of Orange County.

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[9] The Court's authority must nonetheless be tempered by considerations of interstate comity and potential conflicts of laws. (*Allied Artists Pictures Corp. v. Friedman* (1977) 68 Cal.App.3d 127, 137 ["One consideration concerning the propriety of an

But that offers no answer to the question at hand, which is predicate to (and entirely distinct from) the remedial power of the court: Does the District Attorney have authority in the first place to allege claims based on acts or injuries that occurred outside of his jurisdiction? The scope of the court's remedial power is irrelevant to that question. Indeed, because the Orange County District attorney cannot obtain any relief at all for alleged UCL violations with no nexus to Orange County, the court's authority to shape remedies for such violations never comes into play. No injunctions. No restitution. No penalties. Not one of the cases cited by the City Attorneys comes close to saying anything to the contrary.

III. THE CITY ATTORNEYS' AND CONSUMER ATTORNEYS' POLICY ARGUMENTS HAVE NO MERIT.

Finally, the City Attorneys make a number of specious policy arguments, some of which are echoed by the Consumer Attorneys' brief. None of them are convincing, especially given that there is an Attorney General elected by the entire state who is expressly tasked with enforcing the state's consumer protection laws, and who has taken the opposite position from the City Attorneys in this case. It is also notable that the CDAA – which represents the state's 58 district attorneys – takes the position that the rule proposed by the City Attorneys and the Orange County District Attorney cannot be justified as a policy matter and would, on the contrary, "result in substantial harm to our state's consumer

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injunction with extraterritorial impact is whether it creates a conflict with the laws of another jurisdiction."].)

protection system and ultimately to California consumers." (CDAA Br., at p. 17).

No one disputes that local prosecutors have an important role to play in the enforcement of the UCL. The examples touted in the City Attorneys' brief, however, actually underscore the Attorney General's role as the state's chief law enforcement officer responsible for bringing and coordinating UCL actions at a statewide level. The Multistate Master Settlement Agreement with tobacco companies, for instance, was negotiated only after the California Attorney General became involved. (City Attorney Br. at p. 35)

The "checks" on local authority cited by the City Attorneys similarly reinforce the subordinate, rather than co-equal, status of local prosecutors to pursue UCL claims. (City Attorney Br. 32–33 [mentioning moving to vacate a judgment under Code of Civil Procedure, § 663, intervening under Code of Civil Procedure, § 387, and filing a separate action and seeking consolidation under Code of Civil Procedure, § 404, et seq.].) These procedural mechanisms allow the Attorney General to pursue statewide relief in an appropriate case initiated by a local prosecutor; but they say nothing about the ability of local prosecutors to pursue statewide claims on their own. These "checks," moreover, are not sufficient and cannot be counted on to avoid the many conflicts and difficulties that would arise if local prosecutors had statewide authority to enforce the UCL. Given the Attorney General's place at the apex of the state's law enforcement hierarchy, (Cal. Const., art. V, § 13; Gov. Code § 12550), it should not be incumbent on him

to run into court to stop his erstwhile subordinates from running amok with statewide claims.

The City Attorneys' and Consumer Attorneys' arguments about resource constraints on the Attorney General are also unavailing. (City Attorney Br. at p. 34 [asserting that the "Attorney General's Office, on its own, will often lack the personpower and resources to adequately protect the residents of a state as populated and vast as California"]; Consumer Attorneys' Br. at pp. 14–16.) Indeed, as the CDAA's brief points out, were the Attorney General to believe statewide enforcement is needed, he currently has at his disposal and in fact employs various strategies that leverage the additional resources that may be available to local prosecutors. (CDAA Br. at pp. 20–21.) For instance, the Attorney General could readily join with one or more local prosecutors in bringing an action while delegating day-to-day case management responsibilities to his subordinate district attorneys. None of these measures require a rule that affords a local district attorney authority to act unilaterally as a statewide law enforcer.

Particularly unconvincing are the City Attorneys' arguments about the authority of various local prosecutors vis-a-vis each other. (City Attorney Br. at pp. 33, 34–35.) Indeed, *Hy-Lond* raised the concern that extraterritorial enforcement could prove problematic by stepping on the rights of "fellow district attorneys to commence, when appropriate, actions" under the UCL. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 753.) The City Attorneys believe, however, that any concerns about impinging on the prerogatives of other local prosecutors are insignificant

because local prosecutors can join each other's suits or bring separate actions to split up any recovery.

But what if one county's prosecutors want to exercise their prosecutorial discretion to bring no claim at all? (See generally *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1544 [explaining that statutory silence should not be read to authorize interference with prosecutorial discretion].) If, as the City Attorneys contend, by "choosing not to file a UCL action of their own" "local prosecutors are effectively consenting to the award of statewide UCL penalties," (City Attorney Br. at 33), every prosecutor's discretion to decline a civil case would effectively be subject to override by the most aggressive local prosecutor in the State. Without doubt, the structure of state government subjects a local prosecutor's discretion to bring or not bring a civil action to the higher authority of the Attorney General. (Gov. Code, § 12550.) But no authority at all suggests that the district attorneys of one county can or should be permitted an unaccountable veto over another county's district attorney's decision not to bring litigation that a district attorney concludes is not in the interests of his or her constituents.

The City Attorneys also offer two unconvincing reasons why it would be "absurd" to limit local prosecutors' authority to seek statewide penalties and restitution. First, they assert that were one county's district attorney to bring a claim and win, it would be inefficient to require other local prosecutors to bring claims of their own in order to litigate penalty issues arising in their respective jurisdictions. (City Attorney Br. at 36.) But like the rest of the City

Attorneys' arguments, that too ignores the fact that there is an Attorney General, elected by all of the voters in the State, who can, if he finds it in the State's interest, bring a single statewide claim and litigate everything at once.

The argument is also in tension with the City Attorneys' earlier argument about local prosecutors' ability to band together and bring joint claims. Some local prosecutors might want to be in the vanguard and join such actions. Others could take a "wait and see" approach, relying on issue preclusion to potentially ease their burden if the earlier suits succeed and avoid expense if they do not. It is hardly absurd to subject that latter group of prosecutors to the burden of litigating a penalty even if liability has been established elsewhere. Indeed, that very scenario is not uncommon in certain kinds of multi-district and mass litigation. (See generally Asim M. Bhansali, *Offensive Collateral Estoppel in Civil Antitrust Cases: Parklane Hoisery and the Seventh Amendment* (2010) 19 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 35.)

Reiterating an argument raised by the District Attorney, the City Attorneys say it would be somehow absurd that a private plaintiff can certify a statewide UCL class while a local prosecutor is limited to seeking relief that affects his or her own constituents. As explained in detail in Petitioners' Reply, however, there is nothing at all absurd about that arrangement, because the class certification, process affords greater protection to alleged victims than district attorney actions do. (See Reply at pp. 24–25.)

Finally, the Consumer Attorneys argue that a rule that local prosecutors cannot bring statewide UCL claims would relegate

such claims to "faraway federal multi-district litigations." (Consumer Attorneys' Br. at p. 12.) Of course, as discussed above, an action on behalf of the "People of the State of California" brings the state's sovereignty to bear, even if the prosecutor bringing the claim lacks the authority to seek redress for injuries occurring outside of his or her constituency. That, after all, is the very point of the various removal jurisdiction cases cited throughout the City Attorneys' brief. (See *Universal Syndications, supra*, 2009 WL 1689651 at *6 [remanding UCL and FAL action brought on behalf of the people by the Santa Cruz District Attorney]; *Check 'n Go, supra*, 2007 WL 2406888, at *4-7 [remanding UCL action brought on behalf of the people by San Francisco City Attorney].) The Consumer Attorneys' concern is thus without substance.

Respectfully Submitted,

Date: February 23, 2018

Michael Shipley (SBN 233674)

CERTIFICATE OF COMPLIANCE WITH RULE OF COURT 8.204(c)(1)

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 6,865 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: February 23, 2018

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 January 23, 2018, I hereby certify that I have served the document listed below on the following interested parties in this action in the manner set forth below:

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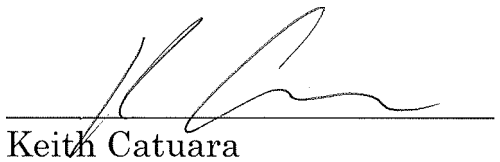
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 23, 2018, at Los Angeles, California.



Keith Catuara