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14
 15 IN THE UNITED STATES DISTRICT COURT
 16 FOR THE EASTERN DISTRICT OF CALIFORNIA- FRESNO DIVISION
 17

18 CENTRAL VALLEY CHRYSLER-JEEP, INC.; et al.,
 19 Plaintiffs,
 20 v.

21 CATHERINE E. WITHERSPOON, in her official
 capacity as Executive Officer of the California Air
 Resources Board,
 22 Defendant,

23 ASSOCIATION OF INTERNATIONAL
 24 AUTOMOBILE MANUFACTURERS,
 25 Plaintiff-Intervenor,

26 SIERRA CLUB, NATURAL RESOURCES DEFENSE
 27 COUNCIL, ENVIRONMENTAL DEFENSE,
 BLUEWATER NETWORK, GLOBAL EXCHANGE
 and RAINFOREST ACTION NETWORK,
 28 Defendant-Intervenors.

No. 1:04-CV-06663-AWI-NEW (TAG)

DEFENDANT AND DEFENDANT-INTERVENORS' REPLY BRIEF REGARDING MASSACHUSETTS v. EPA

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

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1 INTRODUCTION

2 Defendant and Defendant-Intervenors file this reply in support of their Opening
3 Supplemental Brief Regarding *Massachusetts v. EPA*, filed July 20, 2007 (“Defendants’ Opening
4 Brief”) (Docket No. 620). Plaintiffs’ and AIAM’s Responses^{1/} to Defendants’ Opening Brief do
5 nothing to undermine Defendants’ contention that there are no triable issues for this Court.
6 Judgment should be entered in Defendants’ favor.

7 ARGUMENT

8 **I. MASSACHUSETTS v. EPA’S FINDING OF OVERLAP BUT NO**
9 **CONFLICT BETWEEN THE CLEAN AIR ACT AND EPCA REQUIRES**
10 **GRANTING SUMMARY JUDGMENT FOR DEFENDANTS.**

11 Plaintiffs argue that *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S.
12 ____, 127 S. Ct. 1438 (2007) “underscores” their right to trial on their claims of conflict
13 preemption under the Energy Policy and Conservation Act (EPCA). (Plaintiffs’ Response at 6.)
14 In fact, just the opposite is true: *Massachusetts v. EPA* demonstrates that Plaintiffs’ claims are
15 without merit.

16 When this Court issued a stay of this case pending resolution of *Massachusetts v. EPA*, it
17 observed that the elements of the arguments regarding EPCA “exactly mirror[ed]” each other in
18 both cases. (*See* Memorandum Opinion and Order on Defendants’ Motion for Summary
19 Judgment on the Issue of Ripeness and/or Mootness and Order for Stay of Further Proceedings,
20 dated Jan. 12, 2007 (Docket No. 606) at 19, 21.) Plaintiffs’ and AIAM’s opposition briefs
21 sidestep that central point. They advance fundamentally the same argument here that EPA
22 advanced in *Massachusetts*: that the regulation of carbon dioxide emissions is tantamount to the
23 regulation of fuel economy and thus impermissibly conflicts with EPCA. The Supreme Court
24 considered precisely that argument and rejected it. *Massachusetts v. EPA*, 127 S. Ct. at 1461-

25
26 1. Plaintiffs’ Response to Defendant and Defendant-Intervenors’ Supplemental Brief
27 Regarding *Massachusetts v. EPA*, filed Sept. 7, 2007 (“Plaintiffs’ Response”) (Docket No. 625);
28 Response of Association of International Automobile Manufacturers to Defendant and
Defendant-Intervenors’ Opening Supplemental Brief Regarding *Massachusetts v. EPA*, filed
Sept. 7, 2007 (“AIAM’s Response”) (Docket No. 627).

1 62.^{2/} The Supreme Court’s holding, that there is no conflict between regulating carbon dioxide
2 under the Clean Air Act and setting mileage standards under EPCA, resolves the fundamental
3 dispute in this case. (See Defendants’ Opening Brief.)

4 Defendants’ principal argument in this case is, and has long been, that a California
5 emission standard approved by EPA under Section 209(b) of the Clean Air Act is an “other
6 motor vehicle standard of the Government” under EPCA Section 32902(f). As such, that
7 standard is not subject to preemption, either express or implied, under EPCA. The United States
8 District Court for the District of Vermont recently accepted Defendants’ argument in its entirety
9 in the virtually identical case of *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*,
10 No. 2:05-cv-302, slip op. (D. Vt. Sept. 12, 2007) (“*Green Mountain*”).^{3/} Rejecting Plaintiffs’
11 claims, Chief Judge William K. Sessions III found that preemption doctrines do not apply as a
12 matter of law:

13 In *Massachusetts v. EPA* the Supreme Court found overlap
14 but no conflict between EPA’s authority to regulate greenhouse
15 gases from new motor vehicles under the CAA’s Section 202(a)
16 and [National Highway Traffic Safety Administration’s
17 (NHTSA’s)] authority under EPCA to promote energy efficiency
18 by setting mileage standards. 127 S. Ct. at 1461-62. At issue in
19 this case is whether EPA’s authority to issue a waiver under the
20 CAA’s Section 209(b) for a California GHG emissions standard
21 presents the same situation: overlap without conflict.

22 (*Green Mountain* at 104; see also *id.* at 234.) Judge Sessions answered this question in the
23 affirmative, finding it “beyond serious dispute” that:

24 _____
25 2. In *Massachusetts v. EPA*, the Supreme Court recognized the phenomenon of
26 global warming and its potentially catastrophic effects upon our environment, including sea level
27 rise, storm surges, loss of coastal wetlands, saltwater contamination of drinking water, altered
28 temperature and rainfall and detrimental changes to agriculture and forest ecosystems. The
Supreme Court noted that it is reasonable for legislatures and administrative agencies to tackle
large problems step-by-step; they need not “resolve massive problems in one fell regulatory
swoop.” 127 S. Ct. at 1457. California’s greenhouse gas emission standards are an important
part of that solution. (*Green Mountain* at 92-98 (accord).)

3. AIAM and Plaintiffs raised the identical arguments in the *Green Mountain* case.
Defendants are prepared to address the preclusive effect of *Green Mountain* against Plaintiffs
and AIAM, as any trial here would mirror the one already held in Vermont and would be a waste
of judicial resources. Given the stay in this case, Defendants have not briefed this issue. If the
Court decides not to grant summary judgment for Defendants on this record, Defendants
respectfully request that briefing on preclusion be allowed as soon as possible.

1 Congress intended California emissions standards for which EPA
2 granted a waiver pursuant to Section 209(b) of the CAA to
3 constitute “other motor vehicle standards of the Government,”
4 under Section 502 of EPCA. Such a finding is entirely consistent
5 with the language of the statutes, the House and Senate reports that
6 accompanied the legislation, and NHTSA’s practice of taking
7 California standards into consideration when setting CAFE
8 standards.

9
10 (*Id.* at 112, 237.) As a result:

11 [T]he Court concludes that the preemption doctrines *do not apply*
12 to the interplay between Section 209(b) of the CAA and EPCA, in
13 essence a claim of conflict between two federal regulatory
14 schemes.

15 (*Id.* at 119 (emphasis added).)

16 Ignoring the decisions and events of the past year, Plaintiffs argue that Defendants cannot
17 “revive” this Section 32902(f) argument because the Court already addressed it in its September
18 2006 interlocutory order.^{4/} (*See, e.g.*, Plaintiffs’ Response at 7 & n.16.) That order, however,
19 pre-dated not only the Court’s January 2007 Stay Order (Docket No. 606) – which was informed
20 by the parties’ summary judgment briefing – but also the *Massachusetts* and *Green Mountain*
21 decisions.

22 Plaintiffs attempt to distinguish this case from *Massachusetts v. EPA*, by contending that
23 the Supreme Court’s finding of overlap-without-conflict applies only to a standard set by EPA
24 itself under Section 202 of the Clean Air Act, and not to a California standard that EPA has
25 approved under Section 209 of that same Act.^{5/} Judge Sessions rejected this argument for the
26 same reasons that Defendants have advanced in this case. He explained that *Massachusetts v.*

27 4. *Contra Los Angeles v. San Francisco BayKeeper*, 254 F.3d 882, 885 (9th Cir.
28 2001) (courts have inherent authority to reconsider interlocutory orders).

29 5. Plaintiffs persist in their argument that because agencies “have discretion in
30 balancing” factors which they are required to “consider,” NHTSA can declare California
31 greenhouse gas emission standards void. (Plaintiffs’ Response at 8 n.16 (second para.))
32 Defendants have already responded to this argument. (Defendant and Defendant-Intervenors’
33 Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment of
34 Association of International Automobile Manufacturers, filed Nov. 22, 2006 (“Defendants’ Opp.
35 to AIAM MSJ”) (Docket No. 494) at 37-38.)

1 EPA and the Vermont case “present[ed] the same question” – whether there is “overlap but no
 2 conflict” between EPCA and the Clean Air Act. (*Green Mountain* at 104.) Judge Sessions
 3 concluded that the answer depends on congressional intent. (*Id.* at 105.) He found that in
 4 enacting and amending the Clean Air Act, Congress gave California broad latitude to
 5 “experiment and innovate” with motor vehicle emission standards, to the benefit of the entire
 6 nation. (*Id.* at 106.) Further, when enacting EPCA, Congress provided that NHTSA would treat
 7 California’s EPA-approved emission standards as “other motor vehicle standards of the
 8 Government.” (*Id.* at 105-12.) Judge Sessions concluded:

9 [O]nce EPA issues a waiver for a California emission standard, it
 10 becomes a motor vehicle standard of the government, with the
 11 same stature as a federal regulation with regard to determining
 12 maximum feasible average fuel economy under EPCA. Congress
 13 has consistently acknowledged interplay and overlap between
 14 emissions reductions regulations and fuel economy regulations,
 15 and could not have intended that an EPA-approved emissions
 16 reduction regulation did not have the force of a federal regulation.

17 (*Id.* at 112; *see also id.* at 127-29, 134-35.)^{6/}

18 Judge Sessions also rejected Plaintiffs’ argument that EPCA Section 32919(a) expressly
 19 preempts such standards even though they have federal status as “other motor vehicle standards
 20 of the Government” by virtue of Section 32902(f). He agreed with Defendants that, following
 21 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514
 22 U.S. 645, 656 (1995), these standards are not impermissibly “related to” fuel economy
 23 standards.^{7/} As Judge Sessions explained, Congress required NHTSA to take emission standards
 24 into consideration when setting fuel economy levels, “thereby ensuring that environmental
 25 concerns be given appropriate weight when NHTSA balances its four factors.” (*Green Mountain*

26 6. Judge Sessions took the unusual step of holding a 16-day trial before resolving
 27 the legal issues. In the end, he ruled for Defendants on the law, and as a back-up, on the facts as
 28 well. If this Court rules for Defendants on the law, there will of course be no need for another
 trial.

7. Plaintiffs ignore the dispositive effect of *Travelers* on their statutory construction
 argument. *See Travelers*, 514 U.S. at 656 (court must go beyond “unhelpful text” of “relate to”
 and look instead to the objectives of the statute). Despite Plaintiffs’ focus on the meaning of the
 word “a,” the key term in Section 32919(a) is “related to.”

1 at 112.). Thus,

2 The general language of the preemption clause and the
 3 absence of any indication of Congressional intent about its limits,
 4 combined with the specific requirement to take EPA-approved
 5 California emissions regulations into consideration, supports a
 6 conclusion that Congress did not clearly intend to preempt such
 regulations. Unless this Court is to ignore decades of EPA-issued
 and approved regulations that also can be said to “relate to” fuel
 economy, this regulation does not “relate to” fuel economy within
 the meaning intended by Congress.

7 (*Green Mountain* at 129.)^{8/}

8 Plaintiffs try to twist the Supreme Court’s observation that EPA and NHTSA may
 9 coordinate to “avoid inconsistency” into a *requirement* for such coordination. (*See* Plaintiffs’
 10 Response at 11-14.) Defendants have already addressed this issue. (*See* Defendants’ Opening
 11 Brief at 8-9 & n.6; Defendants’ Opposition Brief at 2-6.)^{9/} Moreover, consistent does not mean
 12 identical, as Plaintiffs and AIAM suggest. “[C]onsistent’ means ‘agreeing or according in
 13 substance or form,’ that is ‘congruous’ or ‘compatible.’” *Envtl. Defense Fund, Inc. v. EPA*, 82
 14 F.3d 451, 457 (D.C. Cir. 1996) (citing 3 Oxford English Dictionary 773 (2d ed. 1989)).
 15 Consistency “does not require exact correspondence” or “lock-step correspondence.” 82 F.3d at
 16 457, 460. For example, while the Clean Air Act prohibits California emission standards that “are
 17 not consistent with” section 202(a) of the Clean Air Act (42 U.S.C. § 7543(b)(1)(C)), Congress

18 _____
 19 8. Even assuming (contrary to Judge Sessions’ holding) that this actually is a
 20 preemption case, Plaintiffs deny that they must provide “clear evidence” to support preemption.
 21 (Plaintiffs’ Response at 10 n.19.) Even this argument is wrong. Recently, the Supreme Court
 22 explained that among different “plausible” interpretations of the scope of preemption, a courts’
 “duty [is] to accept the reading that disfavors pre-emption.” *Bates v. Dow Agrosciences LLC*,
 544 U.S. 431, 449 (2005); *see also Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541
 U.S. 246, 260 (2004) (requiring “clear and manifest” evidence of preemption in all cases).

23 It bears noting that Plaintiffs’ and AIAM’s briefs abandon their field preemption theory.
 24 That theory has no support after *Massachusetts v. EPA*, since the Supreme Court held that EPCA
 and the Clean Air Act are “wholly independent” and exist side-by-side. 127 S. Ct. at 1462. (*See*
 25 *also Green Mountain* at 131, 134-35.)

26 9. Contrary to Plaintiffs’ assertion, Defendants have in no way retreated from the
 27 position that trial, if allowed, should be limited to the issue of conflict with fuel economy
 standards already set by NHTSA (that is, light trucks for model years 2009 to 2011). (*See*
 28 Defendant and Defendant-Intervenors’ Memorandum of Points and Authorities in Support
 Motion for Summary Adjudication of EPCA Preemption Claim, filed Nov. 8, 2006 (Docket No.
 427); *see also* Defendants’ Opp. to AIAM MSJ at 27-36.)

1 was clear that California can set more stringent standards than EPA – and, after *Massachusetts v.*
2 *EPA*, more stringent than NHTSA fuel economy standards. (See Defendants’ Opening Brief at
3 5-6; see also *Green Mountain* at 8 (same).)

4 Judge Sessions also rejected Plaintiffs’ claim that the district courts are their “only
5 forum” for relief. (Plaintiffs’ Response at 14-16.) He recognized that Congress provided for
6 EPA to review manufacturers’ contentions about technological feasibility, lead time, cost, and
7 safety considerations during the Clean Air Act Section 209(b) waiver process. (See *Green*
8 *Mountain* at 116-17.) These agencies are the more appropriate venues for the factual issues
9 raised by Plaintiffs and AIAM. (See *id.* at 236.)

10 Plaintiffs’ real objection is that Congress entrusted the regulation of air pollutant
11 emissions from new motor vehicles to California, subject to EPA review in the waiver
12 proceeding. But that is the “congressional design.” See *Massachusetts v. EPA*, 127 S. Ct. at
13 1462 (discussing statutory constraints on EPA). Plaintiffs lost this argument over 40 years ago,
14 in 1967, and they should not be permitted to undermine the congressional design by insisting that
15 this Court wade into a trial on issues committed to EPA.

16 **II. PLAINTIFFS’ FOREIGN POLICY CLAIM HAS NO MERIT.**

17 Plaintiffs make the same foreign relations arguments here that they made in Vermont.
18 Based upon the same legislative enactments and Executive Branch documents that Plaintiffs and
19 Defendants have presented to this Court, Judge Sessions categorically rejected these claims.
20 (See *Green Mountain* at 222-34.)

21 Regarding *Massachusetts v. EPA*, Judge Sessions observed that “the Supreme Court
22 rejected the contention that regulating greenhouse gases domestically might impair the
23 President’s ability to negotiate with developing nations to reduce emissions: ‘[w]hile the
24 President has broad authority in foreign affairs, that authority does not extend to the refusal to
25 execute domestic laws.’ 127 S. Ct. at 1463.” (*Green Mountain* at 230 n.104.)

26 Judge Sessions then addressed two Supreme Court cases on which Plaintiffs have relied.
27 First, he rejected a claim based on *Zschernig v. Miller*, 389 U.S. 442 (1968), that state
28 greenhouse gas emission standards would disrupt U.S. foreign policy:

1 Quite apart from the highly speculative nature of this potential for
 2 disruption or embarrassment, the facts do not support the
 3 plaintiffs' argument. According to the recent release from the
 4 Department of State to the [UN Framework Convention on
 5 Climate Change], California's GHG regulation, far from charting a
 6 divergent, potentially disruptive or embarrassing course, fits
 7 squarely within the nation's emission reduction policies. Far from
 8 representing an intrusion into the "field" of foreign affairs
 9 entrusted exclusively to the national government, Vermont's
 10 regulation stands out as exemplifying a cooperative federal state
 11 approach to the global issues of climate change.

12 (*Green Mountain* at 230 (footnote omitted).) The referenced State Department report is the final
 13 version of the U.S. Climate Action Report that Defendants earlier submitted to this Court in draft
 14 form.^{10/} (*See* Defendants' Opening Brief at 12 n.9 & accompanying request for judicial notice,
 15 Exh. G (Docket No. 618-8).) As Judge Sessions noted, the final version of the Climate Action
 16 Report, like the draft Defendants quoted in Defendants' Opening Brief, expressly praises the
 17 very California emission standards at issue in this case. (*See Green Mountain* at 226-27.)
 18 Plaintiffs are reduced to the remarkable assertion that the praise lavished by the State
 19 Department on state actions – specifically including the California standards – “cannot be taken
 20 as evidence of Executive Branch approval.” (Plaintiffs' Response at 21:1-9.) Rather, Plaintiffs
 21 posit that the State Department reported them “only to avoid the embarrassment that would result
 22 either from ignoring the existence of those regulations or admitting to the international
 23 community” their supposed inconsistency with Executive Branch policy. (*Id.*) This far-fetched
 24 rationalization contrasts with the much simpler explanation that Judge Sessions found
 25 persuasive: “The report applauds nonfederal policies and measures that limit GHG emissions.”
 26 (*Green Mountain* at 226.)

27 Judge Sessions similarly dispatched Plaintiffs' reliance on *American Insurance*
 28 *Association v. Garamendi*, 539 U.S. 396 (2003):

Preemption thus is required under *Garamendi* if the
 plaintiffs have demonstrated a clear conflict between the state law
 and an express national foreign policy. [539 U.S.] at 420, 425.

10. Defendants' are submitting a copy of the relevant part of the final version of the
 U.S. Climate Action Report. (*See* Defendants' Supplemental Request for Judicial Notice, filed
 concurrently (“Supp. RJN”), Exh. A.)

1 The '302 plaintiffs contend that there is an express national foreign
2 policy against adopting unilateral binding limitations on GHG
emissions in favor of a comprehensive international response to the
3 issue. The Court has searched in vain for this policy.

4 Although the United States has consistently called for
international consensus and a comprehensive approach to global
warming, it has never disapproved of domestic regulation of
5 domestic GHG emissions. To the contrary. The United States has
praised such efforts to the international community. That the
6 United States also encourages voluntary efforts to reduce GHG
emissions is not evidence that domestic regulatory programs are
7 antithetical to the country's foreign policy. That the United States
did not ratify the Kyoto Protocol may be evidence that the United
8 States disapproved of international solutions that exempted
developing countries, and was concerned that such a plan would
9 unfairly tax the United States economy; it is not evidence of an
express policy against domestic regulation of greenhouse gases.

10
11 (*Green Mountain* at 232-33.) For these reasons Judge Sessions concluded that the auto industry
12 plaintiffs "have failed to demonstrate that Vermont's GHG regulation represents an insufferable
13 intrusion upon the field of foreign affairs, or that it constitutes a conflict with a national foreign
14 policy."^{11/} (*Id.* at 233-34.)

15 Lastly, Plaintiffs also cite a passage from the standing portion of *Massachusetts v. EPA*
16 observing that a state may not negotiate and emissions treaty with China or India. (Plaintiffs'
17 Response at 19 (citing 127 S. Ct. at 1454).) But that, of course, is not what California is doing.^{12/}

18
19 11. In making this finding, Judge Sessions had before him the EPA rulemaking
20 notice that the Supreme Court vacated in *Massachusetts v. EPA* and the Solicitor General's brief
21 that the Supreme Court rejected, both of which Plaintiffs continue to rely on. But even these two
22 now-defunct documents (which even when purportedly operational did not even address state
regulation) can hardly be relied on to establish an Executive Branch policy forbidding state
regulation of greenhouse gases.

23 Here, Plaintiffs also cite various documents relating to this year's G-8 Summit and
President Bush's decision to hold a meeting of major economies on September 27 and 28, 2007.
24 (Plaintiffs' Response at 22.) Perusal of these documents similarly reveals no statement of a
25 federal policy against state regulation of greenhouse gases. Just yesterday, in fact, Secretary of
26 State Rice confirmed that the Administration is not pursuing a strategy of negotiating reciprocal
27 binding agreements. (*See* Supp. RJN, Exh. B at 2 ("Every country will make *its own* decisions,
reflecting *its own* needs and *its own* interests, *its own* sources of energy and *its own* domestic
politics. Though united by common goals and collective responsibilities, all nations should
28 tackle climate change in the ways that they deem best.") (emphasis added).)

12. Plaintiffs continue to accuse California's Governor of attempting to conduct his
own foreign policy, by holding a meeting with British Prime Minister Tony Blair. (Plaintiffs'

1 California has issued an emissions regulation which, as Judge Sessions found, “stands out as
2 exemplifying a cooperative federal state approach to the global issues of climate change.”
3 (*Green Mountain* at 230.)

4 Over the past year, the Executive Branch issued new documents that undercut Plaintiffs’
5 claims and the Supreme Court issued *Massachusetts v. EPA*. Defendants respectfully submit that
6 Judge Sessions’ analysis of the identical foreign policy claim presented in this Court, and of the
7 past years’ events, is correct and should be followed here.

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27 Response at 21.) Defendants have already pointed out the White House spokesman’s own
28 statements that the Administration takes no issue with the Governor’s actions. (*See* Defendants
and Defendant-Intervenors Reply Memorandum in Support of Their Motion for Summary
Adjudication on Foreign Policy Claim, filed Dec. 4, 2006 (Docket No. 541) at 8-9.)

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CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter judgment in their favor.

Dated: September 28, 2007

Respectfully submitted,

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