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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendant,

ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,

Plaintiff-Intervenor,

SIERRA CLUB, *et al.*,

Defendant-Intervenors.

Case No. CIV-F-04-6663 AWI GSA

PLAINTIFFS' SUPPLEMENTAL RESPONSE TO DEFENDANT AND DEFENDANT-INTERVENORS' COUNTER-MOTION FOR SUMMARY JUDGMENT

Date: **October 22, 2007**
Time: **1:30 p.m.**
Courtroom: **Two**
Judge: **Hon. Anthony W. Ishii**

Trial Date: **TBD**

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Plaintiffs respectfully submit this supplemental memorandum in opposition to defendants' counter-motion for summary judgment, filed November 22, 2006. *See* Defts' Counter Motion for Summary Judgment or, in the Alternative, Motion for Summary Adjudication (Doc. No. 517). This memorandum sets forth the results of supplemental discovery that plaintiffs sought pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and obtained with respect to defendants' counter-motion and other discovery that could not be completed prior to the filing of defendants' counter-motion. *See* Pltfs' Memorandum in Opposition to Defts' Counter Motion for Summary Judgment & Request for Reconsideration (Doc. No. 546), at 24 n.18.[1]

Preliminary Statement

In support of their counter-motion for summary judgment, defendants claimed it was undisputed that the challenged regulations allow manufacturers to gain credit toward compliance by making improvements to air conditioning systems and through use of alternative fuels. Defts' Memorandum of Points & Authorities in Opposition to Motion for Summary Judgment of AIAM, at 20-22 (Doc. No. 494). From these propositions, defendants argued that the regulations accordingly were not "related to" fuel economy standards for purposes of EPCA's express preemption provision and that they instead must be deemed as "emission standards" that are immune from preemption.

Plaintiffs have already filed opposition papers demonstrating why defendants are not entitled to prevail on their counter-motion for summary judgment. *See* Pltfs' Memorandum in Opposition to Defts' Counter Motion for Summary Judgment & Request for Reconsideration (Doc. No. 546). Further reason to deny defendants' counter-motion can be found in testimony from depositions of defendants' expert witnesses and declarants that were taken after the relevant deadlines for filing briefs to be considered at the December 20, 2006 hearing on the various motions for summary judgment. This testimony demonstrates that the provisions in the challenged regulations related to alternative fuels do not provide manufacturers with a viable compliance pathway. As such, the mere existence of these provisions fails to render the regulations not "related to fuel economy standards" so as to entitle the defendants to judgment as a matter of law.

[1] Plaintiffs are seeking leave to file this memorandum, and an amended Statement of Undisputed Material Fact, in an accompanying ex parte application.

To be sure, on its face the regulation offers potential credits for the sale of vehicles where manufacturers can actually ***demonstrate*** that owners used alternative fuels to operate them in the model year in which they were sold. For instance, vehicles that are actually operated on E85 exclusively for an entire year would receive a credit under the regulations equal to a 26% deduction from their measured tailpipe CO_2 emissions, 13 C.C.R. § 1961.1(a)(1)(B)1.d;[2] meanwhile, hydrogen fuel cell vehicles would automatically be deemed for regulatory compliance purposes as producing 210 grams per mile of CO_2-equivalent emissions, which would comply with the regulatory standards through model year 2015, 13 C.C.R. § 1961.1(a)(1)(B)1.e.[3] Defendants accordingly suggest that at least in theory manufacturers could comply with the regulation without raising the fuel economy of their vehicle fleets, simply by selling sufficient volumes of alternative fuel vehicles either in addition to or in lieu of conventional gasoline- or diesel-powered vehicles. In defendants' view, this theoretical possibility precludes characterization of the regulation as a de facto fuel economy standard.

If the alternative fuel options to which defendants point do not in fact provide manufacturers with viable compliance strategies, however, manufacturers will be forced to comply with the challenged regulations' requirements primarily by raising the fuel economy of their vehicle fleets to levels that can be calculated using the mathematical relationship between carbon dioxide emissions and fuel economy that many defense witnesses have already acknowledged. At trial, plaintiffs will

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[2] To the extent such vehicles were operated on E85 for only part of a year, the amount of credit would be less than 26%. Furthermore, although defendants' witnesses assume that the regulations provide credit for sale to individuals, on their face the regulations provide credit only for sale of E85 flexible-fuel vehicles "to fleets that provide the alternative fuel on-site." 13 C.C.R. at § 1961.1(a)(1)(B)2.a.i. The regulations thus would bar any manufacturer from getting credit for any E85 flexible-fuel vehicle sold to an individual rather than to a government agency or other organization with a "fleet[] that provide[s] the alternative fuel on-site." A change in the regulation would be necessary to allow credit for any sale to an individual consumer.

[3] As a technical matter a hydrogen fuel cell vehicle has zero tailpipe CO_2 emissions. Under the regulation, however, it is nonetheless deemed to emit 210 g/mi CO_2-equivalent due to the energy needed (and thus the CO_2 produced) in making the hydrogen. 13 C.C.R. § 1961.1(a)(1)(B)1.e. Interestingly, a consequence of this deemed level of CO_2-equivalent emissions is that even an entire fleet of hydrogen fuel cell automobiles would therefore be out of compliance with the PC/LDT1 standards set by the challenged regulation for model year 2016, which are set at 205 g/mi. 13 C.C.R. § 1961.1(a)(1)(A).

establish that the regulation is thus impermissibly "related to" fuel economy standards despite the presence of the economically impracticable alternative fuel "options" that the regulation offers on its face. *Cf. New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (finding preemption where a state law amounted to an impermissible substantive regulation through its "acute, albeit indirect, economic effects, by intent or otherwise"). The state cannot avoid preemption by "offering" manufacturers an illusory compliance option that in fact will not prevent them from being forced to make substantial increases in their fleetwide fuel economy in order to meet the regulations' requirements, regardless of whether the state could promulgate regulations relating only to alternative fuels. *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 n.25 (1978). "That which cannot be accomplished directly cannot be accomplished indirectly." *Home Ins. Co. v. New York*, 134 U.S. 594, 598 (1890); *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 174 (1st Cir. 1989) ("Massport cannot do indirectly what it is forbidden to do directly."); *Cal. ex rel. State Air Resources Bd. v. Department of Navy*, 431 F. Supp. 1271, 1281 (N.D. Cal. 1977) (construing preemption provision that preempts regulations "respecting emissions" of air pollutants from aircraft and stating "[c]learly, direct state regulation of aircraft engine structure is preempted states cannot require (directly or indirectly) as pollution control measures, for example, changes in engine design or attachments to the engine itself"), *aff'd* 624 F.2d 885 (9th Cir. 1980). As another district judge from the Eastern District of California held in a very similar case where California attempted to avoid EPCA preemption by pointing to additional options that would permit manufacturers to comply without raising their fuel economy, "[p]reemption cannot be avoided by intertwining preempted requirements with nonpreempted requirements." *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal. June 11, 2002).

I. Evidence Regarding the Infeasibility of Obtaining Credits for E85

The principal alternative fuel cited by defendants is E85, a blend of ethanol and gasoline. Manufacturers have already developed relatively low-cost technology that can be used to convert a conventional gasoline-powered vehicle into a "flexible-fuel vehicle" capable of running either on

gasoline or on E85. And defendants have cited statements by various manufacturers indicating their readiness substantially to increase production of E85 vehicles.

But deposition testimony of defendants' own expert witness on alternative fuels and of a CARB official whose declaration defendants have proffered reveals that even if significant numbers of E85-capable vehicles were sold, substantial obstacles still would need to be overcome for manufacturers to gain any alternative fuel credit under the regulations. In particular, this testimony indicates that (i) it is unlikely adequate ethanol will be available to make a sufficient supply of E85, (ii) it is unlikely a sufficiently broad E85 distribution infrastructure will be established, (iii) it is unlikely E85 will be priced low enough to make it competitive with gasoline, and (iv) changes to the regulations would be necessary in order to make it viable for manufacturers to comply using E85 even if other obstacles could be overcome. Each of those factors lie outside the ability of manufacturers to control. Any one of them alone effectively forecloses manufacturers from achieving significant credits toward compliance with the challenged regulations through sale of E85-capable vehicles.

A. Inadequate Ethanol Supply

As an initial matter, in order for consumers to fill up their tanks with E85 there must be an adequate supply of E85 in the United States that is available to be distributed. Since E85 is 85 percent ethanol and 15 percent gasoline, the primary ingredient that must be secured is an adequate supply of ethanol itself. But Mr. Jackson, defendants' primary expert on alternative fuels,[4] agreed at his deposition that because there is a significant and increasing demand for ethanol to use for blending with gasoline in concentrations much smaller than E85, "the way to increase the supply of ethanol for E-85 is going to be either to import more from overseas or to have break-throughs in noncorn-based ethanol production." Jackson Dep. Vol. III, at 666:8-12.

[4] Due to scheduling difficulties Mr. Jackson had not been deposed as of December 4, 2006, when plaintiffs were required to file their opposition to defendants' counter-motion. Since then he has been deposed on four separate occasions: December 6, 2006 ("Jackson Dep. Vol. I") (relevant excerpts attached as Exh. B to the October 12, 2007 Declaration of Michael E. Scoville in support of this supplemental response); December 18, 2006; February 27, 2007 ("Jackson Dep. Vol. III") (relevant excerpts attached as Exh. C to the October 12, 2007 Declaration of Michael E. Scoville in support of this supplemental response); and March 8, 2007.

Substantial roadblocks stand in the way of either of these alternatives. Importing more ethanol from overseas would largely depend on eliminating the 54-cent tariff that the United States imposes on imported ethanol. As Mr. Jackson testified, to make ethanol from Brazil "economic in the E85 market," "you'd have to have that tariff removed." Jackson Dep. Vol. I, at 227:3-18. Meanwhile, Mr. Jackson did not even wish to venture a prediction as to when break-throughs in noncorn-based ethanol production would occur, such as "the conversion of cellulosic biomass to ethanol." *Id.* at 145:19-146:6.

B. Insufficient Infrastructure for Distributing E85 Fuel

Beyond the sheer quantity of ethanol available for use in the United States, another necessary prerequisite for consumers to fill up with E85 is that a sufficient number of fueling stations actually carry the fuel. In this regard, CARB Deputy Executive Officer Michael Scheible, whose responsibilities include "monitor[ing] alternative fuels," Scheible Dep. 205:9-12, admitted at his deposition that currently "E-85 is -- availability is very limited." *Id.* at 65:11.[5] While at present there is only one public station in California that sells E85, Mr. Scheible conceded that "[p]robably in the order of a couple thousand" fueling stations would have to carry E85 in order to provide easy availability to individual automobile owners. *Id.* at 70:15-21, 156:19 - 157:5. He further stated that he was unable to say it was more likely than not that within 5 to 10 years E85 would be easily available to the majority of California individual automobile owners. *Id.* at 74:5-11.

In his declaration, Mr. Scheible had pointed to a number of California initiatives dealing with alternative fuels in order to suggest that the availability of such fuels might increase in the future. At his deposition, however, Mr. Scheible admitted that none of the measures he pointed to would ensure widespread availability of alternative fuels. *Id.* at 98:18-99:2 ("AB 1007 does not require the

[5] In support of their Counter-Motion for summary judgment defendants filed a declaration from Michael Scheible, a CARB Deputy Executive Officer whom defendants had not previously identified as a potential witness. Decl. of Michael Scheible (Doc. #496-2). Plaintiffs accordingly sought and took a deposition of Mr. Scheible on December 18, 2006, two days before this Court held oral argument on the various motions for summary judgment that had been filed by the parties. *See* Dec. 18, 2006 Deposition of Michael Scheible ("Scheible Dep.") (relevant excerpts attached as Exh. A to the October 12, 2007 Declaration of Michael E. Scoville in support of this supplemental response).

widespread availability of fuels"); 99:17-21 (Executive Order S-606 "will not ensure in of itself the widespread availability of alternative fuels"); 99:22-100:7 (Scheible could not say that the activities of the "Bioenergy Interagency Working Group" would "ensure the widespread availability of alternative fuels").

Mr. Scheible's testimony regarding the very limited availability of E85 in California was consistent with the testimony of Mr. Jackson, the designated defense expert. Mr. Jackson clearly stated that in his opinion it would take "a broad coalition . . . to make anything move forward" in terms of establishing E85 infrastructure and making E85 widely available, and that the coalition would have to include not only vehicle manufacturers but also fuel providers. Jackson Dep. Vol. I, at 86:3-87:10. Indeed, Mr. Jackson emphasized that "[i]t would not be only the auto manufacturers themselves doing it. It would not be possible." *Id.* at 204:3-205:4. At the same time, however, Mr. Jackson indicated that it had been difficult to see a "business case pathway for developing a widespread infrastructure for E85." *Id.* at 88:14-88:20. In the end, Mr. Jackson took the position that "in order to move beyond the use of ethanol in the blend market into the use of ethanol as a primary fuel, like E85, we would need to have either voluntary agreements from the energy companies or some type of legislative action beyond [the A.B. 1493 regulations] in order to accomplish that." *Id.* at 128:11-19.

A report published by the U.S. Environmental Protection Agency ("EPA") in April 2007 confirms the conclusions of Mr. Scheible and Mr. Jackson regarding the difficulty of establishing adequate infrastructure for distributing E85. EPA states that between now and calendar year 2012, it "expect[s] the use of high level ethanol-gasoline blends, like E85 to be relatively small in comparison" to the use of low-level ethanol gasoline blends, such as gasoline with ethanol content of ten percent or less that is already sold in many locations throughout the United States. EPA, Regulatory Impact Analysis: Renewable Fuel Standards Program, p. 119, *available at* http://www.epa.gov/otaq/renewablefuels/420r07004.pdf (relevant excerpt attached as Exh. A to Plaintiffs' Request for Judicial Notice filed concurrently herewith).

C. Price Competitiveness of E85 Relative to Gasoline

The price of E85 relative to gasoline will also discourage even those individuals who own

E85 vehicles from actually filling up with E85, which would be necessary in order for manufacturers to receive any credits under the regulation. As Mr. Jackson put it, "you would not have a large sale of E85 unless the price of the E85 on an energy basis was at least comparable to gasoline or lower." Jackson Dep. Vol. I, at 64:11-18. But vehicle manufacturers do not control the price of gasoline. *Id.* at 182:10-16. Accordingly, manufacturers cannot plan on the possibility that E85 prices will in fact be competitive and must instead prepare to comply through alternative means.

This is especially true because the U.S. government agency that prepares fuel price forecasts, the Energy Information Administration, projects that E85 will be priced higher than gasoline on an energy-equivalent basis well into the next decade. *See* Decl. of Thomas C. Austin in Opposition to Defts' Counter-Motion for Summary Judgment (Doc. # 549), at 6-7 & n.7; *see also* U.S. Energy Information Administration, *Annual Energy Outlook 2007*, issued February 2007, Supplementary Table 19 (consistent with the 2006 *Annual Energy Outlook*, projecting a persistent price premium of E85 over gasoline) (relevant excerpt attached as Exh. B to Plaintiffs' Request for Judicial Notice filed concurrently herewith). Significantly, Mr. Jackson stated at his deposition that in his opinion, the most reliable estimates for the future price of gasoline in California are "those that would come out of the Energy Information Administration in terms of their annual energy outlooks as modified by local conditions." Jackson Dep. Vol. I, at 185:16-185:22.

D. Necessity of Changing the Regulation To Award Extra Credit for Non-Corn-Based Ethanol

Mr. Jackson further testified at his deposition that "if corn-based ethanol was the only ethanol that came into California, it would be ***very hard*** for the manufacturers to show ***any kind of compliance*** with greenhouse gas emission standards." Jackson Dep. Vol. I, at 181:1-11 (emphases added). Yet he had to admit that as it stands the regulation does not distinguish among different ethanol sources (corn, sugar cane, cellulosic) for purposes of awarded credit. *Id.* at 100:12-101:3. According to Mr. Jackson, even if a sufficient supply of sugar cane or cellulose-based ethanol were available for use in producing E85, the regulation would still need to be amended to provide higher levels of alternative fuel credit for such E85. *Id.* at 101:20-102:11. Mr. Jackson agreed, however, that it would not be prudent for a manufacturer to count on the materialization of such a regulatory amendment:

> Q. And as the regulation now stands, though, do you think a prudent vehicle manufacturer would rely upon that type of a possible change in planning its compliance strategy for the regulation?
>
> A. I don't think a vehicle manufacturer would go forward with this kind of compliant strategy without having something like that understood and know the timing and make sure it was going to happen. You know, I mean, it would not be prudent to do that.

Id. at 102:17-103:5.

* * *

In sum, the new testimony from defendants' own witnesses defeats their claim that manufacturers do not need to rely on conventional gasoline and diesel fuel economy technology in order to try to comply with the greenhouse gas standards. Vehicle manufacturers can ensure an adequate supply of vehicles capable of running on E85. They can help promote alternative fuels with demonstration programs at selected locations in the state. But they control neither the supply of ethanol, nor the fuel distribution infrastructure, nor the price of E85 relative to gasoline. Ultimately, even Mr. Jackson agreed that it would be extremely "touchy" for manufacturers "to have to be able to rely on the public to -- and others outside the manufacturer's control to comply with the standard." Jackson Dep. Vol. I, at 395:13-17. This remits the automobile industry to strategies for compliance with the greenhouse gas standards through conventional fuel economy technologies, and confirms that the regulations are certainly "related to" fuel economy standards.

II. Evidence Regarding Other Alternative Fuels

Defendants' witnesses admitted to obstacles for other alternative fuels as well, which can be summarized more briefly:

- Mr. Scheible testified that biodiesel "is not going to . . . displace a large fraction of the current diesel use" anytime within the next five to ten years. Scheible Dep., at 207:18-208:10.

- Mr. Jackson testified that his best estimate for the price difference between conventionally fueled midsized passenger car and a plug-in hybrid passenger car with 20 miles of electric range is $6,000. Jackson Dep. Vol. I, at 221:18 - 222:10. Additionally, Mr. Jackson admitted that a major caveat to any strategy relying on manufacture of plug-in hybrid vehicles was "whether lithium ion battery technology will evolve to an acceptable product for the automotive applications, and not only acceptable from a technical point of view." *Id.* at 218:10-21.

- Mr. Jackson testified that fuel cells would require both cost and technical breakthroughs

> to become viable even in the long-term: "Fuel cells are a -- in my opinion a long-term potential approach, but will require cost-breakthroughs, and some technical breakthroughs relative to not only the technology but the fuel technology itself." Jackson Dep. Vol. III, at 698:22 - 699:15.

At bottom, the evidence from defendants' own expert witness and declarant demonstrates that there exist substantial questions regarding the viability of compliance through use of any of the alternative fuels provisions of the challenged regulations. Construed in the light most favorable to plaintiffs, this evidence should foreclose defendants from obtaining summary judgment on their argument that the alternative fuels provisions of the regulations render the regulations not "related to fuel economy standards." *See Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (in summary judgment posture, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor" (internal citations omitted)); *Welles v. Turner Entertainment Co.*, 488 F.3d 1178, 1183 (9th Cir. 2007) (reversing grant of summary judgment due to presence of genuine issues of material fact and noting that on summary judgment the Court must "view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in favor of that party"); *see also Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal. June 11, 2002) (upholding preemption based on a finding that allegedly non-preempted compliance pathways were "not a viable alternative" to preempted compliance pathways).

Conclusion

For the foregoing reasons, in addition to those stated in plaintiffs' previously filed opposition papers, defendants' pending counter-motion for summary judgment should be denied.

DATED: October 12, 2007

Respectfully submitted,

SAGASER, JONES & HELSLEY

/s/ Timothy Jones

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