

1 Plaintiffs in the FAC include the following automobile
2 dealerships located in Modesto, Turlock, Merced, Madera, Lemoore,
3 Tulare, and Porterville: Central Valley Chrysler-Jeep, Inc.;
4 Kitahara Pontiac GMC Buick, Inc.; Madera Ford Mercury, Inc.;
5 Madera Chevrolet; Frontier Dodge, Inc.; Tom Fields Motors, Inc.;
6 Pistoresi Chrysler Dodge Jeep; Bob Williams Chevrolet; Courtesy
7 Oldsmobile Cadillac, Inc.; Merle Stone Chevrolet, Inc.; Merle
8 Stone Porterville, Inc.; Sturgeon and Beck Incorporated; and
9 Swanson Fahrney Ford, Inc. General Motors Corporation and
10 DaimlerChrysler Corporation are also plaintiffs. The Tulare
11 County Farm Bureau and the Alliance of Automobile Manufacturers
12 are also plaintiffs. The defendant is Catherine E. Witherspoon
13 in her official capacity as Executive Officer of the California
14 Air Resources Board.

15 The FAC alleges that it is an action for declaratory and
16 injunctive relief under the Supremacy Clause in Article VI of the
17 United States Constitution and 42 U.S.C. § 1983. The FAC
18 challenges the requirements of A.B. 1493, codified at California
19 Health and Safety Code § 43018.5, and the regulation proposed by
20 the California Air Resources Board (CARB) set forth in Resolution
21 No. 04-28, dated September 24, 2004. The FAC alleges that CARB
22 has interpreted the statute to require the adoption and
23 enforcement of rules to limit the release of carbon dioxide from
24 new motor vehicles sold in California beginning in the 2009 model
25 year, which starts in calendar year 2008. The FAC, which is very
26 verbose, alleges the following claims for declaratory and

1 injunctive relief:

2 1. Count I - Preemption under the Energy
3 Policy and Conservation Act of 1975 (EPCA),
4 49 U.S.C. §§ 329021-32919, specifically
5 Section 32919(a).

6 2. Count II - Preemption under § 209(a) of
7 the Federal Clean Air Act, 42 U.S.C. §
8 7543(a).

9 3. Count III - Preemption under the foreign
10 policy of the United States and the foreign
11 affairs powers of the Federal Government.

12 4. Count IV - Violation of the Dormant
13 Commerce Clause of the United States
14 Constitution.

15 5. Count V - Violation of the Sherman Act,
16 15 U.S.C. § 1.

17 The FAC prays for a declaratory judgment that "the regulation
18 adopted by CARB and Defendant on September 24, 2004, in
19 Resolution 04-28 violates federal law" and for a preliminary and
20 permanent injunction enjoining Defendant "from implementing or
21 enforcing the regulation adopted by CARB in Resolution 04-28, or
22 any substantially similar regulation."

23 The Association of International Automobile Manufacturers
24 (AIAM) has filed a motion to intervene pursuant to Rule 24,
25 Federal Rules of Civil Procedure.

26 AIAM is a trade association of manufacturers, manufacturer-
authorized importers, and distributors of motor vehicles. Its
members include American Honda Motor Company, Inc.; American
Suzuki Motor Corporation; Aston Martin Lagonda of North America,
Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu
Motors America, Inc.; Kia Motors America, Inc.; Maserati North

1 America, Inc.; Mitsubishi Motors North America, Inc.; Nissan
2 North America, Inc.; Peugeot Motors of America, Inc.; Renault, SA;
3 Subaru of America, Inc.; and Toyota Motor North America, Inc.

4 AIAM asserts that the its members account for approximately
5 40% of annual sales in California of passenger cars and light
6 trucks. AIAM contends that, in order to meet the new-California
7 specific standards on the time-table set by the proposed
8 regulation, it's members will be forced to develop and implement
9 substantial motor vehicle design and manufacturing changes, which
10 changes require that AIAM members undertake immediate and
11 intensive capital investments in both research and development
12 and manufacturing.

13 A. Intervention As Of Right.

14 Rule 24(a), Federal Rules of Civil Procedure, which governs
15 intervention as of right, provides in pertinent part:

16 Upon timely application anyone shall be
17 permitted to intervene in an action ... when
18 the applicant claims an interest relating to
19 the property or transaction which is the
20 subject of the action and the applicant is so
21 situated that the disposition of the action
22 may as a practical matter impair or impede
23 the applicant's ability to protect that
24 interest, unless the interest is adequately
25 protected by existing parties.

26 An applicant may intervene as of right pursuant to Rule
27 24(a) if the following elements are satisfied: (1) the motion
28 must be timely; (2) the applicant must have a "significant
29 protectable interest" relating to the property or transaction
30 which is the subject of the action; (3) the applicant must be

1 situated such that disposition of the action may as a practical
2 matter impair or impede its ability to protect that interest; and
3 (4) the applicant's interest must be inadequately represented by
4 the parties to the action. Smith v. Marsh, 194 F.3d 1045, 1049
5 (9th Cir. 1999). The court must interpret the rule broadly in
6 favor of intervention. Forest Conservation Council v. U.S.
7 Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995).

8 There is no dispute by defendant that this application for
9 intervention is timely, that the applicant has a significant
10 protectable interest in the subject of this action, and that the
11 disposition of this action may impair or impede the applicant's
12 ability to protect that interest.

13 The focus of this motion is on the final requirement, i.e.,
14 that the applicants' interest will be inadequately represented by
15 the existing plaintiffs.

16 With respect to this factor, the Ninth Circuit sets forth
17 the following standards in Southwest Center for Biological
18 Diversity v. Berq, 268 F.3d 810, 822-823 (9th Cir. 2001):

19 In determining whether a would-be
20 interveners's interests will be adequately
21 represented by an existing party, courts
22 consider:

- 23 (1) whether the interest of a
24 present party is such that it will
25 undoubtedly make all the
26 interveners's arguments; (2)
 whether the present party is
 capable and willing to make such
 arguments; and (3) whether the
 would-be interveners would offer
 any necessary elements to the
 proceedings that the other parties

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would neglect.

... The prospective interveners bears the burden of demonstrating that the existing parties may not adequately represent its interest ... However, the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate. In assessing the adequacy of representation, the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion.

A legal issue raised in connection with this motion to intervene is whether a presumption of adequate representation applies to its resolution. Defendant refers to cases referring to such a presumption but AIAM takes the position that this presumption applies only to applications for intervention on the side of the public agency charged with enforcing or implementing challenged regulations or laws.

The court concludes that the standard is not limited as AIAM contends. In Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir.), cert. denied, 540 U.S. 1017 (2003), further explained:

The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties ... When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises ... If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation

There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents ... In the absence of a 'very compelling showing to the

1 contrary,' it will be presumed that a state
2 adequately represents its citizens when the
3 applicant shares the same interest ... Where
4 the parties share the same ultimate
5 objective, differences in litigation strategy
6 do not normally justify intervention.
7 [Emphasis added]

8 While it appears that most of the cases discussing the
9 presumption of adequate representation involve challenges to
10 government action, as does Arakaki, the discussion by the Ninth
11 Circuit quoted above implies that the presumption of adequate
12 representation applies to any application for intervention
13 "[w]hen an applicant for intervention and an existing party have
14 the same ultimate objective" Furthermore, "[a] mere
15 difference of opinion concerning the tactics with which
16 litigation should be handled does not make inadequate the
17 representation of those whose interests are identical with that
18 of an existing party or who are formally represented in the
19 lawsuit." Wright, Miller & Kane, 7C Federal Practice and
20 Procedure, § 1909, p. 344 (1986).

21 In contending that it has made the minimal showing of
22 inadequacy of representation by the existing plaintiffs required
23 by the Ninth Circuit, AIAM argues:

24 AIAM's ability to protect the interests of
25 its members is not adequately represented ...
26 because those plaintiffs represent different
 automobile manufacturers which may have a
 different perspective when its comes to
 automotive fuel economy and emissions
 standards and different goals in this
 litigation. As global manufacturers, AIAM'S
 members have a critical need for both
 national and international uniformity in
 emissions and fuel economy standards that

1 impact the design and manufacture of
2 automobiles. Accordingly, AIAM's proposed
3 Complaint in Intervention is focused on this
4 need for uniformity, and how Congress
5 recognized the importance of uniform
6 standards in enacting the preemptive
7 provisions of both EPCA and the CAA. The
8 Central Valley Chrysler-Jeep plaintiffs may
9 not share the same international perspective
10 as AIAM, and their complaint raises issues
11 not espoused by AIAM. Therefore, the
12 arguments they will advance concerning the
13 constitutionality of the CARB Greenhouse Gas
14 Regulations will likely be framed differently
15 and have a different perspective than the
16 arguments AIAM will raise.

9 The court has reviewed the proposed Complaint in
10 Intervention. It appears to raise the same essential issues as
11 raised by the existing plaintiffs in the FAC. The proposed
12 Complaint in Intervention alleges only two claims: (1) a claim
13 for declaratory and injunctive relief for preemption under the
14 Federal Energy Policy and Conservation Act; and (2) a claim for
15 declaratory and injunctive relief under the Federal Clean Air
16 Act. As noted, both of these claims are alleged in the FAC. In
17 its reply brief, AIAM refers to its proposed opposition to
18 defendant's Motion to Dismiss, for which leave has not been
19 granted to file. AIAM asserts that it felt compelled to file
20 this opposition because plaintiffs did not make "certain points
21 concerning the finality of the regulations and the immediate
22 burden on the automobile manufacturers that AIAM believed were
23 important for the Court to consider." AIAM contends that there
24 is no reason to conclude that the existing plaintiffs will
25 provide more adequate representation of AIAM in the future stages
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1 of this litigation.

2 AIAM further contends that it has made the minimal showing
3 that the existing plaintiffs will not adequately represent its
4 interest:

5 [N]ot all automobile manufacturers are
6 similarly situated with regard to technology
7 and product mix, and some manufacturers will
8 consequently prioritize issues in this
9 litigation differently from others. Thus, in
10 the event that this matter is resolved
11 through a stipulated settlement between CARB
12 and the Central Valley Chrysler-Jeep
13 Plaintiffs - and without the involvement of
14 and input from AIAM - there is the potential
15 that AIAM's members will be prejudiced by the
16 settlement. The only way for AIAM to protect
17 these unique interests of its members is to
18 participate in this action.

19 In opposing this motion to intervene, defendant points out
20 that the Alliance of Automobile Manufacturers (hereinafter
21 referred to as the Alliance), an existing plaintiff in this
22 action, is a trade association of nine car and light truck
23 manufacturers including BMW of North American, LLC;
24 DaimlerChrysler Corporation; Ford Motor Company; General Motors
25 Corporation; Mazda North American Operations; Mitsubishi Motor
26 Sales of America, Inc.; Porsche Cars North America, Inc.; Toyota
27 Motor North America, Inc.; and Volkswagen of America, Inc.
28 Members of the Alliance accounted for approximately 78% of sales
29 in California in 2003 of all passenger cars, light duty truck and
30 medium duty vehicle sales. Defendant points out that Toyota
31 Motor North America, Inc. is a member of both AIAM and the
32 Alliance. Toyota's market share of automobile and truck sales in

1 California in 2003 was approximately 18.88%. Defendant also
2 notes that DaimlerChrysler and General Motors Corporation are
3 plaintiffs in this action. DaimlerChrysler's market share of
4 automobile sales in California in 2003 was approximately 11.32%.
5 DaimlerChrysler operates worldwide and sold 3.9 million units
6 worldwide in 2004. DaimlerChrysler's strategy "rests on four
7 pillars: global presence, strong brands, broad product range, and
8 technological leadership" and has a "global workforce and a
9 global shareholder base", being owned by "European, U.S. and
10 other international investors." General Motors claims to be the
11 world's largest automobile manufacturer and the "global industry
12 sales leader since 1931" with manufacturing operations in 32
13 countries and vehicle sales in 200 countries. In 2004, General
14 Motors sold nearly 9 million cars and trucks worldwide and its
15 market share of automobile and truck sales in California in 2003
16 was approximately 20.9%. Defendant asserts that General Motors
17 is a global partner with Fuji Heavy Industries, Ltd. [Subaru],
18 Isuzu Motors Ltd., and Suzuki Motor Corporation of Japan. Isuzu
19 Motors Ltd. and Suzuki Motor Corporation of Japan are the parent
20 companies of AIAM members Isuzu Motors America, Inc. and American
21 Suzuki Motor Corporation, which two companies accounted for
22 approximately 0.12% and 0.48% of AIAM's members' market share of
23 sales in California in 2003. General Motors also has technology
24 collaborations and vehicle manufacturing ventures with Toyota,
25 Suzuki and Renault, members of AIAM and General Motors owed 20.3%
26 of Suzuki in 2004. Mitsubishi Motor Sales of America, Inc., a

1 member of both the Alliance and AIAM, accounted for approximately
2 1.89% of automobile and truck sales in California in 2003 and
3 DaimlerChrysler owns approximately 37% of Mitsubishi. AIAM
4 member Subaru of America, Inc. is owned by Fuji Heavy Industries,
5 Ltd., which has formed a "strategic alliance" with General Motors
6 Corporation that will allow "FHI to continue to enhance its
7 product lineup through joint development with GM". Subaru
8 accounted for approximately 0.83% of sales for motor vehicles in
9 California in 2003. Aston Martin Lagonda of North America is
10 owned by Ford Motor Company, a member of the Alliance. In 2003,
11 Ford's sales accounted for approximately 16.86% of California
12 sales.

13 Defendant relies on these statistics in arguing that
14 approximately half of AIAM's members' market share is already
15 represented by the Alliance, General Motors and DaimlerChrysler
16 and that the existing plaintiffs will adequately represent the
17 interests of AIAM.

18 However, as AIAM responds, even though Toyota and Mitsubishi
19 are members of both the Alliance and AIAM, there are ten other
20 automobile manufacturers in AIAM who are not members of the
21 Alliance, including such high volume manufacturers as Honda,
22 Nissan and Hyundai. AIAM argues that these members have just as
23 significant an interest in this challenge to the proposed
24 regulations as to the existing plaintiffs and have just as much a
25 right to have their interests represented in this litigation.
26 Furthermore, AIAM contends, there is no reason to believe that

1 the two common member companies will adequately represent the
2 interests of the ten other AIAM members.

3 AIAM further argues that the Alliance and AIAM represent
4 divergent interests in the automobile market and are, for the
5 most part, competitors. AIAM's membership is limited to
6 international automobile manufacturers while the Alliance
7 welcomes all new car and light truck manufacturers. AIAM
8 contends that defendant's analyses concerning the proposed
9 regulations demonstrate that foreign manufacturers are situated
10 quite differently from domestic manufactures in terms of green
11 house gas emissions and fuel economy.

12 The court concludes that AIAM is entitled to intervention as
13 of right. The existing plaintiffs and AIAM share the same
14 ultimate objective in this litigation, i.e., to overturn the
15 proposed regulation as preempted by federal law. However,
16 because the members of the Alliance and AIAM are to some extent
17 competitors, AIAM has demonstrated that the Alliance or the other
18 existing plaintiffs might not act in this litigation to protect
19 the interests of AIAM, particularly if the action is settled.

20 B. Permissive Intervention.

21 Even if the court's conclusion that these applicants are
22 entitled to intervention as of right is erroneous, the court
23 concludes that these applicants are entitled to permissive
24 intervention.

25 Permissive intervention is governed by Rule 24(b):

26 Upon timely application anyone may be

1 permitted to intervene in an action ... when
2 an applicant's claim or defense and the main
3 action have a question of law or fact in
4 common ... In exercising its discretion the
5 court shall consider whether the intervention
6 will unduly delay or prejudice the
7 adjudication of the rights of the original
8 parties.

9 An applicant who seeks permissive intervention must demonstrate
10 that it meets three threshold requirements: (1) it shares a
11 common question of law or fact with the main action; (2) its
12 motion is timely; and (3) the court has an independent basis for
13 jurisdiction over the applicant's claims. Donnelly v. Glickman,
14 159 F.3d 405, 412 (9th Cir. 1998). "Even if the applicant
15 satisfies those threshold requirements, the district court has
16 discretion to deny permissive intervention ... In exercising its
17 discretion, the district court must consider whether intervention
18 will unduly delay the main action or will unfairly prejudice the
19 existing parties." Id.

20 There is no dispute that the applicants satisfy the three
21 threshold requirements. The issue is whether permissive
22 intervention will unduly delay the main action or unfairly
23 prejudice the existing parties.

24 As AIAM contends, permissive joinder will not unduly delay
25 the litigation because it is still in the preliminary stages and
26 no discovery has yet commenced.

However, the court expresses its concern about the risk of
undue delay because of AIAM's intervention be minimized by the
parties. The amount of paper already generated in this case is

1 staggering and includes not only the briefs pro and con, but
2 numerous declarations and evidentiary submissions, objections to
3 those declarations and/or evidence, and responses to those
4 objections. In order to prevent the court and the parties from
5 being overwhelmed, the court will require AIAM to coordinate its
6 positions with the existing plaintiffs and to only file separate
7 motions and/or briefs if the existing plaintiffs refuse or cannot
8 factually make an argument AIAM considers relevant. In imposing
9 this requirement, the court cautions that merely because counsel
10 for AIAM believes he can word an argument better or that there
11 may be a case that could be cited but was not, counsel for AIAM
12 should not file a separate motion or brief. The court also
13 requires that plaintiffs and AIAM coordinate scheduling and
14 discovery with the other parties to this litigation to minimize
15 time and expense.

16 ACCORDINGLY:

17 1. The motion to intervene filed by the Association of
18 International Automobile Manufacturers is granted.

19 IT IS SO ORDERED.

20 **Dated: October 20, 2005**
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE

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