UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE-JEEP, et al., Plaintiffs,	)	Hon. William K. Sessions III
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, Plaintiff, v. GEORGE CROMBIE, et al., Defendants.	)	Case Nos. 2:05-CV-302, and 2:05-CV-304 (Consolidated)

DEFENDANTS AND DEFENDANT-INTERVENORS' EXPEDITED MOTION TO STAY AND REQUEST FOR RULE 16 CONFERENCE AND MEMORANDUM IN SUPPORT

The State of Vermont and Defendant-Intervenors (collectively, "Defendants") renew their request for a stay of these cases pending the decision of the United States Supreme Court in Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), cert. granted, 126 S.Ct 2960 (2006), No. 05-1120.[1] Given the upcoming trial date for these cases, Defendants request that this motion be expedited. Defendants also request a hearing on this motion and a Rule 16 Conference as soon as conveniently possible.

INTRODUCTION

In an order filed on January 16, 2007, the California court in the related case of Central Valley Chrysler-Jeep et al. v. Witherspoon ("Central Valley") (E.D. Cal. No. 1:04-CV-06663-AWI-LJO) re-examined its earlier decision on whether to stay that case pending

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[1] Plaintiffs did not consent to this motion. See L.R. 7.1(b).

the Supreme Court's decision in Massachusetts, and has now issued a stay.[2] See Exhibit 1 (Memorandum Opinion and Order On Defendants' Motion for Summary Judgment On The Issue Of Ripeness And/Or Mootness and Order For Stay of Further Proceedings, filed January 16, 2007 ("Central Valley Stay Order")).

As set forth below, the Central Valley court's reasoning is persuasive and should guide this Court's decision. At this juncture, it is clear that, as the Central Valley court found, a ruling in Massachusetts could obviate the need for this Court to consider the remaining claims presented in these cases or could greatly narrow the issues for trial. In addition, the stay of the Central Valley case and the discovery produced in the Vermont case undercut any assertion by the Plaintiffs that they will suffer harm from a short delay here.

LEGAL STANDARD

The power of federal district courts "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254 (1936). As noted by the Central Valley court, a stay of proceedings is appropriate under Landis if: (1) the decision in the pending case or cases will settle or simplify some, but not necessarily all, issues of law or fact in the case being stayed, id. at 256, and (2) the stay is reasonable in duration. Central Valley Stay Order, p. 14. The Central Valley court further noted that "[a]mong the competing interests are the possible damage which may result from the granting of the stay … and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law

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[2] Central Valley Defendant Catherine E. Witherspoon, in her official capacity as Executive Officer of the California Air Resources Board, by and through California Attorney General Edmund J. Brown Jr., supports the Defendants' request for a stay in these cases. Exhibit 2.

which could be expected to result from a stay." Id. (quoting Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005).

ARGUMENT

I. The Supreme Court's Decision In Massachusetts Will Simplify, If Not Settle, All The Remaining Claims Presented In This Case.

In reversing its decision of August 25, 2006 that a Landis stay was not warranted, the Central Valley court explained that the "passage of time, the narrowing of issues remaining to be resolved in this case and the availability of the pleadings currently before the Supreme Court in Massachusetts v. EPA persuade this court that a Landis stay is now appropriate." Central Valley Stay Order, p. 15. As set forth below, many of the circumstances cited by the Central Valley court in support of its decision to stay the case apply with equal – if not more – force in these cases.[3]

At the time that the Central Valley court ruled on the motion for a stay based on the grant of certiorari in Massachusetts, the court noted that all five of Plaintiffs' claims were pending resolution. By contrast, in its January 2007 decision, the Central Valley court recognized that the Sherman Act and Dormant Commerce Clause claims have been dismissed (and the Clean Air Act claim was resolved) leaving only the EPCA and Foreign Policy claim. Central Valley Stay Order, p. 15. Likewise, the Plaintiffs in this case have dismissed the Sherman Act and Dormant Commerce Clause claims, and the Plaintiffs did not oppose Defendants' motion for judgment on the pleadings on the Clean Act Air

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[3] As this Court has noted, the legal issues presented in these cases are the same. See May 3, 2003 Order (Doc. 46, May 3, 2006), p. 2 ("[t]he claims asserted by the California Plaintiffs are virtually identical to the claims asserted in the Vermont cases").

preemption claim.[4] See Memorandum of Plaintiffs Green Mountain Chrysler Plymouth Doge, Inc., et al. in Opposition to Motion for Judgment on the Pleadings (Doc. No. 195, filed January 16, 2007). Therefore, effectively, only the EPCA and Foreign Policy claims remain in both cases.

Furthermore, in its original decision in August 2006, the Central Valley court "expressed doubt that the Supreme Court would reach the merits of its case, and reasoned that even if the Supreme Court did reach the merits, the holding would not affect the disposition of Plaintiffs' EPCA or foreign policy preemption claims in this case." Central Valley Stay Order, pp. 15-16. However, after having the benefit of reviewing the pleadings filed in Massachusetts, the Central Valley court found cause to revisit its previous decision. Id. at 15-16. This Court now also has the advantage of being able to examine briefs submitted in Massachusetts to see the connection to the Plaintiffs' remaining claims. See Exhibit 3 (Brief of Federal Respondents, see, e.g., pp. 17-18, 24-25; Exhibit 4 (Brief of Petitioners, see, e.g., pp. 29-32); Exhibit 5 (Brief of Alliance of Automobile Manufacturers, see, e.g., pp. 37-38).

"Although at first blush it appears that the issues of EPCA preemption or foreign policy preemption are not directly before the Supreme Court, close examination [of the briefs] reveals that the legal issues in this case will be greatly simplified if the Supreme Court reaches the merits of the Massachusetts v. EPA case." Central Valley Stay Order, p. 16; see also id. (Massachusetts decision will have a "clarifying effect" on Plaintiffs' claims); id. at 18 (Plaintiffs' claims will be "greatly affected and simplified" by the Supreme Court's

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[4] The AAM Plaintiffs also have a statutory claim under section 177 of the Clean Air Act. However, as demonstrated in the Defendants' judgment on the pleadings, this claim can be resolved on the law at this time.

decision). For example, as demonstrated by the pleadings in Massachusetts, "the elements of the arguments regarding EPCA that are set forth in Massachusetts v. EPA exactly mirror the structure and elements of the arguments presented by Plaintiffs in this case." Id. at 19. In both cases, "that argument is that the regulation of carbon dioxide emissions from automobiles is tantamount to the regulation of fuel efficiency, which is an area exclusively delegated by Congress to DOT through EPCA." Id.

If the Supreme Court decides the merits in Massachusetts, it will "necessarily" address "whether the regulation of carbon dioxide is, in fact, tantamount to regulation of fuel economy," which "will greatly simplify the resolution of the issues now before the court in this case." Id. In fact, the Central Valley court explicitly reasoned that a decision by the Supreme Court that reverses EPA's decision that it does not have authority to regulate greenhouse gases will "address and overcome Plaintiffs' claims with respect to EPCA and foreign policy preemption." Id. at 21 (emphasis added). Therefore, a decision in Massachusetts along these lines could be entirely dispositive of Plaintiffs' claims, and there is a strong possibility that the California case would never proceed to trial. Similarly, if the Supreme Court finds that the Clean Air Act does not cover greenhouse gases, the Central Valley court suggested that California's (and, by extension, Vermont's) regulations cannot stand. Id. at 16-17. For this reason, a decision in advance of the Supreme Court decision would likely "be superfluous, unnecessary and prudentially unsound." Id. at 18.

In addition, even if the Supreme Court were to base its decision on standing grounds, a Landis stay would still be appropriate based on the impact on Plaintiffs' foreign policy preemption claim. Id. at 20. As noted by the Central Valley court, "[c]onsideration of United States foreign policy crop[s] up in the parties' briefs both with respect to standing and with respect to Congress's evident intent to authorize or not authorize EPA to regulate

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greenhouse gas emissions through the Clean Air Act" and was also evident in oral argument before the Supreme Court. Id. at 20-21.

In sum, the Central Valley court's conclusion that its determination of Plaintiffs' EPCA and foreign policy claims will be "greatly affected and simplified" by the Supreme Court's decision in Massachusetts is equally applicable to this case. Id. at 18. Accordingly, the first element of the Landis analysis is easily satisfied here.

II. A Stay Of A Limited Duration Is Reasonable And Will Not Appreciably Harm Any Of The Plaintiffs In The Vermont Cases.

As set forth below, the limited stay requested here is reasonable, especially in light of the fact that Plaintiffs will not be appreciably harmed by a brief delay to allow the Supreme Court to issue its decision in the Massachusetts case.

A. The Stay Requested Here Is Of Limited Duration And Is Reasonable.

When the California court first considered whether a Landis stay was appropriate, the stay would have resulted in an approximately one-year delay. Central Valley Stay Order, p. 15. By contrast, because the Supreme Court is expected to issue a decision by no later than June 2007, the Central Valley court's January 2007 Order noted that the term of the stay would be "on the order of six months." Id.

Likewise, a stay in this case would be of the same limited duration. Assuming that a trial were necessary in the Central Valley case (see, supra, p. 5), the parties in California could begin to prepare for trial as soon as the Supreme Court issues its decision or no later than July 2007. Because this Court has previously noted the logic of having a trial in California precede a trial in Vermont, if trials are needed at all, a similar six-month stay of Vermont's current trial date of late-March 2007 should allow sufficient time for the Supreme Court to rule and the California case to complete its trial, if needed. In short, a

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limited stay to await the Supreme Court's decision and allow the Central Valley court to hold a trial, if necessary, is reasonable.

B. None Of The Plaintiffs Will Suffer Any Appreciable Harm From A Brief Delay.

The alleged harms asserted by both the Vermont Dealer Plaintiffs and the out-of-state Manufacturer Plaintiffs are either contingent on EPA granting California's waiver application or can be alleviated only by a decision by the Central Valley court. Accordingly, the Plaintiffs will not be appreciably harmed by a short delay so that this Court (and the parties) have the benefit of the Supreme Court's decision in Massachusetts.

1. The Vermont Dealers will not be harmed by a short delay.

The Vermont automobile dealer Plaintiffs[5] will not be harmed from waiting for resolution of the Massachusetts case. The Dealer Plaintiffs allege that when Vermont's GHG regulations go into effect, they will lose sales due to the added cost of the redesigned vehicles and a decrease in the availability of certain models. See AAM Complaint, ¶18 (The GHG standards will "reduce the new-vehicle sales" resulting in "losses in profits and goodwill."). This alleged harm, however, is completely unaffected by a short stay because Vermont's regulations are not scheduled to go into effect until the model year 2009 and also must wait for EPA to grant a waiver to California. Moreover, it is highly unlikely that EPA will rule on California's waiver application before the Supreme Court issues its decision in Massachusetts. Therefore, Vermont's regulations will not go into effect while this litigation is stayed or any time in the near future thereafter.

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[5] The in-state Plaintiffs are automobile and light truck dealers, including Green Mountain Chrysler-Plymouth-Dodge-Jeep, Green Mountain Ford-Mercury, and Joe Tornabene's GMC ("Dealer Plaintiffs").

Recognizing this shortcoming concerning the dealers' present harm, the Plaintiffs also allege that the Vermont Dealers are suffering harm due to loss of current "business value." Memo of Plaintiffs Green Mountain Chrysler Plymouth Dodge, Inc., et al. in Response to Defendants and Defendant-Intervenors' Motion to Modify the Scheduling Order ("AAM Memo. in Opp. to Modify") (Doc. No. 87, July 25, 2006), p. 2. In support of this allegation of present harm, they cite the Declaration of Donald P. Wisehart (Doc. No. 70, filed June 28, 2006). This Court, however, previously questioned the use of this declaration to demonstrate harm to the Vermont Dealers. See Memorandum Opinion and Order ("Ripeness Order") (Doc. No. 165, Nov. 30, 2006), p. 10 (stating that Mr. Wisehart's "declaration is obviously not evidence that the dealers are currently experiencing injury").

Moreover, deposition testimony by the Vermont dealers refutes their assertions that they are suffering current harm. For example, Ronald Carpenter, the owner of Plaintiff Green Mountain Chrysler-Plymouth-Dodge-Jeep and Plaintiff Green Mountain Ford-Mercury was questioned whether the GHG regulations were currently harming his dealerships:

Q: Has it had any adverse effect yet?
A: No.

Exhibit 6 (Excerpts of the Deposition of Ronald Carpenter (Oct. 20, 2006), p. 48, lines 4-5).[6]

Similarly, Joseph F. Tornabene, Jr. of Plaintiff Joe Tornabene's GMC testified on this issue:

Q: So my question is, as you sit here today, can you see any way before those regulations go into effect that you are currently being harmed?

* * *

A: Today?

* * *

A: I can't point to any today.

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[6] Plaintiffs' counsel did not object to this question.

Exhibit 7 (Excerpts of the Deposition of Joseph F. Toranbene (Oct. 11, 2006), p. 56, lines 13-15, p. 57, lines 1, 5).[7] Thus, a short Landis stay in order to allow the Supreme Court to issue its decision in Massachusetts will not prejudice any of the Vermont Dealer Plaintiffs.

2. The Manufacturer Plaintiffs will not be harmed because their alleged harm can only be alleviated by the Central Valley Court.

The out-of-state Manufacturer Plaintiffs, including General Motors Corp., Daimler Chrysler Corp., the Alliance of Automobile Manufacturers, and the Association of International Automobile Manufacturers will not be harmed if this case is stayed because their alleged current harm is based on their alleged need to redesign vehicles to meet the GHG standards. See AAM Memo in Opp. to Modify, p. 2 (vehicle manufacturers have an "increasingly narrow window of time to design, test and prepare to produce new vehicles that would comply with the [GHG] standards"); AIAM Opposition to Defendants' Motion to Stay Cases, p. 3 (Doc. No. 25, Feb. 24, 2006) ("developing and implementing the technological and design changes necessary … to meet the Vermont standards can be a complicated task").

Regardless of how this Court might rule in this case, however, it will be the United States District Court in California and EPA that determine whether the automobile manufacturers will have reason to redesign their vehicles in the way that the Plaintiffs allege. Resolving the legality of Vermont's regulation alone will not lessen that alleged harm to any substantial degree because uncertainty will still remain with respect to the

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[7] Plaintiffs' counsel objected as to the form of the question, and subsequently objected by asserting that it was a question that had been "asked and answered." Tornabene Dep., pp. 56-57. Plaintiffs did attempt to rehabilitate Mr. Tornabene, but he merely testified (id. at 79-80) that he agreed with the contents of Paragraph 64 of the AAM Complaint, which sets forth the same basic "present value" allegations that this Court has already questioned with respect to the Declaration of Donald P. Wisehart.

California regulations (as well as the other states that have adopted California GHG regulations). For similar reasons a stay pending a decision in Massachusetts cannot cause any harm. Unless and until the Central Valley court rules that the GHG regulations are invalid (or EPA denies California's waiver request), the Manufacturer Plaintiffs will have to continue to prepare to meet California's standards.

Even assuming that the automobile manufacturer Plaintiffs argue that, for sales planning purposes, they need to prepare now for the prospect that the GHG regulations will go into effect in Vermont, there will be a negligible impact. New automobile and light truck sales for franchised dealers in Vermont in 2004 were approximately 40,000.[8] The sales of new automobiles and light trucks in California in 2004, on the other hand, totaled over 2,000,000.[9] Thus, the automobile manufacturers produce 50 times more automobiles and light trucks for California dealers than they do for Vermont. Put another way, more automobiles and light trucks are sold in California in about a week than in Vermont in an entire year. Furthermore, nationwide sales of new automobiles for 2004 were approximately 13.5 million, which puts Vermont sales at 0.3 % of the U.S. share.[10]

These sales statistics illustrate the minimal impact of this litigation on the Manufacturer Plaintiffs' sales planning estimates as compared to their existing obligation to market "California cars" in California and all the other states that have adopted California's

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[8] See "2004 Economic Impact Report: The Economic Impact of Franchised New Vehicle Dealerships on the Vermont Economy," Vermont Automobile Dealer Association, p.6, http://www.vermontada.org/docs/ImpactStudy2005.pdf (last accessed January 24, 2007).

[9] See "2005 State Economic Impact Report of California Franchised New Car and Truck Dealerships," p. 3; http://www.cmcda.org/economic05.pdf (last accessed January 24, 2007).

[10] See U.S. Bureau of Transportation statistics, Retail New Passenger Car Sales, http://www.bts.gov/publications/national_transportation_statistics/2005/html/table_01_16.html (last accessed January 24, 2007.

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regulations. Thus, in consideration of the very small number of automobiles needed for Vermont Dealers starting, at the earliest, in model year 2009, the Manufacturer Plaintiffs cannot allege that a limited delay of six-months will cause them harm that would "warrant[] the sacrifice of whatever simplification of issues the Supreme Court's decision in Massachusetts may afford." Central Valley Stay Order, p. 21.

In sum, on balance, the benefit for this Court and the parties to wait for the Supreme Court's decision in Massachusetts outweighs any harm that this brief delay would cause to the Plaintiffs. Therefore, Defendants respectfully request that the Court stay these proceedings pending the decision in Massachusetts v. EPA and the subsequent trial, if any, in the Central Valley case.

III. Request For Expedited Briefing Schedule And A Rule 16 Conference.

Defendants request that the Court expedite the briefing schedule for this motion based on the pending deadlines of the March 2, 2007 final pretrial conference and oral arguments on the dispositive motions, and the March 22, 2007 trial date. The expedited briefing schedule in the attached Proposed Order would allow the Court to rule in a timely manner on the motion to stay after hearing the parties' arguments. See Attachment A.

Under Defendants' proposed expedited briefing schedule, Plaintiffs would have one-week to file their responses to the Motion to Stay, i.e., Plaintiffs' responses must be filed on or before Thursday, February 1, 2007.[11] Defendants would then file their reply brief on or before Tuesday, February 6, 2007. Defendants would be available to present oral arguments on the motion and/or meet for a Rule 16 Conference at the Court's earliest convenience after

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[11] The Defendants have filed this motion and exhibits via the Electronic Case File (ECF) system, and have also sent the filing via e-mail to both local counsel and Washington, D.C. counsel. Likewise, Plaintiffs regularly file via the ECF system. Therefore, extra days for "mailing" under Fed. R. Civ. P. 6(e) should not be necessary.

the briefing is completed. This schedule would allow the Court to consider the parties' arguments and provide a ruling in advance of the final pretrial conference.

CONCLUSION

For all the foregoing reasons, this Court should: (1) stay these proceedings pending the decision in Massachusetts v. EPA and the subsequent trial, if any, in the Central Valley case; (2) set an expedited briefing schedule as set forth in the attached proposed order; and (3) schedule a Rule 16 Conference and/or oral argument on Defendants' motion as soon as conveniently possible after the completion of the briefing.

Respectfully submitted,

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