

United States District Court, D. Vermont.  
GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP, et al., Plaintiffs  
v.  
Thomas W. TORTI, et al., Defendants.  
Docket No. 02:05-cv-302.  
February 23, 2006.

### Memorandum in Opposition to Motion to Stay Cases

Plaintiffs in Case No. 2:05-CV-302 respectfully file this memorandum in opposition to defendants' motion to stay this case and Case No. 2:05-CV-304, dated February 8, 2006.

#### Preliminary Statement

This action and Case No. 2:05-CV-304 seek pre-enforcement review of a regulation adopted by defendants in the fall of 2005. If left standing, that regulation will affect the price, performance and potentially the safety of nearly every car and truck sold in Vermont starting in less than two years' time. Substantial economic harm has already been done to the Vermont businesses most immediately affected by the regulation (new-vehicle dealers in this State), simply by virtue of defendants' decision to go forward with the regulation, and the resulting impact of the regulation on the future viability of their retail businesses. Plaintiffs are therefore grateful that the Court has reserved a trial date of March 2007 for these cases. Any delay in deciding the merits of the claims presented here would impose additional harm on each plaintiff and would continue to destroy the value of retail automotive businesses in Vermont.

The matter is now before the Court on defendants' application for a stay. The delay sought by defendants would cause additional harm to plaintiffs, and there is no clear showing by defendants of any significant inequity arising from the need to defend their regulation in these actions. In addition, and as the Court recognized at the Rule 16 Conference held last week, defendants' resort to the "first filed" and related doctrines is incorrect as a matter of law. The schedule developed by the Court is judicially efficient. The motion for a stay should be denied.

#### BACKGROUND

This case presents important legal issues of nationwide significance. In 1975, the U.S. Congress established a national energy conservation program for automobiles. In the ensuing decades, the national government has developed detailed regulations governing automotive fuel economy that have produced substantial increases in fuel efficiency, under close supervision by the

federal courts. [FN1] Vermont and other States have now adopted rules that also regulate motor vehicle fuel economy, under the guise of controlling automotive carbon dioxide ("CO2"). The central legal issue presented here is whether Congress has preempted individual States from enforcing such regulations, both expressly and based on Congress' occupation of the field of fuel economy regulation, as well as based on specific conflicts between this state regulation and the federal fuel economy regulations that will be developed at trial.

FN1. See Complaint in Case No. 2:05-CV-302 (filed Nov. 18, 2005) <paragraph><paragraph> 12- 13, 36, 75-84.

State CO2 regulations for automobiles have now been adopted in ten jurisdictions. (Vermont was the first State outside California to adopt such rules.) Final resolution of the conflict between federal law and the state regulations cannot be accomplished in a single venue in a timely manner, because each of those ten States intends to start enforcing its CO2 regulation beginning in the 2009 automotive model year, which begins less than two years from now. Accordingly, cases challenging the CO2 regulations on federal preemption grounds have now been filed in District Courts in the First, Second and Ninth Circuits. [FN2]

FN2. The cases filed in other districts are Central Valley Chrysler Plymouth, Inc., et al. v. Witherspoon, Civil Action No. F-04-6663 (E.D.Cal., filed Dec. 7, 2004); Ass'n of Intl. Automobile Mfrs. v. Sullivan, Civil Action No. 06-69-T (D.R.I., filed Feb. 13, 2006); and Lincoln Dodge Inc. et al. v. Sullivan, Civil Action No. 06-70-T (D.R.I., filed Feb. 13, 2006).

The approach taken by the state agencies that have adopted CO2 regulations has left the automobile industry with no practical alternative to litigation in multiple circuits, and to seek the earliest possible trial dates in each circuit. The first trial is scheduled for the Eastern District of California in January 2007, but the official defendant in the California case has made it clear that she has no intention of rescinding her regulation unless ordered to do so by the Ninth Circuit. [FN3] It is entirely possible, given the relative speed of the civil appellate docket in the Second Circuit, that this Court's decision on the merits will be the first to receive appellate review.

FN3. The California defendant laid the groundwork for her appeal from any adverse decision in Fresno in a brief she filed in the District Court in Fresno last spring:

"Since these issues are important enough, and involve several purely legal issues ... the Court can reasonably expect the losing side to file a notice of appeal (or otherwise seek appellate review. The Ninth Circuit will review these legal issues de novo."

Reply Mem. of Pts. & Auth. in Support of Defendant's Mot. to Dismiss, Central Valley Chrysler-Jeep et al. v. Witherspoon (filed May 27, 2005) at 23, attached to an accompanying Request for Judicial Notice ("RJN") as Exhibit 1.

Turning to the specifics of the cases in this Court, the harm being done to plaintiffs is not merely imminent or theoretical, it is immediate. Several vehicle manufacturers have determined that the state C02 regulations will force severe restrictions in their product lines in Vermont and other States enforcing these rules. [FN4] The prospect of future product line restrictions has immediate impacts on the value of the affected dealers in Vermont. Were there any doubt about this point, several plaintiffs in this action are filing the Declaration of Richard S. Bower, an emeritus professor of economics at the Tuck School of Dartmouth College. Dr. Bower explains how the prospects of severe restrictions in the model lines that some dealers will be able to offer in the future, unless the C02 regulation is enjoined, will affect the current value of those retail businesses. [FN5]

FN4. The vehicle manufacturer plaintiffs in this case are prepared, and hereby offer, to prove why and how the C02 regulation will force elimination of a substantial number of vehicle models in Vermont. (It should be noted that such proof cannot be offered by the Alliance of Automobile Manufacturers, which is also a plaintiff in this action. The Alliance of Automobile Manufacturers represents several manufacturers, does not have access to the evidence of how the rules will affect any single manufacturer, and does not take positions on competitive issues in litigation.)

FN5. See Bower Declaration, filed herewith in Case No. 2:05-CV-302 <paragraph> 3 (some automotive businesses in Vermont "have and will continue to experience a real, significant and increasing loss in business value" to the regulation). The premise for Dr. Bower's opinion is contained in the averments of the Complaint that the C02 regulation will force the elimination of many currently offered vehicles from some manufacturers' product lines, which as indicated above the manufacturer plaintiffs in Case 302 are prepared to prove. See Complaint in Case No. 2:05-CV-302 <paragraph><paragraph> 60-64 and note 4 above.

Apparently without regard to the current impact of the C02 regulation on local businesses, defendants have suggested that challenges to the C02 regulation are not yet ripe, because the U.S. Environmental Protection Agency ("EPA") has not decided whether to waive preemption for the C02 rules under the Clean Air Act. There should be no question that the C02 regulation is currently in effect in this State: by operation of Vermont law, the rules became effective on Nov. 22, 2005, according to defendants' web-site, and they are currently requiring active steps by the industry in order to prepare for compliance in the 2009 model year. (See, e.g., Complaint in Case No. 2:05-

CV-302 <paragraph><paragraph> 87-94.) For its part, EPA cannot grant an injunction against enforcement of the regulations, and in the past the State of California has tried to block EPA's consideration of whether its regulations are preempted by the federal fuel economy laws and regulations, in reliance on the D.C. Circuit's decision in *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095 (D.C.Cir. 1979). See *id.* at 1114. ("[W]e think the Administrator was entitled to refuse to pass on petitioners' constitutional claims").

## ARGUMENT

The extraordinary remedy of a stay requires a movant to "make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). The movants here do not even attempt to claim that there is no "fair possibility" of harm, ignore the evidence of immediate harm to Vermont dealers, and try to claim that any other harm is "undu[e]." The few cases on the issue have established that the need to defend one's actions in federal court does not constitute the clear hardship or inequity that would justify a stay. Defendant's motion therefore falls well short of carrying the "heavy burden of showing the necessity for the stay." *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991); see also *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Because defendant cannot show grounds for a stay under the rule in *Landis*, and because the rules concerning "first filed" and "duplicative" cases clearly do not apply here, the stay motion should be denied and the parties should proceed to the merits.

### I. DEFENDANTS DO NOT MEET THE STANDARD FOR A STAY.

#### A. The Obligation To Defend This Action Is Not A Hardship.

Defendants seek a stay to avoid the burden of litigating these cases. Plaintiffs are aware of no decision endorsing the view that a party can avoid litigation by asserting that the litigation itself is a "clear case" of hardship or inequity. To the contrary, apparently the only court obliged to consider the issue held that "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005).

Defendants' assertion of hardship or inequity falls even shorter of the mark when this case is viewed in context. The State controlled its own destiny when it decided to adopt the CO<sub>2</sub> regulation for the 2009 model year. Having affirmatively chosen to promulgate the regulation, the State cannot properly now complain that defending its regulation is somehow a hardship or inequitable. Indeed, it would be truly inequitable to allow the State to subject plaintiffs and other members of the public to regulation without an opportunity for timely review in this Court.

Defendants also asserts hardships relating to defending the action through discovery or the retention of experts. Being forced to defend a regulation is not a hardship within the meaning of Landis, see *Mirant Corp.*, 398 F.3d at 1112, but in any event defendants' position cannot be squared with the recent facts, as plaintiffs understand them. The Agency of Natural Resources conducted a full rulemaking process in the fall of 2005 before deciding to put the CO2 regulation into immediate effect. The state agency obtained and summarized in the administrative record an analysis of the issues that are likely to be involved in expert testimony in this case, which it said it had obtained from a consulting firm called Meszler Engineering Services, based in Maryland. [FN6] Mr. Daniel Meszler, the principal in that firm, is a licensed professional engineer who was apparently retained to work on the CO2 regulations by an association of state agencies whose directors include Mr. Richard Valentinetti, one of the official defendants in this action. Defendants are thus presumably quite familiar with the expert issues in this case, and certainly have access to outside resources to assist them.

FN6. See RJN Exhibit 2 at 12 (describing defendants' reliance on work by the Meszler firm).

#### B. Judicial Economy And Sound Policy Do Not Support A Stay.

The Court has already addressed the interest in judicial economy by setting a trial date in March 2007, after the California case has been scheduled for trial. In addition, the case law indicates that considerations of judicial economy rarely if ever could control the decision whether to stay a case under Landis. "The Supreme Court has indicated ... that to be entitled to a stay, a party must demonstrate a clear case of hardship if there is a danger that the stay will damage the other party." *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 5 (1st Cir. 1983).

In the development of the case law under Landis, "[c]ourts have held that a discretionary stay is justified only if, based on a balancing of the parties' interests, there is a clear inequity to the suppliant who is required to defend while another action remains unresolved and if the order granting a stay can be framed to contain reasonable limits on its duration." *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1552 n. 13 (11th Cir. 1986) (emphasis added). More bluntly: "Judicial efficiency does not, by itself, allow a federal court to refuse to exercise its jurisdiction in favor of proceedings in an alternative forum." *CTF Hotel Holdings Inc. v. Marriot Int'l, Inc.*, 381 F.3d 131, 139 (3d Cir. 2004). [FN7] Particularly in light of the trial sequencing vis a vis the California litigation established by this Court at last week's Rule 16 conference, considerations of judicial economy do not warrant a stay.

FN7. See also *Ortega Trujillo v. Conover & Co. Comm., Inc.*, 221 F.3d 1262, 1265 (11th Cir. 2000) (per curiam) (reversing stay pending resolution of case in foreign court and holding that "interests of judicial economy alone are insufficient to justify such an indefinite stay"); *CFTC v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1485 (10th Cir. 1983) ("We are persuaded ... that such considerations [of judicial economy] should rarely if ever lead to such broad curtailment of the access to the courts."); cf. *N. Assurance Co.*, 201 F.3d at 89-90 ("[T]he scarcity of judicial resources alone does not justify denying a party the opportunity to litigate a claim.").

### C. Were A Balancing Of Interests Necessary In This Case, The Balance Would Not Support A Stay.

The current harm to the Vermont dealers interested in this action is substantial, and the stakes of this litigation for the American automobile industry as a whole are huge. Dealers who now know they will have very restricted product lines to sell in few years cannot value their businesses as highly as they could before this regulation was adopted. Particularly in Vermont, where many dealers have relatively low sales volumes, the prospective loss of important parts of the product line has what Dr. Bower is properly prepared to call a "real, significant, substantial and increasing loss in business value." For their part, the vehicle manufacturers cannot make firm plans for the future until the issues presented by the CO2 regulations have worked their way through several courts of appeals, if only because no individual State that has adopted these regulations is likely to acquiesce in a decision rendered in a trial court or by the court of appeals in another circuit.

Against the interests of the Vermont dealers and the automobile industry at large, there are essentially no other interests that the State can muster to balance against them -- other than the interest in not having to defend a regulation that the State adopted and decided to put into effect immediately. This is a balancing test that the State cannot win, particularly if it seeks something more than what the Court has already given it, which is a trial date more than a year away. Cf. *I.A. Durbin, Inc.*, 793 F.2d at 1152 n. 13 (once movant shows interest in stay, court must balance interests); *Landis*, 299 U.S. at 257 (any stay granted must not be "immoderate"). The importance of the legal issues presented here and probable need for them to be addressed by more than one court provide an additional rationale to support the Court's decision to schedule a trial for March 2007. See *Dellinger v. Mitchell*, 442 F.2d 782, 787-88 (D.C. Cir. 1971) (finding stay invalid in part so that the Supreme Court could have views of multiple courts if it chose to address the merits at some point).

## II. THIS IS NOT "DUPLICATIVE LITIGATION" AND THE "FIRST FILED" RULE DOES NOT

APPLY.

Finally, it is worth reciting in brief why these cases do not fit within the ambit of the rules concerning "duplicative litigation" and the "first filed" rule.

The case principally relied upon by defendants for the rule concerning "duplicative litigation" notes that the doctrine must be applied with care. See *Curtis v. Citibank*, 226 F.3d 133, 136 (2d Cir. 2000). The Supreme Court has recently described "duplicative litigation" as " 'multiple suits on identical entitlements or obligations between the same parties.' " *Will v. Hallock*, 126 S. Ct. 952, 960 (2006) (quoting Wright and Miller, *Federal Practice and Procedure* <section> 4402 (2d ed 2002)). The Second Circuit has similarly described actions being duplicative "if the claims, parties and available relief do not significantly differ between the two actions." *N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 90 (2d Cir. 2000) (internal quotations omitted); *James v. AT&T Corp.*, 334 F. Supp. 2d 410, 411 (S.D.N.Y. 2004) (quoting the same). This Court has also recently adopted this definition. *Country Home Products, Inc. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 569 (D. Vt. 2004) (Sessions, J.) ("A suit is viewed as duplicative if the claims, parties and available relief do not differ significantly between the two actions.").

Here, there are significant differences between the actions in Vermont and in other jurisdictions. First, there are several different plaintiffs and an unrelated defendant. Second, this case involves some legal issues not present in the California action. Third, and, perhaps most important, different relief is sought--an injunction against the enforcement of a Vermont law in Vermont--than is available in the California litigation. It cannot be argued that an injunction against the enforcement of a California law in California does not "differ significantly" from the injunction of a Vermont law in Vermont. The Second Circuit has recently explained that it was unable to find "any case where a second suit against an independent party was dismissed as duplicative." *N. Assurance Co*, 201 F.3d at 90. This is not such a case.

The "first filed rule" is a "change of venue principle" which applies to "subsequently commenced litigation involving the same parties and the same issues when both suits are proceeding in federal courts." *Alden Corp. v. Eazypower Corp.*, 294 F. Supp. 2d 233, 235 (D. Conn. 2003). The nature of the first filed rule was recognized by this Court in *Country Home Products, Inc.*, 350 F. Supp. 2d at 569-70 (Sessions, J.), where the Court was faced with both a request to transfer venue under 28 U.S.C. <section> 1404(a) and an assertion of that the "first filed rule" applied. This Court analyzed the two claims together because the "analysis under the first-filed rule requires consideration of the same factors relevant to stay a 'second-filed' action on a motion to transfer under 28 U.S.C. <section> 1404(a)." *Id.*

Similarly, other courts have explained that the "first filed rule" applies when two federal courts have concurrent jurisdiction over the underlying claim. See, e.g., *E.E.O.C. v. Univ. of Pa.*, 850 F.3d 969, 971 (3d Cir. 1988), *aff'd* 493 U.S. 182 (1990); *id* at 972 (first filed rule "gives a court 'the power' to enjoin the subsequent prosecution of proceedings involving the same parties and same issues before another district court"); see also *William Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177, 178 (2d Cir. 1969). Of course, the instant case does not involve a situation where the same parties are involved in two cases in two different courts that would both be proper venues for the underlying action. As such, the first filed rule is inapplicable.

### CONCLUSION

For the foregoing reasons, the motion for a stay should be denied.

Motions, Pleadings and Filings (Back to top)

. 2006 WL 1521865 (Trial Motion, Memorandum and Affidavit) Reply of Intervenor to Plaintiffs' Conditional Opposition (Apr. 4, 2006)Original Image of this Document (PDF)

. 2006 WL 1203225 (Trial Motion, Memorandum and Affidavit) Defendants' Reply to Plaintiffs' Memorandum in Opposition to Motion to Stay Cases (Mar. 13, 2006)Original Image of this Document (PDF)

. 2006 WL 812029 (Trial Pleading) Defendants' Answer to Complaint Filed by Green Mountain Chrysler-Plymouth- Dodge-Jeep, et al. (Feb. 24, 2006)Original Image of this Document (PDF)

. 2006 WL 812015 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion of Conservation Law Foundation, Sierra Club, Natural Resources Defense Council, Environmental Defense and Vermont Public Interest Research Group to Intervene as Party Defendants (Feb. 21, 2006)Original Image of this Document with Appendix (PDF)

. 2006 WL 812014 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum in Support of Motion to Stay Cases (Feb. 9, 2006)Original Image of this Document (PDF)

. 2:05cv00302 (Docket) (Nov. 18, 2005)

. 2:05cv00304 (Docket) (Nov. 18, 2005)

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