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National Association of Manufacturers

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SACRAMENTO

15 CALIFORNIA CHAMBER OF COMMERCE, a)
16 nonprofit business association, and LARRY DICKE,)
a State of California Taxpayer,)

17 Petitioners/Plaintiffs,)

18 vs.)

19 CALIFORNIA AIR RESOURCES BOARD,)
MARCY NICHOLS, in her official capacity as Chair)
of the Air Resources Board, JOHN BALMES, M.D.,)
20 SANDRA BERG, DORENE D'ADAMO, HECTOR)
DE LA TORRE, RONALD O. LOVERIDGE,)
21 BARBARA RIORDAN, RON ROBERTS,)
ALEXANDER SHERIFFS, M.D., DANIEL)
22 SPERLING, AND KEN YEAGER, members of the)
Air Resources Board, and DOES 1 THROUGH 10,)
23 inclusive,)

24 Respondents/Defendants.)
25)
26)
27)
28)

Case No.: 34-2012-80001313

**[PROPOSED] VERIFIED
COMPLAINT IN
INTERVENTION OF THE
NATIONAL ASSOCIATION OF
MANUFACTURERS**

Department: 29

Judge: Hon. Timothy M. Frawley

Hearing Date: May 31, 2013

Date Action Filed: Nov. 13, 2012

INTRODUCTION

By leave of the Court, the National Association of Manufacturers ("NAM") files this Verified Complaint in Intervention. The NAM joins with Petitioners California Chamber of Commerce and Larry Dicke ("Petitioners") in seeking to enjoin, and declare invalid, regulations adopted by the California Air Resources Board (alternatively "Board" or "ARB"), purportedly pursuant to Assembly Bill 32, Statutes 2006, chapter 488 ("AB 32"), that the Board cites as authority for allocating to itself greenhouse gas ("GHG") emission allowances that would otherwise be allocable to private and public entities and sell the allowances through an auction process to the highest bidder or through reserve sales for the purpose of raising state revenues. Petitioners filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Relief on November 13, 2012. Defendants filed an Answer on January 14, 2013. Petitioners and Defendants stipulated to a briefing schedule and the Court issued an order in conformity with that stipulation on December 11, 2012. By that order, the Board will file an opposition brief on the merits on or before April 10, 2013. Also by stipulation, the Board agreed to a request by one additional party seeking to intervene in support of Petitioners under specified conditions, with which the NAM hereby complies.

Intervenor NAM alleges:

NAM'S RIGHT TO INTERVENE

1. As the nation's largest industrial trade association, the NAM represents small and large manufacturers in every industrial sector in California. The NAM and its member companies are committed to protecting the environment through greater environmental sustainability, increased energy efficiency and conservation and reducing GHG emissions believed to be associated with global climate change. The NAM's position is that the establishment of climate change policies to reduce GHG emissions, whether legislative or regulatory, must be done in a thoughtful and deliberative process that ensures a competitive level playing field for U.S. companies in the global marketplace.

2. On behalf of itself and its members, the NAM opposes efforts by the Board to impose unnecessary and illegitimate costs on California manufacturers through the sale of Cap-and-Trade allowances to generate revenues at allowance auctions and reserve sales. The sale of allowances

1 under the California Cap-and-Trade Regulation will increase the costs to California manufactures,
2 including members of the NAM, by hundreds of millions or even billions of dollars. One or more of
3 the NAM's members is a regulated party subject to California's Cap-and-Trade Regulation.

4 3. As is more fully explained in the Memorandum of Points and Authorities in Support
5 of Unopposed Application for Leave to Intervene by the National Association of Manufacturers, the
6 NAM has the right to intervene in this action under California Code of Civil Procedure § 387(b) by
7 virtue of the following facts:

8 (a) The NAM's motion to intervene is timely, as it is being filed no later than
9 February 15, 2013, the date stipulated to by the parties and incorporated in the Court's January 30,
10 2013 Order;

11 (b) The NAM has a strong and direct interest on behalf of its membership to ensure
12 that unnecessary costs are not imposed directly on manufacturers in California or indirectly on
13 manufacturers throughout the nation as a result of ARB's decision to sell Cap-and-Trade allowances
14 through auctions and reserve sales in an effort to generate billions of dollars through the life of the
15 Cap-and-Trade Program;

16 (c) Intervention will not enlarge the issues in the case because the NAM stipulates
17 that it will not raise any new issues and will confine its briefing to the issues raised by Petitioners'
18 petition (including any amendments thereto) and any defenses to the same, in accordance with
19 general principles of law; and

20 (d) The NAM is not adequately represented by the current Petitioners. In addition to
21 the impacts on California businesses, the NAM is also concerned with the effect that the additional
22 costs imposed by the sale of allowances in California would have on its members in other states that
23 depend on California businesses subject to these unnecessary costs. In this sense, the NAM's
24 interests are broader than those of the California Chamber of Commerce, whose membership is
25 focused on businesses operating in California. The NAM's membership includes small and large
26 businesses from all of the 50 states, including California. As a result, the NAM brings a broader
27 perspective to the legal issues presented in this proceeding.
28

PARTIES

4. Intervenor the NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states, including California. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding of the vital role of manufacturing to America's economic future and living standards. As part of that mission, the NAM participates in litigation at the federal and state level in furtherance of the interests of its membership. The NAM's members include entities who are subject to the regulations challenged in this petition for writ of mandate/complaint for declaratory relief. The legality of those regulations is an issue of surpassing importance to the NAM and its members.

5. Petitioner CALIFORNIA CHAMBER OF COMMERCE (hereinafter "CalChamber") is a non-profit business association with over 14,000 members, both individual and corporate, representing virtually every economic interest in the State of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before courts in cases involving paramount concern to the business community. CalChamber's members include entities who are subject to the regulations challenged in this petition for writ of mandate/complaint for declaratory relief. The legality of those regulations is an issue of surpassing importance to CalChamber and its members.

6. Petitioner LARRY DICKE is a California taxpayer and Executive Vice President, Finance, and Chief Financial Officer of the California Chamber of Commerce.

7. Respondent CALIFORNIA AIR RESOURCES BOARD is an agency of state government and responsible for implementation of AB 32, Statutes 2006, chapter 488.

8. Respondent MARY NICHOLS is Chair of the California Air Resources Board and responsible for implementation of AB 32, Statutes 2006, chapter 488. She is named in her official capacity only.

1 9. Respondents JOHN BALMES, M.D., SANDRA BERG, DORENE D'ADAMO,
2 HECTOR DE LA TORRE, RONALD O. LOVERIDGE, BARBARA RIORDAN, RON ROBERTS,
3 ALEXANDER SHERRIFFS, M.D., DANIEL SPERLING and KEN YEAGER, are members of the
4 California Air Resources Board. They are named in their official capacities only.

5 10. Respondent JAMES GOLDSTENE is the Executive Officer of the California Air
6 Resources Board. Respondent Goldstene is responsible, directly and through the Board, for the
7 promulgation, implementation, and in substantial part, enforcement of the Board's AB 32
8 regulations, including those pertaining to the Board's self-allocation and sale of GHG emissions
9 allowances. Respondent Goldstene is named in his official capacity only.

10 11. Intervenor the NAM is ignorant of the true names or capacities of the Respondents
11 sued herein under the fictitious names DOE 1 through 10, inclusive.

12 **JURISDICTION**

13 12. This court has jurisdiction over this matter and authority to issue a writ of mandate
14 pursuant to Code of Civil Procedure section 1085 and to issue declaratory relief pursuant to Code of
15 Civil Procedure section 1060 and Government Code section 11350.

16 **GENERAL ALLEGATION**

17 13. In 2006, the Legislature enacted AB 32 (Stats. 2006, ch. 488) which added Division
18 25.5 to the Health and Safety Code (§§ 38500, *et seq.*). The stated purpose of AB 32 is to reduce
19 emissions of greenhouse gases. (Health & Saf. Code, § 38501.) To this end, AB 32 delegates to
20 Respondents California Air Resources Board and its members the authority to adopt regulations
21 applicable to GHG emission sources, including retail sellers of electricity and local publicly owned
22 electric utilities, limiting the amount of GHG emissions by these entities so that by 2020 total
23 statewide GHG emissions will be reduced to the level they were at in 1990. (Health & Saf. Code, §
24 38550.)

25 14. In order to fund this regulatory program, AB 32 authorizes the ARB to impose by
26 regulation a schedule of fees, to be paid by the sources of GHG emissions, that are consistent with
27 the California Environmental Protection Agency's existing fee accountability program set forth in
28

1 Health and Safety Code section 57001 applicable to all entities within that agency. (Health & Saf.
2 Code, § 38597.)

3 15. On December 13, 2011, the ARB adopted regulations implementing AB 32. (17
4 CCR, §§ 95801-96022.) As part of these regulations, the ARB created a system whereby it would
5 establish an annual aggregate statewide GHG emissions limit for years 2013-2020. (17 CCR
6 § 95841.) Emitters would annually be allocated a specified number of emission allowances which
7 they could not exceed. The annual allocation would be reduced each year until the total desired
8 GHG reduction is achieved by 2020. One emission allowance represents the right to emit one metric
9 ton of carbon dioxide equivalent. (17 CCR § 95802(a)(8), (41), & (55).) Emitters who find they
10 have excess allowances are authorized to sell those allowances to other emitters who wish to
11 increase their annual allowance limit in any particular year. This procedure is popularly known as
12 “cap and trade.”

13 16. As part of this system, and the only issue raised by this petition, is the provision
14 whereby the ARB allocates to itself an increasing percentage of each year’s authorized emissions
15 allowances and sells them at auction or through reserve sales to the highest bidder. (17 CCR
16 §§ 95870, 95910-95914.) Emission allowances purchased at the auction or reserve sale allow the
17 winning bidder to exceed its annual emission limit by the number of emission allowances purchased.
18 Revenues from the auction or reserve sales are deposited into the existing Air Pollution Control
19 Fund and will be available for appropriation by the Legislature. (17 CCR § 95870, subd. (b) & (f).)

20 17. The first auction took place on November 14, 2012, and subsequent auctions are
21 scheduled to be held on the second month of each calendar quarter thereafter. (17 CCR
22 § 95910(a)(2).) The Governor’s 2012-13 budget assumes that \$500 million from the ARB’s auction
23 can be used to offset General Fund costs. Over the span of the program to 2020, it is estimated that
24 the range of revenue generated by the auctions will be from \$12 billion to \$70+ billion.

25 18. The auction is not a “fee schedule” authorized by AB 32 nor are the auction’s
26 revenues designated for the purpose of regulating GHG emissions. Nothing in AB 32, nor its
27 legislative history, confers on the ARB the authority to allocate to itself emission allowances and
28

1 become an active participant in the cap and trade program for the purpose of generating revenues to
2 the state of up to \$70+ billion over the period 2013-2020.

3 **FIRST CAUSE OF ACTION**

4 Writ of Mandate - Code of Civil Procedure § 1085

5 (Violation of Assembly Bill 32, Statutes 2006, chapter 488)

6 19. Intervenors re-allege and incorporate by reference as if fully set forth herein the
7 allegations of paragraphs 1 through 18 above.

8 20. Respondents have only such authority conferred on them by AB 32. The ARB's self-
9 allocation and auctioning or selling off of GHG allowances pursuant to Respondents' regulations are
10 not authorized by the provisions of AB 32 and therefore are illegal and their enforcement should be
11 prohibited.

12 **SECOND CAUSE OF ACTION**

13 Declaratory Relief - Code of Civil Procedure § 1060,

14 Government Code § 11350

15 (Violation of Assembly Bill 32, Statutes 2006, chapter 488)

16 21. Intervenors re-allege and incorporate by reference as if fully set forth herein the
17 allegations of paragraphs 1 through 20 above.

18 22. Respondents have only such authority conferred on them by AB 32. The ARB's self-
19 allocation and auctioning or selling off of GHG allowances pursuant to Respondents' regulations are
20 not authorized by the provisions of AB 32 and should be declared invalid.

21 **THIRD CAUSE OF ACTION**

22 Declaratory Relief - Code of Civil Procedure § 1060,

23 Government Code § 11350

24 (Violation of California Constitution)

25 23. Intervenors re-allege and incorporate by reference as if fully set forth herein the
26 allegations of paragraphs 1 through 22 above.

27 24. In the alternative, if AB 32 were interpreted to authorize the ARB's self-allocation
28 and auctioning or selling off of GHG allowances pursuant to Respondents' regulations, then those

1 regulations violate the California Constitution because they impose a tax that was not enacted by a
2 two-thirds vote in each house of the Legislature, as required by California Constitution, article XIII
3 A, section 3.

4 **FOURTH CAUSE OF ACTION**

5 Writ of Mandate - Code of Civil Procedure § 1085

6 (Violation of California Constitution)

7 25. Intervenor re-allege and incorporate by reference as if fully set forth herein the
8 allegations of paragraphs 1 through 24 above.

9 26. In the alternative, if AB 32 were interpreted to authorize the ARB's self-allocation
10 and auctioning or selling off of GHG allowances pursuant to Respondents' regulations, then those
11 regulations violate the California Constitution because they impose a tax that was not enacted by a
12 two-thirds vote in each house of the Legislature, as required by California Constitution, article XIII
13 A, section 3, and therefore are illegal and their enforcement should be prohibited.

14
15 WHEREFORE, Intervenor the NAM prays for relief as follows:

16 1. Issue a writ of mandate prohibiting the Respondents from allocating to the ARB
17 and/or the State a portion of the annual available GHG emission allowances and conducting the
18 auctions or selling off of those allowances under the purported authority of 17 CCR §§ 95870 and
19 95910-95914.

20 2. Issue a declaratory judgment that 17 CCR §§ 95870 and 95910- 95914 are invalid and
21 unenforceable.

22 3. Issue a declaratory judgment that 17 CCR §§ 95870 and 95910- 95914 impose an
23 unconstitutional tax.

24 4. Issue a writ of mandate prohibiting the unconstitutional tax contained in 17 CCR
25 §§ 95870 and 95910-95914 from being enforced or imposed.

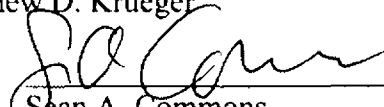
26 5. Grant such other and further relief as the Court shall deem appropriate.
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2 Dated: February 15, 2013
3

Respectfully submitted,

4 SIDLEY AUSTIN LLP
5 Roger R. Martella, Jr.
6 Paul J. Zidlicky
7 Sean A. Commons
8 Eric D. McArthur
9 Matthew D. Krueger

By:


Sean A. Commons
*Counsel for the National Association of
Manufacturers*

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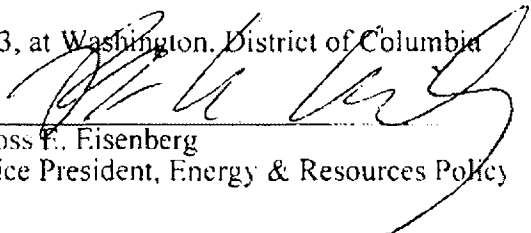
VERIFICATION

I, Ross E. Eisenberg, declare as follows:

I am vice president of Energy and Resources Policy for the National Association of Manufacturers ("NAM"), Intervenor in this action. I have read the foregoing **PROPOSED** **VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** and know its contents. The same is true of my knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of February, 2013, at Washington, District of Columbia



Ross E. Eisenberg
Vice President, Energy & Resources Policy