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August 2, 2013

Via Overnite Express
The Hon. Tani Gorre Cantil-Sakauye,
Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *People v. Pac Anchor Transp., Inc.*, Case No. S194388

Dear Chief Justice and Associate Justices:

We write pursuant to the Court's Order of June 26, 2013, in which the Court asked the parties to submit letter briefs and granted them leave to submit responsive briefs. The Court asked the parties to address what impact, if any, the U.S. Supreme Court's decisions in *American Trucking Associations, Inc. v. City of Los Angeles* ("*ATA*"), 133 S. Ct. 2096, 186 L. Ed. 2d 177 (2013), and *Dan's City Used Cars, Inc. v. Pelkey* ("*Dan's City*"), 133 S. Ct. 1769, 185 L. Ed. 2d 909 (2013), have on the question of whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1), preempts the claim asserted by the People of the State of California *ex. rel.* Kamal Harris (the "State") against Petitioners Pac Anchor Transportation, Inc., and Alfredo Barajas ("Petitioners") under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, for allegedly violating California labor and unemployment insurance laws by misclassifying employees as independent contractors.

Petitioners hereby submit the following response to the letter brief filed by the State on July 17, 2013.

RESPONSIVE LETTER BRIEF

I. *American Trucking Associations, Inc. v. City of Los Angeles* ("*ATA*")

The parties agree that in *ATA*, the U.S. Supreme Court affirmed its two-prong test for FAAAA preemption: 1) whether there has been state action having the force and effect of law (aka "mechanism" prong), and 2) whether the state action is related to motor carrier prices, routes, and services (aka "linkage" prong). See *Brown v. United Airlines, Inc.*, Nos. 12-1543, 12-2056, U.S. App. LEXIS 13804 *1, *6-7 (1st Cir. July 9, 2013).

In addressing the first prong, the Court found that certain provisions of concession agreements between the Port of Los Angeles (the "Port") and motor carriers providing drayage services in

the Port were not mere contractual obligations voluntarily undertaken by the parties. *ATA,* 186 L. Ed. 2d at 181-82, 185-86. Instead, the challenged provisions represented an exercise of "classic regulatory authority" that had the force and effect of law because they were backed by the threat of criminal penalties set forth in a port tariff and only available to the Port. *Id.* at 185-86. The Court therefore found that the agreements constituted state action subject to FAAAA preemption, satisfying the mechanism prong of the test. *Id.* at 186.

The State concedes that its claim against Petitioners has the force and effect of law and contends, wrongly, that *ATA* therefore has no impact on this matter. (Resp.'s Letter Br. at 2.) The State misses the larger implication of *ATA*. In *ATA*, the Court continued to expand the breadth of FAAAA preemption by finding that even the minimally intrusive parking and placard provisions of the concession agreements constituted state regulatory action that warranted FAAAA preemption analysis because a port tariff imposed penalties on third party terminal operators for violations of the agreements. *ATA* therefore indicates that even minor requirements enforced indirectly constitute state action that satisfies the mechanism prong and warrants FAAAA preemption analysis.

Here, application of *ATA*'s force and effect analysis to the UCL and the State's UCL claim demonstrates that they each, like the concession agreements, are enforceable through a penalty only available to the State. Specifically, the UCL provides for a civil penalty that is only available in UCL actions brought by the State or its political subdivisions. Cal. Bus. & Prof. Code § 17206. Moreover, that remedy, and the injunctive relief and restitution available to all litigants under the UCL, overlay those provided by the underlying laws upon which the alleged UCL violation is premised, providing the mechanism by which the State and individual litigants regulate and police unfair competition. *See Id.* §§ 17203, 17205; Resp.'s Ans. Br. § I.A at 10.

Because the UCL is enforceable through a civil penalty that is not available to all litigants, the UCL and claims under the UCL have the force and effect of law and constitute state action subject to FAAAA preemption. Because the civil penalties and other remedies under the UCL overlay the remedies available for a violation of the underlying laws upon which a UCL claim is premised, the force and effect of the UCL and claims under the UCL differ from the force and effect of the underlying laws. Consequently, under *ATA*, the UCL, a claim under the UCL, and the underlying laws upon which a UCL claim is premised, are three separate state actions that are each subject to FAAAA preemption and that each require their own separate FAAAA preemption analyses.

In its pleadings, the State has equated the UCL and its particularized application to enforce state labor and unemployment insurance laws with those laws themselves. The Court of Appeal similarly conflated the three state actions. (Pets.' Opening Br., Ex. A at 10.) *ATA* demonstrates that approach is wrong. The proper approach is to analyze separately whether

the FAAAA facially preempts the UCL, whether it preempts the particularized application of the UCL presented by the State's UCL claim, and whether it preempts the state labor and unemployment insurance statutes underlying the State's UCL claim. This Court employed that approach to federal preemption of a claim under the UCL in *In re Tobacco Cases II*, 41 Cal. 4th 1257, 1272 (2007).

As Petitioners have previously demonstrated, when the test for FAAAA preemption is applied to the UCL, the UCL is invariably preempted. Furthermore, when the test is applied to the State's UCL claim in this matter, and to Sections Four and Seven of I.W.C. Wage Order 9-2001, they are each independently preempted.

Therefore, contrary to the State's contention, *ATA* speaks to the very heart of this matter. *ATA* demonstrates that a claim under the UCL presents three state actions, the UCL itself, the underlying laws being enforced by the UCL claim, and the particularized application of the UCL to those laws presented by the claim. Each of those state actions requires its own separate FAAAA preemption analysis.

II. *Dan's City Used Cars v. Pelkey* ("*Dan's City*")

For several reasons, the U.S. Supreme Court did not separately analyze whether the FAAAA preempted each of the three state actions presented by the New Hampshire state consumer protection claim at issue in *Dan's City*. Initially, *Dan's City* was decided before *ATA*. Therefore, that opinion was not available to guide the parties and the Court.

In addition, the issue of whether the FAAAA preempted the state consumer protection statute itself was not raised until the petitioner's reply brief on the merits, after all of the other principal briefs and *amicus* briefs had been filed. *See* Pet.'s Br. on the Merits § I.C at 11-13, *Dan's City Used Cars, Inc. v. Pelkey*, No. 12-52 (U.S. Mar. 12 2013), *available at* http://www.americanbar.org/publications/preview_home/12-52.html (last visited July 30, 2013). Consequently, the issue was not properly presented to the Court.

Furthermore, Petitioners' research indicates that no court in New Hampshire has issued a published opinion considering whether the New Hampshire state consumer protection statute at issue in *Dan's City* requires a three-part analysis to determine whether the statute itself, the claim under the statute, and the state statute at issue are each preempted. This matter is distinguishable because, in contrast to *Dan's City*, this Court's jurisprudence indicates that claims under the UCL require a three-part analysis. *In re Tobacco Cases II*, 41 Cal. 4th 1257, 1272 (2007).

Moreover, in *Dan's City* the Court did not need to separately analyze whether each of the state actions presented by the claim was preempted because the Court found that the claim was not subject to FAAAA preemption. The Court found that the phrase "with respect to the transportation of property" took a claim that concerned the disposal of a vehicle, rather than the transportation of property, beyond the scope of FAAAA preemption. *Dan's City Used Cars, Inc. v. Pelkey* ("*Dan's City*"), 133 S. Ct. 1769, 185 L. Ed. 2d 909, 915, 917-19 (2013); 49 U.S.C. § 14501(c)(1).

Therefore, the State's contention that *Dan's City* stands for the proposition that the UCL is not facially preempted is in error. (Resp.'s Br. at 3.) *Dan's City* merely indicates that, as a threshold issue, certain claims fall outside the scope of FAAAA preemption altogether, specifically those that do not concern the transportation of property. *See* H.R. Conf. Rep. 103-677 ("HRCR") at 85 (1993) (1 Appellant's App'x ("A.A.") 268) (garbage is not property, so the transportation of garbage falls outside the scope of FAAAA preemption). Such claims may, however, be subject to preemption under other parts of the statute. *See* 49 U.S.C. §§ 14501(a)-(b) (preemption of claims regarding the transportation of passengers and of claims regarding freight forwarders and brokers).

When the UCL is enforced against motor carriers of property in their capacity as motor carriers of property (as opposed to custodians of abandoned property, as was the case in *Dan's City*), the UCL necessarily concerns the transportation of property. The UCL prohibits unfair competition. Cal. Bus. & Prof. Code § 17200. Competition between motor carriers of property necessarily concerns the transportation of property. Therefore, the UCL passes the threshold test and is subject to FAAAA preemption. Moreover, that conclusion further supports facial preemption of the UCL and claims under the UCL against motor carriers of property in their capacities as motor carriers of property.

Similarly, the particularized application of the UCL presented by the State's UCL claim also concerns transportation. The State alleges that Petitioners have obtained an unfair advantage over their competitors by misclassifying drivers who transport property as independent contractors. (1 A.A. 10:3-11, 10:20-11:5, 12:4-8, 13:6-7, 14:8-12.) The classification of drivers who transport property concerns the transportation of property.

As demonstrated in Petitioners' other pleadings, it is well established that the classification of drivers by motor carriers of property concerns transportation and is therefore subject to FAAAA preemption. The classification of drivers concerns transportation because classification is central to a motor carrier's business model. It is so obvious that classification of drivers concerns transportation that in *ATA* the parties conceded that the provisions of the concession agreements requiring motor carriers to transition to the use of employee drivers were preempted by the FAAAA. *See Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct.

2096, 186 L. Ed. 2d 177, 182, 184, n.3 (2013). Furthermore, the Court accepted without comment that the placarding and parking requirements of the concession agreements were subject to FAAAA preemption.

Congress clearly recognized that the classification of drivers by motor carriers of property concerns transportation. Congress expressly stated that it enacted the FAAAA in response to a California law that concerned the classification of drivers. HRCR at 87 (1 A.A. 270) (referring to 193 Stats. Ch. 1255 § 4 (A.B. 2015 (Oct. 11, 1993), *codified at* Cal. Pub. Util. Code §§ 4120 et seq. (1994)) (Pets' Opening Br. Ex. B). Therefore, there can be doubt that the classification of drivers by motor carriers of property concerns transportation. Consequently, the State's UCL claim based on misclassification of drivers passes the threshold test and is subject to FAAAA preemption.

Respectfully submitted,

SANDS LERNER

Neil S. Lerner
NSL:aas/da

DECLARATION OF SERVICE

Case Name: ***People v. Pac Anchor Transportation, Inc.***
Supreme Court Case No.: **S194388**
Court of Appeal Case No.: **B220966**

I declare:

I am employed at the law firm Sands Lerner, the office of a member of the California State Bar at whose direction this service is made. I am over the age of 18 and not a party to this action.

On **August 2, 2013**, I caused the original attached **RESPONSIVE LETTER BRIEF** to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797, via Norco Overnight.

On **August 2, 2013**, I served the attached **RESPONSIVE LETTER BRIEF** on the following recipients by delivering copies thereof enclosed in sealed envelopes and addressed as follows to the common carrier Norco Overnite, which promises overnight delivery by 11:00 a.m. on August 5, 2013:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **August 2, 2013**, at Los Angeles, California.

Diane Adams
Declarant

Diane Adams
Signature