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11 IN THE UNITED STATES DISTRICT COURT  
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 13 FRESNO DIVISION

14  
 15 CENTRAL VALLEY CHRYSLER-JEEP, INC.;  
 et al.,

16 Plaintiffs,

17 v.

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

20 Defendant,

21 ASSOCIATION OF INTERNATIONAL  
 AUTOMOBILE MANUFACTURERS,

22 Plaintiff-Intervenor,

23  
 24 SIERRA CLUB, NATURAL RESOURCES  
 DEFENSE COUNCIL, ENVIRONMENTAL  
 25 DEFENSE, BLUEWATER NETWORK,  
 GLOBAL EXCHANGE and RAINFOREST  
 26 ACTION NETWORK,

27 Defendant-Intervenors.  
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NO. 1:04-CV-06663-AWI-GSA

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

**Date: October 22, 2007**

**Time: 1:30 p.m.**

**Courtroom: Two**

**Judge: Honorable Anthony W. Ishii**

**Trial Date: TBA**

1 **INTRODUCTION**

2 Defendants respectfully submit this opposition to plaintiffs' October 12, 2007, ex parte  
3 application for leave to file a revised opposition, amended separate statement, and multiple  
4 exhibits in response to defendants' November 22, 2006, counter-motion for summary judgment.

5 Plaintiffs seek, in effect, an order on shortened time to revise their December 4, 2006,  
6 opposition brief and to submit a hodgepodge of evidence, previously available, on alternative  
7 fuels. Their application is untimely, prejudicial to defendants, not germane to the upcoming  
8 October 22, 2007, hearing on the effect of the Supreme Court's decision in *Massachusetts v.*  
9 *EPA*, and includes no request for relief from the Court's stay order. Moreover, plaintiffs had  
10 adequate opportunity to present the same evidence on alternative fuels before and at the  
11 December 20, 2006 hearing. They largely availed themselves of that opportunity and any  
12 information they did not present was nevertheless available then.

13 Plaintiffs seek to justify their application by erroneously implying they did not have the  
14 deposition testimony of Messrs. Scheible and Jackson in time for the December 20, 2006,  
15 hearing. In fact, the same plaintiffs attorneys who appeared at the hearing deposed these  
16 witnesses beforehand and liberally referred to their testimony at the hearing. While plaintiffs cite  
17 heavily in their proposed supplemental filing to this testimony, they refer only sparingly to the  
18 testimony obtained after the hearing. Thus, plaintiffs actually had the testimony on which they  
19 pin their application in time for the December 20, 2006, hearing.

20 Certainly, plaintiffs should have requested leave to file supplemental papers by no later  
21 than the June 18, 2007, status conference, when an additional three rounds of briefing was  
22 scheduled and a new date was set to hear oral arguments on the Supreme Court's decision in  
23 *Massachusetts v. EPA*. There is no excuse for plaintiffs failing to disclose their intentions in  
24 conjunction with the new briefing schedule and then waiting until now to spring their ex parte  
25 request upon defendants and the Court.

26 **PLAINTIFFS PRESENT NO EVIDENCE OF DILIGENCE**

27 There is no legal basis for plaintiffs' application. First, plaintiffs' reliance on Rule 56(f)  
28 of the Federal Rules of Civil Procedure is misplaced. Rule 56(b) addresses the situation where a

1 party seeks a continuance to conduct additional discovery before filing an opposition to a  
2 summary judgment motion. That is not what plaintiffs request here. They filed their opposition;  
3 now they want to file another opposition.

4 Moreover, plaintiffs referred to the deposition testimony of both Mr. Jackson and Mr.  
5 Scheible at the summary judgment hearing and included additional references to Mr. Scheible's  
6 testimony in their Power-Point display. (December 20, 2006 hearing transcript at pp. 100:8 -  
7 103:18.) Thus, plaintiffs seek to present the very testimony, in substance, if not every quote, that  
8 they presented at the December 20, 2006, hearing.

9 Plaintiffs also cite Rule 16(b), which requires a factual showing of good cause for relief  
10 from a scheduling order. Diligence is a primary requirement of this standard. (Fed.R.Civ.P. 16  
11 advisory committee's notes (1983 amendment).) Plaintiffs do not attempt to establish diligence;  
12 they ignore the requirement.

13 The only deposition testimony that plaintiffs did not have at their finger tips at the  
14 December 20, 2006, hearing was the snippet they cite from the February 27, 2007, session of  
15 Michael Jackson's testimony. Had plaintiffs been diligent, they would have sought relief from  
16 the stay and leave to present that testimony by noticed motion 8 months ago.

17 Plaintiffs had a particularly germane opportunity to make this request at, if not before,  
18 the status conference held on June 18, 2007. In anticipation of that conference, defendants  
19 served plaintiffs on April 3, 2007, with a notice of defendants' intent to ask the Court to "hold a  
20 status conference . . . to discuss future proceedings in this case." (Court Docket No. 610.)  
21 Defendants proposed further briefing on the Supreme Court's decision in *Massachusetts v.*  
22 *Environmental Protection Agency*. Defendants also included a list of discovery and other matters  
23 that would need to occur in the event the case were to proceed to trial.

24 An additional three rounds of briefing, requested by plaintiffs and agreed to by  
25 defendants, resulted from that status conference. Plaintiffs did not include in their request to  
26 defendants or in the parties' submission to the Court that plaintiffs also wanted to further brief  
27 and submit yet additional evidence on alternative fuels in opposition to defendants' November  
28 22, 2006, motion. Instead, they remained silent in the face of a clear obligation to speak up.

1 Plaintiffs lack of diligence is what prevents their request from being heard by regularly  
2 noticed motion. It is what denies defendants a reasonable opportunity to submit a supplemental  
3 reply. Plaintiffs' failure to act diligently dictates that their application be denied. (*Johnson v.*  
4 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9<sup>th</sup> Cir 1992) [if the party is "not diligent, the  
5 inquiry should end"].)

6 **PLAINTIFFS' UNTIMELY APPLICATION PREJUDICES DEFENDANTS**

7 In Exhibit 1 to the October 12, 2007, declaration of Michael Scoville, his co-counsel  
8 described plaintiffs' proposed supplementation as limited to "evidence from [the] depositions" of  
9 Michael Schieble and Michael Jackson. What plaintiffs proposed to the Court later that day is far  
10 more expansive. Their proposed filing constitutes a broad-sided attack on the extent to which  
11 automakers can satisfy the AB 1493 greenhouse gas regulation with credits for alternative fuels.  
12 Plaintiffs discuss the supply of ethanol and other alternative fuels, the infrastructure for these  
13 fuels, and the relative prices of motor vehicle fuels. They refer to plug-in hybrids, cite multiple  
14 government records, and construe multiple appellate decisions. They offer additional exhibits  
15 and an amended separate statement covering 32 numbered factual issues.

16 By seeking to submit such an expansive filing on alternative fuels so late in the  
17 proceedings, plaintiffs have prejudiced defendants' ability to reply. Plaintiffs had about ten  
18 months to prepare their proposed supplementation. If the Court were to grant plaintiffs'  
19 application, and the Court does not dispose of this case as result of the October 22, 2007, hearing  
20 on the effect of *Massachusetts v EPA*, defendants request reasonable time to reply.

21 **CONCLUSION**

22 Plaintiffs could have cited the same cases, referred to the same regulation, and made the  
23 same arguments before the December 20, 2006, hearing that they seek to make now by ex parte  
24 application. Indeed, they largely did, including Live-Note citations and Power-Point slides  
25 referring to the deposition testimony of Mr. Jackson and Mr. Scheible. Plaintiffs also could have  
26 raised their proposed supplementation in advance of the briefing schedule set at the June 18,  
27 2007, status conference and sought leave to file it by noticed motion. They could have, but did  
28 not.

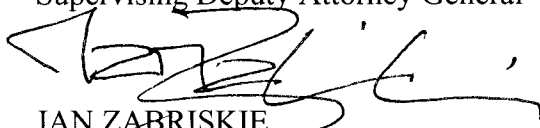
1 For all these reasons, defendants ask that the Court deny plaintiffs' application. In the  
2 alternative, defendants request a reasonable opportunity to submit a reply.

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Dated: October 15, 2007

Respectfully submitted,

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