UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,	:	
v.	:	C.A. No. 06-69T
W. MICHAEL SULLIVAN, in his official capacity as Director of the Rhode Island Department of Environmental Management	:	

LINCOLN DODGE, INC., *et al.*,	:	
v.	:	C.A. No. 06-70T
W. MICHAEL SULLIVAN, in his official capacity only as Director of the Rhode Island Department of Environmental Management	:	

MOTION OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, GENERAL MOTORS CORPORATION, AND CHRYSLER LLC FOR ENTRY OF A RULE 54(b) FINAL JUDGMENT OR IN THE ALTERNATIVE FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL, AND FOR A STAY

The Alliance of Automobile Manufacturers, Chrysler LLC, and General Motors Corporation move the Court to direct that judgment be entered against them in Case No. 06-70T pursuant to Fed. R. Civ. P. 54(b) to permit an appeal of the Court's Memorandum and Order entered on November 25, 2008 (the "November 2008 Order"), or, in the alternative, that the Court amend the November 2008 Order to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Movants also request a stay of proceedings pending appeal of the November 2008 Order. In support thereof, the Movants rely on their accompanying Memorandum of Law.

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Dated: December 10, 2008

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MEMORANDUM OF LAW OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, GENERAL MOTORS CORPORATION, AND CHRYSLER LLC IN SUPPORT OF MOTION FOR ENTRY OF A RULE 54(b) FINAL JUDGMENT OR IN THE ALTERNATIVE FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL, AND FOR A STAY

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For Plaintiffs Alliance of Automobile Manufacturers, Chrysler LLC, and General Motors Corporation

Dated: December 10, 2008

The Alliance of Automobile Manufacturers ("the Alliance"), Chrysler LLC ("Chrysler"), and General Motors Corporation ("GM") respectfully request that the Court direct that judgment be entered against them in Case No. 06-70T pursuant to Fed. R. Civ. P. 54(b) to permit an appeal of the Court's Memorandum and Order entered on November 25, 2008 (the "November 2008 Order"), or, in the alternative, that the Court amend the November 2008 Order to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Movants also request a stay of proceedings pending appeal of the November 2008 Order.

I. Background and Summary

In these consolidated cases, the November 2008 Order granted defendants' motion for judgment on the pleadings with respect to the Association of International Automobile Manufacturers (the sole plaintiff in Case No. 06-69T) and, in Case No. 06-70T, with respect to the Alliance, Chrysler and GM. The Court accordingly dismissed Case No. 06-69T, and movants are advised that AIAM intends to file a Notice of Appeal once final judgment in Case No. 06-69T is entered. *See Fed. Deposit Ins. Corp. v. Caledonia Inv. Corp.*, 862 F.2d 378, 381 (1st Cir. 1988); *In re Massachusetts Helicopters Airline, Inc.*, 469 F.3d 439, 441-42 (1st Cir. 1972). The Alliance, Chrysler and GM wish to join AIAM in that appeal, and, for the reasons presented below, are entitled to entry of judgment permitting appeal under Rule 54(b) or to an interlocutory appeal under 28 U.S.C. § 1292(b). As no party will be prejudiced by a stay, movants also suggest that the interests of judicial economy are also best-served by a stay of proceedings in this Court until disposition of the appeal of the November 2008 Order.

II. Grounds For Entry of Judgment under Rule 54(b)

Rule 54(b) provides that "the [C]ourt may direct entry of final judgment as to one or more, but fewer than all claims ***or parties*** ... if the [C]ourt expressly determines that there is no just reason for delay." *See Darr v. Muratore*, 8 F.3d 854, 862-63 (1st Cir. 1993); *see also Sears*

Roebuck & Co. v. Mackey, 351 U.S. 427, 436 (1956) (Rule 54(b) "provide[s] a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on all the claims in the case."). Determining whether there is "no just reason for delay" involves essentially two inquiries: (a) whether the final judgment would have the "requisite aspects of finality", *i.e.*, whether it would "dispose of all the rights and liabilities of at least one party as to at least one claim";[1] (b) whether the equities establish that there is no just reason for delay. *Darr*, 8 F.3d 854 at 861-62; *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43 (1st Cir. 1988).[2] The latter inquiry requires the district court to assess "the litigation as a whole, and [weigh] all factors relevant to the desirability of relaxing the usual prohibition against piecemeal appellate review in the particular circumstances." *Id*; *see also Darr*, 8 F.3d at 862.[3]

The Court's grant of defendants' motion for judgment on the pleading against the manufacturers and trade associations has the "requisite aspects of finality" insofar as it "dispose[s]" of all of their claims, and dismisses them entirely from the case.[4] And though the

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[1] *See State Street Bank & Trust Co. v. Brockrim, Inc.*, 87 F.3d 1487, 1489-90 (1st Cir. 1996) (citing *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 706 (1996)). *See also Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) ("A district court must first determine that it is dealing with a 'final judgment.' It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'") (citation omitted).

[2] The Court should state its analysis "on the record," *see, e.g., Knight v. Mills*, 836 F.2d 659, 661 n.2 (1st Cir. 1987), and must "consider the interrelatedness of the claims and the overall context of the case before him, *see Darr*, 8 F.3d at 862 & n.11 (citations omitted).

[3] In a sister circuit, district courts are to consider "factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like." *Allis Chalmers Corp. v. Phil. Elec. Co.*, 521 F.3d 260, 364 (3d Cir. 1975) (cited approvingly by the First Circuit in *Spiegel*, 843 F.2d at 43 & n.3).

[4] *Cf. Sears*, 351 U.S. 436 (where district court "struck out" two of four counts, Supreme Court concluded that "there is no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims"); *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 706 (1st Cir. 1996) ("The first requirement was met here with respect to the summary judgments entered (Continued…)

ultimate claims of all plaintiffs are similar, the parties themselves are distinct, and the legal issues that would be reviewed by the First Circuit (collateral estoppel) in an appeal by the manufacturers and trade associations are distinct from the merits of the dealers' claims. *Cf. Kumar v. Ovonic Battery Co., Inc.*, 2002 WL 32705072, at *1-2 (D. Mass) (entering Rule 54(b) final judgment where the claims to be appealed "are separable" from the claims live below, where there is no possibility the claims to be appealed might become moot, and where the "issues" to be appealed are not likely to have to be revisited), *rev'd on other grounds*, 351 F.3d 1364, (Fed. Cir. 2003). Accordingly, Rule 54(b) judgments are routinely entered when parties have been precluded from pursuing the merits based on doctrines of claim or issue preclusion. *See, e.g., Gaind v. Pierot*, 282 Fed. Appx. 946, 947 (2d Cir. 2008); *Accrued Fin. Servs, Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 296 (4th Cir. 2002); *see also O'Reilly v. Malon*, 747 F.2d 820, 822-824 (1st Cir. 1984) (suggesting that district court could have properly made a Rule 54(b) certification where it dismissed a party on collateral estoppel grounds).[5]

With respect to the equities of the current situation, movants note that if the First Circuit were to determine that the Alliance, Chrysler and/or GM should not be precluded from litigating the merits under the doctrine of claim preclusion, movants would be entitled to the benefit of that ruling in other litigation concerning state motor vehicle greenhouse gas regulations in which they are parties. In addition, when the Court enters final judgment in Case No. 06-69T, and thus an appeal in Case No. 06-69T is triggered, fairness and common sense would suggest that all parties

against Fisher and in favor of Biopure and CFI. Although CFI's derivative rights against Biopure remain unresolved, as to Fisher nothing remained but to enter judgment.").

[5] *Accord Matasantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1205 (10th Cir. 2001); *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 867 (5th Cir. 2000); *L-Tec Electronics Corp. v. Cougar Elec. Org.*, 198 F.3d 85, 87 (2d Cir. 1999).

representing the interests of the vehicle manufacturing business in this country be permitted to take an appeal at the same time, rather than to require the First Circuit to hear piecemeal appeals on the issue of collateral estoppel. Moreover, inasmuch as this Court has already determined that movants have standing and that some of their preemption claims are ripe, further motions practice involving the remaining plaintiffs in this case would be pointless if the November 2008 Order is reversed. Failure to apply Rule 54(b) in this situation would unnecessarily increase the expense, time, and complexity of the proceeding. *Cf. Darr*, 8 F.3d at 863 (citing *Curtiss-Wright, supra*) ("The trial court ... may take time and value into consideration in finding delay unreasonable ....").

III. Grounds for Interlocutory Appeal

As an alternative to entering judgment under Rule 54(b) in Case No. 06-70(T) with respect to movants, the Court should modify its Order to certify an interlocutory appeal. *See* 28 U.S.C. § 1292(b) ("When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."). One such "controlling question of law as to which there is a substantial ground for disagreement" in this case is whether non-mutual defensive collateral estoppel should be applied to issues of law, where doing so would "foreclose opportunity for obtaining reconsideration of the legal rule upon which [prior decisions were] based" and thus would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue ...." Restatement (2d)

Judgments § 29(7) & cmt i; *see* Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings ("Pls' Opp") at 10, Dkt. No. 57 (filed April 28, 2008) (citations omitted).[6]

As the November 2008 Order indicates, the rule stated in the Restatement (2d) Judgments § 29(7) has been adopted and applied by at least two sister circuits. *See Pharm. Care Mgmt. Assn. v. D.C.*, 522 F.3d 443 (D.C. Cir. 2008); *Af-Cap v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007). The same rule has also been applied by a district court in this Circuit. *See Wade v. Brady*, 460 F. Supp. 2d 226, 240, 243 (D. Mass. 2006).[7] The rule stated in section 29(7) of the Restatement (2d) Judgments does not appear to have been rejected by any federal court of appeals in a published decision. The First Circuit has not considered the application of section 29(7) Restatement (2d) Judgments in a published decision, which is a factor that in and of itself supports certification of an interlocutory appeal. *See, e.g., In re Heddendorf*, 263 F.2d 887, 888 (1st Cir. 1959) (example of appropriate case for interlocutory review is "one where the district court has denied a motion to dismiss for want of jurisdiction which raised a novel question and is reluctant to embark upon an extended and costly trial until assured that its decision on the motion to dismiss is sustained).[8]

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[6] The question is "controlling" because if the First Circuit, which reviews collateral estoppel determinations *de novo*, *see, e.g., Enica v. Principi*, 544 F.3d 328, 336 (1st Cir. 2008), determines that collateral estoppel should not be applied here, the November 2008 Order may be reversed. And, for the reasons described at pp. 3-4, an "immediate appeal will materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

[7] Agreement or disagreement within the Circuit is relevant to whether a question should be certified. *Cf. Caraballo-Seda v. Mun. of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) ("The fact that two other district courts in Puerto Rico have arrived at a similar holding ... supports a finding that no substantial ground for difference of opinion exists.").

[8] Some First Circuit cases also suggest that the "importance" of an issue is relevant to determining whether certification is appropriate. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Lit.*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988) (finding "matter to be sufficiently novel and important ... to fulfill statutory requisites" for interlocutory appeal). The application of the rule in section 29(7) is an important issue in itself, insofar as it is critical to determine whether, in cases of national significance, the first two district courts to hear a federal preemption question will effectively decide the issue for the entire country , subject to appeals of those decisions.

The November 2008 Order declined to apply the rule in section 29(7) of the Restatement (2d) Judgments on grounds that movants submit warrant interlocutory review. The November 2008 Order appears to assume the rule in section 29(7) of the Restatement (2d) Judgments is only available to the government. *See* Order at 15-16. But the D.C. Circuit, the Ninth Circuit, and District of Massachusetts decisions cited above applied the rule when collateral estoppel was asserted against private parties.[9] The November 2008 Order also seems premised on the view that the Restatement rule is inapplicable in cases of non-mutual defensive (as opposed to offensive) collateral estoppel. *See* Order at 17-18. But both *Pharmaceutical Care* and *Wade v. Brady* apply the rule to prevent non-mutual defensive collateral estoppel. Finally, the November 2008 Order determined that the rule should not apply because the preemption issues presented in this case are not questions of law. *See* Order at 12, 16-17. But the First Circuit has made clear that a federal preemption challenge "represents a pure question of law." *See United States v. R.I. Insurers' Insolvency Fund*, 80 F.3d 616, 619 (1st Cir.1996) (cited approvingly in *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 69 (1st Cir. 2006)).[10] In sum, there is a "substantial ground for disagreement" on the application of the Restatement rule to the preemption issues presented here that is more than sufficient to support interlocutory review.

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[9] *See also Envt'l Def. Fund v. EPA*, 369 F.3d 193, 203 (2d Cir. 2004) (refusing to preclude private party in a case against EPA, and noting that "while . . . *Mendoza* only precludes nonmutual offensive collateral estoppel against the government, its rationale is informative in a case like this, which affects the public interest and is only one of a series of legal challenges across the country").

[10] The two district courts on whose decisions the November 2008 Order relied treated the issue of express preemption under 49 U.S.C. § 32919(a) as questions of law. In the Vermont district court decision, the court held that even if the state greenhouse gas regulations required increases in fuel economy, those regulations could not possibly be preempted under 49 U.S.C. § 32919(a) if they receive a waiver of Clean Air Act preemption. *See* [cite]. In the California case, the district court resolved the issues of both express and implied preemption by way of a motion under Fed. R. Civ. P. 56, and held there could be no preemption even if the regulations required "substantial" increases in fuel economy. *See* [cite].

IV. Grounds for a Stay of Proceedings

Federal district courts have inherent power to stay proceedings pending appeal of a Rule 54(b) judgment; indeed, "[i]f a district court certifies claims for appeal pursuant to Rule 54(b), it ***should*** stay all proceedings on the remaining claims if the interests of efficiency and fairness are served by doing so." *Doe v. Univ. of Cal.*, 1993 WL 361540 at 2 (N.D. Cal.) (emphasis added); *see generally United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970).[11] For the reasons stated above, *see supra* at 3-4, a stay would conserve the resources and time of both the Court and all parties, avoid piecemeal appeals of the collateral estoppel issue, and potentially avoid multiple proceedings on the merits. A district court may also grant a stay pending interlocutory appeal, which similarly "invokes the equitable powers of [the] Court." *Fresenius Med. Care Cardiovascular Resources, Inc. v. Puerto Rico*, 322 F.3d 56, 60 n.3 (1st Cir. 2003).

Conclusion

For the foregoing reasons movants respectfully request that the Court enter final judgment with respect to them pursuant to Rule 54(b) or, in the alternative, modify the November 2008 Order to permit an interlocutory appeal under 28 U.S.C. § 1292(b). Movants

[11] *See, e.g., S.R. v. Hilldale Independent School Dist. No. I-29*, 2008 WL 2346115, at * 2 (E. D. Okla.) (where one party was dismissed from case, court granted 54(b) motion and stay pending appeal because "[p]ermitting judgment to be entered and a stay of the jury trial of the claims against [another party] would . . . conserve judicial and the litigants' resources, and promote efficiency"); *Kumar*, 2002 WL 32705072 at *2 (staying proceedings pending appeal pursuant to Rule 54(b) judgment); *Lewis v. Phi Kappa Tau Fraternity, Inc.*, 2006 WL 763129, at 1 (S.D. Miss 2006) (in an order entering Rule 54(b) judgment, court found "that it would be in the interest of judicial economy to allow the appeal to go forward to the Fifth Circuit prior to trying less than all of the Defendants or potential Defendants, and that the complaint as against the remaining Defendant, John R. Parker, should [thus] be stayed pending resolution of the appeal by the Fifth Circuit Court of Appeals"); *de Aguilar v. National Railroad Passenger Corp.*, 2006 WL 509444, at 3 (E.D. Cal. 2006) (court directed entry of Rule 54(b) judgment and stay of appeal, noting that "[s]taying further proceedings pending the appeal of the grant of summary judgment for the County of Kern possibly will avoid the need to conduct two separate trials, thereby saving judicial resources as well as the resources of the parties").

also request a stay in proceedings pending disposition of the appeal in Case No. 06-69T and in any appeal permitted in Case No. 06-70T.

Respectfully submitted,

Dated: December 10, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 2008, I did send a true copy of the within Motion and Memorandum of Law **by electronic means (ECF)** to:

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