

No. S249895

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

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

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF ORANGE,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Real Parties in Interest.

Petition for Review of a Decision of the Court of Appeal,
Fourth Appellate District, Division 1, No. D072577

Superior Court, County of Orange
Civil Case No. 30-2016-00879117-CU-BT-CXC
Honorable Kim G. Dunning

REPLY TO ANSWER TO PETITION FOR REVIEW

ORANGE COUNTY DISTRICT ATTORNEY
Tony Rackauckas, District Attorney, SBN 51374
Kelly A. Ernby, Deputy D.A., SBN 222969
401 Civic Center Drive
Santa Ana, CA 92701-4575
Tel: (714) 834-3600;
Fax: (714) 648-3636

– In Association with –
Mark P. Robinson, Jr., SBN 05442
Kevin F. Calcagnie, SBN 108994
ROBINSON CALCAGNIE, INC.
19 Corporate Plaza Drive
Newport Beach, CA 92660
Tel: (949) 720-1288; Fax: (949) 720-1292
mrobinson@rcrlaw.net

Attorneys for Real Party In Interest
THE PEOPLE OF THE STATE OF CALIFORNIA

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I. INTRODUCTION

In support of their Petition for Writ of Mandate or Prohibition in the Fourth District (hereinafter, the “Writ Petition”) that led to the challenged Opinion here, Defendants argued that the legal questions presented should be reviewed because the questions – involving “the authority of local officials to bring and settle UCL claims beyond their local area – [have] proven perplexing and resulted in inconsistent decisions from superior courts.”¹ (Writ Petition at p.11.) Defendants claimed extraordinary review is “necessary” and “crucial” because the issues are “of widespread importance,” arising in the early stages of “‘thousands’ of cases.” (Writ Petition at pp.13-16.) Defendants argued that there is a need for “certainty” in the law not only in this case, but in all related cases, since the issues are “of significant statewide importance and [have] heretofore evaded appellate review.” (Writ Petition at p.12.) All of these reasons support granting the People’s Petition for Review.

Yet, in this Court, Defendants argue just the opposite. In their Answer to the Petition for Review, Defendants now contend review is “unnecessary” because the Fourth District’s Opinion on the merits is “grounded in settled principles” and the “prior conflict[s]” in the lower courts are now “irrelevant.” (Answer at pp.15-20.) Defendants ignore

¹ Unless otherwise defined, all capitalized terms used herein shall be as defined in the People’s Petition for Review.

the statewide problems that the broad-reaching policy pronouncement in the Opinion creates for the “thousands” of similarly situated cases in their Answer entirely, arguing that the Fourth District’s two justice Majority Opinion should simply be left to bind *all* trial courts and parties as the final decision on the contested legal questions -- regardless of the procedural or factual circumstances of any of these other cases. The UCL’s broader aim to fully protect California consumers from unlawful and unfair competition that was raised in support of the Petition is of no concern to the Defendants here.

Perhaps if the two justice Majority Opinion were limited to addressing a question linked to the facts and circumstances of the present case, then Defendants objection to further review in this Court would have some merit. But, it is not. The holding in the Opinion sets forth a new procedural process and constitutional policy in the state that shields defendants from liability, not only in UCL cases, but potentially also in other civil law enforcement cases brought by district attorneys. Such a decision should be made for the entire state, if at all, only by the highest Court. Defendants offer no good reason to suggest otherwise.

For each of these reasons, and those described in more detail below and in the Petition, the Petition for Review should be granted.

II. DEFENDANTS' ANSWER FAILS TO REFUTE ANY OF THE REASONS REVIEW SHOULD BE GRANTED

Defendants oppose the Petition because, in their view, the Fourth District Opinion is correct on the merits, and it is fully consistent with all other laws and authorities. (Answer at pp.15-35.) In so doing, the Defendants spend the vast majority of their Answer arguing the merits of the Petition, not whether there is good reason for this Court to grant review.² Not only does the Answer fail to refute the many reasons the People presented supporting their request for review, but the arguments raised highlight precisely why review should be granted.

A. There Is No Dispute That The Petition Presents Important Legal Questions Of First Impression

Defendants do not dispute that the issues presented are heavily contested issues of first impression. (*See* Petition at pp.22-24.) In their Answer, Defendants admit that there is no other published decision that addresses the precise legal question presented. (Answer at p.19 [arguing the “only other published decision on the issue is *Hy-Lond*” and claiming the Fourth District properly relied on the principles of that heavily disputed case when answering the legal questions presented].) The uncontested

² Of course, the People disagree that the Majority Opinion is correct on the merits. (Petition at 34-40.) The People will respond in full to the entirety of the arguments on the merits in their opening brief on the merits if the Petition for review is granted.

statewide importance of the legal issues of first impression decided in the Fourth District Opinion, alone, is a sufficient basis warranting review. (Cal. R. Ct. 8.500, subd. (b), subd. (1).)

B. Defendants’ Attempt To Minimize The Inconsistencies And Conflicts In The Law Does Not Mean They Do Not Exist

In the Petition, the People argued that the holding in the Opinion is inconsistent, and in conflict, with other well settled law and authority for numerous reasons. (Petition at pp.24-32.) In response to these arguments, Defendants argue that the admitted conflicts in the lower courts are no longer relevant because all trial courts are now bound to follow the Fourth District’s Majority Opinion which is, in their view, right on the merits. (Answer at pp.20-29.) These arguments do not refute the People’s showing in support for this Petition for Review.

1. The Conflicts In Lower Court Opinions Are Relevant And Important Reasons Review Should Be Granted

The People argued that review is necessary to ensure uniformity of decisions because there is a risk of conflicting decisions on the legal question addressed in the Opinion, particularly in other appellate districts that are not bound to follow the Fourth District’s Majority Opinion. (*See* Petition at p.24 [contending a “likelihood of inconsistent rulings is evidenced by the different holdings of the trial courts and a divided 2-1 appellate court already with respect to the issue” presented].)

In response, Defendants do not deny that conflicting rulings exist or that there is a real potential for conflicts in other appellate districts if this Court does not settle these important questions. Instead, Defendants contend the conflicts are “irrelevant” because the Fourth District Opinion correctly resolved the issue for all trial courts and parties throughout the state. (Answer at p.20.) However, the fact that the Fourth District’s Majority Opinion may be presently binding on all trial courts in the state does not remove the real and potential conflicts that still exist at the appellate level and justify review. Moreover, if anything, the argument further supports the Petition for Review because, if the Opinion stands, the UCL’s aim to fully protect California consumers will be thwarted not only in this case, but in numerous other cases that raise this question throughout the state. (See Petition at p.40 [arguing the Majority’s holding “will hurt California consumers if it stands” by limiting the power of the trial courts to grant the full scope of remedies authorized in the UCL].)

**2. Defendants’ Answer Highlights The Need For Guidance
From This Court Regarding The Proper Standard For
Interpretation Of Civil Law Enforcement Statutes**

In the Petition, the People argued that review should be granted because there is a clear conflict between the Second and Fourth District’s standard for interpretation of civil law enforcement statutes

and their application of this Court’s ruling in *Safer v. Superior Court* (1975) 15 Cal.3d 230, 236 and related decisions. (See Petition at pp.26-29 [noting in “the Second District, broad prosecutorial standing under the UCL *presumptively exists* unless otherwise specified, but in the Fourth District, civil prosecutorial power *presumptively does not exist*, unless express specified”].) Defendants do not dispute that different standards were applied in these cases, but argue they do not present conflicting interpretations of the *Safer* rule because the Second District decision “concerned a wholly different statute” as the predicate for the UCL action in that case. (Answer at p.22.) Even if the cases are factually distinguishable, however, that does not change the fact that two districts applying conflicting standards to the interpretation of civil law enforcement statutes merits review.

In addition to distinguishing the Second District’s decision, Defendants argue review should be denied because the Fourth District properly applied the *Safer* rule on the merits in support of its holding here. Other than a lengthy argument in favor of extending the *Safer* holding to all civil prosecutions, the Defendants do not explain how or why the *Safer* rule was properly applied to restrict only a portion of the statutorily authorized remedies in the UCL in this case. Indeed, Defendants acknowledge that “section 17204,” which is the statute at issue here, already provides express authorization for the district

attorneys' action to proceed, which is all the *Safer* rule requires. (Answer at p.23.)³

In the broader context, Defendants attempt to offer support for the Fourth District's restrictive view of the district attorney's prosecutorial powers, arguing that the authorization of prosecutorial power to district attorneys under Government Code Section 26500 (amended after the *Safer* decision was rendered) applies only to criminal actions. In support, Defendants ask the Court to take judicial notice of the legislative history of the amendment, claiming Government Code Section 26500 was not intended to have "broad reaching significance" in civil actions. (Answer at p.24.) Yet, all of the legislative history presented and the plain meaning of the language in the statute points to an intent to "allow greater discretion on the part of the public prosecutor in initiations of prosecutions." (*See, e.g.,* Request for Judicial Notice, Ex. A at pp.6-7, 10, 16.)

Moreover, contrary to Defendants' suggestion that a district attorney is intended to be the public prosecutor only in criminal cases

³ There is no dispute that the District Attorney has standing to pursue the UCL claims here, and that the case was properly brought in the competent jurisdiction and venue of Orange County. (Petition at pp.10-11.) Hence, case law permitting courts to refuse to grant relief to plaintiffs that lack standing are not dispositive of the issues here. (*See* Answer at pp.29-32 [arguing courts can dismiss UCL claims when the Plaintiff lacks standing to pursue them and citing authorities for that proposition].)

under section 26500, section 26501 expressly notes the district attorney's concurrent role in prosecuting "civil cases on behalf of the People." (Gov. Code §§ 26500 & 26501.) The Defendants' arguments concerning the limitations in civil prosecutions confirm the various conflicts and confusion in the law that support granting review in order to clarify the proper standard to be applied by the lower courts when interpreting civil prosecution statutes. (*See Answer at pp.23-27* [noting the *Safer* rule has been "applied broadly"].)

3. Defendants' Distinguish Other Case Law, But The Fourth District's Holding Does Not, Thereby Creating Conflicts

In the Petition, the People argued that review should be granted because the holding in the Opinion cannot be reconciled with well settled law governing UCL law enforcement actions. (*See Petition at pp.25-26* [noting inconsistencies between the holding here and the limited evidentiary burdens and punitive focus of remedies on the Defendant's conduct under the UCL to protect California consumers recognized in the *Tobacco II Cases*].) In response, Defendants distinguish the *Tobacco II Cases*, arguing that case involved "a fraud based UCL claim" and "deceptive advertising" and thus, these concepts are irrelevant to the legal questions presented in this Petition. (*Answer at p.27.*) If the Fourth District Opinion was limited to the unique facts and circumstances of this case, the distinction might have merit, but, once again, it is not. As

it stands, the Majority's far reaching ruling restricts monetary remedies and fundamentally alters the policy considerations and burden of proof in *all* UCL actions brought by local prosecutors, including those based on fraud and deceptive advertising. As such, the apparent inconsistencies left unaddressed in the Fourth District Opinion support review by this Court to ensure uniformity of decisions and the protection of California consumers in all UCL cases.

C. The People Did Not Waive Any Arguments That Support Review

In their Answer, Defendants claim review should be denied because the People waived any arguments concerning the conflicting interpretations of this Court's *Safer* decision and the powers of the court to enter appropriate remedies in UCL cases because these arguments were not timely raised in the Fourth District. (Answer at pp.21 & 29.) Neither of these arguments were waived.

First, it is not the job of the district courts to provide uniformity in California law and address conflicts between districts. Only the highest Court has the power to grant review and consider such matters, particularly here when guidance is sought to address conflicting interpretations of decisions of this Court. (Cal. R. Ct. 8.500; *People v. Davis* (1905) 147 Cal. 346, 348.) The People's arguments regarding the conflicts between districts that relate to the *Safer* decision and other

decisions of this Court and districts were thus properly and timely raised in this Court in support of this Petition for review.

Second, it is not correct that the People failed to argue on the record below that the UCL grants the courts the power to award the statutorily authorized remedies in a properly filed UCL case by any authorized public prosecutor. (*See Answer at p.29.*) Indeed, the People made this argument many times in the Fourth District below, including in the pre-hearing briefing, at oral argument, and as a basis for its Petition for Rehearing. (*See Return at pp.37-38; People’s Consolidated Answer to Amicus Briefing at pp.8-10; People’s Petition for Rehearing at pp.19-20.*) The argument was also raised by amicus parties as well. (*See, e.g., City Attorneys’ Amicus Brief at pp.28-31.*) Not only was the argument timely raised numerous times, but it was also a basis for the dissenting opinion by Justice Dato in the Fourth District Opinion. (Dis. Opn. at p.11.)

Accordingly, there is no basis to deny review of these important legal questions on the grounds of waiver.

D. Jurisdictional Overreach By The District Courts May Indeed Support A Basis For Review By This Court

Finally, Defendants argue that the People’s jurisdictional challenges to the Fourth District’s ruling cannot be reviewed by this court under Rule 8.500(b)(2), claiming the reason for the rule “has

ceased to exist.” (Answer at p.35.) This argument ignores the vast body of law permitting this Court to review the lower court’s decisions for error of all types, including jurisdictional errors. (*See, e.g., People v. DeLouize* (2004) 32 Cal.4th 1223, 1228; Petition at pp.32-34.) Even if there was a jurisdictional error, Defendants argue it was merely “procedural error, which does not merit this Court’s review.” (Answer at p.36.) However, as discussed above, the “procedural” errors here stand to affect far more than the parties in this case given the Fourth District’s holding on the merits. Under these circumstances, review by this Court is proper. (Petition at pp.32-34.)

III. CONCLUSION

For all the foregoing reasons, and those set forth in the Petition, the People respectfully request that the Petition for Review be granted. The issues presented should be briefed and heard on the merits, and the Opinion should be reversed.

Dated this 9th day of August, 2018.

Respectfully submitted,

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

BY: Kelly A. Ernby
KELLY A. ERNBY
DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 8.504(d)(1)]

The text of this Petition for Review (excluding tables and caption pages) consists of 2447 words as counted by the word-processing program used to generate this brief.

Dated this 9th day of August, 2018.

Respectfully submitted,

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

BY: Kelly A. Ernby
KELLY A. ERNBY
DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

COURT: Supreme Court of the State of California
Case No. S249895

Case Nos.: Court of Appeal, Fourth Appellate District, 1st Division
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. On August 9, 2018, I served the documents described as:

REPLY TO ANSWER TO PETITION FOR REVIEW

on the parties and entities below by placing a true copy thereof in a sealed Federal Express envelope as follows:

ORANGE COUNTY DISTRICT
ATTORNEYS OFFICE
Joseph D'Agostino
Kelly Ernby
401 Civic Center Drive
Santa Ana, California 92701
Telephone: (714) 834-3600
joe.dagostino@da.ocgov.com
kelly.ernby@da.ocgov.com

ROBINSON CALCAGNIE,
INC.
Mark P. Robinson, Jr.
Kevin F. Calcagnie
Scot D. Wilson
19 Corporate Plaza Drive
Newport Beach, California
92660
Telephone: (949) 720-1288
mrobinson@robinsonfirm.com
kcalcagnie@robinsonfirm.com
swilson@robinsonfirm.com

KIRKLAND & ELLIS LLP
Michael Shipley
333 S. Hope Street
Los Angeles, California 90071
Telephone: (213) 680-8400
mshipley@kirkland.com

*Attorneys for
Petitioners/Defendants Teva
Pharms. USA, Inc.; Duramed
Pharms, Inc.; Duramed Pharms.
Sales Corp., and Barr Pharms,
Inc.*

KIRKLAND & ELLIS LLP
Jay P. Lefkowitz
Adam T. Humann
601 Lexington Avenue,
New York, New York 10022
Telephone: (212) 446-4800
lefkowitz@kirkland.com
ahumann@kirkland.com

*Attorneys for
Petitioner/Defendants Teva
Pharms. USA, Inc.; Duramed
Pharms., Inc.; Duramed Pharms.
Sales Corp., and Barr Pharms.
Inc.*

MUNGER, TOLLES &
OLSON LLP
Jeffrey I. Weinberger
Stuart Senator
Blanca Young
350 S. Grand Avenue, 50th
Floor
Los Angeles, California 90071
Telephone: (213) 683-9100
jeffrey.weinberger@mto.com
stuart.senator@mto.com
blanca.young@mto.com

*Attorneys for
Petitioners/Defendants AbbVie
and Abbott Laboratories*

BLANK ROME, LLP
Yosef Adam Mahmood
2029 Century Park E. Fl. 16
Los Angeles, California 90067
Telephone: (424) 239-3400
ymahmood@blankrome.com

*Attorneys for Petitioner Abbott
Laboratories*

CALIFORNIA DEPARTMENT
OF JUSTICE
Xavier Becerra, Attorney General
of California
David Jones, Deputy Attorney
General
300 South Spring Street, Suite
1702
Los Angeles, California 90013
Telephone: (213) 269-6351
david.jones@doj.ca.gov

*Attorney General of California -
Amicus Curiae*

CITY AND COUNTY OF
SAN FRANCISCO
Dennis J. Herrera, City
Attorney
Yvonne R. Meré
Owen Clements
Fox Plaza, 1390 Market St.,
6th Fl.
San Francisco, California
94102
(415) 554-3874
yvonne.mere@sfcityatty.org
yvonne.mere@sfgov.org
owen.clements@sfcityatty.org

*Attorneys for Consumer
Attorneys of California –
Amicus Curiae*

LAW OFFICE OF VALERIE T.
MCGINTY
Valerie T. McGinty
524 Fordham Road
San Mateo, California 94402
Telephone: (415) 305-8253
valerie@plaintffsappeals.com

*Attorneys for Consumer Attorneys
of California – Amicus Curiae*

CALIFORNIA DISTRICT
ATTORNEYS
ASSOCIATION
Mark Zahner
921 11th Street, #300
Sacramento, California 95814
Telephone: (916) 443-2017
mzahner@cdaa.org

*Attorneys for California
District Attorneys Association
– Amicus Curiae*

SAN DIEGO COUNTY
DISTRICT ATTORNEY'S
OFFICE
Thomas A. Papageorge
330 W. Broadway, Suite 750
San Diego, California 92101
Telephone: (619) 531-3971
thomas.papageorge@sdca.org

*Attorneys for California District
Attorneys Association – Amicus
Curiae*

LOS ANGELES CITY
ATTORNEYS' OFFICE
Michael Nelson Feuer
800 City Hall East
200 N. Main Street
Los Angeles, California 90012
(213) 978-8100
mike.n.feuer@lacity.org

Monica Danielle Castillo
Los Angeles City Attorney
City Hall East
200 N. Spring Street, 14th
Floor
Los Angeles, California 90012
(213) 978-1870
monica.castillo@lacity.org

*Attorneys for City of Los
Angeles – Amicus Curiae*

OFFICE OF THE SAN DIEGO
CITY ATTORNEY
Kathryn Turner
Mara Elliott
1200 3rd Avenue, Suite 700
San Diego, California 92101
Telephone: (619) 533-5600
kturner@sandiego.gov
klorenz@sandiego.gov
cityattorney@sandiego.gov

*Attorneys for City of San Diego –
Amicus Curiae*

OFFICE OF THE SAN JOSE
CITY ATTORNEY
Nora Frimann
200 E. Santa Clara Street
San Jose, California 95113-
1905
Telephone: (408) 998-3131
nora.frimann@sanjoseca.gov

*Attorneys for City of San Jose
– Amicus Curiae*

SANTA CLARA COUNTY
OFFICE OF THE COUNTY
COUNSEL

James R. Williams
Laura Trice
70 W. Hedding Street
East Wing, 9th Floor
San Jose, California 95110
Telephone: (408) 299-5993
laura.trice@cco.sccgov.org

*Attorneys for Santa Clara County
– Amicus Curiae*

HORVITZ & LEVY LLP
Jeremy B. Rosen
Stanley H. Chen
3601 West Olive Ave., 8TH Flr
Burbank, California 91505
Tel: 818-9955-0800
jrosen@horvitzlevy.com
schen@horvitzlevy.com

*Attorneys for Chamber of
Commerce of the United States of
America; and California Chamber
of Commerce*

CALIFORNIA CHAMBER OF
COMMERCE

Heather L. Wallace
1215 K Street, Suite 1400
Sacramento, California 95814
916-444-6670
heather.wallace@calchamber.com

*Attorneys for Chamber of
Commerce of the United States of
America; and California Chamber
of Commerce*

CALIFORNIA STATE
ASSOCIATION OF
COUNTIES

Jennifer Henning
1100 K Street, Suite 101
Sacramento, California 95814
Telephone: (916) 327-7535
jhenning@counties.org

*Attorneys for California State
Association of Counties –
Amicus Curiae*

US CHAMBER LITIGATION
CENTER

Janet Y. Galeria
1615 H Street NW
Washington, DC 20062
Tel: 202-463-5747
jgaleria@uschamber.com

*Attorneys for Chamber of
Commerce of the United States
of America; and California
Chamber of Commerce*

[X] FEDEX TO INTERESTED PARTIES: I placed the document(s) listed above in a sealed overnight courier envelope addressed to the parties below and routing the envelope for pick up by Federal Express on that same day in the ordinary course of business, with charges fully prepaid for next day delivery.

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Clerk of the Court
Court of Appeal of the State of California
Fourth District, Division 1
750 B Street, Suite 300
San Diego, California 92101
(619) 744-0760

Clerk of the Court
Hon. Kim G. Dunning, Department CX-104
Superior Court of the State of California
County of Orange
751 West Santa Ana Boulevard
Santa Ana, California 92701
(657) 622-5304

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street, Suite 1702
Los Angeles, California 90013-1230
(213) 269-6000

Michele Van Gelderen
California Department of Justice
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, California 90013
(213) 269-6000

Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797
(415) 865-7000

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

Executed on August 9, 2018. at Newport Beach, California.

/s/ Darleen Perkins

Darleen Perkins

STATE OF CALIFORNIA
 Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
 Supreme Court of California

Case Name: **ABBOTT LABORATORIES v. S.C. (RACKAUCKAS)**
 Case Number: **S249895**
 Lower Court Case Number: **D072577**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **mrobinson@robinsonfirm.com**
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Jeffrey Weinberger Munger Tolles & Olson LLP 00056214	jeffrey.weinberger@mto.com	e- Service	8/9/2018 4:13:50 PM
Jeffrey Weinberger Munger Tolles & Olson LLP 00056214	jeffrey.weinberger@mto.com	e- Service	8/9/2018 4:13:50 PM
Joseph D'agostino Orange County District Attorney 115774	joe.d'agostino@da.ocgov.com	e- Service	8/9/2018 4:13:50 PM
Joseph D'agostino Orange County District Attorney 115774	joe.d'agostino@da.ocgov.com	e- Service	8/9/2018 4:13:50 PM
Mark Robinson, Jr. Robinson Calcagnie Inc. 05442	mrobinson@robinsonfirm.com	e- Service	8/9/2018 4:13:50 PM
Mark Robinson Robinson Calcagnie , Inc. 54426	beachlawyer51@hotmail.com	e- Service	8/9/2018 4:13:50 PM
Mark Robinson Robinson Calcagnie , Inc. 54426	beachlawyer51@hotmail.com	e- Service	8/9/2018 4:13:50 PM
Michael Shipley Kirkland & Ellis LLP 233674	michael.shipley@kirkland.com	e- Service	8/9/2018 4:13:50 PM
Michael Walsh Office of the Los Angeles City Attorney 150865	michael.walsh@lacity.org	e- Service	8/9/2018 4:13:50 PM
Michael Walsh Office of the Los Angeles City Attorney	michael.walsh@lacity.org	e- Service	8/9/2018 4:13:50 PM

150865			
Stuart Senator Munger Tolles & Olson LLP 148009	stuart.senator@mto.com	e- Service	8/9/2018 4:13:50 PM
Yosef Mahmood Kirkland & Ellis LLP 295976	yosef.mahmood@kirkland.com	e- Service	8/9/2018 4:13:50 PM
Yosef Mahmood Kirkland & Ellis LLP 295976	yosef.mahmood@kirkland.com	e- Service	8/9/2018 4:13:50 PM
Blanca Young Additional Service Recipients	blanca.young@mto.com	e- Service	8/9/2018 4:13:50 PM
Darleen Perkins Additional Service Recipients	dperkins@robinsonfirm.com	e- Service	8/9/2018 4:13:50 PM
Jay Lefkowitz Additional Service Recipients	lefkowitz@kirkland.com	e- Service	8/9/2018 4:13:50 PM
Kelly Ernby Additional Service Recipients	kernby@da.ocgov.com	e- Service	8/9/2018 4:13:50 PM
Kevin Calcanie Additional Service Recipients	kcalcagnie@robinsonfirm.com	e- Service	8/9/2018 4:13:50 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/9/2018

Date

/s/Mark Robinson, Jr.

Signature

Robinson, Jr., Mark (05442)

Last Name, First Name (PNum)

Robinson Calcagnie Inc.

Law Firm