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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA — FRESNO DIVISION

CENTRAL VALLEY CHRYSLER-JEEP, INC.; et al., Plaintiffs, v. CATHERINE E. WITHERSPOON, in her official capacity as Executive Officer of the California Air Resources Board, Defendant, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, Plaintiff-Intervenor, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE, BLUEWATER NETWORK, GLOBAL EXCHANGE and RAINFOREST ACTION NETWORK, Defendant-Intervenors.	NO. 1:04-CV-06663-AWI-LJO **DEFENDANT AND DEFENDANT-INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND DISMISSAL** Date: November 27, 2006 Time: 1:30 p.m. Courtroom: Two Judge: Honorable Anthony W. Ishii

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23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Court's Determination that the CARB Regulations Are Preempted Absent an EPA Waiver Make All Other Issues Unripe. 3

B. The Balance of Hardships Does Not Make This Case Ripe. 8

C. The Court's Preemption Determination Resolves the Case and Makes All Other Issues Moot. 9

CONCLUSION 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Pages

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 4

Anderson v. Green, 513 U.S. 557 (1995) 7

Babbitt v. United Farm Workers, 442 U.S. 289 (1979) 4

Cady v. Morton, 517 F.2d 786 (9th Cir. 1975) 9

Califano v. Sanders, 430 U.S. 99 (1977) 4

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9trh Cir. 2001) 5, 6

Clinton v. New York, 524 U.S. 417 (1998) 7

DBSI TRI IV Ltd. Partnership v. U.S., 465 F.3d 1031 (9th Cir. 2006) 3

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 6

International Truck & Engine Corp. v. Lloyd, No. 01-1245 (E.D.Cal. Oct. 24, 2001) 4, 5

Kapp v. Nat'l Football League, 586 F.2d 644 (9th Cir. 1978) 10

Marchi v. Bd. of Coop. Ed. Services of Albany, 173 F.3d 469 (2d Cir. 1999) 6

Massachusetts v. EPA, S.Ct. No. 05-1120 (*cert. granted*) 6

National Park Hospitality Ass'n v. Dept. of the Interior, 538 U.S. 803 (2003) 9

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Devt. Comm'n, 461 U.S. 190 (1983) 5, 6

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1975) 6

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000) 4, 5, 6

FEDERAL STATUTES

42 United States Code
§ 7543(b)(1) 8

FEDERAL RULES

Federal Rule of Civil Procedure
§ 56(f) 2

OTHER AUTHORITIES

H.R. Rep. No. 94-340 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762 3

I. INTRODUCTION

All parties agree that California cannot enforce its greenhouse gas emission regulations without a U.S. Environmental Protection Agency ("EPA") waiver and that no waiver has been granted. Plaintiffs and Plaintiff-intervenor (collectively, "Plaintiffs") concede[1/] that a waiver may never be granted and that if a waiver ever is granted, it will be a significant time before such a grant occurs.[2/] Plaintiffs further concede[3/] that EPA can evaluate the sufficiency of lead time for implementation of the regulations in its waiver process. Plaintiffs, therefore, are seeking from this Court a purely advisory ruling as to their fuel economy and foreign policy preemption claims.

Plaintiffs do not dispute that an EPA denial of California's waiver request is dispositive of this case. Nonetheless, Plaintiffs contend that this Court must determine complex issues of law and fact following weeks of trial before EPA makes a waiver decision because, first, auto manufacturers have to plan now for the possibility that the waiver may be adopted, and second, that a live controversy exists because the California Air Resources Board ("CARB") might suddenly decide to enforce the regulations absent a waiver. As such, Plaintiffs' attack on the CARB regulations is simply a premature attack on a state requirement, routinely rejected by federal courts.

That CARB might enforce the regulations absent a waiver is a strawman argument. Plaintiffs ignore the Court's September 22, 2006 Order: the Court ruled that CARB's regulations are preempted in the absence of the EPA waiver. In case there is any ambiguity, CARB will follow the Court's order: CARB will not enforce the regulations without an EPA waiver.

The Court's finding that the regulations are currently preempted under the Clean Air Act lays the ripeness issue bare. In the absence of an EPA waiver, and before EPA has determined

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1. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant and Defendant-Intervenors' Motion for Summary Judgment and Dismissal ("Pls. Opp'n.") at 4:6-9.

2. We note that in Plaintiffs' own estimation, an EPA waiver decision is probably more than three years away. (*See* Plaintiffs' Additional Undisputed Fact #36.)

3. Pls. Opp'n. at 32:24-33:2.

how much lead time is required, do automakers' contentions as to their lead time needs make ripe Plaintiffs' various other challenges to those regulations? At a juncture when enforcement of the regulations is preempted, Plaintiffs nonetheless seek to proceed to a multi-week trial on, inter alia, the complex and fact-intensive issues of the relationship of the Clean Air Act and Energy Policy and Conservation Act ("EPCA"); significance and feasibility of air conditioning credits for compliance; significance and feasibility of alternative fuel credits for compliance; cost and feasibility of several dozen engine, transmission, and other technological compliance methods; whether manufacturers would leave the California market rather than comply through technological changes; economic impacts of the regulations; safety impacts of the regulations; relationship of technology and greenhouse gas emissions; market and technology changes that may occur on these issues in the future; and, apparently, determination of the foreign policy of the United States with respect to global warming and the relationship of that foreign policy to California's regulations.

Plaintiffs seek to have the Court decide matters with speculative relevance and without reference to the EPA waiver process that may resolve or moot the controversy or, at the very least, change the factual and legal underpinnings of the issues in this case. In light of the Court's preemption ruling and CARB's acknowledgment that it cannot enforce the regulations without the EPA waiver, and in light of the fact that the EPA waiver process itself provides Plaintiffs with a statutorily-based forum for consideration of the lead time concerns they raise, the lead time claim is insufficient to create a ripe issue for the Court.

II. ARGUMENT[4/]

Plaintiffs make basically three arguments in various forms in their opposition to Defendants' motion for summary judgment on ripeness. First, they contend that California cannot be trusted not to enforce its regulations absent a waiver. Second, Plaintiffs argue that their lead time considerations and loss of value of dealerships creates a ripe controversy even in

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4. Plaintiffs provided with their opposition brief an extensive set of "undisputed facts." Defendants do not agree that the facts are undisputed. Defendants believe, however, that the "facts" presented by Plaintiffs are irrelevant to this motion (except for Plaintiffs' Additional Fact #36). Because Plaintiffs' rendition of the facts is irrelevant, so is its overly broad and unjustified request under Federal Rule of Civil Procedure 56(f).

the absence of enforceable regulations. And third, Plaintiffs contend, any attack on jurisdiction at this juncture must be considered a "mootness" issue rather than ripeness, placing a high burden on Defendants.[5/]

Regarding Plaintiffs first argument concerning enforcement of the regulations, California states that it does not intend to enforce the regulations absent an EPA waiver, and is willing to be subject to a court order to that effect.[6/]

We address Plaintiffs' ripeness/mootness and hardship arguments below.

A. The Court's Determination that the CARB Regulations Are Preempted Absent an EPA Waiver Makes All Other Issues Unripe[7/]

The ripeness doctrine prevents "courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to

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5. Plaintiff-Intervenor makes the additional argument, consistent with their summary judgment motion, that the lead time/dealer value hardship outweighs any ripeness concern because the issue before the court is a legal issue, that an interference with fuel economy is preempted by EPCA. That preemption argument cannot be correct. Since EPCA's enactment in 1975, Congress has been aware that Clean Air Act motor vehicle emission standards, including California's federally authorized emission standards, affected fuel economy. *See* H.R. Rep. No. 94-340, at 86-87, 89-91 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1848-49, 1851-53. For example, Congress knew that the installation of catalytic converters, required by California and federal emission standards, improved the prior year's fuel economy by 13.8 percent. *Id.* at 86-87. It also knew that other, more stringent California emission standards in place at that time *decreased* average fuel economy. *Id.* at 87 ("The California standards . . . appear to result in a 5.7 percent fuel penalty. . . ."). Yet, those emission standards were not preempted. To the extent that Plaintiff-Intervenor's argument is a hardship argument, we address it below. To the extent that it is a legal argument, we address it in response to Plaintiff-Intervenor's summary judgment motion, which will be filed on November 22, 2006.

6. Defendants do not agree with Plaintiffs rendition of the issues surrounding "within the scope" waiver, but the matter is irrelevant to this motion, so we simply note our disagreement without further comment. (Plfs. Opp'n. at 6:10-9:22; Plfs. Additional Facts #9-12.)

7. Plaintiffs state in their brief (Pls. Opp'n. at 3:3-6, 10-12) that Defendants have somehow waived or acquiesced in jurisdiction and ripeness. That is not the case. *See, e.g.,* Defendant's Supplemental Brief Regarding Ripeness, Aug.1, 2005, (reserving right to challenge standing based on ruling); (Transcript of Sept. 15, 2006 Hearing, at 16, 18-19 (Marc Melnick, counsel for Defendants: "We would not object if the Court said you are all here too early. Come back when EPA has granted the waiver;" David Doniger, counsel for defendant-intervenors: "[I]f Your Honor concludes that the fact that we haven't got an EPA decision means the 209(a) preemption is in effect . . . [t]here is no reason, then to go on").) Of course, because ripeness is jurisdictional, it may be raised at any juncture. *DBSI TRI IV Ltd. Partnership v. U.S.,* 465 F.3d 1031 (9th Cir. 2006). The issue of ripeness results here directly from the Court's preemption ruling.

protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967), overruled on other grounds, *Califano v. Sanders,* 430 U.S. 99 (1977). As part of the constitutional case or controversy requirement, the court must consider whether the plaintiff faces a "'realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement' . . . or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir. 2000), *cert. denied,* 531 U.S. 1143 (2001), *quoting Babbitt v. United Farm Workers,* 442 U.S. 289, 298 (1979). If a plaintiff meets the constitutional component, the court must also consider the prudential component of ripeness, requiring the balancing of the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott,* 387 U.S. at 149. Here, Plaintiffs meet neither component.

International Truck & Engine Corp. v. Lloyd, No. 01-1245 (E.D. Cal. Oct 24, 2001) (attached as Exh. 2 to Opening Brief), is not dispositive of this case, of course, but it is instructive. In that case, Judge Burrell found unripe a challenge to CARB emission regulations because of the absence of an EPA waiver and the pendency of CARB's waiver request. Plaintiffs contend (Pls. Opp'n. at 29:23-30:5) that *International Truck* did not involve a situation where the promulgation of the law may itself affect a party enough to satisfy constitutional requirements. Here is International Truck's characterization on appeal to the Ninth Circuit of Judge Burrell's ruling[8]:

> Contrary to the implication in the district court's October Order, International is not challenging a mere CARB "resolution" . . . . CARB adopted Resolution 00-53, which resolved that CARB amended California's regulations . . . . As stated on CARB's website, the 'regulation became effective [on July 25, 2001]. Thus, the Supplemental Emissions Standards . . . are the law in California.

(International Truck's Appellant's Opening Brief (May 2, 2002) at 25 - 26, attached as Exh. D to the McCabe Decl.) The brief continues:

8. The parties stipulated to dismissal of the appeal before the Ninth Circuit issued a ruling. *See* Exhibit E to the Declaration of Gavin G. McCabe ("McCabe Decl.") filed herewith.

> The extensive lead time required to engineer, design, test and re-tool factories to build engines meeting a different set of standards, coupled with the risks of not making the effort to comply with the challenged regulations, force International to change its course of conduct now in an attempt to avoid the potential future sanction of being denied CARB certification to sell its MY 2005 HDDES in California.

Plaintiffs' argument is a carbon copy of International Truck's argument.[9/] Judge Burrell found that "EPA will hold a public hearing to consider whether waiver is warranted. Plaintiff [will] then have an opportunity at a public hearing to express its concerns over technological feasibility and lead time." *International Truck,* at 5.

The cases cited by Plaintiffs in their opposition brief do not support their ripeness argument. (Pls. Opp'n. at 27:1-29:22.) In support of their contention that the issue of the legality of the greenhouse gas regulations in relation to EPCA standards is ripe and must be decided immediately, Plaintiffs cite *City of Auburn v. Qwest Corp*., 260 F.3d 1160 (9th Cir. 2001). In *Qwest,* a telecommunications company challenged local ordinances before they were enforced. The regulations presented Qwest with an immediate dilemma requiring it to choose between complying with the ordinance or risking penalties. *Id*. at 1171. As such, the concept is not novel, and not analogous to this case. In *Qwest*, the ordinances were enforceable at the time the company sought a declaratory judgment to invalidate the ordinances. *Id.* at 1170. The court emphasized that even though plaintiff had not yet been accused by the cities of violating the ordinances, "[t]here can be no question that Qwest is violating the ordinances...." *Id*. at 1172. The court drew a distinction between the telecommunications company's circumstances and those presented in *Thomas,* 220 F.3d at1139[10/], where there was no threat of enforcement of a regulation, because no violation had occurred. *Ibid*. In *Qwest*, the court explained that for a case

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9. International Truck made the same arguments in the district court. (*See* International Truck's brief opposing the motion to dismiss, attached as Exh. C to McCabe Decl. at 12-17.)

10. Plaintiffs suggest that Defendants erroneously cited *Thomas* in their Summary Judgment Motion because there is a clear distinction between ripeness in cases involving criminal prosecution and those related to complex regulatory programs. (Pls.Opp'n. at 25.) However, the *Qwest* case, which Plaintiffs rely upon, draws no such distinction. *Qwest*, 260 F.3d at 1172. Rather, the court distinguished *Thomas* only on the grounds that there was no present credible threat of enforcement. *Ibid*. Plaintiffs' emphasis on the criminal prosecution distinction is unavailing.

1 to be ripe, "the threat of enforcement must be at least 'credible,' not simply imaginary or
2 speculative." *Ibid.*, quoting *Thomas*, 220 F.3d at 1140.
3 Plaintiffs cite *Pacific Gas & Electric Co. v. State Energy Resources Conservation &*
4 *Devt. Comm'n*, 461 U.S. 190 (1983) ("*PG&E*"), in which the Court examined the validity of a
5 state law imposing a statutory moratorium on new nuclear power plants. The state statute
6 imposed a prohibition that took immediate effect. *Ibid.* In finding the moratorium ripe for
7 adjudication, the Court reasoned, "'[o]ne does not have to await the consummation of threatened
8 injury to obtain preventative relief. If the injury is *certainly impending*, that is enough.'" *Id*. at
9 201, quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1975) (emphasis
10 added). Here, of course, rather than certainly impending, we can only speculate on whether
11 EPA will grant a waiver, particularly before the Supreme Court decides the validity of EPA's
12 legal position that it cannot regulate greenhouse gas emissions in *Massachusetts v. EPA*, S.Ct.
13 No. 05-1120 (*cert. granted*). *See, e.g., Marchi v. Bd. of Coop. Ed. Services of Albany*, 173 F.3d
14 469, 478 (2d Cir. 1999) ("A plaintiff must show either prosecution pursuant to the challenged
15 provision or that a sufficiently real and immediate threat of prosecution exists.")
16 *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 67 (1978), like
17 *PG&E*, involved a statute that became effective without need for subsequent action by an
18 agency. In *Duke*, Plaintiffs challenged a federal law that limited the amount of damages
19 recoverable in the event of a nuclear incident. *Ibid*. Defendants argued that the claims were not
20 ripe, because until a nuclear accident occurred and damages were sustained, there would be no
21 way to gauge the reasonableness of the statutory recovery limit. *Id*. at 81-82. The Court
22 determined that "[a]lthough it is true that no nuclear accident has yet occurred and that such an
23 occurrence would eliminate much of the existing scientific uncertainty surrounding this subject,
24 it would not, in our view, significantly advance our ability to deal with the legal issues presented
25 nor aid us in their resolution." *Id*. at 82.
26 Here, in addition to the obvious distinction that the CARB regulations are currently
27 unenforceable, the EPA waiver determination will likely impact both the legal and factual setting
28 for the issues raised by Plaintiffs, and the outcome remains highly speculative. For example, in

1 the three years or more that it may take for EPA to issue a waiver, significantly higher national
2 fuel economy standards may be in place; new alternative fuel technology advances could occur;
3 gasoline prices may escalate impacting consumer demand and resulting in voluntary actions by
4 automakers that impact emissions. Until the EPA waiver process is resolved, the parties cannot
5 know the outcome and the implications.

6 Plaintiffs also cite *Clinton v. New York*, 524 U.S. 417 (1998), contending that it rather
7 than *Anderson v. Green*, 513 U.S. 557 (1995), is analogous to this case. In fact, the Department
8 of Health and Human Services ("HHS") waiver in *Clinton* has no relation to the EPA waiver at
9 issue here. In *Clinton,* the 1991 amendment to the federal Social Security Act reduced federal
10 subsidies to be paid to the state of New York. *Id.* at 422. In 1994, the federal agency
11 implementing the reductions, HHS, contacted New York and requested that it reimburse the
12 federal government $955 million for overpayment of subsidies. *Ibid*. New York applied for a
13 waiver of this reimbursement obligation, but HHS never responded to the state's application.
14 *Ibid*. Thereafter, in 1997, New York sought and received assistance from Congress in the form
15 of a law issued as part of the Balanced Budget Act of 1997. *Ibid*. The law provided a waiver of
16 the state's payment requirement; however before the law went into force, the President used his
17 line item veto power to cancel it. *Id*. at 422-423. In response, New York sued the President and
18 other federal officials. *Id*. at 423. The federal government argued that the New York's injury
19 was speculative, because HHS had not yet acted on the state's waiver request. *Id*. at 430. The
20 Supreme Court found this argument unconvincing, recognizing that the state had "suffered an
21 immediate, concrete injury the moment that the President used the Line Item Veto to cancel [the
22 waiver of payment statute] and deprived them of the benefits of the law." *Ibid*. The HHS waiver
23 was irrelevant to the action taken by the President and to the Court's evaluation of the injury
24 resulting from his action.

25 Here, CARB's regulations remain unenforceable until EPA grants a waiver, an action
26 that Plaintiffs estimate will take over three years, (Plaintiffs' Additional Fact #36) if it occurs at
27 all. Surely, the outcome of the EPA process can only be described as speculative, creating an
28 absence of case or controversy with respect to Plaintiffs' remaining claims.

B. The Balance of Hardships Does Not Make This Case Ripe

Plaintiffs seek to elevate dealership value and lead time concerns to a level of harm and hardship sufficient to create a case or controversy where the regulations at issue have been found to be preempted and may never be enforceable. Defendants do not dispute that at least some of the plaintiff automakers may need lead time to incorporate model changes that will allow them to meet the requirements of the CARB regulations at issue in this case. Nonetheless, Congress has entrusted EPA with deciding whether California has provided adequate lead time, and, if Plaintiffs are correct that they need such additional time, then they should make that case to EPA during the noticed hearing process provided by 42 U.S.C. section 7543(b)(1).

The EPA waiver proceeding, as we note in our Opening Brief, provides the proper forum to address the lead time issue. *See* 42 U.S.C. § 7543(b)(1); Defendants' Opening Brief at 7-8 and citations. Plaintiffs do not deny (Pls. Opp'n. at 32:24-33:2) that EPA has authority to consider lead time issues and that they have the opportunity to present their data and views to EPA on this issue. Rather, they complain that EPA has rarely granted a lead time extension in previous waivers. (*See* Pls. Opp'n. at 34-35.) That determination, however, is within the purview of EPA. Because Congress has entrusted the lead time issue to EPA, this Court should give it minimal weight as a hardship requiring immediate judicial consideration. The hardship claim is also undermined by the fact that Plaintiffs, to Defendants' knowledge, have never requested that EPA act with dispatch on the waiver determination. In sum, the hardship claim cannot overcome the fact that the regulations are currently preempted, there is little or no current prospect for an EPA waiver based on EPA's legal position, and EPA's waiver process presents a forum for consideration of lead time.

Finally, Plaintiffs contend that the dealership plaintiffs are losing the value of their dealerships because of the potential loss of business resulting from the CARB regulations. In making this argument, Plaintiffs rely on a declaration from Stuart Harden, an accountant, whose speculative conclusions are not supported by the statements of the auto dealers who are on the Plaintiffs' witness list.[11/] We note that the two dealers designated by Plaintiffs as testifying

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11. Mr. Harden appears to be testifying as an expert on the issue of dealer valuation,

witnesses could not quantify any harm to their dealerships from the currently unenforceable CARB regulations. (*See* Deposition of Leonard Harrington, September 27, 2006, Transcript at 56-68; Deposition of John W. Gardner, September 27, 2006, Transcript at 61-63, attached as Exh. A (Harrington) and Exh. B (Gardner) to the McCabe Decl.) No dealer has presented any evidence that the claimed loss of value has been realized. They were not able to identify any change in loan or financing terms, or that they had been unable to sell a dealership or have been forced to sell at a reduced price. *Id.* (Harrington Depo. at 65-66, Exh. A to McCabe Decl.) The alleged harm to dealers simply does not, on balance, outweigh the impact on the Court's docket, on the jurisdiction of the regulatory agency, on the Defendants' time and fisc, and, most importantly on the need to avoid judicial decisions based on speculative future events. *See, National Park Hospitality Ass'n v. Dept. of the Interior,* 538 U.S. 803, 811 (2003) ("Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. We are not persuaded.")

In light of the fact that the EPA waiver process will affect every aspect of the matter currently before this Court and will include consideration of the lead time issues raised by Plaintiffs, the harms identified simply do not rise to the level to warrant a determination that the case is ripe.

C. The Court's Preemption Determination Resolves the Case and Makes All Other Issues Moot

Plaintiffs cite cases for the proposition that if a claim of mootness is based on statements or voluntary actions of the moving party, the mootness claim must be reviewed "stringently" and be absolutely clear. Here, Defendants' ripeness/mootness claim depends not on the voluntary action or statement of CARB, but on this Court's preemption determination in its September 22, 2006 Order. It is the Court's determination that CARB's regulations are preempted that make Plaintiffs' remaining causes of action either unripe or moot. Thus, Plaintiffs' discussion of the burden on Defendants to establish mootness is irrelevant.

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but Plaintiffs have not designated him as an expert witness in the case. (McCabe Decl. at ¶ 2.) Because there has been no opportunity for Defendants to depose Mr. Harden on the basis of his expert knowledge, Defendants request that his declaration be stricken.

A decision on one claim that provides the requested relief makes other claims unnecessary to decide, and moot. *Kapp v. Nat'l Football League*, 586 F.2d 644, 649-50 (9th Cir. 1978); *see also Cady v. Morton*, 527 F.2d 786, 798 (9th Cir. 1975) (in challenge to mining leases, finding that further environmental review needed to occur made moot a separate dispute over a different procedural requirement). Here, the Court's preemption determination–that absent an EPA waiver, the CARB regulations are unenforceable–renders the other causes of action moot until such time as EPA actually issues a waiver. Considering this matter as one of mootness rather than ripeness may help clarify the issue: resolution of the Clean Air Act preemption cause of action makes moot any other claims until such time as EPA issues a waiver. If, as Plaintiffs insist, it is an issue of mootness rather than ripeness, Defendants do not object. However, under either analysis, the case must be dismissed.

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CONCLUSION

In light of the Court's determination that the CARB regulations are currently preempted, CARB's acknowledgment that it cannot enforce the regulations absent an EPA waiver, and the fact that the EPA waiver process will impact every aspect of the case before this Court while providing a forum for consideration of lead time impacts on the automakers, the case is not ripe (or it is moot) and should be dismissed.

Dated: November 17, 2006

Respectfully submitted,

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