Docket No. 16-16103

In the

United States Court of Appeals

for the

Ninth Circuit

AMERICAN BANKERS MANAGEMENT COMPANY, INC.,
Plaintiff-Appellant,

v.

ERIC L. HERYFORD,
in his official capacity as District Attorney, Trinity County, California,
Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Eastern District of California, Case No. 2:16-cv-00312-TLN-EFB · Honorable Troy L. Nunley

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The parent company of American Bankers Management Company, Inc. is American Bankers Insurance Group, Inc.

The parent company of American Bankers Insurance Group, Inc. is Interfinancial, Inc.

The parent company of Interfinancial, Inc. is Assurant, Inc., a publicly held corporation.

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JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction of this action for injunctive and declaratory relief against defendant-appellee Eric L. Heryford, in his official capacity as the District Attorney of Trinity County, California ("the District Attorney"), because the action arises under the laws and Constitution of the United States, including the Due Process Clause of the Constitution's Fourteenth Amendment, U.S. Const. amend. XIV, § 1, and 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331; *id.* § 1343(a). On June 13, 2016, the District Court entered a final judgment disposing of all parties' claims. This Court has appellate jurisdiction because plaintiff-appellant American Bankers Management Company, Inc. ("American Bankers") timely filed its notice of appeal on June 17, 2016. *See id.* § 1291; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE PRESENTED

In separate litigation, the District Attorney brought a public law enforcement action on behalf of the People of the State of California against American Bankers and others, alleging violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*., and seeking to recover civil penalties. That action was only nominally brought by the District Attorney, and is actually being prosecuted by a coalition of for-profit private law firms appointed as "Special Assistant District Attorneys." These private law firms operate under a

contingency-fee agreement that will award them a 30 percent share of whatever recovery, if any, is made.

The issue presented for this Court's review is: Does a UCL public law enforcement action for civil penalties implicate due process interests sufficiently akin to the interests implicated in a criminal enforcement action to warrant a categorical rule against the public prosecutor maintaining a direct pecuniary interest in the action's outcome? This issue was raised in the complaint, the District Attorney's motion to dismiss, American Bankers's opposition thereto, and American Bankers's motion for partial summary judgment. The issue was ruled upon in the District Court's order dismissing the action dated June 3, 2016. ER4.

STATEMENT OF THE CASE

I. The UCL Suit And The Contingency-Fee Agreement Motivating It.

Over the past two decades, for-profit, contingency-fee private law firms have succeeded in enticing state prosecutors into allowing the firms – using the prosecutors' names – to seek civil penalties, injunctions, and damages against corporate defendants. *See, e.g.*, *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcommittee on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 48 (2012) (statement of Trent Franks, Subcommittee Chairman); Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014

(discussing the solicitation efforts of, among others, Baron & Budd, P.C.). "The lawsuits follow a pattern: Private lawyers, who scour the news media and public records looking for potential cases in which a state or its consumers have been harmed, approach attorneys general. The attorneys general hire the private firms to do the necessary work, with the understanding that the firms will front most of the cost of the investigation and the litigation. The firms take a fee, typically 20 percent, and the state takes the rest of any money won from the defendants." *Id.*[1]

That is what happened here. Represented by private counsel operating under a contingency-fee agreement, in September 2015 the District Attorney filed a law enforcement action on behalf of the People of the State of California ("the UCL Suit") against American Bankers, Discover Financial Services, Discover Bank, and DFS Services, LLC (collectively, "the Companies"), alleging violations of the UCL's "fraudulent," "unlawful," and "unfair" prongs. ER32-55. In particular, the District Attorney alleges that the Companies engaged in deceptive marketing and sales practices in connection with "ancillary products" offered to cardholders in connection with Discover-issued credit cards. ER32-35.

[1] This phenomenon does not exist in the federal prosecutorial system. By executive order, federal agencies are prohibited from entering into contingency-fee contracts with private counsel. *See* Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (2007) ("To help ensure the integrity and effective supervision of the legal … services provided to or on behalf of the United States, it is the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation[.]").

The Companies deny these allegations or their legal liability. Notably, the allegations were long-ago resolved by, among other settlements, a consent order jointly issued in September 2012 by the Consumer Financial Protection Bureau and Federal Deposit Insurance Corporation. ER126-154. In addition to ordering restitution and civil penalties, the consent order mandated a package of prospective relief designed to ensure that the allegedly deceptive conduct – the identical conduct alleged in the UCL Suit – would not recur. *Id.*

The prospective relief comprehensively regulated the ancillary products' marketing, sale, and administration. ER127-143. Among other things, the consent order mandated the establishment of a compliance management system, the board of directors' oversight of that system and any compliance-related activities, establishment of a compliance audit program and oversight committee, revision of all advertising, marketing, and promotional materials, disclosures to be made during telephone calls with cardholders, post-sale disclosures, disclosures on billing statements, disclosures if a cardholder is denied the products' benefit, regular progress reports, and recordkeeping requirements. *See Id.* This relief was implemented under the federal agencies' supervision. ER143. In July 2015, the consent order was terminated by another order determining "that Discover fulfilled its obligations under the CONSENT ORDER." ER156-157. The UCL Suit

nonetheless alleges that the Companies engaged in misconduct during the same time period that the consent order was in effect.

Before filing the UCL Suit, the District Attorney signed a contingency-fee agreement with Baron & Budd, P.C., Carter Wolden Curtis, LLP, and Golomb & Honik, P.C. (collectively, "the Law Firms"). ER111-121. The agreement designates these Law Firms as "Special Assistant District Attorneys" to perform the investigation, research, filing, and prosecution of claims against the Companies. ER112. In exchange, "if there is a recovery as a result of the Action," *i.e.*, the UCL Suit, then "the Law Firms will be paid a contingency fee of 30% of the Net Recovery, which shall include damages, restitution, disgorgement, civil and/or statutory fines or penalties, *cy pres* or the value of injunctive relief." ER115-116. The Law Firms bear all litigation costs associated with the UCL Suit, subject to reimbursement from any potential recovery. *Id.*

The contingency-fee agreement characterizes the Law Firms as "Independent Contractors" with "the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement," subject to the District Attorney's "general right" to "inspect work in progress to determine whether, in the District Attorney's opinion, the services are being performed by the Law Firms in compliance with this Agreement." ER114.

The agreement further specifies that the Law Firms "are not by reason of this Agreement, agents or employees of Trinity County for any purpose." *Id.*

During an October 2015 meeting of the Trinity County Board of Supervisors, the District Attorney explained his motivations for entering into the contingency-fee agreement, emphasizing that "it's not going to be additional work for my staff basically," and the UCL Suit could yield "potentially significant" financial rewards for Trinity County – what the District Attorney bluntly characterized as "a lot of upside with not a lot of downside." ER26-27. He noted the possibility that "the attorney general's office may have some interest in these cases at some point. They could intervene and we would work with them." ER27. To the District Attorney, "part of the benefit is that it gives the county a big seat at the table at these cases." *Id.*

These statements echoed statements the District Attorney made to the local newspaper that, because of his contingency-fee agreement, prosecution of the UCL Suit would not interfere with his caseload, and that the UCL Suit would not cost Trinity County or his office any money because it is being handled by the Law Firms. ER123-124. The District Attorney stressed that there was "potential for substantial benefit for the county" and that as "the case moves forward it gives our county a seat at the table." *Id.*

Contingency-fee agreement in hand, the Law Firms filed the UCL Suit in Trinity County Superior Court in September 2015, where it remained largely dormant. ER32-55. Months later, the Law Firms voluntarily dismissed the UCL Suit without prejudice. ER66-68. In March 2016, the Law Firms refiled the UCL Suit in the United States District Court for the Eastern District of California. ER70-93. The Companies have moved to dismiss the UCL Suit on a variety of grounds but, as of the time of this brief's filing, the District Court had not ruled on those motions.

II. The Proceedings Below.

The District Attorney's contingency-fee agreement with the Law Firms violates the Due Process Clause of the United States Constitution's Fourteenth Amendment because it gives them, as specially appointed public prosecutors, a direct pecuniary interest in the UCL Suit's outcome. Accordingly, in February 2016 – shortly before the UCL Suit was refiled in federal court – American Bankers brought its own action seeking a judicial declaration that the contingency-fee agreement is unlawful and to permanently enjoin the Law Firms' continued prosecution of the UCL Suit under the agreement. ER96-157. American Bankers did not seek to enjoin the UCL Suit itself, or to enjoin the Law Firms' prosecution of it under alternative arrangements with the District Attorney. (For their part, the

Discover entities have filed their own motion in the UCL Suit, asserting that the contingency-fee agreement separately violates California state law.)

American Bankers asserted a claim for relief under 42 U.S.C. § 1983, which by its terms requires a showing of conduct: (i) committed under color of state law (*i.e.*, "state action") that (ii) deprives the plaintiff of a constitutional right. The continued prosecution of the UCL Suit under the contingency-fee agreement constitutes state action depriving American Bankers of its due process right to fair proceedings conducted by financially disinterested public prosecutors. ER101-109. No future events must take place for American Bankers to be injured – its due process right is being violated *today*.

In its complaint, American Bankers emphasized several factors that set the UCL Suit apart from ordinary civil litigation, making it more akin to a criminal enforcement action. First, the Law Firms appear as specially appointed public prosecutors to enforce the People's laws and California public policy, and not as counsel for a government acting as an ordinary party in pursuing proprietary interests. Second, the UCL Suit seeks substantial civil penalties that serve distinctly public, penal objectives and are akin to criminal sanctions. Third, the UCL Suit is a government effort to curtail, by the imposition of civil penalties, the Companies' First Amendment right to market to cardholders consistent with the dictates of the federal agencies' consent order. ER98, 104-106.

In March 2016, American Bankers moved for partial summary judgment on its § 1983 claim, which presents the application of a single, simple question of law to a set of undisputed facts. Later that month, the District Attorney moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (b)(6). The District Attorney principally argued that American Bankers lacks constitutional standing to assert its § 1983 claim, and, further, that defendants in UCL public law enforcement action have no due process right to a trial by a financially disinterested public prosecutor.

In June 2016, the District Court dismissed American Bankers's complaint without prejudice. ER4-19. The District Court began by rejecting the District Attorney's standing argument, which "mischaracterize[d]" the § 1983 claim:

> ABMC alleges the contingency-fee agreement, not the DA's choice of contingency-fee counsel, violates its due process right. In ABMC's view, the contingency-fee agreement creates an inherent prejudice in the underlying UCL Suit by giving private counsel a pecuniary interest in the outcome of the case, making it unlikely ABMC would receive a fair trial. A personal interest in the litigation extraneous to a government lawyer's official functions may tempt him or her to pursue an action, even where it is not feasible or justifiable to do so.

ER9 (internal citations omitted). "Moreover," the District Court continued, American Bankers "demonstrated a causal connection between the injury and the conduct it complains of, because the alleged prejudice flows from DA Heryford's reliance on contingency fee to compensate the attorneys who are prosecuting the UCL Suit." *Id.* A decision in American Bankers's favor also "would result in DA

Heryford's being enjoined from using contingency-fee attorneys in prosecuting the UCL Suit and, therefore, the injury would be redressed." *Id.*

Recognizing that there is no "controlling authority from this circuit," ER10, the District Court reached the merits of American Bankers's § 1983 claim. Relying on the California Supreme Court's decisions in *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010), and *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985), the District Court identified a "spectrum of neutrality" required of a public prosecutor. ER12. "At one end of this spectrum," the District Court wrote, "absolute neutrality was required, which meant that the contingency-fee agreements were categorically barred." *Id.* "At the other end of the spectrum, where the government was simply enforcing its own contract and property rights, no neutrality was needed, and the government could enter in contingency-fee agreements without violating the Due Process Clause." *Id.* For "middle-of-the-neutrality-spectrum cases, the touchstone due process inquiry was whether the government attorney had control over the case when he or she worked with private counsel under a contingency-fee agreement." ER14.

The District Court applied this "spectrum" analysis to the UCL Suit. Acknowledging that "the UCL Suit against ABMC is civil but penal in nature," the District Court correctly found that this "implicates the requirement of neutrality." ER16. It nonetheless found that the UCL Suit was a "middle-of-the-neutrality-

spectrum" case. *Id.* The District Court reasoned that American Bankers "cites no case law to support a conclusion that conduct giving rise to an action under the UCL, targeting deceptive marketing of ancillary products and services, is protected by the First Amendment," *id.*, overlooking American Bankers's argument that what matters to the analysis is whether First Amendment rights are *arguably* implicated, not whether it has been judicially determined that the speech is protected by the First Amendment. The District Court did not analyze American Bankers's further argument that the California Supreme Court and other courts have held that UCL civil penalties are more akin to criminal sanctions than they are to ordinary civil remedies, like restitution or damages.

The District Court then turned to what it considered the "second question" of whether the District Attorney was actually controlling the UCL Suit. ER16. It found that the contingency-fee agreement contained sufficient provisions to establish that "the agreement provides that DA Heryford controls the litigation, with Baron & Budd serving as co-counsel." ER17. As a result, the District Court concluded, American Bankers "does not state a claim for violation of its Fourteenth Amendment due process rights." ER18-19.

The District Court granted American Bankers leave to amend the complaint "regarding DA Heryford's control over the litigation." ER18. But because "control" is irrelevant if the civil action implicates the same interests implicated in

a criminal action – as the UCL Suit does – American Bankers elected not to further amend. Instead, American Bankers filed a notice of its election to stand on the complaint's sufficiency, asking the District Court to expeditiously enter a final judgment so that American Bankers might pursue this appeal. ER23-24. The District Court obliged, entering its final judgment disposing of the case in its entirety in June 2016. ER1. This appeal timely followed. ER20-22.

SUMMARY OF THE ARGUMENT

A fair trial is a basic requirement of due process. Giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting renders it unlikely that the defendant will receive a fair trial. After all, a scheme injecting a personal interest, financial or otherwise, into the law enforcement process may draw irrelevant or impermissible factors into the prosecutorial calculus. While ordinary civil litigation may not always require a financially disinterested public prosecutor, public law enforcement actions that implicate the same vital interests implicated in criminal enforcement actions *categorically* do.

A UCL law enforcement action for civil penalties is one such suit. As an action filed by the People, it is designed to protect the public and not to benefit private parties. California courts and the District Attorney himself have declared that such actions are "akin to a criminal enforcement action" and serve a "public, penal objective." Although the District Court appreciated that the UCL Suit is

penal in nature, it failed to further appreciate that, for this purpose, there is no discernable difference between a public prosecutor's seeking criminal penalties or civil penalties. Indeed, the United States Supreme Court has stated that awarding civil penalties to the government can be viewed as analogous to sentencing in a criminal action. These reasons alone support a holding that the contingency-fee agreement under which the UCL Suit is being prosecuted is unlawful.

Another, independent reason also supports this holding. Fear of civil penalties can be as inhibiting of free speech as can trepidation in the face of threatened criminal prosecution. The UCL Suit seeks, through the imposition of civil penalties, to restrain the Companies' commercial speech – speech specifically authorized by the federal agencies' 2012 consent order. While the District Court reasoned that deceptive speech is not protected under the First Amendment, that puts the cart before the horse. Nobody has yet determined that the Companies' speech is, in fact, deceptive. What matters to the due process analysis is whether speech rights are *arguably* protected. The District Court's reasoning improperly assumes the UCL Suit's ultimate outcome at the litigation's inception.

Finally, whether the District Attorney is exercising adequate control over the Law Firms' prosecution is irrelevant. If, as here, a public law enforcement action implicates the same interests that are implicated in a criminal enforcement action, then the public prosecutor may not maintain a direct pecuniary interest in the

action's outcome under *any* set of circumstances. There are two good reasons for this categorical ban. First, the instinct of every lawyer paid on a contingent basis (to collect as much as possible) is incompatible with the duty of every government lawyer to see that the public interest is served, even if it means walking away. Second, the very appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the justice system.

ARGUMENT

I. Standard Of Review.

This Court reviews *de novo* a district court's decision to dismiss a § 1983 action for failure to state a claim upon which relief can be granted. *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001). Under the *de novo* standard of review, the Court does not defer to the district court's ruling but freely considers the matter anew, as if no decision had been rendered below. *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988). Moreover, in reviewing a dismissal, the Court accepts all factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmovant. *Knox*, 260 F.3d at 1012.

II. In Quasi-Criminal Civil Actions, Due Process Guarantees A Fair Trial Conducted By A Financially Disinterested Public Prosecutor.

A. There Are Constitutional Limits To A Prosecutor's Partisanship.

With each passing day, the Law Firms' prosecution of the UCL Suit under the District Attorney's contingency-fee agreement deprives American Bankers of

its constitutional rights. The Due Process Clause of the Fourteenth Amendment provides that states shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As discussed below, in civil and criminal matters alike, the right to due process includes the right to prosecution by a lawyer for the government whose judgment is not clouded by a financial or other personal stake in the matter's outcome.

True, "the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). That does not mean they do not exist. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) ("We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors."). After all, a public prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). His interest is not to "win a case, but that justice shall be done." *Id.*; *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979) ("The responsibility of the prosecutor as a representative of the public … requires him to be sensitive to the due process rights of a defendant to a fair trial."); *Reid v. INS*, 949 F.2d 287, 288

(9th Cir. 1991) ("Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.").

In *Marshall*, the United States Supreme Court warned that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." 446 U.S. at 249-50 (rejecting due process challenge because, in the circumstances of that case, "[n]o governmental official stands to profit economically" as the "salary of the assistant regional administrator is fixed by law," but acknowledging that due process requires a disinterested public prosecutor). "In appropriate circumstances," the Supreme Court recognized, the "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of [a government lawyer] were motivated by improper factors or were otherwise contrary to law." *Id.* This was consistent with the principle that due process imposes limits on a public prosecutor's "partisanship." *See id.* at 249 ("Prosecutors are also public officials; they too must serve the public interest.").

Under the federal courts' supervisory power over appointed public prosecutors, there is a "categorical rule" against "interested prosecutors." *See Young*, 481 U.S. at 814. The rule protects against prosecutors who "may be tempted to bring a tenuously supported prosecution if such a course promises

financial or legal rewards." *Id.* at 805. "Prosecution by someone with conflicting loyalties 'calls into question the objectivity of those charged with bringing a defendant to judgment.'" *Id.* at 810 (quoting *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986)). "The appointment of an interested prosecutor raises such doubts." *Id.*; *see also People v. Eubanks*, 14 Cal. 4th 580, 584, 598 (1996) (where "victim of trade secrets theft contributed around $13,000 to the cost of the district attorney's investigation," holding that "financial assistance of the sort received here may create a legally cognizable conflict of interest for the prosecutor").

In his concurring opinion in *Young*, Justice Blackmun echoed *Marshall* by emphasizing this "categorical" rule's constitutional dimension: "the practice – federal or state – of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." 481 U.S. at 814-15. "This constitutional concept," Justice Blackmun wrote, "requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.* at 815; *see also Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (holding that appointment of a personally interested public prosecutor violates the Due Process Clause); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (same); *Santa Clara*, 50 Cal. 4th at 51 n.7 (stating that it is "beyond dispute that due process would not allow for a criminal prosecutor to employ private

cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution").

Here, the Court is presented with the same sort of "scheme" eschewed in *Marshall* and *Young*, one "injecting" a financial interest into the prosecutorial decision and enforcement process that raises "serious constitutional questions." *Marshall*, 446 U.S. at 249-50. Indeed, it is difficult to conceive of a scheme that more directly injects the Law Firms' financial interest into the enforcement process than one giving the Law Firms a sizeable contingent stake in the UCL Suit's outcome. The Law Firms have every incentive to maximize the civil penalties imposed. That dynamic is at war with the tenet that a public prosecutor's interest is not to "win a case, but that justice shall be done." *Berger*, 295 U.S. at 88.

It also violates due process. To state the obvious, "giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting would render it unlikely that the defendant would receive a fair trial," *Santa Clara*, 50 Cal. 4th at 51, and "'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

A respected constitutional law professor elaborates:

> Imagine a coercive civil action – *i.e.*, an action to impose civil penalties – brought by the state against a private actor, where full time state attorneys who are paid solely on a contingent fee basis represent the state. Here, the

> constitutional implications may not be as readily obvious as they are in the context of a criminal prosecution. Nevertheless, the two situations should be treated similarly, for a number of reasons. Civil coercive actions trigger most of the same political and constitutional concerns implicated by criminal prosecutions. True, civil actions do not implicate the array of special constitutional protections traditionally associated with criminal prosecutions, such as the right to confront accusers or the requirement of proof beyond a reasonable doubt. The fact remains, however, that the potential loss of property, as much as the loss of liberty, triggers the protections of procedural due process. When the state acts coercively against its citizens through the judicial process, its obligations to act in good faith in pursuit of the public interest, rather than out of potentially distorting personal motivations, the dictates of due process would seem to be equally applicable.

Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 104 (2010).[2]

[2] *See also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000) ("The primary reason contingent fee arrangements should not be used for government lawsuits is that government legal authority should not be given to someone with a direct financial stake in a matter. In contrast to the government lawyer's incentives, the contingent fee lawyer's incentives are more entrepreneurial than political. Generally, the contingent fee lawyer's primary incentive is to maximize the monetary recovery, which corresponds with the primary interest of most private plaintiffs. However, the government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants."); Robert A. Levy, *The New Business of Government Sponsored Litigation*, 9 Kan. J.L. & Pub. Pol'y 592, 598 (2000) ("We cannot, in a free society, condone private lawyers enforcing public law with an incentive kicker to increase the penalties.").

Prosecutorial impartiality does not affect only the accused. "Society also has an interest in both the reality and the appearance of impartiality by its prosecuting officials: 'It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as is possible, the appearance of impropriety.'" *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 268 (1977) (quoting *People v. Rhodes*, 12 Cal. 3d 180, 185 (1974)). Societal confidence "is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality." *Id.* at 267.

B. The "Leading Analyses" Of Prosecutorial Neutrality.

As the District Court recognized, it does not appear that this Court (or the United States Supreme Court) has squarely addressed "the requirements of due process when public entities engage private counsel on a contingency-fee basis." ER10.[3] Instead, the District Court found, the "leading analyses" can be found in *People ex rel. Clancy v. Superior Court*, *supra*, and *County of Santa Clara v. Superior Court*, *supra*, two California Supreme Court decisions. *Id.* In both of

[3] The District Court correctly distinguished an unpublished decision from this Court, *In re City of San Diego*, 291 F. App'x 798 (9th Cir. 2008), in which the City of San Diego was allowed to employ contingency-fee private counsel to bring tort claims as an ordinary, non-sovereign party, simply enforcing the City's own contract and property rights. ER10.

those cases, the court ruled that while contingency-fee agreements between public prosecutors and private counsel may (with the proper exercise of control) be tolerated in ordinary civil litigation, in quasi-criminal law enforcement actions, standards of prosecutorial neutrality "categorically bar contingent-fee agreements in all instances." *Santa Clara*, 50 Cal. 4th at 51-52; *Clancy*, 39 Cal. 3d at 748-49.

1. *Clancy.*

In *Clancy*, the City of Corona hired outside counsel (Clancy) to prosecute a public-nuisance action to enjoin an adult bookstore from selling sexually explicit materials. *Id.* at 743. Corona's retention agreement provided that Clancy's hourly rate would double if Corona were successful, and the court ordered the losing party to pay Corona's attorneys' fees. *Id.* at 745. "Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.* at 747-48. The California Supreme Court rejected this financial arrangement, explaining that "the prohibition against contingent fees in criminal actions extends to certain civil cases." *Id.* at 748. The public-nuisance action sufficiently resembled a criminal prosecution, as it: (i) was "brought in the name of the People," *id.* at 749; (ii) sought an injunction threatening the defendant's "First Amendment interest in selling protected material," and the public's "First Amendment interest in having such material available for

purchase," *id.*; and (iii) sought a remedy entirely "in the hands of the state," not ordinary private litigants, *id.* (internal quotation marks omitted).

It did not matter that the private attorney was characterized as an independent contractor under the contingency-fee agreement (as is the case here). As the *Clancy* court explained, "a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." *Id.* at 747.

The *Clancy* court thus held "that the contingent fee arrangement between Corona and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 750. "Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* at 749.

To support its legal analysis, *Clancy* relied on *Tumey v. Ohio*, 273 U.S. 510 (1927), which found a Fourteenth Amendment due process violation where the mayor of a town served as judge in liquor possession cases. The punishment was a fine, with the money paid into a fund that the mayor could use to recover his costs for hearing the case. That created an improper financial incentive. *Clancy* similarly relied on *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), in which a

state law authorized mayors to sit in ordinance violation cases. The fines, forfeitures, costs, and fees of the mayor's court provided a substantial portion of the village funds. That arrangement also denied due process before a disinterested judicial officer. Both *Tumey* and *Ward*, the *Clancy* court found, stood for the proposition that "prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." 39 Cal. 3d at 746. "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated." *Id.*

Significantly, the *Clancy* courts (trial and appellate) never decided whether, on the one hand, the sexually explicit materials at issue were protected by the First Amendment or, on the other hand, were obscene and thus not protected. Corona had issued a subpoena duces tecum specifically "to permit the court to determine whether the publications are obscene." *Id.* at 744. As the California Supreme Court later characterized *Clancy*, "operation of the adult bookstore involved speech that *arguably* was protected in part, and thus curtailment of the right to disseminate the books in question *could* significantly infringe upon the [defendants'] liberty interest in free speech." *Santa Clara*, 50 Cal. 4th at 53 (emphases added).

2. *Santa Clara.*

In *Santa Clara*, a group of California counties and cities were prosecuting a public-nuisance action against businesses that had formerly manufactured lead

paint. *Id.* at 43. Importantly, the public-nuisance action did *not* involve a claim under the UCL or seek civil penalties. The public entities were represented both by their own government attorneys and several private law firms. *Id.* These law firms were retained on a contingency-fee basis. *Id.* The paint manufacturers moved to bar the public entities from compensating their privately retained counsel by means of contingent fees. *Id.*

The *Santa Clara* court took a dim view of the fee arrangement, noting that "it is generally accepted that any type of arrangement conditioning a public prosecutor's remuneration upon the outcome of a case is widely condemned." *Id.* at 51. "Accordingly," the court said, "although there are virtually no cases considering the propriety of compensation of public prosecutors pursuant to a contingent-fee arrangement, it would appear that under most, if not all, circumstances, such a method of compensation would be categorically barred." *Id.*

While expressing doubts about contingency-fee arrangements with public prosecutors "under most, if not all circumstances," *id.*, the *Santa Clara* court nonetheless distinguished *Clancy*, which involved interests "akin to the vital interests implicated in a criminal prosecution, and thus invocation of the disqualification rules applicable to criminal prosecutors was justified." *Id.* at 51-52. Had those rules been "found to be equally applicable in the case" before the

Santa Clara court, "disqualification of the private attorneys hired to assist the public entities similarly would be required." *Id.* at 52.

The case, however, fell between the "two extremes on the spectrum of neutrality required of a government attorney." *Id.* at 55. Unlike *Clancy*, *Santa Clara* involved "a qualitatively different set of interests – interests that are not substantially similar to the fundamental rights at stake in a criminal prosecution," a "distinguishing circumstance" the court found to be "dispositive." *Id.* at 54; *see also id.* at 56 ("this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution"); *id.* at 51 (*Clancy* "was guided, in large part, by the circumstances that the public-nuisance action pursued by Corona implicated interests akin to those inherent in a criminal prosecution").

The *Santa Clara* court focused on the nature of the relief sought. Although the law firms were "appearing as representatives of the public and not as counsel for the government acting as an ordinary party in a civil controversy," *id.* at 55, "both the types of remedies sought and the types of interests implicated differ significantly from those involved in *Clancy*," so "invocation of the strict rules requiring the automatic disqualification of criminal prosecutors is unwarranted." *Id.* at 52. Unlike in *Clancy* (and this appeal), *Santa Clara* did not involve relief that "prevents the defendants from continuing their current business operations." *Id.* The *Santa Clara* defendants had not engaged in the challenged conduct (the

production and distribution of lead paint) since 1978, over three decades prior. *Id.* "Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest," the court continued, since "the *remedy* will not involve enjoining current or future speech." *Id.* Moreover, "expenditure of resources to abate a hazardous substance affecting the environment is the type of remedy one might find in an ordinary civil case and does not threaten the continued operation of an existing business." *Id.* at 56.

III. The UCL Suit Is No Ordinary Civil Case, But Implicates The Same Vital Interests Implicated In Criminal Enforcement Actions And Would Curtail Arguably Protected Speech.

The UCL Suit is much closer in kind to the quasi-criminal law enforcement action prosecuted in *Clancy* than it is to the more "ordinary civil case" prosecuted in *Santa Clara*. Like *Clancy*, the UCL Suit: (i) involves for-profit private counsel "appearing as representatives of the public and not as counsel for the government acting as an ordinary party in a civil controversy"; (ii) features punitive remedies and implicates interests "akin to those inherent in a criminal prosecution"; and (iii) if a judgment were entered against the Companies, it would "prevent defendants from exercising any First Amendment right" in marketing their products to the public in a manner that two federal agencies have specifically authorized. Because the UCL Suit raises many of the same concerns raised by a criminal prosecution,

the contingency-fee agreement motivating the Suit violates American Bankers's due process right to a fair proceeding. The District Court erred in ruling otherwise.

A. The UCL Suit Serves A Purely Public Purpose.

As an initial matter, the Law Firms – as so-called "Special Assistant District Attorneys" – are appearing as representatives of the public, not as counsel for the government acting as an ordinary party in a civil lawsuit. This is a crucial point.

Under the UCL, courts "may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition" or "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203. "Unfair competition" means and includes "any unlawful, unfair or fraudulent" business act or practice. *Id.* § 17200. Certain public prosecutors, as well as any "person who has suffered injury in fact and has lost money or property as a result of the unfair competition," may bring a UCL action. *Id.* § 17204.

"But not all suits are created equal. A public prosecutor bringing an action under the UCL may seek civil penalties, permanent injunctive relief, and restitution, whereas suits brought by private individuals are limited to injunctive relief and restitution." *California v. IntelliGender, LLC*, 771 F.3d 1169, 1174 (9th Cir. 2014); *see also* Cal. Bus. & Prof. Code §§ 17206 (allowing only public

prosecutors to seek civil penalties), 17206.1 (same). "Despite the importance of private enforcement of the UCL and FAL, such private suits do not and cannot substitute for public enforcement actions, which serve as a far greater deterrent and thus a greater protection." *Intelligender*, 771 F.3d at 1174.

"An action filed by the People seeking injunctive relief and civil penalties [under the UCL] is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *People v. Pac. Land Research Co.*, 20 Cal. 3d 10, 17 (1977). Significantly, like all UCL public law enforcement actions, the UCL Suit is brought in the name of the People of the State of California and, thus, is filed as an exercise of the State's sovereign power. *See* Cal. Gov. Code § 100. "There can be no question, therefore, that the present case is being prosecuted on behalf of the public, and that accordingly the concerns … identified in *Clancy* as being inherent in a public prosecution are, indeed, implicated in the case now before us." *Santa Clara*, 50 Cal. 4th at 55.

When the government outsources its sovereign powers to private lawyers, the special responsibilities of the government must follow. As a law enforcement officer, "the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual." *Eubanks*, 14 Cal. 4th at 598. "While, as a general rule, district attorneys may not use their funds and powers to intervene in

purely private litigation, some functions, though civil in nature, are so closely related and in the furtherance of criminal law enforcement that the district attorney may properly perform them." *People v. Parmar*, 86 Cal. App. 4th 781, 798 (2001).

Unsurprisingly, the District Attorney's peers spurn the use of contingency-fee counsel in UCL law enforcement actions. Renouncing the District Attorney's apostasy, the California District Attorneys Association ("CDAA") has written that

> it is impossible to understate the importance to CDAA and prosecutors of maintaining public confidence in the fair and impartial enforcement of key civil law enforcement statutes such as the UCL and the FAL. CDAA believes that court approval of contingent fee agreements in civil law enforcement cases giving contingent fee outside counsel direct, personal, and substantial financial stakes in the outcome of commercial cases will greatly undermine public confidence in the fair and equitable use of those statutes with disastrous consequences.

Brief of *Amicus Curiae* CDAA at 36, *County of Santa Clara v. Superior Court* (2010) 50 Cal. 4th 35 (No. S163681), 2009 WL 1541982, at *36. The CDAA emphasized that if a "prosecutor has a financial stake in the outcome of a [UCL] case in which they are participating, he or she obviously lack the impartiality required in order to afford the defendant due process." *Id.* at *10.

B. UCL Penalties Are Akin To Criminal Sanctions.

"In a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief." *Gabelli v. SEC*, 133 S. Ct. 1216, 1223

(2013). The UCL Suit is unlike ordinary litigation because it seeks civil penalties under Cal. Bus. & Prof. Code §§ 17206 and 17206.1 – penalties unavailable to private plaintiffs and that share key characteristics with criminal punishments.

"A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull v. United States*, 481 U.S. 412, 422 (1987). Such penalties have no correlation to actual damage sustained or the cost of enforcing the law. *See Clark v. Superior Court*, 50 Cal. 4th 605, 614 (2010). They are instead designed to "punish and deter unlawful conduct," as well as to stigmatize defendants. *State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 1291 (2005); *see also Gabelli*, 133 S. Ct. at 1223 (civil penalties "go beyond compensation, are intended to punish, and label defendants wrongdoers"); *Tull*, 481 U.S. at 423 n.7 ("The more important characteristic of the remedy of civil penalties is that it exacts punishment").

The District Court recognized, and the District Attorney conceded, that UCL civil penalties serve a punitive purpose. ER15-16. But merely recognizing this, as the District Court did, discounts the central importance this has to the "spectrum" analysis. The "dispositive" question, said the *Santa Clara* court, in that analysis is

whether the case involves interests that are "substantially similar to the fundamental rights at stake in a criminal prosecution." 50 Cal. 4th at 54.

The District Court failed to take the next step in the "spectrum" analysis: comparing UCL civil penalties to criminal sanctions. In particular, the District Court overlooked that "the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998); *see also Lees v. United States*, 150 U.S. 476, 479 (1893) (although "it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts," "the recovery of a penalty is a proceeding criminal in its nature").[4] This is especially true for corporate defendants. After all, the invariable judicial response to a corporate conviction is to economically punish the company which, of course, is incapable of bodily incarceration.

It is equally true for UCL civil penalties. Although labeled as civil, courts have repeatedly likened UCL public law enforcement actions seeking penalties to

[4] Many courts have drawn the analogy. *See, e.g.*, *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001) (the statutes at issue imposed "civil and administrative penalties, including fines and license revocation, which can be characterized as quasi-criminal"); *Corder v. United States*, 107 F.3d 595, 597-98 (8th Cir. 1997) (noting that a civil penalty is "a quasi-criminal sanction"); *United States v. AM Gen. Corp.*, 34 F.3d 472, 474 (7th Cir. 1994) (noting "the quasi-criminal character of civil-penalty actions"); *First Am. Bank of Va. v. Dole*, 763 F.2d 644, 652 n.6 (4th Cir. 1985) ("Civil penalties may be considered 'quasi-criminal' in nature.").

criminal prosecutions. *See, e.g.*, *People v. Cimarusti*, 81 Cal. App. 3d 314, 323 (1978) ("Although the prosecution in this [UCL] case is civil in nature, resulting in the imposition of civil penalties rather than criminal sanctions, the situation is analogous to a criminal proceeding with respect to the division of power between the executive and judicial branches of the government."). Indeed, because they serve to "penalize a defendant for past illegal conduct" and have a "public, penal objective," the California Supreme Court has been unable to "discern a difference" in UCL law enforcement actions "between the [public prosecutor's] seeking criminal penalties or civil penalties." *Altus Fin.*, 36 Cal. 4th at 1308.

In *Altus Finance*, the California Supreme Court answered whether the California Attorney General may pursue civil remedies under the UCL concerning the assets of an insolvent insurance company for which the California Insurance Commissioner is acting as conservator or whether, in contrast, the Insurance Code gives exclusive authority to the Insurance Commissioner to bring civil actions. *Id.* at 1290. The court held that the Attorney General "may pursue that relief only to the extent that it implicates core law enforcement functions rather than duplicating the role played by the Commissioner as conservator of the insolvent company." *Id.* at 1291. Thus, an action seeking UCL restitution for "losses resulting from the allegedly fraudulent acquisition of the insolvent insurance company's assets"

would trespass "on the core function of the Commissioner as conservator of the company," and could not be brought by the Attorney General. *Id.*

UCL civil penalties were a different story. In pursuing civil penalties "based on defendants' allegedly unlawful conduct in violating state and federal statutes, the Attorney General acts primarily in his role as the state's chief law enforcement officer, seeking to punish and deter unlawful conduct." *Id.* "Thus the public, penal objective of civil penalties under the UCL differs fundamentally from the Commissioner's purpose under [the Insurance Code] of protecting the beneficiaries of the insolvent insurance company." *Id.* at 1308. California's Insurance Code "does not preclude the Attorney General from bringing a criminal action," and the California Supreme Court was unable to "discern a difference, for present purposes, between the Attorney General's seeking criminal penalties or civil penalties" under the UCL. *Id.*

Multiple federal judges, including then District Judge (now Ninth Circuit Judge) A. Wallace Tashima, likewise have found that UCL civil penalties "are not damages recovered for the benefit of private parties; *they are more akin to a criminal enforcement action* and are brought in the public interest." *People v. Steelcase Inc.*, 792 F. Supp. 84, 86 (C.D. Cal. 1992), *disapproved on other grounds by California v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004) (emphasis added); *see also People v. Universal Syndications, Inc.*, 2009 WL 1689651, at *3 (N.D. Cal.

June 16, 2009) (directly quoting and agreeing with *Steelcase* on this point); *People v. Time Warner, Inc.*, 2008 WL 4291435, at *2 (C.D. Cal. Sept. 17, 2008) (same). The District Attorney himself admits as much, having directly quoted and relied upon that same language from *Steelcase* in a motion the Law Firms filed on his behalf in another UCL law enforcement action formerly in the United States District Court for the Eastern District of California. *See* Pl.'s Mot. to Remand at 11, *People ex rel. Heryford v. Volkswagen of America, Inc.*, No. 2:15-CV-02254-MCE-CMK (E.D. Cal. filed Nov. 9, 2015), 2015 WL 10384529.

Of course, "the punitive nature of a civil penalty does not make an action to obtain it *completely* criminal in nature." *People v. Bestline Prods., Inc.*, 61 Cal. App. 3d 879, 916 (1976) (emphasis added). UCL civil penalties, in particular, do not trigger all of the heightened constitutional and evidentiary protections applicable to true criminal proceedings. *See, e.g.*, *People v. Superior Court (Kaufman)*, 12 Cal. 3d 421, 431-33 (1974).

That does not mean that such penalties are any less akin to criminal sanctions. The same could be said of punitive or exemplary damages, which indisputably emulate criminal sanctions. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (punitive damages are "quasi-criminal" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing"); *In re Exxon Valdez*, 270 F.3d 1215, 1245 (9th Cir. 2001) ("punitive

damages are quasi-criminal"). "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281 (1994). Punitive damages "serve the same purposes as criminal penalties" even though "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

"Thus, the remedy of civil penalties is similar to the remedy of punitive damages, another legal remedy that is not a fixed fine." *Tull*, 481 U.S. at 423 n.7. In particular, UCL civil penalties are "in the nature of exemplary damages," and equally quasi-criminal, even if neither form of punishment serves to "convert a civil action into a criminal action insofar as it affects constitutional protections in criminal proceedings." *Kaufman*, 12 Cal. 3d at 433; *see also People v. Superior Court* (*Jayhill*), 9 Cal. 3d 283, 287 (1973) (stating that an award of exemplary damages would be "the equivalent of a civil penalty" under the UCL).

C. The UCL Suit Is A Government Effort To Limit Speech.

That UCL public law enforcement actions are brought exclusively to protect the public, not to benefit private parties, and UCL civil penalties share the key characteristics of criminal sanctions are sufficient reasons, in and of themselves, to invoke the categorical bar against financially interested prosecutors. Neither

Clancy nor *Santa Clara* required more – whether interests "substantially similar to the fundamental rights at stake in a criminal prosecution" is the "dispositive" question. *Santa Clara*, 50 Cal. 4th at 54. Simply put, is the UCL Suit "closer on the spectrum to an ordinary civil case than it is to a criminal prosecution"? *Id.* at 56. The nature of the action and the relief sought *clearly* are, ending the inquiry.

Yet there is still another, independent reason supporting the categorical bar: the UCL Suit raises the disturbing specter of a profit motive as the basis for governmental regulation of speech. The District Attorney prays for a judgment declaring the Companies' marketing and communications with cardholders to be deceptive and civil penalties to deter that speech. These remedies necessarily involve chilling current or future speech, further distinguishing the UCL Suit from ordinary civil litigation. This attempt to regulate the Companies' speech is especially alarming given that two federal agencies have already comprehensively regulated the Companies' marketing and communications with its cardholders, ultimately determining that the obligations of the consent order have been fulfilled.

While the District Attorney does not seek an injunction *per se*, but a declaratory judgment and civil penalties, these are simply alternative means of governmental regulation. Just as much as punishing conduct, "a state may impose reasonable penalties as a means of securing obedience to statutes validly enacted under the police power." *Hale v. Morgan*, 22 Cal. 3d 388, 398 (1978).

"Imposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy." *Id.* And "fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000); *see also Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003) (political action committee suffered a First Amendment injury because it "faced a reasonable risk that it would be subject to civil penalties for violation of the statute" at issue).

Examining the First Amendment issue, the District Court dismissively reasoned that American Bankers's "cites no case law to support a conclusion that conduct giving rise to an action under the UCL, targeting deceptive marketing of ancillary products and services, is protected by the First Amendment, in contrast to the well-established First Amendment protection afforded to the *Clancy* plaintiff's right to distribute adult materials." ER16. This reasoning is twice wrong.

First, there was no "well-established First Amendment protection afforded to the *Clancy* plaintiff's right to distribute adult materials" since, just as there is no First Amendment right to disseminate deceptive marketing, there has never been a First Amendment right to distribute obscene materials. *See United States v. Williams*, 553 U.S. 285, 288 (2008) ("We have long held that obscene speech – sexually explicit material that violates fundamental notions of decency – is not

protected by the First Amendment."). Whether the bookstore's materials were, in fact, obscene was the underlying, *undecided* issue in *Clancy*. *See* Part II.B.1, *supra*; *Santa Clara*, 50 Cal. 4th at 53; *Clancy*, 39 Cal. 3d at 744. *Clancy* held that a financially interested public prosecutor could not represent the government in litigating that ultimate issue.

Second, while there is no right to disseminate deceptive marketing, the Companies deny that the marketing is, in fact, deceptive. The UCL Suit threatens this *arguably* protected speech. *Clancy* is thus fully applicable. As "recognized in *Clancy*, the operation of the adult bookstore involved speech that *arguably* was protected in part, and thus curtailment of the right to disseminate the books in question *could* significantly infringe upon the [bookstore's] liberty interest in free speech." *Santa Clara*, 50 Cal. 4th at 53 (emphases added). It did not matter that the speech was only "arguably" protected, *id.*, or that the government *alleged* that the speech was obscene and therefore not entitled to First Amendment protections. *See Clancy*, 39 Cal. 3d at 744. What mattered in *Clancy* was that a liberty interest was "implicated." *Santa Clara*, 50 Cal. 4th at 53. Such a *potential* First Amendment right was "something more to be added to the balance." *Clancy*, 39 Cal. 3d at 749. So too here.

Santa Clara, by contrast, is inapposite. There, the California Supreme Court emphasized that, unlike in *Clancy*, the case would not "prevent defendants from

exercising any First Amendment right or any other liberty interest. Although liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech." *Santa Clara*, 50 Cal. 4th at 55. The manufacture and sale of lead paint had ceased in 1978, more than 30 years prior. *Id.* Consequently, the court reasoned, the litigation was "closer on the spectrum to an ordinary civil case than it [was] to a criminal prosecution." *Id.* at 56. Here, the proposed remedy will punish speech.

Finally, it does not matter that the threatened speech is commercial speech, rather than political or other speech. "The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "Commercial speech is no exception." *Id.* "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'" *Id.* (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). Even marketing for products that raise public health concerns, such as alcohol and tobacco, are protected by the First Amendment. *See*, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

The jurisprudential trajectory is toward greater protection for commercial speech, not less. *See, e.g.*, *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting) (the majority opinion "suggest[s] a standard yet stricter" than prior precedent and "that we must give *content-based* restrictions that burden speech 'heightened' scrutiny"); *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 647 (9th Cir. 2016) ("*Sorrell* requires a more demanding form of scrutiny of content- or speaker-based regulations on commercial speech than we have previously applied."). After all, "the creation and dissemination of information," *any* information, "are speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570. Accordingly, the Court should consider the Companies' loss of (at least) arguable First Amendment rights in evaluating where the UCL Suit falls on the "spectrum."

IV. The District Attorney's Purported Control Of The UCL Suit Is Irrelevant To The *Categorical* Rule Against Interested Prosecutors.

The District Attorney argued below that, because he retained the contractual right to supervise the Law Firms in their prosecution of the UCL Suit, no due process concerns exist with their contingency-fee arrangement. This misses the point, and the District Court erred in accepting it. Again, there is a "categorical rule" against financially interested private counsel prosecuting quasi-criminal law enforcement actions, adequate government supervision or not.

Where, as here, the lawsuit "implicates interests akin to those inherent in a criminal prosecution," it is "appropriate to invoke directly the disqualification rules

applicable to criminal prosecutors – rules that *categorically* bar contingent-fee agreements *in all instances*." *Santa Clara*, 50 Cal. 4th at 51 (emphases added). Thus, "although there are virtually no cases considering the propriety of compensation of public prosecutors pursuant to a contingent-fee arrangement, it would appear that under most, if not all, circumstances, such a method of compensation would be *categorically* barred." *Id.* (emphasis added).

In *Clancy*, the *Santa Clara* court observed, "the interests invoked in that case were akin to the vital interests implicated in a criminal prosecution," justifying just such a categorical disqualification. *Id.* at 51-52. If the same categorical rule was "found to be equally applicable in the case now before us," it reasoned, "disqualification of the private attorneys hired to assist the public entities similarly would be required." *Id.* at 52. In *Santa Clara*, inquiry into whether the private law firms were adequately supervised arose only because the court found that the categorical bar did *not* apply. As the *Santa Clara* court stated,

> although the principles of heightened neutrality do not categorically bar the retention of contingent-fee counsel to assist public entities in the prosecution of public-nuisance abatement actions, those principles do mandate that all critical discretionary decisions ultimately must be made by the public entities' government attorneys rather than by private counsel – in other words, neutral government attorneys must retain and exercise the requisite control and supervision over both the conduct of private attorneys and the overall prosecution of the case.

Id. at 61-62.

In quasi-criminal actions like the UCL Suit, the stakes are simply too high to blindly trust that the government will ride herd on its for-profit private counsel. The categorical bar on an arrangement giving a prosecutor a direct pecuniary interest in the outcome of a public law enforcement action is necessary to preserve "both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall*, 446 U.S. at 242 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

Government oversight cannot restore the "reality of fairness" here. Try as he may, the District Attorney cannot deny the temptation that contingency fees offer the Law Firms. Contingency-fee prosecutors have incentives that, under any "'realistic appraisal of psychological tendencies and human weaknesses,'" *id.* at 252 (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)), create a structural conflict between the pursuit of justice and their direct pecuniary interest. Under their contingency-fee agreement, the Law Firms are entitled to 30 percent of any recovery if they win, but nothing if they lose. The Law Firms also agreed to stake all expenses, an investment they would lose if no civil penalties are awarded. As long as the Law Firms perform the investigation, filing, and prosecution of claims against the Companies – tasks they are contractually obliged to perform – the Law Firms will frame the presentation of all facts and all litigation choices to the

District Attorney and his staff. This arrangement inherently skews the litigation decisionmaking, violating basic tenets of fairness at every stage of the prosecution.

Equally important, government oversight cannot restore the "appearance of fairness." Even if the District Attorney's supervision could neutralize the Law Firms' structural conflict of interest, eliminating any actual prejudice to the Companies, the "appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." *Young*, 481 U.S. at 811. This appearance of impropriety renders any control the District Attorney may exercise immaterial to the analysis.

"A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. 'Justice must satisfy the appearance of justice,' and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." *Young*, 481 U.S. at 811-12 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *see also* Brief of *Amicus Curiae* CDAA, 2009 WL 1541982, at *36 ("[C]ourt approval of contingent-fee agreements in civil law enforcement cases giving contingent fee outside counsel direct, personal, and substantial financial stakes in the outcome of commercial cases will greatly undermine public confidence in the fair and equitable use of [the UCL] with disastrous consequences."). "Our system relies for its validity on the confidence of society; without a belief by the people that the

system is just and impartial, the concept of the rule of law cannot survive." *Clancy*, 39 Cal. 3d at 746.

CONCLUSION

The District Court erred by permitting the District Attorneys' unconstitutional contingency-fee arrangement with the Law Firms. The order of dismissal and consequent final judgment should be reversed and the case remanded for further proceedings.

Dated: September 26, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 10,536 words.

/s/ Frank G. Burt
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STATEMENT OF RELATED CASES

Appellant is not aware of any related case pending in this Court.

CERTIFICATE OF SERVICE

I certify that on September 26, 2016, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Frank G. Burt
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