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July 17, 2013

VIA OVERNIGHT DELIVERY

Chief Justice Tani Gorre Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *People v. Pac Anchor Transportation, Inc., et al.*
Supreme Court of California, Case No. S194388

Dear Chief Justice and Associate Justices:

On June 26, 2013, this Court requested a letter brief addressing the effect of the decisions of the United States Supreme Court in *American Trucking Associations, Inc. v. City of Los Angeles* (2013) 569 U.S. ___ [133 S. Ct. 2096, 186 L.Ed.2d 177] [hereafter "*ATA*"] and *Dan's City Used Cars v. Pelkey* (2013) 569 U.S. ___ [133 S. Ct. 1769, 186 L.Ed.2d 909] [hereafter "*Dan's City*"] on the question of whether the Federal Aviation Administration Authorization Act of 1994 (49 U.S.C. § 14501) ("FAAAA") preempts the People's claims under our state Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.) ("UCL").

As detailed below, *ATA* does not offer guidance because it does not address the key legal issue in the present case: whether the People's UCL action is sufficiently "related to a price, route, or service of any motor carrier" to warrant preemption. On the other hand, *Dan's City* is instructive in at least two respects. First, it establishes beyond doubt that – contrary to Pac Anchor's view – there is no *per se* facial preemption under the FAAAA of actions against motor carriers pursuant to state consumer protection statutes like the UCL. Second, *Dan's City* clarifies the limited scope of FAAAA preemption, and supports the conclusion that the People's UCL action is insufficiently "related to" Pac Anchor's prices, routes, or services to trigger preemption.

I. The *ATA* Decision Does Not Relate to the Issues Presented Here Because It Focuses Solely on the Question of Whether an Allegedly Preempted Action Constitutes an Enactment or Enforcement of Law, Which Is Undisputed in the Present Case.

The FAAAA's express preemption provision does not permit states or their political subdivisions "to enact or enforce a 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).) Thus, finding FAAAA preemption requires answering two questions: (1) whether the act in question constitutes an enactment or enforcement of law (the "state action" prong); and (2) whether the act in question is "related to" prices, routes, or services (the "relatedness" prong). (See *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219, 226-227 [115 S. Ct. 817, 823, 130 L.Ed.2d 715] [describing need to interpret both "relatedness" *and* the phrase "enact or enforce any law"]; *Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1159 [setting forth two-part preemption analysis].)

In *ATA*, the City of Los Angeles entered into contractual "concession agreements" with trucking firms operating in the Port of Los Angeles that required, among other things, that their trucks bear a placard with a phone number for reporting environmental or safety concerns, and that they submit a plan detailing off-street parking locations for each truck. (*ATA*, *supra*, 186 L.Ed.2d at p. 182.) The American Trucking Association challenged the concession agreements as preempted under the FAAAA. (*Id.*, at 183.) The City countered that the concession agreements were merely contractual, and did not possess the requisite "force and effect of law" to trigger preemption. (*Id.*, at p. 184.) Importantly, the parties in *ATA* did not dispute that the placard and parking requirements of the concession agreements were related to a motor carrier's prices, routes, or services, thus obviating the need for the Supreme Court to consider the "relatedness" prong of the FAAAA preemption test. (*Ibid.*)

Addressing only the "state action" prong of the FAAAA's preemption test, the Supreme Court found the concession agreements preempted. (*ATA*, *supra*, 186 L.Ed.2d at p. 185.) The Court recognized that the concession agreements were enforced through the port "tariff" – a type of municipal ordinance that imposed criminal penalties upon terminal operators for permitting access to trucks that were not registered through a concession agreement. (*Ibid.*) The concession agreements and the accompanying enforcement mechanism thus satisfied the "state action" prong as provisions "having the force and effect of law," and were preempted by the FAAAA. (*Id.*, at pp. 185-186.)

Compared to *ATA,* the instant UCL action against Pac Anchor presents the mirror-image scenario. The People's civil prosecution against Pac Anchor is clearly an attempt to "enforce a law." Thus, it is undisputed in the present case that the "state action" requirement for preemption is met. However, the disputed issue in the present case concerns whether the People's UCL action is sufficiently "related to" Pac Anchor's prices, routes, or services, *i.e.*, the "relatedness prong." Since the *ATA* decision speaks only to the "state action" issue – which is undisputed in this case – and says nothing about the contested issue of "relatedness," it offers little insight into the key legal issue in these proceedings.

II. The *Dan's City* Decision Establishes That State Unfair Competition Actions Are Not Facially Preempted, and Demonstrates the Limited Scope of Preemption Under the FAAAA.

In contrast to the *ATA* decision, *Dan's City* offers useful insight about how FAAAA preemption applies to the instant case. *Dan's City* involved a vehicle owner's suit against a

towing company called Dan's City Used Cars. (*Dan's City*, *supra*, 133 S. Ct. at p. 1775.) The vehicle owner alleged that after Dan's City towed his car, the company traded the car away to recoup its towing costs without following New Hampshire state requirements regulating the storage and disposal of towed vehicles. (*Id.*, at p. 1777.) The vehicle owner contended that Dan's City's actions violated the New Hampshire Consumer Protection Act, which outlaws "any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce" within New Hampshire, as well as statutory and common law governing the duties of a bailee of property. (*Id.*, at p. 1777 n.3, quoting New Hampshire Consumer Protection Act (N.H.Rev.Stat. § 358-A:2).) Dan's City asserted that the vehicle owner's claims were preempted by the FAAAA. (*Id.*, at p. 1777.)

The Supreme Court found no preemption. (*Dan's City*, *supra*, at p. 1781.) Notably, the Supreme Court did not apply any special scrutiny to the Consumer Protection Act claim, or give any indication that the claim should be evaluated differently than any other state law claim in determining its "relatedness" to prices, routes, or services. Instead, the Supreme Court observed that the FAAAA only preempts state laws "related to a price, route, or service of any motor carrier ... *with respect to the transportation of property*." (*Id.*, at p. 1778, citing FAAAA (49 U.S.C. § 14501(c)(1)), italics added.)[1] Dan's City was not entitled to claim preemption with respect to its vehicle storage and disposal services – in contrast to Dan's City's towing services – because the regulation of vehicle storage and disposal does not implicate "the transportation of property" or target any transportation services. (*Dan's City*, *supra*, at p. 1779.) Thus, preemption could not be invoked even though Dan's City claimed that its storage and disposal operations were integral to financing its tow service. (*Id.*, at p. 1780.)

The opinion in *Dan's City* supports the People's arguments before this Court in at least two important respects. First, there is the simple fact that in *Dan's City*, the Supreme Court found no preemption of the plaintiff's New Hampshire Consumer Protection Act claim. This debunks Pac Anchor's argument made throughout these proceedings that claims under the UCL or similar state "unfair competition" or "consumer protection" statutes are "facially preempted" because they uniquely interfere with the congressional purpose of promoting competition. (See Opening Brief on the Merits, filed Oct. 25, 2011, at pp. 10-13.) The *Dan's City* Court clearly did not recognize any categorical preemption of unfair competition-type claims. Rather, as the People have previously argued, whether a particular UCL claim is preempted requires a careful examination on a case-by-case basis to determine whether any particular claim is "related to" a

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[1] As the Court notes, the phrase "with respect to the transportation of property" appears in the FAAAA's preemption provision, but not in the otherwise comparable preemption provision applicable to air carriers in the Airline Deregulation Act (49 U.S.C. § 41713(b)(1)) ("ADA"). (*Dan's City*, *supra*, 133 S. Ct. at p. 1778.) Thus, despite the similar language in the two statutes and the similar manner in which many of their terms can be interpreted, the presence of the phrase in the FAAAA "massively limits the scope of preemption" under that statute, as compared to the ADA. (*Id.*, at 1778, quoting *Columbus v. Ours Garage & Wrecker Service, Inc.* (2002) 536 U.S. 424, 449 [122 S. Ct. 2226, 2241, 153 L.Ed.2d. 430, 451] (dis. opn. of Scalia, J.).)

motor carrier's prices, routes, or services within the meaning of the FAAAA. (See Answer Brief on the Merits, filed Jan. 27, 2012, at pp. 16-19.)

Dan's City also illustrates the limits of FAAAA preemption, and supports the conclusion that the People's claims in this case are not preempted. *Dan's City* does not purport to establish any new standard of "relatedness." While the People do not dispute that FAAAA preemption extends beyond the direct regulation of prices, routes, or services, the *Dan's City* decision emphasizes that the FAAAA's preemption provision should not be read too expansively, and focuses on the substantial limitation imposed by the statutory phrase, "with respect to the transportation of property." (*Id.*, at pp. 1778-1779.) In light of this limitation, at least one federal decision following *Dan's City* has cast doubt on whether FAAAA preemption extends to generally applicable state laws that have no greater effect on truck drivers or trucking companies than on the general public. (See *Schwann v. FedEx Ground Package System, Inc.* (D. Mass., July 3, 2013, Civ. A. No. 11-11094-RGS) 2013 U.S. Dist. LEXIS 93509 at pp. *8-*9 [finding no FAAAA preemption of generally applicable state statute that defined "independent contractor" for state wage law purposes].)

However, it is not necessary to reach that far to resolve the instant case. The Supreme Court determined that the plaintiff's claims in *Dan's City* were not preempted because they targeted Dan's City's conduct in the storage and disposal of towed vehicles, as opposed to Dan's City's actual transportation of vehicles. (*Dan's City*, *supra*, 133 S. Ct. at p. 1779.) The Court found plaintiff's claims insufficiently "related to" Dan's City's *transportation*-related prices, routes, and services to trigger preemption, even though both Dan's City's storage and disposal service and its towing service were complementary parts of a single enterprise, and New Hampshire state law directly regulated the conduct of Dan's City's storage and disposal operations. (*Id.*, at p. 1780.)

The connection between the People's claims here and Pac Anchor's prices, routes, or services is at least as "tenuous, remote, or peripheral" as the connection in *Dan's City*. (Cf. *Rowe v. New Hampshire Motor Transport Ass'n* (2008) 552 U.S. 364, 371 [128 S. Ct. 989, 995, 169 L.Ed.2d 933, 939-940] [FAAAA would not preempt state laws that affect fares in only a tenuous, remote, or peripheral manner].) The labor, tax, and insurance laws underlying the People's UCL action have as little to do with regulating transportation as the vehicle storage and disposal requirements in *Dan's City*. Instead, the People's UCL claims are only "related to" Pac Anchor's transportation-related prices, routes, or services in the same attenuated and speculative manner as *every* state law, regulation, or enforcement action might be – by their potential to impose costs and in some undetermined way influence Pac Anchor's future business decisions. *Dan's City* makes clear that something more than that is required to establish "relatedness" to a motor carrier's prices, routes, or services for purposes of preemption within the meaning of the FAAAA. (*Dan's City*, *supra*, 133 S. Ct. at p. 1779; see also *Air Trans. Assn. of Am. v. City and County of San Francisco* (9th Cir. 2001) 266 F.3d 1064, 1074 [no preemption under ADA where carrier could opt to pay costs of compliance or forego route, but not compelled to do either].)

Since the claims set forth in *Dan's City* were found not preempted, and the People's UCL claims in this case are at least as far removed from any relation to motor carrier prices, routes, or services, the People's claims should also escape preemption.

Respectfully Submitted,

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DECLARATION OF SERVICE BY OVERNIGHT COURIER & U.S. POSTAL SERVICE

Case: *People v. Pac Anchor Transportation, Inc., et al.*
Supreme Court of California Case No. S194388

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On July 17, 2013, I served the attached ***Supplemental Letter Brief Re: People v. Pac Anchor Transportation, Inc., et al.***, by placing true copies thereof enclosed in sealed envelopes with **Federal Express Overnight Delivery Service**, and the U.S. Postal Service, as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 17, 2013, at Los Angeles, California.

R.L. NORRINGTON
Declarant

Signature

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