In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL. KAMALA D. HARRIS, AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellant,

v.

PAC ANCHOR TRANSPORTATION, INC., A CORPORATION, AND ALFREDO BARAJAS, AN INDIVIDUAL,

Respondents.

Case No. S194388

Court of Appeal, Second Appellate District, Case No. B220966
Los Angeles County Superior Court, Case No. BC397600
Hon. Elizabeth A. White, Judge

ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
MARK BRECKLER
Chief Assistant Attorney General
SATOSHI YANAI
Deputy Attorney General
State Bar No. 186355
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-0015
Fax: (213) 897-2801
Email: Satoshi.Yanai@doj.ca.gov
Attorneys for Appellant

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

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INTRODUCTION

The People of the State of California have a compelling interest in ensuring that California businesses comply with state requirements imposed upon employers, including the payment of state payroll taxes, maintenance of a workers' compensation insurance policy, and compliance with state employment standards regarding minimum wages and recordkeeping. (See, e.g., *Dept. of Revenue of Oregon v. ACF Industries, Inc.* (1994) 510 U.S. 332, 345 [power to tax is "central to state sovereignty"].)

To further this compelling interest, the People filed this lawsuit against Pac Anchor Transportation, Inc. and Alfredo Barajas (collectively, "Pac Anchor"), alleging that Pac Anchor misclassifies its employee truck drivers as independent contractors, thereby evading employment taxes, workers' compensation insurance requirements, and compliance with basic labor standards, all in violation of the Unfair Competition Law, Business and Professions Code, Sections 17200, *et seq.* ("UCL"). The People allege that as a result, Pac Anchor jeopardizes the physical and financial security of its workers, undermines law-abiding competitors, and deprives the state of tax revenue.

Pac Anchor counters that the People's action is preempted by the express preemption provision of the Federal Aviation Administration Authorization Act ("FAAAA"), which provides that a state "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... ." (49 U.S.C. Section 14501(c)(1).)

Accepting Pac Anchor's preemption arguments would subvert free-market competition by permitting Pac Anchor to maintain an employment relationship with its drivers without having to incur the tax, insurance, and wage expenses of other employers. Such a result would undermine the state's ability to protect the welfare of its citizens, to collect needed tax revenue, and to maintain a level playing field for competing businesses.

The People therefore request this Court to affirm the findings of the Court of Appeal, and remand the case for further proceedings.

STATEMENT[1]

Pac Anchor operates a trucking company based in Long Beach, California. (Appellant's Appendix ("Appx."), Vol. I, at p. 10, lines 20-21 and 24-25.) Pac Anchor contracts with shipping companies to transport shipping containers from the ports of Los Angeles and Long Beach to various locations throughout Southern California, including warehouses and railroad freight depots. (Appx., Vol. I, at p. 10:21-24.)

Alfredo Barajas is employed by Pac Anchor Transportation, Inc. as a manager and truck dispatcher. (Appx., Vol. I, at pp. 10:28-11:1.) Mr. Barajas is also an owner of the company. (Appx., Vol. I, at p. 11:1-2.) Mr. Barajas owns approximately 75 truck tractors. (Appx., Vol. I, at p. 11:2-3.) Mr. Barajas recruits drivers to drive his trucks, and enters lease agreements with the company to utilize the trucks and drivers he supplies. (Appx., Vol. I, at p. 11:3-5.)

Pac Anchor intentionally misclassifies its drivers as "independent contractors" in order to avoid the costs and obligations associated with employee drivers. (Appx., Vol. I, at pp. 11:26-12:8, 13:6-7.) Thus, Pac Anchor does not pay unemployment insurance payroll tax contributions or employment training fund taxes on behalf of the drivers. (Appx., Vol. I, at p. 13:17-23.) Pac Anchor does not withhold state disability insurance taxes or income taxes on behalf of the drivers. (Appx., Vol. I, at p. 13:17-19, 24-27.) Pac Anchor does not secure workers' compensation insurance to protect the drivers from injury. (Appx., Vol. I, at p. 13:17-19, 28.) Finally,

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[1] On this appeal from a ruling on a motion for judgment on the pleadings, all factual allegations in the complaint are deemed to be true. (*Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal.App.4th 526, 535.) Thus, the summary of facts is drawn from the allegations of the complaint.

Pac Anchor does not reimburse business expenses, ensure the payment of the state minimum wage, or provide itemized written statements of hours and pay to the drivers. (Appx., Vol. I, at pp. 13:17-19, 14:1-7.)

Yet, Pac Anchor's relationship with its drivers confirms that the drivers are, in fact, Pac Anchor's employees. (Appx., Vol. I, at p. 13:6-7.) The drivers have no investment of capital, and do not own the trucks they drive; instead they use trucks, tools, and equipment furnished by Pac Anchor. (Appx., Vol. I, at p. 13:15-16.) Pac Anchor can discharge the drivers without cause. (Appx., Vol. I, at p. 13:7.) The drivers are not skilled workers with substantial control over operational details, and the drivers take all necessary instruction from Pac Anchor. (Appx., Vol. I, at p. 13:7-9.) The drivers are an integrated part of Pac Anchor's trucking business, engaged in its core activity of delivering cargo. (Appx., Vol. I, at p. 13:9-11.) The drivers do not have their own businesses or their own customers, and have no significant opportunity for profit or loss other than working more hours for Pac Anchor. (Appx., Vol. I, at p. 13:11-13.) The drivers do not have U.S. Department of Transportation operating authority or other necessary permits and/or licenses to independently engage in the transport of cargo. (Appx., Vol. I, at p. 13:13-14.) The drivers are employed for extended periods of time. (Appx., Vol. I, at p. 13:14-15.)

The People filed the action below on September 5, 2008. (Appx., Vol. I, at pp. 7, 9.) The sole cause of action contends that Pac Anchor violates the UCL by failing to pay state payroll taxes, obtain workers' compensation insurance, or abide by state regulations regarding the minimum wage, reimbursable expenses, and recordkeeping. (Appx., Vol. I, at pp. 13:17-14:7.) The UCL prohibits "unfair competition," which is defined in pertinent part as "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code § 17200.)

Because the statutory definition of "unfair competition" includes "unlawful" acts, the statute has been interpreted to allow a proper plaintiff to "borrow" *any* legal requirement and make it the basis of an unfair competition claim, as long as the violation takes place in the course of "business." (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383 ["[Section 17200] 'borrows' violations of other laws and treats these violations, ... as unlawful practices independently actionable under section 17200, et seq."]; see also *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103 ["Virtually any law – federal, state or local – can serve as a predicate for a section 17200 action"], abrogated in part on other grounds by *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-185.)

Thus, despite utilizing the terminology of "unfair competition," there is no requirement for UCL plaintiffs to invoke any anticompetitive business practice or demonstrate any injury to competitors or consumers in order to state a claim. (See *Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 209-210 [Section 17200 "not confined to anticompetitive business practice" and extends to "any *unlawful* business practice"], emphasis in original; *People v. Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 760 [no need to allege harm to consumers or competitors].)

In this case, the complaint alleges "unfair competition" based primarily upon a number of discrete "unlawful" acts by Pac Anchor, including failure to make payroll tax contributions to the State Unemployment Fund and Employment Training Fund (citing Unemp. Ins. Code §§ 976 and 976.6); failure to withhold and submit employee income taxes and contributions to the State Disability Fund (citing Unemp. Ins. Code §§ 984 and 13020); failure to provide employees with itemized

statements of wages and hours (citing Lab. Code § 226); failure to pay employees the minimum wage (citing Lab. Code § 1194 and Industrial Wage Commission ("I.W.C.") Wage Order 9 [8 Cal. Code of Regs. § 11090]); and failure to secure workers' compensation insurance (citing Lab. Code § 3700).[2] Pursuant to the UCL, restitution, civil penalties, and injunctive relief are sought as remedies with respect to each of these violations. (Bus. & Prof. Code §§ 17203 and 17206.) (Appx., Vol. I, at pp. 14:27-15:12.)

Pac Anchor filed a Motion for Judgment on the Pleadings on August 21, 2009, (Appx., Vol. I, at pp. 5, 31), which was granted on three grounds: (1) that the holding in *Fitz-Gerald v. SkyWest Airlines, Inc.* (2007) 155 Cal.App.4th 411 (hereafter *Fitz-Gerald*) compelled a finding that Section 14501(c)(1) preempted all UCL actions against motor carriers; (2) that the

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[2] Pac Anchor asserts that Unemployment Insurance Code Section 984 and Labor Code Section 1194 are not valid underlying predicate acts for the People's UCL claim, because neither statute imposes any duty upon *employers*. (Opening Brief at p. 26.) Instead, the statutes set forth the *employee* obligation to contribute to the State Disability Fund, and authorize an *employee* cause of action to recover unpaid minimum wages and overtime, respectively. However, a valid complaint need only state sufficient facts "to apprise the defendant of the basis upon which the plaintiff is seeking relief." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) In this case, the complaint clearly sets forth the factual allegations that Pac Anchor engaged in unfair competition by "[f]ailing to withhold State Disability Insurance taxes" and "[f]ailing to ensure payment at all times of California's minimum wage." (Appx., Vol. I, at pp. 13:24-25 and 14:6-7.) The complaint thus effectively alleges that Pac Anchor violated Unemployment Insurance Code Section 986 [employer duty to withhold and transmit State Disability Insurance taxes] and Labor Code Section 1182.12 [setting minimum wage], respectively. These allegations are more than sufficient to place Pac Anchor on notice of the nature of the People's claims. (See Code of Civ. Proc. § 425.10(a) [complaint must contain "[a] statement of the *facts* constituting the cause of action"], emphasis added.)

People's action would increase Pac Anchor's operational costs, and thus "related to" Pac Anchor's prices, routes, or services within the meaning of the FAAAA; and (3) that the suit would "interfere with the forces of competition" by discouraging the use of independent contractor drivers. (Appx., Vol. II, at pp. 428-432 [Order].)[3]

The Court of Appeal reversed. In its decision, the court explicitly rejected the conclusion of the *Fitz-Gerald* court that UCL actions are facially preempted. The court further found that any relationship between the People's action and Pac Anchor's prices, routes, or services was only "indirect and tenuous," and therefore the action was not preempted because it was not "related to" prices, routes, or services within the meaning of the FAAAA.

ARGUMENT

Pursuant to the Supremacy Clause of the Constitution, the laws of the United States "shall be the supreme Law of the Land." (U.S. Const., Art. VI.) Thus, state law that conflicts with federal law is "without effect" and preempted. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 (hereafter *Cipollone*).)

Federal law can preempt state law by express provision, by implication, or by a direct conflict between federal and state law. (*New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 654 (hereafter *Travelers*).) However, where – as here – the possibility of preemption arises from an express statutory provision, there is no need to consider any possible implied preemptive effect, since "Congress' enactment of a provision defining the pre-emptive

[3] The trial court's Order actually enumerates four grounds for granting the motion. However, the fourth ground merely states that the complaint failed to state a cause of action *because* the complaint was both preempted *per se* and related to prices, routes, or services.

reach of a statute implies that matters beyond that reach are not pre-empted." (*Cipollone*, *supra*, 505 U.S. at p. 517.)

In construing federal preemption, there is a "presumption that Congress does not intend to supplant state law." (*Travelers*, *supra*, 514 U.S. at p. 654.) This is especially true in areas of traditional state concern, such as taxes, employment regulation, and unfair business practices. (See *Travelers*, *supra*, 514 U.S. at p. 655 ["in fields of traditional state regulation, [citation omitted], we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'"] [quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230]; see also *Dept. of Revenue of Oregon v. ACF Industries, Inc.*, *supra*, 510 U.S. at p. 345 [power to tax is "central to state sovereignty"]; *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756 [noting traditional state power to regulate child labor, minimum wages, occupational health and safety, workers' compensation, and unemployment insurance], abrogated in part on other grounds by *Kentucky Assn. of Health Plans, Inc. v. Miller* (2003) 538 U.S. 329; and *Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 613 [consumer protection statutes "are included in the states' police power and thus subject to this heightened presumption against preemption"].)

However, "[t]he purpose of Congress is the ultimate touchstone" of preemption analysis. (*Cipollone*, *supra*, 505 U.S. at p. 516.) Analysis thus begins with the text of the allegedly preemptive federal law, turning to "the structure and purpose of the Act in which it occurs" if necessary to interpret the statutory language. (*Travelers*, *supra*, 514 U.S. at p. 655.)

The express preemption provision found in the FAAAA provides as follows:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not 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 (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(49 U.S.C. § 14501(c)(1) (hereafter sometimes, for simplicity, "Section 14501(c)(1)".)

The provision was enacted in 1994 to preempt state trucking regulations and allow free-market forces to shape prices, routes, and services in the trucking industry. (*Rowe v. New Hampshire Motor Transport Assn.* (2008) 552 U.S. 364, 367-368 (hereafter *Rowe*).) The statute was also intended to "level the playing field" between motor carriers and air transport companies, since the air carrier industry had previously been deregulated by the Airline Deregulation Act ("ADA"). (See H.R. Conf. Rep. No. 103-677 (1994), reprinted in 1994 U.S. Code Cong. & Admin. News at pp. 1755, 1757 [Appx., Vol. I, at pp. 266, 268] [purpose of preemption provisions in FAAAA is to apply to both air and motor carriers "the identical intrastate preemption of prices, routes and services" that are applicable to airlines under the ADA].)

Indeed, because the express preemption provision of the ADA employs language identical to that found in the FAAAA, cases construing the ADA provision are considered precedential authority for cases involving FAAAA preemption. (See *Rowe*, *supra*, 552 U.S. at p. 370 [following ADA precedent in construing FAAAA preemption, noting identical language of 49 U.S.C. §§ 41713(b)(4)(A) (ADA) and 14501(c)(1) (FAAAA)].)

Section 14501(c)(1) clearly establishes a two-step analysis for determining whether a state claim is preempted: (1) the claim must be

related to a price, route, or service, and (2) "the claim must derive from the enactment or enforcement of state law." (*Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1159 (hereafter *Tanen*).)[4] A claim "relates to" a price, route, or service if it has "a connection with *or* reference to" such a price, route, or service. (*Morales v. Trans World Airlines* (1992) 504 U.S. 374, 384 (hereafter *Morales*), emphasis added.) The required "connection" can be indirect, yet may still be preempted if it nevertheless has a "significant impact" on a price, route, or service. (*Rowe, supra*, 552 U.S. at pp. 370-371, 375; see also *Tanen, supra*, 187 Cal.App.4th at pp. 1166-1167 [relation to price, route, or service exists "either by expressly referring to them or by having a significant economic effect upon them"].) However, state actions are not preempted if their relation to prices, routes, or services is "too tenuous, remote, or peripheral." (*Morales, supra*, 504 U.S. at p. 390.)

I. UCL ACTIONS AGAINST MOTOR CARRIERS ARE NOT FACIALLY PREEMPTED BY THE FAAAA.

A. The Plain Language of Section 14501(c)(1) Requires Courts to Consider Whether a UCL Action Against a Motor Carrier is Related to Prices, Routes, or Services.

Pac Anchor insists that there is no need to engage in any "particularized analysis" of whether the People's UCL claims are related to Pac Anchor's prices, routes, or services because "[t]he FAAAA preempts the UCL on its face." (Opening Brief on the Merits ("Br. of Resp.") at p. 22.) However, Pac Anchor's proposed *per se* rule of preemption cannot be squared with the plain language of Section 14501(c)(1).

Since "[t]he purpose of Congress is the ultimate touchstone" of preemption analysis, (*Cipollone, supra*, 505 U.S. at p. 516), the scope of

[4] There is no dispute that the People's enforcement at issue derives from "the enactment or enforcement of state law."

preemption should hew closely to the text of the allegedly preemptive federal law. (*Travelers*, *supra*, 514 U.S. at p. 655.) This is especially true when a claim of preemption threatens to eviscerate state regulation in areas of traditional state concern, like treatment of unfair business practices. (See *Washington Mutual Bank v. Superior Court*, *supra*, 95 Cal.App.4th at pp. 612-13 [consumer protection entitled to presumption against preemption as an exercise of state "police power"].) Preemption of the states' police powers should only be permitted if that is the "clear and manifest" intent of Congress. (*Travelers*, *supra*, 514 U.S. at pp. 654-655.) In the instant case, nothing in Section 14501(c)(1) supports Pac Anchor's proposal that preemption can apply to state action without a demonstrated relationship to prices, routes, or services.

Pac Anchor nevertheless posits that the People's UCL action necessarily attempts to regulate competition, and that any effect upon "business practices" or "competition" within the motor carrier industry is necessarily "related to" motor carrier prices, routes, or services within the meaning of the FAAAA. To the contrary, if a state action's only purported relationship to a price, route, or service is indirect, then it is not preempted unless it has a "significant impact" that *compels* a change to a carrier's prices, routes, or services. (See *Air Trans. Assn. of Am. v. City and County of San Francisco* (9th Cir. 2001) 266 F.3d 1064, 1072 (hereafter *ATAA v. S.F.*) [local law has connection with price, route, or service if the law "binds the air carrier to a particular price, route, or service and thereby interferes with competitive market forces ..."].) Thus, even accepting, *arguendo*, the premise that the UCL regulates "competition," this alone would not justify the conclusion that application of the UCL to motor carriers in every case has a relationship to prices, routes, or services, or that any such relationship is *always* sufficiently significant to warrant categorical preemption of all UCL claims against motor carriers.

Moreover, UCL actions are not "invariably concerned" (Br. of Resp. at p. 22) with the effect of unlawful business practices upon competition. When asserting a UCL claim under the "unlawful" prong of the statute – as contrasted with the "unfair" or "fraudulent" prongs of the UCL – a plaintiff need not allege any anticompetitive business practice or demonstrate any injury to competitors or consumers. (See *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, *supra*, 35 Cal.3d at pp. 209-210 [Section 17200 "not confined to anticompetitive business practice"]; *People v. Cappuccio, Inc.*, *supra*, 204 Cal.App.3d at p. 760 [allegations of harm to consumers or competitors unnecessary].) While the UCL *can* be used to target "unfair" anticompetitive conduct, it also provides a cause of action against *any* "unlawful" conduct that takes place in the course of business. (Bus. & Prof. Code § 17200; *Farmers Ins. Exchange v. Superior Court*, *supra*, 2 Cal.4th at p. 383.) Pac Anchor's proposed "facial preemption" of UCL claims based on the statute's reference to unfair competition ignores the fact that demonstration of anticompetitive conduct is not a necessary element of a UCL claim.

Indeed, UCL claims can incorporate a wide range of independent violations of law. (See *State Farm Fire & Casualty Co. v. Superior Court*, *supra*, 45 Cal.App.4th at 1103 ["Virtually any law – federal, state or local – can serve as a predicate for a section 17200 action"].) Acceptance of Pac Anchor's facial preemption model would exclude UCL complaints against motor carriers even if the underlying subject matter of the claim was narcotics smuggling, human trafficking, or some other unlawful conduct patently *un*related to "prices, routes, or services." (Cf. *Morales*, *supra*, 504 U.S. at 390 ["In concluding that the NAAG fare advertising guidelines are preempted, we do not, ... set out on a road that leads to preemption of state laws against gambling and prostitution as applied to airlines"].)

Moreover, preemption determinations under Section 14501(c)(1) must look to the particular circumstances of the case, and their relation to prices, routes, or services – not superficial consideration of the *type* of state claim at issue. (See *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia* (7th Cir. 1996) 73 F.3d 1423, 1433 (hereafter *Travel All Over*) ["*Morales* does not permit us to develop broad rules concerning whether certain types of ... claims are preempted ... [i]nstead, we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes, or services"]; see also *Branche v. Airtran Airways, Inc.* (11th Cir. 2003) 342 F.3d 1248, 1263 fn.9 [claims "must be evaluated on a case-by-case basis to determine the connection between the action in question and airline services"].)

Pac Anchor claims support for its "per se" approach in *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 (hereafter *Wolens*), in which the United States Supreme Court found a claim under the Illinois unfair business practice statute to be preempted. Pac Anchor relies on language in *Wolens* that highlights the regulatory danger of state unfair business practice statutes that can be used to "guide and police" carrier business decisions. However, a more thorough reading of *Wolens* makes evident that nothing in the decision supports the adoption of any rule of facial preemption.

Wolens involved private class actions brought by participants in American Airlines' frequent flyer program. (*Wolens*, *supra*, 513 U.S. at p. 224.) The plaintiffs alleged that changes made by the airline to its frequent flyer program had devalued mileage credits already earned by passengers, and thus constituted both a violation of Illinois's unfair business practices act and a breach of contract. (*Id.* at p. 225.) The *Wolens* Court proceeded to apply the two-step test for preemption by determining: (1) whether the plaintiffs' claims "related to" prices, routes, or services; and (2) whether

this private action constituted an enactment or enforcement of state law. (49 U.S.C. § 14501(c)(1); *Wolens*, 513 U.S. at pp. 226-227.)

From the outset, the *Wolens* Court found the "relatedness" inquiry in the case before it to be straightforward and obvious:

> Plaintiffs' claims relate to "rates," *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to "services," *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates.

(*Wolens*, *supra*, 513 U.S. at p. 226.)[5] Thus, rather than finding unfair business practice claims under Illinois law to be *inherently* "related to" prices, routes, or services, or facially preempted, as proposed by Pac Anchor, the *Wolens* Court instead examined the *specific facts* in the case before it and concluded that both plaintiffs' statutory and contractual claims were "related to" prices, routes, or services. (*Ibid.*)

Importantly, the passage cited by Pac Anchor wherein the *Wolens* Court addressed the potential for "intrusive regulation" through Illinois's unfair business practice statute (*Wolens*, *supra*, 513 U.S. at pp. 226-228) occurs *after* the Court has already determined the claims' "relatedness" and has turned its attention to the second part of the two-step inquiry, *viz.* a determination of whether the private class actions at issue served to "enact or enforce a law" within the meaning of the ADA (and FAAAA). The

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[5] *Wolens* refers to an older version of the ADA preemption provision (49 U.S.C. § 1305(a)(1)), which used the term "rates, routes, or services." In the current, recodified version, (49 U.S.C. § 41713(b)(4)), as well as in the current version of the FAAAA, the equivalent phrase has been restated as "prices, routes, or services." However, this change was not intended by Congress to express any substantive change in the meaning of the provisions. (1994 U.S. Code Cong. & Admin. News, at p. 1755 [Appx., Vol. I, at pp. 266-267]; see also *Wolens*, *supra*, 513 U.S. at p. 223 fn.1 [stating that Congress intended no substantive change in substituting the word "price" for the word "rates" when recodifying the ADA].)

Court emphasized that while both the statutory and contract claims were based on the same conduct by the airline that was clearly related to rates and services, the statutory claim alone imposed state "substantive standards" upon those rates and services, rather than simply holding the airline to its bargain. (*Id.* at pp. 232-233.) The Court concluded that the plaintiffs' claim based on the Illinois unfair business practices statute was preempted as an enforcement of law, but that the contract claim was not. (*Id.* at pp. 228-229.)

Thus, contrary to Pac Anchor's suggestion, it was not the regulatory "potential" of Illinois's unfair business practice statute that established the statute's relatedness and justified preemption. Rather, the *Wolens* Court had already made the *fact-specific* determination that all of the plaintiffs' claims were "related" to rates and services. (*Wolens*, *supra*, 513 U.S. at p. 226.) The "regulatory" nature of the unfair business practice statute was only discussed for purposes of differentiating the plaintiffs' statutory claims — which enact or enforce state law — from the plaintiffs' contractual claims — which do not. (*Id.* at pp. 228-229.) Stated otherwise, the Court did not consider whether an action under Illinois's unfair business practice statute would be preempted by the ADA if it was predicated on an underlying claim *unrelated* to "rates, routes, or services."[6]

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[6] Pac Anchor also insists that, rather than simply applying both steps of the two-step test demanded by the ADA, the *Wolens* Court "expanded the holding of *Morales*" and established new, alternative tests for preemption. (Br. of Resp. at p. 12.) According to Pac Anchor's interpretation, not only can a claim be preempted because it is related to "prices, routes, or services," it can *also* be preempted "for the independent reason that the express language of the preemptive provision and its purpose exhibit an intent by Congress to preempt state action that interferes with the forces of competition." (Br. of Resp. at pp. 12-13.) Were this accurate, however, the Court could simply have ended its analysis once it found plaintiffs' claims to be related to rates and services; it would not have

(continued...)

Pac Anchor also cites to a number of other decisions that it characterizes as interpreting *Wolens* to find state unfair competition statutes preempted "on their face." (See Br. of Resp., at pp. 22-25.) However, among these decisions, only *Fitz-Gerald*, *supra*, 155 Cal.App.4th 411 and the unreported *Blackwell v. SkyWest Airlines, Inc.* (S.D. Cal. 2008) 2008 WL 5103195 (hereafter *Blackwell*) actually suggest any broad rule of UCL preemption, and both decisions reach their conclusion through misinterpretation of *Morales* and *Wolens*.

In *Fitz-Gerald*, plaintiff flight attendants alleged that they were not provided uninterrupted meal and rest breaks, and did not receive overtime or minimum wage for "block time" when an aircraft is immobile on the ground. (*Fitz-Gerald*, *supra*, 155 Cal.App.4th at p. 414.) Plaintiffs raised their claims in four causes of action alleging state labor law violations, as well as one cause of action under the UCL based on the underlying labor law violations. (*Id.* at p. 415.) The court first found that the claims were all preempted under the Railway Labor Act and, alternatively, that the UCL claim was preempted by the ADA. (*Id.* at pp. 422-423.) However, the

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(...continued)
been necessary for the Court to proceed to consider the second prong of the preemption standard. In fact, neither *Wolens* nor the other cases cited by Pac Anchor support the proposition that the regulatory basis for a claim suffices to justify preemption, without due regard for the actual statutory test, *viz.* whether the claim both relates to prices, routes, or services, *and* constitutes an enactment or enforcement of state law. (See *Travel All Over*, *supra*, 73 F.3d at p. 1432 [setting forth two-step test for ADA preemption]; *Abdu-Brisson v. Delta Air Lines, Inc.* (S.D.N.Y. 1996) 927 F.Supp. 109, 111 [same], reversed on other grounds by *Abdu-Brisson v. Delta Air Lines, Inc.* (2nd Cir. 1997) 128 F.3d 77 (hereafter *Abdu-Brisson II*); *Continental Airlines, Inc. v. Kiefer* (Tex. 1996) 920 S.W.2d 274, 279 (hereafter *Kiefer*) [describing *Wolens* as first finding relation with rates and services prior to determining whether private action was enactment or enforcement of law].)

court did not find ADA preemption with respect to the four claims brought directly pursuant to state labor law. (*Id.* at p. 423.)

Fitz-Gerald does not explicitly set forth any rule of facial preemption, but the court there clearly viewed the UCL claim as being preempted separately and apart from the labor law claims upon which the UCL claim was based. In its brief alternative ruling on this point (contrasting to the court's lengthy Railway Labor Act analysis), the court simply cited *Morales*, *Wolens*, and *In re JetBlue Airway Corp. Privacy Litigation* (E.D.N.Y. 2005) 379 F.Supp.2d 299 (hereafter *JetBlue*), stating without further analysis that, "[b]ased on these federal cases, we conclude that the ADA bars the fifth cause of action for relief under the California Unfair Business Practices Act." (*Fitz-Gerald*, *supra*, 155 Cal.App.4th at 423.)[7]

However, the federal cases cited in *Fitz-Gerald* do not support any conclusion that UCL claims are facially preempted. The Supreme Court in both *Morales* and *Wolens* made specific findings that the challenged actions in those cases were related to airline rates, routes, or services. (See *Morales*, *supra*, 504 U.S. at p. 387 [airfare marketing guidelines at issue "quite obviously" related to fares]; *Wolens*, *supra*, 513 U.S. at p. 226 ["Plaintiffs' claims relate to 'rates,' ... and to 'services,' ..."].) Likewise, *JetBlue* found an unfair business practice claim to be preempted because:

> it represents a direct effort to regulate the manner in which JetBlue communicates with its customers in connection with reservations and ticket sales, both of which are *services* provided by the airline to its customers.

(*JetBlue*, *supra*, 379 F.Supp.2d at p. 315, emphasis added.) Thus, in each case, the unfair business practice claim was preempted because, the action was found — on the facts — to relate to prices, routes, or services. These

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[7] This holding in *Fitz-Gerald* was specifically rejected by the Court of Appeal below in the instant matter.

decisions do not lend any support to the proposition that UCL claims *in general* are preempted, and the *Fitz-Gerald* court erred in relying on these authorities to support such a sweeping rule.

As in *Fitz-Gerald*, the court in *Blackwell* misconstrued case authority in articulating a broad holding of preemption. Without anything more than a citation to *Morales, Wolens,* and *Fitz-Gerald,* the *Blackwell* court concluded that, under those decisions, the UCL claim before it was preempted, simply pronouncing that "[i]t is settled that the ADA preempts this claim." (*Blackwell, supra*, 2008 WL 5103195 at p. *20.)

Fitz-Gerald and *Blackwell* thus fail to provide any *reasoned* support for the proposition that UCL claims against motor carriers are facially preempted. The other cases cited by Pac Anchor are simply inapposite. *Aguayo v. U.S. Bank* (S.D. Cal. 2009) 658 F.Supp.2d 1226 does not even involve ADA or FAAAA preemption, but rather addressed whether a UCL claim based on the state Rees-Levering Automobile Sales Finance Act (Civ. Code §§ 2981, *et seq.*) was preempted by the National Bank Act (12 U.S.C. §§ 21, *et seq.*). (*Aguayo, supra*, 658 F.Supp.2d at p. 1230.) Moreover, far from establishing any *per se* rule regarding UCL claims, the *Aguayo* court understood *Wolens* to require that UCL claims be evaluated by examining whether *the underlying predicate acts* are preempted. (See *id.* at p. 1235 ["[T]he only direction *Wolens* provides this Court is to evaluate the Rees-Levering Act directly for preemption"].)[8]

While the remaining cases relied on by Pac Anchor do address preemption under the ADA or FAAAA, none of them supports facial

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[8] The *Aguayo* court ultimately found the UCL claim to be preempted. However, this result was reversed on appeal. (See *Aguayo v. U.S. Bank* (9th Cir. 2011) 653 F.3d 912, 928.)

preemption of UCL claims.[9] Instead, they uniformly present circumstances where the plaintiff's claims clearly implicate prices, routes, or services. (See *Butler v. United Air Lines, Inc.* (N.D. Cal. 2008) 2008 WL 1994896 at pp. *1-*3, *6 [claim based on airline ticketing dispute preempted as attempt to regulate service]; *Flaster/Greenberg P.C. v. Brendan Airways, LLC* (D. N.J. 2009) 2009 WL 1652156 at p. *7 [New Jersey Fraud Act claim preempted because "the ADA expressly preempts state laws *when they relate to 'rates, routes, and services'*"], emphasis added; *Greer v. Fed. Express, et al.* (W.D. Ky. 1999), 66 F.Supp.2d 870, 872 [claim that defendant failed to provide timely package delivery service]; *Kiefer, supra,* 920 S.W.2d at p. 281 [plaintiffs' tort claims found "clearly" related to prices and services]; *W. Parcel Express v. United Parcel Service of Am.* (N.D. Cal. 1996) 1996 WL 756858 at p. *2 [predatory pricing claim "clearly" preempted because related to "purported pricing and service practices"].) Thus, none of these cases provide any support for the proposition that the FAAAA preempts UCL claims *per se.*

The additional "case after case" cited by Pac Anchor as supporting its theory of facial preemption (Br. of Resp. at p. 34) all involve specific facts that relate to prices, routes, or services. (See *Beyer v. Acme Truck Line, Inc.* (Ct. App. La. 2001) 802 So.2d 798, 799-800 [allegation of price fixing related to prices and services]; *Continental Airlines, Inc. v. Am. Airlines, Inc.* (S.D. Tex. 1993) 824 F.Supp. 689, 696 [allegations of predatory

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[9] In fact, two of the cited cases — *Greer v. Fed. Express, et al.* (W.D. Ky. 1999) 66 F.Supp.2d 870 and *Kiefer, supra,* 920 S.W.2d 274 — do not even involve unfair business practice claims. (See *Greer, supra,* 66 F.Supp.2d at p. 872 fn.2 [plaintiffs made no unfair or deceptive trade practices claims]; *Kiefer, supra,* 920 S.W.2d at p. 276 [airlines only appealed finding that negligence claims were not preempted, so unfair practices claims were not before the Texas Supreme Court].) Thus, any discussion of such claims in these decisions is dicta.

pricing "would have an effect on airline rates that would be both 'significant' and 'regulatory'"]; *Dilts v. Penske Logistics LLC* (S.D. Cal. 2011) 2011 WL 4975520 at p. *8 [meal and rest break claims would affect "the types and lengths of routes that are feasible" and "have a significant impact on ... services"]; *Fed. Express Corp. v. United States Postal Serv.* (W.D. Tenn. 1999) 55 F.Supp.2d 813, 818 [unfair business act claim of false advertising re services preempted "*where that claim ... relates to that carrier's prices, routes, or services*"], emphasis added; *Frontier Airlines, Inc. v. United Air Lines, Inc.* (D. Colo. 1989) 758 F. Supp. 1399, 1409 [preempted claim of anticompetitive conduct in pricing and operation of computer reservation system services]; *In re EVIC Class Action Litigation* (S.D.N.Y. 2002) 2002 WL 1766554 at p. *8 [claims that carrier operated unlawful self-insurance scheme were related to prices and services]; *In re Korean Air Lines Co., Ltd., Anti-Trust Litigation* (9th Cir. 2011) 642 F.3d 685, 696-697 [claims that carrier conspired to impose surcharge on airfares "plainly related" to price]; *Tanen, supra*, 187 Cal.App.4th at p. 1170 [claim that gift certificates with expiration dates violated state law preempted as related to services].)

In short, there is no persuasive authority for Pac Anchor's proposition that the UCL is categorically preempted by the FAAAA under every circumstance in which the UCL is applied to address unlawful conduct by a motor carrier.

II. THE PEOPLE'S UCL ACTION IS NOT PREEMPTED BY THE FAAAA, BECAUSE THE ACTION IS NOT RELATED TO PRICES, ROUTES, OR SERVICES.

The action by the California Attorney General to enforce the UCL is indisputably an action to "enact or enforce a law." Accordingly appellant concedes that if the People's suit were "related to" Pac Anchor's prices, routes, or services, it would be preempted. (See *Tanen, supra*, 187

Cal.App.4th at p. 1159 [preemption applies when claim relates to prices, routes, or services, and derives from enactment of enforcement of state law].) A claim is "related to" prices, routes, or services if it has a "connection with, or reference to" such prices, routes, or services. (*Morales*, *supra*, 504 U.S. at p. 384; *Rowe*, *supra*, 552 U.S. at p. 370.)

A. The People's UCL Action Does Not "Refer" to Prices, Routes, or Services.

State action makes "reference" to a price, route, or service only where it acts directly or immediately on the price, route, or service. (See *ATAA v. S.F.*, *supra*, 266 F.3d at p. 1071 [In ADA case, "[p]reemption resulting from 'reference to' price, route or service occurs '[w]here a State's law acts immediately or exclusively upon [price, route or service] ... or where the existence of [a price, route or service] is essential to the law's operation"] [citing *Cal. Div. of Lab. Standards Enforcement v. Dillingham* (1997) 519 U.S. 316, 325 (hereafter *Dillingham*) [same in Employee Retirement Income Security Act ("ERISA") case]].)[10]

In this case, nothing about the People's UCL action or the underlying tax, insurance, or wage laws acts "immediately and exclusively" upon prices, routes, or services, or requires the existence of any prices, routes, or services to proceed or operate. (Cf. *ATAA v. S.F.*, *supra*, 266 F.3d at p. 1071 [no preemption unless state action directly affects price, route, or service, or requires existence of such a price, route, or service].)

Pac Anchor nevertheless argues that "the U.S. Supreme Court can hardly have meant the reference test to be so narrow as to require the use of

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[10] ERISA preempts state actions that "relate to any employee benefit plan." (29 U.S.C. § 1144(a).) Accordingly cases construing the ERISA preemption provision are considered instructive when construing the "related to" preemption language in the ADA or FAAAA. (See *Morales*, *supra*, 504 U.S. at pp. 383-384.)

the actual words prices, routes, and services or their synonyms for state action to be preempted under the reference test." (Br. of Resp. at p. 31.) In fact, however, case authority demonstrates that a literal, express reference — or at the very least, a *direct* relation — is *exactly* what Congress intended the term "reference" to mean. (See *Morales*, *supra*, 504 U.S. at p. 388 [finding preemption of airfare marketing guidelines because, *inter alia*, "[i]n its terms, every one of the guidelines enumerated above bears a 'reference to' airfares"]; *Travelers*, *supra*, 514 U.S. at p. 656 [no preemption by "reference" to ERISA plans where state-mandated health insurance surcharges applied generally to all purchasers, making no special distinction for ERISA plans]; *Dillingham*, *supra*, 519 U.S. at p. 325 [preemption by "reference" occurs where law acts "immediately and exclusively" upon ERISA plan, or where existence of plan is "essential" to law's operation]; *Travel All Over*, *supra*, 73 F.3d at pp. 1432, 1434 [describing "reference" test as referring to whether particular claims "expressly refer" to prices, routes, or services].) Since the UCL action neither mentions prices, routes, or services, nor specifically targets them for regulation, it does not "refer" to prices, routes, or services within the meaning of the FAAAA.

B. The People's UCL Action Is Not "Connected With" Prices, Routes, or Services.

State action that does not directly "refer" to prices, routes, or services may nevertheless be preempted if it has a "connection with" such prices, routes, or services. (See *Rowe*, *supra*, 552 U.S. at p. 370 ["'[s]tate enforcement actions *having a connection with, or reference to'* carrier '"rates, routes, or services" are preempted'"] [quoting *Morales*, *supra*, 504 U.S. at p. 384], emphasis in original.) Courts have found such a preempted "connection" where state action has a "significant impact" upon a price, route, or service. (See *Rowe*, *supra*, 552 U.S. at pp. 370-371 ["preemption

occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives"]; *Morales*, *supra*, 504 U.S. at p. 388 [aside from express reference to fares in the airfare marketing guidelines, preemption also found because guidelines had "forbidden significant effect" upon fares].) In the instant case, however, Pac Anchor fails to demonstrate how the People's UCL action is "connected with" Pac Anchor's prices, routes, or services in anything more than a "tenuous, remote or peripheral a manner." (Cf. *Morales*, *supra*, 504 U.S. at p. 390 [state actions with only a "tenuous, remote, or peripheral" effect upon prices, routes, or services are not preempted].)

1. The People's UCL Action Does Not Compel the Use of Employee Drivers.

Pac Anchor contends that the UCL action effectively compels it to abandon the use of independent contractor drivers in favor of using employees. Respondent reasons that the People are imposing an employee-based business model and thereby regulating the services that Pac Anchor chooses to provide. (*Id.* at p. 36.)[11]

In fact, nothing in the complaint seeks to impose the use of employee drivers, or to prohibit the use of independent contractors. The complaint seeks only to prohibit Pac Anchor from "having its cake and eating it, too" by continuing to utilize employee drivers without complying with

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[11] Pac Anchor's argument is ironic. The People's complaint seeks to ensure Pac Anchor's compliance with tax, insurance, and labor law requirements precisely because Pac Anchor's drivers are, in fact, *employees* and are *not* independent contractors as Pac Anchor represents. Thus, if anything, the complaint would seem to encourage Pac Anchor to use bona fide independent contractors to avoid these employee costs. The truth, of course, is that Pac Anchor does not want to *treat* its workforce as either employees *or* independent contractors, but would rather continue *utilizing* workers who are employees in fact but are deliberately misclassified as independent contractors.

applicable state tax and employment regulations. (Appx., Vol. I, at pp. 13:17-14:7, 14:27-15:3.) Because Pac Anchor remains free to utilize *genuine* independent contractors or employees as it sees fit, the People's UCL action does not impose a "significant impact" on Pac Anchor's choice of services to provide, and is therefore not "connected with" Pac Anchor's "services" within the meaning of Section 14501(c)(1). (See *ATAA v. S.F.*, *supra*, 266 F.3d at p. 1072 [no prohibited connection unless the state action in question "binds the [carrier] to a particular price, route, or service and thereby interferes with competitive market forces"]; cf., *Travelers*, *supra*, 514 U.S. at pp. 659-660 [no ERISA preemption of state health insurance surcharge that altered relative cost of competing health insurance plans, because simply varying incentives does not compel ERISA plan to choose any particular alternative].)

2. Any Costs Imposed on Pac Anchor as a Consequence of the People's UCL Action Are Not "Connected With" Pac Anchor's Prices, Routes, or Services Within the Meaning of the FAAAA, But Are Rather the Consequence of Pac Anchor's Efforts to Evade its Lawful Obligations as an Employer.

Pac Anchor also claims that the costs imposed by the People's UCL action are "connected with" its prices, routes, and services. (Br. of Resp. at p. 38.) Pac Anchor argues that if it has to meet its tax, insurance, and wage obligations, then it "logically will have to charge higher prices, stop servicing routes that become cost-prohibitive, and/or stop offering services that become too expensive." (*Id.* at p. 38.) Pac Anchor further asserts that its drivers, too, will have to "stop being motor carriers and small business owners," and will "no longer charge prices, offer services, or service routes." (*Id.* at 36.) Of course, these arguments are constructed on the flimsy premise that Pac Anchor has a protectable, free-market choice to

evade its tax and insurance obligations by disguising its employees as "independent contractors."

For purposes of this appeal, at least, Pac Anchor's drivers are, in fact, employees.[12] (Cf. *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516 [all factual allegations of complaint deemed true on appeal from judgment on the pleadings].) In harmony with the deregulatory purpose of the FAAAA, Pac Anchor retains the freedom to continue to employ its drivers and pay the associated costs, *or* alternatively, to utilize genuine contractors, – *i.e.*, drivers who operate under their own transportation license, use their own equipment, work on a short-term basis, work for multiple clients, operate their own businesses, or demonstrate other indicia of being an actual independent contractor. (See *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 350-351, 354-355 [discussing relevant factors in evaluating independent contractor status].) What Pac Anchor may not do, however, is to distort free-market forces by utilizing employee drivers, *label* them "independent contractors," and thereby avoid paying the payroll taxes, workers' compensation insurance premiums, and minimum wages that other employers must pay. [13]

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[12] Thus, the drivers will not be forced to "stop being motor carriers and small business owners" because they presently are not "motor carriers" or "small business owners" – they are employees.

[13] Pac Anchor maintains that if a determination is made that its drivers are employees, this "will necessarily imply a finding that the current leasing arrangement between Petitioners [Pac Anchor] and drivers is a sham, despite the fact that such leasing arrangements are permitted and regulated by the U.S. Department of Transportation." (Br. of Resp. at pp. 35-36 [citing 49 U.S.C. Part 376].) In fact, there is nothing fundamentally incompatible between employee status and federally-mandated leasing requirements: "Nothing in the provisions ... of this section is intended to affect whether the lessor or driver provided by the lessor is an independent

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The UCL complaint seeks to force Pac Anchor to make choices it would rather not make, by either shouldering the expenses associated with employment of its drivers, or relinquishing control of its drivers by entering into bona fide independent contracts with them. However, any resulting effect on Pac Anchor's prices, routes, or services is not properly viewed as a consequence of state regulation, but rather as a consequence of Pac Anchor's choice to participate in a competitive market. (See *ATAA v. S.F.*, *supra*, 266 F.3d at 1074 [faced with choice to comply with city ordinance or forego economic benefit of dealing with city, "[w]hat the Airlines are truly complaining about are free market forces and their own competitive decisions"]; see also *Dillingham*, *supra*, 519 U.S. at p. 334 [State law not preempted by ERISA because "[t]he prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans].)

Pac Anchor appears to accept as an article of faith that the imposition of any costs is necessarily "related to" its prices, routes, and services. (Br. of Resp. at p. 38.) However, indirect regulations, like those Pac Anchor argues are encompassed by the instant UCL action, are only preempted by the FAAAA if they have a "significant impact" upon prices, routes, or services. (*Rowe*, *supra*, 552 U.S. at p. 375.) State action is only "connected with" prices, routes, or services where "the law binds the [motor] carrier to a particular price, route, or service and thereby interferes with competitive market forces." (*ATAA v. S.F.*, *supra*, 266 F.3d at p. 1072.)

Thus, not *every* increase in costs resulting from state action against a motor carrier is meaningfully "related to" prices, routes, or services for

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contractor or an employee of the authorized carrier lessee." (49 U.S.C. § 376.12(c)(4).)

purposes of FAAAA. (See *Californians for Safe and Competitive Dump Truck Trans. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1189 (hereafter *Mendonca*) [finding cost of prevailing wage law "in a certain sense is 'related to' [motor carrier's] prices, routes and services," but the relation "is not more than indirect, remote, and tenuous"]; see also *Travelers*, *supra*, 514 U.S. at p. 664 [no preemption of surcharge statute, but speculating that there might exist some extraordinary circumstance where costs *could* be so prohibitive as to impose a "substantive mandate" on ERISA plans].) Prices, routes, and services are subject to the influence of a variety of factors in addition to cost. (See *ATAA v. S.F.*, *supra*, 266 F.3d at p. 1074 [costs of regulatory compliance one of "many factors" taken into consideration by airlines in setting routes and services]; *Abdu-Brisson II*, *supra*, 128 F.3d at pp. 84-85 [rejecting direct linear relationship between costs and prices in airline industry].)

Indeed, the most important factor is the market-driven choices made by carriers themselves to adapt to changing circumstances. Although costs stemming from generally applicable state requirements may alter the incentives of the marketplace — and might even cause some carriers to alter prices, routes, or services as a result — the imposition of such costs are normally not preempted. (See *Travelers*, *supra*, 514 U.S. at p. 661 [to read preemption provision "as displacing all state laws affecting costs and charges" would ignore the limiting language of "related to" out of statute]; *ATAA v. S.F.*, *supra*, 266 F.3d at p. 1074 [no preemption where carrier could opt to pay costs of compliance with city ordinance or forego route, but not *compelled* to do one or the other].) Otherwise, the preemptive reach of the FAAAA would touch every conceivable state control, and crowd out any space for the types of regulations contemplated by the Supreme Court as being "too tenuous, remote, or peripheral" to warrant preemption. (*Morales*, *supra*, 504 U.S. at p. 390.)

Hypothetically, the "mere" imposition of costs by state regulation might be preempted if the costs were so onerous as to *compel* a motor carrier to alter its prices, routes, or services. (*ATAA v. S.F.*, *supra*, 266 F.3d at p. 1075.) At this stage of the proceedings in the trial court, however, no evidence or informed projection of costs or their effects is available, nor would such evidence have been permitted or considered in any event in ruling on Pac Anchor's motion for judgment on the pleadings. (See *Hood v. Santa Barbara Bank & Trust*, *supra*, 143 Cal.App.4th at p. 535 [on motion for judgment on the pleadings, court only considers matters appearing on the face of the pleadings or judicially noticed]; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999 ["Presentation of extrinsic evidence is ... not proper on a motion for judgment on the pleadings"].) Thus, there is no reasonable basis for determining either the amount of costs likely to be imposed by the People's UCL action, or any effect such costs would have on Pac Anchor's prices, routes, or services. (Cf. *Mendonca*, *supra*, 152 F.3d at p. 1189 [substantial costs of state regulation still bore only "indirect, remote, and tenuous" connection to prices, routes, and services].) In light of this information deficit, it would be premature to determine – on the basis of the pleadings alone – whether Section 14501(c)(1) should preempt the People's action because of the *costs* it imposes. (See *Abdu-Brisson II*, *supra*, 128 F.3d at p. 84 [no finding of preemption based on pleadings because "while in the abstract [the state claims at issue] could affect price" there was no substantiation that this was actually or likely the case].) [14]

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[14] Pac Anchor cites *New Hampshire Motor Trans. Assn. v. Rowe* (1st Cir. 2006) 448 F.3d 66, 82 fn.14, for the proposition that it is not necessary to present empirical evidence in order to establish the significant impact that regulation can have on prices, routes, or services, and that it is only necessary to demonstrate a "logical effect." However, at best this approach

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Pac Anchor's attempt to equate the People's UCL action here with the efforts of the City of Los Angeles as described in *Am. Trucking Assn., Inc. v. The City of Los Angeles* (9th Cir. 2009) 559 F.3d 1046 (hereafter *ATA II*) and *Am. Trucking Assn., Inc. v. The City of Los Angeles* (C.D. Cal. 2010) 2010 WL 3386436 (hereafter *ATA IV*) is unavailing. Both *ATA* cases involved the implementation of by the Port of Los Angeles of "Concession Agreements" that imposed new requirements on port trucking firms, including a specific provision that requires motor carriers to utilize 100% employee drivers by the end of 2013. (*ATA II*, *supra*, 559 F.3d at p. 1049; *ATA IV*, *supra*, 2010 WL 3386436 at p. *2.) In both decisions, the courts agreed that such a transition would be sufficiently costly for the carriers to "relate" to prices, routes, or services within the meaning of Section 14501(c)(1). (See *ATA II*, *supra*, 559 F.3d at p. 1056 [on consideration of preliminary injunction, employee driver provision found "highly likely" to be preempted]; *ATA IV*, *supra*, 2010 WL 3386436 at p. *19 ["Furthermore, the record demonstrates that the employee driver provision would significantly affect costs of drayage services"].)

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can only suffice where the information exists to draw such a logical inference. In *N.H. Motor*, the court dealt with a Maine statute that imposed penalties on carriers who knowingly delivered tobacco products to unauthorized recipients, and the court imputed knowledge if the package was labeled as containing such products. (*Id.* at p. 80.) Empirical evidence of the cost of compliance was unnecessary because it could be logically inferred that carriers were compelled to alter their delivery procedures – *i.e.*, "services" — to allow for inspection of packages destined for Maine recipients. (*Id.* at p. 81.) By contrast, where the state action is merely the imposition of unknown costs, more specific information is necessary to gauge the relationship to prices, routes, and services. (See *Mendonca*, *supra*, 152 F.3d at p. 1189 [substantial costs imposed by prevailing wage statute too "indirect, remote, and tenuous" to warrant preemption].)

The cases are manifestly distinguishable from the instant action. The Concession Agreements would have *required* motor carriers that previously utilized presumably legitimate independent contractors to abandon that business model and begin using employees. (*ATA II*, *supra*, 559 F.3d at p. 1049.) By contrast, of course, nothing in the People's lawsuit requires Pac Anchor to use employees – or independent contractors – and Pac Anchor retains the freedom to control whether to incur the costs of employment.

3. The UCL Action Is Materially Indistinguishable from Its Underlying Predicate Statutes, Which Respondent Concedes Are Not Preempted.

Pac Anchor concedes that most of the state laws underlying the People's UCL action are not preempted because they are laws of general application, with only a tenuous connection with prices, routes, or services. (Br. of Resp. at p. 30.)[15] This conclusion is confirmed by federal statutes and case authorities. (See 49 U.S.C. § 14501(c)(2) [state insurance

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[15] However, Pac Anchor maintains that Sections 4 and 7 of I.W.C. Wage Order 9 are preempted because the Wage Order specifically targets the transportation industry, and because Sections 11 and 12 of the Wage Order regarding meal and rest breaks are related to prices, routes, and services. (Br. of Resp. at pp. 26-30.) These arguments are not well taken. Although the Wage Order is directed at the transportation industry, the requirements imposed by Sections 4 and 7 (minimum wage and recordkeeping, respectively) reflect requirements generally applicable to all workers. (See Lab. Code §§ 1174 [recordkeeping] and 1182.12 [minimum wage].) As for Sections 11 and 12 of the Wage Order, even presuming that such meal and rest break provisions were preempted by the FAAAA, that would have no relevance in the instant case, where no allegations of meal and rest break violations have been made. In any event, judgment on the pleadings normally lies only against an entire cause of action. (*Fire Ins. Exchange*, *supra*, 116 Cal.App.4th at p. 452.) Thus, even if Sections 4 and 7 of Wage Order 9 were preempted, Pac Anchor would still not have been entitled to judgment on the pleadings, since Pac Anchor concedes that Labor Code Sections 226, 1194, and 3700, as well as Unemployment Insurance Code Sections 976, 976.6, 984, and 13020 are *not* preempted.

mandates on motor carriers exempt from preemption]; 49 U.S.C. §§ 14502, 14503 [setting explicit restrictions on state taxing authority over motor carriers, thus implying no other restrictions and presuming general validity of state taxing authority over motor carriers]; *Mendonca, supra,* 152 F.3d at p. 1189 [effect of California minimum prevailing wage law on prices, routes, and services too "indirect, remote, and tenuous" to justify preemption]; *Renteria v. K&R Trans., Inc.* (C.D. Cal. 1999) 1999 WL 33268638 at p. *4 [effect of state wage and workers' compensation laws merely "incidental" and insufficient to relate to prices, routes, or services]; *Bostain v. Food Express, Inc.* (Wash. 2007) 159 Wash.2d 700, 721 fn.9 [Washington state overtime statute not preempted by FAAAA]; *Western Ports Trans., Inc. v. Employment Security Dept. of Washington* (Wash. App. 2002) 110 Wash.App. 440, 456-457 [no FAAAA preemption of state unemployment tax, because "when Congress has intended to prohibit state taxing authorities from 'burdening' interstate commerce, it has done so, expressly, clearly and understandably [as in Section 14502(b)]"].) Appellant is at a loss to understand how the People's action against Pac Anchor under the UCL can be preempted when that action is merely seeking to compel Pac Anchor's compliance with substantive laws of general application – that are themselves conceded *not* to be preempted. [16]

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[16] In this respect, the UCL is distinct from most state unfair business practice statutes, including the Illinois unfair business practice statute at issue in *Wolens*. The UCL's "unlawful" prong permits an action to enforce state substantive standards that are far removed from Pac Anchor's prices, routes, or services, such as the tax and labor standards in this case. In contrast, the Illinois unfair business practice statute at issue in *Wolens* included no similar "unlawful" prong; claims under that statute require a finding of "[u]nfair methods of competition [or] unfair or deceptive acts or practices ... ." (*Wolens, supra,* 513 U.S. at p. 227; 815 Ill.Comp.Stat., Act 505, § 2 [attached hereto as Exhibit 1].) Although claims under either statute will not *necessarily* relate to a carrier's prices, routes, or services,

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Pac Anchor relies on *In re Tobacco Cases II* (2007) 41 Cal.4th 1257 as an example of a UCL action that was preempted even where the underlying predicate act was not. In *Tobacco Cases II*, the plaintiff class alleged that advertising by tobacco companies encouraged violation of Penal Code Section 308, which prohibits the sale of tobacco to minors, and the purchase or possession of tobacco by minors. (*Id.* at pp. 1263-1264.) This Court determined that the UCL class action was preempted by the Federal Cigarette Labeling and Advertising Act, which preempts state laws regarding the "advertising or promotion" of cigarettes "based on [concerns about] smoking and health." (*Id.* at p. 1266.)

However, *Tobacco Cases II* is distinguishable in that it did not involve a straightforward use of the UCL's "unlawful" prong to enforce a substantive state law. Instead, the plaintiffs relied on Penal Code Section 308 only to provide the policy rationale underlying their *advertising* claim. It was the plaintiffs' effort to enforce a state *advertising* policy that conflicted with federal law and compelled preemption of the UCL action, not enforcement of the Penal Code provision itself, which does not address – much less regulate – advertising. By contrast, the instant action is a straightforward effort to compel Pac Anchor's compliance with substantive state laws through the vehicle of the UCL, and there is no basis to differentiate the UCL action here from the undisputedly non-preempted underlying predicate acts.

Nor should the Court give consideration to Pac Anchor's argument that the UCL offers remedies distinct from the underlying statutory provisions, including injunctive relief. At this stage of the proceedings,

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(...continued)
the narrower focus of the Illinois statute on competitive market practices are more likely to be so related.

there is no basis for believing that any injunction would extend farther than to require Pac Anchor to report and submit payroll taxes, secure a workers' compensation insurance policy, and comply with wage and hour laws with respect to any employee drivers.[17] Pac Anchor has conceded that these basic requirements are not preempted.

Finally, Pac Anchor cites to *Barber Auto Sales, Inc. v. United Parcel Services, Inc.* (N.D. Ala. 2007) 494 F.Supp.2d 1290 (hereafter *Barber*), and *Deerskin Trading Post, Inc. v. United Parcel Service of America, Inc.* (N.D. Ga. 1997) 972 F.Supp. 665 (hereafter *Deerskin*), for the proposition that the decision in *Wolens, supra,* "prohibits the award of injunctive relief against motor carriers." (Br. of Resp., p. 22.) Both *Barber* and *Deerskin* involved breach of contract actions brought against motor carriers that clearly "related to" prices, routes, or services. (See *Barber*, *supra*, 494 F.Supp.2d at p. 1292 [dispute about shipping charges]; *Deerskin*, *supra*, 972 F.Supp. at p. 667 [same].) There was no dispute in either case that "routine breach of contract actions" are not preempted because they only reflect "privately ordered obligations" and thus do not "enact or enforce" state law. (*Wolens*,

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[17] Pac Anchor submits a Request for Judicial Notice that includes injunctions issued in five other cases filed by the People against port trucking firms, noting that in each case, the injunction forbade any driver operating a truck "provided, owned, or leased" by the carrier from being classified as an independent contractor. (Petitioners' Request for Judicial Notice, at Exhs. D, F, H, J, and L.) Pac Anchor argues that these injunctions effectively prohibit the use of independent contractors, and thereby regulate the respective carriers' services. (See Br. of Resp. p. 36.) However, Pac Anchor neglects to mention that the injunctions in each of these other proceedings were obtained *by stipulation*, and thus reflect an agreement by the carriers to accept the restrictions therein. (Petitioners' Request for Judicial Notice, at Exh. D, at pp. 1:25-2:3; Exh. F, at p. 1:23-28; Exh. H, at pp. 1:25-2:4; Exh. J, at pp. 1:25-2:3; and Exh. L, at p. 1:22-27.) Most importantly, the People have not sought a similar injunction in this case, and Pac Anchor would certainly have an opportunity to object if such a request is made.

supra, 513 U.S. at pp. 228-229, 232; *Barber*, *supra*, at p. 1293; *Deerskin*, *supra*, at p. 671.) Yet, the courts held that the injunctive relief sought *was* preempted because the relief was an "enlargement or enhancement" of the parties' bargain based on requirements of state law, and thus an enactment or enforcement of law within the meaning of the FAAAA. (See *Barber*, *supra*, at p. 1294 [injunction is "extraordinary remedy" not normally available for breach of contract]; *Deerskin*, *supra*, at p. 673 [award of injunctive relief "would remove a contract claim from the realm of '*routine* breach of contract actions'"]; cf., *Wolens*, *supra*, at p. 233 [scope of non-preempted contract actions limited to parties' bargain, "with no enlargement or enhancement based on state laws or policies external to the agreement"].)

But here, too, Pac Anchor's authorities are distinguishable. Most importantly, as discussed earlier, in the instant case, the People's request for injunctive relief is not "related to" prices, routes, or services within the meaning of the FAAAA.[18] Nothing in *Barber* or *Deerskin* suggests that

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[18] In any event, even if the People's request for injunctive relief were found by the trial court to be "related to" prices, routes, or services, that does not assist Pac Anchor in a motion for judgment on the pleadings. There can be no judgment on the pleadings based on a particular remedy, as long as the plaintiff is entitled to any valid remedy. (See *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 [demurrer cannot be sustained as to "particular type of damage or remedy"]; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 163-164 [allegations re punitive damages not subject to demurrer since such damages are merely remedies incident to a cause of action].) In this case, incident to their single cause of action, the People have sought not only injunctive relief, but also restitution and civil penalties – impositions that are generally not sufficient to create a "significant impact" upon, or "connection with" a carrier's prices, routes, or services. (See discussion *ante* at II.B.2.) This is particularly true with respect to the People's request for restitution, which reflects nothing more than the accrued costs of complying with undisputedly non-preempted state tax and labor law

(continued...)

state injunctions should be preempted even where there is no substantial relationship to prices, routes, or services.

III. PAC ANCHOR'S ARGUMENT THAT THE UCL ACTION IMPERMISSIBLY INTERFERES GENERALLY WITH THE FORCES OF COMPETITION IS WITHOUT MERIT.

A. The FAAAA's Preemption Focus Is Expressly Tied to Motor Carrier Prices, Routes, and Services.

Relying on *Rowe*, *supra,* 552 U.S. 364, Pac Anchor contends that the People's UCL action is preempted because of its interference with the forces of competition, regardless of the action's remote relatedness to prices, routes, and services. (Br. of Resp., pp. 39-41.) Of course, the touchstone of preemption analysis is congressional intent. (*Travelers*, *supra*, 514 U.S. at p. 655.) In this case, Section 14501(c)(1) plainly extends only to state action that is "related to ... a price, route, or service." (49 U.S.C. § 14501(c)(1).) Any "interference," then, must relate to prices, routes, and services.

Pac Anchor finds support in *Rowe*'s statement that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." (See *Rowe*, *supra*, 552 U.S. at pp. 371, 375].) Pac Anchor reads this passage as extending the preemptive reach of the FAAAA beyond prices, routes, or services, to state actions that more generally touch upon undefined "deregulatory and pre-emption-related objectives." (Br. of Resp. at p. 16.)

However, a careful reading of *Rowe* reveals that Congress' "deregulatory and pre-emption-related objectives," to which the Court

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(...continued)
requirements. Accordingly, Pac Anchor was not entitled to judgment on the pleadings based on the People's prayer for injunctive relief, because the People also have non-preempted claims for restitution and penalties.

referred, are simply those identified in the language of Section 14501(c)(1): to limit state regulation affecting prices, routes, and services. Thus, in describing the "significant impact" resulting from the Maine statute at issue, the *Rowe* Court described how the law would adversely affect the FAAAA's *pre-emption-related objectives* by requiring carriers to provide a *service* that they might otherwise choose not to provide. (*Rowe*, *supra*, 552 U.S. at pp. 371-372.) The Court later stated that "laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." (*Id.* at p. 375.) Thus, when *Rowe* refers to "deregulatory and pre-emption-related objectives," it is simply referring to the objectives of prohibiting significant state regulation *of prices, routes, or services*.

Pac Anchor's efforts to find preemption beyond the plain language of the FAAAA are unavailing. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." (*Cipollone*, *supra*, 505 U.S. at p. 517.) Section 14501(c)(1) expressly preempts only state efforts to "enact or enforce" any laws "related to a price, route, or service" of a motor carrier. (49 U.S.C. § 14501(c)(1).) Fidelity to congressional purpose requires honoring not only the general objective of the statute, but also the particular means by which Congress chose to advance that objective. In the case of Section 14501(c)(1), Congress chose precise language to define the scope of FAAAA preemption, and Pac Anchor's attempt to create a new preemptive standard based on "interference with competition" exceeds the limits that Congress specifically set forth. (See *An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal.App.4th 1418, 1437

["Legislative intent may not be used to bootstrap a meaning that cannot be found in the statutory language"].)[19]

B. The People's UCL Action Does Not Threaten to Create "Entry Controls."

Pac Anchor complains that the People's UCL action would erect an "entry control" against independent contractors. (Br. of Resp. at p. 41.) By the term "entry control," Pac Anchor apparently means that the UCL action threatens to establish a regulatory barrier that discriminates against the entry of independent contractors into the port trucking market.[20] Pac Anchor concludes that the UCL action is preempted "even if its effect is remote or tenuous" because establishing an entry control "threatens Congress' deregulatory purpose." (*Id.* at p. 43.)

However, the instant UCL action does not impose any requirements upon the use of independent contractor drivers that are any more onerous

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[19] In any event, the excerpts from the legislative history selected by Pac Anchor do not argue for a broader interpretation of the FAAAA's preemption provision. They reveal only that: (1) the FAAAA was intended to parallel the deregulation of air carriers in the ADA; (2) Congress believed "*certain aspects* of the State regulatory process should be preempted"; and (3) Congress viewed "State *economic* regulation of motor carrier operations" – *i.e.*, regulation of prices, routes, or services – to be problematic. (1994 U.S. Code Cong. & Admin. News, at pp. 39, 82, 85, 87 [Appx., Vol. I, at pp. 214, 266, 268, 270], emphasis added.)

[20] As an example of an "entry control," Pac Anchor cites Assembly Bill 2015 ("AB 2015"), a California enactment that is identified in the congressional legislative history of Section 14501(c)(1) as state regulatory legislation that would henceforth be preempted. However, as Pac Anchor itself explains, AB 2015 (which was later repealed) facially discriminated against the use of independent contractors by prohibiting carriers from using contractors "to generate more than ten percent of their gross intrastate revenue." (See Br. of Resp. p. 42.) By contrast, nothing in the People's UCL action can be construed as placing a discriminatory burden on the use of independent contractors.

than those applicable to employee drivers. If anything, the opposite is true, since the complaint alleges that Pac Anchor's drivers are actually employees, and *for that reason alone* Pac Anchor is subject to payroll taxes, workers' compensation insurance, and minimum wage standards. (Appx., Vol. I, at pp. 13:1-14:7.) The UCL action simply demands that Pac Anchor abide by the uniform, generally-applicable rules governing how motor carriers are to compensate and provide for drivers *based upon their actual status* as either employees or independent contractors.

It may very well prove true that, faced with the *true* market cost of its employee drivers, Pac Anchor will reassess its business model and choose to use *bona fide* independent contractors. It is similarly likely that some of Pac Anchor's drivers will decline the significant challenges that would face them were they to become legitimate independent contractors. However, any such challenges facing Pac Anchor and its drivers will not be the result of discriminatory state regulation, but rather the result of precisely the same forces of the free market as are faced daily by other businesses and entrepreneurs. Pac Anchor cannot sensibly argue that it should be allowed to continue using employee drivers without taking on the financial burdens that accompany that choice. (See *ATAA v. S.F.*, *supra*, 266 F.3d at 1074 [airlines not entitled to be spared the consequences of their competitive decisions].)

C. The People's UCL Action Does Not Threaten to Create a "Patchwork of State Regulation"

Finally, making a "floodgates" argument, Pac Anchor insists that allowing the People's UCL action to proceed will result in subjecting motor carriers to a "patchwork of differing standards" across different states. (Br. of Resp., pp. 41, 46.) However, as recognized by the Supreme Court in *Rowe*, the only "patchwork" of rules that Congress ultimately elected to preempt is a network of state regulations that *significantly impacts* prices,

routes, or services. (See *Rowe, supra*, 552 U.S. at 373 [expressing concern that Maine statute regulating delivery services "could easily lead to a patchwork of state *service-determining* laws, rules, and regulations"], emphasis added.) The legislative history of the FAAAA's preemption provision confirms that the "patchwork of regulation" that Congress was concerned about were the rules of 41 states that regulated "intrastate *prices, routes, and services* of motor carriers." (1994 U.S. Code Cong. & Admin. News, at pp. 1758-1759 [Appx., Vol. I, at pp. 269-270], emphasis added.)

Congress was fully aware that states had different laws regarding taxes, insurance, labor regulation, and unfair competition. Yet Congress made no effort to broadly preempt these types of local regulation in enacting the FAAAA. (See 1994 U.S. Code Cong. & Admin. News, at p. 1757 [Appx., Vol. I, at pp. 268-269] ["nothing in this amendment is intended to change the application of State tax laws to motor carriers" and "State authority to regulate ... financial fitness and insurance ... is unchanged"].) Congress chose only to protect carriers from a "patchwork" of narrower state laws more significantly affecting prices, routes, or services. (See *Rowe, supra*, 552 U.S. at p. 373 [Congress intended to preempt Maine statute that "directly regulates a significant aspect of the motor carrier's package pickup and delivery service" and similar "service-determining" state laws].)

However genuine may be the threat that Pac Anchor will have to comply with a patchwork of state tax and labor law requirements, that was not Congress' concern in enacting the preemption provision of the FAAAA.

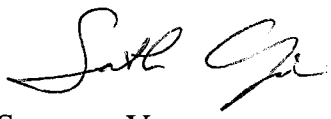
CONCLUSION

Based on the foregoing, the People request this Court to affirm the decision of the Court of Appeal, and remand this matter to the trial court for further proceedings in accordance with this decision.

Dated: January 26, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MARK BRECKLER
Chief Assistant Attorney General



SATOSHI YANAI
Deputy Attorney General
Attorneys for Appellant

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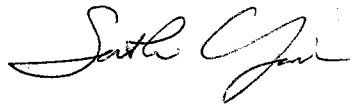
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,210 words.

Dated: January 26, 2012

KAMALA D. HARRIS
Attorney General of California



SATOSHI YANAI
Deputy Attorney General
Attorneys for Appellant

Formerly cited as IL ST CH 121 1/2 ¶ 262

Effective:[See Text Amendments]

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Chapter 815. Business Transactions
Deceptive Practices
Act 505. Consumer Fraud and Deceptive Business Practices Act (Refs & Annos)
505/2. Unlawful practices; construction with Federal Trade Commission Act

§ 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, [FN1] in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act. [FN2]

CREDIT(S)

Laws 1961, p. 1867, § 2. Amended by P.A. 78-904, § 1, eff. Oct. 1, 1973.

Formerly Ill.Rev.Stat.1991, ch. 121 1/2, ¶ 262.

[FN1] 815 ILCS 510/2.

[FN2] 15 U.S.C.A. § 45.

HISTORICAL AND STATUTORY NOTES

P.A. 78-904, rewrote this section.

CROSS REFERENCES

Funeral directors and embalmers licensing, violations, see 225 ILCS 41/15-75.
Safe and Hygienic Bed Act, violations, see 410 ILCS 68/35.
Violation of assurance of voluntary compliance as prima facie evidence of violation of this act, see 815 ILCS 505/6.1.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **People v. Pac Anchor Transportation, Inc. et al.**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **January 26, 2012**, I caused the original and thirteen (13) copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court, at **350 McAllister Street, San Francisco, CA 94102-4797,** by **Fed Ex Overnight Mail Delivery**. A copy to be sent to opposing counsel by **Fed Ex Overnight Mail Delivery** as follows:

Neil S. Lerner Sands Lerner 12400 Wilshire Boulevard, Suite 1300 Los Angeles, CA 90025 *Attorneys for Defendants and Appellees Pac Anchor Transportation, Inc. and Alfredo Barajas* **(Federal Express Tracking # 868255064115)**	California Supreme Court, **350 McAllister Street,** **San Francisco, CA 94102-4797** **(Federal Express Tracking #874443084630)**

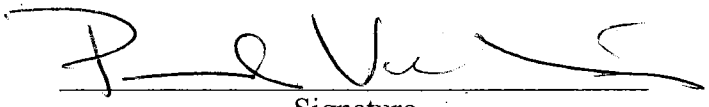
On **January 26, 2012**, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope placed in the internal mail collection system at the Office of the Attorney General and then deposited with the United States Postal Service that same day in the ordinary course of business addressed as follows:

Clerk of the Court L.A. County Superior Court Stanley Mosk Courthouse 111 N. Hill Street Los Angeles, CA 90012 (by U.S. Mail)	Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230 **Service Required Per Bus. & Prof. Code § 17209** (by Internal Mail)	Office of the District Attorney County of Los Angeles 210 W. Temple Street Los Angeles, CA 90012 **Service Required Per Bus. & Prof. Code § 17209** (by U.S. Mail)

Clerk of the Court Second District Court of Appeal, Division Five 300 South Spring Second Floor, North Tower Los Angeles, CA 90013 (by Internal Mail)		

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 **January 26, 2012,** at Los Angeles, California.

Pamela Van Kesteren
Declarant



Signature

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