In the Supreme Court of the State of California

NATIONWIDE BIWEEKLY ADMINISTRATION, INC., ET AL., Petitioners and Defendants, v. **THE SUPERIOR COURT OF ALAMEDA COUNTY,** Respondent, **THE PEOPLE OF THE STATE OF CALIFORNIA,** Real Party in Interest.	Case No. S250047

First Appellate District, Division 1, Case No. A150264
Alameda County Superior Court, Case No. RG15770490
Hon. George Hernandez, Judge (Retired); Hon. Ioana Petrou

BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF REAL PARTY IN INTEREST

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INTRODUCTION AND STATEMENT OF INTEREST

Like the District Attorneys in this case representing their constituents countywide, the Attorney General of California regularly brings actions in the name of the People statewide under the Unfair Competition Law, Business & Professions Code section 17200 et seq., and the False Advertising Law, Business & Professions Code section 17500 et seq., to protect consumers. The Attorney General therefore has a strong interest in the proper interpretation and development of the law involving these statutes.

This case raises the important question of whether there is a right to a jury trial of Unfair Competition Law claims and False Advertising Law claims under article I, section 16 of the California Constitution. That constitutional provision provides a right to a jury trial for civil claims at law, but not for claims in equity, as those categories were understood at the time of the Constitution's adoption in 1850. This Court has repeatedly recognized the equitable nature of Unfair Competition and False Advertising Law claims, and the overwhelming majority of decisions from the Courts of Appeal has affirmed the propriety of bench trials in actions brought by the People under those laws. The Court of Appeal in this case erred in holding to the contrary, giving dispositive weight to the District Attorneys' request for civil penalties—which was just one form of relief

sought, along with injunctive relief and restitution—rather than the gist of the cause of action, as this Court's precedents prescribe.

To assist the Court in deciding this matter, the Attorney General provides additional historical analysis, describes the important role of courts exercising equitable powers, notes the differences between the California and federal tests for determining entitlement to a jury trial in civil actions, and explains the role of remedies in determining whether a cause of action should be considered legal or equitable. As discussed below, applying the "gist of the action" standard, as of 1850, there was no cause of action at law that would provide redress for a wide range of forms of unfair competition, including false advertising, as the modern-day Unfair Competition and False Advertising Laws do. Instead, courts would have exercised equitable jurisdiction over the kinds of cases that are actionable today under the Unfair Competition and False Advertising Laws. Further, the relief these statutes authorize is equitable in nature: damages are not available, but injunctive relief and restitution are; courts consider equitable principles in assessing civil penalties; and civil penalties are not compensatory, but rather serve the Unfair Competition and False Advertising Laws' preventative purposes.

Consistent with the equitable roots of the Unfair Competition and False Advertising Laws, and therefore the state Constitution, as well as the general practice in California courts, the Attorney General's Office has a

longstanding practice of trying its Unfair Competition Law and False Advertising Law cases before the bench.

This Court should reverse the Court of Appeal and affirm the trial court's order granting the District Attorneys' motion to strike Defendants' demand for a jury trial.

ARGUMENT

I. ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION DOES NOT GUARANTEE A JURY TRIAL WHERE THE "GIST" OF THE ACTION IS EQUITABLE

As a statutory matter, the Legislature intended that both Unfair Competition Law and False Advertising Law claims be tried before the bench. The Unfair Competition Law provides that "the court" orders injunctions and/or restitution and "the court shall impose" civil penalties. (See Bus. & Prof. Code, §§ 17203 & 17206, subd. (b).) The False Advertising Law does the same. (See Bus. & Prof. Code, §§ 17535 & 17536, subd. (b).) Defendants have nonetheless asserted a right to a jury trial under the California Constitution, article I, section 16.[1] That provision

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[1] Federal and state guarantees of due process afford a right to a jury trial in state court criminal proceedings and civil proceedings that can result in involuntary commitment. (See *People v. Blackburn* (2015) 61 Cal.4th 1113, 1119-1120; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150 [Sixth Amendment right to jury trial in criminal actions applicable to the states by operation of the Fourteenth Amendment].) There is no potential for involuntary confinement in this civil Unfair Competition and False Advertising Law action.

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states that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." While the language of this provision may appear broad, as this Court has explained, the state constitutional right to trial by jury in civil cases simply preserves "the right as it existed at common law at the time the Constitution was adopted." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287 (*Chevrolet*); *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 995.)

A. Historically, Courts Sitting in Equity Have Played an Important Role in Administering Justice

As a threshold matter, it is worth noting the important role that bench trials, presided over by courts sitting in equity, have played in the English and United States court systems, and more specifically, the court system established in this state. By the time California adopted its constitution in

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In addition, while the Seventh Amendment guarantees a right to a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars," that right applies only to federal proceedings, and is one of the few provisions of the Bill of Rights that has not been held applicable to the states through the Fourteenth Amendment. (*McDonald v. City of Chicago* (2010) 561 U.S. 742, 765, fn. 13; see also *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 993, fn. 8).) While Defendants assert that the Seventh Amendment should apply against the states (Defendants' Answer Brief on the Merits ("ABM") at pp. 64-66), the United States Supreme Court has held to the contrary. (*Minneapolis & St. L.R. Co. v. Bombolis* (1916) 241 U.S. 211, 217.) Under these circumstances, "the prerogative of overruling its own decisions" lies with the U.S. Supreme Court. (*Rodriguez de Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. 477, 484.) Accordingly, this brief addresses only the right to jury trial under the California Constitution.

1850,[2] it was well established that courts exercising their equitable authority played an essential role in administering justice, adjudicating the numerous cases that the common law could not reach, and otherwise correcting shortcomings in the common law.

In his landmark work *Principles of Equity*, first published in 1760, the eighteenth-century Scottish lawyer, judge, and philosopher Henry Home, Lord Kames discusses the role of courts of equity at length. This treatise is recognized as "the first systematic monograph treatment of equity in English." (See Carr, *An Iron Mind in an Iron Body: Lord Kames and his* Principles of Equity (2013) Edinburgh School of Law Research Paper No. 2013/25, Abstract;[3] see also Rahmatian, Lord Kames: Legal and Social Theorist (2015) p. 317 [discussing Lord Kames' "remarkable" influence on colonial American leaders].) In Principles of Equity, Lord Kames observed that "equity in its proper sense, comprehends every matter of law that by the common law is left without remedy . . . ." (Kames, Principles of Equity (4th ed. 1800) p. 5.) It was the role of a court of equity to "correct or

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[2] This Court has referred to 1850 as the year "when the Constitution was first adopted," (see *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8), although the first California Constitution was actually ratified in 1849, before California became a state in 1850. (See Saunders, *California Legal History: The California Constitution of 1849* (1998) 90 Law Libr. J. 447, 450.)

[3] Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id =2282735> (as of Apr. 22, 2019).

mitigate the rigour, and what even in a proper sense may be termed, the *injustice* of common law." (*Id.* at p. 12, original italics.) In particular, Lord Kames noted, courts of equity had powers to order punishment where the common law could not. He explained, "It is an inviolable rule of justice as well as of expediency, [t]hat no man be allowed to reap the fruits of his fraud, nor to take benefit by any wrong he has done. If, by the tortious act, another be hurt in his rights or privileges, there is ground for reparation at common law . . . ." (*Id.* at p. 338.) However, "wrong may be done without impinging on any right or privilege of another; and such wrongs can only be redressed in a court of equity, by inflicting punishment in proportion to the offense. In slight offences it is satisfied with forfeiting the wrong-doer of his gain: in grosser offences, it not only forfeits the gain, but sometimes inflicts a penalty over and above." (*Id.* at pp. 338-339.)

More than eighty years later, United States Supreme Court Justice Joseph Story discussed similar principles in his treatise *Commentaries on Equity Jurisprudence, as Administered in England and America* ("*Commentaries*"). In the fourth edition of that work, published in 1846—just four years before California became a state—Justice Story explained that "one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest . . . ." (1 Story, Commentaries, *supra*, § 28, p. 28.) By contrast,

common law courts were "bound down to a fixed and invariable form of judgment . . . ." (*Ibid.*) Courts of equity could "administer remedies for rights, which rights, Courts of Common Law do not recognise at all . . . ." (*Id.* at § 29, p. 28.) For example, Justice Story noted, there were "many cases . . . of losses and injuries by mistake, accident, and fraud; many cases of penalties and forfeitures; many cases of impending irreparable injuries, or meditated mischiefs; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress; but which the Common Law takes no notice of, or silently disregards." (*Id.* at § 29, pp. 28-29, italics added.)

When California by Constitution created its court system, it elected to create a unified one, without separate "chancery courts" sitting in equity. (*De Witt v. Hays* (1852) 2 Cal. 463, 468-469; *Minturn v. Hays* (1852) 2 Cal. 590, 593.) And, by the Practice Act of 1851 (the precursor to the Code of Civil Procedure), the Legislature abolished "formal distinctions between common law and equity pleadings[.]" (*Smith v. Rowe* (1853) 4 Cal. 6, 7.) Still, the state's courts were empowered to apply equitable principles as appropriate, and in its early days, the Court regularly cited English precedents and other foundational works, including Justice Story's treatise, in discussing available claims and appropriate remedies. (See, e.g., *Naglee v. Palmer* (1857) 7 Cal. 543, 547 [citing Story's *Commentaries*]; *People v.*

Houghtaling (1857) 7 Cal. 348, 351; *Merced Min. Co. v. Fremont* (1857) 7 Cal. 317, 321.) And, as this Court then observed, by design, "the right of trial by jury does not necessarily attach in every case . . . ." (*Smith v. Rowe*, *supra*, 4 Cal. at p. 8 [also noting "the general tendency of the decided cases runs in favor of all controversies of an equitable nature being tried by the Court alone"].)

B. The "Gist" Inquiry Examines Whether the Cause of Action Was Historically Available at Law or Instead Is Essentially One in Equity

"As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity.' [Citations.]" (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 (*C & K Engineering*).) Whether an action should be deemed legal or equitable "is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact." (*Chevrolet*, *supra*, 37 Cal.2d at p. 287.) Courts must assess "the nature of the rights involved and the facts of the particular case" to determine whether the "gist of the action" is legal or equitable. (See *id.* at p. 299.) In determining whether a right to a jury trial attaches, courts consider whether a cause of action comparable to the claim at issue existed in 1850, was at that time considered an action at law, and had a recognized right to a jury trial. (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1009-1010 (*Franchise Tax Bd.*).)

This comparative analysis requires more than identifying superficial similarities. The *Franchise Tax Board* case is illustrative. There, the Court considered the question of whether a taxpayer had the right to a jury trial in an action for a refund of state income taxes. (See *Franchise Tax Bd., supra*, 51 Cal.4th at p. 1009.) The Court acknowledged that as a general matter, a demand for a tax refund in some respects resembled an action for assumpsit at common law. (See *id.* at pp. 1011, 1017.) Yet that was not enough to compel a jury trial. The Court proceeded to closely analyze the plaintiff's cause of action, and it concluded that the plaintiff's claim was "fundamentally different in character from" the kinds of tax refund claims that had been permissible in historic common law courts. (See *id.* at pp. 1011, 1018 & fn. 4.) The plaintiff's claim was against the government, and at "common law, sovereign immunity barred actions against the government, by way of jury trial or otherwise." (See *id.* at p. 1012.) By contrast, suits against private tax collectors were permitted at common law. (See *id.* at p. 1011.) Because of this distinction, the Court held that the plaintiff had no right to a jury trial. (*Id.* at p. 1018).

Similarly, in *C & K Engineering*, the true nature of the cause of action drove the outcome. The plaintiff sought "recovery of damages for breach of contract"—which might at first blush appear to be analogous to an action at law. (See *C & K Engineering*, *supra*, 23 Cal.3d at p. 9.) But the plaintiff based its action solely on the theory of promissory estoppel. (*Id.* at p.

5.) The Court concluded that no jury trial was necessary because "the gist" of a promissory estoppel action was equitable, and the doctrine supplying the cause of action was not recognized at common law but was at equity. (See *id.* at pp. 10-11.)

C. Monetary Remedies Based on Equitable Considerations Support a Conclusion That the Gist of an Action is Equitable

This Court has considered remedies in its analyses of whether there is a right to a jury trial, but has cautioned against rigid labeling of a given type of remedy as "legal" or "equitable." Instead, even when monetary remedies are sought, this Court has looked to the underlying purpose of the remedy and how the amount is to be calculated. When they are assessed based on equitable factors, they support the denial of a jury trial. (See, e.g., *C & K Engineering, supra*, 23 Cal.3d at pp. 8-9.) The Court applied this approach in *C & K Engineering*, in which it recognized that damages for breach of contract "ordinarily" might be considered a legal remedy, but then determined that the damages sought in that case were fundamentally equitable. (See *id.* at p. 9.) The Court explained that a demand for damages, whatever its label, should not compel a jury when the determination of their amount involves "weighing . . . equitable considerations" to avoid injustice, as it did in a promissory estoppel action. (See *id.* at p. 11.)

Defendants assert that the "gist of the action" test "is the same as the federal test" for determining whether there is a Seventh Amendment right to a jury trial. (Defendants' Answer Brief on the Merits ("ABM") at p. 44; see also *id.* at pp. 40, 46 [citing *Tull v. U.S.* (1987) 481 U.S. 412 (*Tull*)].) This is incorrect. In *Tull*, the United States Supreme Court held that for Seventh Amendment purposes, "characterizing the relief sought is 'more important' than" analogizing the cause of action. (*Tull, supra*, 481 U.S. at pp. 420-421.) In contrast, this Court has expressly rejected the view that courts should "focus not on rights but on remedies" in determining whether there is a jury trial right under article 1, section 16. (*C & K Engineering, supra*, 23 Cal.3d at p. 14 (dis. opn. of Newman, J.); see also Hamilton, *Federalism and the State Civil Jury Rights* (2013) 65 Stan. L.Rev. 851, 851, 853 [discussing how some states' constitutional jury right differs from the Seventh Amendment right]; see also *id.* at pp. 864-865, 870, 879-880, 884, 891 [discussing California's different approach to jury trials].) Under California law, if an otherwise "legal" remedy invokes or serves equity, a court trial is generally appropriate. (See *C & K Engineering, supra*, 23 Cal.3d at p. 10; see also *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 181-183 [civil penalties under the Safe Drinking Water and Toxic Enforcement Act of 1986 did not entitle defendant to jury trial where they were "highly discretionary" and "preventative rather than compensatory"

and "determined on the basis of equitable principles, designed to deter misconduct and harm"].[4])

II. THE "GIST" OF UNFAIR COMPETITION LAW AND FALSE ADVERTISING LAW ACTIONS IS EQUITABLE

A. Unfair Competition Law and False Advertising Law Actions Have No Historical Common Law Analog

Here, there is no common law analog for the causes of action under the Unfair Competition and False Advertising Laws. Defendants have attempted to analogize the Unfair Competition and False Advertising Laws' *remedy* of civil penalties to the remedy that could be obtained in a common law action for debt. (ABM at p. 46.) The similarities between these actions are, at best, superficial, in that both may result in monetary relief. But the gist of an action on a debt and an action under the Unfair Competition Law or the False Advertising Law are fundamentally different. When a district attorney or the Attorney General files an Unfair Competition or False Advertising Law claim, he or she is not attempting to recover money as a "party grieved." (See *Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, 484, fn. 18 (*Grossblatt*).) Rather, the Unfair Competition or False

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[4] *DiPirro's* analysis of the civil penalties in that case conforms to this Court's approach to remedies in *C & K Engineering*. To be sure, the First District Court of Appeal, in the decision below, criticized its own analysis of the penalties in *DiPirro*, but this criticism stemmed from its erroneous decision to "follow[] the approach . . . in *Tull* . . . ." (See *Nationwide Biweekly Admin., Inc. v. Superior Court* (2018) 24 Cal.App.5th 438, 442, 461-463.)

Advertising Law claim seeks to prevent harm to the public and to ensure a level playing field for those competitors who are playing by the rules.

In addition, the Unfair Competition and False Advertising Laws' penalties are discretionary and impossible to fix at the outset of a case, (see Section II.D., *infra*), which means that they would not have been obtainable through an action for debt. As one treatise explains, "the untranscendible limit" on actions in debt was that "the claim must be for a fixed sum." (See Maitland, The Forms of Action at Common Law (1910) p. 357 (Maitland).) That means the sum must be "certain," or "readily reducible to a certainty." (See *Grossblatt*, *supra*, 108 Cal.App.2d at p. 484.)[5] In *Grossblatt*, for example, the court held that treble recovery provisions of the Housing and Rent Act of 1947 were "in the nature of penalties," could have been sought through an action in debt at common law, and therefore required a jury trial. (*Id.* at pp. 485-486.) But in that case, penalties were set according to a clear statutory formula that left no room for the court's discretion. (See *id.* at p.

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[5] See also, e.g., *Grossblatt*, *supra*, at p. 484, fn. 18 [citing additional authorities]; Williams, An Introduction to the Principles and Practice of Pleadings in Civil Actions in the Superior Courts of Law at Westminster (1857) p. 59 ["The essential characteristic of the action of debt is, that the obligation is to pay . . . a sum, the amount of which is ascertainable and *reducible to a certainty*, by mere calculation," original italics]; Purdon and Stroud, A Digest of the Laws of Pennsylvania (5th ed. 1837) p. 598 ["[D]ebt, in legal signification, means a *certain, fixed* sum of money," original italics]; 2 Jacob and Tomlins, The Law Dictionary (1st Am. ed. 1811) p. 198 ["The legal acceptation of *debt*, is a sum of money due . . . where the quantity is fixed and specific," original italics].

477.) Conversely, in *People v. Craycroft* (1852) 2 Cal. 243, 244, this Court held that the state could *not* bring an action in debt for the violation of a penal law that was punishable by a fine of not less than $100 nor more than $1000, because the "penalty [wa]s not certain."

Given that an action for debt could not be the basis for seeking, for example, compensation for breach of contract because of the complexity and uncertainty associated with the necessary calculations, (see Maitland, *supra*, at p. 357), or the fine in *Craycroft*, then it cannot be an appropriate analog to claims under the Unfair Competition or False Advertising Laws, which allow for flexible, discretionary civil penalties.[6]

B. Unfair Competition Law Actions Are Equitable as Shown by Their Breadth and Flexibility

The California Supreme Court has repeatedly underscored the equitable underpinnings and origins of the Unfair Competition Law in cases stretching from *Weinstock, Lubin & Co. v. Marks* (1895) 109 Cal. 529 (*Weinstock*) to *Zhang v. Superior Court* (2013) 57 Cal.4th 364 (*Zhang*). Those cases' characterizations of unfair competition actions establish that courts deciding such claims must exercise flexibility and adaptability that is

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[6] In support of their contrary argument, Defendants cite dicta in *Chevrolet* that notes a number of pre-1850 English cases involving penalties and a jury trial. (See *Chevrolet, supra*, 37 Cal.2d at p. 295 & fn. 15.) By and large, though, those cases appear to involve determinate penalties (either a specific dollar amount, or treble the value of the illicit goods at issue). (See *ibid.*)

equitable in nature. While the right to a jury trial was not before the Court in those cases, their thorough explications of the Unfair Competition Law and its predecessors are relevant to understanding "the gist" of this statute. Furthermore, other 19th-century sources confirm that the Unfair Competition Law embodies principles that courts of equity applied when deciding historical cases of unfair business competition.

This Court has recently reaffirmed that the Unfair Competition Law is an "'*equitable* means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices.'" (*Zhang*, *supra*, 57 Cal.4th at 371, quoting *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150 (*Korea Supply Co.*), italics added; see also *Rose v. Bank of Am.* (2013) 57 Cal.4th 390, 397 [The "UCL provides [an] *equitable* avenue for prevention of unfair business practices," italics added]; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173 ["A UCL action is an *equitable* action," italics added].)

When discussing *why* the Unfair Competition Law is equitable in nature, the Court has often pointed to the statute's "broad" and "sweeping" prohibitions against unfair, unlawful, or fraudulent business acts or practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180-181 (*Cel-Tech*).) In describing the Unfair Competition Law's inclusive scope, the Court in *Cel-Tech* explained that "'[w]hen a scheme is evolved which on its face violates the

fundamental rules of honesty and fair dealing, a *court of equity* is not impotent to frustrate its consummation because the scheme is an original one.'" (*Id.* at p. 181, italics added, quoting *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698-699 (*American Philatelic*); see also *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 111-112 [Unfair Competition Law applies a standard of the kind used "to guide *courts of equity*," because "given the creative nature of the scheming mind . . . a less inclusive standard would not be adequate," italics added].)

The tradeoff to the Unfair Competition Law's wide reach is that it provides for limited, discretionary, non-compensatory remedies. (See *Korea Supply Co.*, *supra*, 29 Cal.4th at pp. 1144, 1150-1152.) Private plaintiffs may not obtain damages, only injunctive relief and restitution. (*Id.* at p. 1144.) Public prosecutors may seek penalties, but the amount of those penalties is subject to the court's weighing of any "relevant circumstances," including, but not limited to, the nature, seriousness, persistence, duration, willfulness, or number of instances of the misconduct, and the defendant's assets, liabilities, and net worth. (See Bus. & Prof. Code, § 17206, subd. (b).)

The Court has traced the flexible equitable underpinnings of the Unfair Competition Law to cases heard in courts of equity before 1850. *American Philatelic*, one of the cases on which *Cel-Tech* heavily relies, draws from *Weinstock*, one of the "leading cases on unfair competition" in

California at the time. (See *American Philatelic*, *supra*, 3 Cal.2d at p. 698.) According to *Weinstock*, courts of equity understood that when dealing with allegations of unfair competition, they should not adhere to "'fixed rules,'" for otherwise their "'jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive.'" (See *American Philatelic*, *supra*, 3 Cal.2d at p. 698, quoting *Weinstock*, *supra*, 109 Cal. at p. 539.)[7] *Weinstock* further provides numerous examples of English and American cases heard in courts of equity exercising jurisdiction over unfair business competition claims. (See *Weinstock*, *supra*, 109 Cal. at pp. 535-542.) These include pre-1850 cases such as *Croft v. Day* (1845) 7 Beav. 84 (*Croft*), and *Knott v. Morgan* (1836) 2 Keen 213 (*Knott*), which developed the principle that "'no man has a right to sell his own goods as the goods of another.'" (See *Weinstock*, 109 Cal. at pp. 541-542, quoting *Croft*.)

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[7] *Weinstock* does not provide a precise attribution for this quote, but it appears to come from a 1759 letter to Lord Kames from Philip Yorke, Lord Hardwicke, who, like Lord Kames, is recognized for his writings on equity. (See, e.g., *Philip Yorke, Lord Hardwicke*, Oxford Reference <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095920797> [as of Apr. 18, 2019].) That letter stated that "[W]ere a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief . . . the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive." (See 1 Story, Commentaries, *supra*, § 186 & fn. 5, p. 212.)

Like *Cel-Tech*, *American Philatelic*, and *Weinstock*, Justice Story's *Commentaries* confirm that courts of equity had broad, flexible jurisdiction over a variety of unlawful, unfair, or deceptive conduct, including business conduct. The *Commentaries* underscore that courts of equity avoided articulating boundaries to their jurisdiction over acts of "cunning, deception, or artifice, used to circumvent, cheat, or deceive another," "lest other means of avoiding the Equity of the Courts should be found out." (1 Story, Commentaries, *supra*, § 186, pp. 212-213; see also *id.*, § 189, p. 215.)

C. False Advertising Law Actions—a Subspecies of Unfair Competition Actions—Share These Same Equitable Qualities

The above analysis of the Unfair Competition Law applies with equal force to the False Advertising Law. According to the terms of the Unfair Competition Law, any violation of the False Advertising Law is also a violation of the Unfair Competition Law. (See Bus. & Prof. Code, § 17200; see also Papageorge, Cal. Antitrust & Unfair Competition Law (2016) § 17.03 [False Advertising Law violation "automatically triggers the remedies of both sections 17200 and 17500, including separate civil penalties."].)

Indeed, the state's Unfair Competition Law jurisprudence is in part grounded in pre-1850 cases addressing false advertising. In *Croft*, the defendant sold a product using a name and an image associated with a more

well-known company. The High Court of Chancery enjoined the conduct, holding that the defendant had no right to "'induc[e] the public'" into thinking that his goods were that of, or associated with, someone else's. (See *Weinstock*, *supra*, 109 Cal. at p. 542, quoting *Croft*, *supra*, 7 Beav. 84; see also 30 The Legal Observer (1845) p. 497 [discussing *Croft*].) Similarly, in *Knott*, the High Court of Chancery enjoined a company from selling trolley transportation services using a name, uniforms, and a vehicle paint color resembling its rival's. (See *Weinstock*, *supra*, 109 Cal. at pp. 541-542.) Justice Story's *Commentaries*, too, make clear that courts of equity had the power to enjoin various forms of false advertising. (See 2 Story, Commentaries, *supra*, at § 951, pp. 283-284 [discussing *Knott*, among other cases].)

Thus, courts since before the time of this State's founding have recognized that false advertising is a species of unfair competition, actionable in equity.

D. Civil Penalties Under the Unfair Competition and False Advertising Laws Serve Equitable Principles

Because the Unfair Competition and False Advertising Laws are not simply "'all-purpose substitute[s] for a tort or contract action'" that would be recognized at common law, they do not permit damages. (See *Korea Supply Co.*, *supra*, 29 Cal.4th at p. 1150.) The remedies that are available—civil penalties in actions by public prosecutors, and restitution

and injunctive relief—all entail equitable evaluations. When public prosecutors seek civil penalties in Unfair Competition Law and False Advertising Law actions, the court decides the amount of penalties based on any "relevant circumstances," including, but not limited to, those enumerated in the statute. (See Bus. & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b).) Penalties can range anywhere from a de minimis amount to $2,500 for each violation. (See Bus. & Prof. Code, §§ 17206, subd. (a), 17536, subd. (a).) The purpose of the penalties is to prevent wrongdoing: as *People v. Jayhill* (1973) 9 Cal.3d 283, 288, footnote 3 explains, the Legislature added the penalties provision to the False Advertising Law in 1965 to improve the statute's efficacy at "stop[ping] false advertising rackets." In 1972, the Legislature incorporated an identical penalty provision, for the same reasons, into the Unfair Competition Law. (See Review of Selected 1972 Code Legislation (Cont. Ed. Bar 1972) pp. 341-342.) And since the Unfair Competition and False Advertising Laws' penalties, like the damages in *C & K Engineering*, depend on a balancing of many factors, and have a prophylactic purpose, they are also fundamentally equitable.

In sum, while there is no common law counterpart for either the Unfair Competition Law or False Advertising Law causes of action or their remedies, Unfair Competition Law and False Advertising Law cases closely resemble actions over which courts of equity would have exercised

jurisdiction, and the discretionary, prophylactic nature of their penalty provisions only reinforce that resemblance.

CONCLUSION

For the foregoing reasons, this Court should hold that the California Constitution, article I, section 16, does not require a jury trial in actions brought under the Unfair Competition or False Advertising Laws.

Dated: May 6, 2019

Respectfully submitted,

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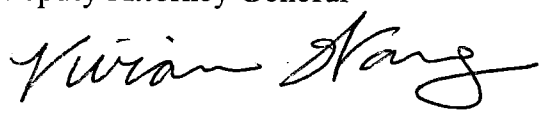

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Attorneys for Amicus Curiae, the Attorney General of California

CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of the Attorney General as *Amicus Curiae* in Support of Real party in Interest uses a 13 point Times New Roman font and contains 4,445 words.

Dated: May 6, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Nationwide Biweekly Administration, Inc. (Amicus)**

No.: **S250047**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On May 6, 2019, I served the attached

- **BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF REAL PARTY IN INTEREST**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

See attached service list

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2019, at San Francisco, California.

Tony Tran
Declarant

Signature

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