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

RETURN TO PETITION FOR WRIT OF MANDATE OR PROHIBITION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rules of Court, rule 8.208, the undersigned hereby certifies that no entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves.

DATED: October 18, 2017

TONY RACKAUCKAS,
ORANGE COUNTY DISTRICT ATTORNEY

By: */s/ Joseph D'Agostino*
JOSEPH D'AGOSTINO,
SR. ASST. DISTRICT ATTORNEY

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Real Parties in Interest, the People of the State of California, represented by District Attorney Tony Rackauckas (the "People" or "Plaintiff"), hereby submit their Return to the Petition for Writ of Mandate filed by Petitioners Abbott Laboratories. AbbVie Inc., Teva Pharmaceuticals USA, Inc., Barr Pharmaceuticals, Inc., Duramed Pharmaceuticals, Inc., and Duramed Pharmaceutical Sales Corp. (collectively "Petitioners" or "Defendants") in the above-captioned matter.

INTRODUCTION

This is a government law enforcement action for unfair competition under the California Business and Professions Code. The People allege that Petitioners engaged in anticompetitive, unfair and unlawful business practices by intentionally delaying the sale of a generic version of a popular pharmaceutical drug to maximize their profits. The unlawful conduct impacted consumers throughout the entire nation, throughout the state of California, and throughout the County of Orange. The complaint seeks injunctive relief, restitution, and civil penalties to the maximum extent permitted by law, properly alleged as expressly set forth in the relevant statutes under a notice pleading standard.

The matter is before this Court on an extraordinary petition for writ of mandate following the denial of Defendants' Motion to Strike certain factual allegations in the Complaint. Specifically, Defendants moved to strike essentially all of the truthful allegations referencing the state of "California" in the operative complaint. Petitioners claim their Motion should have been granted because the

Orange County District Attorney ("OCDA") does not have "authority" to seek relief for California consumers outside the "geographic boundaries" of Orange County.

There is no dispute, however, that the OCDA has legal standing to pursue the relief requested, and that the complaint properly alleges a basis for jurisdiction over the Defendants and proper venue in Orange County. There is also no dispute that the trial court has discretion to issue equitable relief that is enforceable on a statewide basis, and to take into account all of the relevant facts and circumstances of a particular case (including the statewide impacts of the alleged violations) when awarding a civil penalty in a such a case. Petitioner's sweeping arguments to the contrary are both legally and factually wrong, particularly at the pleading stage. As the Respondent Court correctly held, therefore, there is no legal, or other, basis for striking the references to the "state of California" in the complaint as demanded in the Motion.

For all the foregoing reasons, and those described in more detail below, the relief prayed for in the Petition should be denied and the Respondent Court's Order denying the Motion to Strike should be affirmed.

DEMURRER TO PETITION FOR WRIT OF MANDATE

The People hereby demurrer to the Petition on the grounds that it fails to state a justiciable basis for this Court's review by writ of mandate or prohibition. (*See* Cal. Civ. Proc. Code §§ 1085, 1086, 1089; Cal. R. Ct. 8.487(b).)

A. A General Demurrer Lies Against A Petition For Writ Of Mandate Or Prohibition

"If the court issues an alternative writ or order to show cause, the respondent or any real party in interest, separately or jointly, may serve and file a return by demurrer, verified answer, or both." (Cal. R. Ct. 8.487(b).) A general demurrer challenges the sufficiency of a petition for writ of mandate or prohibition. "[A] showing on general demurrer that the petition does not state sufficient facts to justify relief is a complete answer to an order to show cause, and the court is then warranted in discharging the order and dismissing the proceeding." (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 455 [quoting *Green v. Gordon* (1952) 39 Cal.2d 230, 232].).

B. Petitioners' Failure To Serve The California Attorney General With The Herein Petition Deprives This Court Of The Power To Grant Any Relief

Petitioners failed to serve the Attorney General with a copy of their Petition as required by Business and Profession Code Section 17209. Pursuant to California Business and Professions Code Section 17209:

> If a violation of this chapter is alleged *or the application or construction of this chapter is in issue in any proceeding* in the Supreme Court of California,

> *a state court of appeal,* or the appellate division of a superior court, *each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General…* (emphasis added.)

To ensure compliance with this notice requirement, California Rule of Court 8.29 mandates:

> When a statute or this rule requires a party to serve any document on a nonparty public officer or agency, the party must file proof of such service with the document unless a statute permits service after the document is filed, in which case the proof of service must be filed immediately after the document is served on the public officer or agency.

If the Attorney General is not properly served, and if time for serving the brief has not been extended for good cause shown, "… no judgment or relief may be granted by the court." (*Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 285.)

Here, 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. (*See* Petition at pp.47-48 [attaching defective Certificate of Service].) Hence, the Petition for Writ of Mandate or Prohibition is procedurally defective on its face. On this basis alone, the order to show cause should be discharged and the Petition dismissed.

C. The Petition Seeks An Improper Judicial Advisory Opinion

The Petition submits the following legal question for review: "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." (Petition, at p.8.) This broad and ambiguous "issue presented," however, is not tethered to the facts in this case, or any order that is now properly justiciable. Petitioner thus seeks an appellate advisory opinion. Yet, 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]; s*ee also 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."].) As such, the Petition fails to raise a justiciable issue and should be dismissed for this reason as well.

D. There Is No Trial Court Ruling On The "Issue Presented" Ripe For Appellate Review

The Petition should also be dismissed because the trial court never ruled on the "issue presented." Respondent Court made no ruling with respect to what the permissible amount of penalties should be in this case. The only rulings the Respondent Court made involved motions on the pleadings: (1) overruling the Petitioners' demurrer; and (2) denying Petitioner's 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.) In making these rulings, the Court expressly confirmed that she was not deciding what the

appropriate "damages" or relief may be in this case. (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 aways down the road"].) There is accordingly no trial court ruling on the "issue presented" ripe for appellate review presented by the Petition. (*See San Bernardino Public Employees Assoc. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1226 [noting "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].)

E. The Petition Fails To Establish Any Irreparable Harm Supporting A Premature Review Of The Amount Of Penalties To Be Awarded In This Case

There is no dispute that the Plaintiff has standing, and jurisdiction, to seek the remedies prayed for in the Complaint in this case. (*See* Cal. Bus. & Prof. Code §§ 17203-17204 & 17206 [expressly authorizing the pleading of civil penalties, restitution and injunctive relief in UCL actions].) When legally authorized, under

the governing pleading standards, there is no basis to strike the remedies sought in a complaint. (*See* Cal. Civ. Proc. Code § 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"].) Petitioner's motion to strike Plaintiff's well-pled prayers for relief at the pleading stage, and the truthful factual allegations regarding the wrongdoing that is alleged to have occurred throughout the state of California, was thus properly denied by the trial court.

Nevertheless, via their motion to strike, and now this Petition, Petitioner seek to prematurely challenge the *amount* of penalties that may ultimately be assessed at the conclusion of this case. (*See* A.245 [confirming: "So the question really becomes, like everything else in this courthouse, money. right? So how much money are we talking about and where is the money going?"].) As argued in the trial court, Petitioners claim judicial review of the "issue" is necessary to provide guidance to help the parties "focus discovery" and engage in future settlement discussions. (*See* A.243 [arguing, as here, that the trial court should address "an issue like the scope of the remedy that the plaintiff can obtain, in advance, on a motion to strike. Because it will focus the case, it will focus discovery, it will ensure that … these parties can negotiate with this plaintiff to resolve the proceeding . . ."].) This is not an adequate showing of necessity for review or irreparable harm so as to support extraordinary writ relief. (*See, e.g., Hogya v. Superior Court* (1977) 75 Cal.App.3d 123, 128-130.)

First, as stated above, there is no actual discovery dispute or settlement issue presented at this stage for the courts to resolve. As any complaint is intended to do, the complaint here adequately notifies Petitioners of the claims raised against them, thereby sufficiently framing the reasonable scope of permissible discovery and providing workable parameters for settlement discussions.

Second, the trial court's ruling on the motion to strike does not prejudice the case or the parties in any way. To be sure, nothing in the order prevents the parties from seeking further orders from the trial court if, and when, the "issues" regarding the scope of remedies are ripe for review. In addressing the same discovery and settlement-related "concerns" at the hearing on the pleading motions, the trial court assured: "If you reach a settlement with the district attorney, … and if the AG comes in and says I want to be heard about this, you bet I'm going to let them be heard on this; okay?" (A.241.) "If there's a settlement, I can guarantee you the attorney general …is going to know about this. So we will deal with that if and when. I mean, you know, do I encourage you to explore settlement now? Absolutely." (A.242.) Furthermore, the parties advised that any settlement would be submitted for court review and approval at the appropriate time. (A.245-246 [confirming the parties will "ask the court to sign off on any settlements that the District Attorney's office does"].)

Third, irreparable harm cannot be demonstrated by the *mere potential* of having sizable penalties imposed for UCL violations after trial in this case.

Business and Professions Code Section 17206 provides not only a system for allocation of money collected as civil penalties, but also several safeguards designed to protect against any unfounded imposition of such penalties. That is, the court does not automatically assess a $2,500 penalty for each UCL violation. Rather, in calculating the amount of civil penalties for UCL violations, trial courts are required to consider:

> any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(*See* Cal. Bus. & Prof. Code § 17206(b).) None of the required analysis or findings of fact with respect to the proper penalty amount in this case has yet occurred so as to create any actual harm from any potential future order in this regard.

As the Court 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. In *Ordway, supra,* the Court concluded that denial of the relief requested "would constitute, at best, an "irreparable inconvenience" not an 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."].) The same is true here.

F. Petitioners Failed To Demonstrate Relief Is Necessary To Secure Uniformity Of Decision Or To Settle An Important Question Of Law

Finally, the Petition fails to demonstrate that this Court's scrutiny is necessary to secure uniformity of decision or to settle an important question of law. Petitioners fail to identify genuine conflicts of law that must be resolved. Instead, Petitioners urge this Court to adopt an entirely new limitation on the *pleading* of UCL claims that is not found anywhere in the language of the statutes or any binding caselaw. In addition to requesting judicial notice of non-binding orders and briefing in other cases, the Petitioner cites only two Superior Court decisions and an Appellate Court decision from 1979 that are supposedly in conflict; yet, none of these "authorities" addresses the precise "issue presented" in this case, let alone presents a conflict in the law of statewide concern that can be settled via a ruling on this Petition.

Indeed, as the varying procedural postures and facts of these other cases show, the proper remedy in any case is entirely fact specific. Such matters cannot be determined in one broad sweeping statement of the law as Petitioner seeks. If, and when, any lower court enters a contested judgment or penalty order, and applies the analysis and factual findings specific to any such case(s) to frame the court's analysis with respect thereto (*see* Cal. Bus. & Prof. Code § 17206, subd. (b)), only then, may an appeal reasonably be had. (*See, e.g.*, *Hogya v. Superior Court* (1977) 75 Cal.App.3d 123, 128-130 [noting: "In the case of most interim orders, 'the parties must be relegated to a review of the order on appeal from the final

judgment.'" (*quoting Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal. 3d 161, 169)].)

G. The Demurrer Should Be Sustained

For all the foregoing reasons, the Petition fails on its face to establish a justiciable basis for review and the relief requested. The Order to Show Cause should accordingly be discharged and the Petition should be dismissed.

ANSWER TO PETITION FOR WRIT OF MANDATE

By this verified response, the People further answer, respond to and oppose the Petition on the merits as follows.

1. Denied. The "issue presented" is vague and ambiguous and is not tethered to the actual holding of the Respondent Court. The "issue presented" raises, at best, a non-justiciable legal advisory opinion. For these reasons, Real Party denies that writ relief is appropriate and denies that this Court has judicial power to grant the advisory opinion requested.

2. Denied. Respondent Court properly denied a motion to strike true and accurate factual allegations at the pleading stage; it did not issue a judicial advisory opinion on the "issue presented."

3. Denied.

4. Admit.

5. Admit.

6. Admit.

7. Admit.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Denied. The Real Party in Interest in this case is the People of the State of California. The People are represented in this action by the Orange County District Attorney, members of Robinson Calcagnie, Inc., and associated counsel.

13. Deny that the title of the case was "styled" as phrased; admits the balance of the allegations in Paragraph 13.

14. Admit that the Complaint raises claims on behalf of the People of the State of California and the People are represented by both the District Attorneys and members of Robinson Calcagnie, Inc. Deny and move to strike the unverified statements made on "information and belief" in Paragraph 14. Deny that Real Party refuses to disclose the fee agreement between the District Attorney and Calcagnie, Inc.

15. Deny that Real Party refuses to disclose the fee agreement between the District Attorney and Robinson Calcagnie.

16. Deny that the case only "purport[s]" to be brought on behalf of the People. Admits the balance of the allegations in Paragraph 16.

17. Deny the erroneous citation to Ex. 7 ¶ 148; admit the balance of the allegations of Paragraph 17.

18. Deny the erroneous citation to Ex. 7 ¶ 147; admit the balance of the allegations of Paragraph 18.

19. Admit that the Complaint alleges illegal conduct that impacted California commerce and consumers. Deny that the isolated allegations cited in Paragraph 19 include a complete statement of the allegations in the Complaint. Deny further that there is no "geographic limitation" alleged in the Complaint. (*See* Ex. 7 ¶ 144 [alleging the harmed "geographic market is the United States and its territories"].)

20. Admit that the Complaint prays for three forms of relief pursuant to California's Business and Professions Code, including injunctive relief, restitution and civil penalties. Deny the erroneous citation to Ex. 7 ¶ 152 and the balance of the legal argument and mischaracterization of the People's prayer for relief in Paragraph 20.

21. Admit that the Complaint seeks civil penalties for illegal acts by Petitioners that involve the sale of Niaspan to California consumers. Deny the balance of the legal arguments, unverified facts, and conclusions in Paragraph 21.

22. Deny that Petitioner's motion to strike was based on "improperly failing to limit the action to harm allegedly occurring to residents of Orange County or caused by purchases made within Orange County" and any legal argument

suggesting that this is a pleading requirement in this case. Admit that Petitioners filed a motion to strike all factual references to the state of California generally in the Complaint "on the ground that the FAC contains 'irrelevant' and 'improper matter' and is 'not drawn … in conformity with the laws of this state." (A118.)

23. Deny that the exhibits attached to the request for judicial notice are judicially noticeable or relevant to the issues in the motion to strike. Admit the balance of the allegations in Paragraph 23.

24. Admit that Petitioners filed a motion to strike all factual references to the state of California generally in the Complaint "on the ground that the FAC contains 'irrelevant' and 'improper matter' and is 'not drawn … in conformity with the laws of this state." (A118.) Admit that Petitioners argued that "district attorneys have no jurisdiction to bring claims under the UCL 'outside the geographic boundaries of their local jurisdictions.'" Deny the balance of the legal argument and conclusions in Paragraph 24.

25. Admit that Petitioners cited the California Constitution and *People v. Hy-Lond Enterprises, Inc.* in support of their motion to strike. Deny the balance of the legal argument and conclusions in Paragraph 25.

26. Deny that the People's opposition failed to "raise any procedural grounds for denial of the motion." Admit the balance of the allegations in Paragraph 26.

27. Admit.

28. Admit.

29. Admit that Respondent Court disagreed with Petitioner's reliance on *People v. Hy-Lond Enterprises, Inc.* as a legal basis to support their Motion. Deny that the allegations in Paragraph 29 reflect the actual ruling and holding of the Respondent Court in this regard. (*See* A.239-246.)

30. Admit that Respondent Court disagreed with Petitioners' reliance on *People v. Hy-Lond Enterprises, Inc.* as a legal basis to support their Motion. Deny that the allegations in Paragraph 30 reflect the totality of the actual ruling and holding of the Respondent Court in this regard. (*See* A.239-246.)

31. Admit that the Respondent Court stated during oral argument that "if the AG comes in and says I want to be heard on this, you bet I'm going to let them be heard on this; Okay?". Deny that Respondent Court made any findings relating to the AG in ruling on the Motion, and deny any legal conclusions or arguments with respect to the Respondent Court's statement as alleged in Paragraph 31.

32. Admit that Respondent Court disagreed with Petitioners' reliance on *People v. Hy-Lond Enterprises, Inc.* as a legal basis to support their Motion. Deny that the allegations in Paragraph 32 reflect the totality of the actual ruling and holding of the Respondent Court in this regard. (*See* A.239-246.)

33. Admit.

34. Deny.

35. Deny.

36. Deny.

37. Deny.

38. Deny.

39. Deny.

40. Admit.

Prayer for Relief

WHEREFORE, Real Party in Interest, the People of the State of California, respectfully pray for relief as follows:

1. The requested relief in the Petition for Writ of Mandate or Prohibition be denied.
2. Respondent Court's order denying the Motion to Strike be affirmed;
3. Award Real Parties their costs incurred in this proceeding; and
4. Grant such other and further relief as this Court deems just and proper.

Dated this 18th day of October, 2017.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY COUNTY OF ORANGE, STATE OF CALIFORNIA

By: */s/ Joseph D'Agostino*____
JOSEPH D'AGOSTINO
SENIOR DEPUTY DISTRICT ATTORNEY

VERIFICATION

I, Joseph D'Agostino, declare:

1. I am an attorney admitted to practice before the courts of the State of California, and I am the Senior Assistant District Attorney responsible for litigating the present case, along with the Orange County District Attorney, on behalf of the PEOPLE OF THE STATE OF CALIFORNIA.

2. I have read the foregoing Return to Petition for Writ of Mandate. Except where stated to be based on information and belief, the facts alleged are true of my own knowledge.

3. All filed documents are true and correct copies of what they purport to be.

Executed on this 18th day of October at Santa Ana, California

By: */s/ Joseph D'Agostino*
Joseph D'Agostino

MEMORANDUM OF POINTS AND AUTHORITIES

The Petitioners request that this Court issue extraordinary relief from a ruling denying their motion to strike phrases including the word "California" from Plaintiff's First Amended Complaint (herein referred to as the "Complaint" or "FAC") under Code of Civil Procedure § Sections 435 and 436. Petitioners' motion to strike was intended to seek what would amount to an improper summary adjudication of issues concerning remedies to be awarded in this case. As set forth in more detail below, the Respondent Court properly denied the Motion, and its Order should be affirmed.

I. COUNTER STATEMENT OF ISSUE PRESENTED

As a preliminary matter, the issue presented is not correctly described in the Petition. (*See* Petition at p.8 [suggesting that the issue presented is whether "Business and Professions Code section 17204 ("§ 17204") permits 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?"].) Contrary to Petitioner's statement of the issue, the only potentially justiciable issue presented is more appropriately and correctly described as follows:

> Did Respondent Court abuse its discretion in denying a motion to strike all references to the state of California in a complaint for violations of California's Unfair Competition Law [Business and Professions Code section 17200] when the complaint is brought by a district attorney in one county for alleged unlawful and unfair business practices that occurred nationwide, and the district attorney prays for restitution, injunctive relief and civil penalties on behalf of the People of the State of California to the maximum extent permitted under the law in that complaint?

As set forth below, under the clear and unambiguous statutory authorities governing the UCL and the pleading standards in the state of California, the answer is "no."

II. PEOPLE'S STATEMENT OF THE CASE

This case involves a nationwide corporate conspiracy to prevent the ready introduction of a generic version of a prescription drug that could have saved patients, health insurers and other government payors millions of dollars. The corporate wrongdoers conspired to keep the generic alternative from the marketplace to maintain a monopoly on the name brand drug, Niaspan,[1] and thereby maximize their profits on sales for years beyond any legally permissible period. The People of the State of California, like the rest of the nation, are victims of this unlawful, unfair and fraudulent business misconduct. This is an especially egregious case of corporate greed because the elderly and disabled were substantially more impacted by the unlawful conduct due to their poor health and infirmities. There are several private class action lawsuits filed, seeking damages, on behalf of these victims in the United States. This is not one of them.

Rather, this is a civil law enforcement action brought by the District Attorney seeking the further equitable and statutory remedies expressly authorized under California's Business and Professions Code Section 17200, *et seq.*, also known as California's Unfair Competition Law ("UCL"). The purpose of this action is to protect

[1] Niaspan is a time-released dosage of the vitamin niacin used to treat high cholesterol. Niacin, the active ingredient in Niaspan, is also known as Vitamin B-3. In proper dosages, niacin has lipid-lowering properties. Niacin reduces LDL cholesterol (the so-called "bad cholesterol") and triglycerides, while also raising levels of HDL cholesterol (the so-called "good" cholesterol) in patients. For that reason, niacin became a therapy to treat mixed lipid disorders. (FAC ¶¶ 43-49.)

Orange County consumers and punish the corporate wrongdoers for their unlawful, unfair and fraudulent business practices as an exercise of the District Attorney's police powers. (FAC ¶¶ 1 & 4.)

A. There Is No Dispute That The Complaint Adequately Alleges Standing, Jurisdiction, And Venue For This Action To Proceed In Orange County

The Complaint alleges "Plaintiff's Authority" for bringing the present action "pursuant to section 17200 of the California Business and Professions Code." (FAC ¶ 4.) There is no dispute that district attorneys in the state of California have standing to pursue such claims as alleged. (*See* Cal. Bus. & Prof. Code §§ 17204 & 17206 [expressly authorizing "any district attorney" to file civil actions under the UCL.) There is also no dispute that the district attorney has standing to allege these claims on behalf of the People of the State of California. In fact, the district attorney is *required* to bring such claims "in the name of the people of the State of California" when seeking relief under the UCL. (*See* Cal. Bus. & Prof. Code §§ 17204 & 17206(a) [mandating actions to be filed by district attorneys in the "name of the People of the State of California"].)

The Complaint further alleges a proper basis for jurisdiction over the Petitioners in Orange County, and adequately pleads that Orange County is a proper venue for this case to be heard. (*See* FAC ¶¶ 17-18.) Specifically, the Complaint alleges that the Orange County Superior Court has jurisdiction under Article XI, Section 10 of the California Constitution and Section 410.10 of the California Code of Civil Procedure because Petitioners conducted business "in California, and the violations of California law complained of herein resulted in damages to consumers of Niaspan in California, including

in the County of Orange." (FAC ¶ 17.) "Venue is proper," as alleged in the FAC, "pursuant to CCP section 395, because the Defendants transact and have transacted business in this County, and some of the acts complaint of have occurred in this venue." (FAC ¶ 18.)

B. The FAC Alleges Unlawful And Unfair Business Practices Under The UCL

The Complaint alleges that Petitioners intentionally contracted and conspired to delay the introduction of a competing generic version of Niaspan to maximize their profits on the name brand version at the expense of the most vulnerable population in our nation -- the sick, elderly and disabled. Specifically, the FAC alleges that Petitioners: (a) illegally maintained monopoly power in the market for Niaspan in the United States from 2005 through March 2014; (b) illegally maintained the price of Niaspan at supracompetitive levels; and (c) caused consumers, their insurers, public healthcare providers, and other government payors to overpay millions of dollars by depriving them of access to less expensive generic versions of Niaspan. Petitioners spared no geographic market in their wrongdoing. Their unlawful monopoly thus affected the "geographic market" of the entire United States and its territories," including the State of California, and the County of Orange. (FAC ¶ 144.)

Based on the foregoing, the Complaint alleges one Count of Unfair Competition under Business and Professions Code Section 17200 against Petitioners for their unfair, anti-competitive, and unlawfully monopolistic, business practices. (FAC ¶¶ 162-169.) The corporate conspiracy is alleged to be unlawful under several federal, state, statutory and/or common laws including, but not limited to, the following antitrust laws: California

Business and Professions Code section 16700 et seq. ("the Cartwright Act"), The Sherman Antitrust Act, 15 U.S.C. §§ 1–7, The Clayton Antitrust Act, 15 U.S.C. §§ 12-27, and the Federal Trade Commission Act, 15 U.S.C. § 45. (FAC ¶ 164.) The conduct is further alleged to be "unfair" under the UCL because it is offensive to "public policy," "substantially injurious to consumers," and such conduct stands to "significantly threaten and harm competition." (FAC ¶ 165.)

C. The FAC Properly Prays For The Maximum Relief Authorized By Law

Plaintiff's "Prayer for Relief" seeks declaratory relief, injunctive relief, restitution and civil penalties, as well as costs, fees and any further relief the court deems proper. (FAC, at p.35.) The prayer for equitable remedies and civil penalties is alleged in a fashion to seek the maximum relief expressly authorized by law, praying "that the Court:

> A. Declare that Defendants have engaged in unlawful and unfair business acts and practices in violation of the Unfair Competition Law.
> B. Enjoin Defendants from performing or proposing to perform any acts in violation of the Unfair Competition Law.
> C. Order Defendants to pay restitution of any money acquired by Defendants' unlawful and unfair business practices, pursuant to Business and Professions Code Section 17203.
> D. Order Defendants to pay civil penalties for each act of unfair and unlawful competition, pursuant to Business and Professions Code Section 17206.
> E. Order Defendants to pay civil penalties for each act of unfair and unlawful competition perpetrated against senior citizens or disable d persons, pursuant to Business and Professions Code Section 17206.1, trebled according to California Civil Code Section 3345. . . .

(A.110; FAC, at p.35.) There is nothing legally defective in the pleading of the District Attorney's UCL claim for relief in this case.

D. Petitioners' Motion to Strike All Factual References To "California" In the Complaint Was Summarily Denied By Respondent Court

In addition to filing a demurrer, in response to the Complaint, Defendants filed a Motion to Strike (the "Motion") all factual references to the state of "California" from the Complaint. (*See* A.116-126 [seeking to strike the word "California" and phrases containing the word California, such as "in California," "within California," "California users," "such as California purchasers," "across and within California," etc.) Defendants did not contend that any such allegations were false, but rather, argued that all factual references to California should be stricken on the grounds that "district attorneys and other local prosecutors have no jurisdiction to enforce and thus, can make no claims under the Unfair Competition Law outside the geographic boundaries of their local jurisdictions." (A.119.) Plaintiff opposed the Motion, citing the applicable statutory language that grants the district attorneys standing and jurisdiction to seek the relief precisely as prayed for in the Complaint. (A.185-201.)

At the hearing on the Motion, the Respondent Court found no legal authority supporting Defendants' pleading Motion. (A.239-246.) Nevertheless, Defendants argued that the court should consider:

> an issue like the scope of the remedy that this plaintiff can obtain, in advance, on a motion to strike. Because it will focus the case. It will focus discovery, it will ensure that … these parties can negotiate with this plaintiff to resolve the proceeding, to understand the scope of any potential settlement that this plaintiff could enter into.

(A.243; *see also* A.246 [arguing "it makes sense to have the complaint reflect the recovery that this plaintiff can seek, which is why we have moved to strike"].) Respondent Court

rejected the opportunity to prematurely rule on the scope of relief in the case, and denied the Motion. In so ruling, the trial court explained: "We all agree that the court can issue an injunction that applies throughout the state … So the question really becomes, like everything else in the courthouse, money, right? So how much money are we talking about and where is the money going?" (A.244-246 & A.252.) "But that's kind of aways down the road," the court also explained. (A.244.) Regarding Defendants' concerns, the Court found no merit in the contention that "the district attorney in Orange County is going to do [the] kind of overreaching" Defendants accused the district attorney of in pleading this case as part of their Motion and assured the parties that nothing in her ruling prevented the parties from reaching a legal settlement of the claims alleged. (A.244-245.) Defendants were given 30 days to answer the Complaint. There was no abuse of discretion in the Respondent Court's ruling.

III. STANDARD OF REVIEW

A motion to strike a complaint in whole or in part is governed by California Code of Civil Procedure Sections 435 through 437. § 437 authorizes a motion to strike if the grounds appear on the face of a challenged pleading or a matter subject to judicial notice. Pursuant to Section 436, subdivision (b): "[t]he court may, upon a motion ... [s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." Such motions should only be used to strike a portion of a cause of action where the substantive defect is clear from the face of the complaint. *(Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320.)

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Cal. Civ. Proc. Code § 452.) "[A] complaint is not vulnerable to [challenge] if the complaint states the essential and substantial facts to apprise defendant of the nature of the cause of action." (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 156-57.) When reviewing the sufficiency of the pleadings on a motion to strike or demurrer, the Court "accept[s] as true all properly pleaded allegations and do[es] not go beyond the four corners of the complaint except as to matters which are judicially noticeable. (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 837-838; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53 [noting "[a] motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true."].)

The trial court's ruling on a motion to strike is reviewed for abuse of discretion. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

IV. THE MOTION TO STRIKE WAS PROPERLY DENIED

In their Motion, Defendants did not challenge the sufficiency of the allegations in the Complaint to establish the illegality of their conduct. Rather, by way of their Motion, Defendants admittedly sought to prematurely take issue solely with the amount of penalties that could possibly be assessed against Defendants for the alleged violations at the end of the case. More specifically, under the guise of a motion to strike all truthful factual references to the "state of California" throughout the Complaint, Defendants sought an

order shielding them from liability for civil penalties for any "harms" suffered by consumers outside of Orange County.

Defendants failed to cite any legal authority, however, that bars Plaintiff, as a matter of law, from seeking the relief prayed for in the Complaint -- because there is none. Defendants likewise failed to establish how any of the true and accurate factual references to the state of California in the Complaint constitute unlawful, "irrelevant, false or improper" matters to warrant any portion of the relief requested. For each of these reasons, and those discussed in more detail below, the Respondent Court correctly denied the Motion.

A. Background Regarding California's Unfair Competition Law

"The district attorney is the public prosecutor, except as otherwise provided by law." (Cal. Gov't Code § 26500.) As the "public prosecutor," it is the job of the district attorney to "initiate and conduct on behalf of the people all prosecutions for public offenses." (*Id*.) In addition to filing criminal actions, district attorneys are expressly authorized to bring civil actions to enforce the law and protect the people in certain situations.

Business and Professions Code Section 17200 *et seq*. (also known as California's Unfair Competition Law or "UCL"), for example, expressly authorizes the district attorney to seek injunctive and other relief against parties that engage in any "unlawful, unfair or fraudulent business act or practice." (Cal. Bus. & Prof. Code § 17200 *et seq*.) With limited exceptions not applicable here: "[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 … in the name of the people of the State of California upon their own complaint … " (Cal. Bus. & Prof. Code § 17204; *see also id.* § 17206(a).)

Under the "unlawful" business practices prong of the UCL, "section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under Section 17200 *et seq.*" (*Saunders, supra,* 27 Cal.App.4th at p.839.) An unlawful business practices action can be based on the violation of "any law, civil or criminal, statutory or judicially made[,] federal, state or local." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1474 [internal citations omitted]; *see also Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 ["the unfair competition law's scope is broad"; "Its coverage is 'sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law.'" (internal citations omitted)]; *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 927 ["the section 17200 proscription of 'unfair competition' is not restricted to deceptive or fraudulent conduct but extends to any *Unlawful* business practice"].)

Business practices that violate public policy and are particularly injurious to consumers may also be prosecuted as "unfair" business practices under the UCL. (*See, e.g., FTC v. Sperry & Hutchinson Co*. (1972) 405 U.S. 233; *Motors, Inc. v. Times Mirror Co*. (1980) 102 Cal.App.3d 735; *Klein v. Earth Elements, Inc*. (1997) 59 Cal.App.4th 965; *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 304.) A business practice is "unfair" if it is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and that unfairness is determined by weighing the

utility of the practice against the gravity of the harm to the consumer." (*Motors Inc., supra*, 102 Cal.App.3d, at 740-741.)

1. Authorized Equitable Remedies And Penalties

Unlike a private civil action for damages, the primary objective of a government UCL action is to protect the public by putting an end to the unlawful, unfair or fraudulent business practice(s), and to deter the defendant, as well as others in the industry, from committing similar violations. These objectives are typically achieved through injunctive relief and civil penalties. The scope of equitable relief that may be sought is broad, including any:

> orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

(Cal. Bus. & Prof. Code § 17203.)

In addition to injunctive and other appropriate equitable relief, the district attorney is authorized under the UCL to seek civil penalties in an amount "not to exceed two thousand five hundred dollars ($2,500) for each violation." (Cal. Bus. & Prof. Code §§ 17206 & 17206.1.) "Unless otherwise expressly provided," the remedies and penalties are intended to be "cumulative to each other and to the remedies or penalties available under all other laws of this state." (Cal. Bus. & Prof. Code § 17205; *see also People v. Toomey* (1984) 157 Cal.App.3d 1, 22; *People v. Dollar Rent-A-Car Sys., Inc.* (1989) 211 Cal.App.3d 119, 132.)

The Court is required to take into account all of the relevant facts and circumstances unique to any particular case when ordering a civil penalty under the UCL. In this regard, Section 17206, subdivision (b), mandates that:

> The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(Cal. Bus. & Prof. Code § 17206(b).)

2. What Constitutes A "Violation" Is A Question Of Fact To Be Decided On A Case-By-Case Basis, In The Court's Discretion, At The Penalty Phase

What constitutes a "violation" in any particular case is intentionally not defined and not limited in the UCL. (*See Toomey*, *supra*, 157 Cal.App.3d at p.22 ["[Business and Professions Code] [s]ections 17206 and 17536 fail to specify what constitutes a single violation, leaving it to the courts to determine appropriate penalties on a case-by-case basis."].) Indeed, it has long been held in UCL actions that, while an award of penalties is mandatory, it is within the Court's discretion "to determine [the amount of] appropriate penalties on a case-by-case basis." (*People v. Beaumont* (2003) 111 Cal.App.4th 102, 127-30.) Thus, what constitutes a violation in any UCL action is a question of fact to be determined in the trial court's discretion based on the totality of the facts and circumstances of the particular case. (*See, e.g.*, *Beaumont*, *supra*, 111 Cal.App.4th at pp. 127-30; *Motors Inc.*, *supra*, 102 Cal.App.3d, at 740-741.)

Rather than a strict "geographic boundaries" test, "determining what qualifies as a single violation 'depends on the type of violation involved, the number of victims and the repetition of the conduct constituting the violation – in brief, the circumstances of the case.'" (*Beaumont, supra*, 111 Cal.App.4th at p.129 [quoting *People v. Witzerman* (1972) 29 Cal. App. 3d 169, 180].) Numerous factors are relevant to determining how to calculate the number of violations under Sections 17200 and 17500, including the "nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct and the defendant's assets, liabilities and net worth." (Cal. Bus. & Prof. Code § 17206.) The "nature and extent of the public injury that defendants inflicted" and the "gain or the opportunity for gain achieved by defendants' unlawful scheme" are also factors to weigh when determining what the proper penalty calculation should be. (*Beaumont, supra*, 111 Cal.App.4th at p.130.)

Under this broad discretion, Courts have properly ordered civil penalties for violations on a "per victim," "per day," "per transaction," "per representation," and other similar calculations, as deemed appropriate based on the underlying misconduct. (*Id.* at pp.127-131[upholding award of civil penalties for UCL violations "based on defendants' [monthly illegal rent collection] actions as well as the number of affected tenants"]; *Toomey, supra,* 157 Cal. App. 3d at p.22 [penalties awarded on per "sales" or per "victim" basis upheld]; *Dollar Rent-A-Car Sys., Inc., supra,* 211 Cal. App. 3d at p.132 [penalties awarded for violations per contract, per invoice and per oral representation upheld].)

3. Notice Pleading Standard Governs

To plead an unlawful business practice under the UCL, the complaint must state the laws allegedly violated and contain "supporting facts demonstrating the illegality of [such] rule or regulation." (*People v. McKale* (1975) 25 Cal.3d 626, 635.) Particularized factual pleading is not required. (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 47.) "Rather, in order to sufficiently state a cause of action, the plaintiff must allege in its complaint certain facts in addition to the elements of the alleged unlawful act so that the defendant can understand the nature of the alleged wrong and discovery is not merely a blind 'fishing expedition' for some unknown wrongful acts." (*Id.* [quoting *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236].)

Unlike a private right of action, the district attorney is not required to plead, or prove, that any particular person "has suffered injury in fact and has lost money or property as a result of the unfair competition" to sufficiently allege a claim for violations under the UCL. (Cal. Bus. & Prof. Code §§ 17203-17204.) Indeed, while "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure," the statute specifically states that "these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state." (Cal. Bus. & Prof. Code § 17203.) In other words, public prosecutions under the UCL are not tied to the "harms" or injuries suffered by particular consumers in the same way as a private action for damages; the focus of a UCL action is on the violating conduct and the offending parties.

The People are also not required to particularize every evidentiary fact, including the specific sales or location of every single violation of law as Defendants' suggest by way of their Motion, to meet their pleading burden here. (*See People v. Superior Court (Jayhill Corp.)* (1973) 9 Cal.3d 283, 288 [rejecting defense argument seeking further detail in the complaint, noting "evidentiary facts need not be pleaded"; "if defendants require further specifics in order to prepare their defense, such maters may be the subject of discovery proceedings"].) Rather:

> The complaint in a civil action serves … to frame and limit the issues and to apprise the defendant of the basis upon which the plaintiff is seeking recovery. In fulfilling this function, the complaint should set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts.

(*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211-212 [internal citations omitted] [superseded by statute on other grounds].)

B. There Is No "Geographical Limitation" On UCL Remedies Expressly Or Impliedly Set Forth In The Text Of The Relevant Statutes

In support of their Motion, Petitioners argue that "a district attorney's enforcement authority under [the UCL] is limited to the geographic boundaries of the county for which the district attorney was elected." (A.120.) This is not correct. The so-called "geographic boundaries" that Petitioners propose find no support in the text of the UCL, the legislative history of the UCL, nor the purpose of the UCL. To the contrary, as detailed above, the Business and Professions Code expressly authorizes "any district attorney" to file civil claims under the UCL in the "name of the People of the State of California." (Cal. Bus. & Prof. Code §§ 17204 & 17206.) The UCL further equates the authority of the District

Attorney to seek both equitable relief and civil penalties with that of the Attorney General, making no distinction between the two. (Cal. Bus. & Prof. Code §§ 17204 & 17206.) Subject only to the other laws governing jurisdiction and venue in this state (which are met in this case), the clear and unambiguous language of the UCL expressly confers authority, standing and jurisdiction on "any district attorney" to pursue UCL violations and remedies without any geographic limitations on the relief demanded.

If the words of a statute are reasonably free of ambiguity and uncertainty, as here, courts should look no further than those words to determine the meaning of that language. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503.) These rules of statutory construction are "well settled." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250.) The Court "must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" (*Id.*) "If the statutory language is clear and unambiguous," the plain, commonsense meaning of the language controls, and the court is instructed to "presume that the Legislature meant what it said." (*Id.; Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 339.) The Legislature's chosen language is the most reliable indicator of its meaning because "'it is the language of the statute itself that has successfully braved the legislative gauntlet." (*Cal. Sch. Emples. Ass'n v. Governing Bd.* (1994) 8 Cal.4th 333, 338 (internal citation omitted))

"Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretations." (*Id.*) Importantly here, the Court may not "read into the statute a limitation that is not there," including the broad "geographic limitation" urged by Petitioners in this case.

(*Cortez v. Abich* (2011) 51 Cal.4th 285, 290-299; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 928-933; *Suarez v. Pacific Northerstart Mechanical, Inc.* (2010) 180 Cal.App.4th 430, 440-445.)

C. There Is No Dispute That Injunctive Relief Can Be Sought On A Statewide Basis By Any Authorized Prosecuting Authority Having Jurisdiction

There is no dispute that the district attorney may seek injunctive relief in this case under the UCL (Bus. & Prof. Code §§ 17203-17204) and that such relief may be enforced on a statewide basis. (A.244.) Section 17207 expressly recognizes this intent by authorizing further penalties for the violation of any injunction prohibiting unfair competition "issued in the name of the People of the State of California by the Attorney General or by any district attorney … in any court of competent jurisdiction within his or her jurisdiction *without regard to the county from which the original injunction was issued*." (Cal. Bus. & Prof. Code § 17207(b) [emphasis added].)

The statute also obviously contemplates an injunction in one county enforced with respect to conduct in another—that is, a statewide injunction. And the Court, pursuant to its jurisdiction over Defendants, plainly has the power to enjoin *them* from engaging in conduct anywhere in California in violation of the UCL regardless of how many consumers were harmed in one county versus another. Indeed, any person performing or proposing to perform an act of unfair competition within California may be so enjoined in any court of competent jurisdiction. (*Churchill Vill., L.L.C. v. GE* (N.D. Cal. 2000) 169 F.Supp.2d 1119; *Committee On Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197]; *People ex rel. Mosk v. National Research Co. of Cal.,* (1962) 201 Cal.App.2d 765.)

As such, the allegations in the Complaint concerning Petitioner's illegal business practices within and across the entire state of California, are relevant and important factual allegations that support the broad injunctive relief prayed for in this case. On this basis alone, the Respondent Court was correct in denying the Motion to Strike the well pled allegations about the breadth of the misconduct throughout the state.

D. There Is Likewise No Geographical Limitation On The Court's Equitable Powers To Grant Appropriate Restitution

The People have the same broad "legislative mandate" to seek restitution on behalf of the People of the State of California, not just residents of any particular area, in UCL actions. (*See People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 531.) In turn, under Section 17203, courts have wide discretion "to restore to *any person* in interest any money or property . . . which may have been acquired by means of unfair competition." In adopting this language, the Legislature recognized that "a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties" in a UCL action, just as in any other situation where it may do so. (*People v. Superior Court (Jayhill Corp.), supra*, 9 Cal.3d at p.286.) There is no requirement that the "person in interest" must also have independent standing to seek relief in a law enforcement UCL action. (*See In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320 [holding that absent class members need not have standing to sue in order to obtain restitution].) This is because "the standards for establishing standing under section 17204 and eligibility for restitution under section 17203 are wholly distinct." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335-336.) A "trial court has the inherent power to

order restitution as a form of ancillary relief in an action brought by the People." (*Pacific Land Research, supra*, 20 Cal.3d at p.19, fn. 9; *see also Jayhill Corp., supra*, 9 Cal.3d at p.286 [even in the absence of statutory authority, courts retain "inherent authority" to order restitution to any identifiable victim of fraud].)

As with an award of civil penalties, the proper scope of restitution is a matter directed to the sound discretion of the trial court based on the evidence introduced at trial, rather than a matter to be determined on the pleadings. The Court in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 138 & fn. 18, made clear that restitution in representative UCL actions was appropriate and suggested procedures for implementing that restitution.

E. The Full Scope Of The Geographic Location Of The Alleged Violations, Harms, And Offending Misconduct Is Relevant And Properly Pled In A UCL Action

Petitioners have not, and cannot, cite any authority that supports striking truthful factual allegations from a UCL complaint concerning the massive scale of the alleged violations, harms and offending conduct. To the contrary, the fact that the violations are pervasive, occurring statewide (and nationwide), and impacted consumers and payors throughout the state, over a prolonged period of time, are all relevant *facts* that the court "shall" consider under established law governing UCL actions when determining the appropriate relief in such a case. (*See* Cal. Bus. & Prof. Code § 17206(b); *see also* discussion, *infra*, Part IV.A.2.) All such facts are required to be accepted as true at the pleading stage. There is nothing false, improper or unlawful about these allegations so as

to support a Motion to Strike, and for this reason as well, the Respondent Court correctly denied the Motion.

F. Petitioners' Arguments Run Counter To The Express Intentions And Enforcement Objectives Of The UCL

Petitioners' argument—which would arbitrarily shield Defendants from liability for the full extent of their illegal misconduct and/or require district attorney suits in all California counties in order to secure any form of statewide relief—runs contrary to the policy objectives of the UCL:

> The [UCL] defines "'unfair competition' as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.'" [Citation]… [T]he act provides an equitable means through which public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices…. [T]he 'overarching legislative concern [was] to provide a streamlined procedure for prevention of ongoing or threatened acts of unfair competition.'"(*Graham v. Bank of Am., N.A.* (2014) 226 Cal.App.4th 594, 609 [quoting *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150]).

Given that the UCL is designed to promote "fair competition in commercial markets," (*Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1381), effective remedies must logically provide relief congruent with those markets. Here, the People allege that Petitioners' violations were statewide, and there is no statutory or logical basis for truncating that market.

When reviewing the statutory language to effectuate the Legislative intent:

> A statute's literal meaning must be aligned with its purpose. Its meaning may not be determined from a single word or sentence. Instead, the words must be construed in context, and provisions relating to the same subject matter or that are part of the same statutory scheme must be read together and harmonized to the extent possible.

> We must select a construction that: best fits the Legislature's apparent intent; promotes instead of defeats the statute's general purpose; and avoids absurd or unintended consequences. The statute cannot be construed in a way that would make its provisions void or ineffective, especially if that would frustrate the underlying legislative purpose.

(*Harbor Regional Center v. Office of Administrative Hearings* (2012) 210 Cal.App.4th 293, 310-11; *see also Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 340 ["As in any case involving statutory interpretation, our fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose"].)

In the face of statewide misconduct (and nationwide for that matter) by Petitioners in violation of the UCL, the express legislative grant of authority to district attorneys to obtain both equitable relief and civil penalties under the UCL, and the detailed legislative scheme adopted for collection and allocation of penalties, the idea that the Legislature intended to dictate a vague "geographic limitation" to a district attorney's "enforcement authority," particularly at the pleading stage, is absurd. Taken to its logical end, Petitioners urge this Court to adopt a judicially constructed limitation that would result in the need for all 58 district attorneys in each California county to file UCL suits to enjoin statewide unfair business practices. Striking the factual allegations about the full breadth of the illegal practices by eliminating the pleading of references to the state of California from a complaint makes even less sense. Indeed, the only purpose this would serve is to curtail the Court's mandatory discretionary analysis of all of the relevant facts and circumstances in a case that is necessary to fashion an appropriate remedy to protect consumers under the UCL. This is clearly not in line with the letter and spirit of the UCL's aim to prevent unfair competition.

Further defying logic, private parties (with standing) may secure statewide relief under the UCL. It would be absurd if public prosecutors, charged with enforcing the same "broad, sweeping language" of the UCL, (*Kwikset Corp. v. Super. Ct.* (2011) 51 Cal.4th 310, 320), were restricted in their efforts to secure effective statewide relief. To the contrary, as amended by Proposition 64, the UCL now clarifies the specific intent to rely primarily on public prosecutors to bring such actions "on behalf of the general public." (*Troyk v. Farmers Grp., Inc.* (2009) 171 Cal.App.4th 1305, 1345) [citation omitted].)

There is further no logical reason why the People should be limited to obtaining restitution only for those victims who happen to live in Orange County. Such relief is not awarded to the district attorney as Petitioners suggest, but to consumers directly, in whatever form the courts may deem appropriate. The People do not "stand in the shoes" of any particular victim of a challenged business practice. Instead, the People have standing to pursue relief under the UCL even when the victims lack standing or are unable to obtain similar relief. (*People v. James* (1981) 122 Cal.App.3d 25, 39-40.) As *James* explained:

> [T]his is an action by the People to enjoin unlawful and fraudulent business practices; it is not an action by individuals who were victimized by Petitioners. Petitioners' contention that the People, standing in those person's shoes, have no right to injunctive relief is without merit for the same reason. The district attorney is acting pursuant to a legislative mandate to seek injunctive relief against unlawful, unfair, or fraudulent business practices. (*Id*. at p. 40.)

Accordingly, striking any portion of the People's UCL complaint for relief that could theoretically benefit consumers outside of Orange County in this case would be as inappropriate as striking class action allegations at the pleading stage of a case. As the

court in *Blakemore v. Superior Court* 129 Cal.App.4th 36 (2005) recognized, striking class action allegations at the pleading stage is improper.

G. None of the Authorities Cited In The Petition Support Petitioners' Arguments

Petitioners rely almost entirely on *People v. Hy-Lond Enters., Inc.* (1979) 93 Cal.App.3d 734, a 1979 case that is cited approximately *Forty-Three (43) times* by Petitioners in their Petition and Memorandum. However, at least one scholar in a well-respected practice guide has opined that *Hy-Lond* may be of questionable validity. To wit: William L. Stern[2] states in his treatise BUSINESS & PROFESSIONS CODE SECTION 17200 PRACTICE at ¶ 9:51 (Rutter: March 2016 Update) as follows:

> *People v. Hy-Lond Enterprises, Inc.* … holds that a district attorney in one county has no authority to "surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other counties under [§ 17200 et seq.]." *Hy-Lond* may be of questionable validity. The California Department of Justice is composed of the Attorney General and the Division of Law Enforcement. [Gov.C. § 12550] Thus, the State of California has been held bound by a stipulation entered into by a county district attorney and is estopped from rescinding the agreement unless its agent, the district attorney, acted under a mistake of law. [*People v. Mendez* (1991) 234 CA3d 1773, 1783.]

Regardless, as the trial court correctly recognized in this case, *Hy-Lond* does not support the Petitioners' attempt to strip the facts of this UCL action down to Orange County and thereby judicially restrict the remedies available to protect consumers at the

[2] According to the page titled "About the Author" in William L. Stern's BUSINESS & PROFESSIONS CODE SECTION 17200 PRACTICE (Rutter: March 2016 Update), "William L. Stern is a litigation partner in Morrison & Foerster, LLP, San Francisco. He is a recognized authority on California's Unfair Competition Law … and one of the nation's leading experts on consumer class actions. Mr. Stern specializes in the defense of consumer class actions."

pleading stage. The case says absolutely nothing about the proper pleading of a UCL action by district attorneys in this state.

In *Hy-Lond*, the District Attorney of Napa County resolved a state-wide UCL case brought against a nursing facilities operator by entering into a stipulated judgment that included injunctive relief. (*Id.* at p.739.) The UCL claim was based upon the facilities' violations of Health and Safety Code Sections 1275-1300, each of which was a misdemeanor under Health and Safety Code section 1290 and an unlawful business practice. (*Id.* at p.740.) The Attorney General moved to set aside and vacate the judgment, but the Superior Court denied the motion. The Court of Appeals reversed, and held that the District Attorney lacked the authority to enter into an agreement that "surrender[s] the powers of the Attorney General and … fellow district attorneys to commence, when appropriate, actions in other counties." (*Id.* at p.753.) The Court in *Hy-Lond* concluded that the Napa County District Attorney had exceeded his authority because his real "client" in *Hy-Lond*, the Department of Health, had never approved the settlement, the injunctive relief in the judgment would prevent public officers from enforcing the law, and the defendant received immunity from future actions for unfair competition with respect to future alleged violations of the law. Thus, the stipulated judgment was vacated.

Hy-Lond bears no resemblance to this case. *Hy-Lond* involved a post-judgment action regarding the enforceability of a particular judgment concerning the management of nursing homes. This case is a pleading stage UCL action based on the Cartwright Act. The real "client" in *Hy-Lond*, the Department of Health, had never approved the settlement—including the injunctive relief in the settlement. (93 Cal.App.3d at p.753). In

this case, there is no settlement or stipulated judgment proposed or contemplated for the court to consider. In *Hy-Lond*, the defendant in the settlement "received immunity for future actions for unfair competition with respect to future alleged violations of the law and regulations." (*Id*. at p.749.) In this case, no such immunity is conceivable. Further, the court found that the settlement would improperly prevent the Department of Health from doing its statutorily-mandated job. (*Id.* at p.753 ["an injunction cannot be granted to prevent the execution of a public statute by officers of the law for a public benefit."].)[3] The Court in *Hy-Lond* rightly vacated the stipulated judgment. But that decision is limited to the particular facts of that unusual case and does not impede the efforts of district attorneys in performing their duties to protect the consumers of the state of California.

In sum, *Hy-Lond* did ***not*** hold either that a district attorney can never seek remedies outside of his county of residence, or that he can never bind the State. That is precisely what happened in *People v. Mendez* (1991), 234 Cal. App. 3d 1773, 1783. Respondent Court correctly ruled that *Hy-Lond* has no application here.

Petitioners also focus on a 1919 case cited by the *Hy-Lond* Court, *Singh v. Super. Ct. of Glenn Cnt.*(1919), 44 Cal.App.64, for the proposition that a district attorney acts for the state within the territorial limits of the county for which a district attorney was elected. (*Hy-Lond, supra,* 93 Cal.App.3d at p.751 [quoting *Singh, supra,* 44 Cal.App.64 at pp.65-67].) Yet, *Singh* did not concern the UCL or the powers of local officials (including district attorneys) to obtain statewide relief under the UCL. *Singh* instead only dealt with

[3] *See People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 531 (citing *Hy-Lond* for the proposition that "[o]ne branch of government may not prevent another from performing official acts required by law").

issues concerning the power of a district attorney to try criminal cases concerning bribery of a district attorney and whether the district attorney is an executive officer of the state of California. In *Singh*, the Petitioner argued that the district attorney was not an officer of the state. The Court in *Singh* concluded that a district attorney is likely both an officer of the state and of the county, but that the discussion concerning the distinctions between these labels "may well be regarded as unnecessary or academic." (*Id.* at p.67.) *Singh's* discussion of the district attorney's status as both an officer of the state of California and a county official, while interesting, is not dispositive of any issue before this Court.

The same is true with respect to the other authorities cited and relied upon by the Petitioners, which stand for the unremarkable (and irrelevant) legal principals restricting public prosecutors from bringing private civil cases on behalf of themselves, other private citizens, or without express statutory authorization. (Petition at pp.29-42 [citing various authorities in other contexts that have no bearing on the Motion to Strike here].) This case is expressly authorized under the UCL and does not involve a private right of action. Furthermore, nothing in the Respondent Court's order denying the Motion to Strike enjoins or interferes with any lawful action by the Attorney General or any other party. These authorities thus have no bearing on the relief that may be pleaded or ultimately awarded, in the discretion of the courts, in this case.

V. CONCLUSION

"As an action designed to protect the public rather than benefit private parties, … '[o]nly the violation of statute is necessary to justify an injunctive relief and civil penalties.'" (*Toomey*, *supra*, 157 Cal.App.3d 23 [*quoting People v. Pacific Land Research*

Co., (1977) 20 Cal.3d 10, 18, fn.7; *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 72.].) The Complaint here adequately pleads claims for relief based on unlawful and unfair business practices. The factual allegations regarding the statewide impacts of these violations are true, accurate and relevant facts to this case, and are thus properly alleged in support of the prayer for relief in this UCL action. Petitioner's legal arguments to the contrary are premature, beyond the four corners of the Complaint, and without support in the law.

For all of the foregoing reasons, the Respondent Court did not abuse its discretion in refusing to strike the well-pled factual allegations containing the word "California" at the pleading stage in this case. The order denying the Motion should be affirmed.

DATED: October 18, 2017

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CERTIFICATE OF WORD COUNT

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

I certify that the text of this Response consists of 11,431 words counted by the Microsoft Word word-processing program used to generate the brief.

DATED: October 18, 2017

By: */s/ Joseph D'Agostino*
JOSEPH D'AGOSTINO,
SENIOR ASSISTANT DISTRICT ATTORNEY

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 October 18, 2017, I served Plaintiff/Real Party in Interest's Return to Petition for Writ of Mandate or Prohibition dated October 18, 2017 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 October 18, 2017, I served Plaintiff/Real Party in Interest's Return to Petition for Writ of Mandate or Prohibition dated October 18, 2017, electronically via One Legal electronic filing service to:

CLERK OF THE COURT
Hon. Kim G. Dunning
Department CX104
Superior Court of the State of California, for the County of Orange
751 West Santa Ana Boulevard
Santa Ana, California 92701

4. I further declare that on October 18, 2017, I served Plaintiff/Real Party in Interest's Return to Petition for Writ of Mandate or Prohibition dated October 18, 2017, and filed in the above-referenced case on:

State of California Department of Justice
Office of the Attorney General

By uploading the document through 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 the 18th day of October, 2017, at Newport Beach, California.

/s/ Darleen Perkins_____
Darleen Perkins