

STATE OF VERMONT

SUPERIOR COURT  
Chittenden Unit

CIVIL DIVISION  
Docket No. 617-6-15 Cncv

JACOB R. KENT, ANNE B. VERA, THOMAS  
R. MAHAR and DAWN M. MAHAR, DAVID  
C. CARTER and BARBARA CARTER and all  
others similarly situated,

Plaintiffs,

v.

R.L. VALLEE, INC., SB COLLINS, INC.,  
WESCO, INC., CHAMPLAIN OIL  
COMPANY, INC.,

Defendants.

**DEFENDANT WESCO, INC.'S MOTION TO DISMISS**  
**THE FIRST AMENDED COMPLAINT AND**  
**MEMORANDUM IN SUPPORT THEREOF AND**  
**NOTICE OF JOINDER**

**MOTION TO DISMISS AND NOTICE OF JOINDER**

Defendant Wesco, Inc., by and through its attorneys, O'Connor & Kirby, PC, hereby moves to dismiss the First Amended Complaint under Rule 12(b)(6) because it fails to state a claim upon which relief can be granted and because it was filed past the running of the statute of limitations. This Motion is based on the following Memorandum and on the arguments and authorities presented in the Memoranda filed in support of the Motions to Dismiss filed by the co-defendants in this action, which we adopt herein. To the extent their arguments and factual assertions apply to Defendant Wesco, Inc., we give notice of joinder in those assertions, arguments and in the Motions to Dismiss.

## MEMORANDUM

**Failure to State a Claim.** Plaintiffs' Complaint alleges an anti-trust conspiracy. That "conspiracy," they claim, is and was established through "secret meetings and conversations." First Amended Complaint ¶ 79 (hereinafter "Complaint"). Yet no facts support this conclusion. To repeat what the co-defendants have so clearly pointed out in the Motions to Dismiss they have filed, no facts are alleged that describe these "secret meetings" in any fashion, and certainly not with the sufficiency required to survive this Motion to Dismiss. Plaintiffs do not describe the date, place, time of or participants in these "meetings" or what was said by anyone that would constitute an illegal agreement. It is, however, our position that it would be hard to provide specifics, since we believe these meetings to be creations of the Plaintiffs' imaginations. Nonetheless, assuming the truth of the matters in the complaint for purposes of this Motion, nowhere in the complaint are allegations of "agreement" between the defendants set forth with sufficient specificity. The facts are completely lacking. Moreover, nothing else in the Complaint raises any facts sufficient to state a claim. Many of the allegations concern protected First Amendment activity of the Defendants which cannot provide a basis for a claim. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960). The Complaint simply contains conclusory statements which follow the elements of an anti-trust claim, but do not state facts sufficient to form a basis for a viable claim under Rule 12(b)(6). As the Memoranda of the co-defendants make crystal clear, the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

**Statute of Limitations.** Plaintiffs explain their failure to bring these claims in a timely manner by claiming that the Defendants concealed their "unlawful conduct." Complaint ¶ 76. Plaintiffs further state that they "did not discover their cause of action earlier than immediately

before the filing of this lawsuit because Defendants’ fraudulent concealment of their conspiracy was effective.” Complaint ¶ 89. It is hard to imagine that Plaintiffs had no notice of the assertions in the action since numerous public hearings were held concerning high gas prices over the years, and since discussion of these hearings comprises a substantial segment of the allegations and discussions in the Complaint. The issue of gas pricing is not secret. Further, Plaintiffs fail to allege the specific fact or facts they discovered “immediately prior to the filing” which brought this claim to their attention and there is no evidence of such a fact or facts in the Complaint. This appears simply to be an excuse without substance for the failure to bring the Complaint earlier. As the Memorandum of Defendant Champlain Oil Co., Inc., makes clear, the Complaint is out of time and should be dismissed for that reason as well.

### **CONCLUSION**

For the reasons stated in this Memorandum and the Memoranda of the co-defendants in this action, Plaintiffs’ First Amended Complaint should be dismissed in its entirety. To the extent that factual assertions and arguments contained in co-defendants’ motions apply to Defendant Wesco, we give notice of joinder in those motions and adopt the arguments and assertions set forth therein.

Dated: October 5, 2015 at Burlington, Vermont

Respectfully submitted,

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