IN THE

SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc., Plaintiff and Respondent, v. PAC ANCHOR TRANSPORTATION, INC., et al., Defendants and Petitioners.	Case Number S194388

After a Decision by the Court of Appeal
Second Appellate District, Division Five
[Case No. B220966]

Appeal from a Judgment of the Superior Court for Los Angeles County
Hon. Elizabeth A. White, Judge
[Case No. BC397600]

REPLY BRIEF ON THE MERITS

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Service on the Office of the Attorney General and the District Attorney of the County of Los Angeles required by Bus. & Prof. Code § 17209

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I. The Issue Before This Court Is Not Whether Petitioners' Misclassified the Drivers, But Whether the FAAAA Preempts the State's UCL Claim Premised on Misclassification.

This appeal concerns judgment on the pleadings awarded to Defendants-Petitioners Pac Anchor Transportation, Inc., and Alfredo Barajas (collectively, "Petitioners") and against the People of the State of California, *ex rel.* Kamala D. Harris, Attorney General (the "State"). The trial court held that Section 14501(c)(1) of the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"), preempts the State's single claim against Petitioners under California's Unfair Competition Law (the "UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, *per se*[1] because the State's UCL claim affects motor carrier prices, routes, and services directly and because even if the effect were only remote, it threatens to interfere with Congress' deregulatory purpose by erecting a prohibited entry control discouraging the participation of independent contractor drivers in the trucking market. Order Granting Judgment on the Pleadings (1 Appellant's App. ("A.A.") at 428-432). The Court of Appeal disagreed. Opening Brief on the Merits ("Opening Brief," or "O.B."), Ex. A (125 Cal. Rptr. 3d 709 (Ct. App. 2011)).

Although the State's UCL claim is premised on the alleged misclassification[2] of drivers who drive trucks that they lease from Petitioner

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1. "*Per se*" is synonymous with "on its face," which Petitioners use because this Court has used it previously. *E.g.*, *In re Tobacco Cases II*, 41 Cal. 4th 1257, 1272 (2007).

2. In its Answer Brief on the Merits, the State asserts that Petitioners "intentionally" and "deliberately" misclassified drivers. Answer at 2, 22 n.11. The State made no such allegations in its Complaint. *See* Compl. (1 A.A. at 9-15). Therefore, the allegations are irrelevant to this appeal. Moreover, at the time the State filed its UCL claim, the misclassification of employees, whether willful, deliberate, or otherwise, was not in and of itself illegal. On October 9, 2011, more than three years *after* the State

Barajas for Petitioner Pac Anchor Transportation, Inc., as independent contractors, rather than employees, the issue before this Court is not whether a misclassification occurred or even whether the misclassification resulted in a violation of any California labor laws that warrants correction. Allegations regarding those matters in the State's complaint are presumed to be true because this Court is considering judgment on the pleadings. *Smiley v. Citibank (S.D.) N.A.*, 11 Cal. 4th 138, 145-46 (1995).

The State repeatedly argues that it is merely attempting to compel Petitioners to comply with State labor laws. *See* Answer Brief on the Merits ("Answer") at 22-23, 29-31, 36-37. However, the State's "reasons why" it filed this UCL claim and the results it hopes to achieve with it are wholly irrelevant. *See, e.g., Rowe v. N.H. Motor Transp. Ass'n* ("*Rowe*"), 552 U.S. 364, 373-75 (2008) (the State of Maine's "reasons why" it enacted a law does not save the law from preemption). Moreover, the State's action seeks to enforce State labor *by means of the UCL*. If the State had brought the action solely on the labor laws themselves, there might not be a preemption issue.[3]

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filed its UCL claim, the State enacted Section 226.8 of the Labor Code, which prohibits willful misclassification of employees as independent contractors and imposes civil penalties for violations. *See* 2011 Cal. Legis. Serv. Ch. 706 (S.B. 459). Therefore, the characterization of the misclassification as intentional and deliberate carries the misleading and inflammatory connotation that the alleged misclassification was illegal in and of itself. Because that is not the case, the State's use of the terms "intentionally" and "deliberately" should be viewed as an impermissible tactic aimed at dirtying up Petitioners.

3. The exceptions being Sections 4 and 7 of I.W.C. Wage Order 9-2001. As set forth more fully in Section V of the Opening Brief, Sections 4 and 7 are "related to" carrier prices, routes, and services and are therefore preempted. Although the State contends that those provisions are saved because they "reflect requirements generally applicable to all workers," it concedes that the sections are "directed at the transportation industry . . . ." Answer at 29 n.15. Because the provisions are targeted at the

Thus, the issue of whether Petitioners violated State labor laws by misclassifying the drivers is not relevant to the issue before this Court: whether UCL claims in general, and the State's UCL claim specifically, are preempted by the FAAAA. The FAAAA states:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce any law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . .

49 U.S.C. § 14501(c)(1).

As demonstrated herein and in Petitioners' Opening Brief, the FAAAA preempts the UCL on its face because it references motor carrier prices, routes, and services and because it directly affects them. Similarly, the FAAAA preempts the State's UCL claim against Petitioners on its face, because it references motor carrier prices, routes, and services, because it affects them, and services directly, and because, even if the effect were indirect, it threatens to interfere with Congress' deregulator purpose by erecting a prohibited entry control that discourages the participation of independent contractors in the market.

The State's contention that if its UCL claim is preempted, free-market competition would be subverted because Pac Anchor "could maintain an employment relationship with its drivers without having to incur" the attendant labor expenses, Answer at 1, is a straw man. The fact that the FAAAA preempts the UCL and the State's UCL claim against Petitioners only means that the State and others cannot use the UCL to enforce State labor laws against Petitioners and other air and motor carriers. FAAAA preemption does not prevent the State and others from enforcing State laws that are not preempted through other means.

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transportation industry, they are not laws of general applicability. Therefore, they are preempted.

II. This Court Should Follow the Road Map Set Forth by *In re Tobacco Cases II* and Consider Whether the UCL, the State's UCL Claim, and Each of the Labor Laws Upon Which the Claim Is Predicated Are Preempted.

In *In re Tobacco Cases II*, 41 Cal. 4th 1257 (2007), this Court set out a road map for analyzing the federal preemption of UCL claims that is applicable to this case. In accordance with *Tobacco Cases II*, as demonstrated more fully in Section II of the Opening Brief, this Court should first consider whether the UCL is preempted, then whether the particularized application of the UCL presented by the State's UCL claim is preempted, and finally whether the State laws that Petitioners are alleged to have violated are preempted.

The State argues that *Tobacco Cases II* is distinguishable in that it concerned enforcement of a State policy, not enforcement of a State law, and therefore "did not involve a straightforward use of the UCL's 'unlawful' prong to enforce a substantive state law." Answer at 31. That argument fails because this Court considered the unlawful prong in its analysis. *Tobacco Cases II*, 41 Cal. 4th at 1266, 1273-74. It also fails because, in the context of preemption, there is logically no difference between UCL actions based on unlawful conduct and those based on unfair or fraudulent conduct.

The State also argues that there is no reason to analyze federal preemption of the UCL, its UCL claim, and the predicate labor laws separately because the UCL claim and the predicate violations of State labor laws are indistinguishable from one another. Answer § II(B)(3). Nothing could be farther from the truth.

It is well established that Congress' purpose in enacting a preemption statute "is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation omitted). Congress enacted the FAAAA "in the public interest" to facilitate

interstate commerce and facilitate competition between motor carriers by broadly prohibiting State regulation of competition between motor carriers. H.R. Conf. Rep. 103-677 ("HRCR") at 87 (1993) (1 A.A. 270); *Morales v. Trans World Airlines* ("*Morales*"), 504 U.S. 374, 384-87 (1992).

The UCL creates a cause of action for unfair competition, which is defined as "unlawful, unfair or fraudulent" business acts or practices, including advertising, Cal Bus. & Prof. Code § 17200, and "governs 'anti-competitive business practices,'" *Tobacco Cases II*, 41 Cal. 4th at 1266, *quoting Cel-Tech Commc'ns v. Los Angeles Cellular Tel.* ("*Cel-Tech*"), 20 Cal. 4th 163, 180 (1999). Furthermore, the State's UCL claim addresses unfair competition, alleging that Petitioners gained an unfair competitive advantage over other motor carriers by violating various State labor laws. Compl. ¶¶ 14-15 (1 A.A. 13:17-14:9).

Because Congress enacted the FAAAA to prevent the State from regulating competition between motor carriers, in the context of FAAAA preemption there is a fundamental, material difference between a claim for violation of a generally applicable State labor law, which standing on its own may or may not run afoul of the FAAAA, and a claim of unfair competition under the UCL premised on that violation. The Court of Appeal ignored that difference, impermissibly equated the two, and thereby disregarded a large portion of the trial court's analysis and the analysis required by case law. *See* O.B. Ex. A at 9-10 (125 Cal. Rptr. 3d 709, 715-16 (Ct. App. 2011)).

Tobacco Cases II instructs that federal preemption analysis of a UCL claim requires courts to first consider whether the preemption provision at issue preempts the UCL itself, then to consider whether it preempts the particularized application of the UCL presented by the claim, and finally to consider whether it preempts the predicate laws that were allegedly violated. *See Fitz-Gerald v. Skywest Airlines*, 65 Cal. Rptr. 3d

913, 921-22 (Ct. App. 2007), *and Dilts v. Penske Logistics*, No. 08-CV-318 JLS (BLM), 2011 WL 4975520 at *6 (S.D. Cal. Oct. 19, 2011) (slip op.) (each employing much the same analysis). This analysis is consistent with the FAAAA itself, which preempts State enactment and enforcement of laws, regulations, and other provisions "having the force and effect of law related to a price, route, or service of any motor carrier . . . ." The FAAAA, therefore, by its plain language may preempt the UCL as an enactment of law by the State, the State's UCL claim against Petitioners as an enforcement of law by the State, and the labor laws upon which the State's UCL claim is predicated, both as enactments and enforcements of law by the State.

Because the UCL concerns unfair competition, because the State's UCL claim concerns unfair competition between motor carriers, and because the FAAAA may preempt enactment and enforcement of the UCL and of the predicate labor law violations, this Court is *compelled* to consider separately whether the UCL, the State's UCL claim, and the predicate State labor laws are preempted by the FAAAA.

III. UCL Claims Against Motor Carriers in General, As Well As the State's UCL Claim Against Petitioners, Are Facially Preempted.

Courts need not, as the State contends, Answer at 12, perform a case-by-case analysis to determine whether the UCL, similar State consumer protection statutes, and claims against motor carriers under them

are preempted.[4] In *Morales v. Trans World Airlines*, 504 U.S. 375, 384 (1992), a case concerning State enforcement of airline advertising guidelines by means of State consumer protection laws, the U.S. Supreme Court considered the plain language of the ADA to determine the preemptive effect of the phrase "related to" and announced a two-step "reference to" and "connection with" test for analyzing whether State action is "related to" prices, routes, and services and therefore preempted.[5]

However, when the Court revisited the issue of the preemption of claims under a State consumer protection statute, one very similar to the

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4. The authorities upon which the State relies either indicate that a case-by-case analysis is necessary to determine whether *common law* claims are preempted and/or were not confronted with claims under the UCL or another State unfair competition or consumer protection statute. *Brache v. Airtran Airways*, 342 F.3d 1248, 1251, 1261 (11th Cir. 2003) (cause of action regarding safety violations under a State whistleblower statute); *Abdu-Brisson v. Delta Airlines*, 128 F.3d 77, 80, 86 (2d Cir. 1997) (claims under New York State and municipal human rights laws); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428, 1433 (7th Cir. 1996) (State common law breach of contract and tort claims). In *Travel All Over the World v. Kingdom of Saudi Arabia*, the court stated "*Morales* does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA." 73 F.3d at 1433 (emphasis added); *see also In re JetBlue Airways Privacy Litig.* ("*JetBlue*"), 379 F. Supp. 2d 299, 314 (E.D.N.Y. 2005), *quoting id.*

5. Congress borrowed the preemptive "related to" language it used in the FAAAA from comparable provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), and the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(4) (previously codified at 49 U.S.C. app. § 1305(a)(1)) Therefore, case law regarding ERISA and ADA preemption is precedential authority regarding Congress' intent in enacting the FAAAA and regarding the breadth of FAAAA preemption. H.R. Conf. Rep. 103-677 ("HRCR") at 83-85 (1993) (1 A.A. 266-68); *Rowe*, 552 U.S. 364, 370 (2008); *Mendonca*, 152 F.3d 1184, 1188 nn.4-5 (9th Cir. 1998).

UCL,[6] *see* O.B. § I.E, in *American Airlines v. Wolens* ("*Wolens*"), 513 U.S. 219, 226 (1995), rather than perform the *Morales* test, the Court summarily stated that the claims at issue "related to" rates[7] and services and that it "need not dwell on the question . . . ." *See Levitt v. Sw. Airlines*, No. 11 C 8176, 2012 WL 695468 at *3 (N.D. Ill. Mar. 5, 2012) ("the Court [in *Wolens*] found the ICFA preempted without applying or relying on [the *Morales*] test"); *Lavine v. Am. Airlines*, No. 2917, 2011 WL 6003609 at *7 (Md. Ct. Spec. App. Dec. 1, 2011) ("In dicta, the Supreme Court stated '[p]laintiffs' claims relate . . . to "services," *i.e., access to flights*'").

Then the Court returned to the plain language of the ADA to determine the preemptive effect of the phrase "enact or enforce," stating:

> Finally, the ban on enacting or enforcing any law "relating to rates, routes, or services" is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.

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6. The Illinois Consumer Fraud Act, unlike the UCL, does not broadly permit claims premised on allegedly unlawful conduct. *Compare* Cal. Bus. & Prof. Code § 17200 *with* 815 Ill. Comp. Stat. § 505/2. Nevertheless, as demonstrated in Section I(E) of the Opening Brief, both the UCL and the Illinois statute parallel the Federal Trade Commission Act, 15 U.S.C. § 45(a). *Cel-Tech*, 20 Cal. 4th 163, 185 (1999); *Robinson v. Toyota Motor Credit Corp.*, 775 N.E. 2d 951, 960 (Ill. 2002); 816 Ill. Comp. Stat. § 505/2. The State argues that the broader reach of the UCL means it is less likely to be preempted on its face. *See* Answer at 30-31 n.16. However, that broader reach presents an even greater potential for the State to impose its policies on carriers and a greater potential to affect prices, routes and services. Therefore, the argument for facial preemption of the UCL is even stronger than for preemption of the Illinois statute.

7. There is some variation in language in case and statutory law regarding preemption resulting from recodification. However, Congress stated that it intended no change in meaning or judicial interpretation when it changed "relating to" to "related to" and when it changed "rate" to "price." HRCR at 83-84 (1 A.A. 266-67). As the FAAAA uses "related to" and "price," those terms are used herein.

Id. at 229 n.5 (internal quotation omitted). The Court found that the prescriptive nature of the State consumer protection statute at issue made it a regulatory tool for State policing and guidance of carrier business practices, stating the advertising guidelines at issue "highlight the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation typified by the Illinois Consumer Fraud Act." *Id.* at 227-28. Therefore, the Court found the preemption provision to shelter carriers from consumer protection claims. *See id.* at 228.

The Court then contrasted State consumer protection claims with breach of contract claims, characterizing the former as "what the State dictates," requiring a showing, "in all cases, [of] an unfair or deceptive practice" and the latter as "what the [carrier] itself undertakes," requiring the showing of an agreement. *Id.* at 233. The Court therefore held that breach of contract claims are not generally preempted. *Id.* at 233. It also thereby implicitly held that State consumer protection claims against carriers generally are preempted.[8]

As demonstrated more fully in the Opening Brief, subsequent courts have interpreted *Wolens* as generally preempting all UCL claims against carriers, including UCL claims premised on California labor law violations. In *Fitz-Gerald v. Skywest Airlines*, 65 Cal. Rptr. 3d 913, 914, 920-22 (Ct. App. 2007), following a thorough analysis of federal preemption as it

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8. In *Morales*, the U.S. Supreme Court announced that courts should look both to the plain language of express preemption statutes and Congress' intent regarding the preemptive effect of such statutes in determining whether State action is preempted. The Court stated, "The question, at bottom, is one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales*, 504 U.S. 374, 383, (1992) (internal quotation omitted). This standard is therefore neither "new" nor "alternate," as the State argues. Answer at 14-15 n.6. It is an integral part of determining whether State action is preempted.

applies to California labor laws, the court interpreted *Morales* and *Wolens* to require that a UCL claim premised on a violation of Section 4 of I.W.C. Wage Order 9-2001 be preempted on its face. The court read *Morales* and *Wolens* to have "held that claims under a state unfair business practices statute are preempted by the ADA because the state claims would impose economic regulation on airlines." *Fitz-Gerald*, 65 Cal. Rptr. 3d at 921-22. In an unpublished opinion, the U.S. District Court for the Southern District of California agreed, finding the law on that point to be settled and citing *Fitz-Gerald*, *Morales*, and *Wolens*. *Blackwell v. Skywest Airlines*, No. 06cv0307 DMS (AJB), 2008 WL 5103195 at *20 (S.D. Cal. Dec. 3, 2008). The court therefore held that a UCL claim premised on the violation of California labor laws to be preempted. *Id.*

In this case, the Court of Appeal rejected the holding of *Fitz-Gerald* (and, by association, *Blackwell*) without analyzing whether *Morales* or *Wolens* supported that holding. O.B. Ex. A at 8 (125 Cal. Rptr. 3d 709, 715). The court merely stated that it equated UCL claims premised on the violation of State labor laws with separate causes of action for the violation of those laws, and saw no reason for one to be preempted while the other was not. *Id.* As demonstrated in Section III above, the Court of Appeal impermissibly ignored the fundamental, material difference between the UCL, UCL claims, and State labor laws in doing so. The Court of Appeal thereby created a split between the divisions of the Second Appellate District on this issue, as well as a potential split between federal and State courts in California.

The validity of the *Fitz-Gerald* court's reading of *Wolens* to mean that all UCL claims against motor carriers and air carriers are preempted is supported by the fact that, in addition to *Morales*, *Wolens*, *Fitz-Gerald*, and *Blackwell*, the overwhelming majority of courts that have considered the issue of ADA or FAAAA preemption of claims under the UCL or any other

State unfair competition or consumer protection law, and published opinions on the issue, have found the claims to be preempted absent a statutory exception. *In re Korean Air Lines*, 642 F.3d 685, 688, 697 (9th Cir. 2011) (UCL claim); *Levitt v. Sw. Airlines*, No. 11 C 8176, 2012 WL 695468 at *1, *3 (N.D. Ill. Mar. 5, 2012); *Esquivel v. Vistar Corp.*, No. 2:11-cv-07284-JHN-PJWx, 2012 WL 516094 at *1, *6 (C.D. Cal. Feb. 8, 2012) (UCL claim); *Shulick v. United Airlines*, No. 11-1350, 2012 WL 315483 at *1, *3, *6 (E.D. Penn. Feb. 2, 2012); *Dilts v. Penske Logistics*, No. 08-CV-318 JLS (BLM), 2011 WL 4975520 at *2, 6, 10-11 (S.D. Cal. Oct. 19, 2011) (slip op.) (UCL claim); *Flaster/Greenberg P.C. v. Brendan Airways* No. 08-4333, 2009 WL 1652156 at *2, 7 (D.N.J. June 10, 2009); *Butler v. United Air Lines*, No. C 07-04369 CRB, 2008 WL 1994896 at * 5 (N.D. Cal. May 5, 2008) (UCL claim); *Brownstein v. Am. Airlines*, No. C-05-3435 JCS, 2005 WL 2988720 at *2, *7 (N.D. Cal. Nov. 7, 2005) (UCL claim); *JetBlue*, 379 F. Supp. 2d 299, 304 n.1, 315 n.12, 315-16 (E.D.N.Y. 2005) (UCL claim, *Fitz-Gerald*, 65 Cal. Rptr. 3d at 922); *In re EVIC Class Action Litig.*, No. M-21-84 (RMB), 2002 WL 1766554 at * 1, 8 (S.D.N.Y. July 31, 2002); *FedEx v. UPS*, 55 F. Supp. 2d 813, 814, 818 (W.D. Tenn. 1999); *W. Parcel Ex. v. UPS*, No. C 96-1526, 1996 WL 756858 at *1, 3 (N.D. Cal. 1996) (UCL claim); *Virgin Atlantic Airways. v. British Airways* 872 F. Supp. 52, 59, 67 (S.D.N.Y. 1994); *Cont'l Airlines v. Am. Airlines*, 824 F. Supp. 689, 693, 695 (S.D. Tex. 1993); *Frontier Airlines v. United Air Lines*, 758 F. Supp. 1399, 1402, 1409 (D. Colo. 1989); *Tanen v. Sw. Airlines* 114 Cal. Rptr. 3d 743, 745, 752, 756 (Ct. App. 2010) (UCL claim); *Beyer v. ACME Truck Line*, 802 So. 2d 798, 799, 801 (La. Ct. App. 2001) (unfair trade practices claim); *but see Cardenas v. McLane Foodserv's*, 796 F. Supp. 2d 1246, 1248, 1256 (C.D. Cal. 2011) (issue remained open after cross-motions for summary judgment); *Foley v. JetBlue Airways*, No. C 10-

3882 JCS, 2011 WL 3359730 (N.D. Cal. Aug. 3, 2011), *appeal pending*, No. 11-17128 (9th Cir.).

That fact is reflective of the fundamental nature of such claims. In addition to alleging violations of State law, they allege anti-competitive conduct. The State argues that, because allegations of unfair competition are not necessary to support a claim under the UCL, such claims are not invariably concerned with anti-competitive conduct. Answer at 11. The UCL creates a cause of action for unfair competition and broadly defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. Therefore, it is true that UCL claims need not be premised on allegations of unfair competition; they can be premised on claims of unlawful or fraudulent business practices or misleading advertising instead. However, because the UCL defines all such conduct to be unfair competition, and because the UCL creates a cause of action for unfair competition, every claim under the UCL, regardless of the conduct upon which it is premised, necessarily concerns anti-competitive conduct.

The FAAAA was enacted to prohibit the State from interfering with the forces of competition between motor carriers by preempting State action that refers to or affects motor carrier prices, routes, or services. HRCR at 87 (1 A.A. at 270); 49 U.S.C. § 14501(c)(1). As demonstrated in Sections IV and V below and more thoroughly in the Opening Brief, UCL claims, because they are claims for unfair competition, invariably refer to and affect motor carrier prices, routes, and services and invariably interfere with Congress' deregulatory intent in enacting the FAAAA. Therefore, UCL claims are invariably preempted.

The courts in *Wolens*, *Fitz-Gerald*, and *Blackwell* recognized this fact. Instead of focusing on the *Morales* "reference to" and "connection with" tests, the Court in *Wolens*, just as it had done in *Morales* before,

examined the plain language of the preemption provision and found that, in light of its language broadly prohibiting State action, the Illinois Consumer Fraud Act presented too great a threat of State regulation to stand, and was preempted. *Wolens* therefore held that claims under State consumer protection statutes such as the UCL are preempted on their face by the plain language of the ADA, and by extension, the FAAAA.

IV. UCL Claims Against Motor Carriers Generally, and the State's UCL Claim in Particular, Are Preempted Because They Concern Unfair Competition and Therefore Refer to Motor Carrier Prices, Routes, and Services.

The State concedes that if its UCL claim is related to Petitioners' prices, routes, or services the claim is preempted and that the test for preemption is whether the claim "refers to" or is "connected with" motor carrier prices, routes, or services. Answer at 19; *see Rowe*, 552 U.S. 364, 371, 370 (2008); *Morales*, 504 U.S. 374, 384 (1992).

As the State has indicated, State action "refers to" motor carrier prices, routes, or services where it expressly refers to them, where it acts immediately and exclusively upon them, or where their existence is essential to the State action. Answer at 20-21; *see California Div. of Labor Standards Enforcement v. Dillingham Construction* ("*Dillingham*"), 519 U.S. 316, 325 (1997); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992); *Ingersoll Rand v. McClendon*, 498 U.S. 133, 139 (1990); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 829 (1988); *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2011).

The UCL creates a cause of action for unfair competition, which is defined as "unlawful, unfair or fraudulent" business acts or practices. Cal Bus. & Prof. Code § 17200. When a UCL claim is brought against a motor carrier of property, the unfair competition and business acts and practices to which the UCL claim refers are those of a business "providing motor

vehicle transportation for compensation." 49 U.S.C. § 13102(14). Business competition and compensation require prices and services, and business competition regarding transportation requires routes. Thus, the competition, acts, and practices complained of necessarily concern the prices the carrier charges for compensation, the transportation services the carrier offers, and/or the routes the carrier uses.

Without prices, services, or routes, there would be no competition and no business act or practice upon which to predicate a UCL claim against a motor carrier. Consequently, the existence of motor carrier prices, routes, or services is essential to a UCL claim against a motor carrier. Therefore, UCL claims against motor carriers refer to prices, routes, and services and are preempted by the FAAAA.

In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 135-36, 139, the U.S. Supreme Court held that a common law cause of action for wrongful termination premised upon an employer's desire to avoid contributing to an employee's pension fund was preempted. In its analysis, the Court stated, "We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Id.* at 139. The Court rejected as irrelevant the argument that the cause of action focused on the employer's termination decision and held the cause of action to be preempted because "there simply is *no* cause of action if there is no plan." *Id.* at 140.

Similarly, UCL claims against motor carriers, because they are claims for unfair competition, are not the equivalent of generally applicable statutes that make no reference to, and function irrespective of, the existence of motor carrier prices, routes, or services. Such claims, regardless of the predicate acts, concern competition between motor carriers and are consequently premised on motor carrier prices, routes, and

services. Thus, UCL claims against motor carriers refer to motor carrier prices, routes, and services and are therefore preempted.

Moreover, the State's UCL claim against Petitioners in this case is premised squarely on Petitioners' prices, routes, and services. It alleges that Petitioners, who transport cargo using trucks, "illegally lowered their costs of doing business" by failing to pay the costs of the alleged labor law violations, that they thereby "gained an unfair competitive advantage over competing trucking companies," and that they profited from doing so. Compl. 2:3-11, 2:20-3:3, 6:8-12 (1 A.A. 10:3-11; 10:20-11:3; 14:8-12). Profit, transportation of cargo, business costs, and competitive advantages over other trucking companies are all allegations that presuppose the existence of motor carrier prices, routes, and services. Thus, just as the claim for wrongful termination in *Ingersoll* referenced an ERISA plan in that it would not exist without the plan, the State's UCL claim references Petitioners' prices, routes, and services in that it would not exist without them. Consequently, the State's UCL claim against Petitioners is preempted, and the fact that it focuses on alleged misclassification and alleged violations of labor laws is irrelevant.

V. The UCL and the State's UCL Claim Are Preempted Because They Directly and Significantly Affect Motor Carrier Prices, Routes, and Services.

State action has a "connection with" motor carrier prices, routes, or services if it affects them. Answer at 21, Morales, Rowe. As demonstrated more thoroughly in Section VII of Petitioners' Opening Brief, both the UCL and the State's UCL claim have a forbidden effect on motor carrier prices, routes, and services and are therefore preempted. Because the UCL creates a cause of action for unfair competition, and because, when applied to motor carriers, the UCL concerns anti-competitive conduct by persons transporting property for compensation, any claim under the UCL against a

motor carrier necessarily concerns the prices the carrier charges for compensation, the transportation services the carrier offers, and the routes the carrier uses. *See* Section IV, *supra*. Because the UCL empower courts to enjoin future predicate conduct and to award restitution and impose civil penalties for past conduct, Cal. Bus. & Prof. Code §§ 17203, 17206, each time the UCL is enforced against a motor carrier, it directly affects the carriers' prices, routes, or services. This conclusion is supported by the fact that, other than the court below, every reported opinion that has considered whether claims under the UCL and other State unfair competition and consumer protection statutes are preempted by the ADA or FAAAA has found the claims to be preempted. *See* Section III, *supra*; O.B. § VII(1).

As demonstrated more thoroughly in Section VII(2) of the Opening Brief, the State's UCL claim against Petitioners similarly affects motor carrier prices, routes, and services. In the Complaint, the State alleged:

> This action is brought . . . to halt an unlawful practice by Defendants of misclassifying their truck driver employees who do not own a truck as "independent contractors" rather than employees. As a consequence of misclassifying the truck driver employees, Defendants illegally lowered their costs of doing business . . . .

Compl. ¶ 2 (1 A.A. 9:26-10:4). The State seeks an injunction to permanently enjoin "defendants, their successors, representatives, employees and all persons who act in concert with defendants" from engaging in that practice, at least $4,160,000.00 in civil penalties, and at least $1,000,000.00 in restitution.[9] Compl. at 6-7 (1 A.A. 14:27-15:7).

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9. The State attempts to differentiate between the effect the injunctive relief and the restitution and civil penalties it seeks will have. Answer at 33-34 n.18. FAAAA preemption under the "connection with" test requires an analysis of the overall effect of State action on motor carrier, prices, routes, and services. While Petitioners focus on the effect that the injunction threatens to have, the overall effect of the State's UCL claim also includes more than $5,000,000.00 in civil penalties and restitution,

The State contends that drivers already are employees and that, consequently, the injunction will not force Petitioners to transform their business model from one using independent contractor drivers to one using employee drivers. Answer § II(B)(2). The State also contends that the injunction will not force the drivers to abandon their small businesses or buy trucks. Answer § II(B)(3).

However, the plain text of the Complaint and the request for injunctive relief state otherwise. If the requested injunction is granted, Petitioners have two choices: switch their operations to an employee-based model or fire the current drivers and hire other drivers who own trucks. The drivers, who consider themselves to be independent contractors and who operate small businesses, will be faced with a similar choice: dissolve their businesses or buy trucks.

Each of these decisions threatens to affect motor carrier prices, routes, and services. If the drivers dissolve their small businesses, they will stop charging prices, offering services, and servicing routes altogether. If they buy trucks, their operating expenses will increase dramatically, affecting the prices they charge, the services they can afford to offer, and the routes that they use. The fact that the drivers lease the trucks now rather than own them is indicative of the fact that the price to buy them is prohibitively high.

If Petitioners treat the drivers as employees, they will have to immediately pay employment costs. In *American Trucking Associations v. City of Los Angeles* ("*ATA*"), 559 F.3d 1046, 1048-49, 1058-59 (9th Cir. 2009), the court found such costs imposed by the employee driver requirement of the Port of Los Angeles Concession Agreement to be so vast, that when imposed gradually on motor carriers over a five-year period,

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which will certainly dramatically affect Petitioners' operating costs and hence their prices, routes, and services.

they could force smaller carriers out of the market altogether. *See also ATA*, No. CV 08-4920 CAS (RZx), 2010 WL 3386436 at *10, 19 (C.D. Cal., Aug. 26, 2010) (reclassification of drivers threatens to increase motor carrier operating costs by as much as 167%). Therefore, the court found that such costs directly and significantly affected prices, routes, and services. *Id.* at 1956, 1060. The effect on Petitioners will be even greater, as they will have to pay those costs from one day to the next, as well as over $5,000,000.00 in restitution and civil penalties.

In the event that Petitioners have truly misclassified the drivers, other State action that is not preempted may still compel them and/or the drivers to make these changes and pay these costs. However, it is irrelevant whether Petitioners have made a valid market choice and whether they should make the changes and pay the costs. Those issues are not before this Court.

Instead, the issue presented by this appeal is whether the State action at hand, namely the enforcement of the UCL against Petitioners, is preempted because, among other reasons, it threatens to affect motor carrier prices, routes, and services. As demonstrated here and in the Opening Brief, the State's UCL claim threatens to affect both Petitioners prices, routes, and services and those of the drivers quite dramatically, substantially more than the preempted employee driver provisions of the Port of Los Angeles Concession Agreement threatened to do. Therefore, the State's UCL claim is "connected with" motor carrier prices, routes, or services and is preempted.

Under the FAAAA, there is no difference between new and existing requirements or between requirements imposed by statute, by a mandatory

port concession agreement, or by an injunction.[10] Under the FAAAA, which concerns State *enactment and enforcement* of *laws, regulations, and other provisions having the force and effect of law*, statutes, mandatory concession agreements, and injunctions are all State actions subject to preemption, regardless whether their requirements are existing or new. Thus, the State's argument that *ATA* concerned the imposition of a "new" requirement on motor carriers fails. *See* Answer at 28. Moreover, because there is no difference between mandatory concession agreements and injunctions under the FAAAA, the Ninth Circuit's finding regarding the costs of forcing motor carriers like Petitioners to use employee drivers and the effect of those costs on prices, routes, and services is persuasive authority demonstrating that the State's UCL claim threatens to impose even greater costs and threatens to have an even greater effect on prices, routes, and services.

The State contends that the effect of its UCL claim on prices, routes, and services is too indirect to support preemption. Answer at 25-27. Cases that have considered the effect of labor laws generally applicable to all employers have found that the costs imposed by those laws have an indirect effect. *E.g.*, *Dillingham*, 519 U.S. 316, 334 (1997); *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca* ("*Mendonca*"), 152 F.3d 1184, 1189 (9th Cir. 1998). However, the State action here is not merely the enforcement of a State labor law of general applicability. Instead, it is enforcement of the UCL in a way that will force Petitioners and the drivers to change their business models from the use of independent

10. Equitable relief, including injunctions, necessarily invokes issues of State policy. *Deerskin Trading Post, Inc. v. UPS, Inc.* 972 F. Supp. 665, 675 (N.D. Ga. 1997) (finding the ADA preempted a claim for injunctive relief). "Before a court grants equitable relief, it necessarily must consider numerous competing interests, including interests of the parties and whether the public interest supports the granting of an injunction." *Id.*

contractor drivers to employee drivers. As demonstrated by *ATA*, the effect of such State action on motor carrier prices, routes, and services is direct.

VI. Even if the Effect of the UCL and the State's UCL Claim Were Remote, the UCL and the Claim Would Nevertheless Be Preempted Because They Threaten to Interfere With Congress' Deregulatory Purpose by Regulating Competition Between Motor Carriers and Erecting a Prohibited Entry Control Regarding the Participation of Independent Contractors in the Trucking Market.

Even if the effect of the State's UCL claim on motor carrier prices, routes, or services was indirect, the claim would nevertheless be preempted if its acute, albeit indirect, effect threatens to interfere with Congress' deregulatory purpose in enacting the FAAAA. This second prong to the connection test for FAAAA preemption, which the Court of Appeal impermissibly omitted from its analysis, is not an alternate test for preemption or an argument for implied or conflict preemption as the State suggests. *See* Answer at 34-35. Instead, it is an integral part of the connection test as applied by the U.S. Court of Appeals for the Ninth Circuit in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d at 1188-89, based on its reading of *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. at 325, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company.*, 514 U.S. 645, 668 (1995); and *Wolens*, 513 U.S. 219, 232 (1995), and by the U.S. Supreme Court in *Rowe v. N.H. Motor Transportation Association*, 552 U.S. 364, 371, 375 (2008).

The State misses the point on this element of the connection test. It is not merely a yardstick for measuring the magnitude of the effect of State action on motor carrier, prices, routes, and services or even for determining whether State action proximately caused the effect. Instead, it is an integral component of the test to determine whether the effect, however slight or indirect, is significant in light of Congress' deregulatory purpose, and thus

preempted. In *Morales*, the U.S. Supreme Court stated, "state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Morales*, 504 U.S. 374, 386 (1992). Then, in *Rowe*, the Court stated, "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption related objectives." *Id.* at 371, *citing Morales*, 504 U.S. at 391, *and Wolens*, 513 U.S. at 226-28.

The Court has thereby indicated that State action which only has an indirect effect on prices, routes, and services is preempted if that indirect effect interferes with Congress' deregulatory purpose. Thus, some State action having only an indirect effect on prices, routes, and services, such as statutes of general applicability prohibiting gambling or imposing a prevailing wage on all employees providing services under public contracts, is not preempted because it does not interfere with Congress' intent to prevent the States from regulating competition between motor carriers. *See Morales*, 504 U.S. at 390; *Mendonca*, 152 F.3d at 1189. In contrast, other State action, although its effect is also not particularly direct, is preempted because it interferes with Congress' deregulatory purpose by impermissibly imposing State policy on motor carriers. *See Rowe*, 552 U.S. at 371-72.

In *Rowe*, the Court examined the effect of a provision of a Maine tobacco law requiring shippers to use only those delivery services that followed particular the regulation at issue on prices, routes, and services. Id. at 371. The Court found the regulation to be indirect in that it regulated shippers, not motor carriers. *Id.* at 372. Nevertheless, the Court found that the indirect effect was precisely what the FAAAA "sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the service that motor carriers will provide." *Id.*, *quoting Morales*, 504 U.S. at 378. Therefore, the Court found that the regulation was "connected with"

motor carrier services and held it to be preempted by the FAAAA. *Id.* at 371, 377. *Rowe* thereby affirms that State action which only indirectly affects motor carrier prices, routes, or services is nevertheless preempted if, in doing so, it interferes with Congress' deregulatory purpose in enacting the FAAAA.

Both the UCL and the State's UCL claim interfere with that deregulatory purpose. As demonstrated more thoroughly in Section VIII(1) of Petitioners' Opening Brief, Congress intended to facilitate interstate commerce and promote competition between motor carriers by broadly prohibiting State regulation of motor carriers. HRCR at 87 (1 A.A. 270); *Morales*, 504 U.S. at 384-87. The State suggests that Congress intended to prohibit only State economic regulation of motor carriers. Answer at 36 n.19. However, Congress specifically considered and rejected a proposal to limit the prohibition to State *economic* regulation, and instead adopted a broad prohibition displacing all State action, even that which is consistent with Congress' goals. *See Rowe*, 552 at 374; *Morales*, 504 U.S. at 384-87. In adopting the FAAAA, Congress identified entry controls as a particular form of State regulation it intended to prohibit, and specifically identified a California statute that discouraged carriers from using independent contractor as being the type of State interference with the forces of competition between carriers it intended to preempt. *See* HRCR at 87 (1 A.A. at 270).

The UCL regulates competition between motor carriers by prohibiting what the State deems to be anti-competitive, unlawful, and fraudulent business practices and acts. When applied to motor carriers, the UCL directly violates Congress' intent to prohibit States from regulating them and from interfering with the forces of competition between them. Therefore, even where the effect of the UCL on motor carrier prices, routes, and services may be indirect, it is nevertheless preempted.

Moreover, as also demonstrated more thoroughly in Section VIII(2) of the Opening Brief, the State's UCL claim threatens to interfere with Congress' deregulatory purpose by erecting an entry control that discourages the participation of independent contractor drivers in the market. The State's UCL claim seeks an injunction that will require Petitioners to treat the drivers who do not own their own trucks as employees. Compl. at 2:1-3, 5:6-7; 6:27-7:3 (1 A.A. 10:1-3; 13:6-7; 14:27-15:3). Although the State argues that the drivers are already employees, Answer at 37, the drivers perceive themselves to be independent contractors and small business owners and operate as such. If the injunction is granted, for the drivers to continue to participate in the market as small businesses, they will face a significant economic hurdle: they will have to buy trucks.[11] That requirement is not simply a cost of doing business, it is an entry control that robs drivers of the option to lease, rather than buy, trucks and that will chill their participation in market.

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11. The State deems the current alleged leasing arrangement to be inconsistent with employee status and indicates that the only way the drivers can be independent contractors is for them to own their own trucks. This position is itself an attempt to impermissibly regulate the industry. *See* Compl. at 1:26-2:3, 2:28-3:5; 5:6-16 (1 A.A. 9:26-10:3, 10:28-11:5; 13:6-16) "This action is brought . . . in order to halt an unlawful practice . . . of misclassifying . . . truck driver employees who do not own their own trucks as 'independent contractors' rather than employees." Compl. at 1:26-2:3 (1 A.A. 9:26-10:3). The stipulated injunctions that the State has obtained in at least five other cases prohibit motor carriers from classifying drivers who lease trucks from the carriers as independent contractors. Req. for J. Not. ¶¶ 6, 8, 10, 12, 14. Moreover, as demonstrated below, the State has a long-standing policy favoring the use of employee drivers over independent contractor drivers. The State has thereby demonstrated that it is unlikely to accept any leasing arrangement as consistent with independent contractor status. Consequently, an injunction will be tantamount to a requirement that drivers buy trucks to operate as independent contractors.

Thus, the State's UCL action interferes with Congress' deregulatory purpose in two ways. First, the UCL, as applied to carriers, regulates competition between them. Second, the State's UCL claim threatens to erect a prohibited entry control that will discourage independent contractor drivers from participating in the market. Therefore, even if the effect of the State's UCL claim on motor carrier prices, routes, and services is indirect, it is nevertheless preempted.

The State does not contest that it and its political subdivisions have sought for more than thirty years to impose a State policy favoring the use of employee drivers over independent contractor drivers on motor carriers. As evidenced by the legislative history of the FAAAA, Congress enacted the FAAAA to preempt an attempt by the State to impose this policy legislatively. HRCR at 87 (1 A.A. at 270). Recently, the Ninth Circuit decided that the State and its political subdivisions cannot impose that policy by means of mandatory concession agreements, either. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 407-408 (9th Cir. 2011).

This case is not an isolated incident. It is simply the next wave in the seemingly endless attempts by the State to impose its policy over the policy favored by the free market. The State has used the UCL to obtain injunctions requiring motor carriers to treat drivers as employees and/or to refrain from using independent contractor drivers in at least five other cases. Req. for J. Not. ¶¶ 5, 7, 9, 11, 13. If the State's UCL claim is not preempted, the State will be free to use the UCL to continue to force California motor carriers to treat drivers who do not own their own trucks as employees and to force drivers who wish to operate as independent contractors to purchase trucks.

Contrary to the State's assertion, Answer at 28, the patchwork of differing State requirements that the State's UCL claim and that the State's

ongoing efforts to impose its policy favoring employee drivers over independent contractor drivers threaten to create is not one of differing labor and tax laws between the States. It is one in which some, potentially all, motor carriers in California will be encouraged and even compelled to use employee drivers over independent contractor drivers, whereas carriers in other States will not. When Congress enacted the FAAAA, it specifically considered State action encouraging the use of employee drivers rather than independent contractor drivers to constitute State interference with the forces of competition between carriers, and it specifically intended the FAAAA to strike down and prohibit such State action. HRCR at 87 (1 A.A. at 270). Therefore, the imposition of the State's policy is precisely the sort of patchwork regulation by the States that Congress intended to preempt.

FAAAA preemption extends to all State action having the force and effect of law, including injunctions. Therefore, the State cannot achieve piecemeal though UCL claims and injunctions what it is prohibited from achieving through mandatory concession agreements and legislation. The State's use of the UCL to impose a State policy on motor carriers is exactly the sort of intrusive, backdoor State regulation of motor carriers by means of State consumer protection statutes that the U.S. Supreme Court warned against in *Wolens*. *See* 513 U.S. 219, 227-28 (1995). Congress told the State to stop regulating motor carriers and specifically told the State to stop interfering with the forces of competition between carriers by imposing a State policy favoring the use of employee drivers on them. HRCR at 87 (1 A.A. at 270). The State cannot use the UCL to circumvent that prohibition.

CONCLUSION

If the Petitioners were air carriers instead of motor carriers, this would not be a close case. The State, however, propelled by a political agenda that favors-indeed requires-employee drivers over independent

contractors, has shown no willingness to treat motor carriers as equal to air carriers despite being told by the U.S. Supreme Court that it must. The Concession Agreement case is the proof. Thus, we have wave after wave of attempts by the State to regulate the motor carrier industry. The first wave resulted in the passage of the FAAAA. The Concession Agreement case, along with this case and the five other cases requested to be judicially noticed, are merely the most recent wave. Unless the State is stopped in its tracks here, there will certainly be many more.

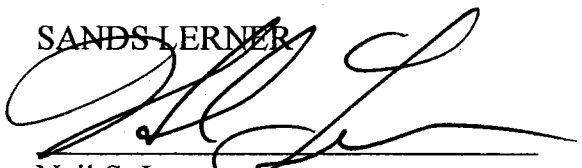
As demonstrated herein and in the Opening Brief, the preemptive provision of the FAAAA preempts the UCL as well as the State's UCL claim against Petitioners. Since the preemptive provision of the FAAAA has the same preemptive effect as the ADA, this result means that enforcement of the UCL against all motor carriers and air carriers is preempted.

Because the UCL and the State's sole claim under the UCL are preempted, this Court should find that the State's Complaint fails to state a cause of action and return the case to this Court of Appeal with instructions to remand it to the trial court and reenter the original judgment.

Dated: March 19, 2012

Respectfully submitted,

SANDS LERNER



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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rules 8.204(c)(1), 8.520(b)(1), and 8.520(c)(1) of the California Rules of Court, the attached REPLY BRIEF ON THE MERITS uses 13 point Times New Roman font including footnotes and contains 8,381 words, which is less than the total number of words permitted by the Rules of Court. I rely on the word count of the computer program used to prepare this brief in making this certification.

Dated: March 19, 2012

Respectfully submitted,

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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 **March 19, 2012**, I caused the original and thirteen (13) copies of the attached **REPLY BRIEF ON THE MERITS** to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797, via Norco Overnight.

On **March 19, 2012**, I served the attached **REPLY BRIEF ON THE MERTIS** 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 March 20, 2012:

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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 **March 19, 2012**, at Los Angeles, California.

Diane Adams	Diane Adams
Declarant	Signature