UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP; GREEN MOUNTAIN FORD MERCURY; JOE TORNABENE'S GMC; CODY CHEVROLET, INC.; ALLIANCE OF AUTOMOBILE MANUFACTURERS; DAIMLERCHRYSLER CORPORATION; and GENERAL MOTORS CORPORATION,

Plaintiffs,

v. — Case No. 2:05-cv-302

THOMAS W. TORTI, Secretary of the Vermont Agency of Natural Resources; JEFFREY WENNBERG, Commissioner of the Vermont Department of Environmental Conservation; and RICHARD VALENTINETTI, Director of the Air Pollution Control Division of the Vermont Department of Environmental Conservation,

Defendants.

consolidated with

THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,

Plaintiff,

v. — Case No. 2:05-cv-304

THOMAS W. TORTI, in his official capacity as Secretary of the Vermont Agency of Natural Resources; JEFFREY WENNBERG, in his official capacity as Commissioner of the Vermont Department of Environmental Conservation; RICHARD A. VALENTINETTI, in his official capacity as Director of the Vermont Air Pollution Control Division,

Defendants.

MEMORANDUM OPINION and ORDER

In these consolidated cases, Plaintiffs, a collection of new

motor vehicle dealers, automobile manufacturers and associations of automobile manufacturers, seek declaratory and injunctive relief from regulations adopted by Vermont in the fall of 2005 that establish greenhouse gas ("GHG") emissions standards for new automobiles. These regulations are identical to those developed and adopted by the State of California, which has authority under the federal Clean Air Act to develop its own motor vehicle emission standards. *See* 42 U.S.C.A. 7543(b) (West 2003). Other states are permitted to adopt California's standards instead of the federal standards, *id.* § 7507 (West 2003), and have done so with respect to GHG emissions standards.[1]

In December 2004, some of the plaintiffs in this lawsuit filed suit in the Eastern District of California challenging California's regulations and the state law directing the California Air Resources Board to implement the regulations. *See* *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-cv-06663-REC-LJO (E.D. Calif. filed Dec. 7, 2004) ("*Central Valley Chrysler*"). The claims asserted by the California plaintiffs are virtually identical to the claims asserted in the Vermont cases.[2]

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[1] Maine, New York, Connecticut, Massachusetts, Oregon, Washington, New Jersey, and Rhode Island, in addition to Vermont, have adopted California's standards for GHG emissions.

[2] Similar plaintiffs have now filed similar lawsuits in Rhode Island. *See Ass'n of Int'l Automobile Mfrs. v. Sullivan*, No. 06-cv-69 (D.R.I. filed Feb. 13, 2006); *Lincoln Dodge, Inc. v. Sullivan*, No. 06-cv-70 (D.R.I. filed Feb. 13, 2006).

Essentially these cases all contend that Congress has preempted states from enforcing state regulations governing GHG emissions, both expressly and based on Congress's occupation of the field of fuel economy regulation, as well as based on alleged conflicts between these state regulations and federal fuel economy regulations. They claim that the regulations will have a negative effect on the price, performance and potentially the safety of nearly every car and truck sold in Vermont when the regulations go into effect, beginning in the 2009 automotive model year.

Before the Court are Defendants' Motion to Stay Case (Doc. 22), and a Motion to Intervene as Party Defendants (Doc. 25) by Conservation Law Foundation, Environmental Defense, Natural Resources Defense Council, Sierra Club, and Vermont Public Interest Research Group ("Applicants"). For the reasons that follow, the motion to stay is denied, and the motion to intervene is granted.

I. Motion to Stay

The Defendant state officials ("the State") have moved to stay the Vermont actions pending the outcome of the litigation in the Eastern District of California. The State has invoked "principles of comity among federal district courts,"[3] the "first

[3] Technically, "comity" refers to the recognition and respect that a court of one jurisdiction shows to another jurisdiction's laws and judicial decisions, not to its pending actions. *See*

filed" rule and principles of judicial economy in support of its motion.

The power of a district court "to stay proceedings is incidental to [its] power . . . 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. N. Am. Co.*, 299 U.S. 248, 254 (1936). In general, concerns of wise judicial administration and conservation of judicial resources counsel against duplicative lawsuits in the federal district courts. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) (as part of its general power to administer its docket, district court may stay or dismiss suit that is duplicative of another federal court suit). "[A] suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions.'" *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993) (quoting *Ridge Gold Standard Liquors v. Joseph E. Seagram & Sons*, 572 F. Supp. 1210, 1213 (N.D. Ill. 1983)); *see also N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 89 (2d Cir. 2000) (dismissal of complaint may be justified if claims, parties and available relief do not significantly differ, quoting *Serlin*).

Black's Law Dictionary 267 (6th ed. 1990); *Dragon Capital Partners L.P. v. Merrill Lynch Capital Servs. Inc.*, 949 F. Supp. 1123, 1127 n.8 (S.D.N.Y. 1997).

Complete identity of parties and issues thus is not required for lawsuits to be duplicative of one another. *But cf. Will v. Hallock*, ___ U.S. ___, 126 S. Ct. 952, 960 (2006) (defining duplicative litigation as "multiple suits on identical entitlements or obligations between the same parties," quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4402 (2d ed. 2002)). This Court, however, is unable to conclude that the State of California defendants do not significantly differ from the State of Vermont defendants, and the State has not cited any authority for this novel proposition. Because the defendants in the California and the Vermont lawsuits are distinctly separate entities, despite the similarity of issues and a degree of overlap among the plaintiffs, the two lawsuits are not duplicative. *See N. Assurance Co.*, 201 F.3d at 90 (circuit court could not find any case where suit against different independent entity was dismissed as duplicative). The first to file rule thus does not apply, and the Court will not dismiss or stay the Vermont action based on the California complaint having been filed first.

Although a district court has the power to stay proceedings based on judicial efficiency, the moving party "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to some one else." *Landis*, 299 U.S. at 255.

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). That burden has been described as heavy, *Microfinancial Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004), and the longer the length of the requested stay, the greater the showing of need should be. *Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000); *cf. Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991) (movant bears heavy burden of showing necessity for stay of lawsuit in favor of pending arbitration).

Plaintiffs have submitted the affidavit of an economist who avers that the Vermont retail automobile business will be harmed through lost business and higher prices should the regulations not be invalidated. The State has submitted an affidavit from the Chief of the Mobile Sources Section of the Air Pollution Control Division, averring that Vermont will incur substantial costs, suffer an enormous burden on staff resources, and be hampered in its ability to provide adequate support to the Vermont legislature during the 2007 session should it be required to defend this suit.[4]

Assuming for the sake of argument that Plaintiffs have demonstrated a fair possibility that a stay of this action would damage the Vermont retail automobile business, the State's claim

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[4] Neither affidavit specifically addresses the harm that granting or denying a stay (as opposed to dismissing the case) will cause.

of hardship, although genuine, is not the sort of hardship or inequity that the Court in *Landis* meant. As one court recently stated, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). The State has not sustained its burden of showing need for a stay. *Cf. People v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 172 (S.D.N.Y. 1989) (stay of challenge to state regulation as preempted in deference to similar challenge to similar regulation in another state not warranted).

Moreover, the Court is not convinced that considerations of judicial economy would support a stay. The California litigation is currently scheduled for trial in January 2007. The State claims that should the California plaintiffs succeed with their litigation, the Vermont case would be moot. Whether or not that is the case, the unsuccessful litigants in California are likely to appeal the district court's decision. The decision may or may not be stayed on appeal. By the time an appeal, and conceivably a petition for a writ of certiorari is ruled upon, years may have elapsed. Given the unspecified but undoubtedly lengthy stay sought by the State, any judicial economy must yield to the rights of the plaintiffs to their day in court in their chosen forum.

The Motion to Stay Case (Doc. 22) is denied.

II. Motion to Intervene

Applicants have moved to intervene as party defendants pursuant to Rule 24 of the Federal Rules of Civil Procedure. The State supports the motion. Plaintiffs have submitted "conditional opposition" to the motion, out of concern that the Applicants' entry into the case will delay its progress. They seek an agreement from Applicants to cooperate in the entry of a protective order regarding access to highly confidential trade-secret information in exchange for the withdrawal of their opposition.

On April 20, 2006, Plaintiffs and the State filed an executed Stipulation and Protective Order Regarding Handling of Confidential Information (Doc. 45). The stipulation has not been signed by any of the proposed intervenors. Given that some of the same parties have reportedly been mired in extensive disagreements regarding a protective order in the California litigation, the Court lacks its normal confidence that these parties will be able to resolve their discovery issues by agreement. In any event, regardless of whether the parties consent to intervention, the Court makes its own determination whether intervention, of right or by permission, is appropriate in this case.

Rule 24(a)(2) provides that

> anyone shall be permitted to intervene in an action . . . when the applicant claims an interest

> relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).[5] The nature of the interest "must be 'direct, substantial, and legally protectable.'" *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (quoting *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990)); *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971) (obvious that Rule 24(a)(2) interest must be significantly protectable). Applicants claim an interest in the regulations that are the subject of this action because they were directly involved in the enactment of the regulations, and because their members use and enjoy the resources protected by the regulations.

Public interest organizations may have "a sufficient interest to support intervention by right where the underlying action concerns legislation previously supported by the organization." *Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998); *accord Commack Self-Serv. Kosher Meats, Inc. v Rubin*, 170 F.R.D. 93, 102 (E.D.N.Y. 1996);

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[5] An application for intervention under Rule 24(a) or 24(b) must also be timely. Fed. R. Civ. P. 24(a), (b). The motion for intervention was filed three months after the action was filed, and a week after an initial Rule 16 conference in this case. The parties do not dispute that the application is timely.

see also Diamond v. Charles, 476 U.S. 54, 68 (1986) (certain public concerns may constitute adequate interest for purposes of Rule 24(a)(2); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (public interest group is entitled to intervene of right in action challenging legality of measure it has supported); *Herdman v. Town of Angelica*, 163 F.R.D. 180, 187 (W.D.N.Y. 1995) (finding environmental group's interest sufficient to support Rule 24(a)(2) intervention).

Like the environmental group that sought intervention in *Herdman, see id.*, Applicants here have alleged their members' personal stake in the improvement of local air quality and the problems posed by global warming, as well as their active involvement in developing GHG emission standards for automobiles in Vermont and other states. Conservation Law Foundation and Vermont Public Interest Research Group advocated for adoption of the GHG regulations in Vermont. Environmental Defense supplied comments during the rule-making process. Sierra Club and Environmental Defense worked extensively on the adoption of the California GHG emission standards. The Court finds that Applicants have adequately alleged a direct and substantial interest in the subject of this action.

As a practical matter a disposition of this lawsuit may

impede Applicants' ability to protect their interest.[6] Applicants have an interest in the validity of the regulations they worked to have adopted, as well as an interest in protecting the public health and natural resources that may be affected if the regulations are invalidated. *See Herdman*, 163 F.R.D. at 189; *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (adverse decision in suit challenging creation of birds of prey conservation area would impair wildlife conservation society's interest in preservation of birds and bird habitat).

Rule 24(a)(2) requires intervention of right if the interest and impairment conditions are met, unless an applicant's interest is adequately represented by existing parties. The applicant ordinarily need only make a minimal showing that representation may be inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). When the State, in its capacity of *parens patriae*, sues on behalf of its citizens, however, it "is presumed to represent the interests of all its citizens," and "a greater showing that representation is inadequate should be

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[6] Plaintiffs appear to suggest that in order to intervene as of right, Applicants must demonstrate that Vermont's GHG emission regulations will in fact reduce global warming, or that invalidating Vermont's regulations will directly cause a reduction in their members' use and enjoyment of Vermont's natural resources. This is an unduly restrictive interpretation of the interest requirement of Rule 24(a)(2), and has not received the endorsement of any case law in this Circuit.

required." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984); *see also Natural Res. Defense Council, Inc. v. N.Y. State Dep't of Envtl Conservation*, 834 F.2d 60, 62 (2d Cir. 1987) (district court did not exceed its discretion in concluding that interests of association of gas station owners were adequately represented by federal and state forces defending citizen suit brought by environmental groups).

The State supports intervention in this case. Although not a concession of inadequate representation, its support of intervention is at least an acknowledgment that Applicants may be able to advocate for aspects of the case that are outside the State's purview, or beyond its area of expertise. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (showing of inadequate representation met when applicant has expertise government may not have). Specifically, the national organization applicants have intervened as defendants in the closely-related California litigation, and are able to share their expertise and first-hand knowledge of the legal and factual developments in that case.

Intervention of right is granted if it is shown that representation *may* be inadequate. *Trbovich*, 404 U.S. at 538 n.10. The State must represent the interests of all its citizens, and not only the environmental interests asserted by Applicants. Currently the State and Applicants appear to share

objectives, but the possibility exists that their interests may significantly differ when it comes to weighing environmental issues, industry interests and budgetary concerns in defending this lawsuit. Applicants have made a sufficiently strong showing that the State may not adequately represent their interests.

The Court would also grant permissive intervention under Rule 24(b)(2), which permits intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). It is undisputed that Applicants' anticipated defense would share common questions of law and fact. In determining intervention under Rule 24(b)(2), a court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Plaintiffs' entire opposition to intervention is based upon their fear of delay in proceeding to trial as scheduled.

Regardless of whether intervention is granted under Rule 24(a) or Rule 24(b), this Court has the power to limit the scope of that intervention. *See* Fed. R. Civ. P. 24 advisory committee's note, 1966 Amendment (intervention of right may be subject to appropriate conditions or restrictions for efficient conduct of proceedings). It will not permit Applicants' participation to delay unduly the progress of this case to trial. The Court will not condition their entry into this case on their

consent to an "appropriate" protective order, but intervention is granted only to the extent that Applicants' involvement in the discovery process does not disrupt the deadlines for discovery agreed to by the parties. *See* Joint Proposed Discovery Schedule/Order, approved Mar. 7, 2006 (Doc. 31). The Court expects that the parties will rapidly reach agreement on the scope of an appropriate protective order, or seek the Court's assistance, in order that the case remains ready for trial by March 1, 2007.

The Motion to Intervene is granted; Applicants' participation in discovery may be limited if their participation renders the parties unable to abide by their joint discovery schedule.

Dated at Burlington, in the District of Vermont, this 3rd day of May, 2006.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge
U.S. District Court