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

13 THE UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 THE STATE OF CALIFORNIA; GAVIN C.
NEWSOM, in his official capacity as
17 Governor of the State of California; THE
CALIFORNIA AIR RESOURCES BOARD;
18 MARY D. NICHOLS, in her official capacity
as Chair of the California Air Resources Board
and as Vice Chair and a board member of the
19 Western Climate Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
20 BLUMENFELD, in his official capacity as
Secretary for Environmental Protection and as
21 a board member of the Western Climate
Initiative, Inc.,
22 Defendants.

2:19-cv-02142-WBS-EFB

**EX PARTE APPLICATION FOR ORDER
CONTINUING THE HEARING DATE
FOR CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Courtroom: 5
Judge: Honorable William Shubb

Trial Date: Not Set
Action Filed: 10/23/2019

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27 ¹ The State Defendants are State of California; Gavin C. Newsom, in his official capacity
as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in
28 her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his
official capacity as Secretary for Environmental Protection.

NOTICE AND EX PARTE APPLICATION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that State Defendants hereby apply ex parte for an order to continue the hearing on the parties' cross-motions for summary judgment from June 29 to July 13, the next hearing date available on the Court's motion calendar. The request for a short continuance of the hearing is based on good cause—a scheduling conflict that arises from an order recently issued in consolidated appellate matters before the Court of Appeals for the District of Columbia Circuit. Absent relief by this Court, State Defendants will suffer prejudice in that their lead counsel, who also serves as lead counsel for California in the D.C. Circuit matter, will not have sufficient time to prepare for the hearing in this matter.

This Application is supported by the attached Memorandum of Points and Authorities, the Declaration of M. Elaine Meckenstock and supporting exhibits, the case file, and any other matter this Court may consider. All Defendants support this Application. Declaration of M. Elaine Meckenstock, ¶ 23. Only Plaintiff, which failed to identify any prejudice that would befall Plaintiff if the hearing is continued and presented no alternative accommodation, indicated it will oppose. *Id.* at ¶¶ 19-22, Exhibit F.

Dated: May 26, 2020

Respectfully submitted,

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Attorney General of California
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Supervising Deputy Attorney General

/s/ Michael S. Dorsi
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Under the current briefing and hearing schedule in this matter, the hearing on the cross-
4 motions will occur on Monday, June 29, 2020. ECF No. 104. On May 20, the United States
5 Court of Appeals for the District of Columbia issued a scheduling order in the case of *Union of*
6 *Concerned Scientists v. NHTSA*, consolidated petitions seeking review of actions by two federal
7 agencies concerning certain California vehicle emissions standards. The Circuit Court’s
8 scheduling order requires California to file its opening brief by no later than Friday, June 26,
9 2020—only three days before the hearing in this matter. Neither the United States nor any of the
10 petitioners requested June 26 as the deadline for the petitioners’ opening brief. In fact, the
11 petitioners, including California, requested that briefing commence on July 21, several weeks
12 after the hearing in this matter. Deputy Attorney General M. Elaine Meckenstock, who has
13 considerable experience in litigating matters involving air pollution control programs
14 administered by the California Air Resources Board, serves as the lead attorney for California in
15 both cases. The Circuit Court’s order creates a schedule conflict that prejudices State Defendants
16 in that their lead attorney will not have an adequate opportunity to prepare for the hearing in the
17 instant matter.

18 To remedy the prejudice to State Defendants that would otherwise result from this
19 scheduling conflict, State Defendants request that the Court continue the hearing from June 29 to
20 July 13, 2020, the next available motion hearing date on the Court’s calendar. This extension will
21 permit the State Defendants’ advocate to prepare for argument, which in turn will allow her to
22 offer more useful responses to the Court’s questions.

23 Recognizing that a two-week continuance of the hearing would add two weeks to the end of
24 the briefing period, State Defendants propose that the Court either (1) leave the briefing schedule
25 as is, reserving the additional time for the Court’s preparations; or (2) divide those two weeks
26 equally, so that Plaintiff would have one additional week for their opposition and reply and
27 Defendants would have one additional week for their reply briefs. If the Court chooses the
28

1 second option, Plaintiff’s opposition and reply would be due June 15, 2020, and Defendants’
2 replies would be due July 6, 2020.

3 State Defendants attempted to resolve this scheduling conflict by way of a stipulation for a
4 two-week continuance, but Plaintiff declined. Declaration of Elaine Meckenstock (“Meckenstock
5 Decl.”), ¶ 19. Plaintiff did not indicate that it would suffer any prejudice as a result of a two-
6 week extension. *Id.* at ¶¶ 19-21. Rather, as purported grounds for its position, Plaintiff asserts,
7 incorrectly, that State Defendants’ counsel created the scheduling conflict. *Id.*, at ¶ 20, Exh. F.
8 As demonstrated below, Plaintiff’s contention is inaccurate. *Id.* at ¶¶ 8-17. Plaintiff also refers to
9 other matters where California has demonstrated the ability to act quickly—litigation matters
10 assigned to different attorneys and not involving the instant scheduling conflict. *See id.* at ¶ 21,
11 Exh. F. Plaintiff cannot credibly assert that it will suffer any prejudice. State Defendants are not
12 seeking a lengthy delay of proceedings and are instead seeking a final resolution of this matter a
13 little more than six months after Plaintiff filed its Amended Complaint.

14 State Defendants submit that their request for a short continuance should be granted as it is
15 supported by good cause and will not prejudice any party.

16 BACKGROUND

17 A. Deputy Meckenstock is Lead-Counsel In Two Separate Matters That Raise 18 Complex Issues with Potentially Significant Implications

19 Deputy Attorney General Meckenstock is assigned as lead counsel for State Defendants in
20 the instant matter. Meckenstock Decl., ¶ 4. She was selected to serve in this role because she has
21 substantial knowledge of California’s cap-and-trade program from her work on other matters and
22 substantial experience defending California regulatory programs against constitutional challenges.
23 *Id.* Meckenstock has served as lead counsel for State Defendants from the beginning of this case,
24 acquiring substantial expertise in the issues in this matter. *Id.* She has presented oral argument at
25 all hearings to date in this matter, including the first summary judgment hearing on March 9,
26 2020. *Id.*

27 In its second summary judgment motion, Plaintiff challenges the California Air Resources
28 Board’s decision to link its cap-and-trade program to a similar program adopted independently by

1 the Canadian province of Quebec on the grounds that it is preempted under the Foreign Affairs
2 doctrine. Linkage is an important aspect of California's cap-and-trade program for California
3 businesses regulated under the program because it allows them to use compliance instruments
4 issued by either California or Quebec to satisfy their regulatory obligations, expanding the
5 compliance instrument markets.

6 Deputy Meckenstock also serves as the lead counsel in *State of California, et al. v.*
7 *Wheeler, et al.*, Case No. 19-1239, D.C. Circuit (consolidated under *Union of Concerned*
8 *Scientists, et al. v. National Highway Traffic Safety Administration*, Case No. 19-1230, D.C.
9 Circuit). Meckenstock Decl., ¶ 5. There, California and other petitioners are challenging
10 decisions by the United States Environmental Protection Agency (EPA) and the National
11 Highway Traffic Safety Administration targeting state authority to adopt certain vehicle
12 emissions standards, including EPA's decision to withdraw parts of a Clean Air Act preemption
13 waiver it had granted to California in 2013. *Id.* The agencies publicly proposed to take these
14 actions back in August 2018. *Id.* Meckenstock led the team of attorneys who prepared
15 California's comments on that proposal and personally drafted substantial portions of those
16 comments. *Id.* Meckenstock has been leading California's team working on these issues since
17 then, including the briefing work to date, personally drafting several core sections of the brief.
18 Because of her substantial involvement in this matter over almost two years, including ongoing
19 work on the brief, Meckenstock cannot hand off responsibilities to another attorney with a
20 deadline approximately a month away. *Id.*

21 The work in *Union of Concerned Scientists* is complex and time-consuming. *Id.* at ¶ 6. It
22 involves agency actions that have never before been taken and raises multiple novel legal
23 questions of appellate jurisdiction, agency authority, and statutory construction under two
24 different and complex statutes. *Id.* Acknowledging this complexity, the D.C. Circuit allowed
25 26,000 words per brief, double what it ordinarily allows. *Compare* D.C. Circuit Scheduling
26 Order (Meckenstock Decl., Exh. G) *with* Fed. R. App. P. 32(a)(7)(B)(i). The briefing will also
27 require a substantial amount of coordination amongst the myriad parties involved in the litigation,
28 including more than 20 other States who joined California's petition. Meckenstock Decl., ¶ 6.

1 This work will be especially time-consuming in the two weeks leading up to the June 26, 2020
2 filing deadline, the period in which Meckenstock will be coordinating reviews by, and comments
3 from, clients, internal reviewers and the other parties (including more than 20 other States) who
4 we expect will join our brief. *Id.* Meckenstock will have little time, if any, in that window to
5 prepare for an oral argument in this case. *Id.*

6
7 **B. The Briefing Schedule in *Union of Concerned Scientists* Presents a Conflict**
8 **with the Hearing In this Case that Cannot be Addressed Without a Court**
9 **Order and Plaintiff's Assertion that California's Attorneys Created the**
10 **Conflict is Unfounded**

11 In *Union of Concerned Scientists*, the parties jointly proposed a briefing schedule on March
12 5, 2020, in which the petitioners' opening briefs would be due on May 22. Meckenstock Decl., ¶
13 8. Shortly after that March 5 submission, however, day cares, schools, and other businesses
14 began to close around the country due to stay-at-home and shelter-in-place orders responding to
15 the coronavirus pandemic. *Id.* at ¶ 9. These closures, and the transition to working full-time from
16 home, had significant impacts on counsel for California and other petitioners in the *Union of*
17 *Concerned Scientists* case. *Id.* On March 25, 2020, Deputy Meckenstock and counsel for some
18 other petitioners sought to continue petitioners' opening brief deadline by 60 days to July 21,
19 2020. *Id.* at ¶ 10. The United States took the position that the request was premature but
20 ultimately agreed not to oppose an immediate request for 21 additional days that would be
21 without prejudice to petitioners' ability to seek additional time in the future. *Id.* at ¶ 12.
22 California and other petitioners submitted a request for that 21 days to the Court on April 3, 2020,
23 expressly reserving the right to seek further time. Under that request, petitioners' briefs would
24 have been due June 12, 2020. *Id.* at ¶ 12.

25 During this same time period (late March / early April), counsel for the United States in this
26 case had informed Defendants that Plaintiff intended to move for leave to amend its complaint to
27 add a statutory preemption claim under the Clean Air Act and to remove its dormant Foreign
28 Commerce Clause claim. *Id.* at ¶ 11; *see* Exhibit A. Thus, Deputy Meckenstock did not know
then that Plaintiff would ultimately decide not to seek that leave and to move for summary

1 judgment on April 20, 2020. *Id.* Plaintiff ultimately decided not to seek leave to amend its
2 complaint and chose to file its second summary judgment motion on April 20, 2020.

3 The full impacts of the pandemic and its shutdowns on counsel for petitioners in *Union of*
4 *Concerned Scientists* became more clear in the weeks that followed the parties' submission to the
5 appellate court in early April. Meckenstock Decl., ¶ 13. On May 4, 2020, Petitioners in *Union of*
6 *Concerned Scientists* submitted a request to extend their briefing deadline by 39 additional days
7 (reflecting the 60 days about which petitioners had originally approached the United States on
8 March 25 minus the 21 days requested of the Court on April 3). *Id.* at ¶ 14. This request, which
9 would have set a July 21 deadline for Petitioners' opening brief, was based both on the ongoing
10 constraints on counsel's time from the pandemic's closures and on the conflict created by the
11 summary judgment motion filed in this case. *Id.* On May 11, 2020, the United States opposed
12 this request, asserting, *inter alia*, that petitioners would have ample time to brief the *Union of*
13 *Concerned Scientists* case with a deadline of June 12, 2020. *Id.* Neither side proposed a deadline
14 of June 26. *Id.*

15 On May 13, 2020, the parties in this case filed a stipulated schedule for the cross-motions
16 for summary judgment. ECF No. 103. This schedule did not provide Defendants with additional
17 time for their oppositions and cross-motions beyond that provided by Plaintiff's noticed hearing
18 date and operation of the local rules. It did, however, set a date for amicus briefs (giving them a
19 week to review Defendants' filings before filing their own briefs), provide Plaintiff with three
20 weeks for its opposition and reply, and provide Defendants two weeks for their replies. State
21 Defendants stipulated to this schedule largely to establish a clear deadline for amici after
22 Defendants' filings and to ensure that Defendants would have two weeks, rather than one, for
23 their reply. Meckenstock Decl., ¶ 15.² This Court issued an order adopting the stipulated
24 schedule. ECF No. 104.

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26
27 ² During the negotiations that led to the stipulated schedule, State Defendants repeatedly
28 indicated to Plaintiff that they were concerned about conflicting schedules in other matters,
including unsettled schedules in some of those matters. Meckenstock Decl., ¶ 16; *see* Exhibits C,
D, E.

1 On May 20, 2020, the D.C. Circuit issued a scheduling order in *Union of Concerned*
2 *Scientists*, setting June 26, 2020 as the deadline for petitioners’ (including California’s) briefs.
3 Meckenstock Decl., at ¶ 17. This is neither the date requested by California and the other
4 petitioners nor the date requested by the United States. *Id.* Had the D.C. Circuit adopted the
5 deadline proposed by California and other petitioners, petitioners’ opening briefs would have
6 been due more three weeks after the hearing in this case. As it stands now, Petitioners’ opening
7 brief is due on the Friday before the Monday hearing in this case, leaving State Defendants’ lead
8 attorney in this case with insufficient time to prepare for the hearing.

9 LEGAL STANDARD

10 Under Federal Rule of Civil Procedure 6(b)(1)(a), courts “may, for good cause, extend the
11 time” for a party to act, “if a request is made, before the original time or its extension expires.”
12 “‘Good cause’ is a non-rigorous standard that has been construed broadly across procedural and
13 statutory contexts.” *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010).
14 Accordingly, “requests for extensions of time made before the applicable deadline has passed
15 should ‘normally . . . be granted in the absence of bad faith on the part of the party seeking relief
16 or prejudice to the adverse party.’” *Id.* (quoting Charles Alan Wright & Arthur R. Miller, *Federal*
17 *Practice and Procedure* § 1165 (3d ed. 2004)). Further, when considering such requests, “courts
18 should be mindful that the rules are to be construed to achieve the just determination of every
19 action.” *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (citing Fed. R. Civ. P. 1); *cf. Cool*
20 *Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (noting the importance of “a full and fair
21 opportunity to ventilate the issues involved in [a] motion” for summary judgment).

22 ARGUMENT

23 I. STATE DEFENDANTS’ REQUEST FOR A SHORT CONTINUANCE OF THE HEARING IS 24 SUPPORTED BY GOOD CAUSE

25 The most important task of an attorney at oral argument is “[t]o answer any questions and
26 satisfy any doubts that have arisen in the judges’ minds.” Antonin Scalia & Bryan Garner,
27 *Making Your Case: The Art of Persuading Judges*, 94 A.B.A. J. 41, 41 (May 2008) (reprinting
28 excerpts from book of the same title). This case is particularly suited to meaningful oral

1 argument because it permits an opportunity for the Court to question advocates to ascertain the
2 relevant details of California’s cap-and-trade program, the linkage with Quebec’s program, and
3 potential interference, if any, with the foreign policy of the United States. California’s advocate
4 cannot be expected to prepare for such an important and complex argument over one weekend.

5 As noted, Deputy Meckenstock is the lead counsel in both the instant case and the *Union of*
6 *Concerned Scientists* matter. Both cases involve complex legal issues and significant
7 environmental protection programs. Deputy Meckenstock was selected to lead these cases
8 because of their complexity and because she has substantial experience and expertise in defending
9 California regulatory programs from constitutional and statutory attacks. Deputy Meckenstock
10 also has substantial knowledge of California’s cap-and-trade program from her work on other
11 matters as well as other air pollution programs administered by the California Air Resources
12 Board. She is also deeply familiar with the specific issues in these two cases due the fact that she
13 has been assigned as lead attorney in both since their inceptions.

14 Absent a continuance of the hearing in this matter, State Defendants will be prejudiced by
15 having to either: (1) substitute counsel with less familiarity with California’s Cap-and-Trade
16 program and less experience in defending California’s regulatory programs to present argument at
17 the hearing; or (2) having Deputy Meckenstock present argument at June 29, 2020 hearing despite
18 having insufficient time to prepare. This prejudice would be cured by a short continuance.

19 **II. PLAINTIFF WILL NOT BE PREJUDICED BY A TWO-WEEK CONTINUANCE**

20 When State Defendants’ presented their proposal to continue the hearing to July 13, the
21 next available date on the Court’s motion calendar, Plaintiff did not deny that a conflict exists but
22 instead responded by asserting that the existing scheduling conflict was of Deputy Meckenstock’s
23 “own making.” *See* Meckenstock Decl., ¶ 20, Exh. F. As demonstrated above, however, Plaintiff
24 is flatly wrong.

25 More importantly, in response to State Defendant’s proposal to continue the hearing for
26 two-weeks, Plaintiff failed to identify how it will be prejudiced.³ State Defendants submit that

27 ³ In his May 22 response to the State Defendants’ request to continue the hearing,
28 Plaintiff’s counsel did not identify any scheduling conflicts that would interfere with a July 13
(continued...)

1 this is because Plaintiff cannot credibly assert an injury that would result from such a short
2 continuance.

3 While Plaintiff has consistently sought expedited schedules in this case, it has never
4 explained an urgent need for relief. Plaintiff has had many years to develop and bring these
5 challenges. Linkage between California and Quebec was established in 2013 and commenced
6 operations in 2014. Amended Compl., ¶ 57; *see also* Cal. Code Regs., tit. 17, § 95943(a)(1).
7 Neither Plaintiff's Amended Complaint (ECF No. 7) nor its pending Second Motion for Summary
8 Judgment (ECF No. 102) contains any factual allegations describing time-sensitive ill effects
9 from those operations. In light of the fact that the parties' cross-motion for summary judgment
10 will resolve Plaintiff's entire lawsuit approximately six-months after State Defendants filed their
11 initial answer, Plaintiff cannot credibly assert that a two-week continuance will result in an
12 unreasonable delay of the proceedings.

13 **CONCLUSION**

14 Defendants' proposed modification to the schedule addresses their concern, and Defendants
15 respectfully request that the Court adopt it.

16
17 Dated: May 26, 2020

Respectfully submitted,

18 XAVIER BECERRA
19 Attorney General of California
20 MICHAEL P. CAYABAN
Supervising Deputy Attorney General

21 /s/ Michael S. Dorsi
22 MICHAEL S. DORSI
23 Deputy Attorney General
24 *Attorneys for State Defendants*

25 _____
26 hearing. *See* Meckenstock Decl., Exh. F. State Defendants note that in previous negotiations
27 concerning a briefing schedule, Plaintiff's counsel represented that one or more attorneys on
28 Plaintiff's team would be on vacation in July but counsel did not identify the attorney(s) or the
dates upon which that attorney(s) would be unavailable. *See id.* at Exhs. C, D. If Plaintiff's lead
counsel is unavailable on July 13, or unable to properly prepare for argument on that date due to a
scheduling conflict, State Defendants would certainly be willing to accommodate counsel's
schedule.