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California Dump Truck Owners Association

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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

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12 CALIFORNIA DUMP TRUCK OWNERS
ASSOCIATION

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14 Plaintiff,

15 vs.

16 MARY D. NICHOLS, Chairperson of the
California Air Resources Board; JAMES
17 GOLDSTENE, Executive Officer of the
California Air Resources Board; and DOES 1-
18 50

19 Defendants.
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Case No. 2:11-CV-00384-MCE-GGH

**DECLARATION OF LEE BROWN IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

23 I, Lee Brown, declare as follows:

24 1. I am the Executive Director of the California Dump Truck Owners Association
25 (“CDTOA”), the plaintiff in the above-entitled case. The mission of CDTOA is to advance the
26 professional interests of construction trucking companies in California. CDTOA is a nonprofit
27 corporation organized and existing under the laws of the state of California, with its principal
28 place of business in Upland, in the County of San Bernardino, California. I have held my current
position for 13 years and have been with CDTOA for 22 years.

1 2. CDTOA has approximately 1,000 members, and the membership varies from
2 small owner-operators who own and operate only one truck, to large companies that own fleets
3 of trucks between 400 to 500 power units and trailers. Collectively CDTOA's membership owns
4 or leases at least 5,000 power units, most primarily based in California. The vast majority of
5 members are motor carriers as that term is defined in 49 U.S.C. §13102. Materials hauled by our
6 members include dirt, sand, rock, gravel, asphalt and heavy equipment. CDTOA members
7 typically transport construction material from aggregate plants, asphalt and cement plants to
8 construction sites. Dirt is primarily hauled from a barrow or construction site to another
9 construction site.

10 3. The nationwide recession has devastated the construction trucking industry and
11 over the past four years, CDTOA membership has declined from 1,600 in 2007 to 1,000 today as
12 many members have been forced to declare bankruptcy or just give up their businesses.

13 4. As part of my duties, I actively seek out and recruit new members to the
14 association. I also regularly meet with current members to ensure that the association is meeting
15 their needs. I speak with dozens of members each week, and routinely visit them at their place of
16 business. Virtually all of the trucks owned and operated by CDTOA members are subject to the
17 Truck and Bus Regulation promulgated by the Air Resources Board, codified at 13 CCR § 2025.

18 5. The rule requires trucks to be replaced, repowered and/or retrofitted with diesel
19 particulate filters (DPFs) beginning on January 1, 2012, on a schedule based on the truck type
20 and model year of the truck engine. Low mileage dump trucks (under 20,000 miles/year) may be
21 given two year extensions to comply but this will only benefit about 5-10 percent of the trucks
22 owned by CDTOA members. The rule prohibits older trucks that have not been replaced or
23 retrofitted from operating on the public roadways, and imposes steep fines and penalties on
24 anyone who operates their trucks in violation of the rule.

25 6. The rule is called the Truck and Bus Regulation; On-Road Heavy-Duty Diesel
26 Vehicles (In-Use) Regulation, and is available online at
27 <http://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm>. It is a "regulation . . . having the force
28 and effect of law" as that term is used in 49 U.S.C. §14501(c)(1).

1 7. CDTOA members' primary source of livelihood is their diesel powered tractor
2 and truck body or trailer. Most members purchase trucks to be used for decades, and most are
3 purchased utilizing lengthy conditional sales contracts lasting for 5 to 6 years. Today financing
4 charges are now running 15-20 percent. The trucks typically cost at least \$130,000 to purchase.
5 With new truck bodies and trailers the cost can easily exceed \$210,000. Due to the low mile
6 nature of the local haul construction industry, trucks operate about 50,000 miles a year so they
7 have a useful life of several decades if maintained properly.

8 8. Available retrofit technology utilizing DPF's enable trucks to comply with the
9 rule but they cost approximately eighteen thousand dollars (\$18,000) or more to purchase and
10 install for each truck. Most CDTOA members at this time do not have the financial resources to
11 purchase and install retrofit technology for their trucks, and will likely lose their business. The
12 last four years have been especially difficult on the construction trucking industry as home
13 building has dropped by 80%, commercial property development by a similar amount, and even
14 public works investments have dropped. As all three major segment contractors compete for
15 what little work there is today, the lowest winning bid price has little profit margin for the
16 contractor, and even less for the subcontractors and suppliers, which happens to be the category
17 under which the construction trucking falls. In addition, the industry is struggling with diesel fuel
18 price increases that have doubled since 2009. Likewise, tire costs have increased by at least 30%
19 during this same period. Tires and fuel are the two major components of the operating costs for
20 most trucking businesses. Due to this economic dilemma, virtually no trucking company now
21 makes enough profit to afford to purchase these retrofit devices nor can they pay to buy a new
22 \$150,000 truck even with heavy subsidies or grants.

23 9. Anecdotal stories now abound within the industry and from members related to
24 retrofit and new engine technology that contributes to a variety of problems for those who have
25 chosen this early compliance path. There are many stories shared at meetings, through blogs and
26 publications which suggest that these devices contribute to engines becoming less reliable and
27 less efficient. In some instances, the truck engine becomes less efficient (8% verified by most
28 fleet owners) from a mileage perspective. With the prices of diesel hovering over \$4.50/gallon, a
reduction in fuel economies or efficiencies is a disaster for many truck owners. Other stories

1 relate that the DPF equipment forces the engines to shut down as they can no longer run for long
2 periods of time because they require the DPF or filter cleanings, and additionally they are prone
3 to more electrical and mechanical breakdowns.

4 10. In the April 2011 issue of Caltrux magazine, Chris Shimoda, the Manager of
5 Environmental Affairs for the California Trucking Association authored an article called *The*
6 *Coming CARB Surcharge?* He believes that with diesel prices in California creeping above
7 \$4.50/gallon and rising, fuel surcharges are once again a very popular and almost necessary
8 element of a trucking businesses pricing scheme today. The article confirms that while shippers
9 have grown accustomed to truckers having to cope with high prices at the pump, that is likely to
10 change as more truckers impose fuel surcharges on shippers. The article suggests that the name
11 of this surcharge should be named for the state agency behind it. The article explains that the
12 various diesel rules promulgated by CARB will pile on tens of billions of dollars in higher
13 operational costs between now and 2023. The Statewide Truck and Bus Rule alone is expected to
14 cost fleets at least six billion dollars in added capital expenditures. Industry estimates are double
15 this conservative number as CARB truck replacement cycle estimates were flawed. The article
16 concludes by noting that "The hard reality is – the only way most fleets are going to be able to
17 absorb these costs is to charge their customers higher rates and/or apply higher surcharges. Not
18 dissimilar to the rising price of fuel, CARB's actions have created a new cost paradigm to haul
19 goods in California."

20 11. CDTOA members have based their business models on the ability to use their
21 trucks for at least two decades (or more). Due to the lower mileage nature of construction
22 material hauling (50,000 miles per year) a typical dump truck can travel less than 1 million miles
23 in a twenty year period. A million miles is a milestone that diesel engines may reach or exceed
24 prior to major overhaul requirements. Because the rule requires retrofit or replacement of
25 otherwise perfectly useful and clean trucks (which had to meet state or federal emissions
26 standards when manufactured) much earlier than would otherwise be required, most CDTOA
27 members will be unable to continue their business without substantial capital investment if that is
28 available to them. As stated earlier, this is not an option to many and will disproportionately harm

1 smaller business owners in virtually every segment of the commercial transportation or trucking
2 industry in California not just construction trucking.

3 12. Retrofitting or replacing trucks and engines to comply with the rule will directly
4 impact the price that motor carriers of property must charge for their services for several reasons.
5 First, motor carriers of property will be forced to raise their prices because they will need to
6 defray the costs including financing of retrofitting or replacing their trucks. Also, because many
7 members will be unable to afford to bring their trucks into compliance, there will be fewer motor
8 carriers to meet the transportation needs of the construction industry. As a result, as the
9 construction industry recovers from the recession, the increase in demand for construction
10 trucking services combined with fewer suppliers of those services will result in substantially
11 higher prices for those services.

12 13. The rule will also directly impact the service that motor carriers of property
13 provide, because those CDTOA members with multiple trucks will not be able to replace or
14 retrofit their entire fleets all at once. Rather, they will have to gradually update their fleets over
15 time. As a result, they will be unable to provide certain levels of services that they presently
16 provide, because they will not have enough trucks in compliance with the rule.

17 The overall effects of these regulations on services will touch almost every business and
18 consumer segment of this state and even our countries economy. I believe there will be many
19 unforeseen slowdowns and stoppages within every segment of our economy and it may take
20 years to correct because of the limited new truck, engine and retrofit manufacturing capacity in
21 the U.S. and even worldwide. Even today truck lead-times are over eight months and growing
22 according to the truck dealer members I have recently spoken with.

23 14. The rule will also directly impact the routes that motor carriers of property take,
24 because the retrofit technology limits the length of time trucks can run continuously. As a result,
25 those CDTOA members who opt to retrofit their trucks may have to choose different routes in
26 order to accommodate the more limited hours of service of their trucks.

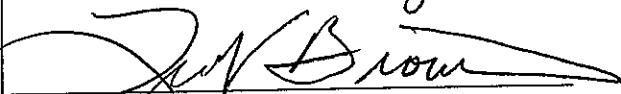
27 I have also spoken to many other members in and around the Lake Tahoe region that
28 believes that they may move some or all of their trucking operations to Nevada because of this
regulation and the many others they are subject to here in California. Thus, they suggest they

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and based on my personal knowledge, and if called to testify to these facts, I would do so competently and truthfully.

Executed this 24th day of May 2011, in Upland, California.


Lee Brown