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. (now retired)
The Honorable Stephen Kaus

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REAL PARTY IN INTEREST'S REPLY 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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INTRODUCTION

In their opening brief, the People[1] showed that the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)) and the False Advertising Law (Bus. & Prof. Code, § 17500 et seq. (FAL)) are modern, consumer protection statutes, without common law analogue. They demonstrated that, under the "gist of the action" test as applied in *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, the availability of monetary relief, even relief arguably viewed as "legal," does not "convert" an action in equity to one in law. And they showed that the UCL and FAL are quintessential examples of equitable actions. This explains why for over forty years, courts unanimously concluded that there is no right to a jury trial in UCL or FAL cases, even those involving civil penalties.

Defendants do not effectively refute these points. Instead, their argument is premised on a distortion, namely, that this case is nothing more than an "action for penalties" of the kind tried in the days of King John. In Defendants' view, the "gist" of this action is penalties, full stop.

Defendants are wrong. The People are not simply bringing a "cause of action for penalties." This is a consumer protection case where the "gist of the action" is a claim for unfair competition and false advertising, as to

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[1] Consistent with the Opening Brief, the real party in interest will be referred to as the "People," and the petitioners in the court below as "Defendants."

which a number of remedies are available. It is only upon proof of these underlying causes of action that relief in any of its forms may be appropriate. In this way, UCL and FAL actions differ fundamentally from the historical ones cited by Defendants, which were only about penalties. The vast majority of those older cases were viewed as "actions on a debt," a theory that does not hold up here.

Unlike these historical cases, the chief remedy in UCL or FAL actions is an injunction, an undeniably equitable form of relief. So too is restitution, which the People also seek. And although civil penalties may have a punitive aspect, modern jurisprudence recognizes that they also serve equitable purposes which never arose in cases of the past. Taken together, the remedies in this case are far more equitable than legal.

Tull does not compel a different result for the reasons stated in the Opening Brief. Contrary to Defendants' argument, the Seventh Amendment is not binding on the states, something the United States Supreme Court has consistently observed. Nor is this a "criminal" prosecution in disguise.

If the lower court is upheld, public enforcement actions that seek civil penalties will be treated differently than all other UCL or FAL cases, public and private alike. A defendant's exposure to *any* amount of penalties will trigger a jury. This approach may dramatically affect civil enforcement actions of all kinds, including a host of other California statutes.

As Defendants concede, that this Court remains free to interpret

article 1, section 16 of the California constitution for itself. It should do so here by affirming four decades of case law and concluding that there is no right to a jury trial here.

CLARIFICATION OF FACTS

Defendants largely accept the People's statement of the case. However, the central premise upon which they base their argument is the apocalyptic assertion, repeated throughout their brief, that the People seek "$19.25 billion" in penalties. (Answering Brief (AB) 13; see also AB 14, 16-17, 31, 33, 46, 66-67.)

This is an unfounded and gross exaggeration.

Nowhere in any pleading, transcript or other statement have the People said they are seeking "billions of dollars" or anything of the sort. They are not. At no point has any court said that penalties of this magnitude may be imposed. Nothing in the court of appeal's decision turns on any such finding. In truth, the "$19.25 billion" figure comes from Defendants' *own* legal filings. (See AB 17 [citing to defense trial brief, Vol. II. Ex. M. at p. 274].)

This is a typical consumer protection lawsuit. If civil penalties are warranted, they will be set by the trial judge in the exercise of sound judgment, consistent with statutory factors, and subject to appellate review for abuse of discretion and excessiveness. (See *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1087-91.)

Moreover, Defendants' legal arguments would apply whether penalties on the order of $100, $1000 or $1,000,000 were warranted. Thus, Defendants' rhetoric, and the Carl-Sagan-like figures upon which it is based, is not only hyperbolic, but irrelevant to the broader legal question.

It is also ironic. Although Defendants assert that a jury is needed to "safeguard" them from "colossal" penalties (AB 13, 17), they are *not* asking for a jury to actually determine the amount of penalties. They are content leaving that up to a judge.

LEGAL ARGUMENT

I. UNDER *C & K ENGINEERING*, ONE FORM OF RELIEF THAT IS ARGUABLY LEGAL IN NATURE DOES NOT CONVERT AN EQUITABLE CASE INTO A LEGAL ONE.

Under the "gist of the action test" as applied in *C & K Engineering*, a prayer for relief that includes a remedy traditionally regarded as "legal" in nature, is not conclusive: "if 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,* 6 Cal.3d at p. 9, quotations omitted; accord *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 995.) A request for a monetary remedy does not "convert" what is "essentially an equitable action into a legal one." (*C & K Engineering*, at p. 11.) "The 'gist' of such an action" remains "equitable." (*Ibid.*)

The People's case depends entirely upon the "equitable doctrines" embodied in the UCL and FAL. (See, e.g., *Solus Industrial Innovations, LLC*

v. Superior Court (2018) 4 Cal.5th 316, 340 (*Solus*); *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.) If the People are entitled to any relief at all, it is only by "application" of these doctrines. As with *C & K Engineering*, "[b]oth historically and functionally, the task of weighing such equitable considerations is to be performed by the trial court, not the jury." (*C & K Engineering, supra,* 23 Cal.3d at p. 11.)

Rather than address these points, Defendants engage in a misdirection. They argue that *C & K Engineering* actually "helps" them because "the addition" of an injunction and restitution "does not convert what is essentially a legal action into an equitable one." (AB 38.) As discussed below, the argument is premised on a fallacy – namely, that this case is nothing more than "an action for penalties" as to which other forms of equitable relief have been "added." The argument also turns the UCL and FAL on their heads by ignoring the equitable underpinnings of the statutes and suggesting that injunctive relief is merely an add-on, when it is actually paramount.

C & K Engineering is grounded in logic and practicality. It recognizes that in cases involving multiple remedies, some legal and some equitable, a determination regarding liability "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, supra,* 23 Cal.3d. at p. 11, quotations and citations omitted.) When that decision rests on "equitable doctrines" such as those embodied in the UCL or FAL, it must be made by a judge.

II. THE UCL AND FAL ARE EQUITABLE CAUSES OF ACTION

Defendants chastise the People for sometimes referring to the UCL and FAL as equitable "statutes," rather than "causes of action." From this, Defendants conclude that the People are asking the Court to look at the "gist of the *statutes*" not the "gist of the action." (AB 47, original italics.) This argument mischaracterizes the People's brief and is otherwise without merit.

The People consistently (and properly) describe the UCL and FAL as equitable "causes of actions" throughout their brief. (See, e.g., Opening Brief (OB) 18-20, 25-26, 31-32, 34, 37-38, 41, 48-49.) Of course, the People's characterization is less important than the courts'. Here, the cases are unanimous: "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, italics added; see also, e.g., *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179 [UCL actions are "actions" in equity]; *Zhang, supra,* 57 Cal.4th at p. 371.)

This principle applies equally to public enforcement cases seeking civil penalties. The UCL "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." (*Solus, supra,* 4 Cal.5th at p. 340, underline added, italics omitted, citations omitted.)

What Defendants are really saying is that the UCL and FAL may be "equitable" in private cases, but not public enforcement actions seeking civil penalties. (AB 52 [calling the Court's "commentary" from private action cases "irrelevant"].) No California court has drawn this distinction, and many have explicitly or impliedly rejected it. (*Hodge, supra,* 145 Cal.App.4th at p. 285 ["the identity of the plaintiff does not assist in determining entitlement to a jury trial"]; *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 181–82 ["[i]njunctive relief is invariably an equitable remedy, and a demand for civil penalties does not in itself require a jury trial"]; *People v. Bestline Prod., Inc.* (1976) 61 Cal.App.3d 879, 916 (*Bestline*) [upholding trial court holding that potential "imposition of civil penalties ... did not serve to change the nature of the case"]; see also *People v. Superior Court* (*Cahuenga's the Spot*) (2015) 234 Cal.App.4th 1360, 1384 (*Cahuenga's the Spot*) [citing *Hodge*: "the gist of an action under the UCL is equitable"].)

The recent decision in *Solus*, a public enforcement action, is significant. The Court described it as "an action for civil penalties" under the UCL and FAL. (*Solus, supra,* 4 Cal.5th at p. 323.) The availability of penalties was an important factor in the Court's preemption analysis. (*Id.* at p. 346.) Yet it did not change the Court's view of the UCL as an "equitable

means" by which public prosecutors address unfair competition, or dissuade the Court from describing UCL remedies as "equitable." (*Id.* at p. 341.)

III. THE AVAILABILITY OF CIVIL PENALTIES DOES NOT CONVERT THE UCL AND FAL FROM EQUITABLE TO LEGAL

Defendants' argument depends on a reframing of the issues. They assert that, by "amending the UCL and FAL" to include penalties (AB 20), the legislature effectively created a distinct cause of action for purposes of the "gist of the action" test. What would otherwise indisputably be an equitable case about proving unfair competition or false advertising, triable to a court, has become merely an "action[] for civil penalties," triable to a jury. (AB 14.)

This is a fallacy. The People do not bring a case simply "to recover civil penalties." Rather, this is an action to enforce the UCL and FAL, as to which a variety of remedies are available, foremost among which is injunctive relief.

There is a tell in Defendants' argument that demonstrates how important this reframing is to it. The issue for review is whether there is "a right to a jury trial in a civil action brought by the People, acting through representative governmental agencies, pursuant to the [UCL] or [FAL], because the People seek statutory penalties, *among other forms of relief*." (Nov. 14, 2018, Order, italics added.) This phrasing reflects the fact that civil penalties are only one remedy among others in UCL or FAL actions.

This phrasing is inconvenient for Defendants. Accordingly, they have rewritten the question presented to leave out the reference to "among other forms of relief":

QUESTION PRESENTED

> Whether defendants have a constitutional right to a jury trial in civil actions brought by the government seeking statutory penalties under the [UCL] and [FAL].

(See AB 13.)

This attempt at reframing does not only result in strained phraseology. It suffers from substantive defects as well.

A. Defendants Fail to Grasp the Equitable Heritage of the UCL and FAL.

The "penalties-is-all-that-matters" argument is inconsistent with the history of the UCL and FAL. For decades, the *only* relief available under the statutes was injunctive. (See OB 27-28.) The availability of civil penalties was not added until decades later (see OB 27-28) and even then was seen as an aid to consumer protection. (See Dept. Consumer Affairs, Enrolled Bill Report, Assembly Bill No. 1937 (Aug. 15, 1972) ["This bill will increase the protection for legitimate and honest businessmen while protecting consumers in the process."])

This sequencing is not merely an interesting bit of legislative history. It reflects the fact that the UCL and FAL are born out of the power of equitable courts to stop unfair or deceptive business practices, not to punish

or compensate. (OB 28-34.) Far from being an outgrowth of the common law, the UCL was something new and different: "'its broad, sweeping language'" allows courts to "'deal with the innumerable new schemes which the fertility of man's invention would contrive.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 181, citations omitted.)

Defendants gloss over almost all of this heritage. Instead, they chide the People for "not say[ing] what [they think] the proper historical analogue" is here. (AB 53.) In many ways, Defendants are making the People's point: there *is* no readily available common-law analogue.

The UCL does not just prohibit "unfair" business practices, a sweeping term left undefined by the legislature. It also acts as a "chameleon" statute that "borrows violations of other laws and treats them as unlawful practices" that are "independently actionable." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196, citations omitted.) To paraphrase this Court, a statutory right of action of this unique nature "occupies a different class from the common law form of action in which a jury trial was available." (*Franchise Tax Board. v. Superior Court* (2011) 51 Cal.4th 1006, 1018.) "[S]ome recent causes of action have no historical analogues," including statutory "consumer protection actions" as to which "no parallel in the law" exists. (*State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n* (Wash.Ct.App. 2002) 49 P.3d 894, 909 (*EFF*).)

However, insofar as Defendants insist on drawing analogies, one should *not* look to common law. Rather, the UCL and FAL have an equitable tradition that more closely aligns with English courts of chancery.

"The equity jurisdiction" with which California courts are invested "is that administered in the High Court of Chancery in England." (*People v. Davidson* (1866) 30 Cal. 379, 390.) Courts of chancery had authority to issue injunctions and compel other equitable remedies that were not typically available at common law. (*Minturn v. Hays* (1852) 2 Cal. 590, 593; *McMillan v. Richards* (1858) 9 Cal. 365, 420.) In chancery cases, "the parties have no right to demand a trial by jury." (*Cahoon v. Levy* (1855) 5 Cal. 294, 294.)[2]

The UCL in particular presupposes the "skills and wisdom" of the "trained and experienced chancellor." (*A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473.) "In permitting the restraining of all 'unfair' business practices, [the UCL] undeniably establishes only a wide standard to guide courts of equity...." (*Cel-Tech, supra,* 20 Cal.4th at p. 181, quotations and citations omitted.) Indeed, it is "impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited

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[2] An advisory jury could be impaneled, but it was a matter of a chancellor's discretion, not a party's right. (Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal* (1972) 83 Yale L.J. 1620, 1624 [if chancery court had jurisdiction, it was "never obliged to refer a fact dispute to common law trial"].) In this case, the trial judge declined Defendants' request to impanel an advisory jury. That decision is not challenged here.

[citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." (*People v. National Research Co. of California* (1962) 201 Cal.App.2d 765, 772.)[3]

In short, even if this Court "were to decide that the present case" requires an analogue from 1850, "it would be one analogous to an action in equity," not law. (*EFF, supra,* 49 P.3d at p. 909.)

B. The Historical Cases Cited by Defendants Are Inapposite.

Defendants' effort to reframe this case as merely "an action for penalties" is part of a larger attempt to tether this modern action to a litany of historical ones. (AB 25-33.) This effort is unpersuasive.

The majority of cases cited by Defendants were either criminal or quasi-criminal in nature (see, e.g., *United States v. Mann* (C.C.D.N.H. 1812) 26 F.Cas. 1153 ["high misdemeanor"])[4] or involved statutes that were *only* about punishing violations of law with fixed penalties. (See, e.g., *Matthews*

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[3] Pointing out that the UCL presupposes a trained and learned chancellor does not demonstrate a "hostil[ity] toward juries," as Defendants suggest. (AB 63.) The right to a jury is a cherished one. However, it does not arise unless granted by statute or the constitution, neither of which applies here.

[4] To the extent criminal or "penal" cases are relevant here, they actually support the People's position. The California constitution does not afford a right to jury for criminal infraction cases in which a monetary fine is the only form of punishment. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1242.)

v. Offley (C.C.D. Mass. 1837) 16 F.Cas. 1128 [$100 fine not helping "destitute seaman"]; *Jacob v. United States* (C.C.E.D. Va. 1821) 13 F.Cas. 267 [$500 fine for "forcibly rescuing" seized liquors]; see also *Lees v. United States* (1893) 150 U.S. 476 [$1,000 fine for "importation" of laborers]; *Adams v. Woods* (1805) 6 U.S. 336 [$2000 fine for carrying on slave trade in foreign country].)

Moreover, the majority of these historic cases were brought as common-law "actions on debt." (See, e.g., *Chaffee & Co. v. United States* (1873) 85 U.S. 516; *Stockwell v. United States* (1871) 80 U.S. 531; *United States v. Lyman* (C.C.D. Mass. 1818) 26 F.Cas. 1024; *Rex v. Malland* (1728) 93 Eng.Rep. 877; *Atcheson v. Everitt* (1775) 98 Eng.Rep. 1142; *Calcraft v Gibbs* (1792) 101 Eng.Rep. 11.) However, the "action on a debt" theory does not apply here because the sums at issue are not "certain" and the statutes in question prescribe their own method of enforcement. (See Part IV, *infra*.)

Citing *Tull* and other cases, Defendants also argue that equitable courts would "refuse to enforce" a penalty. (AB 34.) However, the maxim upon which Defendants rely arose in cases involving private agreements, where the penalty was meant to coerce a payment or performance. When "the person who [sought] to enforce" the penalty could "be fairly compensated by an award of money," equity would not allow the penalty. (1 Pomeroy, *A Treatise on Equity Jurisprudence* (4th ed. 1918) § 162, p. 198 (Pomeroy).) This case, by contrast, does not involve an agreement among the parties, and

the People are not seeking and cannot get "compensation."

More importantly, courts have observed that the maxim does not apply to statutory penalties:

> The unsoundness of this view lies in the failure to make the distinction between statutory penalties and penalties created by contract between private persons. The latter, courts of equity refuse to enforce, but the former,-the expression of the will of the lawmaking power,-the courts of equity will not undertake to disregard and nullify by refusing their aid, in proper cases. [Citations] Having acquired jurisdiction, the court below should have given full relief by following the law and enforcing the penalty.

(*State v. Marshall* (Miss. 1911) 56 So. 792, 796; *State v. Franklin* (Utah 1924) 226 P. 674, 677 ["statutory penalty...falls within the jurisdiction of a court of equity to enforce"]; Pomeroy, § 458, at p. 870.) That unfair competition actions were intended to fit within this tradition is apparent from the UCL itself, which provides that notwithstanding a contrary statute, "specific or preventive relief may be granted to enforce a penalty... in a case of unfair competition." (Bus. & Prof. Code, § 17202.)

Finally, the handful of California cases cited by Defendants do not support their historical argument. (See AB 30, citing *Orcutt v. Pac. Coast Ry. Co.* (1890) 85 Cal. 291; *O'Callaghan v. Booth* (1856) 6 Cal. 63; *Greenberg v. Western Turf Assn.* (1905) 148 Cal. 126.) None discussed the right to a jury trial, statutory penalties or the "gist of the action." Rather, each involved routine disputes between private parties, in which one sought damages against the other. (See, e.g., *O'Callaghan, supra,* 6 Cal. at p. 65

[unlawful detainer action for damages]; *Orcutt, supra,* 85 Cal. at p. 294 [negligence suit for damages related to death of a horse].)

More troubling still are the quotes that Defendants purport to pull out of these opinions. Take *Orcutt*. Defendants say this case holds that "under a statute allowing a 'district attorney' to sue for a 'penalty' for 'every [statutory violation],' it is 'for the jury alone to determine the question.'" (AB 30.) This description is wrong. *Orcutt* involved neither a "statutory violation" case, a "district attorney," nor a suit for penalties. It was a negligence suit in which the plaintiff sought damages from a railroad for running over his horses. The reference to "district attorney" comes from a statute that required a train to ring its bell before crossing a road, or face a fine. (*Orcutt, supra,* 85 Cal. at pp. 296-97.) *Orcutt* cited the statute simply as prima facie evidence of liability, nothing more. (*Ibid.*) From this benign reference, Defendants cobbled together a citation that appears to be dispositive of this case. It is not.

Quotes from *O'Callaghan* and *Greenberg* are also taken out of context. The excerpt from *O'Callaghan* implies that there is a right to a jury trial "'[w]here an offense is created by statute, and a penalty inflicted.'" (AB 30.) However, the quoted passage had nothing to do with the right to jury, but rather with the form of a pleading. Likewise, *Greenberg* does not hold "that actions for statutory penalties are 'properly submitted...for determination [by] the jury,'" as Defendants claim. (AB 30.) *Greenberg* involved a question of respondeat superior; that was the issue "properly

submitted" to the jury. (*Greenberg, supra,* 148 Cal. at p. 127.) The case did not debate the right to jury trial at all.

In the end, none of the historic cases cited by Defendants involved an underlying civil cause of action that had been deemed to be equitable in nature, provided for purely equitable remedies (such as an injunction or restitution), or left the amount of penalties open to the discretion of the judge.

C. Courts Distinguish the Cause of Action and the Remedy in UCL/FAL Cases

Defendants' attempt to make civil penalties the dispositive feature of this case is also at odds with how the UCL and FAL have been applied. In *People v. Superior Court* (*Jayhill Corp.*) (1973) 9 Cal.3d 283, for example, one of the issues was whether each request for penalties constituted a separate cause of action. This Court said no, reasoning as follows: "the Attorney General has only *one cause of action* against a particular defendant for violating section 17500; for this he seeks *several forms of relief*, including the civil penalty of $2,500." (*Id.* at p. 288, italics added.)

This principle was extended in *Cahuenga's the Spot*, another public enforcement action. (*Cahuenga's the Spot*, *supra*, 234 Cal.App.4th at p. 1379.) That case affirmed that the UCL provides the "cause of action"; penalties are "not an element" thereof. (*Ibid.*)

To be sure, this rule is an application of the "primary right" theory. (Cf. *Walton v. Walton* (1995) 31 Cal.App.4th 277, 291.) Yet it demonstrates

that, notwithstanding Defendants' attempt to meld them together, the cause of action under the FAL and UCL and the remedies available under those statutes are distinct concepts.

D. *1941 Chevrolet* Does Not Compel a Different Result

Defendants claim that the outcome of this case is dictated by *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286 (*1941 Chevrolet*). (AB 32.) However, as demonstrated in the People's Opening Brief, *1941 Chevrolet* describes the way in which penalties-only cases involving a fixed amount were handled at common law. (OB 43-45.) Actions for "recusancy" or "forcibly rescuing" liquors say little about how the common law would treat an "unfairness" case or "chameleon" cause of action that contains its own method for enforcement, prescribes a host of equitable remedies, and allows for civil penalties within a broad range. Defendants call these points "picayune." (AB 32.) Yet, as this Court has held, "[i]n assessing the precedents, we search for the meaning and substance of jury trial and are not rigidly bound by the exacting rules that happen to be found" in cases "of a century and a half ago." (*Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 829, citations omitted.)

Defendants also contend that an action in rem to forfeit property is merely a species of civil penalties. (AB 32.) However, forfeitures and civil penalties were "distinct" concepts in equity. (Pomeroy, § 449, at p. 854.)

Moreover, comparison of forfeiture cases with UCL or FAL actions actually *supports* the People's point: in rem cases such as *1941 Chevrolet* are all about the "penalties" (to adopt Defendants' analogy), there being no relief sought other than the forfeiture. The "gist" of an in rem action is the forfeiture. (*Lee v. Silva* (1925) 197 Cal. 364, 368 ["an action in rem proceeds only against property seized"].)

In all events, none of the forfeiture cases Defendants cite come anywhere near describing the situation presented in this case, involving equitable causes of action, a range of remedies, discretionary penalties, etc. It is telling in this regard that other states have found a right to a jury trial in a forfeiture cases but not in actions of this kind. (Compare *State v. One 1981 Chevrolet* (Me. 1999) 728 A.2d 1259, 1261 [jury for in rem forfeiture proceeding] with *Dept. of Environmental Protection v. Emerson* (Me. 1992) 616 A.2d 1268, 1271 [no jury in "equitable" action for injunction and "ancillary coercive" penalties].)

IV. THIS IS NOT AN ACTION ON A "DEBT"

The linchpin of Defendants' historical argument is the "action on a debt" theory. Defendants contend that because the People seek penalties payable to the government, this case would have been seen as a type of "debt" in 1850, triable to a jury. This argument misconstrues California law.

A. An Action on a Debt Requires a "Sum Certain"

Under California law, an action in debt would lie only if the amount

in question was a sum "certain" or "readily reducible to a certainty." (*Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, 484; *State v. Poulterer* (1860) 16 Cal. 514, 531.)[5] The "sum certain" principle goes back to earliest days of statehood. (*Ames v. Hoy* (1859) 12 Cal. 11, 20 ["sum liquidated and made definite by contract or judgment"]; *People v. Craycroft* (1852) 2 Cal. 243, 244 [no action of debt where "the penalty is not certain"].)[6]

In this case, the "sums" at issue can hardly be considered "certain" or readily reducible to a certainty. The possible penalty is within a range of $0.01 to $2,500.00 per violation, subject to a set of discretionary factors. (See Bus. & Prof. Code, § 17206, subd. (b).) If a range of this breadth, subject to factors of this kind, and contingent on the number of violations proven at trial, amounts to a "sum certain," then those words lose all meaning. (See *Comm. Environmental Protection v. Connecticut Bldg. Wrecking Co.* (Conn.

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[5] Defendants contend that "nothing [in *Poulterer*] turned on [the] fact" that the plaintiff was seeking a sum certain. (AB 56.) This argument is puzzling; the sum certain issue came up in a key passage from that case: "How, then, can the Court say that debt does not lie, since there is a duty on the defendant to pay the plaintiff a *determinate sum of money*?" (*Poulterer, supra,* 16 Cal. at p. 527, italics added.)

[6] Defendants dismiss *Craycroft* because it involved a "criminal" statute. (AB 55.) This argument actually supports the People's position; an action on a debt would not be implied if the statute in question specified its own means of enforcement. (See Part IV.B., *infra.*) In all events, among the reasons the Court refused to find a civil "action on a debt" was because the penalty of between $100 and $1000 was "not certain." (*Craycroft, supra,* 2 Cal. at p. 244.)

1993) 629 A.2d 1116, 1122 [penalties are "an unliquidated sum"]; *Atlantic City v. Crandol* (N.J.Sup.Ct. 1902) 51 A. 447, 448 [contrasting an "action of debt," which "presupposes a sum certain to be due," with a "maximum penalty" left to the discretion of trial court].)[7]

Defendants argue that the People's prayer for relief asks for "exactly $2,500 per violation." (AB 54.) However, requesting penalties at the statutory maximum is a convention of civil pleading. The actual amount of penalties is subject to the judge's broad discretion after trial. Although the complaint may request the statutory maximum, the People "nonetheless [seek] an unliquidated sum." (*Connecticut Bldg. Wrecking Co., supra,* 629 A.2d at p. 1122.)

Defendants' also attempt to read the "sum certain" requirement out of California law. Yet the two California cases upon which they rely, *Grim v. Norris* (1861) 19 Cal. 140, and *Smith v. Polack* (1852) 2 Cal. 92, do not help them. *Grim* was not a penalties case and does not discuss the requirements for an "action on a debt." It appears Defendants cited it because the plaintiff may have recovered less that he had demanded. But what does this prove?

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[7] Defendants cite *United States v. J.B. Williams Co.* (2nd Cir. 1974) 498 F.2d 414, in support of a contrary view. However, that case was decided under the Seventh Amendment, has never been cited in California, has been criticized by at least one other circuit court and, most importantly, did not discuss the sum certain requirement or an action on a debt.

This ambiguous fact does not undermine decades of settled law, much less support Defendants' assertion that "jury trials were required" in actions involving "*indeterminate* amounts, too." (AB 56, original italics.)

The citation to *Smith* is more misguided. Defendants say that case involved a "statute providing for an amount 'not exceeding $500.'" (AB 54.) Defendants have misread the opinion. *Smith* was a case in quantum meruit; it did not involve a statutory cause of action or penalties, much less a range up to $500. That figure ($500) apparently referred to a surety bond purchased by the defendant. *Smith* has nothing to do with the "sum certain" issue.

B. An Action on a Debt Is Only Implied if No Other Means of Enforcement Is Specified.

In California, courts will only imply "an action in debt" if the statute in question does not *already* provide a mechanism for recovery:

> When a statute gives a new right, and prescribes a particular remedy for its recovery, such remedy must be strictly pursued; though it is otherwise when the statute gives a right without prescribing the remedy. In the latter case, the common law affords the remedy, and any suitable form of action may be adopted.

(*Poulterer, supra,* 16 Cal. at p. 525, citation omitted; accord *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766, 771.)

This principle has deep roots in English and American jurisprudence. Where "a claim [is] given by statute, and the same statute which creates it prescribes a particular remedy for its enforcement.... no other can be resorted to." (*Underhill v Ellicombe* (1825) 148 Eng.Rep. 489, 491; accord *Smith v.*

Drew (1809) 5 Mass. 514, 515-16.)

There can be little dispute that the statutes in this case prescribe both the "right" at issue *and* the means of enforcement. The UCL, for example, includes a detailed set of provisions that set forth:

- the conduct prohibited (Bus. & Prof. Code, § 17200);
- the proper parties, the available injunctive relief, the courts in which cases may be pursued, and standing requirements for individuals (Bus. & Prof. Code, §§ 17203, 17204);
- the agencies that may seek civil penalties, the penalty factors, the courts in which penalties may be imposed, and the use to which they may be put (Bus. & Prof. Code, § 17206);
- enhanced penalties for certain violations, the courts in which such actions may be pursued, the proper parties, and the manner in which penalties are disbursed (Bus. & Prof. Code, §§ 17206.1, 17207); and
- the statute of limitations and other procedural requirements (Bus. & Prof. Code, §§ 17205, 17208, 17209.)

The FAL has a parallel set of statutes. (See Bus. & Prof. Code, §§ 17500 [defining false advertising], 17535 [procedure, venue and requirements for obtaining injunctive relief], 17536 [procedure, venue and requirements for penalties].)

Thus, the UCL and FAL create a set of legal obligations and provide

means of enforcement. These enforcement mechanisms must "be strictly pursued," leaving no reason to imply an "action on a debt."

V. THE FORMS OF RELIEF REQUESTED IN THIS ACTION MANDATE A COURT TRIAL

Continuing their refrain, Defendants maintain that because this case is simply an action for civil penalties, the relief requested entitles them to a jury trial. (AB 33-39.) This argument is wrong.

A. If the "Gist of the Action" Test Takes Account of *Any* Remedies, It Should Take Account of *All* Remedies

Defendants concede that the People seek relief that is equitable in nature, including a permanent injunction and consumer restitution. (AB 34, 38.) They acknowledge that the latter may exceed $10 million. (AB 36.) They nevertheless maintain that the availability of civil penalties trumps these other remedies for purposes of the gist of the action test.

However, Defendants can cite to no California case holding that one remedy among others is dispositive. This is unsurprising. At least since *C & K Engineering*, the law is to the contrary. Just because an (arguably) legal remedy "is one of a full range of possible remedies does not guarantee...the right to a jury...." (*C & K Engineering, supra,* 23 Cal.3d at p. 9, citations omitted; accord *Shaw, supra,* 2 Cal.5th at p. 995.) In other words, one form of relief among others is not "conclusive" for purposes of determining the right to a jury. Yet "conclusiveness" is exactly what

Defendants want here. This case is no more a mere "action for penalties" than *C & K Engineering* was merely "an action for damages."

An argument of this kind arose in *People v. Witzerman* (1972) 29 Cal.App.3d 169. (See OB 42-43, 46-47.) There, the court declined to "decide whether an action brought *solely* [for penalties under the FAL] would be legal in nature." (*Id.* at p. 177, fn. 4, original italics.) Instead, the court made an observation that applies fully here: because "[t]he same alleged misconduct on the part of [defendants] was the basis for both types of relief sought by the People. ... 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 p. 177, citations omitted; see *Cahuenga's The Sport, supra*, 234 Cal.App.4th at p. 1384 [no right to jury since People seeking equitable relief].)

Witzerman was a prescient decision. It has been cited and relied upon for nearly 45 years, including by this Court and its members. (See, e.g., *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 322 [citing *Witzerman* in holding that UCL and FAL claims "are decided by a judge, not a jury"].) Indeed, the refusal in *Witzerman* to segregate remedies for purposes of the jury trial analysis foreshadowed this Court's holding in *C & K Engineering*.

Defendants hardly discuss *Witzerman*. Instead, they cite to two older California cases for the proposition that California law affords a jury trial

when "in a single legal action" a plaintiff seeks equitable and legal relief. (AB 37, 61-62, citing *Pacific Western Oil Co. v. Bern Oil Co.* (1939) 13 Cal.2d 60, and *Hughes v. Dunlap* (1891) 91 Cal. 385.)

These cases do not support Defendants' contentions. Both involved claims for compensatory damages, and both were decided long before *C & K Engineering*. More importantly, the underlying claim in both cases was for trespass, a common-law right of action. (See *Pacific Western*, *supra,* 13 Cal.2d at p. 68 [describing a "common-law right"]; *Hughes, supra,* 91 Cal. at p. 389 ["real issue of fact" was a "common action of trespass"].) To the extent *Pacific Western* and *Hughes* are relevant here, they show that, in California, the right to a jury trial depends more on the underlying cause of action than the form relief. If these holdings look like they help the People, it is because they do.[8]

Defendants also cite to *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, claiming that there is a right to a jury if "the plaintiff seeks legal and equitable relief through a single claim." (AB 61, italics omitted.) Defendants misunderstand *Raedeke*. Unlike this case, "[t]he *Raedeke* complaint alleged *dual* theories of traditional breach of contract and promissory estoppel." (*C & K Engineering, supra,* 23 Cal.3d at p. 10, original

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[8] See *Walton, supra,* 31 Cal.App.4th at p. 294 (rejecting argument raised here: "[t]hese cases [including *Pacific Western* and *Hughes*] do not help resolve the case before us").

italics.) Thus, "the 'resolution of [*Raedecke*] did not depend entirely upon the application of equitable principles; the doctrine of promissory estoppel was only one of two alternative theories of recovery.'" (*Ibid.*, quoting *Raedecke,* at p. 674.)

By contrast, the People are not pursuing an "alternative" common law claim, such as breach of contract or trespass. This case depends solely on application of "equitable doctrines." Under *C & K Engineering*, there is no right to a jury trial.

Nor are the federal cases cited by Defendants on this point dispositive. (See AB 37, citing *Tull v. United States* (1987) 481 U.S. 412, and *Connolly v. United States* (9th Cir. 1945) 149 F.2d 666.) These cases arose under the Seventh Amendment or federal statutes, were decided under a different legal framework, and do not reflect California law.[9] It is also important to keep in mind that *unlike* the federal system, it is "well-established" that California courts are at liberty to follow the "equity-first" rule. (*Orange County Water Dist. v. Alcoa Glob. Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 355 (*Orange County*).) Although this case does not involve "mixed" causes of action, the general rule in California that equitable matters may proceed to trial first explains at least some of the divergence between federal and state law on this

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[9] The main problem in *Connolly* was that defendants had not been given notice that the government was seeking penalties. (*Connolly, supra,* 149 F.2d at p. 669.)

issue.

B. The Primary Form of Relief Is an Injunction

By magnifying civil penalties and downplaying the other remedies here, Defendants turn the UCL and FAL on their heads. "The primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction." (*McGill v. Citibank* (2017) 2 Cal.5th 945, 954, citations omitted.) Indeed, an injunction was the *only* relief available for years. Thus, Defendants' claim that civil penalties are "predominant" in this case (AB 20) is not only wrong as a factual matter (see above) but as a legal one as well. (Cf. *State ex rel. Douglas v. Schroeder* (Neb. 1986) 384 N.W.2d 626, 629-30 ["principle thrust" of consumer protection action seeking penalties, among other relief, "is to prevent unfair or deceptive acts or practices"].)

The primacy of injunctive relief is not a minor point. Typically, an injunction would only issue from a court of equity, not law. (See, e.g., *Martin v. Los Angeles County* (1996) 51 Cal.App.4th 688, 696; James, *Right to A Jury Trial in Civil Actions* (1963) 72 Yale L.J. 655, 672 ["the law would not give an injunction"].) To paraphrase Defendants, if the People found themselves before a court of law in 1850, and requested the principal form of relief available to them (an injunction), they likely "would have been thrown out of court." (AB 34.)

C. Civil Penalties Also Serve Equitable Purposes

Defendants also unduly magnify the "legal" nature of civil penalties under the UCL and FAL. (AB 34-37.) Contrary to Defendants' arguments, civil penalties are not "damages" (punitive or otherwise) and do not "compensate." (See *DiPirro, supra,* 153 Cal.App.4th at pp. 182-84.) And although punishment is one of their purposes (see OB 57), courts "take into consideration the equities of the case" in imposing them. (*People v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 523.)

These considerations include things that would have seemed foreign to courts of the past, such as: achieving "public policy objectives" (*Kizer v. San Mateo County* (1991) 53 Cal.3d 139, 148); "implement[ing] statutory policy" (*People v. Superior Court* (*Olson*) (1979) 96 Cal.App.3d 181, 195); and enhancing the enforcement of consumer protection laws. (Bus. & Prof. Code, § 17206, subd. (b).)

Defendants cannot deny that these equitable considerations apply here or that they are legitimate factors to take into account. (Cf. *Vermont v. Irving Oil Corp.* (Vt. 2008) 955 A.2d 1098, 1107 ["primary purpose" of penalties is not punishment but making "noncompliance at least as costly as compliance"].)

VI. *TULL* DOES NOT COMPEL A DIFFERENT RESULT

Defendants concede that *Tull* does not control here and that this Court "remains free to give its charter a different meaning." (AB 42.) This

concession is proper. *Tull* was a Seventh Amendment case; that amendment is "not binding" on the states and "differs significantly" from California's constitutional provision. (*Jehl, supra,* 66 Cal.2d at p. 827.)[10]

Defendants nonetheless try hard to fold California law into Seventh Amendment jurisprudence. (AB 43-45.) As set forth in greater detail in the Opening Brief, this is a misguided effort.

Under a "gist of the action" analysis, the form of relief is not "conclusive" and does not "convert" an underlying cause of action that "depends upon equitable doctrines" into one that now sounds in law. (*C & K Engineering, supra*, 6 Cal.3d at pp. 9, 11.) Defendants can point to no similar passages from *Tull* or any other Seventh Amendment case.

Moreover, California courts have on numerous occasions either found Seventh Amendment decisions "inapplicable" (see, e.g., *Stubblefield Constr. Co. v. San Bernardino* (1995) 32 Cal.App.4th 687, 706 fn. 10) or actually parted ways with those decisions. (See *Jehl, supra,* 66 Cal.2d at p. 832 [permitting additur]; *Orange County, supra,* 12 Cal.App.5th at pp. 356-57 [upholding "equity-first rule"].)

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[10] Defendants dismiss *Jehl*, claiming that it was decided simply based on the reexamination clause of the Seventh Amendment. (AB 43-44.) This argument does a disservice to the opinion, which engaged in a thoughtful discussion of California's right to a jury and rejected contrary federal case law as based on "an historical and logical analysis that was open to serious question." (*Jehl, supra,* 66 Cal.2d at p. 828.)

Finally, *Tull* is distinguishable. (See OB 53-63.) Unlike this case, the U.S. government did not ask for financial restitution and sought only "modest" equitable relief. (*Tull, supra,* 481 U.S. at p. 424.) The Court in *Tull*, moreover, found that the government's case was "clearly analogous" to an "action on a debt" and that the principal purpose of penalties in that case was to "impose punishment" (*id.* at p. 423 & fn. 7) – findings that do not square with California law.

In the end, *Tull* does not dictate the outcome of this case. It has been distinguished by a number of sister states (OB 62-64; 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 should be here as well.

VII. THE SEVENTH AMENDMENT DOES NOT BIND THE STATES

Defendants next argue that the Seventh Amendment should be found binding on the states. (AB 64-66.) This argument was not addressed by the court of appeal and arguably exceeds the scope of the question for review. In all events, it is wrong.

For almost 150 years, the U.S. Supreme Court has held that the Seventh Amendment "is inapplicable to proceedings in state court." (*Osborn v. Haley* (2007) 549 U.S. 225, 252, fn. 17; accord *Gasperini v. Ctr. for Humanities, Inc.* (1996) 518 U.S. 415, 432; *Minneapolis & St. Louis Railroad Co. v. Bombolis* (1916) 241 U.S. 211, 217; *Walker v. Sauvinet* (1875) 92 U.S. 90, 92.)

This Court has also repeatedly acknowledged that holding. (See, e.g., *Shaw, supra,* 2 Cal.5th at p. 993, fn. 8; *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173, fn. 5.)

Defendants nevertheless maintain that "doctrinal developments" in recent years have "free[d]" up this Court to find that the Seventh Amendment is in fact binding on the states. (AB 65.) This argument suffers from three fatal flaws.

First, the Supreme Court's conclusion regarding the incorporation of the Seventh Amendment (or lack thereof) is an interpretation of the federal constitution. California's courts must follow it. "On matters of federal constitutional law, of course, we are bound by the decisions of the United States Supreme Court." (*Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 692.)

Second, even if this precedent could be revisited, principles of stare decisis counsel against doing so. (*Kimble v. Marvel Entertainment, LLC* (2015) 135 S.Ct. 2401, 2409.) Tellingly, the Supreme Court has declined to take up cases challenging the non-incorporation of the Seventh Amendment, including as recently as 2017. (See, e.g., *S.S. v. Bellevue Med. Ctr. L.L.C.* (2017) 138 S.Ct. 506.)

Finally, one of the Supreme Court cases cited by Defendants in support of their "doctrinal developments" claim, *McDonald v. Chicago* (2010) 561 U.S. 742, actually forecloses that argument. *McDonald*

reaffirmed that a few amendments "remain unincorporated," *including the Seventh Amendment.* (*Id.* at p. 765, fn. 13; *id.* at p. 784, fn. 30.) Justice Stevens made this point clear: "we have declined to apply several provisions to the States in any measure. See, *e.g., Minneapolis & St. Louis R. Co. v. Bombolis* ... (Seventh Amendment)." (*McDonald, supra*, 561 U.S. at p. 867 (diss. opn. of Stevens, J); *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.* (1st Cir. 2015) 798 F.3d 26, 29-30 [rejecting argument raised here].)[11]

Citing *Latta v. Otter* (9th Cir. 2014) 771 F.3d 456 and a concurring opinion in *Lockyer v. San Francisco* (2004) 33 Cal.4th 1055, Defendants assert that subsequent decisions "'not only suggest but make clear'" that prior Seventh Amendment cases are "no longer good law." (AB 66.) These decisions say nothing of the sort. Neither even mentioned the Seventh Amendment, and both predate *McDonald* and *Gonzalez-Oyarzun,* which re-affirm the non-incorporation of that amendment.

VIII. THIS IS NOT A CRIMINAL CASE.

Defendants contend that the penalties at issue in this case "are so extreme" that they amount to "criminal" punishment under the Sixth Amendment and "due process." (AB 66.) This argument is wrong as a matter of fact and law.

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[11] The other Supreme Court case cited by Defendants, *Timbs v. Indiana* (2019) 139 S.Ct. 682, also did not mention the Seventh Amendment, much less revisit the holding in *Bombolis*.

As a factual matter, it is premised on two baseless assumptions. The first is that the People are requesting "billions" of dollars in civil penalties. As demonstrated above, that argument is pure hyperbole. The second is that, regardless of what the People may seek, the trial court is actually going to impose "excessive" penalties. In essence, Defendants are assuming that the court will do something improper, so improper that criminal procedural rights should be applied.

As a legal matter, *every* California court to have considered the issue has held that UCL or FAL actions seeking civil penalties do not trigger criminal due process or Sixth Amendment rights. (See, e.g., *People v. Superior Court* (*Kaufman*) (1974) 12 Cal.3d 421, 431-33; *Cahuenga's the Spot, supra,* 234 Cal.App.4th at p. 1385 ["factually false" to claim UCL is a criminal prosecution]; *Bestline, supra,* 61 Cal.App.3d at p. 916 [right to jury in criminal cases "does not apply"]; accord *Witzerman, supra,* 29 Cal.App.3d at p. 177; see also *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 [UCL "contains no criminal provisions"].)

It is by now "firmly established that an action brought pursuant to the [UCL] seeks only civil penalties, and accordingly the due process rights which apply in criminal actions, including the right to a jury trial, need not be provided." (*People v. Toomey* (1984) 157 Cal.App.3d 1, 17.)

Defendants' reliance on *Hudson v. United States* (1997) 522 U.S. 93 is misplaced. Under *Hudson*, the primary factor for determining whether a

statute is criminal or civil is the legislature's intent. (*Id.* at p. 99.) That factor is dispositive unless there is the "clearest proof" to the contrary. (*Id.* at p. 100.) Only at this second stage does the multi-factorial test come into play. (*Ibid.*)

Defendants do not argue that the legislature intended penalties under the UCL and FAL as anything other than "civil." Nor could they. (See Bus. & Prof. Code, § 17206, subd. (a) [describing "a civil penalty...assessed and recovered in a civil action"]; § 17206, subd. (b) [setting forth factors to consider in assessing "the civil penalty"]; accord Bus. & Prof. Code, § 17536, subd. (a) & (b).)

Even at the second stage of the analysis, all of the factors relied upon in *Hudson* weigh against Defendants:

- monetary penalties have never "historically been viewed as punishment" (*Hudson, supra,* 522 U.S. at p. 104);
- such penalties do not involve "disability or restraint" or anything approaching "imprisonment" (*ibid.*, citations and quotations omitted.)
- neither the UCL or FAL requires "scienter" (*ibid.*);
- the UCL contains no criminal provisions, and although the FAL has a criminal component (not alleged here), "[t]his fact is insufficient to render" money penalties "criminally punitive" (*id.* at p. 105); and, finally,

- "the mere presence of [a deterrent] purpose is insufficient to render a sanction criminal." (*Ibid.*, quotations and citations omitted.)

In short, "there is little evidence, much less the clearest proof" that civil penalties in this case are actually criminal sanctions in disguise. (*Id.* at p. 104.)

CONCLUSION

The People respectfully request that the holding of the lower court be reversed.

Dated: April 5, 2019

Respectfully submitted,
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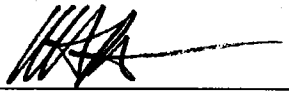
By: 

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

I certify that Real Party In Interest's Reply Brief On The Merits uses a 13-point Times New Roman font and, according to the computer program it was written in, contains 8,391 words, not including: the tables, the cover information (including the second page listing attorneys), this certificate, and the signature block.

Dated: April 5, 2019

Respectfully submitted,

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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.

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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 April 5, 2019, at Oakland, California.