

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

THE ASSOCIATION OF INTERNATIONAL
AUTOMOBILE MANUFACTURERS,

Plaintiff,

v.

W. MICHAEL SULLIVAN, in his official capacity
as Director of the Rhode Island Department of
Environmental Management

Defendant.

Civil Action No. 06-69T

LINCOLN DODGE, INC., *et al.*,

Plaintiff,

v.

W. MICHAEL SULLIVAN, in his official capacity
only as Director of the Rhode Island Department of
Environmental Management

Civil Action No. 06-70T

**PLAINTIFF ASSOCIATION OF INTERNATIONAL AUTOMOBILE
MANUFACTURERS' MOTION FOR ENTRY OF JUDGMENT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 58(d) OR IN THE ALTERNATIVE ENTRY
OF JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b)**

By this motion, Plaintiff in Civil Action No. 06-69T, the Association of International Automobile Manufacturers ("AIAM"), requests that this Court enter judgment in Civil Action No. 06-69T pursuant to Federal Rule of Civil Procedure 58(d). Alternatively, this Court should enter judgment as to AIAM's claims pursuant to Federal Rule of Civil Procedure 54(b). This motion is based on the fact that this Court granted Defendants' motion for judgment on the pleadings as to all of the claims that were pled by AIAM in Civil Action No. 06-69T, *see* Mem. & Order Granting in Part & Denying in Part Defs.' Mot. for J. on the Pleadings (Nov. 24, 2008)

(the "November 24 Order"), and there is no just reason for delay. In support hereof, AIAM relies on its accompanying Memorandum of Law.

Respectfully Submitted,

Plaintiff Association of International
Automobile Manufacturers,

By its Attorneys,

Of Counsel:

Raymond B. Ludwiszewski
Charles H. Haake
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Emails: rludwiszewski@gibsondunn.com
chaake@gibsondunn.com

/s/ Kristin E. Rodgers

Joseph V. Cavanagh, Jr. (#1139)
Kristin E. Rodgers (#4842)
Mary C. Dunn (#6712)
BLISH & CAVANAGH, LLP
Commerce Center
30 Exchange Terrace
Providence, RI 02903
Tel: (401) 831-8900
Fax: (401) 751-7542
Emails: jvc@blishcavlaw.com
ker@blishcavlaw.com
mcd@blishcavlaw.com

Dated: December 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2008, an exact copy of the within document was electronically submitted to the Electronic Case Filing System of the United States District Court for its electronic distribution to all counsel of record as follows:

Michael Rubin, Esq.
Trish K. Jedele, Esq.
Special Assistant Attorneys General
150 South Main Street
Providence, RI 02903

Mary Kay
Acting Executive Legal Counsel
Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

John A. Tarantino, Esq.
Patricia K. Rocha, Esq.
Adler Pollock & Sheehan, P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903

Andrew B. Clubok, Esq.
Stuart A.C. Drake, Esq.
Kirkland & Ellis, LLP
655 Fifteenth Street, N.W.
Washington, DC 20005

Cynthia Giles, Esq.
Conservation Law Foundation
55 Dorrance Street, Suite 201
Providence, RI 02903

Matthew F. Pawa, Esq.
1280 Centre Street, Suite 230
Newton Centre, MA 02459

Melissa A. Hoffer, Esq.
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

ls\ Kristin E. Rodgers

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

THE ASSOCIATION OF INTERNATIONAL
AUTOMOBILE MANUFACTURERS,

Plaintiff,

v.

W. MICHAEL SULLIVAN, in his official capacity
as Director of the Rhode Island Department of
Environmental Management

Defendant.

Civil Action No. 06-69T

LINCOLN DODGE, INC., *et al.*,

Plaintiff,

v.

W. MICHAEL SULLIVAN, in his official capacity
only as Director of the Rhode Island Department of
Environmental Management

Civil Action No. 06-70T

**MEMORANDUM IN SUPPORT OF PLAINTIFF ASSOCIATION OF
INTERNATIONAL AUTOMOBILE MANUFACTURERS' MOTION FOR ENTRY OF
JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 58(d) OR IN
THE ALTERNATIVE ENTRY OF JUDGMENT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 54(b)**

Plaintiff Association of International Automobile Manufacturers ("AIAM") submits the within Memorandum in support of its motion to enter judgment in Civil Action No. 06-69T pursuant to Federal Rule of Civil Procedure 58(d). Alternatively, this Court should enter judgment as to AIAM's claims pursuant to Federal Rule of Civil Procedure 54(b). This motion is based on the fact that this Court granted Defendants' motion for judgment on the pleadings as to all of the claims that were pled by AIAM in Civil Action No. 06-69T, *see* Mem. & Order

Granting in Part & Denying in Part Defs.' Mot. for J. on the Pleadings (Nov. 24, 2008) (the "November 24 Order"), and there is no just reason for delay.

A. This Court Should Enter Final Judgment As To Civil Action Number 06-69T Under Rule 58(d).

Federal Rule of Civil Procedure 58(a) provides that except in certain cases (not applicable here), "[e]very judgment and amended judgment must be set out in a separate document." *See* Fed. R. Civ. P. 58(a). Rule 58(b) further provides that "[s]ubject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: ... (C) the court denies all relief" in the action. *Id.* Rule 58(b). Finally, Rule 58(d) provides that "[a] party may request that judgment be set out in a separate document as required by Rule 58(a)." *Id.* Rule 58(d).

Final judgment should be entered in Civil Action No. 06-69T because this Court has denied all relief that was requested in that action by AIAM. Moreover, Rule 54(b) would not dictate otherwise, because that rule applies where "an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved ..." *See* Fed. R. Civ. P. 54(b). Here, all of the claims asserted by AIAM have been disposed of. Moreover, although Civil Action No. 06-69T has been consolidated with Civil Action No. 06-70T, each action maintains its separateness for purposes of finality and appeal. *See Gray v. Evercore Restructuring, L.L.C. (In re High Voltage Eng'g Corp.)*, 544 F.3d 315, 319 (1st Cir. 2008); *see also Fed. Deposit Ins. Corp. v. Caledonia Inv. Corp.*, 862 F.2d 378, 381 (1st Cir. 1988) ("[W]here cases are consolidated for purposes of convenience and judicial efficiency, the cases retain their separate identity and judgments rendered in each individual action are appealable as final judgments within the meaning of 28 U.S.C. 1291"); *In re Mass. Helicopter Airlines*, 469 F.2d 439 (1st Cir. 1972) (where one case in consolidated action was

entirely disposed of, parties did not need to obtain Rule 54(b) to appeal the completed action). This court should therefore enter judgment in Civil Action No. 06-69T so as to allow AIAM to perfect its appeal.

B. Alternatively, The Court Should Enter Judgment As To AIAM Pursuant To Rule 54(b).

In the event that this Court were to determine that it is not appropriate to enter final judgment in Civil Action No. 06-69T under Rule 58(d), then it should enter judgment as to AIAM pursuant to Rule 54(b). Rule 54(b) provides that “the [C]ourt may direct entry of a final judgment as to one or more, but fewer than all claims or parties” if the Court expressly determines that “there is no just reason for delay.” *See* Fed. R. Civ. P. 54(b); *see also* *Darr v. Muratore*, 8 F.3d 854, 862-63 (1st Cir. 1993).¹ In determining whether there is no just reason for delay, courts consider 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” – and whether the equities establish that there is no just reason for delay. *Darr*, 8 F.3d 854 at 861-62.

¹ The U.S. Supreme Court has made clear that this mechanism is no longer reserved for the “infrequent” case, but rather constitutes an important tool that district courts can and should use to promote judicial economy given the increasingly complicated nature of modern federal civil litigation. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980) (“However accurate it may be as a description of cases qualifying for Rule 54(b) treatment, the phrase ‘infrequent harsh case’ in isolation is neither workable nor entirely reliable as a benchmark for appellate review.” (quoting 1946 Notes of the Advisory Committee)). Indeed, “[t]he present trend is toward greater deference to a district court’s decision to certify under Rule 54(b).” *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991); *see also* *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1094–95 (2d Cir. 1992) (“The reason that ‘infrequent harsh case’ is ‘neither workable nor entirely reliable as a benchmark for appellate review’ is obvious: federal litigation has changed over the years, and what was ‘infrequent’ in 1946 has become normal in 1992. . . . In short, now that the garden-variety civil complaint often involves multiple claims and/or multiple parties, we cannot, as the Supreme Court has recognized, hide behind the old ‘infrequent harsh case’ chestnut.” (citations omitted)).

Here, there can be no question that the Court's granting of the Defendant's motion for judgment on the pleadings has the requisite aspects of finality as to AIAM, notwithstanding the consolidation of Civil Action No. 06-69T with Civil Action No. 06-70T. That motion was directed at all of the claims asserted by AIAM in Civil Action No. 06-69T. Having granted that motion, this Court has disposed of all of the rights asserted by AIAM and all of the liabilities of the Defendant as to all of AIAM's causes of action. Courts routinely grant entry of judgment under Rule 54(b) where all of the claims as to one of the parties have been adjudicated in their entirety. *See Britton v. Maloney* 196 F.3d 24, 27 (1st Cir. 1999) (affirming district court's grant of 54(b) motion as to certain defendants whose claims were entirely disposed of).

Nor is there any just reason for delay. As a trade association consisting of some of the world's largest automobile manufacturers and whose sales comprise roughly 40% of the new vehicle market, AIAM deserves to have the merits of its claims decided with those parties that have live claims remaining. If the First Circuit Court of Appeals were to determine that AIAM's claims should not have been dismissed on collateral estoppel grounds, then AIAM should be free to pursue the merits of its claims in this Court. If, however, this Court were to proceed to the merits of the underlying EPCA and Clean Air Act preemption claims asserted by the dealer plaintiffs remaining in Civil Action No. 06-70T before AIAM has had a chance to appeal this Court's November 24 Order, then AIAM will effectively be frozen out of the litigation and prevented from having its arguments heard.² Moreover, the legal issues that would be reviewed by the First Circuit (collateral estoppel) in an appeal by AIAM are distinct from the merits of

² For this reason AIAM joins in the request for a stay of proceedings set forth in the motion for entry of judgment filed by Plaintiffs in Civil Action No. 06-70T, the Alliance of Automobile Manufacturers, Chrysler LLC, and General Motors Corporation.

claims that survived this Court's November 24 Order. Finally, there will be no prejudice to the Defendant should this Court enter judgment as to AIAM and allow AIAM to perfect its appeal of the November 24 Order. To the contrary, doing so will provide a more orderly and efficient disposition of these actions since the threshold issue of collateral estoppel will be fully resolved before this Court proceeds to the merits of the underlying claims. For these reasons, this Court should enter final judgment as to AIAM under Rule 54(b).³

I. CONCLUSION

Because the Court's November 24 Order finally resolved all of AIAM's claims and completely disposed of Civil Action No. 06-69T, AIAM respectfully requests that this Court enter final judgment under Rule 58(d) of the Federal Rules of Civil Procedure. Alternatively, because the Court's November 24 Order is final as to AIAM yet not to all plaintiffs in the consolidated case, Civil Action No. 06-70T, and because there is no just reason for delaying appellate review of that final determination, AIAM requests that this Court certify its ruling as a final judgment under Rule 54(b).

³ As an alternative to entering judgment under either Rule 58(d) or 54(b) with respect to AIAM's claims set forth in Civil Action No. 06-69T, this Court should modify its Order to certify an interlocutory appeal for the reasons set forth in the motion for entry of judgment filed by Plaintiffs in Civil Action No. 06-70T, the Alliance of Automobile Manufacturers, Chrysler LLC, and General Motors Corporation. AIAM hereby joins in that request.

Respectfully Submitted,

Plaintiff Association of International
Automobile Manufacturers,

By its Attorneys,

/s/ Kristin E. Rodgers

Of Counsel:

Raymond B. Ludwiszewski
Charles H. Haake
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Emails: rludwiszewski@gibsondunn.com
chaake@gibsondunn.com

Joseph V. Cavanagh, Jr. (#1139)
Kristin E. Rodgers (#4842)
Mary C. Dunn (#6712)
BLISH & CAVANAGH, LLP
Commerce Center
30 Exchange Terrace
Providence, RI 02903
Tel: (401) 831-8900
Fax: (401) 751-7542
Emails: jvc@blishcavlaw.com
ker@blishcavlaw.com
mcd@blishcavlaw.com

Dated: December 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2008, an exact copy of the within document was electronically submitted to the Electronic Case Filing System of the United States District Court for its electronic distribution to all counsel of record as follows:

Michael Rubin, Esq.
Trish K. Jedele, Esq.
Special Assistant Attorneys General
150 South Main Street
Providence, RI 02903

Mary Kay
Acting Executive Legal Counsel
Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

John A. Tarantino, Esq.
Patricia K. Rocha, Esq.
Adler Pollock & Sheehan, P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903

Andrew B. Clubok, Esq.
Stuart A.C. Drake, Esq.
Kirkland & Ellis, LLP
655 Fifteenth Street, N.W.
Washington, DC 20005

Cynthia Giles, Esq.
Conservation Law Foundation
55 Dorrance Street, Suite 201
Providence, RI 02903

Matthew F. Pawa, Esq.
1280 Centre Street, Suite 230
Newton Centre, MA 02459

Melissa A. Hoffer, Esq.
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

ls\ Kristin E. Rodgers
