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

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF MANDATE OR PROHIBITION

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INTRODUCTION

The Petition for Writ of Mandate or Prohibition presents a single question: Does Business & Professions Code section 17204[1] permit a county district attorney to seek 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. As the Petition explains, the pertinent case law, related statutes, and bedrock principles of governmental structure and democratic accountability all point to the same conclusion: that the Court should grant the Petition.

In response to the Court's Order to Show Cause, the District Attorney filed a Return to Petition for Writ of Mandate or Prohibition (the "Return")[2], which offers no good argument to the contrary. Indeed, the Return spills most of its ink arguing various purported reasons why the Court should avoid answering the question presented, rehashing arguments against writ relief that were rejected when the Court issued its OSC, and conjuring up procedural diversions that have nothing at all to do with merits of this case. The Return also tries to recast the question presented so as to strip it of any meaning, it interprets the pleadings in a manner contrary to what the District Attorney argued in the

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[1] All further undesignated statutory references are codification of the Unfair Competition Law in Business & Professions Code sections 17200 through 19209.

[2] The District Attorney also filed, under separate cover, an opposition to Petitioners' request for judicial notice. But the Court granted Petitioners' request on September 18, 2017, so the point is moot.

strernsuperior court, and it strawmans again and again. In short, the Return tries to obfuscate the central issue here, but it does not (and cannot) present any persuasive argument that a county district attorney should be permitted to bring a claim that seeks relief for persons outside the county he or she serves.

The Court should grant the writ and order the allegations relating to conduct outside of Orange County stricken from the First Amended Complaint.

ARGUMENT

I. THE UCL DOES NOT AUTHORIZE THE DISTRICT ATTORNEY TO OBTAIN RELIEF FOR ALLEGED CONSUMER INJURIES HAVING NO FACTUAL NEXUS TO THE COUNTY WHOSE CITIZENS ELECTED HIM.

The Petition established two key legal points that, when taken together, merit granting the writ. First, unlike in criminal prosecutions, the authority of a local district attorney to bring claims for civil penalties is narrowly circumscribed. (Petn. at pp. 29–34.) When pursing civil claims, a district attorney can act only when and to the extent expressly authorized by statue. In granting that authority, "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*." (*People v. Superior Court* (*Solus Industrial Innovations, LLC*) (2014) 224 Cal.App.4th 33, 42 (*Solus*), emphasis original.)

Second, as addressed in *People v. Hy-Lond Enterprises. Inc.* (1979) 93 Cal.App.3d 734 (*Hy-Lond*) and other relevant authorities, the Legislature did not specify that a local district

attorney can bring claims for statewide violations and relief under the Unfair Completion Law. (Petn. at pp. 34–45.)

The Return does not address the first point at all. In fact, none of the key cases addressed in the Petition regarding the first point[3] are even cited in the Return. With respect to the Petition's second point, the Return does not attempt to confront it until page 40, and advances only unpersuasive arguments in response. First, the Return attempts, but fails, to distinguish the authorities cited in the Petition. Second, the Return argues that the text of the UCL does not include any "geographical limitations," [4] (Return at pp. 40–41), but offers no response to the Petition's argument that the statute's silence on the issue disposes of it in Petitioners' favor. Third, the Return invokes the policy and Legislative intent behind the UCL, (Return at pp. 45–48), but as explained in the Petition, strong policy and prudential reasons support, rather than negate, the need for geographic limits on district attorneys' UCL civil enforcement powers. Last, the Return makes the unsubstantiated

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[3] (Compare Petn. at pp. 29–34 [addressing *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737; *Safer v. Superior Court* (1975) 15 Cal.3d 230; *Bullen v. Superior Court* (2008) 204 Cal.App.3d 22; *Solus*, *supra*, 224 Cal.App.4th 33; and *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180] with Return at pp. 5–7 [table of authorities listing none of these cases].)

[4] The Return quotes phrases like "geographic boundaries" and "geographic limitation" that do not appear in the cited cases. (See, e.g., Return at p. 38 [quoting "geographic boundaries," which does not appear in *People v. Beaumont* (2003) 111 Cal.App.4th 102, 129]; Return at pp. 40–42 [quoting "geographic limitation," which does not appear in *Cortez v. Abich* (2011) 51 Cal.4th 285, 290–299].)

and illogical leap that because a district attorney may enforce an injunction anywhere in the state, he or she must have the power to seek state-wide restitution and penalties under the UCL. None of these arguments in the Return has any merit.

A. The Authorities Addressed in the Petition Merit Granting the Writ.

The District Attorney argues that "[n]one of the authorities cited in the petition support petitioner's arguments," (Return at p. 48), but the Return fails to distinguish key authorities like *Hy-Lond* and does not address other authorities at all.

The District Attorney asserts that *"Hy-Lond* did ***not*** hold . . . that a district attorney can never seek remedies outside of his county of residence[.]" (Return at p. 49, emphasis original.) Of course, the Petition never claimed that it did. Rather, the Petition relied on *Hy-Lond*'s reasoning, which leads unmistakably to the conclusion that a district attorney lacks authority under § 17204 to seek statewide remedies. (Petn. at pp. 34–38.) (*Ibid.*) Specifically, in holding that a district attorney settled claims outside the scope of his authority, *Hy-Lond* reasoned that section 17204's authorizing district attorneys, among others, to prosecute actions under the UCL, did not afford district attorneys "uncircumscribed authority" to "restrain the powers of other public officials and agencies." (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 752.) Nor did it 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]." (*Id.* at p. 753.) *Hy-Lond* thus addressed—and recognized—geographic limits on a district attorney's authority under the UCL.

The Petition bolstered this analysis by reference to other cases, statutes, and principles each of which confirm, under *Hy-Lond's* rationale, the District Attorney lacks the authority to pursue statewide claims and remedies under the UCL.

The District Attorney attempts to distinguish *Hy-Lond* by asserting that it is "limited to the particular facts of that unusual case[.]" (Return at pp. 49–50.) But *Hy-Lond* does not say that and the Return offers no cogent reason why it should be so. As the Supreme Court explained long ago, "when a case is only new in instance, but not new in principle, the mere failure to discover a precedent in which the principle was applied to exactly the same facts is of little weight or consequence." (*People v. Richards* (1865) 67 Cal. 412, 418.)[5]

Hy-Lond was concededly different "in instance." It was a post-judgment challenge by the Attorney General to a statewide settlement entered by the Napa County District Attorney. This case addresses defendants' pleadings challenge to a district

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[5] The District Attorney's interpretive technique of "distinguishing" cases based on irrelevant differences in facts or procedural posture was deftly critiqued by the Ninth Circuit in *Chew v. Gates*. There, the court noted that if precedent is read so narrowly as to only apply to factually and procedurally identical circumstances, "*Brown v. Board of Education* [(1954) 347 U.S. 483], would stand for the proposition that separate is inherently unequal only in Topeka, Kansas, (or possibly only as to Linda Brown), *Marbury v. Madison* [(1803) 5 U.S. (1 Cranch) 137], would stand for the proposition that the courts have the power of judicial review only when considering the validity of a statute conferring mandamus jurisdiction, and our judiciary would be in an even worse state than it already is." (*Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1447 fn. 16.).

attorney's authority to bring statewide claims. But the difference in *Hy-Lond*'s posture does not matter—and the decision is not distinguishable "in principle"—because section 17204 does not distinguish between claims that a district attorney is authorized to bring and claims that a district attorney is authorized to settle. Put differently, and to be clear, if the Return's interpretation were correct, then district attorneys would have the authority to bring and litigate claims covering the entire State but (under *Hy-Lond*) no authority to release those same claims. Yet, the District Attorney offers no reason, much less any authority, to support that absurd result.

The District Attorney also suggests that *Hy-Lond* is of "questionable validity," based on a conclusory suggestion in the Stern § 17200 treatise. (Return at p. 48 [quoting Stern, *Business & Professions Code § 17200 Practice* (Rutter Group March 2016 update) ¶ 9:51 (Stern)].) Specifically, Stern suggests that *Hy-Lond* may be inconsistent with a statement in *People v. Mendez* (1991) 234 Cal.App.3d 1773, 1783 (*Mendez*) to the effect that the Attorney General could be bound to the stipulation of a county district attorney.[6] (See Stern, *supra*, ¶ 9:51.) Of course, a treatise's disagreement with the rationale of a written opinion of the Court of Appeal does not (and cannot) abrogate the decision. And in any event, Stern is incorrect because *Mendez* was a criminal case and

[6] *Mendez* ultimately declined to bind the Attorney General to a district attorney's stipulation under the facts at issue in that case. (*Mendez, supra*, 234 Cal.App.3d at p. 1784.)

the statement in Stern fails to appreciate district attorneys' significantly different roles in criminal versus civil cases.

"In the prosecution of criminal cases [a county's district attorney] acts by the authority and in the name of the people of the state." (*Pitts v. Cty. of Kern* (1998) 17 Cal.4th 340, 359 (*Pitts*).) Subject to the supervision of the Attorney General, a district attorney is the executive branch of the state government's representative who "independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." (*People v. Eubanks* (1996) 14 Cal.4th 580, 589. [citing Gov. Code, § 26500]; see also *Mendez*, *supra*, 234 Cal.App.3d at p. 1783.) "[T]he district attorney represents the state, not the county, when preparing to prosecute and when prosecuting crimes[.]" (*Pitts*, *supra*, 17 Cal.4th at p. 345); *see also* Penal Code, § 684 [making the state the plaintiff in all criminal prosecutions].) Under those circumstances, it is unsurprising that a district attorney may bind the state government to an agreement, just as any agent may bind his principal. (See Civil Code, § 2330.)

But the situation in a civil action is vastly different. In 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." (*Solus*, *supra*, 224 Cal.App.4th at p. 43.) Thus, as *Hy-Lond* explains, to sue for civil penalties, a district attorney's actions must be expressly authorized by statute. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 751.) Those actions do not bind the state or the

Attorney General unless the statute says they do. (See *id.* at p. 752; *cf. In re Stier* (2007) 152 Cal.App.4th 63, 74 [declining to bind Attorney General to district attorney's concession in a non-criminal prosecution because "[t]his is not a case in which the District Attorney, as it often does, was acting in the capacity of sole public prosecutor for the State under the 'direct supervision' of the Attorney General."].)[7] Thus, contrary to the suggestion in the Stern treatise, there is no tension between *Hy-Lond* and *Mendez*.[8]

The Return likewise fails in its attempt to factually distinguish *Singh v. Superior Court* (1919) 44 Cal.App. 64. *Singh* states the basic legal proposition that 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." (Petn. at p. 31.) That proposition does not turn on any of the facts of the case that the Return addresses—such as that "*Singh* did not concern the UCL or the powers of local officials[.]" (Return at p. 50.) Notably, Petitioners cite *Singh* for the exact same proposition that *Hy-Lond* cites it for. (*See Hy-Lond, supra,* 93 Cal.App.3d at p. 751.)

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[7] As noted in the Petition, a district attorney can also bind the Attorney General in a civil case where the district attorney was acting under authority delegated by the Attorney General. (Petn. at p. 30 fn. 5.)

[8] Notably, Stern has been previously found to have cited authorities that do not support the propositions asserted in the treatise. (See, e.g., *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 889 [finding Stern's statement about recovery of attorneys' fees under the UCL to be unsupported by the cases it cited].)

The Return also has no response at all to many of the other authorities and arguments addressed in the Petition.

Nowhere does the Return address—or even mention—*People of the State of California v. M & P Investments* (E.D.Cal. 2002) 213 F.Supp.2d 1208 (*M&P*). *M&P* applied *Hy-Lond*'s geographic limits to local prosecutors' authority and held that a city attorney could not act on behalf of the entire state in seeking a preliminary injunction on public nuisance claims. (*Id.* at pp. 1215–17.) *M&P*'s reliance on *Hy-Lond* contradicts the District Attorney's attempt to limit *Hy-Lond* to what the Return describes as "the particular facts of that unusual case[.]" (Return at p. 50.)

Nor does the Return address the Petition's arguments about the importance of delineating the scope of elected officials' authority. (Petn. at pp. 31–33.) Indeed, the Return does not so much as cite *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203 (*Younger*), which the Petition relied upon in explaining the importance of a prosecutor's being elected by the citizens on whose behalf he or she brings claims.

The Return also fails to address the Petition's demonstration that other statutes—in circumstances not present here—authorize district attorneys to act outside of their territorial jurisdiction (Petn. at p. 33), or bring statewide claims. (*Id.* at pp. 41–42). These statutes show that the Legislature knows how to grant authority to seek civil remedies beyond a district attorney's own county, when that is its intent.

Nor does the Return address the inherent conflict of interest that would arise from permitting an officer elected by a single

county to recover statewide civil penalties that will be paid into the treasury of only his own county. (Petn. at p. 37.)

The District Attorney ignores these arguments for good reason: he has no compelling response to them, just as it is no response for the District Attorney to point out factual distinctions between the cases on which the Petition relies, on one hand, and this case, on the other, without showing how or why those distinctions make any difference.

B. The Text of the UCL Does Not Convey the Broad Authority the District Attorney Claims.

The Return argues that the plain meaning of sections 17204 and 17206 permit district attorneys to bring claims and seek remedies for conduct occurring anywhere the UCL applies, regardless of their jurisdiction. This argument fails both (1) because it is based on a misreading of the relevant statutes and (2) because it is irreconcilable with *Hy-Lond* and with the structure and purpose of local law enforcement authorities under California law.

Section 17204 states that "[a]ctions for relief pursuant to [the UCL] shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by [various other local and city prosecutors][.]" (§ 17204.) The Return argues that by including district attorneys along with the Attorney General in the list of those authorized to prosecute UCL actions, the Legislature has "equate[d] the authority of the District Attorney . . . with that of the Attorney General." (Return at pp. 40–41 [citing §§ 17204, 17206].) But the statutory text on which the Return relies is merely a general statement that the UCL can be

enforced by the listed prosecutors—which no one disputes. It says nothing about the *geographic scope* of each prosecutor's enforcement authority. On that question, section 17204 is silent. As the Petition explained, that silence cannot be read to expand the authority of a district attorney beyond the county he serves. (Petn. at pp. 34–38.)

Under both the California Constitution, various statutes, and the common law, the Attorney General has plenary authority to seek civil relief on behalf of the state and all its citizens. (Gov. Code, § 12512; see *D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 14 (*D'Amico*).) Local district attorneys, on the other hand, do not. They have "no authority to prosecute civil actions absent specific legislative authorization[.]" (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753; see also *Solus* 224 Cal.App.4th at p. 43.) These differences are fundamental to the structure of California's state government and enshrined in the Constitution itself. (Compare Cal. Const. art. V, § 13 with *id.* art. XI, § 1; see generally *D'Amico, supra*, 11 Cal.3d at p. 14; *Younger, supra*, 86 Cal.App.3d at p. 203.) The Return fails to acknowledge—much less address—the Petition's showing that the scope of the authority of the Attorney General is different from that of a district attorney.

The Return also fails to address the fact that courts "do not construe statutes in isolation; rather, [they] construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided." (*Coachella Valley Mosquito & Vector Control Dist. v. California Pub.*

Employment Relations Bd. (2005) 35 Cal.4th 1072, 1089.) The Supreme Court has explained that "the Legislature has manifested its concern that the district attorney exercise the power of his office only in such civil litigation as that lawmaking body has, after careful consideration, found essential." (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 236 (*Safer*).) When the Legislature chooses to do so, it "countenance[s] the district attorney's participation" with "specificity" and "narrow perimeters." (*Ibid.*)

Had the Legislature intended to upset the long-settled distinctions between the scope of the Attorney General's and local district attorneys' respective authority to prosecute civil cases, it could and would have explicitly done so in the text of the statute. (See, e.g., Bus. & Prof. Code, §§ 16750, subd. (g), 16760, subd. (g) [permitting district attorneys to bring *parens patriae* claims under the Cartwright Act, but including specific procedures to ensure that the Attorney General maintains ultimate control over such claims].) There is no such explicit grant of authority to district attorneys under the UCL.

The District Attorney fares no better with his argument based on section 17206's statement that civil penalties "shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, [and various other city and local prosecutors]." (§ 17206, subd. (a).) To interpret this language as the District Attorney suggests—giving each district attorney the authority to challenge conduct occurring anywhere in the State—would lead to

the absurd conclusion that the District Attorney could bring an action based on conduct occurring entirely within another county and harming only the residents of that other county. That argument was rejected by *Hy-Lond*, which expressly addressed that the fact that actions are to be styled as brought by the "The People of the State of California," but explained that this language "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 p. 751.)

Indeed, even if not belied by *Hy-Lond*, the District Attorney's textual arguments would show only that, like section 17204, section 17206 does not expressly limit the geographical scope of a District Attorney's authority. By the same token, however, neither statute purports to authorize a local district attorney to prosecute extraterritorial or statewide violations or seek relief based on them. The question, then, is how to interpret that silence. As shown above and in the Petition, the only conclusion that can be drawn from it is that the civil enforcement authority of the District Attorney is limited to his own county.

C. The Policy and Legislative Intent Behind the UCL Do Not Require the Broad Authority the District Attorney Claims.

Nor is there any merit to the District Attorney's argument that the policy and legislative intent behind the UCL must permit him to seek statewide relief for violations having no nexus to Orange County.

As an initial matter, although the Return makes an oblique reference to the legislative history of the UCL, (Return at p. 40), it does not actually cite any legislative history. In any event, nothing in the available legislative history of the UCL suggests any Legislative intent to permit district attorneys to seek statewide relief under the UCL. (*See generally People v. Superior Court (Jayhill Corp.)* (1973) 9 Cal.3d 283, 287 fn. 2 (*Jayhill*) [discussing origin of the UCL's civil penalties provision]; *People v. Superior Court (Cahuenga's The Spot)* (2015) 234 Cal. App. 4th 1360, 1379 [discussing legislative history of UCL remedies in general].)

What the Return does cite are several pages of quotations from inapposite cases[9] regarding the general policies behind the UCL. But the Return offers no authority or support for why those general policies require vesting statewide authority in a district

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[9] For instance, the Return block-quotes from *People v. James* (1981) 122 Cal.App.3d 25, 40 (*James*), to suggest the standing of victims to seek relief has no effect on a district attorney's authority to seek equitable relief under the UCL. (Return at p. 47.) But—as is clear from a phrase omitted from the District Attorney's block quote without an ellipsis—the quoted portion of *James* is explaining that the allegedly "unclean hands" of victims who illegally parked their cars did not bar a local district attorney from obtaining an injunction against a tow truck operator for charging illegal impound fees at his impound yard. (*James*, *supra*, 122 Cal.App.3d at pp. 39–40.) Although the case was filed by a district attorney, the facts arose from events occurring at a liquor store parking lot in Huntington Beach. (*Id.* at p. 30.) In context, the block [mis]quote from *James* has absolutely nothing to say about a district attorney's authority to seek relief for injuries that occur in other counties.

attorney elected by only 8 percent of the state's residents[10]—and they do not—particularly when there is an elected Attorney General who unquestionably has statewide authority. (See Gov. Code, § 12512 [requiring the Attorney General to "prosecute or defend all causes to which the State . . . is a party[.]"].) Indeed, the Petition showed that these policies would be undercut by such a scheme. (See *M&P*, *supra*, 213 F.Supp.2d at p. 1214 ["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." Emphasis omitted]; *Younger, supra,* 86 Cal.App.3d at p. 204 ["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."].)

The District Attorney's bald statement that it is "absurd" for his authority to be geographically limited, (Return at p. 46), has no basis in logic, and the Return cites no authority for it. Indeed, as noted above, the opposite is true: it makes no sense at all to permit a local prosecutor to prosecute civil UCL arising from conduct occurring in some distant county. The undisputed fact that the Attorney General has statewide civil enforcement authority disposes of the District Attorney's hyperbolic claim that the

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[10] (See U.S. Census Bureau, QuickFacts for Orange County, California, *available at* https://www.census.gov/quickfacts/fact/table/orangecountycalifornia,CA/PST045216.)

Petition's argument "would result in the need for all 58 district attorneys in each California county to file UCL suits to enjoin statewide unfair business practices." (*Ibid.*)

Indeed, there are good reasons why a citizen might question whether the politically unaccountable district attorney of some other county is really acting in his or her best interests. For example, in this case, the District Attorney hired private counsel to litigate his claims. Under his fee agreement with those counsel,[11] counsel are not paid an hourly rate or a contingency, but instead are permitted to "apply for an award of attorneys' fees and costs as against one or more of the defendants in the Litigation pursuant to Code of Civil Procedure Section 1021.5[.]" (Ex. 20 at SA20 [§ 7.1.1.1].[12]) A government plaintiff suing private defendants,[13] however, may not ever recover its fees under section

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[11] As stated in the Petition, the District Attorney had not at the time of the filing disclosed his fee arrangements with his outside counsel, despite a proper request that he do so. (Petn. ¶¶ 14–15.) It was only after this court issued the order to show cause and stay of proceedings in the superior court that that the District Attorney has belatedly produced a copy. (See Return ¶¶ 14–15.)

[12] Citations to record materials follow the conventions used in the Petition. (See Petn. at p. 14 fn. 3.) Additionally, citations to Exhibits numbered 17 or higher are to the exhibits to the Supplemental Appendix filed under separate cover with this Reply. Page references in those documents beginning with "SA" are to the pagination of those documents in Petitioners' Supplemental Appendix.

[13] "In 1993 . . . the Legislature amended the statute to its present form, which allows a public entity to recover attorney fees from another public entity." (*People ex rel. Brown v. Tehama Cty. Bd. of Sup'rs* (2007) 148 Cal.App.4th 790, 450.)

1021.5. (Code Civ. Proc., § 1021.5 ["With respect to actions involving public entities, this section applies to allowances *against, but not in favor of,* public entities," emphasis added]; see also *City of Carmel-By-The-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 254 [so holding].) Nor is there any other basis for the District Attorney to recover his outside counsel's fees from defendants. (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 889 [holding that the UCL itself does not permit public prosecutors to recover attorneys' fees].)

The upshot of this curious arrangement is that if this case is taken to trial and judgment, the District Attorney's outside counsel will not get paid. That puts a heavy onus on the District Attorney and his outside counsel to end the case by a settlement in which any recovery is partially allocated to attorney's fees rather than restitution, to the potential detriment of those out-of-county residents to whom the District Attorney is not politically accountable. It is hardly absurd to be skeptical about a district attorney's having extraterritorial jurisdiction in this circumstance.

Further, contrary to the Return's argument, the territorial limitation on a district attorney's authority does not put him in the supposedly "absurd" position of having narrower jurisdiction than a private plaintiff. (Return at p. 47.) Under Proposition 64, a private UCL plaintiff may bring claims on behalf of others (statewide or not) only when she can satisfy the rigorous requirements to certify the case as a class action. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980; see § 17203.) The certification procedure ensures the alignment of interests between the plaintiff,

the class, and counsel, and ensures that the case is pursued in the best interests of the class as a whole. (See generally *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811.) In this manner, class actions afford greater protection to alleged victims than district attorney actions do. (See *People v. Pac. Land Research Co.* (1977) 20 Cal.3d 10, 18 (*"Pacific Land"*) [noting that a "governmental official who files [a UCL] action is ordinarily not a member of the class, his role as a protector of the public may be inconsistent with the welfare of the class so that he could not adequately protect their interests . . . ."].)[14]

Finally, where, as here, penalties are sought by a district attorney, the penalties are payable to the treasury of the prosecutor's county. (§ 17206.) As noted in the Petition (but not addressed in the Return) a significant conflict of interest can result from "put[ting] 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 of other claimants, whose interests would be better protected by the

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[14] The Return cites *Troyk v. Farmers Grp., Inc.* (2009) 171 Cal.App.4th 1305 (*Troyk*), in support of this argument. (Return at p. 47.) But *Troyk* explains only that Proposition 64 amended the private party standing requirements of the UCL to "ensure that only the California Attorney General and local public officials [are] authorized to file and prosecute actions on behalf of the general public." (*Troyk, supra*, 171 Cal.App.4th at p. 1345, quotations omitted). Nothing in the reasoning or facts of *Troyk* suggests that the "local public officials" it refers to, which include district attorneys, are "authorized to file and prosecute actions on behalf of the general public" outside of their local jurisdictions or on a statewide basis.

Attorney General or their own district attorneys. (Petn. at p. 37, quoting *Hy-Lond, supra,* 93 Cal.App.3d at p. 753.)

Thus, the District Attorney has not established that the "policy and legislative intent behind the UCL" favor, let alone require, the Court's construing the UCL or any other law to permit him to bring claims for relief having no factual nexus to Orange County.

D. The District Attorney's Arguments About Injunctions and Restitution Are Inapposite.

The District Attorney's position is not saved by his contention that he can obtain injunctive relief on a statewide basis, and his argument that he can obtain statewide restitution is just wrong.

Petitioners do not dispute that a public prosecutor can obtain an order enjoining a defendant from violating the UCL. (See §§ 17203, 17204.) So long as the plaintiff can show that a violation is likely to recur, (*Madrid v. Perot Sys. Corp.* (2005) 130 Cal.App.4th 440, 465), an injunction will generally take the form of an order prohibiting the defendant from engaging in whatever activity has been found to violate the UCL. (See, e.g., *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 530 (*Fremont Life*) [in a UCL action based on fraudulent marketing of insurance products, the court "enjoined numerous acts, ranging from the conduct of insurance agents in the residence of a prospective customer and disclosures in policies and brochures, to the size of the margin on the annuity policy"]; *People v. Los Angeles Palm, Inc.* (1981) 121 Cal.App.3d 25, 27 [in a UCL violation based on Labor Code violations "the court enjoined

defendant from crediting tips against wages owed"].) Petitioners also do not dispute that once such an injunction is issued, an action to seek redress for a violation of that injunction can be brought in any court of competent jurisdiction in this state. (§ 17207, subd. (b).)

These basic (and undisputed) points, however, are wholly irrelevant to the issue presented here. The District Attorney has not brought his action in the trial court to enforce an injunction arising from a violation of the UCL. He brought it to prove that UCL has been violated in the first instance and to obtain remedies for that violation. (See generally Ex. 7.) None of the three cases cited in the Return stands for the proposition that a local prosecutor can obtain an injunction on the basis of UCL violations that occurred outside of his jurisdiction. Instead, each stands only for the uncontroversial, but inapposite, proposition—set forth in section 17203—that "[a]ny person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." (See § 17203; *Churchill Vill., L.L.C. v. Gen. Elec. Co.* (N.D.Cal. 2000) 169 F.Supp.2d 1119, 1126 [quoting former version of § 17203]; *Comm. On Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 209 [quoting 1972 case that quoted former version of § 17203]; *People ex rel. Mosk v. Nat'l Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 771 (*Mosk*) [relying on former Civil Code, § 3369, which was subsequently recodified at § 17203].)

Equally inapposite is *Fremont Life, supra,* 104 Cal.App.4th at p. 531. That case was brought by, among others, the Attorney

General. (*Id.* at pp. 529–30.)[15] It is entirely unremarkable that Attorney General Lockyer was able to obtain restitution for "each nonsettling California consumer . . . who had purchased an annuity policy from" the defendant, regardless of where in the state they resided. (*Id.* at p. 531.) But nothing in the reasoning or facts of *Freemont Life* suggests that, had the action been brought only by a local district attorney, restitution could or would have been awarded "on behalf of the People of the State of California, not just residents of any particular area[.]" (Cf. Return at p. 43.)

Two other cases cited in the Return were also brought by the Attorney General, not local prosecutors. (*See Jayhill*, *supra*, 9 Cal.3d at p. 286; *Pacific Land*, *supra*, 20 Cal.3d at p. 19 fn. 9.) The District Attorney cites these two cases for the proposition that courts have the discretion to provide restitution to any identifiable victims. (Return at pp. 43–44.) Once again, however, while in an Attorney General action that discretion may exist wherever in the state the victims reside, it does not mean that such discretion exists in a case brought by a local prosecutor—nor does it mean that such discretion would exist in a case brought by a private plaintiff individually. As the Supreme Court wrote, "In particular, in an action by the Attorney General . . . a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded." (*Jayhill*, *supra*, 9 Cal.3d at p. 286.)

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[15] While the Return repeatedly quotes the term "legislative mandate" in its discussion of *Fremont Life,* the term does not appear in the opinion.

The Return cites no authority, because there is none, that a district attorney's power to obtain restitution is as broad.[16]

Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116 (*Kraus*), is also inapposite to the question at hand. *Kraus* was a pre-Proposition 64 representative action (i.e., a private action where no class was certified and the plaintiff didn't need to have any injury), brought against a landlord that "owns and leases residential rental properties in the City and County of San Francisco[.]" (*Id.* at p. 122.) The Supreme Court held that, although renters who were required to pay deposits that violated the UCL could obtain restitution, "section 17203 does not authorize orders for disgorgement into a fluid recovery fund" in representative actions. (*Id.* at p. 137.) Given that the victims were all residents of San Francisco, *Kraus* did not entail statewide restitution. And while *Kraus* may have suggested, in passing in a footnote, that "restitution in representative UCL actions was appropriate," (Return at p. 44, citing *Kraus*, *supra*, 23 Cal.4th at p. 138 fn. 18), that relief was authorized under the law as it existed at the time. (See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal. 4th 993, 1000 [noting that Kraus's discussion of representative actions was abrogated by

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[16] The District Attorney also fails to address that any authority to act extraterritorially must include not only the authority to bring a statewide UCL claim but also to lose a statewide UCL claim. That would give rise to significant questions regarding the preclusive effect of a defense judgment. Although the Petition explained that the trial court's ruling created uncertainty regarding the precursory effect of a judgment, (see Petn. at p. 44), the Return does not address the issue.

Proposition 64].) Regardless, *Kraus* says nothing about whether a district attorney can obtain restitution for residents of some other county.

II. A MOTION TO STRIKE WAS THE APPROPRIATE PROCEDURAL VEHICLE TO ADDRESS THE DISTRICT ATTORNEY'S PRAYER FOR ULTRA VIRES REMEDIES.

The Return's procedural arguments are no more than a distraction. Raising an argument that he did not make in the superior court (Ex. 11 at A193–200 [arguing only that "[t]he UCL explicitly authorizes the district attorney to seek statewide relief, and defendants' arguments in contravention of the statutes are meritless."]), the District Attorney contends in the Return that a motion to strike was an improper procedural means by which Petitioners could determine the limits of his authority at the pleading stage. The District Attorney is incorrect.

The Supreme Court recently recognized that a "defective portion of a cause of action is subject to a conventional motion to strike[.]" (See *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393, citing *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 (*PH II*).) Strike-able "defects" include allegations implicating relief that the plaintiff lacks standing or authority to obtain as a matter of law. (See, e.g., *Pac. Gas & Elec. Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 27.)

As explained in *PH II*, a motion to strike is the appropriate remedy when "a portion of a cause of action [is] substantively defective on the face of the complaint." (*PH II, supra*, 33 Cal.App.4th at p. 1682-83.) "[I]n such cases, the defendant should not have to suffer discovery and navigate the often dense thicket

of proceedings in summary adjudication." (*Ibid.*) "[W]hen a substantive defect is clear from the face of a complaint, such as a . . . purported claim of right which is legally invalid, a defendant may attack that portion of the cause of action by filing a motion to strike." (*Ibid.*) That is precisely what Petitioners sought in the superior court.

The District Attorney's First Amended Complaint in this case included numerous references to "California Niaspan users, their insurers, public healthcare providers and other government payors" as well as acts alleged to have occurred "in California," "within California," and "across and within California." (See Ex. 7 ¶¶ 1, 2, 3, 17, 40, 114, 123, 132, 133, 134–40, 141, 151, 154, 155, 165.) The clear implication of these allegations is that the District Attorney is seeking relief for UCL violations occurring entirely outside of Orange County. Because Petitioners contended (correctly) that the District Attorney lacks authority to bring those claims or seek that relief, Petitioners properly moved under Code of Civil Procedure section 436, subdivisions (a) and (b), to strike these allegations as "irrelevant" and "improper matter" and "not drawn . . . in conformity with the laws of this state." (Ex. 8 at p. A118.)

In the superior court, the District Attorney did not deny that these allegations constituted an effort to bring statewide claims; he defended against the motion to strike not by challenging the motion procedurally, but instead by claiming he had authority to pursue state-wide relief. (See generally Ex. 11.) His current attempt to characterize these allegations as having been made for

some other purpose (Return at pp. 33–34) is disingenuous—as also shown by his concurrent position that "[p]articularized factual pleading is not required" for him to state a UCL violation (Return at p. 39). (See *Green v. Palmer* (1860) 15 Cal.411, 416 ["[N]othing should be stated which is not essential to the claim or defense, or in other words, that none but *issuable facts* should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts.", Emphasis original].)

Further, none of those other supposed purposes would have been legitimate. First, while the Return suggests that the "California" allegations pertain to counting "what constitutes a 'violation," under section 17206 (Return at pp. 37–38), that does not make the allegations somehow invulnerable to a motion to strike. It is true that case law interpreting the UCL—including cases cited in the Return—is vague about how to ascertain the proper unit of a single UCL "violation." (See generally *People v. Toomey* (1984) 157 Cal.App.3d 1, 22 (*Toomey*) ["Section[ ] 17206 . . . fail[s] to specify what constitutes a single violation, leaving it to the courts to determine appropriate penalties on a case-by-case basis."]; accord *Mosk, supra*, 201 Cal.App.2d at p. 771 [upholding former Civil Code, § 3369 (1962)—the predecessor to the UCL—against a void for vagueness challenge].) Cases have counted violations per injury, per customer, per sale, per contract, and in other ways. (*See Toomey, supra*, 157 Cal.App.3d at pp. 22–23.) But however the unit of violation is defined in this case, that definition has no bearing on the District Attorney's ability to advance his arguments. If Petitioners are right on the merits, the unit of a

"violation" will be defined based only on conduct with a factual nexus to Orange County. That will not save the allegations going beyond Orange County from being stricken.

The same reasoning applies to the District Attorney's argument that his "throughout the state" allegations are relevant to the Court's ability to grant statewide injunctions or restitution, (Return at 43–44). As discussed above, there is no authority whatsoever to suggest that a local district attorney can obtain an injunction based on extraterritorial violations of the UCL or that he can pursue restitution on behalf of residents of other counties. So again, if Petitioners are correct on the merits, the District Attorney will simply be limited to obtaining equitable relief with a factual nexus to Orange County. Thus, this argument too provides no basis to save his allegations from being stricken.

The District Attorney's final argument—that the statewide nature or effect of the conduct at issue might have some bearing on the Court's discretion as to how to set an ultimate civil penalty under section 17206, subdivision (b)—fails as well. If Petitioners are right on the merits of their Petition, the District Attorney will be limited to proving conduct with a factual nexus to Orange County because acts "throughout California" are within the jurisdiction of other district attorneys or the Attorney General. To consider that conduct as an aggravating factor in setting a penalty in this case would improperly penalize Petitioners multiple times for the same conduct, in violation of Penal Code section 654. (See *Ralph's Grocery Co. v. California Dep't of Food & Agric.* (2003) 110 Cal.App.4th 694, 701 [applying Penal Code, § 654's prohibition on

multiple penalties for the same act in a civil penalty case].) Indeed, to punish Petitioners in this case for harming those outside of Orange County—persons who the District Attorney does not and cannot represent—raises a due process concern under the Fourteenth Amendment to the U.S. Constitution. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 ["In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation."]).

Regardless, even if the trial court could properly consider the statewide nature of the conduct in selecting a civil penalty, in context, not every one of the sixteen allegations that were the subject of Petitioners' motion implicates the court's discretion under section 17206, subdivision (b). For instance, Petitioners moved to strike the words "in California" from paragraph 165 of the First Amended Complaint. (*See* Ex. 8 at p. A118 [motion]; Ex. 7 at p. A109 ¶ 165 [allegation].) That paragraph alleges that harm Petitioners caused throughout California outweighs the justifications for their practices and thus violates the "unfair" prong of the UCL under one of the tests that has developed in the case law. (See *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839 [setting out test quoted in the pleading].[17]) In the context

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[17] (But see *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 186 [holding that when allegations address anticompetitive behavior, more stringent test applies].)

of the First Amended Complaint, the purpose of that paragraph is unambiguous. It alleges liability based on statewide conduct. The allegation is irrelevant to the superior court's discretion to assess a civil penalty for violations within Orange County. Indeed, the civil penalty allegations are stated later in the First Cause of Action, in paragraph 168. (Ex. 7 at p. A109 ¶ 168.)

Similarly, paragraph 155 does not allege statewide harm, or even violations. It says only that "Defendants transmitted funds and contracts, invoices, and other forms of business communications and transactions in a continuous and uninterrupted flow of commerce across and within California in connection with the sale of Niaspan." (Ex. 7 at p. A107 ¶ 155.) Regardless of the breadth of the superior court's discretion under section 17206, subdivision (b), the transmission of documents "across and within California" has no logical bearing on it.

The writ should be granted regardless of whether there is some overlap between some paragraphs that allege extraterritorial violations one one hand and paragraphs that allege facts germane to penalty selection on the other, because that is not true for every paragraph addressed in Petitioners' Motion.

At the end of the day, it is inequitable to force defendants to submit to discovery and go to trial on expansive statewide claims that local prosecutors lack any authority to litigate. The contrivance that facial allegations of statewide UCL violations might also tangentially relate to some other consideration should not preclude resolution of this issue on the pleadings. Civil procedure is not a game that "reward[s] artful pleading," (see

Baral, *supra*, 1 Cal.5th at p. 393), which is exactly what the District Attorney is attempting in this case.

III. NONE OF THE DISTRICT ATTORNEY'S NON-MERITS ARGUMENTS JUSTIFY DENIAL OF THE WRIT.

A significant portion of the District Attorney's Return is devoted to arguing that the Court should not reach the merits of the question presented in the Petition. These arguments are lengthy and convoluted, (Return at pp. 12–18), but they do not require an extended reply here. Each of these issues was addressed in Petitioners' reply to the informal opposition. (See Reply to Informal Opposition at pp. 1–4.) When a court issues an order to show cause on a writ petition, it necessarily determines that the prerequisites to writ review have been met. (See *Ingram v. Superior Court* (1979) 98 Cal.App.3d 483, 489) ["By issuing the order to show cause [the Court of Appeal] necessarily determine[s] that there is no adequate remedy in the ordinary course of the law, and that an extraordinary writ is appropriate."].) [18]

The only new procedural argument in the Return is the District Attorney's claim that "Petitioners failed to provide proof of the required service upon the California Attorney General, and presumably, have not served the Attorney General with their Petition." (Return at p. 12.) The Return asserts that the purported lack of service precludes the court from affording the relief sought in the petition under Business & Professions Code section 17209.

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[18] In meeting the threshold requirements for writ review, "an order to show cause has the same effect as an alternative writ[.]" 8 Witkin, California Procedure (2017 online ed) Writs, § 120.

(*Ibid.*) But the premise is demonstrably untrue, and the conclusion legally erroneous.

Petitioners served the Attorney General with the Petition on September 8, 2017, by uploading the documents to the website established by the Attorney General for that purpose. (Ex. 18 at pp. SA7–9.) On September 11, 2017—the next court day—Petitioner filed a Certificate of Service attesting to that service, (*ibid.*), which is reflected on the Court's on-line docket.[19]

Petitioners filed the Certificate of Service using the Court's TrueFiling vendor. (See Ex. 19 at pp. SA11–12) The vendor issued an email notice confirming that the parties' attorneys—including the Assistant District Attorney who verified the Return and five of the District Attorney's outside counsel—were electronically served with a link wherein a copy of the Certificate of Service could be downloaded. (*Ibid.*)

It may be true that service on the Attorney General should have been made sooner. Section 17209 requires such service within three days, and here the service was made after that.[20] But service was made before the Court issued its order to show cause, which required a Return, thereby setting the deadline for amicus participation by the Attorney General. (Rules of Court, rule 8.487(d)(2)). And in any event, the Attorney General has applied

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[19] *See* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=41&doc_id=2218815&doc_no=D072577

[20] Petitioners note that the District Attorney also served the Attorney General with a copy of the District Attorney's informal opposition more than three days after filing it with the Court. (See Ex. 17 at pp. SA4–5 [District Attorney's certificate of service].)

for and received an extension of that deadline. Thus, the purpose of the requirement has been satisfied. (See *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 503.)

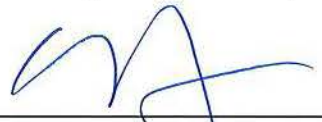
Case law squarely holds that section 17209's requirement of service on the Attorney General "is not jurisdictional." (*Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 284 ("*Californians for Population Stabilization*"), *disapproved on other issue by Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 175.) Section 17209 limits an appellate court's authority to issue an opinion or grant relief only "until proof of service of the brief or petition on the Attorney General . . . is filed with the court." (§ 17209.) Thus, in every relevant published decision, the court reached the merits. (See *Application Grp., Inc. v. Hunter Grp., Inc.* (1998) 61 Cal.App.4th 881, 907 fn. 20; *Soldate v. Fid. Nat. Fin., Inc.* (1998) 62 Cal.App.4th 1069, 1076; *Black v. Fin. Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 924 fn. 6; *Californians for Population Stabilization*, *supra*, 58 Cal.App.4th at p. 284.)

Under the circumstances, section 17209 presents no obstacle to the Court's reaching the merits of the Petition.

* * *

For the above-discussed reasons, and those presented in the Petition, the Court should grant the writ and order the superior court to vacate its order denying Petitioner's motion to strike and to enter a new order granting the motion.

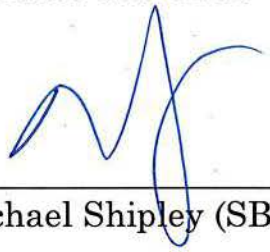
Respectfully Submitted,



Date: November 2, 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 8,512 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: November 2, 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 November 2, 2017, I hereby certify that I have electronically served the documents listed below in the manner set forth below.

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF MANDATE OR PROHIBITION [EXHIBITS FILED UNDER SEPARATE COVER]

on the following interested parties in this action:

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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.

[X] BY ELECTRONIC SERVICE: I caused the above listed documents to be electronically uploaded to the State of California Department of Justice website: https://oag.ca.gov/services-info/17209-brief/add

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

Executed on November 2, 2017, at Los Angeles, California.

Keith Catuara