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7 Attorneys for Plaintiff
California Dump Truck Owners Association

8
9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11
12 CALIFORNIA DUMP TRUCK OWNERS
ASSOCIATION

13
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.
20
21
22

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

**DECLARATION OF ROBERT
McCLERNON IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

23 I, Robert McClernon, declare as follows:

24 1. I am the owner and operator of McClernon Trucking, Inc. I am also the President
25 (for the years 2010 & 11) of the California Dump Truck Owners Association ("CDTOA"), the
26 plaintiff in the above-entitled case. I have been a member of CDTOA since 1987 and have
27 volunteered for many positions within the organization. I have owned and operated my trucking
28 business for thirty-four years, since 1977. My business mainly involves the transportation of

1 construction material to and material to and from construction sites. I regularly haul dirt, sand,
2 rock, gravel, and asphalt, among other things in dump trucks and water for on-site compaction
3 and dust control in water trucks.

4 2. I currently own five trucks. Three are registered for on-road application (dump
5 trucks) and two for off-road applications (water trucks) but it is my understanding that all five
6 are subject to the CARB on-road regulations. The cost to replace these types of working trucks
7 today would typically cost in excess of \$125,000 each. When maintained properly, construction
8 trucks, (including both those purchased new and those that are purchased used) have a useful life
9 of several decades if maintained properly. I performed a higher level of maintenance on all my
10 vehicles to ensure they have a long and useful life. Because of the very high cost of new trucks,
11 I, like most small businesses within the construction trucking industry, must obtain long-term (4
12 to 6 years) financing in order to purchase even used trucks. I purchased most of my trucks one at
13 a time over my thirty-four years in the business. This is a business model very common among
14 the thousands of owner-operators and small businesses within the construction trucking industry
15 of this state.

16 3. I had always believed that the equity or value of my equipment would be
17 enhanced with the level of maintenance efforts I committed to my fleet. I built my business and
18 made capital investments on the assumption that I would be able to continue to use the trucks I
19 purchased for many years. At least 20 years of use is normal in our industry, as we typically
20 reuse on-road freight trucks with some modifications to operate as dump trucks for another 15 or
21 more years. Recycling large trucks I believed was a responsible and "green"/environmentally-
22 friendly statement. I hoped that the hard work and dedication to my business would provide for
23 some of my retirement needs with retained equity in my equipment. Because of the high initial
24 cost of the trucks, the seasonality of my work here in northern California, and in many cases, low
25 mileage nature of my work, there is little or no profit unless these trucks can be used for many
26 years.

27 4. I maintained these trucks at a high standard because I depended on their longevity
28 to be successful with the lowest possible competitive operating costs. In fact, as demonstrated in

1 Exhibit A, I recently smoke tested all three of my on-road vehicles which has been required by
2 CARB's Periodic Smoke Inspection Program since 1988, and they all tested far below the
3 allowable maximum emissions levels. My oldest and dirtiest truck tested at an average of 8.2%
4 opacity with the allowable level set at 55%, which is 670% below this allowable level. In fact, all
5 my diesel engines tested between 5.9% to 8.2% opacity and I am still told this is too dirty.

6 5. I was a motor carrier until November 1, 2010 with a valid motor carrier permit,
7 permit #224233. I have since put my business on hold, I have no more employees, and I have
8 sold one of my trucks at a substantial loss as I consider my options, and evaluate the
9 uncertainties created by the regulation.

10 6. I am aware of the Truck and Bus Regulation promulgated by the Air Resources
11 Board, codified at 13 CCR §2025. I attended numerous public meetings during which the rule
12 was debated, modified, and ultimately enacted. The rule requires trucks to be replaced or
13 retrofitted beginning on January 1, 2012, on a schedule based on the mileage, use, type and
14 model year of the truck engine. The rule prohibits older trucks that have not been replaced or
15 retrofitted from operating on the public roadways, and imposes steep fines and penalties on
16 anyone who operates their trucks in violation of the rule.

17 7. Based on my familiarity with the rule and its impending effective date, I have
18 researched the cost of bringing my trucks into compliance with the rule. In order to retrofit my
19 trucks with a DPF or diesel particulate filter, I would have to spend approximately \$44,372 per
20 truck to purchase and install the retrofit technology due to their ages. (See Exhibit B.) Because
21 of these rules my trucks, although well maintained and very clean are only worth about \$6,000 to
22 \$9,000 each. This is approximately less than 25% of what their values would have been without
23 these CARB regulations. These prices or value estimates are based on what I have recently seen
24 at equipment and truck auctions such as those sponsored at Richie Bros. Auctioneers here in the
25 Sacramento area. It is not practical nor would I likely find financing to put a \$45,000 DPF on an
26 \$8,000 truck that in most cases would only give me 3 or 4 additional years of compliance and
27 operation before I would have to upgrade again with newer or new trucks. Furthermore, a DPF
28 is truck-specific by CARB rules, and cannot be re-used on any other trucks in the future.

1 8. I had in the past voluntarily updated some of my trucks with incentive grant funds
2 from SECAT and my own money and now those trucks will not comply with the new rule
3 without another substantial investment in a DPF. And because it would be unlawful to drive my
4 current trucks at that time (even if they were retrofitted), the trucks would have little or no resale
5 value.

6 9. In 2004, CARB adopted a mandatory software update known as a "chip reflash"
7 for affected heavy-duty diesel engines. I fully complied with this requirement at a substantial
8 cost to my business. In 2006, a California Superior Court struck down these chip reflash
9 regulations. I was never re-compensated for the costs of CARB's illegal regulation.

10 10. If I were to instead replace my trucks with new trucks to comply with the rule, it
11 would cost approximately \$125,000.00 per truck. My current trucks have a very low resale value
12 because potential buyers would be unwilling to pay much for a truck that could not legally be
13 driven in California and only have a value after being shipped out of state or country. And it
14 would not be possible to pay the note from such an investment in this economy and would lead
15 to my financial demise even faster. I built my business over thirty years and this rule has
16 compromised my entire life's work. My business equity vanished the day CARB viciously
17 announced the Diesel Regulations and promoted the outlawing of older equipment. My trucks,
18 because of their lower mileage use per year do not qualify for incentives offered by most state
19 grant programs, that could be financially considered acceptable, this is not even an option for me
20 today.

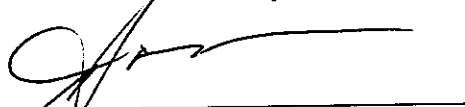
21 11. Whether I decide to retrofit my trucks or replace them, I will have to make
22 substantial capital investments in my company, on the order of hundreds of thousands of dollars.
23 Such an investment would require me to raise my truck rates by at least 100% as I would have to
24 recoup the costs of equipment purchases within a five year period – the financing period, if
25 finance funding was even available. A 100% rate increase is substantial in our industry today.
26 Also because the competition is so severe, again very little construction is happening because
27 environmental regulations have halted all major growth in the state, there is little to no work.
28 And the work there is, is so competitive that the lowest bids are at a contractors costs, if not less

1 than their costs. A 100% rate increase would make me uncompetitive. I would be out of
2 business and worse yet, more than likely bankrupt. I have been forced into a set of losing options
3 – all will lead to the loss of my business.

4 12. I have determined that the only way for me to afford to make the necessary
5 investments in light of the CARB rule, will be to raise the prices that I charge for my services.
6 However, this is impossible because of my work and the economy. Thus, the only remaining
7 option is to diminish the level of service (go out of business) that I provide for the people of my
8 community that I have served for over thirty years.

9
10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct and based on my personal knowledge, and if called to testify to
12 these facts, I would do so competently and truthfully.

13 Executed this 25th day of May, 2011, in Sacramento, California.

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15 _____
16 Robert McClernon

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EXHIBIT A

* Diesel exhaust test *
 #Vers. 091100US 0500ms*

C.D.T.O.A
 334 NORTH EUCLID AVE.
 UPLAND CA 91786
 909-982-9898
 909-425-9382
 BOSCH RTT100
 J1667 COMPLIANT
 UNIT SN-320 279 589

Calibrated at 0 and 100%
 h-STACK SIZE CORR.: 5.0"

05.19.11 17:49

License.....

Make *Kenworth*

VIN *41*

Mileage.....

Model *T-800*

Visual Inspection OK...0

US DOT no.

Snap measurements

#	Opac. %	K 1/m	Conc. ng/m3	Speed rpm
1	7.6			
2	7.2			
3	7.3			
4*	8.3			
5*	9.4			
6*	8.1			

Average value:
8.0
 Legal limit:
55.0

Spread-Value:
0.3
 Legal Limit:
5.0

Test PASSED

Tester *Betty Plowman*

Signature *Betty Plowman*

* Diesel exhaust test *
 #Vers. 091100US 0500ms*

C.D.T.O.A
 334 NORTH EUCLID AVE.
 UPLAND CA 91786
 909-982-9898
 909-425-9382
 BOSCH RTT100
 J1667 COMPLIANT
 UNIT SN-320 279 589

Calibrated at 0 and 100%
 h-STACK SIZE CORR.: 5.0"

05.19.11 17:33

License.....

Make *Freightliner*

VIN *99*

Mileage.....

Model *Cow*

Visual Inspection OK...0

US DOT no.

Snap measurements

#	Opac. %	K 1/m	Conc. ng/m3	Speed rpm
1	7.9			
2	6.6			
3	6.4			
4*	6.1			
5*	6.4			
6*	5.7			

Average value:
6.9
 Legal limit:
40.0

Spread-Value:
0.7
 Legal Limit:
5.0

Test PASSED

Tester *Betty Plowman*

Signature *Betty Plowman*

* Diesel exhaust test *
 #Vers. 091100US 0500ms*

C.D.T.O.A
 334 NORTH EUCLID AVE.
 UPLAND CA 91786
 909-982-9898
 909-425-9382
 BOSCH RTT100
 J1667 COMPLIANT
 UNIT SN-320 279 589

Calibrated at 0 and 100%
 h-STACK SIZE CORR.: 5.0"

05.19.11 17:27

License.....

Make *Kenworth*

VIN *67*

Mileage.....

Model *T-800*

Visual Inspection OK...0

US DOT no.

Snap measurements

#	Opac. %	K 1/m	Conc. ng/m3	Speed rpm
1	5.9			
2	5.4			
3	5.7			
4*	5.6			
5*	6.4			
6*	5.7			

Average value:
5.9
 Legal limit:
40.0

Spread-Value:
0.8
 Legal Limit:
5.0

Test PASSED

Tester *Betty Plowman*

Signature *Betty Plowman*

EXHIBIT B

