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July 30, 2018

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: Request for Depublication
***Abbott Laboratories, et al. v. Superior Court (The People)* (2018) 24 Cal. App. 5th 1**
Court of Appeal Case No. D072577
California Supreme Court Case No. S249895

To the Chief Justice and Associate Justices of the California Supreme Court:

The City of Los Angeles supports the petition for review filed by the Orange County District Attorney on behalf of the People of the State of California, and the need for the Court's intervention in this matter. Alternatively, should the Court deny the petition for review, the City of Los Angeles requests depublication of the Court of Appeal decision in *Abbott Laboratories, et al. v. Superior Court (The People)* (2018) 24 Cal.App.5th 1 ("*Abbott Laboratories*"), issued by the Court of Appeal, Fourth Appellate District, Division One, on May 31, 2018, Court of Appeal docket number D072577, pursuant to Rule 8.1125(a) of the California Rules of Court.

Introduction and Summary

In *Abbott Laboratories*, a divided Court of Appeal produced an advisory opinion which has erroneously undermined the will of the California Legislature and California voters who have unequivocally expressed their desire to broadly protect California consumers from unfair, illegal, and fraudulent business practices. In fact, there is no dispute that the Orange County District Attorney properly alleged a claim under California's Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.[1]) regarding the "unlawful scheme" of Petitioners to suppress generic versions of Niaspan from reaching the market in order to illegally inflate the drug's price. While the parties disagreed as to the scope of available remedies, the complaint's operative prayer for relief only described the types of potential remedies being sought. Petitioners' motion to strike did not address the prayer, but instead sought only to strike any factual allegation which referred to Petitioners' allegedly illegal activities on a statewide basis. As a result, the trial court held that any ruling regarding the appropriate scope of remedies would be premature, holding only that the First Amended Complaint properly alleged a UCL claim, which is undisputed.

Nevertheless, *Abbott Laboratories* disregarded the procedural posture of the case, going on to opine on the ability of the Orange County District Attorney to seek relief for alleged injuries occurring throughout California. Despite the express UCL statutory language, the majority held that a district attorney could not seek civil penalties or restitution for proven violations occurring outside of his or her home county. (*Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 10.) Both because it is merely an advisory opinion, and because it reaches an incorrect

[1] Statutory references are to the Business and Professions Code unless otherwise specified.

and detrimental legal conclusion, the Court should depublish *Abbott Laboratories*.

The advisory nature of this decision is demonstrated in multiple ways. First, as noted above, there is no trial court order which addressed or resolved the issue embraced by the appellate court majority. As a result, the majority opinion was not reviewing an existing ruling, but instead ruled on an anticipated future ruling – the very definition of an advisory opinion. Second, the disposition in *Abbott Laboratories* does not alter the trial court ruling denying the motion to strike because of the undisputed possibility of a statewide injunction to stop future illegal activity. Since such an injunction is based on the allegations of statewide conduct, those allegations remain an active part of this litigation, leaving no remaining allegations to strike. Third, Petitioners' failed to show the irreparable harm needed to justify extraordinary relief. This undermines the basis for any appellate intervention, and further confirms the advisory nature of the majority opinion.

By rewriting the UCL – which gives coextensive authority to the Attorney General and certain prosecutors to bring actions in the name of the People of the State of California – *Abbott Laboratories* significantly restricts the ability of designated prosecutors to protect California residents from unfair business practices. Moreover, this advisory opinion not only reaches a mistaken statutory interpretation of the UCL, it also reaches a gratuitous constitutional interpretation that significantly restricts the power of the Legislature to provide for the statewide enforcement of consumer and business protection laws. (*Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 10, and see 35 and 38 (dissent).)

While *Abbott Laboratories* involves a district attorney, the corresponding authority of the designated city attorneys is described in a largely similar fashion. Thus, the Los Angeles City

Attorney anticipates *Abbott Laboratories* will be used to shield unfair business practices from enforcement by the City Attorney. This provides the City Attorney with a significant interest in the majority's wrongfully decided opinion in *Abbott Laboratories*.

Discussion

I. *Abbott Laboratories* Should be Depublished as an Improper Advisory Opinion

A. *Abbott Laboratories* Prematurely Addresses an Issue not Ruled on Below

A single issue is raised by Petitioners – "Does Business & Professions Code section 17204 ("§17204") permit a county district attorney to bring a claim that seeks relief for alleged injuries to residents of California counties whom he or she does not represent, based on conduct occurring outside the county he or she serves." This issue was not resolved by the trial court and was not alleged in the First Amended Complaint. These was simply no order by the trial court on this issue. Thus, *Abbott Laboratories* is an improper advisory opinion. It is "the well settled rule that courts should 'avoid advisory opinions on abstract propositions of law." (*People v. Ybarra* (1988) 206 Cal.App.3d 546, 549 [quoting *In re William M.* (1970) 3 Cal.3d 16, 23, fn.14]; see also *Younger v. Superior Court (*1978) 21 Cal.3d 102, 119-120 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531 ["Courts may not render advisory opinions on disputes which the parties anticipate might arise but which do not presently exist."].)

Since this matter was just at the pleading stage, the only trial court rulings were: (1) overruling Petitioners' demurrer; and (2) denying Petitioners' motion to strike the word, and phrases including the word, "California" in the complaint. (See

Petitioner's Appendix, Ex. 15, Reporter's Transcript of Proceedings, at pp.239-246.) The trial court stated that the issue raised by Petitioners was still premature and that it was not deciding the appropriate or potential scope of remedies or relief. (A.229-230 ["we are not worried about damages on a demurrer, so I think your concerns are a little premature"; "I'm not deciding on a demurrer a lot of things. I'm just deciding whether the complaint is sufficient to withstand a demurrer."], p.232 ["What kind of remedies plaintiff may be entitled to down the line, there's no reason to reach that now."] & p.244 ["we are looking at civil penalties and what you want to do. But that's kind of a ways down the road"]; and see *Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 33 (dissent).)

Thus, there is no trial court ruling on Petitioners "issue presented" which could be ripe for appellate review. It is the trial court which will ultimately decide what remedies are available under the circumstances, but no such determination was made here. (See, *Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 33 (dissent); and see *San Bernardino Public Employees Assoc. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1226 ["A court may not issue rulings on matters that are not ripe for review."]; see also *Quesada v. Herb Thyme Farms* (2015) 62 Cal.4th 298, 324 [declining review of legal issues not decided or fully "developed below" and "leaving it to the lower courts in the first instance to decide" prior to appellate review].)

This is particularly problematic because the majority does not limit its advisory opinion merely to an interpretation of the UCL statutes, but also imposes constitutional limits on the Legislature's power to enact consumer and business protection laws, such as the UCL, and to ensure that those laws will be adequately enforced by designating appropriate prosecutors. (*Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 10 and at 35-36 (dissent) [lamenting the majority's decision to issue a broad and

premature policy pronouncement].) The Court of Appeal should avoid constitutional issues whenever possible, and particularly in advisory opinions. (*California Teachers Assn. v. Board of Trustees* (1977) 70 Cal. App.3d 431, 442-443 ["courts should not pass on constitutional questions when a judgment can be upheld on alternative, nonconstitutional grounds," particularly when "rendering an advisory opinion"]; *Hochheiser v. Superior Court* (1984) 161 Cal.App.3d 777, 787 (reversed by statute on other grounds) ["It is not our function as an appellate court to give an advisory opinion on constitutional issues. Our Supreme Court has consistently refused to decide constitutional questions unless they are absolutely necessary for disposition of the case."].)

An advisory opinion improperly issued should be depublished. (See, Cal. Rules of Court, Rule 8.1125(c) [which assumes that any opinion worthy of publication "affirms or reverses a trial court order or judgment"].) This is even more urgent when the advisory opinion purports to change or define the Legislature's constitutional powers.

B. The Majority Opinion Has No Actual Effect on the Operative Complaint

The gratuitous and advisory nature of *Abbott Laboratories* is further demonstrated by its lack of a practical effect on the underlying order. Petitioners challenged only one ruling below, the trial court's order denying Petitioners' motion to strike portions of the First Amended Complaint. While *Abbott Laboratories* purports to reverse that order, the Court of Appeal's only direction was "to enter a new and different order striking the allegations by which the Orange County District Attorney seeks statewide monetary relief under the UCL." (*Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 31.) However, the majority failed to identify any specific language to which that direction would apply – because there is none. (*Id*., at Dissent, pp. 32-33.)

The First Amended Complaint does not specify any relief sought, including any monetary relief. Rather, it included multiple allegations describing Petitioners' various statewide UCL violations, but did not attach those allegations to a particular remedy. The prayer for relief lists the potential UCL remedies (injunction, restitution, and civil penalties), but without describing the desired scope or amount sought for each. While Petitioners argued that the Orange County District Attorney should not be permitted to seek restitution or civil penalties for UCL violations which extended beyond Orange County, they did not challenge the district attorney's ability to seek a statewide injunction to prevent continuing UCL violations. (See, *Abbott Laboratories*, *supra*, 24 Cal. App. 5th at 28, n 14; and see Dissent at p. 32 ["The parties agree that should the court ultimately find the allegations of the complaint have been proved, it has the authority to issue statewide injunctive relief."].) As such, the scope of injunctive relief is not included in Petitioners' "Issue Presented". (See, Petition for Writ, p. 8.) In sum, *Abbott Laboratories* declined to address whether a district attorney could seek a statewide injunction, leaving it as a continuing viable claim in this lawsuit

The allegations identified in Petitioners' motion to strike each describe alleged UCL violations without specifying where in California they took place. Those factual allegations are a necessary predicate to a request for statewide injunctive relief because they describe the statewide activities that such an injunction will address. The fact that those allegations might also support claims for statewide restitution or civil penalties does not diminish either their importance or their necessity in supporting the separate prayer for injunctive relief. As such, all of the allegations identified by Petitioners remain a proper and active part of this lawsuit, even after the majority's advisory opinion.

Because there are no allegations specific to a statewide recovery of restitution or civil penalties, *Abbott Laboratories'* disposition only *purports* to "reverse" the trial court's order denying Petitioners' motion to strike, while not actually striking any portion of the First Amended Complaint. This is functionally equivalent to affirming the trial court's order and further confirms that *Abbott Laboratories* is an improper advisory opinion that should be depublished.

C. The Lack of Irreparable Harm Further Confirms that *Abbott Laboratories* Is an Advisory Opinion

Abbott Laboratories was also improperly decided because Petitioners never met the conditions for review of a petition for writ of mandate or prohibition. In order to avoid the normal appeals process, and obtain extraordinary relief regarding an interim order while litigation is still pending, a party must meet strict requirements. (*Hogya v. Superior Court* (1977) 75 Cal. App. 3d 122, 129 ["In the case of most interim orders, the parties must be relegated to a review of the order on appeal from the final judgment."] internal quotes and citations omitted; *Burrus v. Municipal Court* (1973) 36 Cal.App.3d 233, 236 [to consider a writ "some extraordinary reason for this kind of priority treatment must appear"].) Here, Petitioners failed to establish that irreparable harm would occur without early appellate intervention, so their petition was not properly granted, and should not have been considered. This further supports the conclusion that *Abbott Laboratories* is a premature advisory opinion that should be depublished.

As explained in *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 101, fn.1, (disapproved in part on other grounds, *Knight v. Jewett* (1992) 3 Cal.4th 296), extraordinary writs should not proceed unless real, rather than theoretical, irreparable harm can be demonstrated. *Ordway* concluded that avoiding potential litigation is insufficient to show irreparable

harm. (198 Cal.App.3d at 101, fn. 1 [confirming "A trial does not generally meet the definition of 'irreparable injury,' being at most an irreparable inconvenience."].) In *Abbott Laboratories*, litigation and a potential trial would proceed in any case, as Petitioners were not seeking to end this litigation through their motion to strike, but only sought to limit the scope of the remedies.

All agree that the Orange County District Attorney has standing and jurisdiction to seek all UCL remedies. (See §§ 17203-17204 & 17206 [expressly authorizing the pleading of civil penalties, restitution and injunctive relief in UCL actions].) As discussed above, this includes the pursuit of a statewide injunction to prevent further UCL violations by Petitioners. When they are legally authorized, there is no basis to strike the remedies sought in a complaint. (See Code of Civ. Proc. § 436 [authorizing courts to strike only "irrelevant, false or improper matter" or "any part of any pleading not drawn in conformity with the laws of this state"].) Since this lawsuit would proceed in any case to consider all of the listed remedies, including a potential a statewide injunction, there was no irreparable harm to justify the premature intervention by the Court of Appeal and no showing that other potential relief was inadequate.

Petitioners' arguments that an advisory opinion was needed to guide the trial court, focus discovery, and improve Petitioners' leverage in settlement discussions fail to demonstrate the irreparable harm needed for extraordinary writ relief. (See, e.g., *Hogya v. Superior Court*, *supra*, 75 Cal.App.3d at 128-130.) In fact, this is precisely the type of theoretical harm rejected in *Ordway*. Because there is no actual discovery dispute or settlement issue presented at this stage, it is only speculation that such an issue will ever require judicial intervention. Moreover, there is no reason to conclude that an adequate remedy at law is lacking, since the parties can simply address

future disputes to the trial court as needed. A complaint merely serves to notify defendants of the alleged claims, not to provide a vehicle to decide all potential issues in the subsequent litigation. In any case, in light of the remaining potential for a statewide injunction, discovery would not be limited to a particular California region. Petitioners' motion to strike the truthful factual allegations regarding their alleged wrongdoing throughout California was properly denied by the trial court.

II. *Abbott Laboratories* Should be Depublished as an Inaccurate Statement of Law

The majority opinion in *Abbott Laboratories* has incorrectly stripped the UCL of an important enforcement mechanism – the ability of the designated local prosecutors to protect California consumers and businesses from unlawful, unfair, and fraudulent business practices. Moreover, the majority purports to impose constitutional limitations on the Legislature's power to enact such legislation. To avoid needless duplication, this request incorporates the Petition for Review, as well as the supporting joint Amici letter, as though fully set forth herein, as further grounds to depublish *Abbott Laboratories*.

Conclusion

The advisory opinion in *Abbott Laboratories* will thwart the intended application of the UCL, and will undermine the ability of the Legislature to address widespread and reoccurring unfair business practices. It should be depublished.

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By: _____
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CA Supreme Court	PROOF OF SERVICE

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