

Agreement of Counsel Concerning the 2001 California ZEV Litigation

This document describes an agreement between counsel for (1) the parties in *Central Valley Chrysler-Plymouth, Inc., et al. v. Witherspoon*, Case No. CIV F-02-05017 REC SMS (E.D. Cal.), (2) the plaintiffs and petitioners and the defendants and respondents in *Liberty Motors, Inc., et al. v. California Air Resources Board, et al.*, Case No. 02 CE CG 00039 (Superior Court for Fresno County), and (3) the parties in *DaimlerChrysler Corp. et al. v. California Air Resources Board et al.*, Case No. 02 CE CG 04456 HAC (Superior Court for Fresno County). These three cases are collectively referred to in this document as the “2001 California ZEV Litigation.”

Background

1. At a public meeting held April 24, 2003, the California Air Resources Board (“ARB”) approved Board Resolution 03-04, which directs the ARB Executive Officer to initiate the process of revising the zero-emission vehicle (“ZEV”) regulation contained in the Final Regulation Order of April 12, 2002 (hereinafter the “2001 ZEV Regulation”).

2. In *Central Valley Chrysler-Plymouth, Inc., et al. v. Witherspoon*, No. 02-16395, the U.S. Court of Appeals for the Ninth Circuit has entered an Order withdrawing from submission the Executive Officer’s appeal of a preliminary injunction entered in the United States District Court for the Eastern District of California on June 11, 2002, pending submission of supplemental briefs concerning the effect of ARB’s adoption of Resolution 03-04 on April 24, 2003. By Order dated July 28, 2003, those briefs are due on August 28, 2003.

3. Board Resolution 03-04 will result in the issuance of a new Final Regulation Order (hereinafter the “2003 Final Regulation Order”) that will contain amendments to the 2001 ZEV Regulation. Once the amended ZEV regulation (hereinafter the “2003 ZEV Regulation”) has been approved by the Office of Administrative Law, and notice of the approval has been published in the *California Regulatory Notice Register*, the 2001 ZEV Regulation will cease to be effective.

4. The 2001 ZEV Regulation provided credit mechanisms and substantial credits for the early placement of ZEVs and partial ZEV allowance vehicles (“PZEVs”), upon which vehicle manufacturers have reasonably relied. The 2003 ZEV Regulation will maintain, and in some respects expand, those credit mechanisms and credits, consistent with the modified amendments in Attachment C to Resolution 03-04. Accordingly, under the 2003 ZEV Regulation, plaintiff manufacturers and their contractors and affiliates will qualify for credits from 2004 and earlier model year ZEVs and PZEVs to at least the same extent as permitted under the 2001 ZEV Regulation, consistent with the modified amendments in Attachment C to Resolution 03-04.

5. Board Resolution 03-04 specifies percentage ZEV requirements beginning in model year 2005, which under applicable regulations can begin as early as January 2, 2004.

6. This Counsel's Agreement is the product of discussions among counsel for the parties listed above in order to bring the 2001 California ZEV litigation to an end. Counsel have agreed to use their best efforts to obtain consent of their clients in the 2001 California ZEV litigation to implement this settlement plan.

Recommendations and Agreement of Counsel

Counsel for the parties listed above agree to recommend the following actions.

7. Parties' Agreement. The parties enter into the Agreement Concerning the 2001 California ZEV Litigation attached as Exhibit A ("the Parties' Agreement") as soon as feasible but no later than two months following execution of this Counsel's Agreement.

8. Preliminary Injunction Appeal. In *Central Valley Chrysler-Plymouth, Inc., et al. v. Witherspoon*, No. 02-16395, appellees will cooperate with the Executive Officer in implementing the Executive Officer's decision to seek an Order dismissing or withdrawing from submission the appeal No. 02-16395. Upon the District Court's dismissal of the underlying action entitled *Central Valley Chrysler-Plymouth, Inc., et al. v. Witherspoon*, Case No. CIV F-02-05017 REC SMS (E.D. Cal.), the Executive Officer will seek dismissal of the appeal. The Executive Officer will not seek vacatur of the preliminary injunction in either the District Court or the Court of Appeals.

9. Modification of Preliminary Injunction. In the event that ARB does not issue a 2003 Final Regulation Order adopting the 2003 ZEV Regulation prior to July 31, 2003, the plaintiffs in the *Central Valley* case may at any time thereafter file a motion in the U.S. District Court for the Eastern District of California to modify the preliminary injunction issued June 11, 2002, so as to prevent enforcement of the 2001 ZEV Regulation in model year 2005. The proposed Order is attached as Exhibit B. The Executive Officer will stipulate to entry of such a modification to the preliminary injunction issued June 11, 2002.

10. Notice and Proceedings in the Trial Courts at the End of Rulemaking. Within 15 calendar days after publication of any supplemental notice of a regulatory modification by the Executive Officer in the 2003 ZEV Rulemaking, or during the allotted comment period for comments on a supplemental notice, whichever is longer, plaintiffs will advise the Executive Officer of any changes in the proposed text of the 2003 ZEV Regulation that they would recommend to fulfill the intent of Board Resolution 03-04. Unless the plaintiffs believe that the 2003 ZEV Regulation does not fulfill the intent of Board Resolution 03-04 for any reason identified in response to a supplemental notice, within 30 days after the 2003 ZEV Regulation is filed with the California Secretary of State plaintiffs will file motions seeking voluntary dismissal without prejudice of the 2001 California ZEV Litigation, and will not seek awards of attorneys' fees or costs related to such litigation. These notice and filing requirements do not apply to any modification to the 2003 ZEV Regulation that has been made without an opportunity for the public to comment on the modification.

11. Litigation Standstill. Except as provided in this Counsel's Agreement, counsel will seek any necessary judicial stays of the 2001 California ZEV Litigation until September 30, 2003.

12. Public Communications. The parties and their agents or employees will coordinate public communication, if any, concerning this Counsel's Agreement. And they have agreed to a joint prepared statement advising the public of the Counsel's Agreement recommending settlement of the 2001 California ZEV litigation. The joint statement is attached as Exhibit C.

Other Provisions

13. Confidentiality. Drafts of this Counsel's Agreement and its Exhibits are protected by the evidentiary privilege for settlement communications and will be protected, so far as legally permissible, from disclosure under the Public Records Act. The final signed Counsel's Agreement is not confidential.

14. Execution of Filings. If required, the parties will execute court filings to effectuate this Counsel's Agreement.

15. Execution of Counterparts. This Counsel's Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all such counterparts together shall constitute but one and the same instrument.

IT IS SO AGREED.

FOR ALL PLAINTIFFS:

By: /s/
Stuart A.C. Drake
Kirkland & Ellis

August 12, 2003
Date

By: /s/
Timothy Jones
Sagaser, Franson & Jones

August 12, 2003
Date

FOR ALL DEFENDANTS:

By: /s/
W. Thomas Jennings
Senior Staff Counsel
California Air Resources Board

August 12, 2003
Date

By: /s/
Gavin G. McCabe
Deputy Attorney General
California Department of Justice

August 12, 2003
Date