IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONWIDE BIWEEKLY ADMINISTRATION, INC.; LOAN PAYMENT ADMINISTRATION, LLC; and DANIEL LIPSKY, 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 Iona Petrou

****

APPLICATION BY THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST, THE PEOPLE OF THE STATE OF CALIFORNIA

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The attorneys on the following page represent *amicus curiae*, the California District Attorneys Association:

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APPLICATION TO FILE AMICUS CURIAE BRIEF

The California District Attorneys Association (CDAA) respectfully applies to this Court for leave to file a brief as *amicus curiae* in support of the Real Party in Interest, the People of the State of California, and the position that civil law enforcement actions brought by prosecutors to protect the public under the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.) and the False Advertising Law (FAL; Bus. & Prof. Code, § 17500 et seq.) are equitable in nature—even when civil penalties are among the remedies sought by prosecutors—such that the parties are not entitled to a jury trial under the California Constitution.

CDAA has approximately 2,500 members including the elected district attorneys and prosecutors employed by the district attorneys, the Attorney General's Office, and various local law enforcement offices. In existence for almost 100 years, CDAA regularly presents the perspective of prosecutors on various matters affecting law enforcement and the administration of justice.

State and local prosecutors play a leading role in safeguarding and vindicating the rights of the public through civil law enforcement efforts under a variety of statutes including the UCL and FAL. For more than 75 years, prosecutors (and the courts and the defense bar) have operated under

the established precedent that public UCL and FAL actions are tried before the bench. The First District's holding requiring jury trials in these public enforcement actions significantly alters the long-standing way these matters are handled. In view of the potentially dramatic effect this may have on how local prosecutors evaluate and handle these cases, given the increased devotion of time and resources that will be necessary to prosecute these matters through trial, CDAA respectfully offers its views on this subject.

DATED: May 1, 2019

Respectfully submitted,

MARK ZAHNER
Chief Executive Officer
California District Attorneys Association

/s/Matthew T. Cheever
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INTRODUCTION AND STATEMENT OF INTEREST

The California District Attorneys Association (CDAA) is composed of the elected district attorneys and prosecutors employed by the district attorneys, the Attorney General's Office, and various local law enforcement offices, who are charged with criminal and civil law enforcement in California.

The Consumer Protection Committee of CDAA is the standing committee of California prosecutors actively engaged in the enforcement of our state laws to combat consumer fraud, deception, and unfair competition, including violations of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 *et seq.*) and the False Advertising Law (FAL; Bus. & Prof. Code, § 17500 *et seq.*) such as those alleged in this matter. The interest of CDAA here stems from its commitment to the enforcement of our state's laws promoting a free and fair marketplace for all California consumers and businesses.

As the principal spokespersons for California's local prosecutors, CDAA offers its views to assist this Court in determining the proper trier of fact in law enforcement actions brought under the UCL and the FAL, our state's primary consumer protection statutes, when prosecutors seek civil penalties along with other available remedies under the statutes.

For more than 75 years, UCL and FAL actions have been viewed as equitable and tried before the bench. That was and is correct. Both actions provide an "equitable means" and "streamlined procedure" to prevent acts of unfair competition. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.)

After civil penalties were added to the list of remedies available to prosecutors under both statutes over 40 years ago, these actions continued to be uniformly tried before the bench. Again, that was and is correct. This Court has recognized that public actions seeking penalties are still equitable in nature. (*See, e.g., Solus Industrial Innovations, LLC v. Superior Court* (2018) 4 Cal.5th 316, 340.)

Countless reported UCL and FAL decisions confirmed this status quo, until the First District's decision here. (*Nationwide Biweekly Administration, Inc. v. Superior Court* (2018) 24 Cal.App.5th 438, 455-456 (*Nationwide*).) *Nationwide* holds that article I, section 16 of the California Constitution affords a right to jury trial in public UCL and FAL actions where prosecutors seek civil penalties along with injunctive relief or restitution. This decision should not stand.

As this Court is well aware, California prosecutors are no strangers to jury trials. Prosecutors try thousands of cases to juries throughout the

state every year. Prosecutors respect the crucial role that juries play in in our judicial system.

However, courts of equity and bench trials exist in California jurisprudence for a reason. The bench is best suited for evaluating and weighing complex factors and considerations and reaching equitable results. This is especially true in UCL and FAL actions where, in many instances, it would be difficult or impossible to successfully distill such complex or abstract issues—including notions of fairness, ethics, and morality—adequately into jury instructions, but which judges have successfully handled for decades. Moreover, bench trials are typically shorter, more efficient, and less expensive than jury trials, i.e. more "streamlined." For decades, these more streamlined proceedings have preserved valuable court resources, and allowed local prosecutors to devote their scarce resources to as many appropriate investigations and prosecutions as possible.

Moreover, UCL and FAL actions are "essentially" equitable, and the relief available under both the UCL and FAL "depend upon the application of equitable doctrines." Therefore, the parties to a UCL or FAL action are not entitled to a jury trial under the California Constitution.

For all of these reasons, the Court should follow the long line of precedent holding that the UCL and FAL are equitable actions, and do not

afford a right to a jury trial. Accordingly, the First District's holding should be overturned, and law enforcement UCL and FAL actions—including those where prosecutors seek civil penalties along with injunctive relief or restitution—should continue to be heard by the bench, as they have been successfully for more than 75 years.

ARGUMENT

I. THERE IS NO RIGHT UNDER THE CALIFORNIA CONSTITUTION TO A JURY TRIAL IN UCL OR FAL LAW ENFORCEMENT ACTIONS—EVEN WHEN CIVIL PENALTIES ARE AMONG THE REMEDIES SOUGHT.

A. The Parties Are Not Entitled To A Jury Trial Where The Gist Of The Action Is Equitable, Rather Than Legal.

Article I, section 16 of the California Constitution broadly states that "[t]rial by jury is an inviolate right and shall be secured to all … ." However, case law has limited the right to a jury trial to "the right as it existed at common law in 1850, when the [California] Constitution was first adopted." (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1010, quoting *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 (*C & K Engineering*).)

As this Court stated in *C & K Engineering*:

> If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. 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.* A jury

> trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law. (Citations omitted.) On the other hand, *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.*

(*Id.* at p. 9, quoting *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 299 (*1941 Chevrolet*) (emphasis added); see also *Shaw v. Superior Court* (2017) 2 Cal. 5th 983, 994-95.)

As discussed below, UCL and FAL actions are "essentially" equitable and the relief available under both the UCL and FAL "depends upon the application of equitable doctrines." Therefore, the parties to UCL and FAL actions are not entitled to a jury trial.

B. The Gist of UCL And FAL Actions Is Equitable.

1. The Court of Appeal mischaracterized the People's entire action as "a civil penalty suit."

In determining the right to a jury trial, the *C & K Engineering* test requires an analysis of whether an action is "essentially one in equity." (See *C & K Engineering*, *supra*, 23 Cal.3d at p. 9.) In making this determination, "the prayer for relief in a particular case is not conclusive." (*Id.*)

Rather than assess whether the UCL and FAL are essentially *equitable actions*, the *Nationwide* court focused solely on the People's prayer for relief, and then only on one requested remedy among many. Simply because the People sought civil penalties—and notwithstanding that

the People also sought injunctive relief and restitution for victims—the court below categorized the People's *entire* action as "a civil penalty suit". (*Nationwide, supra,* 24 Cal.App.5th at p. 453, quoting *Tull v. United States* (1987) 481 U.S. 412, 418.) This conclusion effectively ended the court's inquiry into whether UCL and FAL actions are essentially equitable because it found, quoting *Tull*, that "a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law." (*Id.*)

That prosecutors here sought civil penalties as one type of remedy among several, however, does not end the inquiry under California law. If it did, there would be no need to engage in the type of analysis that this Court performed in *C & K Engineering*. In that case, this Court held that the Plaintiff's *action* was essentially one in equity despite the fact that the plaintiffs there sought a clearly legal remedy (damages) in addition to multiple equitable remedies.[1] (*C & K Engineering*, *supra*, 23 Cal.3d at p. 9.)

UCL and FAL actions are not simply suits to recover civil penalties, but rather broad causes of action to stop unfair, unlawful, and fraudulent

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[1] While damages are clearly "legal" in nature, the People contend that civil penalties under the UCL and FAL serve equitable purposes. (See section I.B.3.a, *infra*.)

business activity, and false or misleading advertising. Although civil penalties are *among the remedies* available in UCL and FAL suits, they are not the only tool in the prosecutor's tool belt to stop violations of the law. Injunctive relief and restitution are also available to prosecutors, and are oftentimes more important to combat and stop unfair or unlawful practices.

Moreover, none of the available UCL and FAL remedies—injunctive relief, restitution, civil penalties—can be awarded except by the application of equitable doctrines; i.e., the statutes and related case law that have developed over the past 75 years to protect consumers, and that have heretofore been treated as equitable.

Furthermore, the remedies available under the UCL and FAL should not be conflated with the underlying actions themselves. The remedies, including civil penalties, are not elements of the UCL or FAL actions. (*People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1379-80, citing *People v. Superior Court (Jayhill Corp.)* (1973) 9 Cal.3d 283, 288.) Nor do the remedies—especially one type of remedy among several—define the causes of action. As will be discussed in detail below, the essential nature of the UCL and the FAL and their associated remedies, when considered as a whole, is equitable.

2. UCL and FAL actions are not analogous to any pre-1850 common law action.

The first step in the analysis is to determine whether UCL or FAL actions are analogous to an action that existed at common law in 1850 when the California Constitution was enacted. (See *Franchise Tax Bd., supra,* 51 Cal.4th at pp. 1009-1010.)

The *Nationwide* court, following the rationale in *Tull*, found that UCL and FAL actions in which prosecutors seek civil penalties are analogous to a common law "action in debt", which were historically tried in courts of law. (*Nationwide, supra,* 24 Cal.App.5th at p. 446, citing *Tull, supra*, 481 U.S. at pp. 417-18.) This analysis is flawed for two reasons.

a. The UCL and FAL are not analogous to "actions in debt," which were traditionally for a fixed or determinate sum.

First, "actions in debt" at common law were actions to recover a fixed sum. (See *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"]; see also Maitland, The Forms of Action at Common Law (1910) p. 357 ["the untranscendible limit" on actions in debt was that "the claim must be for a fixed sum"].) The amount of civil penalties in a UCL or FAL action are far from fixed, and can vary from as low as $.01 to as high as $2,500 per violation. (Bus. & Prof. Code, §§ 17206 and 17536.) Judges have extremely broad discretion in setting penalties, after evaluating all relevant factors including the six set forth in the statutes, and will only be overturned for an abuse of that discretion.

(See *id.*; *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1250.) Indeed, *Nationwide* recognized that an "action (writ) of debt was the general remedy at common law for the recovery of *all sums certain, or sums readily reducible to a certainty*[.]" (*Nationwide, supra,* 24 Cal.App.5th at p. 454, quoting *Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, 484; emphasis added.), Despite finding that civil penalties in UCL and FAL actions are analogous to actions in debt for a sum certain, the court also contradictorily held that "the *amount* of any statutory penalties [in UCL or FAL actions] is committed to the discretion of the trial court." (*Id.* at p. 456; emphasis in original.)

b. The UCL and FAL were created by the Legislature precisely because the common law was inadequate to protect consumers.

Second, and more fundamentally, a review of the historical record reveals that there are simply no common law analogs for UCL and FAL *actions*. "At common law, deceived consumers had no claim for unfair competition . . . deceived consumers were left without a claim or a remedy. This was the era of *caveat emptor*." (Stern, Bus. & Prof. C. §17200 Practice (2018) §2:3, p. 2-1, citing Divelbiss, Prevention of Unfair Business Practices in California: A Proposal for Effective Regulation (1980) 32 Hastings L.J. 229, 236-37.) The common law tort of unfair competition was originally aimed only at protecting one business from another:

> [It] developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection . . . Expansion of legal remedies against deceptive business practices occurred not so much through the common law as through the enactment of statutes . . . The primary purpose of these statutes was to "extend[] to the entire consuming public the protection once afforded only to business competitors."

(*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263, quoting *Barquis v. Merchants Collection Assn. of Oakland* (1972) 7 Cal.3d 94, 109.)

Therefore, in 1933, the Legislature greatly expanded Civil Code section 3369 to prohibit unfair competition, which was defined to include "unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by Penal Code Sections 654a, 654b, or 654c." (Cal. Stats. 1933, ch. 953, § 1, p. 2482.)[2] Despite this broad language, courts applying section 3369 remained so tethered to the common law understanding that unfair competition actions were only to protect competing businesses, that "[d]uring the first three decades following the 1933 amendment, the [UCL] was used principally in name

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[2] The previous provisions of section 3369 had only addressed the availability of civil remedies in cases of penalty, forfeiture, or criminal violation. (See Papageorge & Fellmeth, California White Collar Crime & Business Litigation (5th ed. 2016) § 3.42, p. 276.) In 1977, the UCL was moved to section 17200 of the Business and Professions Code. (Cal. Stats. 1977, ch. 299 § 1, p. 1201.)

infringement cases." (Papageorge, The Unfair Competition Statute: California's Sleeping Giant Awakens, 4 Whittier L.Rev. 561, 565 (1982) [citing cases].) Courts were clearly uncomfortable applying the new law to the full extent of its actual language, likely because the sweeping prohibition of unfair competition and protection of consumers had no antecedent. (See Howard, Former Civil Code Section 3369: A Study in Judicial Interpretation (1979) 30 Hastings L.J. 705, 709 ["The confusion in development indicates that attorneys and judges were unsure as to how broad the statutory language was intended to be and that the social incentive that would encourage lawyers to focus on section 3369 itself as a remedy for a wide variety of unfair business practices did not yet exist."].)

By 1972, however, this Court plainly stated that "section 3369 indicates that unfair competition *cannot be equated with the common law definition of unfair competition. . . .*" (*Barquis, supra,* 7 Cal.3d at p. 109 [internal quotations omitted; emphasis added].) Indeed, this Court found that:

> [T]he Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, although most precedents under section 3369 have arisen in a "deceptive" practice framework, even these decisions have frequently noted that the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive. [citation omitted] . . . In permitting

> the restraining of all "unfair" business practices, *section 3369 undeniably establishes only a wide standard to guide courts of equity*; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate.

(*Id.* at p. 111-112 [emphasis added].)

Beyond the intentionally broad language used by the Legislature to combat "unfair" competition, this Court has also interpreted the "unlawful" prong of the UCL to be equally broad, including "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Id.* at p. 113; see also *Aryeh v. Canon Bus. Sols., Inc.* (2013) 55 Cal.4th 1185, 1196 [describing the UCL as a "chameleon" that "borrows violations of other laws and . . . makes [them] independently actionable." (citations omitted)].)

Similarly, the FAL created a new cause of action to prohibit false or misleading advertising, which was far broader than traditional common law fraud actions. (See Cal. Stats, 1941, ch. 63, § 1 p. 727.) Common law fraud theories were incapable of protecting consumers and competitors from false or misleading advertising because of the difficulty of proving traditional common law requirements of knowledge of actual falsehood and reasonable reliance. (See Papageorge & Fellmeth, California White Collar Crime & Business Litigation (5th ed. 2016) § 3.2, p. 234.) In contrast, the FAL prohibits making a statement that the speaker knows, or by the exercise of

reasonable care should know, is false or misleading. (Bus. & Prof. Code, § 17500.) A statement is misleading if it "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].) Proof of actual deception or harm to a consumer is not required as they were previously under the common law. (See, e.g., *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951 (*Kasky*); *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332.)

The *Nationwide* court erred by shoehorning these modern UCL and FAL actions into fundamentally different common law causes of action. The court cited *pre-1850* examples in which penalties "paid to the crown" were tried in courts of law. (See *Nationwide*, *supra*, 24 Cal.App.5th at p. 448, citing *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 295.) However, the *Nationwide* court failed to examine, beyond the existence of penalties, whether these common law cases bore any resemblance to modern UCL and FAL actions, which allow a party to challenge *any* unlawful, unfair, or fraudulent business practice, or *any* untrue or misleading advertising, and to pray for an injunction, restitution, and other equitable relief in addition to non-determinate penalties. Notably, *1941 Chevrolet* and *Tull*, cases on which *Nationwide* heavily relied, also failed to examine the essential nature of the underlying action in the historical cases they cited beyond the fact

that at common law some of the cases brought by the government for penalties were tried by a jury. (See, *e.g.*, *Isabell Fortescues Case* (1611), 145 Eng.Rep. 324 [action for penalty for absence from church]; *Stevens* v. *Duckworth* (1775 or 1776) 145 Eng.Rep. 486 [action for forfeiture of five pounds a day for selling wine without a license]; *Atty. Gen.* v. *Brewster* (1795) 145 Eng.Rep. 966 [action for a penalty for concealing soap]; *Atty. Gen.* v. *Brown* (1801), 145 Eng.Rep. 1129 [action for penalties for assisting in unshipping spirituous liquors and tobacco before the duties were paid]; *Atty. Gen. v. Horton* (1817) 146 Eng.Rep. 451, 451–452 [action for a penalty for smuggling salt].)

Neither Petitioners, nor the *Nationwide* court below, point to a truly analogous pre-1850 cause of action to the UCL or FAL at common law because such causes of action simply did not exist in any form prior to the passage of the UCL and FAL.

Moreover, none of the *post-1850* California cases cited by Petitioners to support their assertion that "[t]his State's early courts had jury trials for civil actions where an offense is created by statute, and a penalty inflicted" (Answering Brief 30) analyzed causes of action that were analogous to UCL or FAL actions. (See, e.g., *O'Callaghan v. Booth* (1856) 6 Cal. 63, 65-66 [civil action by private plaintiff seeking treble damages for forcible entry and unlawful detainer]; *Orcutt v. Pacific Coast Ry. Co.*

(1890) 85 Cal. 291, 296–297 [case involving a statute that required a train to ring its bell before crossing a road brought by a private plaintiff seeking damages related to the death of a horse]; *Greenberg v. Western Turf Assn.* (1905) 148 Cal. 126, 127 [action by private plaintiff to recover a "statutory penalty" for ejection from a race course]; *1941 Chevrolet*, supra, 37 Cal.2d at p. 286 [statute providing for seizure of a car used to sell or transport any narcotic, in which equitable remedies were not provided by statute, nor sought by the prosecution]; *Grossblatt*, *supra*, 108 Cal.App.2d at pp. 484-485 [statute at issue provided for treble damages for rent charged by the landlord over the maximum, but which did not provide for equitable relief].)

3. UCL and FAL actions are "essentially equitable" and have been treated as equitable for more than 75 years.

Since the UCL and FAL have no common law analog, this Court must decide whether the UCL and FAL are essentially equitable actions and whether the relief they provide depends upon the application of equitable doctrines. (*C & K Engineering*, *supra*, 23 Cal.3d at p. 9.) In the more than seventy-five years since the UCL and FAL were created, this Court and others have repeatedly characterized UCL actions as equitable. (See, *e.g.*, *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 771 [describing the relief authorized by the UCL as "equitable"]; *Barquis*, *supra*, 7 Cal.3d at p. 112 ["In permitting the

restraining of all 'unfair' business practices, section 3369 undeniably establishes only a wide standard to guide courts of equity . . ."]; *Korea \supra* 29 Cal.4th at p., 1144 ["UCL action is equitable in nature"]; *Cortez v. Purolater Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173 ["UCL action is an equitable action"]; *Solus*, *supra*, 4 Cal.5th at p. 340, quoting *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371 ["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.'" Emphasis in original)].)

Courts have consistently analogized the FAL to the UCL and recognized that the FAL is also grounded in "equitable principles." (See, e.g., *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320 [stating that the FAL "is equally comprehensive [as the UCL] within the narrower field of false and misleading advertising."]; *Cahuenga's the Spot, supra,* 234 Cal.App.4th at 1379 [noting the "congruence of language and the legislative history" of the FAL and UCL]; see also *Fletcher v. Sec. Pac. Nat'l Bank* (1979) 23 Cal.3d 442, 452.)

Moreover, this Court has also described the *remedies* available under the UCL and FAL, including civil penalties, as equitable. In *Solus*, a case brought by the Orange County District Attorney which this Court

acknowledged was "an action for civil penalties" under the UCL and FAL (*Solus, supra*, 4 Cal.5th at p. 323), this Court stated just last year that "the UCL does not serve as a mere enforcement mechanism. It provides its own distinct and limited *equitable remedies* for unlawful business practices, using other laws only to define what is 'unlawful.'" (*Id.* at p. 341, quoting *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 397 (emphasis added).)

"Thus, 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.) Indeed, the very name of the cause of action – the *unfair* competition law – reinforces that its purpose was to apply equitable principles to root out conduct that was not actionable at law. Over decades of jurisprudence, California courts have consistently found that UCL and FAL actions, including their remedies, are equitable.

4. That civil penalties were added to the remedies available to prosecutors in UCL and FAL actions many decades after their creation did not change their fundamental nature from equitable to legal.

For decades, the remedies available under the UCL and FAL were limited to various forms of equitable relief, including injunctive relief and

restitution. (See *Jayhill, supra*, 9 Cal.3d at p. 286; *People ex rel. Mosk v. National Research Co.* (1962) 201 Cal. App. 2d 765, 775-776.) The UCL and FAL were indisputably equitable actions. Civil penalties were not added to the list of available remedies under the FAL until 1965 and under the UCL until 1972, and were only made available to prosecutors in law enforcement actions brought on behalf of the People of the State of California. (See Cal. Stats. 1965, ch. 827, § 1 at 2419 [FAL]; Cal. Stats. 1972, ch. 1084, § 2, at 2021 [UCL].) The question, then, is whether by adding civil penalties as one form of relief among several already available to prosecutors, the Legislature unwittingly converted what was clearly an equitable cause of action into a legal one. Based on this Court's holding in *C & K Engineering*, the answer is "no."

As this Court stated in *C & K Engineering*, "the prayer for relief in a particular case is not conclusive." (*C & K Engineering, supra*, 23 Cal.3d at p. 9.) Just because "one of a full range of remedies" sought is legal does not guarantee the right to a jury trial. (*Id.*) The fact that damages—the most quintessentially legal of all remedies—was one of the remedies sought in that case was not "conclusive" in determining the right to a jury trial. (*Id.*) Similarly here, that a prosecutor seeks civil penalties among several other clearly equitable remedies available under the UCL or FAL, is not "conclusive" in determining the right to a jury trial.

a. Civil penalties under the UCL and FAL are equitable.

An award of civil penalties under the UCL and FAL requires "the application of equitable doctrines." None of the available UCL or FAL remedies—including civil penalties—can be awarded except by the application of these equitable doctrines.

Moreover, as the *Nationwide* court itself recognized, setting and awarding penalties in a UCL or FAL action involves a high degree of judicial discretion which has traditionally been subject to great deference by reviewing courts. (See *Nationwide*, *supra,* 24 Cal.App.5th at p. 456; see also *JTH Tax, supra,* 212 Cal.App.4th at p. 1250.) It requires courts to weigh and balance numerous factors, including those set forth by statute. (See Bus. & Prof. Code, §§ 17206 and 17536.) Chief among those factors is determining the number of violations, which is no easy task. As one court stated, "[i]t is up to the courts to determine what constitutes a violation. [Business and Professions Code] *sections 17206 and 17536 fail to specify what constitutes a single violation,* ***leaving it to courts to determine*** *appropriate penalties* on a case-by-case basis." (*People ex rel Kennedy v. Beaumont Inv., Ltd.* (2003) 111 Cal.App.4th 102, 127-128, citing *People v. Toomey* (1984) 157 Cal.App.3d 1, 22 (emphasis added; citations, quotations, and brackets omitted).)

In *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 182, the court, in holding that civil penalties sought by the plaintiff for violations of Proposition 65, the California Safe Drinking Water and Toxic Enforcement Act of 1986,[3] did not afford the right to a jury trial, stated:

> [C]ivil penalties for violations of the Act are assessed upon consideration of articulated factors that do not primarily take into account any harm suffered by the plaintiff. (§ 25249.7, subd. (b)(2).) Where, as here, the statute has ***delegated the assessment of civil penalties in accordance with a highly discretionary calculation that takes into account multiple factors, this is the kind of calculation traditionally performed by judges rather than a jury***, and does not require a jury trial for that purpose in a civil action.

(Emphasis added.)

Moreover, civil penalties under the UCL and FAL serve equitable purposes. As this Court previously held, civil penalties were added to the FAL:

> [B]ecause the injunction and misdemeanor provisions of the old law were not adequate to stop false advertising rackets. The injunction is little more than a cease and desist order. The guilty party keeps his gains and is merely ordered not to defraud people in the same way again.

(*Jayhill, supra*, 9 Cal. 3d at p. 289 n.3.) Civil penalties were added to the UCL in 1972 for similar reasons. (Sen. Com. on Judiciary, Analysis of

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[3] CDAA asserts that awarding civil penalties under Proposition 65 requires a similar discretionary process as awarding civil penalties under the UCL and FAL. (Compare Bus. & Prof. Code, §§ 17206, subd. (b) and 17536, subd. (b), with Health & Saf. Code, § 25249.7, subd. (b)(2).)

Assem. Bill No. 1937 (1972 Reg. Sess.) as amended May 25, 1972 ["[T]he allowance of civil penalties, in addition to the requested injunctive relief, will provide a sufficient deterrent to the resumption of these unlawful practices."].) Securing compliance and deterring future violations, as opposed to compensating a plaintiff for actual harm or damages, is essentially equitable. (See *DiPirro, supra,* 153 Cal.App.4th at p. 183; *Korea Supply Co., supra,* 29 Cal.4th at p. 1148; see also *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-48; *cf. State of Vermont v. Irving Oil Corp.* (*Irving Oil Corp.*) (Vt. 2008) 955 A.2d 1098, 1107 ["[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)].)

Civil penalties serve other equitable purposes as well. With the passage of Proposition 64 in 2004, civil penalties under the UCL and FAL "shall be for the exclusive use [by prosecutors] for the enforcement of consumer protection laws." (Bus. & Prof. Code, §§ 17206, subd. (c) and 17536, subd. (c).) (Cf. *Irving Oil Corp., supra,* 955 A.2d at p. 1107 [civil penalties serve the purpose of reimbursing government "for enforcement expenses and other costs generated by the violation"].)

Since civil penalties under the UCL and FAL depend upon the application of equitable doctrines and serve equitable purposes, they do not change the underlying equitable nature of UCL and FAL actions.

b. If the Court considers any remedies in determining whether the UCL and FAL are "essentially equitable," it should consider all of the remedies.

However, even assuming *arguendo* that civil penalties are essentially legal rather than equitable, in law enforcement UCL and FAL actions, injunctive relief and restitution—clearly equitable forms of relief—are also available to prosecutors. In fact, in UCL actions an injunction is the "primary form of relief available under the UCL to protect consumers from unfair business practices" (see *In re Tobacco II* (2009) 46 Cal.4th 298, 319), and restitution is an available "ancillary" but important form of relief. (See *Jayhill, supra*, 9 Cal. 3d at p. 286.) Merely adding civil penalties to the mix does not convert a clearly equitable cause of action into a legal one.

In *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 353–54, the court, applying the *C & K Engineering* test, held:

> ***[T]he bulk of the relief sought here, under both the nuisance and easement claims, was equitable.*** In addition to the prayer for abatement, the Wolfords requested that the Thomases be enjoined from maintaining the penthouse addition and that the City of San Francisco be authorized to demolish it if the Thomases did not. Also, the Wolfords prayed for a declaration that they possessed an easement for air, light, heat, ventilation and view over the Thomases' roof. ***The fact that the Wolfords' complaint also sought "damages according to proof" does not convert this essentially***

> ***equitable action into a legal one. It was infeasible for the court to sever the legal claim from the equitable one here.*** Moreover, the damage claims were incidental to the equitable claims. If the Wolfords were to prevail and damages were awarded, it would be primarily on a basis of the court fashioning a remedy other than demolishing the penthouse. One of the aspects of an equitable action is the balancing of the interests of the parties. To do equity a trial court must have various options available to it including that of awarding damages. In sum, the trial court's action of granting the Thomases' motion for court trial was correct. The Wolfords were not entitled to a jury trial on their claims.

(Emphasis added.)

In law enforcement UCL and FAL actions, "the bulk of the relief" is equitable. The primary and most immediate goal of virtually all law enforcement UCL and FAL actions is to stop the unlawful conduct. This is why injunctive relief (including preliminary injunctions and temporary restraining orders) is the primary remedy under the UCL and FAL. Penalties were added much later to reinforce injunctive relief, and with the passage of Proposition 64 in 2004, to help finance law enforcement actions.[4]

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[4] All of the Legislature's major amendments to the UCL and FAL were intended to expand the scope of the statutes and give a full measure of equitable means to protect consumers from ever changing scams: the addition of *unlawful* conduct to the definition of unfair competition (see Cal. Stats. 1963, ch. 1606, § 1); adding *deceptive* to the description of the kind of advertising that constitutes unfair competition (see Cal. Stats. 1972, ch. 1804, § 1); expressly authorizing courts to order restitution, appoint receivers, and to make any such orders as necessary to prevent unfair competition (see Cal. Stats. 1972, ch. 711, § 3 [FAL]; see also Cal. Stats. 1976, ch. 1006, §1 [UCL]); expanding injunctions to cover past as well as

In *Wolford*, the fact that the plaintiff also sought damages, in addition to an injunction, did not change an essentially equitable action into a legal one. Similarly, in UCL and FAL actions, the mere fact that the People also seek civil penalties, in addition to an injunction, does not change a UCL or FAL action from an essentially equitable one into a legal one.

The reasoning in *C&K Engineering* and *Wolford* has been extended to UCL and FAL actions. Consistent with repeatedly finding that UCL and FAL actions are equitable in nature (see section I.B.2, *supra*), California courts have also repeatedly held that in public enforcement actions, there is no right to jury trial under the UCL or FAL. (See, e.g., *People v. Witzerman* (1972) 29 Cal.App.3d 169, 176-177; *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879, 915-916; *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 321; *People v. Toomey* (1984) 157 Cal.App.3d 1, 17-18; *People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 732-733; *People v. Bhakta* (2008) 162 Cal.App.4th 973, 977-979; *Cahuenga's The Spot, supra,* 234 Cal.App.4th at p. 1384.)

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ongoing misconduct (see Cal Stats. 1992, ch. 430, § 3); and the addition of civil penalties. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570 ["whenever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it"]; emphasis in original.)

In *Witzerman, supra*, 29 Cal.App.3d at p. 176-77, the court specifically addressed whether, in a law enforcement FAL action where civil penalties were sought, along with other remedies, "the issues tried were legal rather than equitable in nature." The Court of Appeal held:

> *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 omitted] 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.

(Emphasis added; 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"].) Similarly, in *Bhakta, supra*, 162 Cal.App.4th at pp. 977-979, a UCL action where the court imposed civil penalties, the court applied the rule in *C & K Engineering*, and concluded there was no right to a jury trial "if an action in effect is one in equity and the relief sought depends upon the application of equitable doctrines."

The *Nationwide* court below, in fairly summary fashion, dismissed this long line of precedent, asserting that these cases either were "not on point or did not fully analyze the jury trial issue." (*Nationwide, supra*, 24 Cal.App.5th at pp. 457-460.) However, as illustrated above, this issue has been analyzed and addressed numerous times before, and as the *Witzerman,*

Bestline, and *Bhatka* courts (and others) have concluded, UCL and FAL actions—including those where prosecutors seek penalties along with injunctive relief or restitution—are essentially equitable and there is no right to a jury trial.

c. *Tull* and *1941 Chevrolet* are distinguishable and do not compel a different result.

Finally, neither the United States Supreme Court's decision in *Tull v. United States* (1987) 481 U.S. 412, nor this Court's decision in *1941 Chevrolet, supra,* 37 Cal.2d. at p. 286, compel a different result here.

Tull was decided under the Seventh Amendment to the United States Constitution[5], and did not apply the "gist of the action" test which is determinative in California of the right to a jury trial. In *Tull*, the Court focused solely on one remedy—civil penalties sought by the government—and stopped its analysis there, finding that the government's entire action under the Clean Water Act was analogous to an "action on a debt," affording the right to a jury trial. (*Id.* at p. 421-424.) Whereas under California law, as discussed above, "the prayer for relief in a particular case is not conclusive." (*C & K Engineering, supra,* 23 Cal.3d at p. 9.) Merely seeking "one of a full range of remedies" that is legal does not convert what

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[5] The Seventh Amendment has not been extended to the states. (See *Shaw, supra,* 2 Cal.5th at p. 993 n. 8.)

was otherwise a clearly equitable action into a legal one. (See *id.*; see also *Wolford v. Thomas*, *supra*, 190 Cal.App.3d at pp. 353–54.)[6]

1941 Chevrolet held that where the government seeks penalties only (through an in rem action seeking forfeiture of property), the action is essentially legal and the right to a jury trial attaches. (*1941 Chevrolet, supra,* 37 Cal.2d. at p. 286.) *1941 Chevrolet* does not address the situation here where the underlying causes of action (UCL and FAL) have historically and universally been viewed as equitable, and where only "one of a full range of remedies" sought is legal, while the "bulk" of the other remedies sought is equitable. (See *C & K Engineering*, *supra*, 23 Cal.3d at p. 9; *Wolford v. Thomas*, *supra*, 190 Cal.App.3d at pp. 353–54.) Under those circumstances, an otherwise "essentially" equitable action is not automatically converted to a legal one. (*Id.*) Nor does *1941 Chevrolet* address the UCL or FAL (which have been treated as equitable for more than 75 years) at all. The gist of UCL and FAL actions is equitable, even when prosecutors seek civil penalties along with injunctive relief or

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[6] Numerous other states have declined to follow *Tull* in determining the right to a jury trial under their respective states' laws. (See, e.g., *Vermont v. Irving Oil, supra,* 955 A.2d at pp. 1106-1108; *Connecticut Bldg. Wrecking Co.* (Conn. 1993) 629 A.2d 1116,1121-1123; *Wisconsin v. Schweda* (Wis. 2007) 736 N.W.2d 49, 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.)

restitution. (See *Witzerman, supra,* 29 Cal.App.3d at pp. 176-177; see also *Bestline Products, Inc., supra,* 61 Cal.App.3d at pp. 915-916; *Bhakta, supra,* 162 Cal.App.4th at pp. 977-979)

II. THE NATIONWIDE COURT'S HOLDING IS INCONSISTENT WITH THE PRINCIPLES UNDERLYING THE EQUITY FIRST RULE.

As discussed above in section I.B, the UCL and FAL are single causes of action, the gist of which are equitable, such that no right to a jury trial attaches. Moreover, as discussed above in section I.B.3.a, civil penalties in UCL and FAL actions are essentially equitable. However, to the extent the Court finds that the UCL and FAL have a "mixed bag" of available legal (civil penalties) and equitable (injunction and restitution) remedies, it should follow the principles underlying the "Equity First" rule.

It is well-established in California that when a case involves both legal and equitable issues, the court has discretion to decide the equitable issues first. (*Jaffe v. Albertson Co.* (1966) 243 Cal.App.2d 592, 609.)[7] As the *Jaffe* court held: "If the decision as to the equitable issues is such as is determinative of the legal issues a jury trial as to the latter is obviated. If

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[7] This is an area where California courts and Federal courts diverge. "Unlike California, federal courts usually try legal issues before equitable issues in mixed actions. (Citations omitted.)" (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 158; see also *Orange Cty. Water Dist. v. Alcoa Glob. Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 356.)

not, the jury trial as to the remaining issues will follow." (*Id.*, citing *Connell v. Bowes* (1942) 19 Cal.2d 870, 872; see also *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal. 3d 665, 671; *Thomson v. Thomson* (1936) 7 Cal.2d 671, 682, 683.)

As the court in *Hoopes v. Dolan* (2008) 168 Cal.App 4th 146, 157, stated:

> The *historical reason* for this procedure, at least as concerns equitable defenses, *is that the same order of trial was observed when there were separate law and equity courts*: "If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law until he could make his equitable defense effective by a hearing before the chancellor."

(Citation omitted; emphasis added.)

The practical purposes behind the rule include judicial economy, the avoidance of duplicative effort and the minimization of inconsistencies. (*Id.* at p. 158; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1238.) Therefore, numerous courts have said "The better practice for trial courts is to decide equitable issues first for the explicit reason that a jury trial on any legal issues may be avoided." (*Orange Cty. Water*, *supra*, 12 Cal.App.5th at p. 355.)

The First District refused to follow the equity first rule here, calling it "impermissible" in light of this Court's holding in *Shaw*. (*Nationwide, supra,* 24 Cal.App.5th at p.456, citing *Shaw*, *supra*, 2 Cal.5th at p. 1006.)

However, the holding in *Shaw*, that the plaintiff was entitled to a jury trial on her *Tameny* cause of action, notwithstanding her separate equitable action under Health and Safety Code section 1278.5, is limited to the statutory exception provided by Health and Safety Code section 1278.5, subd. (m). (See *Shaw, supra,* 2 Cal.5th at p. 1006.)

The long standing "equity first" principle is alive and well in California and should be applied in law enforcement UCL and FAL actions. (See, e.g., *Orange Cty. Water*, *supra*, 12 Cal.App.5th at p. 355 [decided after *Shaw*].) The bench should hear and decide the many equitable issues that arise in UCL and FAL actions, including determining the appropriate remedies.

III. REQUIRING JURY TRIALS IN UCL AND FAL LAW ENFORCEMENT ACTIONS WILL WEAKEN CONSUMER PROTECTION IN CALIFORNIA.

For all of the reasons set forth above, there is no right under the California Constitution to a jury trial in UCL or FAL law enforcement actions—even when prosecutors seek civil penalties along with injunctive relief or restitution. Additionally, there are many practical effects that will result from the lower court's holding which, in our view, will collectively weaken consumer protection in California.

A. Judges Are Best Suited To Hear And Decide Equitable Actions, Including Actions Under the UCL And FAL.

As stated above, California prosecutors try thousands of cases to juries every year, and they highly respect the role that juries play in our judicial system. However, courts in equity exist for a reason, and our system of having equitable actions tried before the bench developed for a reason. (See *C & K Engineering*, *supra*, 23 Cal.3d at p. 11.) As one lower court explained:

> 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. Sec. Pac. Nat. Bank* (1985) 173 Cal.App.3d 462, 473; see also *Hoopes*, *supra*, 168 Cal.App.4th at pp. 155-156.) Judges are uniquely situated to weigh and balance multiple complex factors and arrive at a just and equitable result. In *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 322, the defendant in a UCL and FAL action "express[ed] concern" that its claims regarding its organic produce would be "evaluated by a lay jury applying a nebulous 'reasonable consumer' standard." This Court dismissed those concerns, stating, "These claims are decided by a judge, not a jury." (*Id.*, citing *Hodge*, *supra*, 145 Cal.App.4th at pp. 284–285; *Witzerman*, *supra*, 29 Cal. App. 3d at pp. 176–177.)

Moreover, as discussed above, UCL and FAL actions are essentially equitable, and relief in UCL and FAL actions requires the application of

equitable principles. (See section I, *supra.*) To write jury instructions that adequately address unlawful or unfair business practices—as well as to incorporate notions of fairness, ethics and morality, i.e. equity—would be extremely challenging, if not impossible. The trial judge in this matter was clearly troubled by this issue, as demonstrated by the judge's questioning of defense counsel in the hearing on the motion to strike the jury trial demand below:

> Before I ask for a response, every so often there will be a motion either to strike a request for a jury or not. If, for example, we were to go forth with the jury in this case, what set of instructions would be used? Remember, you start -- what the – what the judicial counsel [*sic.*] and the judges over years with instructions, criminal instructions, civil instructions they create for the Court and for the jurors potential jury instructions on pretty much everything. Where would we -- ***how would we do our jury instructions? Have you thought about what sort of jury instructions? Because I don't see jury instructions that would necessarily cover this complaint.*** Do you have a jury instruction we could use in case we choose to send the matter to a jury?
>
> ***
>
> But I'm trying to then determine, let's say that we do go forth with a jury trial. ***As I was looking through the CACI instructions, the instructions given for all sorts of jury trials, all manner of theories, I didn't see anything that would fit.***

(Vol. II, Ex. P at p. 365, ll.3-17, p. 366, ll. 4-8 [Reporter's Transcript of Proceedings – Hearing on Motion to Strike Jury Demand, November 10, 2016]; emphasis added.)[8]

The unlawfulness prong of the UCL "borrows" violations of law from other federal, state, or local statutes or regulations (*see Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech Communications*)), and is so incredibly broad, it has been called a "chameleon." (*Aryeh, supra*, 55 Cal.4th at p. 1196.) As the *A-C Co.* court envisioned, being able to navigate and understand this wide array of violations can be best handled by a judge with "years of study, training and experience" and cannot be adequately distilled by jury instructions. (*A-C Co., supra,* 173 Cal. App. 3d at p. 473.)

Similarly, judges are best situated to flexibly weigh and balance the many competing factors necessary to determine whether a business practice is "unfair," regardless of which test for unfairness is applied. (See *Zhang, supra*, 57 Cal.4th at p. 380, fn. 9 [describing the "unsettled" various lower court tests for unfairness under the UCL].) For example, under the test set forth in *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159

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[8] 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. __, ll. __."

Cal.App.3d 509, 530, "an unfair business practice occurs when [the practice] offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Under *Podolsky v. First Healthcare Group* (1996) 50 Cal.App.4th 632, "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. . . ." (*Id.* at p. 647, citing *State Farm v. Superior Court* (1996) 45 Cal.App.4th 1093, 1102.) Finally, under *Cel-Tech Communications, supra,* 20 Cal.4th at p. 185, the unfairness must be "tethered" to some other statutory statement or policy.

Attempting to write a jury instruction that adequately explains how to determine whether a business practice is "immoral" or "unethical", or how to balance the benefits vs. harm, or how to determine whether something is "tethered" to a statute or policy seems futile. These matters are best left to judges, as they have been successfully for the past 75 years.

Finally, the FAL is violated where an ad "has a capacity, likelihood, or tendency to deceive or confuse the public" (See *Kasky, supra,* 27 Cal.4th at p. 951) and can be determined based solely upon reviewing the advertisement itself. (See *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 100; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 679.) Neither the UCL nor the FAL requires the People to prove that any

specific member of the public was actually deceived or relied upon the fraudulent act or practice. (See *Day*, *supra*, 63 Cal.App.4th at p. 332 ["Actual deception or confusion caused by misleading statements is not required"].) Nor is there a requirement of showing individualized harm. (*Committee on Children's Television Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211; see also *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1143.) Attempting to fashion jury instructions to address what "has a capacity, likelihood, or tendency to deceive or confuse the public" based solely on the ad itself, or why the People prevail despite the fact that no consumer was actually deceived, confused or harmed, would be problematic. These determinations are best left to a "trained and experienced chancellor." (See *A-C Co.*, *supra*, 173 Cal.App.3d at p. 473; *Hoopes*, *supra*, 168 Cal.App.4th at pp. 155-156.)

The impracticability or impossibility of writing adequate jury instructions in UCL and FAL actions, as discussed above, underscores why these actions have been considered essentially equitable for decades. Trial and appellate judges alike have apparently been understandably reluctant to wade into such a thorny area. If, as demonstrated above, judges are best situated to hear and decide equitable actions, then it stands to reason that if we take such matters away from judges, the results will likely suffer. If the

results in law enforcement UCL and FAL actions suffer, consumer protection is weakened.

B. Requiring Jury Trials In UCL And FAL Actions Undermines The Legislature's Intent In Enacting The Statutes.

Requiring jury trials in UCL and FAL actions undermines the Legislature's intent in creating them. This Court has described the UCL as:

> [A]n 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. As we have said, the 'overarching legislative concern [was] to provide a ***streamlined procedure for the prevention of ongoing or threatened acts of unfair competition***.' [Citation.] Because of this objective, the remedies provided are limited."

(*Zhang*, *supra*, 57 Cal.4th at p. 371, citing *Korea Supply*, *supra*, 29 Cal.4th at p. 1150; emphasis added.)

Presumably, by creating this "streamlined procedure," the Legislature envisioned judges hearing UCL matters in bench trials, weighing the equities, and reaching a just result by granting the appropriate equitable remedies. Bench trials are typically less formal, less lengthy and less costly than jury trials.

Moreover, the *Nationwide* holding leaves open numerous questions about how UCL and FAL trials would be conducted in the future. In *Nationwide*, 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.) Presumably, the relief the judge is left to determine includes not only awarding injunctive relief and restitution, but also weighing the factors under sections 17206 and 17536[9] and the awarding of civil penalties.

Under this scenario, what exactly is the role of the jury? If a jury found a single violation of the FAL, for example, is that portion of the trial over, and the judge left to do the heavy lifting of hearing and weighing the evidence regarding the number of violations? Oftentimes, it is difficult to unravel what constitutes a violation under the UCL or FAL from the number of violations that occurred and from the penalties to be awarded. (See *Toomey, supra,* 157 Cal.App.3d at p. 22 ["[Business and Professions Code] Sections 17206 and 17536 fail to specify what constitutes a single violation, leaving it to the courts to determine appropriate penalties on a

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[9] Business and Professions Code sections 17206 (b) and 17536 (b) both state: "In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." Pursuant to the *Nationwide* court's holding, a judge, sitting in equity, will apply these factors to determine the amount of the penalty, which can range from $.01 to $2,500.00 per violation. (See *Nationwide*, *supra*, 24 Cal.App.5th at p. 456.)

case-by-case basis."].) To separate these functions will likely cause confusion at the worst, and inefficiency at the least. Either way, it makes UCL and FAL actions less streamlined.

Therefore, requiring jury trials in UCL and FAL actions will thwart an important purpose behind the creation of the UCL—to create a streamlined procedure for addressing unfair competition.

C. Requiring Jury Trials In UCL And FAL Actions Undermines The Voters' Intent In Enacting Proposition 64.

Similarly, requiring jury trials also undermines the voters' intent in enacting Proposition 64 in 2004. The "Findings and Declaration of Purpose" for Proposition 64 state, in pertinent part:

> (e) It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.
>
> (f) It is the intent of California voters in enacting this act that *only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.*
>
> (g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.
>
> (h) It is the intent of California voters in enacting this act *to require that civil penalty payments be used* by the Attorney General, district attorneys, county counsels, and city attorneys *to strengthen the enforcement of California's unfair competition and consumer protection laws.*

(Prop. 64 as approved by voters, Gen. Elec. (Nov. 2, 2004), § 1, subd. (e)-(h); emphasis added.) The clear intent behind Proposition 64 was to shift much of the enforcement of the UCL and FAL away from the private bar and toward prosecutors by limiting private standing, and reaffirming prosecutors' role in bringing actions on behalf of the public. (*Id.;* see also *Californians for Disability Rights v. Mervyn's, LLC.* (2006) 39 Cal.4th 223, 228.) To achieve these results, Proposition 64 directed that civil penalties "be for the exclusive use by [prosecutors] for the enforcement of consumer protection laws." (Bus. & Prof. Code, §§ 17206, subd. (c) and 17536, subd. (c).)

Eliminating bench trials will make UCL and FAL trials longer and more expensive, and take them out of the hands of judges who are best suited to decide them. Moreover, some defendants may be incentivized to settle less and litigate more. This potential increase in resources necessary to prosecute UCL and FAL cases will likely reduce the number of cases that can be effectively investigated and prosecuted, thereby weakening, rather than strengthening, the enforcement of the UCL and FAL, and thwarting the voters' intent in enacting Proposition 64.

D. Holding That Jury Trials Are Required Whenever Prosecutors Seek Civil Penalties—Regardless Of The Other Equitable Remedies Sought—Could Have Far Reaching Effects.

Finally, while this case involves only the question of whether the California Constitution requires a jury trial in UCL or FAL actions where prosecutors seek civil penalties, along with injunctive relief or restitution, if the *Nationwide* holding is affirmed, it will likely have far reaching effects for prosecutors.

California prosecutors have civil enforcement authority—including the ability to seek penalties—in a wide variety of areas that extend well beyond the UCL and FAL. If the *Nationwide* holding stands, and the determining factor in whether a defendant is entitled to a jury trial hinges not on the underlying action or violation of law, but solely on whether civil penalties are among the relief sought by prosecutors, we are likely to see jury trials required in virtually all areas where prosecutors have civil jurisdiction.

For example, prosecutors can seek civil penalties, along with injunctive relief and other equitable remedies, in a broad range of consumer and environmental protection schemes. Enforcement of the following consumer protections statutes, along with countless others, would likely be affected: Unlicensed cannabis (Bus. & Prof. Code, § 26038); Violating Do Not Call Registry (Bus. & Prof. Code, § 17593); Disclosure of Private Information (Fin. Code, § 4057); Sale of Tobacco to Minors (Bus. & Prof. Code, § 22958); Seller Assisted Marketing Plan Act (Civ. Code, §§

1812.17, 1812.219); Mortgage Loan Modifications (Civ. Code, § 2944.7); Check Casher Fees (Civ. Code, §1789.35); and California Medical Information Act (Civ. Code, §§ 56.36 (c) and (f)(1).)

Similarly, enforcement of the following areas of environmental protection, among countless others, may be affected: Water pollution (Fish & G. Code, §§ 1602, 1615, 5650.1, and 12025, and Wat. Code §13385); Handling and disposal of hazardous waste and Hazardous Materials Business Plans (Health & Saf. Code,§§ 25182, 25189, 25189.2, and 25550 et seq); Air pollution (Health & Saf. Code, §§ 39674, 42401, 42402, 42402.1, 42402.2, and 42402.3 via 42403); Underground storage tanks (Health & Saf. Code, § 25299.02); and Public Resources Code §§ 42358 (selling plastic labeled as "biodegradable") and 42285 (violating plastic bag ban).

Other areas where enforcement is shared between private litigants and prosecutors, and where civil penalties are available, that could be affected include, but are not limited to, Proposition 65 (Health & Saf. Code, § 25249.7) and the Labor Code Private Attorneys General Act (Lab. Code, § 2698 et seq.)

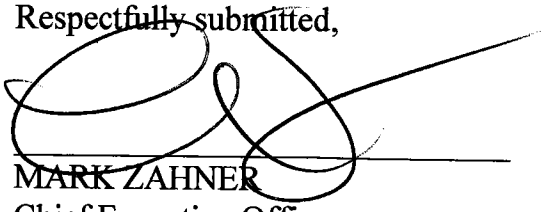
As with the UCL and FAL, eliminating bench trials in these enforcement areas will make trials longer and more expensive, and take them out of the hands of judges who are best suited to decide them.

CONCLUSION

For all of the reasons set forth above, the Court should follow the long line of precedent holding that the UCL and FAL are equitable actions, and do not afford a right to a jury trial. Accordingly, the First District's holding should be overturned, and law enforcement UCL and FAL actions—including those where prosecutors seek civil penalties along with injunctive relief or restitution—should continue to be heard by the bench, as they have been successfully for more than 75 years

Dated: May 1, 2019.

Respectfully submitted,



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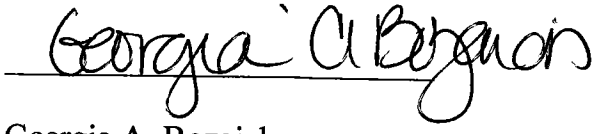
CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204 and 8.520(c), I certify that this amicus curiae brief was prepared using a computer, that is proportionally spaced, that the type is 13 point, and that the word count is 10,003 words as determined by the word count feature of the word processing system.

DATED: May 1, 2019

Respectfully Submitted:



Georgia A. Bozaich

PROOF OF SERVICE

I, Georgia A. Bozaich, declare as follows:

I am over the age of 18 and am not a party to the within action; my business address is 921 11th Street, Third Floor, Sacramento, CA 95814.

On May 1, 2019, I served the forgoing

APPLICATION BY THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST, THE PEOPLE OF THE STATE OF CALIFORNIA and BRIEF OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF REAL PARTY IN INTEREST, THE PEOPLE OF THE STATE OF CALIFORNIA

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Clerk of Court
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BY OVERNIGHT DELIVERY: I enclosed an original copy, plus thirteen copies of the documents in a sealed envelope provided by an overnight delivery carrier and addressed to the Supreme Court of California as required by Supreme Court Rule 5(a). I placed the envelope or package for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.

BY U.S. MAIL: I served the attached documents by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, CA, to each party listed on the service list.

I am readily familiar with this business's practice for collecting and processing correspondence for mailing; it is deposited in the ordinary

course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

SERVICE ON CALIFORNIA ATTORNEY GENERAL: In addition, I caused a copy of this document to be uploaded to the California Attorney General, as follows:

Office of Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
https://oag.ca.gov/services-info/17209-brief/add

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 1, 2019, at Sacramento, California.

Georgia A Bozaich

GEORGIA A. BOZAICH