SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CAL CARTAGE TRANSPORTATION EXPRESS LLC, CCX2931, LLC and DOES 1-50, inclusive,

Defendants.

CASE NO. BC689320

Related Cases: BC689321, BC689322, 19STCV19291, 19STCV0377

ORDER GRANTING IN PART DEFENDANTS' MOTION IN LIMINE RE PREEMPTION AND NON-RETROACTIVITY OF ABC WORKER CLASSIFICATION TEST

Assigned for all purposes to:
Hon. William F. Highberger
Dept.: SSC-10

Action Filed: January 8, 2018
Trial Date: None Set.

ORDER GRANTING IN PART DEFENDANTS' MOTION IN LIMINE

I. Executive Summary

After careful consideration, the Court agrees with Defendants that the currently operative legal requirements for determination of employee versus independent contractor status are preempted as to certain motor carriers and their drivers by an act of Congress. A preemption determination is not a relative weighing of the desirability of a given state's legal regime as opposed to the rules which Congress seeks to impose. Rather, it is simply a determination that Congress has exercised its overriding powers under the Supremacy and Commerce clauses of the United States Constitution to require a uniform rule to apply in all 50 states. Here the requirements of the "ABC Test" set forth in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") and the recently enacted Assembly Bill 5 ("AB 5") clearly run afoul of Congress's 1994 determination in the Federal Aviation Administration Authorization Act (the "FAAAA"), 49 U.S.C. § 14501(c)(1) that a uniform rule endorsing use of non-employee independent contactors (commonly known in the trucking industry as "owner-operators") should apply in all 50 states to increase competition and reduce the cost of trucking services. This conclusion is supported both by the detailed analysis which follows and by the recent ruling of the United States District Court for the Southern District of California in Case No. 3:18-cv-02458 *California Trucking Ass'n v. Becerra* on Dec. 31, 2019, granting a Temporary Restraining Order against the State's representatives prohibiting enforcement of AB 5.

The legislative history of the FAAAA makes plain there was a desire to preempt a specific California statute which limited use of owner-operators by freight companies, such as Roadway Express, which were in competition with Federal Express, then solely regulated as an air carrier. Although this case does not specifically involve competitors in the over-night cargo business, the Court is strongly persuaded by the House Report's reference to this statute as objectionable, which demonstrates Congress's intent to protect the owner-operator business model in the trucking industry and preclude its replacement by an "employee-operator" regime. The Court is also highly persuaded by the rulings of the First Circuit and the Supreme Judicial Court of Massachusetts holding that the FAAAA does preempt the ABC Test in the formulation used in both Massachusetts and California. (*Schwann v. FedEx Ground Package System, Inc.* (1st Cir. 2016) 813 F.3d 429; *Chambers v. RDI*

Logistics, Inc. (2016) 476 Mass. 95; *see also Bedoya v. American Eagle Express Inc.* (3d Cir. 2019) 914 F.3d 812 (finding no FAAAA preemption of New Jersey's ABC test because it does not apply to workers who perform services "outside of all the places of business of the enterprise for which such service is performed").)

Defendants[1] placed this question before the Court by moving in limine for an order determining that the claims set forth in this case should be adjudicated with reference to the worker classification test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"), rather than the "ABC Test" set forth in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") and the recently enacted Assembly Bill 5 ("AB 5"). This is so, Defendants argue, because (1) Prong B of the ABC Test as applied to motor carriers is preempted by the FAAAA, 49 U.S.C. § 14501(c)(1); (2) the ABC Test as applied to motor carriers violates the Dormant Commerce Clause of the U.S. Constitution; and (3) the ABC Test cannot be applied retroactively. For the reasons set forth below, the Court **GRANTS** Defendants' motion and finds that the ABC Test as applied to motor carriers is preempted by the FAAAA, and thus that the *Borello* test will apply to the claims in this case. Because the Court need not address Defendants' alternative arguments that the ABC Test violates the Dormant Commerce Clause or that it may not be applied retroactively, the Court **DENIES** Defendants' motion without prejudice as to those two issues.

II. Relevant Background

Defendants are motor carriers that operate or have operated "trucking and drayage compan[ies] . . . in and around the Ports of Los Angeles and Long Beach." (Compl. ¶ 2.) Defendants utilize the services of independent owner-operator truck drivers to perform drayage— "the short distance transportation of cargo by truck to and from the ports." (*Id.*)

[1] Defendants are Cal Cartage Transportation Express, LLC, CMI Transportation, LLC, K&R Transportation California, LLC, CCX2931, LLC, CM2931, LLC, and KRT2931, LLC.

(Cont'd on next page)

On January 8, 2018, Plaintiff filed the Complaints at issue in these three related cases,[2] each alleging two causes of action under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.: a first cause of action predicated on Defendants' alleged misclassification of truck drivers as independent contractors, and a second cause of action predicated on Defendants' alleged violations of the federal Truth-in-Leasing Regulations, 49 C.F.R. § 376.1, et seq. (1979). At the time Plaintiff filed the lawsuits, the test for worker classification in California was governed by *Borello.*

In April 2018, the California Supreme Court decided *Dynamex*, in which the Court replaced the *Borello* test for claims brought under California's Wage Orders. Through *Dynamex*, the California Supreme Court adopted an "ABC Test," which renders workers presumptive employees unless the putative employer demonstrates each of the following:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact,
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> (B) that the worker performs work that is outside the usual course of the hiring entity's business, and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business.

(*Dynamex*, *supra*, 4 Cal.5th at p. 964.)

On September 18, 2019, California Governor Gavin Newsom signed AB 5 into law. AB 5 codified the ABC Test and, when it takes effect on January 1, 2020, will expand the reach of the ABC Test to apply to all claims under the Labor Code and the Unemployment Insurance Code. The three prongs of the ABC Test codified by AB 5 are identical to the prongs of *Dynamex*. (AB 5, § 2(a)(1).) AB 5 also includes certain exceptions that were not part of the *Dynamex* test, including an exception for "business-to-business contracting relationship[s]" (*id.*, § 2(e)), which is discussed in more detail below. Under the terms of AB 5, "[i]f a court of law rules that the three-part [ABC] test … cannot be applied to a particular context" due, for example, to federal preemption, "then the

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[2] The Court's Order applies to the three related cases filed on January 8, 2018 by the City Attorney of Los Angeles: *People v. Cal Cartage Transportation Express LLC, et al.* (BC689320); *People v. CMI Transportation LLC, et al.* (BC689321); and *People v. K&R Transportation California LLC, et al.* (BC689322).

determination of employee or independent contractor status in that context shall instead by governed by [*Borello*]." (*Id.*, § 2(a)(3).)

The Parties disagree whether the ABC Test or the *Borello* test applies to Plaintiff's misclassification-based UCL claims. Thus, the Court permitted Defendants to submit a motion in limine addressing the threshold legal issues of (a) whether *Dynamex* is preempted by federal law; and (b) whether *Dynamex* can be applied retroactively. Following several rounds of briefing and two hearings on November 6 and November 25, Defendants' motion is now ripe for determination.

III. FAAAA Preemption

Independent contractor owner-operators—independent truckers who lease their vehicles and services to a licensed motor carrier in order to move freight under the motor carrier's operating authority—have long been a feature of the U.S. trucking industry. (*Am. Trucking Assns. v. United States* (1953) 344 U.S. 298, 303 ["Carriers . . . have increasingly turned to owner-operator truckers . . . . By a variety of arrangements, the authorized carriers hire them to conduct operations under the former's permit."]; *Central Forwarding, Inc. v. ICC* (5th Cir. 1983) 698 F.2d 1266, 1267 ["Owner-operators are the 'independent truckers' of song and legend. They are persons owning one or a few trucks who lack [motor carrier] operating authority. Since they cannot transport regulated commodities in interstate commerce in their own right, . . . they lease their services and equipment to a carrier in order to utilize the carrier's operating authority."].)

The relationship between motor carriers and independent truckers has been the subject of extensive federal regulation. In 1978, Congress determined that "[t]he independent owner-operator is undoubtedly regarded as one of the most efficient movers of goods and accounts for approximately 40 percent of all intercity truck traffic in the United States." (H.R. Rep. No. 1812, 95th Cong., 2d Sess. 5 (1978) ("H.R. Rep. No. 1812").) In 1979, the federal government enacted the Truth-in-Leasing Regulations, 49 C.F.R. § 376.1, et seq., to provide a uniform set of rules and guidelines for independent contractor owner-operators nationwide. (44 Fed.Reg. 4680 (1979) [noting that the Truth-in-Leasing Regulations govern the relationship "between the carrier and owner-operator" in order to "promote the stability and economic welfare of the independent trucker"].) The following

year, Congress passed the Motor Carrier Act of 1980, 49 U.S.C. § 10101, et seq., to eliminate the barriers to entry that states had imposed on truckers seeking to enter the motor carrier industry.

In 1994, Congress enacted the FAAAA's preemption provision, which 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 . . . with respect to the transportation of property." (49 U.S.C. § 14501(c)(1).) Congress's stated goal was eliminating the patchwork of state and local regulations that had bogged down the motor carrier industry and increased costs for motor carriers and consumers. (See H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 87 (1994) ["The sheer diversity of these [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."]; *id.* [disparate state treatment of motor carriers "causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets"].) Congress explained that "[l]ifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure." (*Id.* at pp. 87–88.) As one example of a state law that Congress intended to preempt, Congress pointed to a California law disfavoring motor carriers "using a large proportion of owner-operators instead of company employees." (*Id.* at p. 87.)

In enacting the FAAAA preemption provision, Congress intentionally duplicated the language of the Airline Deregulation Act ("ADA"), thereby replicating the "broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines, Inc.*" (*Id.* at p. 83, citing *Morales v. TransWorld Airlines, Inc.* (1992) 504 U.S. 374.)[3] In *Morales*, the Supreme Court held that Congress "express[ed] a broad pre-emptive purpose" because the phrase "related to" is "deliberately expansive" and "conspicuous for its breadth." (*Morales*, *supra*, at pp. 383–384.) Thus,

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[3] Conversely, the preemption provision's enumerated exceptions are to be construed narrowly: "There has been concern raised that States . . . may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." (H.R. Conf. Rep. No. 103-677, *supra*, at p. 83.)

the FAAAA preempts any state law that affects motor carrier prices, routes, and services in anything other than a "tenuous, remote, or peripheral [] manner." (*Id.* at p. 390.) A law or regulation is "related to" prices, routes, or services for purposes of FAAAA preemption if it has a "direct or indirect" effect on them. (*Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 644–645; see also *Rowe v. New Hampshire Motor Transport Assn.* (2008) 552 U.S. 364, 375; *Morales*, *supra*, 504 U.S. at p. 386.) FAAAA preemption "occurs at least where state laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives," which include ensuring that motor carriers' rates "reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." (*Rowe*, *supra*, 552 U.S. at p. 371.) Thus, the FAAAA prevents "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 p. 372.)[4]

The sole difference between the ADA's preemption provision and the FAAAA's preemption provision is a qualifying phrase in the FAAAA provision limiting preemption to those laws having an effect "with respect to the transportation of property." (49 U.S.C. § 14501(c)(1).) As the Supreme Court has explained, this limits the preemptive scope of the FAAAA to those laws that have "a direct [or] an indirect connection to any transportation services a motor carrier offers its customers." (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. 251, 252–253.)

IV. Analysis

Several state and federal courts in California and Massachusetts (which uses the same ABC Test) have held that the ABC Test is preempted by the FAAAA in the motor carrier context because Prong B of the test effectively prohibits motor carriers from utilizing independent owner-operator truck drivers. (See *Mass. Delivery Assn. v. Healey* (1st Cir. 2016) 821 F.3d 187; *Schwann v. FedEx Ground Package Sys., Inc.* (1st Cir. 2016) 813 F.3d 429; *Valadez v. CSX Intermodal Terminals, Inc.*

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[4] The California Supreme Court has held that the typical presumption against federal preemption does not apply to the FAAAA: "[N]either *Rowe*, nor *Morales*, nor *Wolens* 'adopted [the] position . . . that we should presume strongly against preempting in areas historically occupied by state law.'" (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778–779.) The Court therefore does not employ a presumption against preemption, and instead conducts an "analysis of the underlying state regulations," legislation, and decisional authority at issue. (*Id.* at p. 780, citing *Morales*, *supra*, 504 U.S. at p. 388.)

(N.D.Cal. Mar. 15, 2019) 2019 WL 1975460; *Alvarez v. XPO Logistics Cartage LLC* (C.D.Cal. Nov. 15, 2018) 2018 WL 6271965; *Chambers v. RDI Logistics, Inc.* (2016) 476 Mass. 95.) For the reasons set forth below, this Court agrees.

A. *Pac Anchor* Does Not Dictate The Outcome Of Defendants' Motion

As an initial matter, Plaintiff argues that the California Supreme Court's decision in *People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772 forecloses FAAAA preemption of the ABC Test. If Plaintiff is correct, then this Court is bound to apply *Pac Anchor* and deny Defendants' motion. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1213; *Auto Equity Sales, Inc. v. Sup. Ct.* (1962) 57 Cal.2d 450, 454 [lower courts must follow appellate courts' unambiguous holdings on "precise question[s]" that have been "considered and passed upon"].)

In *Pac Anchor*, the California Supreme Court addressed the question "whether an action under the unfair competition law . . . based on a trucking company's alleged violation of state labor and insurance laws" is preempted by the FAAAA, answering in the negative. (*Pac Anchor*, *supra*, 59 Cal.4th at p. 775.) That is a different question than the one presented here in two respects. First, the defendants in *Pac Anchor* sought preemption of the UCL action itself—*Pac Anchor* arose in the context of a motion for judgment on the pleadings, which, if granted, would have barred the plaintiff's UCL action in its entirety. (*Id.* at p. 777.) Unlike in *Pac Anchor*, the Defendants in this case are not arguing that the Plaintiff's UCL action is preempted and cannot proceed; they agree with *Pac Anchor*'s conclusion that the action can proceed under the *Borello* standard. Second, *Pac Anchor* was decided several years before *Dynamex* or AB 5 came into being, so the state labor and insurance laws at issue were at the time evaluated under the *Borello* standard, not the ABC Test. Thus, the Supreme Court did not have occasion in *Pac Anchor* to consider the precise question of whether the ABC Test is preempted under the FAAAA. (*In re Marriage of Conejo* (1996) 13 Cal.4th 381, 388 ["It is axiomatic that cases are not authority for propositions not considered."].)[5]

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[5] See also *Fairbanks v. Sup. Ct.* (2009) 46 Cal.4th 56, 64 ["[A] judicial decision is not authority for a point that was not actually raised and resolved."]; *People v. Knoller* (2007) 41 Cal.4th 139, 169 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered. An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided."]; *Mercury Ins. Grp. v. Sup. Ct.* (1998) 19 Cal.4th 332, 348 ["A decision, of course, is not authority for what it does not consider."].

Nevertheless, Plaintiff argues that *Pac Anchor* stands for a broader proposition: that there can be no FAAAA preemption of California's generally applicable labor and employment laws, including in particular laws that set forth the generally applicable test for distinguishing between employees and independent contractors. To be sure, certain language in the Supreme Court's decision could be read to support such a broad proposition. For example, in the portion of the opinion addressing the defendants' *facial* challenge to the UCL, the Court upheld the law in part because "defendants have conceded, as they must, that the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services." (*Pac Anchor*, *supra*, 59 Cal.4th at p. 783.) Later, in the portion of the opinion addressing the defendants' *as-applied* challenge to the UCL, the Court upheld the law in part because the UCL is one of many "generally applicable labor and employment laws," and because other jurisdictions have similar "generally applicable laws governing when a worker is an independent contractor (or the equivalent) and when a worker is an employee." (*Id.* at pp. 785–786.)

Other portions of the opinion, however, suggest that the rule has limitations. In particular, the California Supreme Court explained that FAAAA preemption "calls for an analysis of the underlying state regulations to see if they relate to motor carrier prices, routes, or services when enforced through the UCL." (*Id.* at pp. 784–785.) And the Court found it significant that the People were *not* seeking to prohibit the motor carriers' use of independent contractors: "The defendants' assertion that the People *may not prevent* them from using independent contractors *is correct*, but its characterization of the People's UCL claim is not. Nothing in the People's UCL action would prevent defendants from using independent contractors." (*Id.* at p. 785, emphasis added.)

In rejecting the preemption argument advanced in *Pac Anchor*, the California Supreme Court characterized the People's position as follows: "if defendants pay individuals to drive their trucks, they must classify the[se] drivers appropriately." (*Id.*) This Court reads that language to mean that a labor law distinguishing employees from independent contractors can, in appropriate circumstances, be applied to motor carriers as it could to other businesses, and motor carriers can face consequences if they misclassify their drivers. Defendants in this case have never contended otherwise, and whether they correctly classified drivers would be the central issue in this case were it to proceed

under the *Borello* standard should the Court find preemption. But what makes the present case different from *Pac Anchor* is that, according to Defendants, the ABC Test (which was not at issue in *Pac Anchor*) would not just *distinguish* employees from independent contractors, but would *prohibit* the use of independent contractors altogether. If Defendants are correct and the ABC Test *does* prohibit motor carriers from using independent owner-operator truck drivers, then *Pac Anchor* in fact points to a finding of preemption, because a state law "may not . . . prevent defendants from using independent contractors." (*Id.*)

Importantly, Plaintiff agrees with that conclusion, conceding that *Pac Anchor* leads to a finding of preemption in a case in which a state law prohibits motor carriers from using independent owner-operators: "[T]he People have never contended that *Pac Anchor* held that an employment law of general applicability can never be preempted. The People's position is simply that *Pac Anchor* means what it says, and such laws are preempted only where they 'prevent' the use of independent contractors." (The People's Supp. Br. at p. 4, fn. 3; see also *id.* at p. 2 ["Under the FAAAA, a generally applicable law that defines the standard for employment status is only preempted where it forces motor carriers to use employee drivers, rather than independent contractors."].)

Moreover, in a decision post-dating *Pac Anchor*, the Ninth Circuit agreed with the proposition that laws prohibiting motor carriers from using independent owner-operators would likely be preempted by the FAAAA. (*Cal. Trucking Assn. v. Su* (9th Cir. 2018) 903 F.3d 953, 964 [discussing the "obvious proposition that an 'all or nothing' rule requiring services be performed by certain types of employee drivers . . . [is] likely preempted"].) Indeed, the Ninth Circuit noted in dicta that the very ABC Test at issue here is likely preempted: "[T]he 'ABC' test may effectively compel a motor carrier to use employees for certain services because, under the 'ABC' test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor." (*Id.*)

U.S. Supreme Court decisions both before and after *Pac Anchor* confirm that laws of general applicability are not immune from federal preemption. In the ADA context (the law that Congress used as a model for the FAAAA preemption provision), the Supreme Court was clear on this point:

> [P]etitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of ***general applicability***. Besides creating an ***utterly irrational loophole*** (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language. We have consistently rejected this precise argument in our ERISA cases: "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."

(*Morales*, *supra*, 504 U.S. at p. 386, quoting *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 139, emphasis added.) More recently, two years after *Pac Anchor*, the U.S. Supreme Court held again (this time in the ERISA context, another statutory model for ADA and FAAAA preemption) that laws of general applicability can be preempted. As the Court explained, a state regulation with forbidden effects on "a central matter of [ERISA] plan administration" was not saved from preemption merely because it had "nothing to do with the financial solvency of plans or the prudent behavior of fiduciaries"—the principal objectives animating ERISA's preemption provision. (*Gobeille v. Liberty Mut. Ins. Co.* (2016) 136 S. Ct. 936, 946.) To the contrary, "[a]ny difference in purpose does not transform" a statute or regulation "into an innocuous and peripheral set of additional rules." (*Id.*)

The Ninth Circuit and California Court of Appeal also have both reaffirmed, in decisions post-dating *Pac Anchor*, the principle that laws of general applicability can be preempted under the FAAAA and ADA. (*Su*, *supra*, 903 F.3d at p. 966 ["What matters is not solely that the law is generally applicable, but where in the chain of a motor carrier's business it is acting to compel a certain result . . . and what result it is compelling."]; *People ex rel. Harris v. Delta Air Lines, Inc.* (2016) 247 Cal.App.4th 884, 902 ["We additionally find no merit to the Attorney General's assertions that [] the OPPA is a law of general applicability," and therefore exempt from ADA preemption, because "the high court has disposed of these arguments in *Morales* and *Wolens*."].)

In sum, the better reading of *Pac Anchor* is not that laws of general applicability are always immune from FAAAA preemption. Rather, *Pac Anchor* left open the possibility that state laws prohibiting motor carriers from using independent owner-operator truck drivers might be preempted—and even suggested that they would. The Court simply decided that the *Borello* standard

does *not* constitute such a prohibition. The critical question in this case is whether the ABC Test does.

B. The ABC Test Is Preempted As Applied To Motor Carriers

1. Prong B Prohibits Motor Carriers From Using Independent Contractors

Given Plaintiff's concession that the ABC Test would be preempted, even under *Pac Anchor*, if it precludes motor carriers from using independent contractors, the Court turns to that issue first. Prong B of the ABC Test requires that a worker be classified as an employee unless the employer establishes that the worker "performs work that is outside the usual course of the hiring entity's business." (*Dynamex*, *supra*, 4 Cal.5th at p. 964; AB 5, § 2(a)(1)(B).) Under this test, it is plain that a motor carrier's core transportation-related services cannot be performed by independent contractors. Neither party argues otherwise. Thus, absent some applicable exception, the ABC Test prohibits motor carriers from using independent owner-operator truck drivers.

Plaintiff points to two exceptions that it says allow motor carriers to continue using independent contractors as truck drivers: (1) AB 5's "business-to-business" exception (AB 5, § 2(e)); and (2) the joint employment context. These exceptions, however, do not save AB 5.

1. Business-to-Business Exception. Under AB 5, the ABC Test "do[es] not apply to a bona fide business-to-business contracting relationship," where certain enumerated criteria are met. (AB 5, § 2(e).) For several reasons, however, this exception does not aid Plaintiff because it does not permit motor carriers to utilize *independent owner-operator truck drivers*, as that term has been used in the trucking industry, by Congress, and by the U.S. Supreme Court for many decades.

First, the exception "does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business." (*Id.*, § 2(e)(2).) And in order to be a qualifying business entity, the "business service provider" must "ha[ve] the required business license." (*Id.*, § 2(e)(1)(D).) For truck drivers wishing to transport cargo in the United States, that means, at a minimum, having a federal motor carrier operating license. (See, e.g., 49 C.F.R. § 365.101.) Both Congress and the U.S. Supreme Court, however, have explained that the *absence* of a motor carrier license is a core attribute of an independent contractor in the trucking industry. (See H.R. Rep. No. 1812, *supra*, at p. 5 [defining independent owner-operators as "a person who owns and

operates one, or a few, trucks for hire without holding ICC operating authority"]; *Am Trucking Assns.*, *supra*, 344 U.S. at p. 303 ["Carriers . . . have increasingly turned to owner-operator truckers . . . to conduct operations under the former's permit."].)[6] Indeed, the premise of the federal Truth-in-Leasing Regulations—which establish a uniform set of rules for independent-contractor truckers nationwide—is that independent owner-operators "lease" their services and trucks to motor carriers because the contractors lack independent operating authority. (See 49 C.F.R. §§ 376.1, 376.2.)

Second, in addition to requiring licensure, the business-to-business exception establishes a host of other barriers to entry for independent truckers: they must, for example, "maintain[] a business location that is separate from the business or work location of the contracting business" (AB 5, § 2(e)(1)(E)), "actually contract[] with other businesses to provide the same or similar services and maintain[] a clientele" of their own (*id.*, § 2(e)(1)(G)), and "advertise[] . . . to the public" (*id.*, § 2(e)(1)(H)). These barriers to entry contradict the rationale for enacting the FAAAA preemption provision in the first place, which sought the "[l]ifting of these antiquated controls" to allow "transportation companies to freely compete more efficiently," so that "[s]ervice options will be dictated by the marketplace, and not by an artificial regulatory structure." (H.R. Conf. Rep. No. 103-677, *supra*, at pp. 87–88); see also Statement by President William J. Clinton Upon Signing H.R. 2739, 1994 U.S.C.C.A.N. 1762-1 (Aug. 23, 1994) ["State regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State . . . ."].) The Ports of Los Angeles and Long Beach have explained the importance of independent owner-operators to the U.S. drayage industry, noting that the "[l]ack of barriers to entry" for independent owner-operators "has created a very competitive port drayage sector." (John E. Husing et al., San Pedro Bay Ports Clean Air Action Plan (Sept. 7, 2007), p. 15, available at https://bit.ly/2CYUaZT.)

Third, the business-to-business exception is inapplicable unless the business services provider "can negotiate its own rates" with the motor carrier. (AB 5, § 2(e)(1)(J).) Again, however, this is

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[6] See also Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time* (2008) 35 Transp. L.J. 115, 116, fn. 1 ["The independent owner-operator is an independent trucker who lacks federal operating authority."]; Hardman, *The Employment Classification Issue in the Motor Carrier Industry* (2010) 37 Transp. L.J. 27, 28 ["'Independent contractors' include an individual who. . . leases [her] vehicle to a motor carrier with driver service to be used in moving freight . . . indicating the lessor of the equipment as the motor carrier of the freight transported."].

inconsistent with the federal regulations governing independent owner-operator truck drivers, which require the motor carrier to *provide* "clearly stated" rates to independent owner-operators. (49 C.F.R. § 376.12(d).)

Fourth, under the business-to-business exception, the determination of "whether an individual working for a business service provider is an employee or independent contractor" is still governed by the ABC Test. (AB 5, § 2(e)(3).) Thus, under Prong B, any truck drivers who work for the independent trucking company that contracts with the motor carrier would be considered employees of that company, not independent contractors.

In short, the relationship contemplated by the business-to-business exception is nothing like the independent contractor relationship that has been a staple of the trucking industry through nearly 70 years of congressional proceedings and court decisions.

2. Joint employment. Plaintiff argues that the joint employment context also provides a means for motor carriers to continue utilizing independent contractors because the Court of Appeal has determined that the ABC Test does not apply in the joint employment context. (See *Henderson v. Equilon Enters.* (2019) 40 Cal.App.5th 1111, 1128.) This argument suffers from a similar deficiency, however, because truck drivers affected by the joint employment rule are, by definition, employees of at least one company, not independent contractors. (*Id.* ["In a joint employer claim, the worker is an admitted employee of a primary employer . . . . The distinct question posed in such claims is whether 'another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order.'"], quoting *Dynamex*, *supra*, 4 Cal.5th at p. 915.) Thus, the joint employment context does not permit independent owner-operator truck drivers.

2. The ABC Test Has A Substantial Effect On Motor Carriers' Prices, Routes, And Services

Having concluded that the ABC Test, as codified by AB 5, prohibits motor carriers from using independent contractors as truck drivers, the question remains whether such a prohibition has sufficient direct or indirect effects on motor carrier prices, routes, and services, and is therefore

preempted by the FAAAA. This Court, like many others before it, concludes that it does.[7]

In *Schwann v. FedEx Ground Package Sys., Inc.* (1st Cir. 2016) 813 F.3d 429, 439, the First Circuit held that Prong B of Massachusetts' ABC Test (which contains the same language as California's ABC Test) is preempted by the FAAAA because it "mandate[s] that any services deemed 'usual' to" a motor carrier's "course of business be performed by an employee. Such an application of state law poses a serious potential impediment to the achievement of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." (*Id.* at p. 438.) The First Circuit explained that the implications of Prong B's mandated employee relationship would necessarily affect the motor carrier's prices, routes, and services, thus triggering FAAAA preemption:

> [B]ecause Prong 2 would mandate that FedEx classify these individual contractors as employees, FedEx would be required to reimburse them for business-related expenses. The logical effect of this requirement would thus preclude FedEx from providing for first-and-last mile pick-up and delivery services through an independent person who bears the economic risk associated with any inefficiencies in performance. This regulatory prohibition would also logically be expected to have a significant impact on the actual routes followed for the pick-up and delivery of packages. . . . It is reasonable to conclude that employees would have a different array of incentives that could render their selection of routes less efficient, undercutting one of Congress's express goals in crafting an express preemption proviso.

(*Id.* at p. 439, emphases added; see also *Mass. Delivery Assn. v. Healey* (1st Cir. 2016) 821 F.3d 187, 193 [following *Schwann* in holding that application of Massachusetts' Prong B would necessarily "deprive [the motor carrier] of its choice of method of providing for delivery services and incentivizing the persons providing those services"].)

The Massachusetts Supreme Court has similarly held that the ABC Test is preempted by the FAAAA:

> Prong two [], in essence, requires that motor carriers providing delivery services . . . use employees rather than independent contractors to deliver those services. As a result, motor carriers are compelled to adopt a different manner of providing services from what they otherwise might choose because prong two dictates the

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[7] "[A] statute's 'potential' impact on carriers' prices, routes, and services' need not be proven by empirical evidence; rather, courts may 'look[ ] to the logical effect that a particular scheme has on the delivery of services.' [Citation.] This logical effect . . . 'can be sufficient even if indirect' so that motor carriers can be immunized 'from state regulations that threaten to unravel Congress's purposeful deregulation in this area.'" (*Schwann v. FedEx Ground Package Sys., Inc.* (1st Cir. 2016) 813 F.3d 429, 437, quoting *Mass. Delivery Assn. v. Coakley* (1st Cir. 2014) 769 F.3d 11, 21.)

> type of worker that will provide the services. This likely also would have a significant, if indirect, impact on motor carriers' services by raising the costs of providing those services.

(*Chambers v. RDI Logistics, Inc.* (2016) 476 Mass. 95, 102–103.)

Federal courts in California have reached the same result with respect to the ABC Test. In *Alvarez v. XPO Logistics Cartage LLC*, the Central District of California found that applying Prong B "would require a court to look at a motor carrier's service, determine that the service is outside the carrier's usual course of business, and then bar the carrier from using workers as independent contractors to perform that service," which "posed a serious potential impediment to the FAAAA's objectives." (*Alvarez v. XPO Logistics Cartage LLC* (C.D.Cal. Nov. 15, 2018) 2018 WL 6271965, at *4, quotations and citation omitted.) Likewise, the Northern District of California held that the ABC Test is preempted because "application of Part B would require carriers to classify all workers who performed trucking work as employees, rather than independent contractors," which "is impermissible" under the FAAAA. (*Valadez v. CSX Intermodal Terminals, Inc.* (N.D.Cal. Mar. 15, 2019) 2019 WL 1975460, at *8.)

The Ninth Circuit has also suggested that the ABC Test is likely preempted by the FAAAA—in a decision holding that the *Borello* test is *not* preempted. The court focused on the important differences between the two tests. (*Su, supra*, 903 F.3d at p. 964 [noting that, unlike *Borello*, "the 'ABC' test may effectively compel a motor carrier to use employees for certain services because, under the 'ABC' test, a worker providing a service within [a motor carrier's] usual course of business will never be considered an independent contractor"]; *id.* [unlike the ABC Test, the *Borello* test provides flexibility for motor carriers, because "[w]hether the work fits within the usual course of an employer's business is one factor among many – and not even the most important one"].)[8]

In contrast, the Third Circuit held that New Jersey's version of the ABC Test is *not* preempted by the FAAAA, but that holding reinforces the conclusion that the California ABC Test *is* preempted.

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[8] The Eastern District of California has twice come to the opposite conclusion, finding California's ABC Test not preempted by the FAAAA. (*Henry v. Cent. Freight Lines, Inc.* (E.D.Cal. Jun. 13, 2019) 2019 WL 2465330, at *7; *W. States Trucking Ass'n v. Schoorl* (E.D.Cal. Mar. 29, 2019) 377 F.Supp.3d 1056, 1070–1072.) But both of those cases relied solely on precedent finding the *Borello* test not preempted because it does not prevent the use of independent contractors and failed to evaluate whether the substantively different ABC Test *does* prevent motor carriers from using independent contractors to drive trucks. Thus, the Court finds *Henry* and *Schoorl* unpersuasive.

(*Bedoya v. Am. Eagle Express Inc.* (3d Cir. 2019) 914 F.3d 812, 824.) Specifically, Prong B of the New Jersey ABC provides that a worker is an employee unless she performs work "outside the [employer's] usual course of business . . . *or [performs such service] outside of all the places of business of [the employer].*" (*Id.* at p. 824, quoting N.J. Stat. Ann. § 43:21-19(i)(6)(B), emphasis added, alterations in original.) The "or" clause is pivotal because, as the Third Circuit explained, it provides motor carriers a viable "alternative method for reaching independent contractor status—that is, by demonstrating that the worker provides services outside of the putative employer's 'places of business.'" (*Ibid.*)

The record before the Court in this case confirms the common-sense conclusion that AB 5 would have a substantial impact on trucking prices, routes, and services, as motor carriers in California revamp their business models either to utilize only employee drivers or attempt to satisfy the business-to-business exception. As the evidence shows, in those circumstances where Defendants have contracted with licensed motor-carriers to transport loads, the cost of such transport was nearly triple the cost of using independent owner-operators for the same route. (The People's Opp. Br. at pp. 10–11 [demonstrating that contracted licensed motor-carriers earned $160 for a route from "Sears c/o Cal Cartage" to "Yusen Terminals Inc" whereas owner-operators earned $65 for the same route].) That is precisely the sort of inefficiency Congress sought to preempt.

Finally, this Court points out that a finding of FAAAA preemption does not mean these cases will cease. To the contrary, the UCL claims in this case will proceed under the *Borello* standard, just as AB 5 contemplates. (AB 5, § 2(a)(3).) That is the same result the California Supreme Court reached in *Pac Anchor* and the same standard Plaintiff intended to apply when it filed its Complaint in January 2018, which Plaintiff says it modeled off the *Pac Anchor* complaint.

V. Conclusion

Because Prong B of the ABC Test under both *Dynamex* and AB 5 prohibits motor carriers from using independent contractors to provide transportation services, the ABC Test has an impermissible effect on motor carriers' "price[s], route[s], [and] service[s]" and is preempted by the FAAAA. (49 U.S.C. § 14501(c)(1).) Defendants' motion is **GRANTED** on that basis, and **DENIED** without prejudice as to Defendants' other arguments.

Furthermore, and pursuant to Code of Civil Procedure § 166.1, the Court finds that the question of whether the FAAAA preempts the ABC Test as implemented by *Dynamex* and AB 5 is "a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

DATED: January 8, 2020

By: _____
Hon. William F. Highberger