In the Supreme Court of the State of California

NATIONWIDE BIWEEKLY ADMINISTRATION, INC., an Ohio corporation; LOAN PAYMENT ADMINISTRATION, LLC, an Ohio limited liability company; and DANIEL S. LIPSKY, an individual,

Petitioners,

v.

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

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S250047

First Appellate District, Division 1, Case No. A150264
Superior Court, County of Alameda, Civil Case No. RG15770490
The Honorable George Hernandez Jr. (retired)
The Honorable Ioana Petrou

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REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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Service on California Attorney General required by California Business and Professions Code sections 17209 and 17536.5

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ISSUE FOR REVIEW

Is there a right to a jury trial in a civil action brought by the People, acting through representative governmental agencies, pursuant to the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) or the False Advertising Law (Bus. & Prof. Code, § 17500 et seq.), because the People seek statutory penalties, among other forms of relief?

INTRODUCTION

The Unfair Competition Law ("UCL") and the False Advertising Law ("FAL") are the primary mechanisms by which the People of the State of California, represented by designated public officials, act to prevent commercial conduct that threatens harm to the state's citizens. The UCL and FAL are modern, equitable statutes, which have been broadly written and construed. Neither affords a statutory right to jury trial.

For over forty years, lower courts have unanimously held that UCL/FAL cases brought by the People, including those seeking civil penalties, are to be tried to the court, not a jury. These holdings were and are consistent with the nature and purpose of the statutes as interpreted by this Court. That unanimity abruptly ended in the case below, when the First District Court of Appeal ("Court of Appeal") held that article I, section 16 of the California Constitution affords a right to jury trial on the issue of liability, but not relief, when the People seek civil penalties, among other forms of relief. (See *Nationwide Biweekly Admin., Inc. v. Superior Court* (2018) 24

Cal.App.5th 438 (*Nationwide*).) The decision in *Nationwide* should not stand.

Although the Court of Appeal based its opinion on the "gist of the action" test, it applied that test incorrectly in this instance by singularly focusing on the availability of civil penalties. This Court's precedent teaches that monetary relief, even monetary relief traditionally regarded as "legal," does not alter the gist of an action which otherwise depends upon equitable doctrines. Nor does it lead inevitably to a jury right. A cause of action that sounds firmly in equity should not be severed into its constituent parts and then transformed into one sounding in law based on one of those parts, i.e., a claim for penalties.

The Court of Appeal's opinion is also inconsistent with the history and purpose of the UCL and FAL. These are quintessential examples of statutes sounding in equity. They reflect a contemporary approach to protecting consumers and afford the judicial flexibility needed to address sharp business practices in whatever form they occur. The remedies available under the statutes depend entirely upon equity and are limited in number, so as to allow for a streamlined process. The fact that civil penalties are among those remedies in public enforcement actions does not change the fundamental nature of the statutes. In short, the "gist of the action" under the UCL and FAL is equitable.

In reaching a contrary conclusion, the Court of Appeal relied heavily

on the United States Supreme Court's decision in *Tull v. United States.*[1] *Tull*, however, involved principles of federal jurisprudence that do not align with California law. It was not decided under the "gist of the action" test, as understood and refined by this Court, but rather under the Seventh Amendment to the United States Constitution, which does not apply to the states. Other aspects of the analysis in *Tull* also do not hold up under California law, including the attempt to analogize a law enforcement case seeking unliquidated civil penalties to a common law "action on a debt." Tellingly, the majority of other state courts to have considered this issue have distinguished *Tull* or otherwise concluded that a right to jury does not attach.

The Court of Appeal's decision in *Nationwide* is also unwarranted from a practical perspective. California judges have historically decided unfair competition and false advertising cases, an approach that makes sense given the evolving nature of schemes to defraud the public and the depth of legal experience needed to address them. The decision below would require juries to decide questions historically entrusted to courts of equity, involving judges only when equitable findings have already been made. So far as the People can tell, this approach is unprecedented in California law. It is consistent with the legislative intent underlying UCL/FAL actions and

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[1] *Tull v. United States* (1987) 481 U.S. 412.

threatens to encumber them with unsettled procedural questions. It also has the potential to ripple out to scores of other remedial statutes in which civil penalties are available. The lower court's decision in *Nationwide* should be overturned.

STATEMENT OF THE CASE

I. ALLEGATIONS OF THE COMPLAINT AND REQUEST FOR RELIEF

On May 15, 2015, the People, represented by the California Department of Business Oversight (the "DBO") and the District Attorneys of Alameda, Marin and Monterey Counties,[2] filed civil complaint against Defendants Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC, and the companies' owner, Daniel Lipsky. Defendants offer debt payment services that purport to help consumers reduce their long-term interest obligations. (*Nationwide, supra,* 24 Cal.App.5th at p. 442.) They advertised these services, in large part, by blanketing the state with direct mailers.

The complaint alleges that Defendants violated the state's consumer protection laws by, among other things: misleadingly implying an affiliation

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[2] Two changes in the People's representation occurred after the filing of the complaint: the District Attorney of Kern County joined as additional counsel, and the DBO withdrew. The DBO's withdrawal was part of a larger settlement between that agency and one of the Defendants. (See footnote 5, *infra*; Robert Lux, Department of Business Oversight, letter to Chief Justice Cantil-Sakauye, et al., filed in this case, Oct. 31, 2018.)

with a consumer's lender; over-promising or misstating the amount of savings a consumer could reasonably expect to achieve; and disguising how much Defendants' services actually cost. (Vol. II, Ex. R. at pp. 420-422, ¶¶ 8-11.)[3] The complaint further alleges that Defendants' practices have been the subject of numerous regulatory and law enforcement actions around the country, including a recent lawsuit by the Consumer Financial Protection Bureau. (*Id.* at p. 422, ¶ 11.)[4] The complaint also alleges that Defendants were acting without being properly licensed or complying with applicable regulations. (*Id.* at p. 420, ¶¶ 5-6.)

In its current form, the complaint contains four causes of action.[5]

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[3] Except as otherwise noted, all references to the record are to volume one or two of the "Exhibits in Support of Petition for Writ of Mandate" filed by Defendants in the case below. Citations will take the following form: "Vol. __, Ex. __, p. __, ¶ __."

[4] The CFPB action went to trial before Judge Richard Seeborg in the Northern District of California in 2017. Judge Seeborg found that Defendants had made a variety of misleading statements in their marketing materials and, as a consequence, imposed injunctive relief and civil penalties. (*CFPB v. Nationwide Biweekly Admin., Inc.*, (N.D.Cal. Sept. 8, 2017) No. 3:15-cv-02106-RS, 2017 WL 3948396, at pp. *6-9, *12-13.) Both parties filed appeals, which are pending. (See *CFPB v. Nationwide Biweekly Admin., Inc.*, (9th Cir., filed Mar. 15, 2018, & May 10, 2018) Case Nos. 18-15431 & 18-15887.)

[5] As originally plead, the complaint asserted two additional causes of action under the Check Sellers, Bill Payers, and Proraters Law (the "Proraters Law"), a specialized set of statutes in the Financial Code. (See Fin. Code, § 12200 et seq.) Like the UCL and FAL, the Proraters Law is a modern consumer protection statute which authorizes injunctive relief, restitution, disgorgement, and civil penalties, all of which were sought here. (Vol. II,

Three are alleged under the UCL and one under the FAL:

- The first UCL cause of action alleges that Defendants engaged in unfair competition by violating Business and Professions Code section 14701. (Vol. II, Ex. R at pp. 440-441, ¶¶ 121-124.) Section 14701 provides that any written solicitation for financial services that uses the name of a financial lender without permission must include certain clear and conspicuous disclosures. (See Bus. & Prof. Code, § 14701, subd. (b).) By way of relief, the People seek an injunction and civil penalties. (Vol. II, Ex. R at p. 441, ¶ 123-24.)
- The second UCL cause of action alleges that Defendants engaged in unfair competition by violating Business and Professions Code section 14702. (Vol. II, Ex. R at p. 441, ¶¶ 125-28.) Section 14702 provides that whenever a written solicitation for financial services uses a consumer's loan number or loan amount it also must contain certain clear and

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Ex. R at pp. 436-440, ¶¶ 105-120; Fin. Code, §§ 12000 et seq.) It does not afford a statutory right to jury. (*Nationwide*, *supra,* 24 Cal.App.5th at p. 444.)

On October 25, 2018, after this Court granted review, the DBO moved on behalf of the People to dismiss the two causes of action alleged under the Proraters Law. This partial dismissal was part of a larger settlement between the DBO and one of the Defendants. (See Robert Lux letter to Chief Justice Cantil-Sakauye, et al., filed in this case Oct. 31, 2018.)

conspicuous disclosures. (Bus. & Prof. Code, § 14702.) Again, the People seek an injunction and civil penalties by way of relief. (Vol. II, Ex. R. at p. 441, ¶¶ 127-128.)

- In the cause of action asserted under the FAL, the People allege that Defendants engaged in various forms of false or misleading advertising, including: misleadingly implying that their services were affiliated with consumers' existing lenders; misstating the nature and amount of fees charged; and misleading consumers about the amount of "savings" they could achieve. (*Id.* at pp. 441-443, ¶¶ 129-130.) By way of relief, this cause of action seeks an injunction and civil penalties. (*Id.* at p. 443, ¶¶ 131-132.)
- The last cause of action is an omnibus claim under the UCL. It alleges predicate violations based on the Proraters Law, the FAL, the Consumer Legal Remedies Act (Civ. Code, § 1770, subd. (e)) and a host of statutes and regulations made applicable to Defendants by virtue of their attempt to operate in California pursuant to a real estate broker's license. (*Id.* at pp. 443-445, ¶¶ 133-150.) By way of relief, this cause of action also seeks civil penalties and an injunction. (*Id.* at p. 445, ¶¶ 151-152.)

The People restated their requests for relief in a separate prayer. (*Id.*

at pp. 445-446, ¶¶ 1-10.) In accordance with the operative provisions of the UCL and FAL, the People ask the court to:

- impose an injunction to preclude Defendants from continuing to violate the law (see Bus. & Prof. Code, §§ 17203, 17535);
- order restitution of all money wrongfully acquired from California consumers in violation of the UCL or FAL (see Bus. & Prof. Code, §§ 17203, 17535); and
- impose civil penalties up to $2,500 for each violation of the UCL or FAL. (See Bus. & Prof. Code, §§ 17206, 17536.)[6]

II. PROCEDURAL HISTORY

In their answer, Defendants demanded a jury trial on "all issues so triable." (Vol. I, Ex. D, at p. 83 [first amended answer].) The People moved to strike the demand in the trial court. (See, e.g., Vol. I, Ex. K, at pp. 183-198.) After two rounds of briefing, the trial court granted the motion. (Vol. II, Ex. Q, at pp. 414-415 [order].) Thereafter, Defendants sought review by way of writ of mandate in the Court of Appeal.

The Court of Appeal initially denied the writ in summary fashion. Defendants then filed a petition for review in this Court, which granted the petition and transferred the matter back to the Court of Appeal. (See Supreme

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[6] Given the dismissal of the two causes of action alleged under the Proraters Law, the People no longer seek disgorgement of profits as a remedy here. (See Fin. Code, § 12105, subd. (b) [allowing disgorgement].)

Court Case No. S239979.) This Court directed the Court of Appeal to issue an order to show cause why a defendant does not have a right to a jury trial "where the government seeks to enforce the civil penalties authorized under Business and Professions Code sections 17206 and 17536 and Financial Code section 12105, subdivision (d)." (*Nationwide*, *supra,* 24 Cal.App.5th at p. 442.)

III. THE COURT OF APPEAL'S DECISION IN *NATIONWIDE*

The matter was fully briefed and argued in the Court of Appeal. On June 13, 2018, that court reversed its earlier decision, granted the writ of mandate and ordered the trial court to reinstate the demand for a jury trial as to liability, but not relief.

The Court of Appeal issued a published opinion. It began by acknowledging that none of the statutes at issue here contains a statutory right to a jury (*Nationwide*, *supra*, 24 Cal.App.5th at p. 444) and that none existed in 1850, when the right to jury trial was enshrined in the state Constitution. (*Id.* at p. 445.)

However, the court reasoned that under the "gist of the action" test, because the People are seeking civil penalties, "the statutory causes of action asserted against [Defendants] are legal," rather than equitable, "thereby giving rise to a right to jury trial" under article I, section 16 of the California Constitution. (*Nationwide*, *supra*, 24 Cal.App.5th at p. 442.) The Court of Appeal concluded, however, that this jury right was limited to liability only,

and not to imposition of relief, including the amount of civil penalties. (*Ibid.*)

The Court derived "substantial guidance" (*Nationwide*, *supra*, 24 Cal.App.5th at p. 448) from the United States Supreme Court's decision in *Tull*. In that case, the Supreme Court held that, under the Seventh Amendment to the United States Constitution, there is a right to a jury trial as to liability, but not relief, when the government seeks civil penalties under the federal Clean Water Act. (*Nationwide*, *supra,* 24 Cal.App.5th at p. 447-448.) Although the Seventh Amendment is not binding on the states, the Court of Appeal was persuaded that the test in *Tull* was sufficiently similar to the "gist of the action" test to control the outcome here. (*Id.* at p. 453.) The court found additional support in two California cases: *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286 (*1941 Chevrolet*), which observed in dicta that "cases involving penalties to the Crown" were triable by jury at English common law; and *Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, which held that statutory penalties in the form of treble damages were akin to an action on a debt, and also triable at law. (*Nationwide*, *supra,* at pp. 453-454.)

A significant portion of the *Nationwide* opinion was spent distinguishing, criticizing or declining to follow other appellate decisions that had *not* found a right to jury trial in UCL or FAL actions brought by the People. (*Nationwide*, *supra,* 24 Cal.App.5th at pp. 457-461.) These decisions represent over 40 years of jurisprudence, from *People v. Witzerman*, 29

Cal.App.3d 169, in 1972, to *People v. Superior Court* (*Cahuenga's The Spot*), 234 Cal.App.4th 1360 (*Cahuenga's The Spot*), in 2015. In addition, the Court of Appeal criticized and ultimately declined to "endorse" one of its own decisions, *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, which held there was no right to a jury trial in an action pursuant to Health and Safety Code section 25249.5 et seq., commonly known as "Proposition 65." (*Nationwide*, *supra,* at p. 461-463.) [7]

On September 19, 2018, this Court granted the People's petition for review. In its original form, the issue for review referenced the UCL, FAL and Proraters Law. On November 14, 2018, following dismissal of two causes of action alleged under the Proraters Law (see footnote 5, *infra*), this Court granted the People's request to modify the question presented to remove reference to that Law.[8]

STANDARD OF REVIEW

Whether Defendants have right to a jury trial under article I, section 16 of the California Constitution is a legal question subject to de novo review.

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[7] Defendants made other legal arguments not adopted by the Court of Appeal. They contended, for example, that the Seventh Amendment should apply to the states (see Petition for Writ of Mandate, at pp. 36-42) and that potential imposition of "extreme" civil penalties justifies application of criminal due process rights. (*Id.* at p. 35.)

[8] The Proraters Law remains a part of this case only insofar as it may constitute a predicate offense under the UCL. (See Vol. II, Ex. R. at p. 443, ¶ 135.).

(*Nationwide, supra,* 24 Cal.App.5th at p. 444; *Caira v. Offner* (2005) 126 Cal.App.4th 12, 23.)

ARGUMENT

I. THERE IS NO RIGHT TO A JURY TRIAL IN ACTIONS BROUGHT UNDER THE UCL OR FAL

A. There Is No Statutory Right to a Jury Trial

The UCL and FAL are statutory causes of action. The former prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code, § 17200.) The latter prohibits any "untrue or misleading" statements made with an intent "to induce the public to enter into any obligation" to purchase goods or services. (Bus. & Prof. Code, § 17500.) Neither affords a statutory right to jury trial. (See *Nationwide*, *supra*, 25 Cal.App.4th at p. 444; Bus. & Prof. Code, §§ 17203, 17206, 17535, 17536.)

B. There Is No Constitutional Right to a Jury Trial

The Court of Appeal nevertheless concluded that Defendants had a jury right under article I, section 16 of the California Constitution. That provision provides that "[t]rial by jury is an inviolate right and shall be

secured to all...."[9]

"Notwithstanding the breadth of this declaration," this Court has held, not all civil actions are triable to a jury. (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 994.) Rather, "past California cases make clear that the state constitutional right to a jury trial is the right as it existed at common law in 1850, when the [California] Constitution was first adopted." (*Id.* at pp. 994-995, quotation marks and citations omitted.) "[W]hat that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact." (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 (*C & K Engineering*), quotation marks and citations omitted.) In making this determination, "the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case - the *gist* of the action." (*Id.* at p. 9, original italics.)

i. Neither of these causes of action existed in 1850

Defendants do not contend that the statutes at issue here existed in

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[9] Although Code of Civil Procedure section 592 codifies the right to a jury, the scope of the right "embodied in [section 592] parallels the scope of the right" embodied in the California Constitution. (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 994, fn. 9.) Accordingly, "section 592 provides no independent basis for a right to a jury." (*Ibid.*, quotation marks and citations omitted.)

1850, when the state Constitution was adopted. (See *Nationwide*, *supra*, 24 Cal.App.5th at p. 445.) Nor could they.

The UCL evolved out of a 1933 amendment to, and expansion of, Civil Code section 3369. (See Stats. 1933, ch. 953, § 1, p. 2482; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 130.) Although initially employed in lawsuits between businesses, by the late 1950's, the UCL had come to be seen and used as a consumer protection statute. (See *ibid.*; *People ex rel. Mosk v. Nat. Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 771 (*People ex rel. Mosk*).)

As originally enacted, an injunction was the only form of relief set forth in the UCL. Two other remedies were added in the early 1970's: restitution (see Stats. 1976, ch. 1005, § 1, p. 2378; Bus. & Prof. Code, § 17203) and civil penalties, which are only available in actions brought by law enforcement agencies. (See Stats. 1972, ch. 1084, § 2; Bus. & Prof. Code, § 17206.)

The FAL developed along a similar trajectory. It grew out the so-called "Printer's Ink" laws[10] of the 20th century and took its current form and

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[10] "In 1911, *Printer's Ink,* the trade association journal of the publishing industry, proposed a model statute prohibiting the publishing of an advertisement, with the intent to sell or dispose of merchandise or services[,] that was 'misleading, deceptive or untrue.'" (Papageorge & Fellmeth, California White Collar Crime & Business Litigation (5th ed. 2016) § 3.2, p. 234.)

place at Business and Profession Code section 17500 in 1941. (Stats. 1941, ch. 63, § 1, p. 727.) The ability of public agencies to seek civil penalties was added in 1965 (Stats. 1965, ch. 827, § 1, p. 2419; Bus. & Prof. Code, § 17536) and the availability of restitution in 1972. (Stats. 1972, ch. 244, § 1, p. 494; *People v. Superior Court* (*Jayhill Corp.*) 1973 9 Cal.3d 283, 286 (*Jayhill Corp.*).)

Both the UCL and FAL were revised over the years, always in the direction of expanding, rather than contracting, their consumer protections. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570-571.) The passage of Proposition 64 in 2004 placed restrictions on the standing of *private* litigants and their ability to pursue actions in a representative capacity. (See Prop. 64, as approved by voters, Gen Elec. (Nov. 2, 2004).) However, it left intact the right of public officials to take action under the statutes and the availability of civil penalties in such actions. (See, generally, *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 314 (*In re Tobacco II*).)

ii. The "gist of the action" is equitable

Because there is no statutory right to jury trial in this case and because the statutes at issue were all enacted long after the adoption of the California Constitution, Defendants are only entitled to a jury if the UCL or FAL are "'of like nature' or 'of the same class'" as claims existing at common law in

1850. (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1012 (*Franchise Tax Bd.*), quoting *1941 Chevrolet, supra,* 37 Cal.2d at p. 300.) This is the so-called "gist of the action" test: "In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case – the *gist* of the action." (*C & K Engineering, supra,* 23 Cal.3d at p. 9, original italics, quoting *1941 Chevrolet, supra,* at p. 299.)

The distinction between law and equity is critical to this analysis. "As a general proposition, [t]he jury trial is a matter of right in a civil action at law, but not in equity." (*C & K Engineering, supra,* 23 Cal.3d at p. 8, quotations and citation omitted.) Only where "the action has to deal with ordinary common-law rights cognizable in courts of law" is it to that extent a case at law. (*Id.* at p. 9, quoting *1941 Chevrolet, supra,* 37 Cal.2d at p. 299.) As discussed in greater detail below, although this Court has "said that the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded...the prayer for relief in a particular case is not conclusive." (*C & K Engineering*, *supra*, at p. 9, quotations and citations omitted.)

Neither the UCL nor the FAL is of the "same class" or a "like nature" as claims triable at common law. Rather, the UCL evolved as an equitable tool for addressing harmful practices that the common law could not. At common law, unfair competition was primarily limited to practices resulting

in injury to business competitors. (See *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181 fn. 9 (*Cel-Tech*).) However, "[w]ith passage of time and accompanying epochal changes in industrial and economic conditions, the legal concept of unfair competition broadened appreciably." (*People ex rel. Mosk, supra,* 201 Cal.App.2d at p. 770, footnote omitted.) Thus, "the statutory definition of 'unfair competition' 'cannot be equated with the common law definition....'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, quoting *Barquis, supra,* 7 Cal.3d at p. 109; *Cel-Tech, supra*, at p. 181, fn. 9 [affirming the distinction between the common law and UCL claims].)

The UCL was not intended merely to reach areas left unaddressed by the common law, but also to sweep comprehensively within those areas. It was "intentionally framed in its broad, sweeping language" so as "to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (*Cel-Tech, supra,* 20 Cal.4th at p. 181, quotation marks and citation omitted.) This broad language leaves a great deal of discretion to courts: "In permitting the restraining of all 'unfair' business practices, [the UCL] undeniably establishes only a wide standard to guide courts of equity; ... given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." (*Barquis, supra,* 7 Cal.3d at pp. 112.) "The Legislature

intended this sweeping language to include anything that can properly be called a business practice and that at the same time is forbidden by law." (*Bank of the West, supra,* 2 Cal.4th at p. 1266, quotation marks and citation omitted.)

Coupled with this statutory flexibility is an "overarching legislative concern...to provide a streamlined procedure" for preventing unfair competition. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371, citations omitted.) Thus, the UCL was not intended to be encumbered with common law elements found in tort or contract, such as proof of reliance or damages. "The Legislature deliberately traded the attributes of tort law for speed and administrative simplicity." (*Bank of the West, supra,* 2 Cal.4th at pp. 1266-1267.)

Judicial efficiency and flexibility of the kind found in the UCL and FAL are the hallmarks of a court sitting in equity. (See *People ex rel. Mosk, supra,* 201 Cal.App.2d at p. 770.) "The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury." (*A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473.)

Given its intended scope, reach and effect, the UCL has always been regarded as an "equitable" form of action. (See, e.g., *Korea Supply Co. v.*

Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144 (*Korea Supply*) ["[a] UCL action is equitable in nature"]; accord *In re Tobacco II, supra,* 46 Cal.4th at p. 312; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173 ["[a] UCL action is an equitable action"].) "[T]he act provides an *equitable means* through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices." (*Zhang, supra,* 57 Cal.4th at p. 371, italics added; accord *Solus Industrial Innovations, LLC v. Superior Court* (2018) 4 Cal.5th 316, 340 (*Solus*).) Put another way, "the UCL is not simply a legislative conversion of a legal right into an equitable one. It is a separate equitable cause of action." (*Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 284.)

The remedies available under the UCL have also been described as equitable in nature. (See, e.g., *Solus, supra,* 4 Cal.5th at p. 341.) The trade-off for the statute's breadth and flexibility is a limitation on the number of such remedies: "While the scope of conduct covered by the UCL is broad, its remedies are limited." (*Korea Supply, supra,* 29 Cal.4th at p. 1144; *Solus, supra,* 4 Cal.5th at p. 341.) The principal form of relief is an injunction. (*In re Tobacco II, supra,* 46 Cal.4th at p. 319.) Neither compensatory nor punitive damages are recoverable. (*Korea Supply, supra,* at p. 1148.) Nor are attorney's fees. (*Ibid.*) Restitution is available, but it is limited to money "acquired" by means of unfair competition. (*Ibid.*) And civil penalties can

only be pursued by designated public agencies. (See Bus. & Prof. Code, §§ 17206, 17536.) By limiting remedies in this way, the Legislature was able "to achieve its goal of deterring unfair business practices in an expeditious manner." (*In re Tobacco II*, *supra,* at p. 312.)

The history and legislative purpose behind the FAL parallel those of the UCL. (See *Cahuenga's The Spot*, *supra*, 234 Cal.App.4th at p. 1379 [noting "congruence of language" and "legislative history" of the statutes].) The FAL "is the major California legislation designed to protect consumers from false or deceptive advertising." (*People v. Superior Court* (*Olson*) (1979) 96 Cal.App.3d 181, 190 (*Olson*).) Just as the UCL is framed in "broad, sweeping language," the FAL "is equally comprehensive within the narrower field of false and misleading advertising." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320, citations and quotation marks omitted.) Like the UCL, the remedies available under the FAL are similarly limited in number. (See Bus. & Prof. Code, §§ 17535, 17536.)

Also like the UCL, the FAL differs from common law actions. For example, unlike common law fraud, which requires a showing of actual deception and reasonable reliance (see, e.g., *In re Tobacco II*, 46 Cal.4th at p. 312), the FAL proscribes not only advertising that is actually deceptive but also that "which has a capacity, likelihood or tendency to deceive or confuse the public." (*People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1078, quotations and citations omitted.)

Given these considerations, courts have universally regarded the FAL as grounded in "equitable principles." (See *Fletcher v. Security Pacific Nat. Bank* (1979) 23 Cal.3d 442, 452.) As this Court has noted, past amendments to the FAL are "congruent" with those of the UCL and "intended to affirm equity power already existing in courts" (*Korea Supply, supra,* 29 Cal.4th at p. 1147, citing legislative history; see also *Jayhill Corp., supra,* 9 Cal.3d at p. 286 [examining an FAL action in terms of the powers exercisable by a "court of equity"].)

Thus, neither the UCL nor the FAL is of the "same class" or "of a like nature" as traditional common law claims triable to a jury. Rather, they are modern, equitable statutes that grow out of a legislative desire to address consumer protection issues that the common law did not. Given this history, courts have consistently held that the gist of such actions is equitable and no jury right attaches. (See, e.g., *Hodge, supra,* 145 Cal.App.4th at p. 281 ["The gist of the section 17200 cause of action is equitable"].)

iii. This is not an "action on a debt"

The Court of Appeal did not engage in the historical analysis above. Instead, taking its cue from *Tull* (discussed *infra*), it concluded, among other things, that the People's request for civil penalties makes this case similar to a common law "action on a debt," and therefore more like a case at law, than equity. This reasoning is incorrect.

The only California authority cited by the Court of Appeal was *Grossblatt v. Wright, supra,* 108 Cal.App.2d 475. In that case, the plaintiff had sued her landlord under a federal housing act which placed limits on rents. The act allowed for the recovery of "liquidated damages" of either $50 or three times the amount of the rental overcharge. (*Id.* at p. 477.) Although the court analogized this alternative relief to a request for penalties, it also described them as a form of "treble damages." (*Ibid.*)

The landlord argued that the case was in reality an action to collect on a debt and therefore triable to a jury at common law. The court in *Grossblatt* agreed. It explained that the action on a debt "was the general remedy at common law for the recovery *of all sums certain, or sums readily reducible to a certainty*, whether the legal liability arose from contract or was created by statute. Statutory penalties existed at common law, and debt was the appropriate action for the recovery thereof *where no other remedy was specified*...." (*Grossblatt*, *supra,* 108 Cal.App.2d at pp. 484-485, italics added, footnotes omitted.) It described the liquidated damages as "legal" in nature because "they grow out of a claim for moneys due and owing—in the nature of a suit at common law—and the court which determines this issue sits as a court of law." (*Id.* at p. 485.)

This case is a far cry from *Grossblatt.* Unlike the mathematical precision of the monetary relief available there, civil penalties under the UCL or FAL are not "sums certain" or "readily reducible" thereto. Rather, they

are subject to a wide range of up to $2,500 per violation. The trial court has broad discretion to set penalties within that range, in the exercise of which it may be guided by a highly discretionary set of statutory factors. (See Bus. & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b).) Also, unlike the statute in *Grossblatt*, the UCL and FAL authorize relief *in addition to* civil penalties, foremost among which are an injunction and restitution, which the People seek here.

Finally, the civil penalties under the UCL or FAL action are not a form of moneys "due and owing." This is not a personal lawsuit to obtain compensation for an individual transgression, such as breach of contract or personal injury. Rather, it is a public protection action in which the People, acting through representative agencies, are pursuing remedies in the public interest. Statutory penalties of this nature "do not grow out of a claim for moneys due and owing or for personal harm or property damages...." (*DiPirro*, *supra*, 153 Cal.App.4th at pp. 183.) Indeed, to the extent such penalties "grow" out of anything, it is the equitable principles embodied in the statutes.

In short, public enforcement actions under the UCL or FAL, such as this one, are not akin to an "action on a debt" under California law. The Court of Appeal was mistaken in drawing the analogy.

II. THE GIST OF THE ACTION IS NOT CONVERTED FROM EQUITABLE TO LEGAL BECAUSE THE PEOPLE SEEK STATUTORY PENALTIES, AMONG OTHER FORMS OF RELIEF

As demonstrated above, the UCL and FAL are modern statutes without common law analogue. The Court of Appeal nevertheless held that actions for penalties payable to the government were tried to a jury at common law and therefore the People's request for civil penalties – one form of relief among others – converted this otherwise equitable UCL/FAL case into a legal one. Put another way, the Court of Appeal concluded that, because penalties are among the "array" of remedies sought, all remedies now "flow from what are historically legal *claims* by the government as to which there is a right to jury trial" under the state Constitution. (*Nationwide, supra*, 24 Cal.App.5th at p. 456, original italics.) This holding cannot withstand scrutiny.

A. The Holding in *Nationwide* Is Incorrect as a Matter of California Law

i. A court trial is appropriate where monetary remedies depend upon application of equitable doctrines

Under California law, where a cause of action sounds firmly in equity such that its resolution is contingent upon equitable considerations, it may be

tried to the court, even if some remedies are arguably "legal" in nature.[11] "[I]f the action is essentially one in equity and the relief sought depends upon the application of equitable doctrines, the parties are not entitled to a jury trial." (*C & K Engineering, supra,* 23 Cal.3d at p. 9, quotation marks and citations omitted, italics added; accord *Shaw, supra*, 2 Cal.5th at p. 995; *Franchise Tax Bd., supra,* 51 Cal.4th at p. 1010.) "Although [this Court has] said that the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded," it also has recognized that "the prayer for relief in a particular case is not conclusive." (*C & K Engineering, supra,* at p. 9, quotation marks and citations omitted; accord *Shaw, supra*, at p. 995.) In other words, the availability of monetary relief, even monetary relief that is regarded as "legal" in nature, "does not convert" an action that otherwise sounds in equity into one that now sounds in law. (*Id.* at p. 11.)

C & K Engineering is illustrative. The plaintiff was a general contractor, which sued a subcontractor for reneging on a bid. (*C & K Engineering, supra,* 23 Cal.3d at p. 5.) The action was based on a theory of promissory estoppel, which this Court concluded was "essentially equitable in nature" and not available to courts of law prior to 1850. (*Id.* at p. 8.) However, because the plaintiff sought damages, which are ordinarily

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[11] As discussed more fully in Part II.B.ii.3, civil penalties under the UCL or FAL cannot be described as purely "legal" in nature, as they serve equitable purposes under California law.

recoverable only at law, the defendant contended it was entitled to a jury. (*Id.* at p. 6.)

This Court rejected the argument. Because "the present action is, essentially, one recognized only in courts of equity," the Court held, "despite plaintiff's request for damages, [it] is not an 'action at law'...." (*C & K Engineering, supra,* 23 Cal.3d at p. 10.) "The only manner in which damages" could be imposed "is by application of the equitable doctrine of promissory estoppel .... Without the employment of this doctrine, essentially equitable, there was no remedy at all." (*Ibid.*, citation omitted.) "[T]he addition...of a prayer for damages *does not convert* what is essentially an equitable action into a legal one for which a jury trial would be available." (*Id.* at p. 11, italics added; *Shaw, supra,* 2 Cal.5th at p. 994 [quoting from *C & K Engineering*: "'The fact that damages is one of a full range of possible remedies does not guarantee ... the right to a jury....'"].)[12]

The principles set forth above apply equally here. The People's case depends wholly on application of equitable doctrines embodied in the UCL

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[12] In contrast, a jury trial may be appropriate where alternative causes of action, legal *and* equitable, are both alleged. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 674.) However, even then, "it is well established" that "equitable issues [may be tried] first." (*Id.* at p. 671.) "[I]f the court's determination of those [equitable] issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." (*Id.*; see Part II.A.v., *infra.*)

and FAL. (See Part I.B., *supra*.) The People do *not* assert an overlapping or separate common law claim, say for breach of contract or trespass; indeed, the People are unaware of any such claim that might exist in a public enforcement action of this kind.[13] The complaint itself announces the purely equitable nature of this case. (See Vol. II, Ex. R. at p. 418 ["Complaint For Injunction, Civil Penalties And Ancillary Relief Of Restitution And Disgorgement"]; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 845 [gist of action may be "gleaned" from review of caption of the complaint, allegations and prayer for relief].) In short, without the UCL or FAL, and the equitable doctrines upon which they are based, the People would have no grounds for requesting relief here, monetary or otherwise, including civil penalties.

Contrary to the opinion below, the availability of penalties among other forms of relief "does not convert" an equitable action into one at law. (*C & K Engineering, supra,* 23 Cal.3d at p. 11; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 865 ["the fact plaintiffs sought money damages did not make an equitable action into one at law"].) As the Court of

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[13] Put another way, this is not an instance where a plaintiff has opted *not* to pursue a common law cause of action that would otherwise be available to it. (See *Shaw, supra,* 2 Cal.5th at p. 1007, fn. 21 [declining to decide "highly theoretical question" that might arise under such circumstances].)

Appeal previously stated in *DiPirro*, "[i]njunctive relief is invariably an equitable remedy, and a demand for civil penalties does not in itself require a jury trial." (*DiPirro, supra*, 153 Cal.App.4th at pp. 181-182.)

This approach is consistent with other "gist of the action" opinions issued by this Court, including cases involving small claims actions (*Crouchman v. Superior Court* (1988) 45 Cal.3d 1167) and lawsuits brought to obtain a tax refund. (*Franchise Tax Bd., supra,* 51 Cal.4th at p. 1011; cf. *Sonleitner v. Superior Court* (1958) 158 Cal.App.2d 258 [no right to jury in tax collection actions].) These cases each involved remedies that were "legal" in nature. (See, e.g., *Franchise Tax Bd., supra,* at p. 1011.) And in each, the Court concluded that a jury trial was not appropriate.[14]

ii. The *Nationwide* decision creates a "severability" problem

In its opinion, the Court of Appeal singularly focused on the People's request for civil penalties, isolating it from the underlying cause of action and treating it as a transformative feature which entitled Defendants to a jury trial. In so doing, the Court of Appeal created a "severability" problem.

In *C & K Engineering*, this Court observed that "'[t]he fact that

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[14] In *Franchise Tax Board*, this Court held that "it is a general proposition, not an absolute rule, that the right to a jury trial attaches when the 'gist' of the action is legal." (*Franchise Tax Bd., supra,* 51 Cal.4th at p. 1011.)

damages is one of a full range of possible remedies does not guarantee real parties the right to a jury,' since '*there is no possibility of severing the legal from the equitable.*'" (*C & K Engineering, supra,* 23 Cal.3d at p. 11, italics added, quoting *Southern Pacific Transportation Co. v. Superior Court* (1976) 58 Cal.App.3d 433, 437.) An action predicated on equitable doctrines is "'not susceptible of division into one component to be resolved by the court and another component to be determined by a jury. *Only one decision can be made,* and it must make a proper adjustment of the "rights, equities, and interests" of all the parties involved.'" (*C & K Engineering,* 23 Cal.3d at p. 11, italics added, quoting *Southern Pacific Transportation Co., supra*, at p. 437-438.)

These principles apply with equal force to consumer protection actions. *People v. Witzerman*, for example, was an FAL case in which the trial court had imposed civil penalties. (*Witzerman, supra,* 29 Cal.App.3d at p. 173.) The court concluded that the defendants did not have a right to jury, reasoning as follows:

> Assuming, without so deciding, that the civil penalties sought represent legal rather than equitable relief, we do not believe that in this case such issues could have been severed from the equitable ones. The *same alleged misconduct* on the part of appellants was the basis for both types of relief sought by the People. [Citation] Under these circumstances trial to the court of the People's case for injunctive relief disposed of as well the People's case for relief by way of civil penalties.

(*Id.* at pp. 176-177, italics added.)[15]

As in *Witzerman*, the same misconduct alleged in the People's current complaint forms the basis for injunctive relief, restitution *and* civil penalties. This action should not be divided or severed into constituent parts and then transformed from an action in equity to one at law based on *one* of those parts, i.e., a request for civil penalties. "Only one decision" on liability can be made and it must take into account "a proper adjustment of the rights, equities, and interests" of the parties – i.e., the kind of decision-making "calling for the exercise of equitable principles." (*C & K Engineering, supra*, 23 Cal.3d at p. 11, quotations and citations omitted.) Consistent with the history of the UCL and FAL, the trial judge sitting in equity is the proper person to make that decision.

iii. The *1941 Chevrolet* case does not compel a different result

In reaching a contrary conclusion, the Court of Appeal focused on the decision in *1941 Chevrolet*. (*Nationwide, supra*, 24 Cal.App.5th at p. 448-450.) *1941 Chevrolet* was an action in rem, stemming from the forfeiture of an automobile used to transport illegal drugs. (*1941 Chevrolet, supra*, 37

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[15] *Witzerman* included a footnote in which it recognized, but did not reach, the question of whether an FAL action that *only* sought penalties, and not injunctive relief, would trigger a jury trial right. (*Witzerman, supra,* 29 Cal.App.3d at p. 177, fn. 4.) That hypothetical question is also not at issue in this case.

Cal.2d at p. 286.) This Court concluded that, at common law prior to 1850, forfeiture actions were triable to a jury and therefore the state constitutional right to jury would attach. (*Id.* at p. 300.) It observed in dicta that, "[c]ases involving penalties to the Crown, other than forfeiture of conveyances and goods, were also tried by a jury in the Court of Exchequer." (*Id.* at p. 295 and fn. 15, citing English cases.) The Court of Appeal felt bound by this passage and "discern[ed] nothing" in *C & K Engineering* or *Shaw* reflecting a departure from it. (*Nationwide, supra*, at p. 450.)

1941 Chevrolet is not dispositive. The dicta upon which the Court of Appeal relied appears to show at most that cases brought *solely* to obtain determinate penalties for infractions such as "recusancy"[16] or "concealing soap" or "unshipping of spirituous liquors and tobacco before the duties were paid" were triable to a jury at English common law. (*1941 Chevrolet, supra*, 37 Cal.2d at p. 295, fn. 15, citing among others *Isabell Fortescues Case* (1611) 145 Eng.Rep. 324; *Attorney General v. Brewster* (1795) 145 Eng.Rep. 966; and *Attorney General v. Brown* (1801) 145 Eng.Rep. 1129.) None of these historic cases involved the "gist of the action" test or engaged in the kind of analysis set forth in *C & K Engineering*. None were consumer protection actions based on equitable doctrines of the kind at issue here. And

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[16] "Recusancy" is absence from church.

so far as the People can tell, none involved injunctive relief or restitution or a highly discretionary list of factors for imposing penalties. As this Court has previously stated, "[i]n assessing the precedents, we search for the meaning and substance of [the right to] jury trial and are not rigidly bound by the exacting rules that happen to be found" in legal proceedings "of a century and a half ago." (*Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 829, quotation marks and citations omitted.)[17]

Finally, even if cases involving "penalties to the Crown" were triable to a jury at common law, so too were cases involving money damages. (See, e.g., *Hughes v. Dunlap* (1891) 91 Cal. 385, 388.) Yet, as seen above, that damages are among the remedies available in an otherwise equitable action does not compel a jury trial.

iv. The Court of Appeal's holding is contrary to decades of California case law

The Court of Appeal's decision represents a seismic break with precedent. For over 40 years, California courts have held that there is no right to a jury trial in a UCL or FAL actions. These cases not only include actions between private litigants (see, e.g., *Hodge, supra,* 145 Cal.App.4th 278), but

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[17] Although the Court of Appeal noted that *C & K Engineering* and *Shaw* had quoted "extensively" from *1941 Chevrolet* (*Nationwide, supra*, 24 Cal.App.5th at p. 451), neither decision repeated the "penalties to the Crown" passage upon which the Court of Appeal relied.

also actions brought by the People, in which statutory penalties were sought and obtained. (See *Cahuenga's The Spot, supra,* 234 Cal.App.4th at p. 1384; *People v. Bhakta* (2008) 162 Cal.App.4th 973, 977-979; *People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 732-733; *People v. Toomey* (1984) 157 Cal.App.3d 1, 17-18; *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 321; *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879, 915-916 (*Bestline*); and *People v. Witzerman, supra,* 29 Cal.App.3d at pp. 176-177.)

Although some of these cases examined the issues in light of criminal due process rights (see, e.g., *Toomey, supra,* 157 Cal.App.3d at pp. 17-18),[18] others were confronted with the same argument presented here – i.e., that a law enforcement action seeking civil penalties was legal, rather than equitable, in nature. (See *Cahuenga's The Spot*, *supra*, 234 Cal.App.4th 1360; *Bhakta*, *supra*, 162 Cal.App.4th 973; *Witzerman, supra,* 29 Cal.App.3d at p. 176.)

Both *Cahuenga's The Spot* and *Bhakta* were decided in the post-*Tull* era and both cited to *1941 Chevrolet*. Both came to the same conclusion: there is no right to a jury trial. (See *Cahuenga's The Spot*, *supra,* 234

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[18] Tellingly, none of these due process cases regarded the jury trial question as a close call. As one court noted, "[t]he law is well settled" that criminal due process does not apply. (*E.W.A.P.*, *supra,* 106 Cal.App.3d at p. 321.)

Cal.App.4th at p. 1364; *Bhakta, supra,* 162 Cal.App.4th at p. 979.) In *Bhakta*, the court there observed that "if an action in effect is one in equity and the relief sought depends upon the application of equitable doctrines, there is no right to a jury trial," thus applying the rule in *C & K Engineering* to a public enforcement action seeking penalties under the UCL.[19] (*Bhakta, supra*, at p. 978; see also *Bestline, supra,* 61 Cal.App.3d at p. 916 [upholding trial court, which had held that the imposition of civil penalties "did not serve to change the nature of the case"].)

Although *Witzerman* discussed the issue of due process rights, it also considered and rejected the argument that "the issues tried were legal rather than equitable in nature" under the California Constitution due to the imposition of civil penalties. (*Witzerman, supra,* 29 Cal.App.3d at p. 176.) *Witzerman* was decided before *Tull*; however, it has recently been cited by this Court in support of the observation that false advertising claims "are decided by a judge not a jury." (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, citing *Witzerman, supra,* at pp. 176-177.)

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[19] One of the claims in *Bhakta* was pursued under the red light abatement law, a species of nuisance which does not support a jury trial under common law. However, the People alleged another cause of action under the UCL, pursuant to which the trial court imposed statutory penalties. (*Bhakta, supra,* 162 Cal.App.4th at p. 976.)

v. The Court of Appeal improperly refused to take into account the "equity-first" rule

The Court of Appeal's holding in *Nationwide* is also in tension with the equity-first principle – i.e., that, in mixed cases involving both equitable and legal claims, the equitable ones "could, and in many cases should," be tried first. (*Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 354 (*Orange County Water*). The rule derives from "[n]umerous opinions from California courts, including our Supreme Court." (*Id.* at p. 355; see *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665.) It is grounded in judicial economy, the avoidance of duplicative effort and the minimization of inconsistencies. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 158; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1238.)

To be sure, this action is not a "mixed case" because it involves *only* equitable causes of action, not a combination of equitable and legal ones. Yet, given the severability issues discussed above, this difference only strengthens application of the rule. In other words, the principles underlying the equity-first rule, and the preference for equitable proceedings to go first, are even more pronounced where the so-called "legal" issues derive from one of the forms of relief requested, rather than from a stand-alone cause of action.

The Court of Appeal was unpersuaded, holding that the equity-first approach is "impermissible" after the recent decision in *Shaw*. (See

Nationwide, supra, 24 Cal.App.5th at p. 482) The Court of Appeal reads too much into *Shaw*. That case was a wrongful termination action in which the plaintiff asserted two overlapping causes of action: a common law one, which gave rise to a right to jury, and a statutory one, which arguably did not. (*Shaw, supra,* 2 Cal.5th at p. 988.) The statute at issue included a clause that preserved "any other theory of liability" otherwise available at law. (*Id.* at p. 996.) This preservation clause was critical to the Court's analysis. "[C]onsistent with the purpose" of the clause, *Shaw* held that the plaintiff could not be deprived of a jury trial on the common law claim. (*Id.* at p. 1006.)

Contrary to the Court of Appeal, *Shaw* did not eliminate the general rule that equitable matters may be tried first. Rather, it identified a statutory *exception* to an otherwise general rule based on the assertion of two separate (but overlapping) causes of action, one of which preserved the jury right in the other. No such scenario exists here.

vi. The holding is at odds with the Court of Appeal's own precedent

Underscoring its break with precedent, the Court of Appeal devoted a substantial portion its opinion to undoing one of its own earlier decisions, *DiPirro v. Bondo Corp., supra,* 153 Cal.App.4th 150. *DiPirro* is a Proposition 65 case in which the plaintiff, who was seeking both an

injunction and statutory penalties,[20] argued that he had a right to a jury trial on one of the defendant's affirmative defenses. (*Id.* at pp. 175-176.) Applying the "gist of the action" test, *DiPirro* concluded that the action was equitable, rather than legal, and therefore no right to jury attached. (*Id.* at pp. 179-186.) As in *C & K Engineering*, *DiPirro* observed that if an action sounds "essentially" in equity and the "relief sought depends upon application of equitable doctrines, the parties are not entitled to a jury trial." (*DiPirro*, *supra,* at pp. 178-179, citations omitted.) In words that apply equally here, *DiPirro* concluded that Proposition 65 was a "remedial statute intended to protect the public" that was "thoroughly infused with equitable principles," such that a jury trial was not available. (*Id.* at p. 180, quotations and citation omitted.)

DiPirro was properly decided. It has been cited over a dozen times in published and unpublished cases alike. (See, e.g., *Orange County Water, supra*, 12 Cal.App.5th at p. 355; *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1513.) This Court recently cited it in support of the proposition that "fashioning an appropriate remedy to fit the nature of a

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[20] Proposition 65 authorizes penalties up to $2500 per day. (Health & Saf. Code, § 25249.7, subd. (b)(1).) Seventy-five percent of penalties are payable into a government fund and the other 25% to the public agency or private enforcer bringing the action. (Health & Saf. Code, § 25249.12, subds. (c)(1), (d).)

wrongful act is the usual description of the type of discretionary equitable action that is to be taken by a court, rather than a jury." (*Shaw, supra,* 2 Cal.5th at pp. 1002-1003.) Yet despite *DiPirro*'s secure place in the law, the Court of Appeal was forced to "reexamin[e]" its prior analysis, ultimately disavowing it in order to reach the outcome here. (*Nationwide, supra,* 24 Cal.App.5th at pp. 462, 463.) The rejection of its own established case law further illustrates the Court of Appeal's departure from precedent.

B. *Tull v. United States* Does Not Compel a Different Result

As set forth above, there is no basis in California law for holding that defendants in a UCL or FAL action have a jury right under the state Constitution merely because the People seek statutory penalties, among other forms of relief. It is little surprise, then, that the Court of Appeal based its decision largely on *federal* precedent, namely, the decision in *Tull v. United States, supra,* 481 U.S. 412. In that case, the United States Supreme Court held that a governmental action seeking penalties under the Clean Water Act ("CWA"), 33 U.S.C. section 1251 et seq., was sufficiently analogous to an historical case at common law that the defendants were entitled to a jury trial as to the issue of liability, although not relief. *Tull* does not support the dramatic shift in California law attributed to it.

i. *Tull* was decided under the Seventh Amendment

A fundamental difference between this case and *Tull* is that the latter

was decided under the Seventh Amendment to the United States Constitution. (See *Tull, supra,* 481 U.S. at p. 414 [the question "is whether the Seventh Amendment guaranteed petitioner a right to a jury trial..."].)[21] It is settled law that the Seventh Amendment does not apply to the states: "The civil jury trial provision of the Seventh Amendment has been applied only in *federal* judicial proceedings." (*Shaw, supra,* 2 Cal.5th at p. 993, fn. 8, original italics.) "So far as the Seventh Amendment is concerned, [t]he States ... are left to regulate trials in their own courts in their own way." (*County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263, 1271, quotations and citation omitted.)

The distinction between state and federal law on this issue is not merely a matter of form. This Court has observed that the Seventh Amendment "differs significantly in language from the California constitutional provision" (*Jehl, supra,* 66 Cal.2d at p. 827) and thus has diverged from Seventh Amendment jurisprudence in the past.

In *Jehl*, for example, the Court declined on state law grounds to follow *Dimick v. Schiedt* (1935) 293 U.S. 474, a case holding that a judge's decision

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[21] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

to increase an award of damages following a jury trial ("additur") impermissibly infringed on the Seventh Amendment. (*Jehl, supra,* 66 Cal.2d at pp. 827-833.) Noting that *Dimick*'s analysis was "open to serious question," the Court observed that "[c]ourts often determine fact issues...and the acceptance of this practice [additur] over many years refutes the argument that the framers of the Constitution regarded the jury as the only competent finder of facts." (*Id.* at pp. 828, 830.)

This Court is not the only state tribunal to have parted ways with the United States Supreme Court based on the inapplicability of the Seventh Amendment. As discussed in greater detail below, a number of state courts have distinguished *Tull* on the basis of its Seventh Amendment origins. (See, e.g., *Sofie v. Fibreboard Corp.* (Wash. 1989) 771 P.2d 711, 725, as amended 780 P.2d 260 ["the conclusion in *Tull* has no bearing on this court because we base our decision on adequate and independent state grounds"]; *State v. Schweda* (Wis. 2007) 736 N.W.2d 49, 59, fn. 9 (*Wisconsin v. Schweda*) [declining to follow *Tull*: "[w]e are not bound by the federal courts' interpretation of the federal Constitution in construing our own constitution"].)

ii. *Tull* is distinguishable

Largely because *Tull* was decided under Seventh Amendment jurisprudence, various aspects of its analysis do not square with California law.

1. The test in *Tull* has critical differences from the one employed in California

The test employed in *Tull* differs meaningfully from the "gist of the action" test as it has evolved in California. The inquiry in *Tull* consisted of two-parts: first, the Court assessed whether the cause of action at issue was "similar to" an 18th century claim at common-law; and second, it "examine[d] the remedy sought and determine[d] whether it was legal or equitable in nature." (*Tull*, *supra*, 481 U.S. at pp. 417-418.) The Court regarded this second inquiry as the "more important" of the two. (*Id.* at p. 421.) Indeed, the Court's conclusion came to rest largely on its outcome. (*Id.* at pp. 422-425.)

As discussed above, California law is different. Although the prayer relief ordinarily guides the "gist of the action" analysis, it is not "conclusive." (*C & K Engineering*, *supra*, 23 Cal.3d at p. 9.) A prayer for otherwise legal remedies does not necessitate a jury trial if, as here, that relief "depends upon the application of equitable doctrines" (*ibid.*), particularly where equitable forms of relief are also requested. This Court, moreover, has recognized that legal and equitable issues may be inseverable from the underlying cause of action. (See *id.* at p. 11.) The second (and more important) stage of the analysis set forth in *Tull* contains no such exceptions or nuances, a critical

difference between the two approaches.[22]

2. *Tull*'s view of an "action on a debt" does not reflect California law

The first stage of the Supreme Court's analysis in *Tull* – i.e., whether the cause of action was similar to an 18th century common law claim – yielded a result that is also at odds with California law. Although penalties under the CWA were subject to a range, the Court in *Tull* nevertheless analogized the government's case to an "action on a debt." It reasoned that, in England prior to 1789 and in federal decisions thereafter, courts viewed civil penalty suits as actions on a debt and that therefore the CWA case was in the nature of a suit on a debt, triable to a jury. (*Id.* at pp. 418-420.)[23]

The rationale in *Tull* does not square with California law, at least as it pertains here. As discussed above, an action for penalties in California is only recoverable "in debt" if the penalties are "certain" or "readily reducible to a certainty." (*Grossblatt, supra,* 108 Cal.App.2d at pp. 484.) This concept is deeply rooted. In 1852, just two years after the adoption of the state

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[22] It also bears mention that, unlike California, federal courts do *not* follow an equity-first rule. (See *Orange County Water*, *supra*, 12 Cal.App.5th at p. 356.)

[23] The Supreme Court also observed that, although a case under the CWA "resembles" a public nuisance action, it was "debatable" whether nuisance was a "better analogy" than an action in debt. (*Tull, supra,* 481 U.S. at p. 420.)

Constitution, this Court held that the People could not bring an action in debt for violation of a penal law punishable by a fine of between $100 and $1000. The Court noted that a civil lawsuit was not authorized by statute and that an action in debt did not afford an alternative legal theory because the "penalty is not certain." (*People v. Craycroft* (1852) 2 Cal. 243, 244; see also *State v. Poulterer* (1860) 16 Cal. 514, 527 (1860) [an action of debt will lie when "there is a duty on the defendant to pay the plaintiff a determinate sum of money"].)

There are no fixed penalties or "sums certain" due in this case or any other UCL/FAL lawsuit seeking penalties. Rather, the statutes in question authorize penalties in a range of up to $2,500 per violation, subject to the court's discretion upon consideration of multiple statutory factors. (See Bus. & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b).) A framework of this kind, which "delegate[s] the assessment of civil penalties in accordance with a highly discretionary calculation that takes into account multiple factors," reflects equitable, rather than legal, qualities. (*DiPirro, supra,* 153 Cal.App.4th at p. 182.) The imposition of penalties pursuant to such a framework is not akin to an action on a debt under California law. (Cf. *Comm. of Environmental Protection v. Connecticut Bldg. Wrecking Co.* (Conn. 1993) 629 A.2d 1116, 1122 (*Connecticut Bldg. Wrecking Co.*) [distinguishing *Tull* because, among other things, "unliquidated" penalties cannot "be considered substantially similar to an action in debt" under

Connecticut law].)

3. Civil penalties serve equitable purposes under California law

One of the chief factors motivating the Supreme Court in *Tull* was its view of the purpose of civil penalties under the CWA. It found that such penalties amounted to "punishment to further retribution and deterrence" and, as such, were a form of legal relief historically imposed by courts at law. (*Tull, supra*, 481 U.S. at p. 423.) Again, this perspective does not align squarely with California law.

To be sure, California courts have described penalties as a form of punitive exaction. (See, e.g., *People v. Superior Court* (*Kaufman*) (1974) 12 Cal.3d 421, 431.) However, penalties also serve purposes apart from punishment. As this Court has explained in analogous circumstances, "[w]hile the civil penalties may have a punitive or deterrent aspect, *their primary purpose* is to secure obedience to statutes and regulations imposed to assure important public policy objectives." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-48, italics added; accord *California Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 294.)

In *Kizer*, a state agency sought to enforce statutory penalties against the County of San Mateo based on the county's alleged violations of a long-term care statute. The statutory scheme authorized penalties within broad ranges. (*Kizer, supra,* 53 Cal.3d at p. 142.) The county contended that the

penalties were primarily punitive in nature and therefore contrary to a Government Code statute that immunizes public entities from punitive damages. (*Id.* at p. 146.)

This Court rejected the argument. It observed among other things that: the penalties were available without any showing of "actual harm," "motive" or "intent to injure;" the focus was on prevention rather than compensation; and the funds obtained were "applied to offset the state's costs in enforcing" the regulations in question. (*Kizer, supra*, 53 Cal.3d at p. 147-148.) All of these considerations motivated the Court to reject the argument that the penalties were "primarily punitive." (*Id.* at p. 146; see also *Los Angeles County Metropolitan Transportation Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 274 [finding that the holding in *Kizer* applied outside of the regulatory context and recognizing the "non-punitive roles" played by civil penalties].)

The principles set forth in *Kizer* also apply to UCL/FAL actions. This Court has held, for example, that although "deterrence of unfair practices" is "an important goal" of the UCL, "the fact that attorney fees and damages, including punitive damages, are not available under the UCL is clear evidence that deterrence by means of monetary penalties is not the act's sole objective." (*Korea Supply Co., supra,* 29 Cal.4th at p. 1148.) In *Olson,* another UCL/FAL case, the court observed that "[i]mposition of civil penalties has, increasingly in modern times, become a means by which

legislatures implement statutory policy." (*Olson, supra,* 96 Cal.App.3d at p. 195, quotations and citations omitted.)[24]

As in *Kizer*, one of the chief purposes of penalties under the UCL and FAL is to fulfill public policy objectives by ensuring obedience to the law. (*Olson, supra,* 96 Cal.App.3d at p. 195.) Such penalties are available without any showing of reliance or individualized harm (*People v. Dollar Rent-A-Car Sys., Inc.* (1989) 211 Cal.App.3d 119, 131), are not intended to compensate for damage (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 18, fn. 7) and, since the enactment of Proposition 64 in 2004, are earmarked for "the enforcement of consumer protection laws" by designated agencies. (See Bus. & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b); see Prop. 64, § 1, subd. (h), as approved by voters, Gen Elec. (Nov. 2, 2004) ["It is the intent of California voters...to require that civil penalty payments be used by [designated enforcement agencies] to strengthen the enforcement of California's unfair competition and consumer protection laws"].)

Nowhere in the UCL or FAL are courts instructed to make punishment the primary consideration in fixing the amount of penalties. Thus, a finding

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[24] The court in *Nationwide* viewed the concept of securing obedience to the law as equivalent to "deterrence" and therefore a form of punishment. (See *Nationwide, supra,* 24 Cal.App.5th at p. 454, fn. 7.) This view appears is at odds with the holdings in *Kizer* and *Korea Supply Co.*, which draw a distinction between punishment and the goal of achieving policy objectives.

of reprehensibility is not required. (See *People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 526.) On the contrary, the statutes contain a list of six non-exclusive factors, including: the seriousness of the misconduct; the number of violations; the persistence of the misconduct; the length of time over which it occurred; willfulness; and the defendant's assets, liabilities, and net worth. (See Bus. & Prof. Code, §§ 17206, subd. (b); 17536, subd. (b).) The primary purpose of this list is not punishment. (Cf. *State of Vermont v. Irving Oil Corp.* (Vt. 2008) 955 A.2d 1098, 1107 (*Vermont v. Irving Oil*) [rejecting *Tull* because, among other reasons, "[t]he primary purpose of civil penalties [under Vermont statute] is *not* punishment" but rather to "serve a remedial purpose by making noncompliance at least as costly as compliance"], original italics, citation omitted.)

Thus, under California law, civil penalties imposed pursuant to remedial statutes such as the UCL and FAL serve purposes unrelated to punishment or retribution. Categorizing penalties as strictly "legal" in nature fails to acknowledge the equitable considerations they embody under modern jurisprudence. (See *Cahuenga's The Spot, supra,* 234 Cal.App.4th at p. 1384 ["the People seek relief that is equitable in nature"].)

4. The relief available in *Tull* was primarily focused on civil penalties

Another feature that distinguishes *Tull* is its factual history. By the

time the government had filed suit, the wetlands in question had almost entirely been sold. (*Tull, supra,* 481 U.S. at p. 415.) Although the government sought injunctive relief, such relief was "impractical except with regard to a small portion of the land," and the government "was aware" that "relief would be limited primarily to civil penalties." (*Id.* at pp. 415, 424.) This factor, although not dispositive, seems to have influenced the Supreme Court's decision. (See *Connecticut Bldg. Wrecking Co., supra,* 629 A.2d at p. 1123 [noting that the "modest equitable relief" sought in *Tull* lead "the Supreme Court to conclude that the enforcement action sought relief that was primarily legal in nature"].)

This case presents a different scenario. The People are not only seeking robust injunctive relief, but restitution as well, another equitable remedy. Further, at the time the People filed this lawsuit, Defendants' business was fully operational. (See Vol. I, Ex. D [first amended verified answer] at p. 63, ¶ 2 [admitting to extensive operations].) Although Defendants may claim no longer to be fully operational, if that is true, it is only because various national banks elected to stop doing business with *them* (see Vol. II, Ex. N [declaration of V.P. Sherry Ann Scott] at p. 338, ¶¶ 4-6) and regulators otherwise took remedial action. (See Respondent's Exhibits In Support of Writ Return, Ex. B at pp. 7-18 [administrative accusation]; Ex. A at p. 1-2 [voluntary surrender of real estate license].) These events occurred *after* the People filed a complaint.

In any event, under the UCL, courts have the power to enjoin anyone who "has engaged" in past conduct that is capable of resumption. (See Bus. & Prof. Code, § 17203; *Robinson v. U-Haul Co.* (2016) 4 Cal.App.5th 304, 315.) By their own admission, Defendants plan to resume operations as soon as they can. (Vol. II, Ex. N [declaration of V.P. Scott] at p. 342 ¶ 23 ["it is the intention of NBA to resume" operations "as soon as banking services can be obtained once again"].)

In short, this case does not entail the "modest equitable relief" sought in *Tull*. To the extent this consideration influenced the Supreme Court's decision, it provides an additional basis for distinction.

iii. Numerous other states have declined to find a jury right in actions involving civil penalties

California is not the only state whose legal history does not square with *Tull*. Many other states have opted not to follow that decision. The list includes states whose histories date back to the beginning of the country (see, e.g., *Vermont v. Irving Oil, supra,* 955 A.2d at pp. 1106-1108; *Connecticut Bldg. Wrecking Co., supra,* 629 A.2d at pp. 1121-1123) and others whose statehood, like California's, originated in the 19th century. (See *Wisconsin v. Schweda, supra,* 736 N.W.2d at p. 59, fn. 9; *Dept. of Environmental Quality v. Morley* (Mich.App. 2015) 885 N.W.2d 892, 897; *State ex rel. Evergreen Freedom Found. v. Washington Ed. Assn.* (Wash.Ct.App. 2002) 49 P.3d 894, 908-909.)

Many more states, without specifically mentioning *Tull*, have concluded in the post-*Tull* era that there is no right to a jury trial in civil actions brought by governmental actors seeking statutory penalties. (See *Dept. of Environmental Protection v. Emerson* (Me. 1992) 616 A.2d 1268, 1271; *State ex rel. Douglas v. Schroeder* (Neb. 1986) 384 N.W.2d 626, 629-630; *People v. Shifrin* (Colo.Ct.App. 2014) 342 P.3d 506, 513; *State ex rel. Darwin v. Arnett* (Ariz.Ct.App. 2014) 330 P.3d 996, 1002; *State ex rel. Dann v. Meadowlake Corp.* (Ohio Ct.App. 2007) 2007 Ohio 6798, 2007 WL 4415206 at *7; *State v. Sailor* (N.J. App. Div. 2001) 810 A.2d 564, 566-569; *State by Humphrey v. Alpine Air Products, Inc.* (Minn.Ct.App. 1992) 490 N.W.2d 888, 895, affd. 500 N.W.2d 788 (Minn. 1993); see also *Fazio v. Guardian Life Ins. Co. of Am.* (Pa.Ct.App. 2012) 62 A.3d 396, 411, citing with approval *Commonwealth of Penn. v. BASF Corp.* (Phil. Ct. Common Pleas 2001) 2001 WL 1807788.)

To be sure, some states –though fewer– have chosen to follow *Tull* or otherwise found that the right to jury trial exists in actions to recover civil penalties. (See *Dept. of Revenue v. Printing House* (Fla. 1994) 644 So.2d 498, 501; *Bendick v. Cambio* (R.I. 1989) 558 A.2d 941, 945; *American Appliance, Inc. v. State* (Del. 1998) 712 A.2d 1001, 1003; *State v. Credit Bureau of Laredo* (Tex. 1975) 530 S.W.2d 288, 291; cf. *State v.*

Walgreen Co. (Miss. 2018) 250 So.3d 465, 473-76.)[25]

Yet, what distinguishes the vast majority of these decisions is the willingness of state courts to decide this issue in light of their own constitutional and legal history. Although *Tull* "may provide material for [this] analysis," it does not "direct" it. (*Sofie, supra,* 771 P.2d at p. 725.) In the words of the Vermont Supreme Court, "[i]n keeping with our own state-law approach to civil penalties... and in light of the civil-enforcement statute in question, we do not find *Tull* persuasive." (*Vermont v. Irving Oil, supra,* 955 A.2d at p. 1107.)

III. GRAFTING A JURY TRIAL ONTO UCL/FAL ACTIONS UNDERMINES LEGISLATIVE INTENT AND WILL CAUSE CONFUSION AND OTHER NEGATIVE EFFECTS

The Court of Appeal's holding is not only incorrect as a matter of California constitutional law. If given effect, it also threatens to undermine legislative intent, lead to procedural confusion and potentially affect civil actions involving other remedial statutory schemes.

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[25] Other state courts have noted in passing that the proceedings below either were or were not jury trials, without discussing the merits of the issue. (Compare, e.g., *People ex rel. Ryan v. Agpro, Inc.* (Ill. 2005) 824 N.E.2d 270, 271 [bench trial], with *Ortho-McNeil-Janssen Pharmaceuticals, Inc. v. State* (Ark. 2014) 432 S.W.3d 563, 570 [jury trial].)

A. The Court of Appeal's Holding Undermines the Legislative Desire for Streamlined Adjudicative Process

This Court has repeatedly recognized that the UCL was motivated by the legislature's desire to afford an "expeditious" process for protecting consumers:

> As we have said, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. [Citation.] Actions to enforce the UCL or FAL...address the overarching legislative concern...to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.

(*Solus, supra,* 4 Cal.5th at p. 340, italics, citations and quotations marks omitted, underlining added; accord *Zhang, supra,* 57 Cal.4th at p. 371; see also *In re Tobacco II, supra,* 46 Cal.4th at p. 312 [noting legislature's "goal of deterring unfair business practices in an expeditious manner"].) This principle has not only been invoked in private actions, but also in public enforcement cases in which penalties were sought. (See *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 889.)

The need for "streamlined procedure" is most often mentioned as a justification for limiting the forms of available relief in UCL/FAL cases. (See, e.g., *Cortez, supra,* 23 Cal.4th at p. 173.) It has also been cited as a reason to avoid encumbering UCL cases with the substantive elements of tort (*Bank of the West, supra,* 2 Cal.4th at p. 1266-1267) and for distinguishing them from class actions. (*Corbett v. Superior Court* (2002) 101 Cal.App.4th

649, 670.)

Importantly, this principle has been cited as a reason for finding there is no right to a jury trial. The court in *Hodge v. Superior Court* specifically referenced the legislature's desire for "streamlined procedure" in concluding that the UCL does not afford such a right. (*Hodge, supra,* 145 Cal.App.4th at p. 284.) Although *Hodge* involved private litigants, the concern for preserving this aspect of legislative intent extends equally to public enforcement actions. (*Id.* at p. 285.) It is also consistent with precedent from this Court recognizing the "efficient administration of justice" as a legitimate consideration in assessing the right to a jury. (*Jehl, supra,* 66 Cal.2d at p. 829; cf. *Sonleitner, supra,* 158 Cal.App.2d at p. 260 ["To construe the constitutional jury trial guarantee as entitling a person to have a trial by jury on every demand made upon him for taxes would cause interference and delay in tax collection"].)

B. Judges Are Well Suited to Decide Issues Arising under the UCL or FAL

Although the right to trial by jury is "a cherished one," it is "not a necessary feature of a fair hearing." (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1253.) California courts decide "many weighty issues with life-altering consequences without requiring a jury trial...." (*Ibid.*) This observation has a constitutional dimension as well: "Courts often determine fact issues, however, and the acceptance of this practice [i.e., additur] over

many years refutes the argument that the framers of the Constitution regarded the jury as the only competent finder of facts." (*Jehl, supra,* 66 Cal.2d at p. 830.)

UCL actions are particularly well-suited to court trials. With regard to the "unlawfulness" prong, for example, the statute has been described as a "chameleon" because it "borrows" violations of other laws. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196.) These other laws run the gamut from "civil [to] criminal, federal, state, or municipal, statutory, regulatory, or court-made." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839.) The panoramic sweep of the UCL presumes a versatility and depth of experience found most often in judges sitting in equity.

The same can be said for the "unfairness" prong. Although this Court has described the test for unfairness in consumer actions as "currently unsettled" (*Zhang, supra,* 57 Cal.4th at p. 380, fn. 9), the standards adopted by the lower courts all involve some form of equitable consideration. These include, for example, whether a practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" (*Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 539, quotations and citation omitted), whether an underlying public policy is "tethered" to an existing constitutional right, statute or law (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854), or whether an injury is

"outweighed by any countervailing benefits to consumers or competition." (*Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403.) Judges sitting in equity are uniquely situated to function within these "wide" equitable standards. (*Barquis, supra,* 7 Cal.3d at pp. 112.)[26]

C. The Unprecedented Holding in *Nationwide* Will Result in Confusion and Procedural Uncertainty

Taking its cue from *Tull,* the Court of Appeal held that the right to a jury extends only to liability and that "the amount of statutory penalties, as well as whether any equitable relief is appropriate, is properly determined by the trial court." (*Nationwide, supra,* 24 Cal.App.5th at p. 471.) So far as the People can tell, there is no precedent in California law for leaving otherwise equitable issues to be decided by a jury, only for the matter to revert back to the court on the question of relief, where the form of relief was the reason for the jury trial in the first place. As this Court has stated in another context, "[s]uch a statutory construction has the tail wagging the dog." (*Ontario*

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[26] Judges are also well-suited to act as fact-finders in false advertising cases. *Quesada v. Herb Thyme Farms, supra,* 62 Cal.4th 298, for example, was a false advertising case based on the use of the term "organic." The defendant argued that, unless the claims were preempted by federal law, the issue of whether the term "organic" was used properly "would be evaluated by a lay jury applying a nebulous 'reasonable consumer' standard." (*Id.* at p. 322.) This Court was unmoved, noting that "these claims are decided by a judge, not a jury" and citing *Hodge* and *Witzerman* in support. (*Ibid.*)

Community Foundations, Inc. v. State Bd. of Equalization (1984) 35 Cal.3d 811, 822.)

The Court of Appeal's decision also leaves unanswered a host of practical questions. Foremost among these is how to harmonize the shared fact-finding roles of judge and jury. As discussed above, the FAL and UCL both contain a non-exclusive list of factors a court may consider in imposing penalties. (See Bus. & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b).) Among the most important is the "number of violations." Determining what constitutes a "violation" is often a vexing legal question and has generated a body of case law all its own. (See, e.g., *People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 127-130.) Although the Court of Appeal seemed to assume that "the enumerated factors" in section 17206, subdivision (b), fall within the scope of the judge's discretion after a jury verdict (*Nationwide, supra,* 24 Cal.App.5th at p. 456), it did not say which fact-finder (judge or jury) ought to decide what constitutes a "violation" in any particular case or which should determine how many violations occurred. If these issues only arise *after* the verdict on liability, do they necessitate a second trial?

The procedural uncertainties are not limited to calculating penalties. For example, restitution is among the remedies sought by the People in this case. According to the *Nationwide* decision, that remedy will presumably be imposed by the trial judge after jury verdict. Restitution, however, typically

requires identifying victims from whom money was improperly received and calculating the amount of such transfer. (See, e.g., *Korea Supply*, *supra*, 29 Cal.4th at p. 1149.) The Court of Appeal did not say whether the judge or jury is to decide how many victims exist, who they are, or how much money they improperly transferred to the defendants. Assuming the judge is to make this determination, would it involve a second trial or evidentiary hearing, after the liability phase?

D. *Nationwide* Will Have Ripple Effects

Issues of the kind described above will continue to plague UCL and FAL cases if the decision below is left standing. These uncertainties also have the potential to spread to civil actions based on *other* statutes that authorize civil penalties.

The *DiPirro* case offers an immediate example. Like the UCL and FAL, Proposition 65 is a remedial statute that authorizes civil penalties up to $2,500 per violation per day, 75 percent of which go into a state fund and 25 percent to the governmental agency (or private enforcer) pursuing the action. (Health & Saf. Code, §§ 25249.7, subd. (b)(1), 25249.12, subds. (c), (d).) Given the availability of such penalties, litigants in Proposition 65 cases will be left to wonder in the wake of the *Nationwide* decision whether there is a right to jury trial or not.

These same questions may well extend to *scores* of other remedial statutes authorizing the imposition of penalties in actions brought by the

People, acting through governmental agencies or private attorneys general. (See, e.g., Health & Saf. Code, § 25189 [hazardous waste disposal]; Govt. Code, § 51018.6 [pipeline safety]; Fin. Code, § 4057 [disclosure of personal information]; Rev. & Tax. Code § 30101.7 [unauthorized sale of tobacco]; Labor Code, § 2698 et seq. [Labor Code Private Attorneys General Act].)

CONCLUSION

The Court of Appeal's opinion in *Nationwide* is contrary to California law and the equitable foundations of the Unfair Competition Law and False Advertising Law. The decision in *Tull* does not warrant the dramatic shift in California law attributed to it. The People respectfully request that the holding of the lower court be reversed.

Dated: December 18, 2018

Respectfully submitted,
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c))

I certify that Real Party In Interest's Opening Brief On The Merits uses a 13-point Times New Roman font and, according to the computer program it was written in, contains 13,993 words, not including: the tables, the cover information (including the second page listing attorneys), this certificate, the signature block, and the quotation of issues presented for review.

Dated: December 18, 2018.

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to this action. My business address is 7677 Oakport Street, Suite 650, Oakland, CA 94621.

On December 18, 2018, the attached **REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS** was served on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 18, 2018, at Oakland, California.