Case No. **S194388**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc.,
Plaintiff and Appellant,

vs.

PAC ANCHOR TRANSPORTATION, INC., et al.,
Defendants and Respondents.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE, NO. B220966.
LOS ANGELES COUNTY SUPERIOR COURT,
HON. ELIZABETH A. WHITE, BC397600.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

FRED J. HIESTAND
Fhiestand@aol.com
State Bar No. 44241
2001 P Street, Suite 110
Sacramento, CA 95811
Tel.: (916) 448-5100
Fax.: (916) 442-8644

Counsel for *Amicus Curiae*

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

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INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

The Civil Justice Association of California ("CJAC" or "amicus") welcomes the opportunity to address the issue this case presents:[1]

> **Is an action under California's Unfair Competition Law (UCL) against a trucking company for treating individuals who drive trucks for them as "independent contractors" instead of "employees" preempted by the Federal Aviation Administration Authorization Act (FAAAA)?**

The trial court, in a judgment on the pleadings, answered Yes; but the appellate court reversed, stating the "State's action to enforce [defendant's] obligations as an *employer* is *not related* to [its] prices, routes, or services, even though it may *remotely*

[1] By separate application accompanying the lodging of this brief, CJAC asks the Court's permission that the brief be accepted for filing.

affect the prices, routes, or services . . . the motor carrier provides." Opinion, p. 10; emphasis added.

CJAC is vitally interested in the resolution of this important issue, which we believe the trial court got right and the appellate court wrong. Its consideration by the Court should bring greater certainty and clarity to the operation of laws governing motor carriers in interstate commerce; and more uniformity and fairness concerning the scope and application of the UCL (B & P Code § 17200 *et. seq.*) when its prosecution collides with the doctrine of federal preemption, specifically as expressed by the FAAAA (49 U.S.C. § 14501). Both of these goals are central to the purpose of CJAC, a more than 30 year old non-profit organization of businesses, professional associations and local government groups dedicated to educating the public about ways to make our civil liability laws more fair, efficient, economical and certain.

Amicus has often sought legislative[2] and judicial[3] reform of the UCL, a statute so facially capacious as to embrace just about every conceivable wrong, a virtual "law to end all laws"; one for which, not surprisingly, plaintiffs and too many courts have omnivorously imposed on a seemingly endless variety of scenarios involving "deep pocket" defendants, ranging from serious to trifling. We have also been frequent

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[2] CJAC, along with the California Chamber of Commerce, was a sponsor of Proposition 64, a 2004 statutory initiative passed by 59% of the voters in that election to, *inter alia*, prevent "private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact . . .." Prop. 64, §1(e).

[3] See, *e.g.*, *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310; *In re Tobacco II Cases* (2009) 46 Cal.4th 298; and *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069.

participants in cases concerning the proper sweep of federal preemption,[4] an issue that "for most judges, whether liberal or conservative, . . . pits one dimension of their ideology, their principles of federalism, against another, their policy preferences or attitudes toward the particular local regulation at issue." David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: a Quantitative Analysis* (1999) 87 *CAL. L. REV.* 1125, 1129.

This case presents the unique challenge and opportunity to extract from the intersection of the UCL and federal preemption important guidance for resolving or avoiding future disputes.

SUMMARY OF SALIENT FACTS AND PROCEEDINGS BELOW[5]

The essential facts of this case and how it came to be before the Court animate and define the pure legal issue of whether the asserted UCL claim is preempted by the FAAAA.

Defendant Pac Anchor Transportation ("Pac Anchor") operates a trucking company based in Long Beach, California. It contracts with shipping companies to transport containers from the ports of Los Angeles and Long Beach to locations throughout Southern California. Answer Brief on the Merits (ABM), p. 2.

Defendant Alfredo Barajas is employed by Pac Anchor as a manager and truck dispatcher, and is also an owner of the company. *Id.* Mr. Barajas owns about 75 truck tractors, for which he recruits drivers who enter into lease agreements with Pac

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[4] *E.g.*, *In re Tobacco II Cases*, *supra*, 46 Cal.4th 298.

[5] These facts are taken from the briefs of the parties.

Anchor to use the trucks and drivers he supplies. *Id.*

The California Attorney General, on behalf of the State of California, sued Pac Anchor and Mr. Barajas under the UCL for misclassifying the drivers as "independent contractors," accusing them of doing so to avoid costs and obligations associated with employee drivers. Opening Brief on the Merits (OBM), p. 2. These "costs" include unemployment insurance, payroll tax contributions, workers' compensation insurance and the withholding of state disability insurance and income taxes on behalf of the drivers. The State claims that by "misclassifying" the drivers, defendants have "illegally lowered their costs of doing business, unfairly and unlawfully profited, and obtained an unfair advantage over their competitors." *Id.*

Pac Anchor filed a motion for judgment on the pleadings, which was granted on three grounds: (1) *Fitz-Gerald v. SkyWest Airlines, Inc.* (2007) 155 Cal.App.4th 411 compelled a finding that § 14501(c)(1) of the FAAAA preempted all UCL actions against motor carriers; (2) the UCL suit would increase Pac Anchor's operational costs, and thus "related to" its "prices, routes or services" in violation of the preemption provision of the FAAAA; and (3) the UCL action would "interfere with the forces of competition" by discouraging the use of independent contractor drivers. ABM at 5-6.

The People appealed and the appellate court reversed. The appellate opinion found *Fitz-Gerald* unpersuasive, the relationship between the UCL action and its effect on Pac Anchor's "prices, routes or services" only "indirect and tenuous," and FAAAA preemption not applicable.

Defendants petitioned for review.

SUMMARY OF ARGUMENT

A trilogy of U.S. Supreme Court cases decided between 1992 and 2008 provide ample authority and reason for concluding that this UCL action is preempted by the FAAAA. That statute prohibits states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of any motor carrier." This express bar is modeled on the antecedent Airline Deregulation Act (ADA), which contains essentially identical preemption language prohibiting states from enacting or enforcing laws "relating to" the "rate, route or service or any airline carrier."

The Supreme Court has made clear in these three opinions that the "key phrase" – "relating to" or "related to" – in the preemptive provisions of the FAAAA and the ADA, as well as in the Court's construction of an identical phrase in the ERISA, "express a broad preemptive purpose." What's more, preemption occurs under the FAAAA even if the state law's effect on prices, routes or services "is only indirect" and regardless of whether the state law in question is "consistent" or "inconsistent" with the goals of federal regulation.

Enforcement of California's UCL against a motor carrier like defendant for "misclassifying" its drivers as "independent contractors" instead of "employees" is precisely what Congress sought to avoid in enacting the preemptive provision of the FAAAA. UCL prosecution here is indistinguishable from state enforcement of consumer protection laws against airline and motor carriers the Court has consistently thwarted. If allowed now, it would constitute a state regulatory patchwork inconsistent with Congress' intent to leave such efforts, where federally unregulated, to the competitive marketplace.

ANALYSIS

I. THE FAAAA PREEMPTS THIS UCL LAWSUIT AGAINST DEFENDANT TRUCKING COMPANY FOR "UNLAWFULLY" CLASSIFYING THOSE WITH WHOM IT CONTRACTS TO DRIVE ITS TRUCKS AS "INDEPENDENT CONTRACTORS" INSTEAD OF "EMPLOYEES."

This case poses a conceptual paradox: What happens when the seemingly irresistible force of the UCL – a broadly worded statute proscribing "unfair, unlawful or fraudulent" business practices – runs head-long into the immovable object of "federal preemption" – a doctrinal revetment Congress found "necessary" to express in the FAAAA "to facilitate interstate commerce" for "motor carrier operations"? *H.R. Rep. No. 103-677* (1994) (Conf. Rep.), p. 87. A hint whence to cull the answer is found in the title of a once popular song, *Something's Gotta Give*, containing the paradoxical riddle in its lyrics.[6] High Court precedent makes clear that what has to "give" here is the UCL, not the "old immovable object" of federal preemption.

The supremacy clause of article VI[7] of the United States Constitution grants Congress the power to preempt state law. "[S]tate law that conflicts with federal law is 'without effect.' " *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516. "In

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[6] Johnny Mercer, borrowing from the "irresistible force paradox" in physics to describe in song what happens when a relationship between a vivacious woman and an older, world-weary man occurs, wrote *Something's Gotta Give* in 1954 for Fred Astaire, who performed it in the 1955 musical film, *Daddy Long Legs*. The paradox is lyrically expressed by the refrain, "When an irresistible force such as you meets an old immovable object like me, you can bet as sure as you live, something's gotta give, something's gotta give." Josh Friedman, *Film: Some Movies are Entitled to do Well*, LOS ANGELES TIMES, May 12, 2008, p.1.

[7] "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article VI.

determining whether federal law preempts state law, a court's task is to discern congressional intent." *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1087-1088. The starting point for ascertaining Congressional intent is the plain language of the statute itself. *Utah v. Evans* (2002) 536 U.S. 452, 496. If there is any ambiguity in that language, then the legislative history, including Congressional reports and hearings on it, can be considered. *Eldred v. Ashcroft* (2002) 537 U.S. 186, 210.

A. *Rowe v. N.H. Motor Transp. Ass'n*. Supports Federal Preemption Because the State's UCL Action Has a "Connection with" Motor Carrier "Prices, Routes or Services" and, if Applied, Creates a Hodge-Podge of Regulation Contrary to the Purpose of the FAAAA.

Most instructive for this case is the Court's recent explanation in *Rowe v. N.H. Motor Transp. Ass'n.* (2008) 552 U.S. 364 of Congress' intent respecting the preemptive effect of the FAAAA's language prohibiting States from enacting or enforcing any law "related to" a motor carrier "price, route, or service."

Rowe involved an asserted conflict between the preemptive provision in the FAAAA and a Maine statute intended to protect minors from purchasing cigarettes from out-of-state suppliers. The Maine statute required its licensed tobacco *shippers* to utilize delivery companies with recipient-verification services to confirm the buyer is of legal age and, further, charged knowledge to carriers where the package shipped is marked as originating from a Maine-licensed tobacco retailer, or if received from a distributor on an official list of un-licensed tobacco retailers. *Id.*

Several transport carrier associations sued Maine's Attorney General in federal court claiming that the FAAAA preempted two sections of the Maine statute, namely the "recipient-verification" and the "deemed to know" provisions. They sought

declaratory and injunctive relief through summary judgment. In invalidating these sections and the statute of which they were an integral part on the ground of FAAAA preemption, *Rowe* noted that "motor carriers . . . enjoy 'the identical intrastate preemption of prices, routes and services as that originally contained in' the ADA." *Id.* at 370; quoting *H.R. Rep. No. 103-677*, *supra*, at 83. *Rowe* emphasized that "[t]he Maine law . . . produces the very effect that the [FAAAA] . . . sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Id.* at 372; quoting *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 378 (*Morales.*). *Rowe* further explained that:

> To interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

Id. at 373, citing H.R. Rep. No. 103-667, *supra*, at 87.

In reaching its conclusion, *Rowe* relied in large part on *Morales*, which it said determined:

> (1) that [s]tate enforcement actions *"having a connection with, or reference to*" carrier "rates, routes, or services are preempted"; (2) that such preemption may occur even if a state law's effect on rates, routes or services "is only indirect"; (3) that, in respect to preemption, it makes no difference whether a state law is

> "consistent" or "inconsistent" with federal regulation; and (4) that preemption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and preemption-related objectives.

Rowe, *supra*, 552 U.S. at 370-371, quoting *Morales*, *supra*, 504 U.S. at 386, 390.

Not content to leave motor carrier "prices, routes, or services" to uniform federal regulation and the competitive marketplace, the Attorney General seeks here to regulate the trucking industry through UCL litigation,[8] "bootstrapping" to one of its three prongs (the "unlawful" prong) various state labor and insurance laws so as to convert, *mutato nomine*, "independent contractors" into "employees." This is precisely what Congress sought to prevent through the FAAAA and why it is even more important today that federal regulation, not piece-meal, hodge-podge regulation by states through unfair business practice litigation, guide a uniform policy promoting competition by motor carriers. The importance of that goal and the necessity of federal regulation to achieve it through competition in the marketplace, is emphasized by economic reality:

> In 2006, the trucking industry in the United States employed an estimated 3.4 million drivers, approximately nine percent of whom were owner-operators. These numbers are expected to

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[8] Not surprisingly, this case is not an isolated instance of attempts to end-run the FAAAA's preemptive ambit through UCL prosecution by the AG of motor carriers for allegedly misclassifying their drivers as "independent contractors" instead of "employees." See, e.g., *People v. Guasimal Trucking, L.L.C.*, Case No. BC400653 (Cal. Super. Ct., Sept. 9, 2009); *People v. Edmundo Jose Lira*, Case No. BC400654 (Cal. Super. Ct., Dec. 14, 2009); *People v. Pacifica Trucks, L.L.C.*, Case No. BC428934 (Cal. Super. Ct., Jan. 5, 2010); *People v. Moreno*, Case No. BC400655 (Cal. Super. Ct., Jan. 8, 2010) and *People v. Jose Maria Lira*, Case No. BC397601 (Cal. Super. Ct., Feb. 2, 2010).

> climb by approximately eight percent over the next decade. These circumstances, along with the current nationwide driver shortage, which is only expected to get worse, make it more important than ever for trucking industries to maximize the utility of the workforce.

David C. Dunbar, G. Clark Monroe II & Benny M. May, *Who's the Boss? Addressing the Increasing Controversies Associated with the Owner-Operator/Employee Dichotomy* (2008) 35 *TRANSP. L. J.* 203, 208; footnotes omitted (hereinafter "Dunbar *et al.*").

Of course, it is extremely difficult for "trucking industries to maximize the utility of the workforce" when faced with a plethora of lawsuits from numerous state Attorneys General based on their states' consumer protection statutes. Indeed, state enforcement actions against motor carriers pursuant to consumer protection statutes for "misclassifying" employees as "independent contractors" will, if permitted and successful, indubitably increase the carriers' costs of doing business and significantly effect the "prices, routes and services" they pay and provide. See, *e.g.*, the required disclosure statement companies like SIRVA, Inc. must file to alert potential investors of the risks associated with the uncertain classification of workers, stating that "owner/operators are currently not considered to be employees by taxing and other regulatory authorities. Should these authorities change their position and consider our owner/operators to be our employees, our costs related to our tax, unemployment compensation and workers' compensation payments could increase significantly" Registration Statement of SIRVA, Inc. (Form S-1), May 7, 2004, p. 16, quoted in Dunbar, *et al.*, *supra*, 35 *TRANSP. L. J.* at 206, n. 16.

Rowe, as mentioned, buttressed its holding by reference to and discussion about *Morales*, *supra*, 504 U.S. 374, an opinion invalidating on federal preemption grounds an Illinois state consumer-fraud statute used to prosecute an airline for deceptive airline fare advertisements. *Rowe* also cited to and relied upon *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219, 226-228 (*Wolens*), which similarly held that federal law preempts application of a State's general consumer-protection statute to an airline's frequent flyer program. Examination of *Morales* and *Wolens* underscores the preemptive force of the FAAAA's express preemption provision as elucidated in *Rowe* and makes clear why it applies to this case.

B. *Morales v. Trans World Airlines, Inc.* Supports Preemption Because the UCL Claim "Relates to" and is "Connected with" the "Prices, Routes or Services" of Motor Carriers.

Morales addressed whether the Airline Deregulation Act of 1978, 49 U.S.C. § 1301 *et seq.* (ADA), upon which the preemption provision of the FAAAA is modeled, prevents States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes. The Court began its analysis by pointing out that Congress enacted the ADA to provide for "maximum reliance on competitive market forces" to best further "efficiency, innovation, and low prices" as well as "variety [and] quality . . . of air transportation services." 504 U.S. at 378. To ensure States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision, prohibiting States from enforcing any law "relating to rates, routes, or services" of any air carrier. 49 U.S.C. § 1305(a)(1). The ADA retained the Civil Aeronautics Board's (CAB) previous enforcement authority regarding deceptive trade practices (which was transferred to the Department of Transportation (DOT) when the CAB was abolished in 1985);

and it also did not repeal or alter the saving clause in the prior law, which provided "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506.

In 1988, the Attorneys General of seven states wrote "intent to sue" letters to several airlines because they were allegedly in violation of the National Association of Attorneys General (NAAG) detailed standards or "guidelines" governing the content and format of airline advertising, the awarding of premiums to regular customers (so-called "frequent flyers"), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights. Those guidelines did not purport to "create any new laws or regulations" applying to the airline industry, but claimed to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Morales*, *supra*, 504 U.S. at 379.

A few airlines responded with a preemptive strike of their own, filing suit against the Attorneys General because, they contended, threatened enforcement of the NAAG guidelines on fare advertising through a State's general consumer protection laws was preempted by the ADA. The Court agreed, finding the operative language in the preemption provision of the ADA barring States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . .," to say what it meant and mean what it said. *Morales*, *supra*, 504 U.S. 383.

In parsing the controlling language of the ADA, which is reiterated essentially verbatim in the FAAAA, *Morales* gives great weight to what it calls the "obvious" "key phrase" – "*relating to.*"

> The ordinary meaning of these words is a broad one – to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," [Citation] – and the words thus express a broad preemptive purpose.

Id.

The Court compared its construction of the similarly worded "relates to" phrase in the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(a); ERISA), emphasizing by citation to numerous opinions interpreting ERISA that both phrases are equivalent, that both have a "broad scope" and "expansive sweep," are "broadly worded," "deliberately expansive," and "conspicuous for [their] breadth." Accordingly, *Morales* concluded:

> Since the relevant language of the ADA is *identical*, we think it appropriate to adopt the same standard here: State enforcement actions *having a connection with or reference to* airline "rates, routes, or services" are pre-empted under 49 U.S.C.App. § 1305(a)(1).

Id. at 384; emphasis added.

Certainly the UCL prosecution here against defendant motor carrier, if allowed to go forward, constitutes "an enforcement action" that "has a connection with or reference to" the "prices, routes or services" it can and does provide. An injunction requiring defendant to reclassify those who lease and drive its trucks as "employees" rather that "independent contractors" would certainly impact defendant's ability to compete with other motor carriers by imposing on it additional and significant financial burdens.

C. *American Airlines, Inc. v. Wolens* Supports Preemption Because it Holds that State Consumer Protection Statues Like the UCL Apply and Dictate Policies and Laws External to what Motor Carriers Voluntarily Agree to be Bound By.

Wolens, decided after *Morales* but before *Rowe*, answered whether a state-court suit by participants in an airline's frequent flyer program challenging the airline's retroactive changes in terms and conditions of the program was preempted by the ADA. The Court held the preemption provision of the ADA bars state-imposed regulation of air carriers by consumer protection laws, but allows room for court enforcement of contract terms set by the parties themselves. Since there are no contract claims present in this case, the reasoning of *Wolens* as to why consumer protection laws like the UCL cannot apply under the ADA, and by parity of reason, under the FAAAA, is instructive.

A major reason *Wolens* distinguished between contract claims, for which monetary damages are a remedy, and injunctive relief under state consumer protection statutes, is that the latter could constitute a means of regulating an airline carrier's "rates, routes or services" or, in the case of the analogous FAAAA, a motor carrier's "prices, routes or services." "The basis for a contract action is the parties' agreement; to succeed under the consumer protection law, one must show not necessarily an agreement, but in all cases, an *unfair or deceptive practice*." *Wolens, supra*, 513 U.S. at 233; emphasis added.

Wolens' distinction between contract claims and statutorily based consumer protection claims for unlawful or unfair competition, also makes sense given the ADA's "savings clause."

> The ADA's preemption clause, [citation], read together with

> the Federal Aviation Act's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between *what the State dictates* and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, *with no enlargement or enhancement based on state laws or policies external to the agreement*.

Id. at 222-223; emphasis added.

Lest there be any doubt about why a state's unfair competition law, as opposed to contract law claims, is unenforceable against air or motor carriers, *Wolens* explained:

> The United States recognizes that [the preemption provision], because it contains the word "enforce" as well as "enact," "could perhaps be read to preempt even state-court enforcement of private contracts." But the word series "law, rule, regulation, standard, or other provision," . . ., "connotes official, government-imposed policies, not the terms of a private contract." Similarly, the phrase "having the force and effect of law" is most naturally read to "refe[r] to binding standards of conduct that operate irrespective of any private agreement." Finally, the ban on enacting or enforcing any law "relating to rates [or prices], routes, or services" is most sensibly read, in light of the [FAAAA's and] ADA's

> overarching deregulatory purpose[s], to mean "States may not seek to impose their *own public policies or theories of competition or regulation* on the operations of an air [or motor] carrier."

Id. at 229, fn. 5; emphasis added; internal citations omitted.

CONCLUSION

Enforcement of the UCL against defendants for "misclassifying" the drivers of their trucks as "independent contractors" instead of as "employees" would have a "significant" and adverse "impact" in respect to the FAAAA's ability to achieve its preemption-related objectives. For this reason and all those aforementioned, the judgment of the Court of Appeal should be reversed.

Dated: April 25, 2012

Respectfully submitted,

Fred J. Hiestand
General Counsel
Amicus Curiae, The Civil Justice
Association of California (CJAC)

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Date: April 25, 2012

Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2001 P Street, Suite 110, Sacramento, CA 95811.

On April 25, 2012, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendants/Respondents in *People v. Pac Anchor Transportation, Inc., et al.*, S194388 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

Kamala D. Harris, Esq.
Mark J. Breckler, Esq.
Jon M. Ichinaga, Esq.
Maurice R. Jourdane, Esq.
Satoshi Yanai, Esq.
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Attorneys for Plaintiff/Appellant

Neil S. Lerner, Esq.
Arthur A. Severance, Esq.
Sands Lerner
12400 Wilshire Blvd., Suite 1300
Los Angeles, CA 90603
Attorneys for Defendants/Respondents

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013
Per Bus. & Prof. Code § 17209

Office of the District Attorney
County of Los Angeles
210 West Temple Street
Los Angeles, CA 90012
Per Bus. & Prof. Code § 17209

Clerk, Court of Appeal
Second Appellate District
Division Five
300 S. Spring Street
Second Floor, North Tower
Los Angeles, CA 90013
Appellate Court

Clerk of the Court
Los Angeles County Superior Court
Central District
Stanley Mosk Courthouse
111 N. Hill Street
Los Angeles, CA 90012
Trial Court

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 25th day of April at Sacramento, California.

David Cooper