NO. D072577

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

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

Defendants/Petitioners,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

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

REAL PARTY IN INTEREST'S CONSOLIDATED ANSWER TO AMICUS BRIEFING

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Real Party In Interest, the Plaintiff, People of the State of California (the "People"), hereby submit the following consolidated answer to the Brief of the Attorney General as *Amicus Curiae* (the "AG Brief"); the Amicus Curiae Brief in Support of Geographical Limitations on Civil Penalty Authority Under the Unfair Competition Law of the State of California by the California District Attorneys Association (the "CDAA Brief"); the Amicus Curiae Brief of the City Attorneys of Los Angeles, San Diego, San Francisco, and San Jose, and the Santa Clara County Counsel, and the California State Association of Counties in Support of Real Party in Interest the People of the State of California (the "City Attorney's Brief"); the Amicus Curiae Brief of the Consumer Attorneys of California in Support of Real Party in Interest the People of the State of California (the "CAC Brief"); and the Amici Curiae Brief of Chamber of Commerce of the United States of America and California Chamber of Commerce (the "Chambers' Brief").

I. NONE OF THE AMICUS BRIEFING ADDRESSES THE REAL ISSUE PRESENTED HERE

With the exception of footnote 2 in the AG Brief supporting the Respondent Court's challenged ruling in this case, none of the Amicus Briefs address the merits of the motion to strike that is the subject of the present Petition. The hypothetical discussion and concerns raised with respect to all stages of a UCL prosecution (*e.g.*, discovery, settlement, final judgments, post-trial motions, etc.), and the incomplete legal analysis and conclusions with respect thereto, are thus of little help in addressing

the only properly justiciable issue presently before this Court. (*See* Return to Petition for Writ of Mandate or Prohibition (the "Return") at pp.11-19 [demurer to Petition by Real Party in Interest on Grounds that the "issue presented" in the Petition seeks an improper, unripe, judicial advisory opinion not tethered to the ruling on the motion to strike properly before the Court].) If anything, the various briefs illustrate the numerous ***case-specific facts and circumstances*** that render the broad legal question presented premature and incapable of any meaningful review on the current record. As set forth in the Return, the scope of permissible penalties in this case presents a mixed question of law and fact that must be determined by the trial court vested with discretion to order appropriate remedies, based on the totality of the factual circumstances unique to this UCL case, when the issue is ripe. (*See* Return, at pp. 33-48.) On this basis alone, the Demurrer to the Petition should be sustained and the Petition dismissed.

II. THERE IS NO "JURISDICTIONAL" ISSUE, OR QUESTION OF "AUTHORITY" BY THE OCDA TO BRING THIS CASE

Throughout, one or more of the amicus groups use legal terms such as "jurisdiction" and undefined terms such as "authority" and "power" in a confusing patchwork of arguments unrelated to the actual pleading and circumstances of this case. (AG Brief, at pp.5-19 [discussing the "authority" of district attorneys]; Chambers' Brief, at pp.12-35 [discussing the "authority" and "power" of district attorneys]; CDAA Brief, at pp.12-21 [referring to "jurisdictional principles,"

"authority" and "local jurisdiction"].) Yet, there is no dispute that the OCDA has the authority and power (properly known as "standing") to bring the present UCL case. There is also no dispute that there is proper subject-matter and personal "jurisdiction," as well as "venue," for the case to be heard in Orange County.[1] (*See* Return, at pp.28-29.) There is thus no issue concerning jurisdiction or standing of the OCDA to bring the present case as these amicus parties' arguments seem to suggest.

A. The "Authority" With "Power" To Issue An Order For Penalties Under The UCL Is Vested With The Courts, Not The Particular Prosecutor

At best, these amicus parties challenge the "authority" and "power" of the OCDA to "seek" the full remedies available under the UCL to protect all California consumers (versus only those in Orange County). However, under well-settled law, the "authority" that determines the appropriate remedy, including all civil penalty amounts, in a UCL action is vested with the ***courts*** of the state, not the particular public prosecutor that brings the case. (Return, at pp.33-45 [citing authorities explaining that the issue is a matter within the court's discretion].) Neither the Attorney General, nor any particular prosecuting agency, has the absolute "power" or

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[1] This is not an "extraterritorial" case as the Chambers' suggest. (Chambers' Brief, at p.23.) The alleged unlawful and unfair business practices occurred in Orange County and affected consumers in Orange County. Under well-settled laws governing jurisdiction and venue, the case is thus properly brought in Orange County. The mere fact that consumers throughout the entire state and nation were also harmed does not transform the case into an "extraterritorial" case.

"authority" to determine the ultimate remedy in a properly filed UCL action such as this. To the extent the amicus parties frame the issue as one of "jurisdiction" or "authority" on the part of the OCDA, therefore, their arguments miss the mark entirely.

Furthermore, taken to the logical extreme, if these amicus arguments were correct, and the available remedy must be determined by the particular prosecutor that files the case, it is the power of the courts to make a proper penalty order to protect consumers that would be restricted, not the "power" of authorized prosecuting attorneys to file UCL cases. There is no law, policy or other legal authority cited to support such an extreme departure from the laws of equity and the ***courts'*** "inherent equitable powers" to exercise their discretion to protect California consumers in such matters. (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 132-133 & 137 (superseded by statute on other grounds) [evaluating the "*powers of the court* in a UCL action" to issue an appropriate remedy and noting the legislative intent "to vest the trial *court* with broad *authority* to fashion a remedy" (emphases added)]; *see also In re Tobacco II Cases* (2009) 46 Cal.4th 298, 334 (conc. & dis. opn. of Baxter, J.) [noting "the court may order the full range of remedies specified in the statute" in public law enforcement actions under the UCL].).

Despite the seemingly contradictory arguments in the CDAA Brief here, the CDAA has long agreed that the *courts* have broad authority to issue appropriate procedural orders and remedies to protect *all* California consumers in UCL actions.

In 2000, Justice Werdegar publicly agreed with the CDAA in her dissenting opinion in *Kraus*, explaining:

> Under existing precedent, the District Attorneys note, courts have discretion to require class-action-like procedures in particular UCL matters, although they are not required to do so. …
>
> …
>
> I agree with the District Attorneys that we should retain a flexible construction of section 17203, permitting trial courts to countenance the full range of equitable and statutory UCL remedies … even absent class certification. The District Attorneys amply demonstrate that the deterrent effect of private UCL actions is an essential component of California's scheme for combating unfair competition. And, as we have understood for over 20 years, obtaining "the full impact of the deterrent force [of UCL remedies] is essential if adequate enforcement [of the law] is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom." (*Fletcher, supra*, 23 Cal.3d at p.451 …; *see also Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833, P.2d 545, superseded by statute on another point [Legislature considered UCL deterrence "so important that it authorized courts to order restitution without individualized proof of deception, reliance and injury."].)

(*Kraus, supra,* 23 Cal.4th at p.148 (dis. opn. of Werdegar, J.).) Although the standing of private persons to bring statewide UCL actions was curtailed by the enactment of Proposition 64 in 2004, the power of the courts recognized by CDAA -- to issue the full range of remedies and appropriate procedural orders -- in UCL actions brought by public prosecutors (as here) on behalf of the People of the State of California was unchanged.

B. The AG's Constitutional Duties Do Not Preempt District Attorney Actions Expressly Authorized Under The UCL

As the "chief law enforcement officer" of the state, amicus parties' argue, the Attorney General has exclusive powers to bring "statewide enforcement" actions under the California Constitution. (Chambers' Brief, at pp.13-17; AG Brief, at pp.8-11.) This is not so. Although "it is true that the Attorney General is the state's chief law enforcement officer," over the *State's* business, the legislature may (and often does) grant standing to other state agencies or prosecutors to seek statewide relief, either exclusively, or concurrently, on behalf of the *People* of the State. (*See State v. Altus Finance, S.A. et al.* (2005) 36 Cal.4th 1284, 1305 [noting the Attorney General's "chief law enforcement officer" role, but holding the legislature granted the Insurance Commissioner exclusive standing to seek relief on behalf of "creditors and policyholders of the insolvent company" under section 1037(f) of the Insurance Code].) There is nothing unconstitutional about legislative grants of authority to individuals other than the Attorney General to handle such matters.

When it comes to the UCL, there is no question that the legislature intended to grant both the "Attorney General *and* other specified government officials," including district attorneys, concurrent jurisdiction to pursue representative relief on behalf of the People of the State. (*State v. Altus Finance, supra,* 36 Cal.4th at p.1307 (emphasis added). Indeed, in its official summary of Proposition 64, the Attorney General confirmed for California voters that, while Proposition 64 would restrict private

actions under the UCL, either "the California Attorney General or local government prosecutors" would still be authorized "to sue *on behalf of the general public* to enforce unfair competition laws" and that the "monetary penalties recovered by [the] Attorney General *or local government prosecutors* [would be dedicated] to enforcement of consumer protection laws." (Voter Information Guide, Official Title and Summary, Proposition 64 (Nov. 2004) (emphases added); *see also In re Tobacco II Cases*, *supra*, 46 Cal.4th at p.334 (conc. & dis. opn. of Baxter, J.) [citing the Attorney General's summary of Proposition 64 and arguments in favor of Proposition 64 similarly advising voters of the intent to authorize "only the Attorney General, district attorneys and other public officials to file lawsuits on behalf of the People of the State of California" and to "permit only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California"].) There is no statute, case, legislative history, or other authority that even remotely suggests an intent to grant the Attorney General exclusive authority to bring UCL actions on behalf of the People of the State as suggested by the amicus curiae parties here.

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III. THE "BINDING" NATURE OF A UCL JUDGMENT IS GOVERNED UNDER PRINCIPLES OF *RES JUDICATA* JUST LIKE ANY OTHER

Much of the amicus briefing is devoted to a hypothetical discussion and set of conflicting concerns regarding the binding impact of an unspecified final UCL judgment. The Chambers claim the OCDA "cannot properly be suing on claims they have no authority to settle with finality" because the defendant "must be able to negotiate with confidence" in the finality of judgments.[2] (Chambers' Brief, at pp.29-30.) The Attorney General, on the other hand, expresses concern over permitting finality of judgments in UCL actions brought by district attorneys, claiming "a district attorney asserting statewide authority to release claims" could "bar the Attorney General and sister district attorneys from taking further action." (AG Brief, at p.10.) Oddly, neither party discusses the applicable legal standards governing the finality of

[2] The Chambers' desire for finality in judgments is well-taken. However, it is unclear how limiting the finality of the judgment in statewide UCL actions to a particular city or county, as the Chambers also seemingly appear to advocate for in their brief, helps achieve this purpose. To the contrary, such a result would surely leave defendants open to a multiplicity of additional suits because there could be no possibility of a "statewide" final judgment in cases brought by district attorneys. On its face, the UCL protects these finality concerns. Specifically, by granting "any court of competent jurisdiction" the power to hear a UCL action on behalf of the People of the State, and enter appropriate statewide remedies -- regardless of which prosecuting agency files the case -- the UCL, when properly construed, already provides the means to achieve statewide relief and finality in one prosecution.

judgments in this state as part of this hypothetical debate: namely, the doctrine or res judicata and the principles of collateral estoppel and issue preclusion.[3]

A. The Appropriate Terms Of A Final Judgment In A UCL Action Are Case-Specific And Subject To Court Review

Of course, "[t]he propriety of any given representative action obviously depends on whether the nonparties assumed to be represented will in fact be bound by the judgment." (*Arias v Superior Court* (2009) 46 Cal.4th 969, 990 (conc. opn. of Werdegar, J.).) This is a valid concern for the trial court to address when exercising its discretion in entering an appropriate final judgment or stipulated consent decree in UCL cases. (*Kraus, supra,* 23 Cal.4th at pp.138-139 [noting the trial court's ability to fashion a judgment to address potentially duplicative lawsuits]; *Cal. State Automobile Association Inter-Insurance Bureau v. Superior Court* (1990) 50 Cal.3d 658, 663-665 [confirming "a stipulated judgment may properly be given collateral

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[3] The Chambers' argument is hard to follow. On the one hand, the Chambers argues (contrary to the holding in *Tennison*) that a UCL judgment obtained by a single district attorney cannot be binding because it "would run directly contrary to two aspects of the constitutional structure: (1) the fact that the Attorney General is the chief law officer who is solely responsible for the uniformity of state law enforcement and whose power thus cannot be constitutionally encroached upon by a subordinate law enforcement officer he directly supervises; and (2) the fact that every other district attorney has the power and duty to prosecute claims within his or her respective county." (Chambers' Brief, at pp.25-26.) Yet, the Chambers' also points out, correctly, that "the OC district attorney ordinarily does have the power to bind the State" and, with the exception of legal error, "the People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the district attorney." (Chambers' Brief, at p.26 [*quoting People v. Mendez* (1991) 234 Cal.App.3d 1773, 1783-1784].)

estoppel effect, at least when the parties manifest an intent to be collaterally bound by its terms"].)

In this regard, contrary to the suggestion by the amicus parties otherwise, it is certainly *possible* for the Attorney General to be bound by UCL actions taken by other authorized state officials. (*See, e.g., People v. Garcia* (2006) 39 Cal.4th 1070, 1076-1091 [noting, for purposes of collateral estoppel, "[e]ntities that are 'agents of the same government' are generally found to be in privity because they are both acting to vindicate the rights of the same governmental entity"]; *Tennison v. Cal. Victim Compensation and Government Claims Board* (2007) 152 Cal.App.4th 1164, 1174-75 [holding the Attorney General was in privity with a district attorney for purposes of collateral estoppel, in part, due to the Attorney General's supervisory role and its duty to intervene if necessary to ensure adequate enforcement of the law]; *Arias, supra,* 46 Cal.4th at p.986 [noting "a judgment in an employee's action under the [Labor Code Private Attorney General Act] binds not only that employee but also the state labor law enforcement agencies," "nonparty employees" and "the government" under collateral estoppel principles].)

Whether, and to what extent, a final judgment (under the UCL, or any other law) is binding against future actions, is a complex question that depends on the terms of the final judgment, and the totality of the unique facts and circumstances of the particular case. (*See, e.g.*, *Tennison, supra,* 152 Cal.App.4th at pp.1173-1180; *Cal. State Automobile Association Inter-Insurance Bureau v. Superior Court*, *supra*, 50

Cal.3d at pp.663-665; *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1171-1174.) Such a matter is clearly premature and incapable of any meaningful review at the pleading stage here.

B. The *Hy-Lond* Opinion Does Not State Otherwise

To the extent the amicus parties interpret the First District's dated opinion in *People v. Hy-Lond Enterprises, Inc.,* (1979) 93 Cal.App.3d 734, as authority effectively barring the application of res judicata principles in UCL cases brought by district attorneys, the amicus parties read too much into that opinion. (*See, e.g.*, AG Brief, at pp.10-14 & fn.7 [arguing no UCL judgment is binding on the state under *Hy-Lond* unless "the Attorney General, or the District Attorneys from all of California's 58 counties" are joined in the lawsuit];[4] CDAA Brief, at pp.10 & 14; Chambers' Brief, at pp.29-30.) *Hy-Lond* does not pronounce any hard-and-fast rule against statewide UCL actions by district attorneys, but rather, found the particular "terms embodied by the judgment" in that case legally void and unenforceable because the judgment

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[4] Certainly, the tax payers of the state would not wish to pay for such an inefficient and costly system -- involving action by every public attorney in the state -- to obtain statewide relief for corporate wrongdoing. This is like saying every private member of a class action needs separate counsel in order for the class to obtain class-wide relief. There is no legal authority or logical reason for making it easier for private class action parties to bring UCL claims on a representative basis than authorized public prosecutors. The fact that county and city prosecutors have opted to work together on some cases, or seek the "sign off" of the Attorney General, in practice, does not mean that every statewide UCL action must be jointly prosecuted. (*See* CDAA Brief, at p.20 [noting that "appropriate and effective [cooperative] mechanisms for statewide UCL enforcement are already in place"]; AG Brief, at p.14 [noting the "long history" of the Attorney General "joining local prosecutors" and giving their "Sign-On" in UCL prosecutions].)

purported to "limit the powers of other state agents or entities" to commence other authorized actions as may be necessary to ensure compliance with the law. (*Hy-Lond*, at pp.747, 749, 752, fn.1 & fn.2 [noting the judgment in question improperly granted "immunity for future actions for unfair competition with respect to future alleged violations of law" by the "People of the State" and required any future actions to be brought "exclusively" in Napa County].) Because of the plain legal error in the judgment, the *Hy-Lond* court held, only, that the Attorney General and the Department of Health had standing to file a motion to set aside and vacate the judgment, and thereby remanded the case to the lower court to entertain that motion. (*Hy-Lond*, at p.739.)

The *Hy-Lond* court did not, as the Chambers argue, hold that a district attorney could never bring a binding statewide UCL action for all alleged past violations. (*See* Chambers' Brief, at fn.6.) The *Hy-Lond* opinion also does not say that the Attorney General has exclusive authority to bring statewide UCL actions, or that the court erred in ordering civil penalties for all statewide violations established in that case. These issues were not presented to the First District for review in *Hy-Lond*. Since "an opinion is not authority for a proposition not therein considered," the opinion offers little support to the broad legal arguments by the amicus parties here. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn 2.)

C. The District Attorney Represents the People of the State, Not the County, in Both Criminal and Civil Actions

Like civil actions under the UCL, "criminal prosecutions are brought on behalf of the People of the State of California, whether by a county district attorney or by the Attorney General." (*People v. Garcia, supra,* 39 Cal.4th at p.1081.) In all such matters, the district attorney "acts as an agent of the state" and "represents the state, not the county." (*Id.* at pp.1080-1081 [quoting *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 345].) The Attorney General does not necessarily dispute this basic principle, but argues in a UCL action, a district attorney "exercises the State's sovereign police powers, but does so only within the boundaries of that prosecutor's represented geographic territory." (AG Brief, at p.6.) It is unclear what this means, and the AG cites no authority for this vague and ambiguous assertion. At most, this general statement is an accurate summary of the undisputed requirement that a prosecutor must have proper jurisdiction and venue in "the boundaries" of their county in order to bring an action on behalf of the People of the State; the AG's lone statement in its amicus brief here is not authority for the Petitioner's contention that only the AG may seek statewide relief under the UCL.

IV. THE PUBLIC POLICY CONCERNS ARE UNFOUNDED

At the heart of the amicus arguments in favor of the Petitioner are a series of public policy arguments that suggest, contrary to the express text and intentions of the UCL, that only the Attorney General should have the authority to pursue statewide UCL actions. None of these public policy arguments support the relief requested in the Petition here.

A. There Is No Conflict Of Interest Created By The UCL Penalty Scheme; If So, The AG Suffers From This Very Conflict In Every Case

In support of the contention that "only Attorney General Actions Address Statewide Misconduct," the Attorney General points to dicta in the *Hy-Lond* opinion discussing a "possible conflict of interest" if district attorneys are placed "in the position of bargaining for the recovery of civil penalties that would flow into his county's coffers." (AG Brief, at pp.15-17.) There are a number of problems with this outdated argument.

First, *Hy-Lond* is not good law for this point. The discussion is not only pure dicta, but it predated and is now superseded by an important change to the penalty statutes under Proposition 64 in 2004. Specifically, with the enactment of Proposition 64, Section 17206 was amended to require "that the penalty funds [from law enforcement UCL actions] 'shall be for the exclusive use by the Attorney General [and other public prosecutors] for the enforcement of consumer protection laws.'"

(*State v. Altus Finance, supra,* 36 Cal.4th at p.1307.) The funds may not, therefore, improperly be used to "line the coffers" of the district attorney.

Second, if the allocation of funds under the UCL to government use created a conflict in the prosecution of such actions, then the Attorney General (and the assigned judge) would be equally conflicted in every case. (*See State v. Altus Finance, supra,* 36 Cal.4th at p.1307 [recognizing if the Attorney General files a UCL action, one half of the penalties are paid to the "state General Fund" and the other half to the "county in which the judgment was entered" [citing Bus. & Prof Code § 17206(b); *see also* Voter Information Guide, Official Title and Summary, Proposition 64 (Nov. 2004) (drafted by the Attorney General, confirming for voters, that under Proposition 64, the "monetary penalties recovered by [the] Attorney General or local government prosecutors [are both limited for use] to enforcement of consumer protection laws"].) Whether paid to the state general fund or a county fund, as amended by Proposition 64, all penalties are now statutorily mandated to be used exclusively "for the enforcement of consumer protection laws." (*State v. Altus Finance, supra,* 36 Cal.4th at p.1307.) Given this legislatively established and voter-approved allocation of penalty funds for use by the public, there is neither an appearance or an actual conflict of interest in either a local or statewide UCL prosecution by any of the authorized public prosecutors (whether it be the Attorney General, any of the 58 district attorneys or other local prosecutors, or some combination between them).

Third, the Attorney General's policy concerns are not in line with well-settled law governing conflicts of interest for public prosecutors, and its own prior arguments to the contrary. For example, in *People v. Eubanks*, the California Supreme Court explained that a district attorney may suffer from a conflict of interest if he or she receives direct "private financial contributions [that] are of a nature and magnitude likely to put the prosecutor's discretionary decision-making within the influence or control of an interested party," and, in such case, "the trial court must consider the entire complex of facts surrounding the conflict to determine whether the conflict makes fair and impartial treatment of the defendant unlikely." (*People v. Eubanks* (1997) 14 Cal.4th 580, 599.) Arguing against the alleged conflict of the district attorney (who accepted an unauthorized payment from a victim in a criminal case), the Supreme Court highlighted:

> The Attorney General argues at length that the financial contributions to the district attorney's office should not, as a matter of law, be considered as creating a conflicting interest for purposes of disqualification, because any interest of the district attorney in such contributions would be an *institutional* rather than *personal* interest. He emphasizes that [the citizen's] payments [to the district attorney] "did not benefit any official's personal pocket book," and contends the case law shows "recusal will usually require a showing of a prosecutor's personal interest in prosecution," or stated differently, "a showing of personal or emotional involvement" on the part of the district attorney.

(*People v. Eubanks, supra,* 14 Cal.4th at p.599.) There is no explanation for the Attorney General's drastic difference of opinion when it comes to UCL actions in its amicus brief in this case.

Fourth, the UCL is not unique in requiring monetary awards (either criminal fines or civil penalties) to be paid to county funds for use in future prosecutions.[5] (*See, e.g.*, Labor Code § 3820.) As CDAA pointed out to the California Supreme Court as amici in *Eubanks*, there are numerous "statutes establishing industry-financed funding schemes for certain types of fraud prosecutions."[6] (*People v. Eubanks, supra,* 14 Cal.4th at p.597.) The Supreme Court noted that "statutory funding schemes are required by law to contribute to prosecution efforts" and found it unlikely that such a scheme would create any undue "influence over the conduct of

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[5] The amicus parties suggest there is somehow a difference between a criminal prosecution and a UCL action merely because the UCL seeks civil penalties rather than criminal fines. The California Supreme Court disagrees with this distinction. (*See State v. Altus Finance, supra,* 36 Cal.4th at p.1308 ["We fail to discern a difference, for present purposes, between the Attorney General's seeking criminal penalties or civil penalties."].) "'Civil Penalties, which are paid to the government are designed to penalize a defendant for past illegal conduct'" in precisely the same way as criminal fines. (*Id.* [citations omitted].)

[6] In their amicus brief here, the CDAA does not contend, like the Attorney General, that the UCL penalty scheme creates a conflict of interest for district attorneys. However, CDAA suggests there could be ethical violations by a district attorney if private outside counsel is retained to aid the district attorney to enforce the UCL and protect California consumers. (CDAA Brief, at p.17.) CDAA cites *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 (notably without a pin cite) for the argument that "prosecutorial neutrality is improperly compromised by the use of private contingent fee counsel." (CDAA Brief, at p.17 fn.2.) While certain precautions must certainly be taken by prosecutors that hire outside counsel, the *County of Santa Clara* opinion expressly confirms that the use of contingent-fee counsel by local prosecutors who take these precautions (as the OCDA has done here) is fully permissible. (*Id*., at p.58 [confirming, "Indeed, retention of private counsel on a contingent-fee basis is permissible in such cases if neutral conflict-free government attorneys retain the power to control and supervise the litigation."]). Regardless, while an interesting discussion, the CDAA's point is not at all relevant to the issue presented in the Petition.

any particular prosecution" because the funds "are spent on investigation and prosecution" of related law enforcement matters. (*Id.*) The same is true under the penalty scheme under the UCL.

B. There Is No "Accountability" Problem Created By The UCL's Statutory Scheme

The idea that a District Attorney cannot competently prosecute a statewide violation because they do not have "statewide perspective" is unheard of. As discussed above, it is the court that determines the proper remedy in a UCL case, and as a neutral trier of fact, it is the obligation of the court to exercise statewide perspective when necessary in UCL actions. There is no reason to assume that a judge in Orange County is any less capable of making a statewide ruling than one in any other county where a UCL case may be brought by the Attorney General.

On the flip side, there is good reason the UCL does **not** limit standing to the Attorney General to seek UCL relief for California consumers. Namely, in some cases, it may be the Attorney General that lacks the necessary local perspective and resources to prioritize consumer actions that are important to local consumers, and such matters may or may not rise to the political agenda of the Attorney General. Recognizing the intent to maximize protection for California consumers, the UCL expressly permits local prosecutors, including certain City Attorneys and District Attorneys, concurrent authority to bring representative UCL actions to courts in their jurisdictions when necessary to protect consumers.

Unlike private persons -- for which such an argument may have some teeth -- as elected public officials, all such authorized persons are properly held "accountable" to voters. Moreover, as noted above, with the passage of Proposition 64, the voters were assured that all such persons would have the authority to pursue public actions on their behalf. There is accordingly no "accountability" problem presented by the current UCL statutory scheme.

C. Courts Have Power To Address Duplicative Lawsuits

The Chambers argue it would be "fundamentally unfair and violate due process principles" if defendants could be subject to "duplicative" UCL actions by various district attorneys if they all have standing to seek statewide relief on behalf of consumers. (Chambers Brief, at p.30.) This argument is not persuasive. Indeed, the California Supreme Court has already rejected any policy concern over duplicative lawsuits in representative UCL actions, leaving that concern for the trial courts to address, in their discretion, when entering orders and judgments in such cases. (*See Kraus, supra,* 23 Cal.4th at pp.138-139.) As the Supreme Court explained: "If the possibility of future suits exist, it may be appropriate for the court to condition payment of restitution to beneficiaries of a representative UCL action on execution of acknowledgement that the payment is in full settlement of claims against the defendant, thereby avoiding any potential for repetitive suits on behalf of the same persons or dual liability to them." (*Id.; see also* dis. opn. at pp.158-161 [similarly rejecting the policy argument concerning "repetitive suits" and "double" monetary

awards because "as in all UCL actions, a court has power and authority to fashion a constitutional remedy."].) "[J]ust as California courts are served by legal and equitable principles empowering them to craft remedies in light of relief previously awarded, so too they are bound by others forbidding them to permit any kind of double recovery." (*Kraus, supra*, dis. opn. at p.160.)

Moreover, there are multiple safeguards to protect defendants from defending against multiple lawsuits with respect to the same UCL violations filed in different counties at the same time -- if that situation were ever to arise. As in any other civil case, defendants may seek to consolidate such actions under the Code of Civil Procedure. The Attorney General could also exercise its authority to intervene if necessary. (*See* City Attorneys' Brief, at pp.31-33 [noting various procedural safeguards that exist].)

D. The Amicus Policy Arguments Run Counter to Current Law and Policy

As the Chambers' Brief acknowledges, "Courts will not interpret a statute to abrogate long-standing legal principles unless the statute does so explicitly or by necessary implication." (Chambers' Brief, at p.23.) Yet, if the trial court were limited to granting relief only to protect the consumers in Orange County in this case as the amicus parties suggest, this creates a number of questions and conflicts with other long-standing principles in UCL actions not addressed by the amicus parties. For instance, under the UCL, relief is typically "available without individualized proof of

deception, reliance and injury." (*In re Tobacco II*, *supra*, at p.320.) In order for a court to limit remedies to a subset of the state, this would naturally require individualized proof of harm to consumers in a particular area that is not otherwise required under the law. Requiring the court to review statewide violations using tunnel vision (*e.g.*, only through the lens of one particular county) is also contrary to the general punitive focus in UCL actions on the "defendant's misconduct" and the mandate that the court consider the total "number of violations" and the "nature and seriousness" of the misconduct under Section 17206 to fashion a proper remedy. (*In re Tobacco II*, *supra*, at p.312 [confirming the "UCL's focus [is traditionally] on the defendant's conduct, rather than the plaintiff's damages"].) Last, but not least, "the statute's larger purpose of protecting *the general public* against unscrupulous business practices" would certainly be frustrated by requiring courts to focus relief on one locality in geographic isolation. (*Id*. at p.312 [emphasis added].)

E. None Of The Concerns Have Actually Manifested Into The Hypothetical Abusive Prosecution Scenarios

Finally, none of the policy concerns raised by the amicus parties has any merit when you look at the history of prosecutions under the UCL. Indeed, the UCL has been used for decades by both local prosecutors and the Attorney General without any of these concerns actually manifesting into any of the hypothetical "unfair prosecutorial practices" scenarios raised by the amicus groups. (*See e.g.*, Chambers' Brief, at p.33; *but see Kraus, supra,* 23 Cal.4th at p.130 [noting "public prosecutors"

have been bringing UCL actions since "the late 1950's"].) This is evidence that the safeguards already implemented in the statutory scheme work to prevent the speculative public policy concerns raised here.

Nevertheless, in an argument better suited to the state legislature, the Chambers argue that only the AG *should, exclusively,* be able to bring UCL actions in the biggest impact cases (*e.g.*, those affecting consumers in more than one county). (Chambers' Brief, at p. 35 [arguing UCL filing decisions should be made by "a single Department of Justice under the supervision of a single chief law officer"].) If that was the intent of the legislature, however, they would have certainly said so. Instead, in order to best protect consumers, the legislature granted concurrent authority to both local prosecutors and the Attorney General to bring such matters, and left it to the discretion of the courts to establish the appropriate remedies. [*Kraus, supra,* 23 Cal.4th at p.129 ["A first principle of statutory construction is that the intent of the Legislature is paramount"].) There is nothing unfair about the current legislatively created system, and definitely nothing unfair about the actual UCL case against

Petitioners here merely because it was brought by the OCDA and not the Attorney General.[7]

V. CONCLUSION

None of the arguments raised by the amicus parties supports the relief requested in the Petition here. The Respondent Court did not abuse its discretion in denying the motion to strike. Accordingly, the Petition should be dismissed and the order of the Respondent Court should be affirmed.

DATED: February 23, 2018 Respectfully submitted,

TONY RACKAUCKAS,
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By: *Joseph D'Agostino*

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[7] One of the primary concerns by the amicus groups appears to be a UCL prosecution by "those of the tiniest counties" in the state. Of course, Orange County is not among the "tiniest counties," but rather, is one of the largest. Hence, the hypothetical concern is not even remotely relevant to the present case. Moreover, as discussed above, if there was a perceived abuse by a small county prosecutor, the Attorney General may always seek to intervene to prevent the supposed unfair prosecution's impact, while at the same time ensuring statewide consumer protection against unlawfully operating businesses. (Cal. Gov. Code § 12550.) If the Attorney General assumes the prosecution, he or she has all the powers of the district attorney in that case. (*Id*.)

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.486(3)(a)(6)

I certify that the text of this brief, including footnotes, consists of 7,008 words counted by the Microsoft Word word-processing program used to generate the brief.

DATED: February 23, 2018

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CERTIFICATE OF SERVICE

COURT: Court of Appeal, Fourth Appellate District, 1st Division

Case No.: D072577

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

1. I declare at the time of service I was a citizen of the United States, employed in the County of Orange, State of California. My business address is 19 Corporate Plaza Drive, Newport Beach, California 92660.

2. I further declare that on February 23, 2018, I served REAL PARTY IN INTEREST'S CONSOLIDATED ANSWER TO AMICUS BRIEFING on the parties indicated on the entities below, electronically via the TrueFiling Electronic Servicing Notification System.

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3. I further declare that on February 23, 2018, I served:

REAL PARTY IN INTEREST'S CONSOLIDATED ANSWER TO AMICUS BRIEFING

By United States Mail: Following the ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of this office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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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 the 23rd day of February, 2018, at Newport Beach, California.

/s/ *Darleen Perkins*_____
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