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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-GSA

**PLAINTIFFS' REPLY IN SUPPORT OF
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 Plaintiffs respectfully submit this reply in support of their ex parte application for leave to
2 submit supplemental briefing in opposition to the counter-motion by defendants and defendant-
3 intervenors (“defendants”) for summary judgment.

4 1. As plaintiffs made clear in their initial ex parte application, the primary purpose of the
5 supplemental brief and amended statement of disputed material facts that plaintiffs seek leave to put
6 before the Court is to permit the Court to consider deposition testimony from Michael Scheible and
7 Michael Jackson. Both Mr. Scheible and Mr. Jackson submitted declarations in support of
8 defendants’ counter-motion for summary judgment. It is entirely proper and consistent with the
9 Federal Rules of Civil Procedure for the Court to permit these sworn declarations to be “opposed by
10 depositions” from the very witnesses whose declarations are at issue. Fed. R. Civ. P. 56(e).

11 2. Contrary to defendants’ arguments, both Rule 56(f) and Rule 16(b) of the Federal Rules
12 of Civil Procedure provide this Court with discretion to entertain plaintiffs’ supplemental filings.
13 Plaintiffs properly invoked Rule 56(f) on December 4, 2006, when they were required to submit
14 their opposition to defendants’ counter-motion for summary judgment even though plaintiffs had not
15 yet had the opportunity to depose either Mr. Scheible or Mr. Jackson.¹ Plaintiffs’ Rule 56(f) motion
16 is still pending before this Court, as is defendants’ counter-motion for summary judgment itself.
17 Now that the depositions of Mr. Scheible and Mr. Jackson have in fact been taken, this Court can
18 exercise its power under Rule 56(f) to “make such other order as is just,” and permit plaintiffs to
19 submit to the Court the relevant passages from those depositions that demonstrate why defendants’
20 counter-motion lacks merit. *Buchanan v. Stanships, Inc.*, 744 F.2d 1070, 1074 (5th Cir. 1984)
21 (“Rule 56(f) should be applied with a spirit of liberality.”). And even in the absence of Rule 56(f),
22 the Court would also have the power to consider plaintiffs’ supplemental filing under Rule 16(b) of
23 the Federal Rules of Civil Procedure, upon a showing of “good cause.”

24 ¹ See Pltfs’ Memorandum in Opposition to Defts’ Counter Motion for Summary Judgment &
25 Request for Reconsideration (Doc. No. 546), at 24 & n.18 (requesting leave to take supplemental
26 discovery pursuant to Federal Rule of Civil Procedure 56(f)); Federal Rule of Civil Procedure 56(f)
27 Decl. of Stuart A.C. Drake in Opposition to Defts’ Counter-Motion for Summary Judgment (Doc.
28 No. 546); *Hamilton v. Willms*, 2005 WL 3797562, *5 (E.D. Cal. 2005) (noting that one factor
relevant to the consideration of a motion under Rule 56(f) is whether the summary judgment motion
was made “before relevant discovery could be completed”).

1 3. The circumstances surrounding the submission of defendants' counter-motion undermine
2 their claim that plaintiffs' supplemental material is untimely. Critically, defendants submitted their
3 counter-motion for summary judgment well past the November 8, 2006 deadline for the filing of
4 summary judgment motions in this case. And they did this even though the arguments supporting
5 their counter-motion were available to them before November 8, 2006 and despite their own
6 admission that their submission "might have been made earlier."² Of course, if the Court grants
7 plaintiffs' pending motion to strike defendants' counter-motion, then there would be no need to
8 permit the supplemental filing plaintiffs have now sought to make. If the Court elects to consider
9 defendants' motion on the merits, however, consideration of plaintiffs' supplemental filing is
10 warranted given the relevance of the evidence set forth in the filing and the shortened deadlines
11 defendants' own conduct imposed upon plaintiffs in preparing their initial response to the counter-
12 motion.

13 4. Operating on a shortened timeframe in light of defendants' late-breaking counter-motion,
14 plaintiffs acted with diligence in nonetheless preparing their response by the relevant deadline,
15 December 4, 2006. Along with that response plaintiffs submitted evidence in the form of a
16 declaration from an expert witness citing and attaching relevant deposition testimony from defense
17 witnesses that had already been deposed.³ Plaintiffs also timely apprised the Court of the fact that
18 the depositions of Michael Jackson and Michael Scheible had not yet taken place, and appropriately
19 moved under Rule 56(f) for a continuance to allow the relevant discovery to be completed in the
20 event the Court found the evidence plaintiffs had already submitted insufficient to create a genuine
21 dispute of material fact.

22 5. To be sure, and as plaintiffs acknowledged in their initial application, the deposition of

23 ² See Pltfs' Memorandum of Points & Authorities in Support of Motion to Strike Defts' Counter
24 Motion for Summary Adjudication & Request for Reconsideration (Doc. No. 529); *see also* Defts'
25 Memorandum of Points & Authorities (1) in Reply to Opposition of Pltfs & Pltf-Intervenor to Defts'
26 Countermotion and (2) in Opposition to Pltfs' Motion to Strike, at 13 (Doc. No. 562) (admitting that
27 the request for reconsideration central to defendants' counter-motion "might have been made
28 earlier").

³ Decl. of Thomas C. Austin in Opposition to Defts' Counter-Motion for Summary Judgment (Doc.
549), at 3, 5 n.2, 6 n.5 (citing deposition testimony of CARB officials Paul Hughes and Charles
Shulock).

1 Mr. Scheible was taken on December 18, 2006 (two days before the initial hearing on the summary
2 judgment motions) and the first two sessions of Mr. Jackson's deposition were taken on December 6
3 and December 18, 2006. But defendants overreach in trying to use this circumstance to suggest that
4 plaintiffs could have made a formal supplemental filing in time for the December 20, 2006 hearing.
5 Even rough transcripts from the December 18, 2006 depositions, let alone signed and certified
6 transcripts, obviously could not be received until several hours after those depositions were
7 completed. Plaintiffs accordingly did the best they could, in the midst of their other preparations for
8 the December 20, 2006 hearing, by putting together powerpoint slides based on the rough transcript
9 testimony from the Scheible and Jackson depositions for presentation to the Court.⁴ Shortly after the
10 hearing last December, the Court entered a stay with respect to pending motions.

11 6. Defendants offer no concrete indication of any prejudice from the Court's consideration
12 of the deposition testimony of their own witnesses. Plaintiffs have identified the specific passages
13 in those witnesses' depositions that they wish to put before the Court. Defendants can respond to
14 those specific portions of their witnesses' testimony. Given the similarity of the evidence plaintiffs
15 now seek to put before the Court to the evidence plaintiffs already submitted to the Court in the form
16 of their powerpoint presentation at last December's hearing, defendants can hardly claim to be
17 surprised by plaintiffs' arguments. *Cf. Pourny v. Maui Police Dept., County of Maui*, 127 F.Supp.2d
18 1129, 1139 (D. Hawai'i 2000) (permitting supplementation, even despite failure to seek leave of
19 Court, where supplementation "merely buttressed the authenticity of exhibits previously submitted").

20 **Conclusion**

21 Defendants filed their counter-motion for summary judgment out of time. They now seek to
22 preclude the Court from considering the complete and verified deposition testimony of their own
23 witnesses that, along with other evidence, defeat their motion. Plaintiffs respectfully request that, if
24 the Court does not strike defendants' counter-motion for summary judgment, it grant plaintiffs'
25 application for leave to submit a supplemental response to defendants' counter-motion.

26 ⁴ It would hardly have been efficient for plaintiffs to submit and request the Court to consider
27 a supplement on the first day of Jackson's deposition, followed by a separate supplement after the
28 second day, another after the third, and still another following the fourth.

1 DATED: October 17, 2007.

2 Respectfully submitted,
3 SAGASER, JONES & HAHEYS

4 /s/ Timothy Jones

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7 Timothy Jones
8 Attorney for all Plaintiffs

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