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 8 *Mary D. Nichols, Chairperson of the California Air*
Resources Board, and James Goldstene, Executive
 9 *Officer of the California Air Resources Board*

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12 SACRAMENTO DIVISION

15 **CALIFORNIA DUMP TRUCK
 OWNERS ASSOCIATION,**

16 Plaintiff,

17 v.

19 **MARY D. NICHOLS, Chairperson of
 the California Air Resources Board,
 20 and JAMES GOLDSTENE,
 Executive Officer of the California
 21 Air Resources Board,**

22 Defendants,

23 **NATURAL RESOURCES DEFENSE
 COUNCIL, INC.,**

24 Defendant-Intervenor.

2:11-CV-00384-MCE-GGH

OBJECTIONS TO EVIDENCE

Date: December 15, 2011
 Time: 2:00 p.m.
 Courtroom: 7
 Judge: The Honorable Morrison C.
 England, Jr.
 Trial Date: June 3, 2013
 Action Filed: February 11, 2011

26 Defendants Mary D. Nichols, Chairperson of the California Air Resources
 27 Board, and James Goldstene, Executive Officer of the California Air Resources
 28 Board, (collectively, the Board) hereby object to the following evidence presented

1 by plaintiff California Dump Truck Owners Association (Association) in
2 connection with the Association's motion for preliminary injunction:

3 **Recupido Declaration (Doc.31-2)**

4 **Evidence:** Declaration of Fred Recupido in Support of Motion for Summary
5 Judgment (Recupido Declaration),¹ 3:2-8: "First, due arguably to the CARB rules,
6 the values of my trucks were artificially cut in half because they would have to be
7 retrofitted at a unit cost of about \$16,700 each sometime in the near future. Second,
8 because the trucks were no longer marketable in California, the values of the trucks
9 had dropped by more than half of what they otherwise would be, or to about \$8,000
10 versus a historical valuation of about \$17,000. I have undoubtedly personally
11 suffered financially from this and the entire truck value and investment paradigm
12 has changed for me."

13 **Objection:** This evidence is objected to on the ground that it is speculative, it
14 lacks foundation, and it is an improper opinion by a lay witness. Fed. R. Evid. 602,
15 701.

16 **Evidence:** Recupido Declaration, 3:27 – 4:1: "Presently, there is virtually no
17 flexibility to raise trucking rates to cover any additional operating costs"

18 **Objection:** This evidence is objected to on the ground that it is speculative, it
19 lacks foundation, and it is an improper opinion by a lay witness. Fed. R. Evid. 602,
20 701.

21 **Evidence:** Recupido Declaration, 4:25-27: "If in fact I was forced to raise my
22 rates by any percentage, I believe that I would not have been able to obtain any
23 work at all and would likely face bankruptcy."

24
25
26 _____
27 ¹ Although some of the Association's declarations are titled as in support of
28 its motion for summary judgment, they were also filed in support of the motion for
preliminary injunction.

1 is acceptable to the Air Resources Board. Moreover, it would not be
2 cost-effective to install filters, as they would only extend the useful life
of the trucks for a number of years before replacement would be required.

3 4. Purchasing brand new trucks fully equipped for construction use
4 would cost millions of dollars, and I presently cannot invest that amount
of capital in the business.

5 5. Even if I could obtain financing for filters or new trucks, taking on
6 new debt would mean I would have to raise my prices, and would also
7 have to layoff many of my employees, who currently enjoy steady jobs
with health benefits.

8 6. If the Truck and Bus Regulation goes into effect, I will most likely
9 retire a number of my older trucks to bring my fleet into partial
10 compliance. This will dramatically reduce the level of services that I am
able to provide to my customers.

11 **Objection:** Mr. Kern does not provide sufficient details about the age, type,
12 and condition of his truck engines, so it impossible to evaluate the bases for his
13 conclusions. Therefore, this evidence is objected to on the ground that it lacks
14 foundation. Fed. R. Evid. 602.

15 **Brown Declaration (Doc.31-4)**

16 **Evidence:** Declaration of Lee Brown in Support of Motion for Summary
17 Judgment (Brown Declaration), 3:10-11 and 3:20-22:

18 Most CDTOA members at this time do not have the financial resources to
19 purchase and install retrofit technology for their trucks, and will likely
lose their business. . . . Due to this economic dilemma, virtually no
20 trucking company now makes enough profit to afford to purchase these
21 retrofit devices nor can they pay to buy a new \$150,000 truck even with
heavy subsidies or grants.

22
23 **Objection:** Mr. Brown does not have personal knowledge of the data or other
24 bases for his conclusions. (In fact, during discovery, the Board information about
25 the financial resources of the Association's members, but the Association objected
26 and responded that it did not have such information.) This evidence is objected to
27 on the ground that it is speculative, it lacks foundation, and it is an improper
28 opinion by a lay witness. Fed. R. Evid. 602, 701.

1 **Evidence:** Brown Declaration, 3:23-28 and 3:29 – 4:3:

2 Anecdotal stories now abound within the industry and from members
3 related to retrofit and new engine technology that contributes to a variety
4 of problems for those who have chosen this early compliance path.

5 There are many stories shared at meetings, through blogs and
6 publications which suggest that these devices contribute to engines
7 becoming less reliable and less efficient. In some instances, the truck
8 engine becomes less efficient (8% verified by most fleet owners) from a
9 mileage perspective. . . . Other stories relate that the DPF equipment
10 forces the engines to shut down as they can no longer run for long
11 periods of time because they require the DPF or filter cleanings, and
12 additionally they are prone to more electrical and mechanical
13 breakdowns.

14 **Objection:** This evidence is objected to on the ground that it is hearsay. Fed.
15 R. Evid. 802.

16 **Evidence:** Brown Declaration, 4:4-19: This paragraph of the declaration
17 summarizes and quotes from an article in “Caltrux,” an industry magazine.

18 **Objection:** This evidence is objected to on the ground that it is hearsay. Fed.
19 R. Evid. 802.

20 **Evidence:** Brown Declaration, 4:20 – 5:26: These paragraphs purport to
21 describe how the Truck and Bus Rule will affect the Association’s members.

22 **Objection:** Mr. Brown does not qualify as an expert witness, and he does not
23 lay a foundation for his analysis of how the Truck and Bus Rule at issue will affect
24 the Association’s members. Therefore, this evidence is objected to on the ground
25 that it is speculative, it lacks foundation, and it is an improper opinion by a lay
26 witness. Fed. R. Evid. 602, 701.

27 **Evidence:** Brown Declaration, 5:27 – 6:2:

28 I have also spoken to many other members in and around the Lake Tahoe
region that believes that they may move some or all of their trucking
operations to Nevada because of this regulation and the many others they
are subject to here in California. Thus, they suggest they would have to

1 service many areas of California from Nevada and clearly the routes they
2 utilize will be significantly affected.

3 **Objection:** This evidence is objected to on the ground that it is hearsay. Fed.
4 R. Evid. 802.

5 **Parigini Declaration (Doc.31-5)**

6 **Evidence:** The entire Declaration of Mike Parigini (Parigini Declaration).

7 **Objection:** This evidence is objected to on the ground that the declaration does not
8 include an oath or affirmation attesting to its truth and was not made under penalty
9 of perjury.

10 **Pocock Declaration (Doc.31-6)**

11 **Evidence:** Declaration of Jay Pocock in Support of Motion for Summary
12 Judgment (Pocock Decl.), 2:22-24: “My discovery that the converse is true
13 reinforces my belief that the filtering technology required to make trucks compliant
14 with the Truck and Bus Regulation results in decreased fuel efficiency.”

15 **Objection:** This evidence is objected to on the ground that it is an improper
16 opinion by a lay witness. Fed. R. Evid. 701.

17 **Evidence:** Pocock Decl., 2:25-27: “My 2009 truck engine with a diesel
18 particulate filter has also completely shut down while I have been driving it, due to
19 an excess buildup of heat and pressure from the filter unit.”

20 **Objection:** This evidence is objected to on the ground that it is an improper
21 opinion by a lay witness. Fed. R. Evid. 701.

22 **McClernon Declaration (Doc.31-7)**

23 **Evidence:** Declaration of Robert McClernon in Support of Motion for
24 Summary Judgment (McClernon Declaration), 4:16-17: “the day CARB viciously
25 announced the Diesel Regulations”

26 **Objection:** Mr. McClernon provides no basis for stating that the Board’s
27 announcement was made “viciously.” This evidence is objected to on the ground
28

1 that it lacks foundation, and it is an improper opinion by a lay witness. Fed. R.
2 Evid. 602, 701.

3 **Evidence:** McClernon Declaration, 4:23-25: “Such an investment would
4 require me to raise my truck rates by at least 100% as I would have to recoup the
5 costs of equipment purchases within a five year period -the financing period, if
6 finance funding was even available.”

7 **Objection:** This evidence is objected to on the ground that it lacks
8 foundation, and it is an improper opinion by a lay witness. Fed. R. Evid. 602, 701.

9 **Evidence:** McClernon Declaration, 4:26-27: “Also because the competition
10 is so severe, again very little construction is happening because environmental
11 regulations have halted all major growth in the state, there is little to no work.”

12 **Objection:** This evidence is objected to on the ground that it lacks
13 foundation, and it is an improper opinion by a lay witness. Fed. R. Evid. 602, 701.

14 **Wipf Declaration (Doc.31-9)**

15 **Evidence:** The entire Declaration of Ernie Wipf (Wipf Declaration).

16 **Objection:** This evidence is objected to on the ground that the declaration
17 does not include an oath or affirmation attesting to its truth and was not made under
18 penalty of perjury.

19 **Evidence:** Wipf Declaration, 1:28 – 2:7:

20 3. Installing diesel particulate filters is not an option for the majority
21 of my fleet due to the age of the engines. Only three of my trucks could
22 be retrofitted with filters

23 4. If forced to comply with the rule, I would purchase filters for three
24 of my trucks, which could cost anywhere between \$40,000 and \$80,000.
I would also have to replace several of my trucks, at a cost of at least \$1

25 00,000 per truck.
5. This type of capital investment would force me to raise my prices
or lower the level of service I provide.

26 6. I will be also be forced to lay off a number of current employees
27 who currently earn a very good wage with health benefits.
28

1 **Objection:** Mr. Wipf does not provide sufficient details about the age, type,
2 and condition of his truck engines, so it impossible to evaluate the bases for his
3 conclusions. This evidence is objected to on the ground that it is speculative, it
4 lacks foundation, and it is an improper opinion by a lay witness. Fed. R. Evid. 602,
5 701.

6 At the hearing on the motion for preliminary injunction, the Board will
7 respectfully request that the Court sustain the above objections and strike the
8 evidence referred to above.

9
10 Dated: December 1, 2011

Respectfully submitted,

11 KAMALA D. HARRIS
12 Attorney General of California
13 SARA J. RUSSELL
Supervising Deputy Attorney General

14
15 */s/ Nicholas Stern*
16 NICHOLAS STERN
17 Deputy Attorney General
18 *Attorneys for Defendants*
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California Air Resources Board, and
James Goldstene, Executive Officer of
the California Air Resources Board

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