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July 19, 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 addressing what bearing, if any, the recent U.S. Supreme Court 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 this matter. Specifically, the Court asked whether those cases have any impact on 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 letter brief in response.

LETTER BRIEF

The U.S. Supreme Court recently addressed the issue of FAAAA preemption in two cases, *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 v. Pelkey* ("*Dan's City*"), 133 S. Ct. 1769, 185 L. Ed. 2d 909 (2013).

ATA reiterates the established rule that purely contractual obligations do not have the force and effect of law and are therefore not preempted. *See ATA*, 186 L. Ed. 2d at 184-85. *ATA* finds that state action backed by the threat of penalties not available to other litigants has the force and effect of law. Because the UCL threatens and the State's UCL claim seeks such penalties and because those penalties are also beyond those provided for by the underlying state laws upon which the claim is premised, *ATA* implies that the UCL is subject to facial preemption under the FAAAA and that the particularized application of the UCL in the State's

UCL claim is subject to preemption. ATA thereby unanimously affirms the expanding breadth of FAAAA preemption.

Dan's City, in an opinion limited to the particular facts of the case, reiterates an established rule, albeit by a different route. That rule is that state action which is not related to carrier prices, routes, and services is beyond the scope of FAAAA preemption. *See Dan's City*, 185 L. Ed. 2d at 919-20; *Brown v. United Airlines, Inc.*, Nos. 12-1543, 12-2056, U.S. App. LEXIS 13804 *1, *29 (1st Cir. July 9, 2013) Because the case is limited to its facts and because it effectively reiterates an established rule, it has no significant impact on this matter.

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

ATA, like this matter, concerns FAAAA preemption in the context of port drayage. *See ATA*, 186 L. Ed. 2d at 182. *ATA* reiterates the rule the Court announced in *American Airlines, Inc. v. Wolens* ("*Wolens*"), 513 U.S. 219, 221, 228-29 (1995), that purely contractual obligations are not preempted by the FAAAA and the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713. In doing so, *ATA* elaborates on the rule regarding what state action has the force and effect of law, stating that state action backed by the threat of penalties constitutes regulatory action that is subject to preemption.

In *ATA*, the parties agreed that even minimally intrusive provisions regarding the placement of placards on trucks and the submission of off-street parking plans contained in concession agreements between the Port of Los Angeles (the "Port") and motor carriers providing drayage services within the Port were related to the carriers' prices, routes, and services.[1] *ATA*, 186 L. Ed. 2d at 182, 184. However, the parties disputed whether the provisions were mere contractual obligations or had the "force and effect of law" necessary for FAAAA preemption.[2] *Id.* at 184; 49 U.S.C. § 14501(c)(1).

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[1] The agreements also contained provisions regarding the carriers' financial capacity and truck maintenance and required the carriers to transition from the use of independent contractor drivers to employee drivers. *Id.* at 182; *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 394 (9th Cir. 2011). The parties did not appeal the Ninth Circuit's holdings that the maintenance provision was subject to a safety exception and that the employee driver mandate was preempted. *ATA*, 185 L. Ed. 2d at 183, n.2, 184; 49 U.S.C. § 14501(c)(2)(A).

[2] The Court also granted *certiorari* on an issue regarding one of the agreements' enforcement provisions. *ATA*, 186 L. Ed. 2d at 183-84, 186-87 (2013). However, because the provision had not yet been enforced, the Court held the issue was not yet ripe for consideration. *Id.* at 181, 187-88. Although the petitioner had also asked the Court to determine whether the agreements' financial-capacity provisions were "related to" prices, routes, or services, the Court declined to review that issue. *Id.* at 183, n.2, 184 n.3.

The Port had amended its tariff to mandate the adoption of and to enforce the concession agreements, making it a misdemeanor for a terminal operator to admit a truck that was not registered under one of the agreements and imposing a fine or imprisonment for violations. *ATA*, 186 L. Ed. 2d at 182. The Court stated that the motive for adopting the agreements and the target of the tariff's penalties were irrelevant; instead, the *means* by which the Port acted mattered. *Id.* at 181, 186.

Because the agreements were "backed by the threat of criminal punishment," the Court found that the Port had not simply participated contractually in the local trucking market by undertaking self-imposed obligations of the sort that the Court had found not to be preempted in *Wolens*; instead, the Port had "exercised classic regulatory authority . . . ." *ATA*, 186 L. Ed. 2d at 185-86; *Wolens*, 513 U.S. at 228. Therefore, the Court held the agreements' placard and parking requirements to have the force and effect of law and to be preempted by the FAAAA. *Id.* at 181, 185, 188.

Thus, in *ATA*, the Court reiterated the conclusion it reached regarding the "force and effect of law" language of the FAAAA and ADA in *Wolens*: that mere, self-imposed contractual obligations are not preempted. Furthermore, the Court elaborated on the rule, finding that state action backed by the threat of penalties, even penalties that are imposed on targets other than carriers, constitutes classic regulatory action and therefore has the force and effect of law necessary for preemption.

Petitioners have previously demonstrated that in *Wolens* and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court indicated that the UCL, other similar state consumer protection statutes, and claims thereunder, whether brought by private parties or state attorneys general, have the force and effect of law and are therefore subject to preemption. *See Wolens*, 513 U.S. at 228; *Morales*, 504 U.S. at 378, 380, 383, 390; *Trans World Airlines v. Mattox*, 712 F. Supp. 99, 105 (W.D. Tex. 1989); *id.*, 897 F.2d 773, 788 (W.D. Tex. 1990), *aff'd in relevant part*, *Morales*, 504 U.S. 374; Req. for J. Not. ¶ 1, Ex. A at 1, 3-4; *see also Dan's City Used Cars, Inc.*, 133 S. Ct. 1769, 185 L. Ed. 2d 909, 915, 919-920 (2013) (performing a preemption analysis of a state consumer protection claim).

Application of *ATA*'s force and effect analysis confirms that the UCL and the State's UCL claim against Petitioners each have the force and effect of law.[3] Section 17206 of the UCL backs the UCL with the threat of a civil penalty, stating:

[3] One court applying the force and effect of law analysis in the wake of *ATA* referred to it as the "mechanism" sub-question for preemption and referred to the reference and connection tests for preemption as the "linkage" sub-question. *Brown v. United Airlines, Inc.*, Nos. 12-1543, 12-2056, U.S. App. LEXIS 13804 *1, *6-7 (1st Cir. July 9, 2013).

> (a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.
>
> (b) The court shall impose a civil penalty for each violation of this chapter.

Cal. Bus. & Prof. Code § 17206. The State's UCL claim seeks that civil penalty against Petitioners. (1 Appellant's App. 14:16-19; 15:4-7.) Thus, the UCL and the State's UCL claim each threaten to impose a highly coercive statutory penalty that is only available to the State. Although civil, rather than criminal, this penalty, is comparable to those potentially faced by the terminal operators in *ATA*.

The fact that the UCL threatens, and the State's UCL claim seeks, a civil penalty that is not available to private litigants underscores the fundamental regulatory nature of both the UCL and the State's UCL claim. The UCL and the State's UCL claim, like the concession agreements, are each, *in and of themselves*, attempts to exercise intrusive State regulatory authority against carriers. *See Wolens*, 513 U.S. at 227. Therefore, the UCL and the state's UCL claim against Petitioners have the force and effect of law and are subject to FAAAA preemption.

The fact that the UCL and the State's UCL claim each have the force and effect of law is of paramount significance in this matter. The penalties that they threaten are in addition to those imposed by the underlying state laws. Cal. Bus. & Prof. Code § 17205. Consequently, they have a force and effect separate from those laws. Accordingly, in a case involving a UCL claim such as this, it is necessary to determine not only whether the state laws underlying the UCL claim are preempted, but also whether the UCL itself is facially preempted and whether its particularized application to the underlying state laws is preempted.[4] *See In re Tobacco Cases II*, 41 Cal. 4th 1257, 1272 (2007) (performing such a three-part analysis).

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[4] Facial preemption may also be referred to as preemption *per se* or categorical preemption. *See Fortson v. Dorsey*, 379 U.S. 433, 438 (1965) (using "*per se*" synonymously to "on its face"); *In re Tobacco Cases II*, 41 Cal. 4th 1257, 1272 (2007) (analyzing facial preemption of the UCL); Question Presented, *Northwest, Inc. v. Ginsberg*, No. 12-464 (U.S. May 20, 2013)

Thus, *ATA*'s impact on this case is to affirm the breadth of FAAAA preemption. Moreover, *ATA* demonstrates that the UCL and claims under the UCL each have the force and effect of law beyond that of the underlying state laws upon which such claims are predicated. Therefore, the UCL itself and the State's UCL claim are each subject to preemption.

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

In *Dan's City*, which was argued and decided before *ATA*, the Court addressed FAAAA preemption of claims based on a state abandoned vehicle statute, including a claim under a state consumer protection statute, but held that the facts presented by the claims at issue, the sale of a vehicle long after it was towed, took them outside the scope of FAAAA preemption. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 185 L. Ed. 2d 909, 915, 920-21 (2013).

The Court's analysis focused on the phrase "with respect to the transportation of property" in the FAAAA. *Id.* at 915; 49 U.S.C. § 14501(c)(1). The Court noted that the definition of "transportation" as used in the FAAAA includes storage and handling, but only to the extent those services "relate to the movement of property." *Id.* at 919 (internal quotation and alteration omitted); 49 U.S.C. § 13102(23)(B).

The Court found that the sale of a vehicle after it had been towed and stored was so far removed from the transportation of the vehicle during the tow that the claim concerned the sale of the vehicle, not its transportation. *Id.* at 919. Therefore, the Court held that the claims fell outside the scope of the FAAAA. *Id.* For the same reason, the Court found that the state abandoned vehicle disposal statute and claims based on its violation were neither directly nor even indirectly connected with the services of a motor carrier with respect to the transportation of property and were, consequently, not "related to" such services. *Id.* at 915, 920.

The Court took pains to limit its holding to the facts of the case, stating that the FAAAA "does not preempt state-law claims for damages stemming from the storage and disposal of a towed vehicle." *Id.* at 915, 920, 921. This narrow holding is consistent with the legislative history and structure of the FAAAA, in which Congress demonstrated it intended to preempt state action against motor carriers transporting property, not transporting passengers, which is the subject of another provision, or providing other, unrelated services, and with the fact that the FAAAA treats motor carriers providing non-consensual towing services differently than other those

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(asking whether claims for the breach of the implied covenant of good faith and fair dealing are "categorically unrelated" to carrier prices, routes, and services), *available at* http://www.supremecourt.gov/qp/12-00462qp.pdf (last visited July 15, 2013); *Per se*, Ballentine's Law Dictionary (1969).

providing other transportation services.[5] *See* H.R. Conf. Rep. 103-677 at 85 (1993) (1 Appellant's App. 268); 49 U.S.C. 14501(a)-(b), (c)(2)(C); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 484, 485-86 (1996) (the structure and purpose of a preemption statute are indicative of its preemptive scope).

The Court's analysis only addresses the preemption of the state abandoned vehicle disposal statute claims based on a violation of that statute. While one of those claims was pursuant to a state consumer protection statute, the Court had no occasion to consider arguments for facial preemption, at least in part because the case was argued and decided before *ATA*. Thus, *Dan's City* is silent on the issue of whether the state consumer protection statutes such as the UCL are facially preempted due to their nature and purpose.

In sum, *Dan's City* stands for the limited proposition that FAAAA preemption does not extend to claims regarding certain services or acts performed by motor carriers that do not relate to the provision of transportation services at all, such as the sale of a vehicle. That rule is not new; as early as its decision in *Morales*, the Court stated that preemption did not extend to unrelated matters such as gambling or prostitution. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992); *see Brown v. United Airlines, Inc.*, Nos. 12-1543, 12-2056, U.S. App. LEXIS 13804 *1, *29 (1st Cir. July 9, 2013) (finding that *Dan's City* merely reiterates existing preemption law.) Consequently, *Dan's City* has no additional impact on the current matter.

As Petitioners have previously demonstrated, the UCL and the State's UCL claim against Petitioners each relate to motor carrier prices, routes, and services, both Petitioners' and those of the allegedly misclassified drivers. The UCL does so by regulating competition between motor carriers providing transportation services, and the State's UCL claim does so by interfering with the business practices of Petitioners and of the drivers in providing such services. For the same reasons, the UCL and the State's UCL claim each relate to transportation; they therefore fall well within the scope of FAAAA preemption.

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[5] Moreover, the narrowness of the holding reflects the particularly unpleasant circumstances of the case, including the facts that the owner of the vehicle was quite ill and that he offered to pay to reclaim his vehicle. *Dan's City*, 185 L. Ed. 2d at 916-17. In addition, the motor carrier simultaneously and inequitably sought the protection of the state statute to justify the sale of the vehicle while arguing that the owner was not entitled to protection under that statute because it was preempted. *Id.* at 921. It further reflects a concern that the vehicle's owner had no other remedies available. *Id.* That concern is not present in this matter; the state has other remedies available. *See* Pets.' Opening Br. § VIII.3 and Req. for Judicial Not. ¶ 4, Ex. B (each indicating that the State's Division of Labor Standards Enforcement ("DLSE") investigates alleged instances of misclassification; *see also* Cal. Lab. Code §§ 95, 98 (empowering the DLSE to investigate and enforce California labor laws).

III. Conclusion

The U.S. Supreme Court's recent decision in *ATA* reiterates the established rule that purely contractual obligations are not preempted because such obligations do not have the force and effect of law. *ATA* elaborates on the rule, indicating that state action backed by the threat of penalties not available to other litigants has the force and effect of law.

Applied to this matter, the UCL threatens and the State's UCL claim seeks civil penalties that are not only not available to other litigants, but which also are beyond those provided by the underlying state laws upon which the UCL claim is predicated. Therefore, it is necessary to determine not only whether the state laws underlying the UCL claim are preempted, but also whether the UCL itself is facially preempted and whether its particularized application to the underlying state laws is preempted.

In contrast, *Dan's City* has no significant impact on this matter. It essentially only reiterates the established rule that claims wholly unrelated to carrier prices, routes, and services are beyond the scope of preemption. While that rule is relevant, because the holding in *Dan's City* case is limited to its facts and because, as thoroughly demonstrated in Petitioners' other briefs, the UCL and the State's UCL claim are "related to" prices, routes, and services, *Dan's City* does not offer any guidance to aid the Court in reaching a decision here. Moreover, it is silent on the issue of whether the FAAAA facially preempts the UCL.

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 **July 19, 2013**, I caused the original attached **LETTER BRIEF** to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797, via Norco Overnight.

On **July 19, 2013**, I served the attached **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 July 22, 2013:

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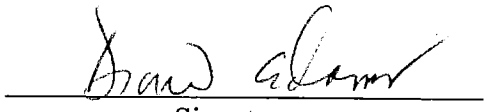
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **July 19, 2013**, at Los Angeles, California.

Diane Adams
Declarant



Signature