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June 24, 2016

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VIA HAND DELIVERY

Christine Brock, Superior Court Clerk
Vermont Superior Court
Chittenden Civil Division
175 Main Street
Burlington, VT 05402

Re: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al.
Docket No.: 617-6-15 Cncv
DRM File No.: 05130-0000224

Dear Christine:

Enclosed for filing with the Court in the above-referenced matter is Defendant R.L. Vallee, Inc.'s Reply to Plaintiffs' Opposition to Motion for Protective Order/Stay of Discovery and a Certificate of Service.

Thank you for your assistance.

Sincerely,

Tristram J. Coffin

Enclosures

Cc: Joshua L. Simonds, Esq. (w/enc.) (via first class mail and electronic mail)
R. Jeffrey Behm, Esq. (w/enc.) (via first class mail and electronic mail)
John Roddy, Esq. (w/enc.) (via first class mail and electronic mail)
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STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 617-6-15Cncv

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 R.L. VALLEE, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR A PROTECTIVE ORDER/ STAY OF DISCOVERY

I. Introduction

Pursuant to V.R.C.P. 78(b)(1), Defendant R.L. Vallee, Inc. ("Vallee") submits this Reply to Plaintiffs' June 8, 2016 Opposition ("Opposition") to Vallee's Motion for Protective Order/Stay of Discovery Pending Final Disposition of Defendants' Motion for Interlocutory Appeal.[1] In its Motion for Protective Order ("Motion"), Vallee: (i) explained the compelling need for a protective order/stay of discovery in a case such as this (the exorbitant costs of discovery in a price-fixing, class action lawsuit that purports to cover ten years), justified by the fact that the requested interlocutory appeal, if granted, could be fully dispositive of Plaintiffs'

[1] In fact, Plaintiffs' Opposition is a combined: 1) Opposition to Defendant's Motion for Protective Order/Stay of Discovery, and 2) Motion to Compel Defendants to Answer the Amended Complaint. Consistent with the Court's request that litigants not file separate motions in a single document, Vallee will respond separately to the Motion to Compel Defendants to Answer.

Amended Complaint; and (ii) demonstrated that the courts of Vermont and other jurisdictions routinely grant stays where early, fully-dispositive defense motions are pending. As is shown in Plaintiffs' Opposition, however, and in the parties' various reports to the Court regarding their attempts to agree on a discovery schedule, Plaintiffs not only will not agree that discovery should be temporarily stayed while Defendants' motion for interlocutory appeal is pending, but also will not agree to any staging, phasing, or limitations on discovery at all. Plaintiffs demand that full-blown discovery commence, on both liability and class issues, with no limitations or phasing. See, e.g., Plaintiffs' June 10 Status Report and Defendants' June 13 Status Report.

In their Opposition, Plaintiffs argue that because Defendants' motion to dismiss was denied, they are entitled to commence full-blown discovery from Defendants, despite the pendency of a motion for permission to appeal that denial. Plaintiffs do not cite any authorities for the proposition that discovery should proceed – even partially – despite the pendency of a motion for permission to appeal the denial of a motion to dismiss. Plaintiffs do not cite any authorities denying a motion to stay discovery while a motion for permission to appeal is pending.[2] Instead, they argue, first, that the motion to appeal will not succeed. Plaintiffs are entitled to their opinion on that issue, but this motion is not the proper place to reargue the merits of Defendants' motion for permission to appeal. Plaintiffs have already fully made their arguments in their opposition to the motion for permission. Second, they dispute that the motion

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[2] Plaintiffs cite one decision, Serrano v. I. Hardware Distributors, Inc., No. 14-2488, 2016 WL 2757426 (S.D.N.Y. May 11, 2016), for the proposition that the court denied a motion to stay discovery while defendant sought an interlocutory appeal of the denial of its motion to dismiss. Opposition at 7. But this decision does not reflect the proposition for which it is cited. The decision was a substantive decision on defendant's motion for permission to take an interlocutory appeal, not a discovery decision. The court denied defendant's motion for appeal, and, therefore, at the same time, denied defendant's also-pending motion to stay discovery. The decision is not a decision on whether discovery should be stayed while a motion for appeal is pending, or while an appeal itself is pending. Plaintiff's parenthetical description of this decision is misleading.

for permission to appeal is an extension of Defendants' motion to dismiss. Given that the Defendants are seeking an appeal of this Court's denial of their motion to dismiss Plaintiffs' Amended Complaint in its entirety, it is hard to see how Plaintiffs can make this assertion with a straight face. If this Court allows interlocutory appeal and the Vermont Supreme Court grants the relief that Defendants are seeking, Plaintiffs' case goes away completely. Third, they argue that even if the Supreme Court changes the relevant pleading standard, it would not be dispositive of this litigation. That is incorrect. As noted above, on this appeal Plaintiffs' case is subject to complete dismissal. The Vermont Supreme Court could, for example, adopt Twombly and hold that the Amended Complaint fails under that standard. But even if the Supreme Court remands the case for further consideration, there is no reason for discovery to proceed until such an analysis is concluded, and Plaintiffs' do not explain why that is not true. Fourth, Plaintiffs argue that they will be prejudiced by any delay in discovery because "evidence disappears" and "memories fade." No evidence that was in Defendants' possession when Plaintiffs filed this case has "disappeared," and to the extent that any memories might have faded, Plaintiffs have only themselves to blame for waiting so long to bring this action, as the Court itself noted in its May 6 Order (dismissing any claims older than six years as barred by the statute of limitations because Plaintiffs were aware long ago of their potential claims). Lastly, Plaintiffs accuse Defendants of merely trying to delay. On the contrary, Defendants are seeking to have this case dismissed, as they believe it should be.

II. Background

Procedurally, in its May 6 Order this Court granted in part and denied in part Defendants' motion to dismiss. In its Order the Court cited what it characterized as Vermont's "exceedingly

weak" pleading standard; it identified three "plus factors" pulled together from various other anti-trust cases across the country; and it determined that, as screened through those "plus factors," Plaintiffs' Amended Complaint presented sufficient allegations to survive dismissal. The Court noted, however, that it was not saying that Plaintiffs' claims would survive summary judgment; only that Vermont's low threshold for dismissal allowed this Amended Complaint to survive. Subsequent to that Order, the parties have met-and-conferred several times, but Plaintiffs would not agree with Defendants' position that discovery should be stayed and that if and when it commences, it should be "phased."[3] Plaintiffs have taken the position that full-blown discovery must commence, on all issues, and that there should be no phasing, limitations, or restrictions. On May 20 Defendant S.B. Collins filed a Motion for Permission to Take Interlocutory Appeal.[4] The bases of Defendants' motion are: 1) whether the Court applied the proper pleading standard; and 2) assuming the Court applied the proper standard, whether the facts alleged in the Amended Complaint meet that standard. Even after Defendants filed their motion, they have in good faith continued to discuss discovery issues with Plaintiffs, but the parties simply cannot agree, as they have reported to the Court in their respective status reports.

III. Argument

Plaintiffs argue that now that the motion to dismiss has been denied, the procedural posture is different than it was while that motion was pending, even though Defendants are timely seeking appellate review of that denial. But they do not explain why it is different, and

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[3] Defendants have proposed a phased discovery schedule that generally tracks the logic of the Court's May 6 Order.

[4] The Motion for Permission to Take Interlocutory Appeal is pending as Motion 20, and has been joined in by the other three defendants.

why that difference means that Defendants' motion for permission to appeal – a potentially fully-dispositive motion – must simply be disregarded procedurally such that unlimited discovery should commence immediately. The current procedural posture of the case is this: Plaintiffs' Amended Complaint survived dismissal because of a purely legal, and controversial, issue – the correct pleading standard. Alternatively, the Amended Complaint survived dismissal – even under the correct (Colby) pleading standard – because this Court misidentified and/or misapplied the appropriate "plus factors." Defendants are currently seeking review of those important issues, as is their right. Defendants accept the possibility that the Supreme Court may deny their motion for permission to appeal, or may accept the appeal and affirm the trial court. But the current procedural posture of the case is not so fundamentally different than it was when Defendants' motion to dismiss was pending such that discovery must now inexoribly commence. See Mann v. National Review, Inc., No. 2012 CA 8263 B (Super. Ct., Dist. Of Col., Apr. 11, 2014 (granting defendant's motion to stay discovery pending interlocutory appeal); See Chrysler Capital Corp. v. Century Power Corp., 137 F.R.D. 209, 211 (S.D.N.Y. 1991, June 27, 1991) (granting stay of all discovery pending disposition on a motion to dismiss); See Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 130 (2d Cir.1987) (district court has discretion to halt discovery pending its decision on motion to dismiss; when a motion to dismiss is based on *forum non conveniens* extensive discovery would defeat the purpose of the motion thus the motion to stay discovery was affirmed); See James v. York County Police Dep't, 160 F.App'x 126 , 136 (3d Cir. 2005) (courts may properly defer or delay discovery while it considers a potentially dispositive pretrial motion).

Plaintiffs next argue that "even a successful appeal would not be dispositive." It is difficult to understand how Plaintiffs can make this argument. A successful appeal might not be dispositive, but it very well could be. The Supreme Court could agree either that Vermont courts should now be governed by Twombly, or at least that that a higher pleading standard should apply in a case like this. In either event, the Court could either evaluate the Amended Complaint under the higher standard or remand to this Court for further consideration. Contrary to Plaintiffs' assertions, remand is not preordained.

But even if the Supreme Court orders a remand and reconsideration by this Court (either under a new, higher pleading standard or because, under the existing pleading standard, this Court erred in the application of that standard), Plaintiffs do not explain why discovery should commence until that analysis – an analysis that, in turn, could be case-dispositive – is finished. Even a remand scenario could ultimately result in a dismissal. In such an event, any discovery that had been done in the interim would have been entirely wasteful. Courts should not engage in unnecessary, wasteful proceedings, and defendants should not be subjected to them. See Johnson v. New York University Sch. of Education, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) ("because the adjudication of the pending motion to dismiss may obviate the need for burdensome discovery, defendant's request for a stay of discovery is granted"); See McAssey v. Discovery Mach., Inc., No. 4:16-CV-705, 2016 U.S. Dist. LEXIS 76327, *4-5 (M.D. Pa. June 13, 2016) ("Parties who file motions which may present potentially meritorious and complete

legal defenses to civil actions should not be put to the time, expense and burden of factual discovery").[5]

Plaintiffs argue that they will be harmed by a delay in discovery. But they only make the conclusory assertion of harm; they do not explain why – having waited since 2006 to file this case – they will actually be harmed by waiting another few months. They engage in alarmist speculation only; they identify no evidence that is in danger of being lost and they identify no memories that are in danger of fading. In fact, this is largely a document case. The case hinges on what Defendants' gasoline prices were; how they were set; and whether that setting involved illegal collusion. Defendants are not aware of any documents that existed when this suit was filed that are in danger of being lost – no matter when formal discovery commences and no matter how long the suit lasts.

Lastly, Plaintiffs resort to falsely accusing Defendants of a "motive" to delay, supposedly demonstrated by a refusal to abide by court orders. Plaintiffs cite not a single court order or deadline that the Defendants have refused to abide by. Certainly, since the May 6 Order the parties have had differences over when discovery should commence, and whether discovery should be staged. There is nothing improper in the fact of those disagreements. There is nothing improper in Defendants having their own views on these issues. And there is not a single

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[5] It should be borne in mind that this is not a case where the defendants sought only partial dismissal of the Complaint. In a case where the defendants seek only partial dismissal, the commencement of some discovery might be justified. This is not such a case. Here, Defendants moved for dismissal of the Complaint in its entirety, and are now seeking appellate review on that dismissal.

deadline that Defendants have flouted or ignored. Plaintiffs' accusations of bad faith are as baseless as were their allegation of "secret meetings."[6]

IV. Conclusion

For the forgoing reasons, the Motion for a Protective Order and Stay of Discovery should be granted and all discovery in this case should be stayed pending a final resolution of Defendants' motion for interlocutory appeal of this Court's ruling on Defendants' motion to dismiss, and, should the motion be granted, decision on the appeal itself. Defendants should also be relieved of having to file an Answer to the Complaint at this time.

Burlington, Vermont.

June 24, 2016

DOWNS RACHLIN MARTIN PLLC

By: _____

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[6] Defendants and Plaintiffs disagree over whether Defendants are required to answer the Amended Complaint while they are seeking to appeal the denial of their motion to dismiss that Amended Complaint. The fact of that disagreement does not justify Plaintiffs' accusation that Defendants have "ignored" deadlines. In fact, Plaintiffs have not cited a single authority that holds that a party in Defendants' current procedural position must answer the complaint. And Plaintiffs' position doesn't make any sense as a practical matter. Why should a party be put to the exercise of answering a complaint that might not survive, where the Defendants have properly exercised the procedural rules, in a timely fashion, to seek the dismissal of that complaint and to appeal the denial of that dismissal?