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12 Stuart A. C. Drake (*pro hac vice*)
13 Andrew B. Clubok (*pro hac vice*)
14 Michael E. Scoville (*pro hac vice*)

15 Attorneys for all Plaintiffs

16 **UNITED STATES DISTRICT COURT**
17 **EASTERN DISTRICT OF CALIFORNIA**

18 CENTRAL VALLEY CHRYSLER-JEEP,
19 INC., *et al.*,

20 Plaintiffs,

21 vs.

22 CATHERINE E. WITHERSPOON, in her
23 official capacity as Executive Director of the
24 California Air Resources Board,

25 Defendant,

26 ASSOCIATION OF INTERNATIONAL
27 AUTOMOBILE MANUFACTURERS,

28 Plaintiff-Intervenor,

SIERRA CLUB, *et al.*,

Defendant-Intervenors.

Case No. CIV-F-04-6663 AWI-NEW (TAG)

PLAINTIFFS' *EX PARTE*
APPLICATION FOR LEAVE TO FILE
SUPPLEMENTAL RESPONSE TO
DEFENDANTS' COUNTER-MOTION
FOR SUMMARY JUDGMENT

[Fed. R. Civ. P. 16(b), 56(f)]

Date: October 22, 2007

Time: 1:30 p.m.

Courtroom: Two

Judge: Hon. Anthony W. Ishii

Trial Date: TBD

1
2 **PLEASE TAKE NOTICE** that pursuant to Federal Rules of Civil Procedure 16(b) and
3 56(f), plaintiffs Central Valley Chrysler-Jeep, Inc., *et al.* (“plaintiffs”) hereby move the Court for an
4 order permitting plaintiffs to file a supplemental response to defendants’ counter-motion for
5 summary judgment and an amended statement of disputed material facts regarding the same. *See*
6 Defts’ Counter Motion for Summary Judgment or, in the Alternative, Motion for Summary
7 Adjudication (Doc. No. 517). There is good cause for granting this application, as detailed in the
8 accompanying declaration of counsel and in the supplemental response itself.

9 The attached supplemental response will permit the Court to consider highly relevant
10 deposition testimony by two witnesses from whom defendants filed declarations in support of their
11 counter-motion: Michael Scheible and Michael D. Jackson. *See* Decl. of Michael Scheible (Doc.
12 No. 496-2); Decl. of Michael D. Jackson (Doc. No. 497-1). Neither of these witnesses had been
13 deposed as of the time plaintiffs were required to file their response to defendants’ counter-motion
14 on December 4, 2006. Decl. of Michael E. Scoville at ¶¶ 3-5 (“Scoville Decl.”) (filed concurrently
15 herewith).¹ Now that the depositions of Mr. Scheible and Mr. Jackson have been taken and final
16 transcripts of those depositions received, plaintiffs seek leave to put the testimony of those witnesses
17 before the Court.

18 As explained in the attached supplemental brief and as indicated in the attached amended
19 statement of disputed material fact, in their depositions both witnesses made highly significant
20 admissions showing that manufacturers cannot comply with the standards challenged in this action
21 using credits from the sale of vehicles designed to operate on alternative fuels. Because defendants
22 place substantial reliance on the alternative fuels provisions of the regulation with respect to their

23 ¹ As reflected in the record, plaintiffs sought to continue the Court’s consideration of that motion
24 pursuant to Rule 56(f), in the event that the Court found that the evidence plaintiffs had already
25 submitted along with their opposition to the counter-motion was insufficient to create disputed issues
26 of material fact. *See* Pltfs’ Memorandum in Opposition to Defts’ Counter Motion for Summary
27 Judgment & Request for Reconsideration (Doc. No. 546), at 24 & n.18 (noting that neither Mr.
28 Scheible nor Mr. Jackson had been deposed as of that date and requesting leave to take supplemental
discovery pursuant to Federal Rule of Civil Procedure 56(f)); Federal Rule of Civil Procedure 56(f)
Decl. of Stuart A.C. Drake in Opposition to Defts’ Counter-Motion for Summary Judgment (Doc.
No. 546).

1 counter-motion, plaintiffs request the Court to consider this testimony from defendants' own
2 witnesses.

3 DATED: October 12, 2007.

4 Respectfully submitted,
5 SAGASER, JONES & HAHEYSY

6 /s/ **Timothy Jones**

7
8 _____
9 Timothy Jones
10 Attorney for all Plaintiffs

1 **DECLARATION OF MICHAEL E. SCOVILLE**

2 Pursuant to 28 U.S.C. § 1746, I, Michael E. Scoville, declare as follows:

- 3
- 4 1. I am one of the attorneys representing plaintiffs in this action. I am admitted to practice *pro*
- 5 *hac vice* before the United States District Court for the Eastern District of California for this
- 6 matter.
- 7 2. On November 22, 2006, defendants filed a Counter-Motion for Summary Judgment (Doc.
- 8 No. 517). In support of that motion defendants filed declarations from Michael Scheible, a
- 9 CARB official whose identity defendants had not previously disclosed as a potential witness
- 10 in this case, and Michael D. Jackson, an expert retained by defendants.
- 11 3. Neither Mr. Scheible nor Mr. Jackson had been deposed as of the time by which plaintiffs
- 12 were required to file their opposition to defendants' counter-motion on December 4, 2006.
- 13 4. As noted, prior to November 22, 2006 defendants had never disclosed the identity of Mr.
- 14 Scheible as a witness possessing information relevant to this matter and whose testimony
- 15 defendants might rely upon. Pursuant to agreement between the parties, Mr. Scheible's
- 16 deposition was taken on December 18, 2006. This was a mere two days before the initial
- 17 hearing on the pending motions for summary judgment filed by defendants and plaintiff-
- 18 intervenor AIAM, which took place on December 20, 2006. Mr. Scheible did not sign his
- 19 deposition until February 3, 2007.
- 20 5. Mr. Jackson's deposition had initially been scheduled for a date prior to November 8, 2006,
- 21 but had to be rescheduled to permit the parties to resolve discovery disputes. *See* Federal
- 22 Rule of Civil Procedure 56(f) Decl. of Stuart A.C. Drake in Opposition to Defts' Counter-
- 23 Motion for Summary Judgment (Doc. No. 546), at 2-3. An initial deposition of Mr. Jackson
- 24 was taken December 6, 2006. Follow-up deposition sessions, made necessary by additional
- 25 disclosures from Mr. Jackson and to permit Mr. Jackson to give complete responses to
- 26 plaintiffs' questions, were held on December 18, 2006, February 27, 2007, and March 8,
- 27 2007.
- 28 6. At their depositions, both Mr. Scheible and Mr. Jackson gave testimony regarding the subject
- of alternative fuels. In the attached supplemental brief and amended statement of disputed
- material facts which plaintiffs seek leave to file with the Court, plaintiffs cite admissions
- from both of these witnesses regarding the infeasibility of manufacturers' relying on credits
- from the sale of vehicles designed to operate on alternative fuels in order to comply with the

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regulation. Plaintiffs submit that these admissions demonstrate that, at the very least, there are disputed issues of material fact regarding defendants' contentions with respect to the viability of alternative fuels, in the event that the Court does not grant the pending motion for summary judgment by plaintiff-intervenor AIAM.

7. Plaintiffs have contacted counsel for defendant and defendant-intervenors to seek agreement to the filing of the attached supplemental brief and amended statement. *See* October 12, 2007 Letter from Andrew Clubok to Ellen Peter & Marc Melnick (attached as Exh. 1 to this Declaration). Plaintiffs have so far been unable to obtain this consent. Defendants and defendant-intervenors have advised plaintiffs that they will oppose the filing of a supplemental memorandum. *See* October 12, 2007 Email from David Bookbinder to Michael Scoville (attached as Exh. 2 to this Declaration); October 12, 2007 Letter from Marc Melnick to Andrew Clubok (attached as Exh. 3 to this Declaration). Plaintiffs will nonetheless continue to try to work with defendant and other defendant-intervenors to obtain consent. Because a hearing on pending motions is scheduled for October 22, 2007, however, plaintiffs are now respectfully requesting leave to file their supplemental brief and amended statement with the Court now.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

Executed on October 12, 2007 at Washington, District of Columbia.

/s/ Michael E. Scoville

Michael E. Scoville

EXHIBIT 1

**TO DECLARATION OF MICHAEL E. SCOVILLE
SUPPORTING EX PARTE APPLICATION FOR LEAVE
TO FILE SUPPLEMENTAL RESPONSE**

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

Andrew B. Clubok
To Call Writer Directly:
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October 12, 2007

Via E-Mail and Federal Express

Ellen M. Peter, Esq.
Supervising Deputy Attorney General
State of California Department of Justice
1300 I Street, Suite 125
Sacramento, California 94244-2919

Marc N. Melnick, Esq.
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, California 94612-0550

Re: *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*
U.S.D.C (E.D. Cal.) No. CIV-F-04-6663 AWI LJO

Dear Ellen and Marc:

I am writing to let you know that Plaintiffs intend to file a short supplemental brief with the Court regarding defendants' Counter-Motion for summary judgment filed November 22, 2006, along with an amended statement of disputed material facts. The purpose of the brief and the amended statement would be to place before the Court evidence from depositions that took place after the deadline for plaintiffs to file an opposition to defendants' Counter-Motion for summary judgment filed November 22, 2006. In particular, plaintiffs want to ensure that in considering the pending motions for summary judgment, the Court has before it relevant admissions from Michael Scheible and Michael Jackson, both of whom filed declarations in support of defendants' Counter-Motion, but neither of whom had been deposed as of the time plaintiffs were required to file their response to defendants' Counter-Motion on December 4, 2006.

Because the supplemental hearing on the pending motions for summary judgment is set for October 22, plaintiffs intend to file their short supplemental brief and amended statement with the Court today. We would appreciate a response from you by 3:00 p.m. Pacific Time this afternoon as to whether you would consent to this filing.

KIRKLAND & ELLIS LLP

Ellen M. Peter, Esq.
Marc N. Melnick, Esq.
October 12, 2007
Page 2

If we do not hear back from you by 3:00 p.m. today, we will proceed to submit our brief and amended statement accompanied by an *ex parte* application for leave to file.

Sincerely,

Andrew B. Clubok / MES

Andrew B. Clubok

ABC/raa

cc: Counsel of Record

EXHIBIT 2

**TO DECLARATION OF MICHAEL E. SCOVILLE
SUPPORTING EX PARTE APPLICATION FOR LEAVE
TO FILE SUPPLEMENTAL RESPONSE**



David.Bookbinder@sierraclub.org

10/12/2007 01:28 PM

To Michael Scoville <mscoville@kirkland.com>

cc ellen.peter@doj.ca.gov, marc.melnick@doj.ca.gov, #Central Valley Service List K&E - Outside Counsel

<#Central_Valley_Service_List_K&E_-_Outside_Counsel@ki bcc

Subject Re: CVCJ v. Witherspoon: Letter from Andrew Clubok

Michael:

Obviously we will oppose this motion, and please tell Andy and Stuart that the one lesson they should have learned from the Vermont trial is that chances of litigation success are not improved merely by submitting more paper.

DB

-----Michael Scoville <mscoville@kirkland.com> wrote: -----

To: ellen.peter@doj.ca.gov, marc.melnick@doj.ca.gov
From: Michael Scoville <mscoville@kirkland.com>
Date: 10/12/2007 01:16PM
cc: #Central Valley Service List K&E - Outside Counsel
<#Central_Valley_Service_List_K&E_-_Outside_Counsel@kirkland.com>
Subject: CVCJ v. Witherspoon: Letter from Andrew Clubok

Attached please find a letter from Andrew Clubok addressed to Ellen Peter and Marc Melnick.

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for the use of the addressee. It is the property of Kirkland & Ellis LLP or Kirkland & Ellis International LLP. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return e-mail or by e-mail to postmaster@kirkland.com, and destroy this communication and all copies thereof, including all attachments.

[attachment "Peter-Melnick Ltr 10-12-07.pdf" removed by David Bookbinder/Sierraclub]

EXHIBIT 3

**TO DECLARATION OF MICHAEL E. SCOVILLE
SUPPORTING EX PARTE APPLICATION FOR LEAVE
TO FILE SUPPLEMENTAL RESPONSE**



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October 12, 2007

Via U.S. Mail and E-Mail

Mr. Andrew B. Clubok
Kirkland & Ellis LLP
655 15th Street, N.W., Suite 1200
Washington, DC 20005

RE: *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*
U.S.D.C. (E.D. Cal.) No. 1:04-CV-06663-AWI-NEW (TAG)

Dear Andy:

I have received your letter dated today regarding your filing an ex parte application later today. We do not consent to you filing another brief and additional evidence. While we will evaluate the application when we receive it, we expect to oppose it.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc N. Melnick".

MARC N. MELNICK
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: Stuart A. C. Drake (by e-mail only)
Timothy Jones (by e-mail only)