VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

JACOB R. KENT, et al., Plaintiffs v. R.L. VALLEE, INC., et al., Defendants	Docket No. 617-6-15 Cncv

RULING ON DEFENDANTS' MOTION FOR INTERLOCUTORY APPEAL

In this class action, plaintiffs allege price-fixing by defendants, who are wholesale and retail sellers of unleaded gasoline in Chittenden, Franklin, and Grand Isle counties. Specifically, plaintiffs claim violations of the Vermont Consumer Protection Act (VCPA) (9 V.S.A. § 2453) as to wholesale gasoline (Count I) and retail gasoline (Count II), as well as unjust enrichment (Count III). Defendants moved to dismiss pursuant to V.R.C.P. 12(b)(6), and also on statute of limitations grounds. In a written order, the court granted the motion to dismiss in part as to the statute of limitations issue, but denied it in all other respects. Defendants now move for an interlocutory appeal from that denial.

There are three requirements for interlocutory review: (1) the order or ruling must "involve[] a controlling question of law"; (2) there must be "substantial ground for difference of opinion" regarding that question; and (3) "an immediate appeal may materially advance the termination of the litigation." V.R.A.P. 5(b)(1); *see also* 12 V.S.A. § 2386; In re Pyramid Co. of Burlington, 141 Vt. 294, 301 (1982). Interlocutory appeals are considered an "exception to the normal restriction of appellate jurisdiction to the review of final judgment" because "[p]iecemeal

appellate review causes unnecessary delay and expense, and wastes scarce judicial resources." Pyramid, 141 Vt. at 300. However, there is a "narrow class of cases" for which interlocutory review is advisable, as articulated by the requirements outlined in Appellate Rule 5(b). Id. at 301. Because that rule is based upon 28 U.S.C. § 1292(b) and F.R.A.P. 5, the "policies and rationales underlying the federal statute provide guidance for our construction of V.R.A.P. 5(b)." Pyramid, 141 Vt. at 301. The definitions of the criteria enumerated in Rule 5(b) are "not self-evident"; rather, they are deliberately vague so as to "'inject an element of flexibility . . . . The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal.'" Id. at 301–02 (quoting 16 Wright & Miller, Federal Practice and Procedure § 3930, at 156 (1977)).

Defendants raise two issues for appeal: (1) the correct pleading standard for antitrust claims in Vermont; and (2) whether the complaint in this case satisfied the Vermont pleading standard as articulated in Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1 and Bock v. Gold, 2008 VT 81, ¶¶ 4–5, 184 Vt. 575. The first and third criteria under Rule 5(b) are satisfied as to the first issue. It is a "controlling question of law" because review would not require an examination of any factual record, and an immediate appeal could potentially "materially advance the termination of the litigation." V.R.A.P. 5(b); *see also* In re Text Messaging Antitrust Litig., 630 F.3d 622, 624–27 (7th Cir. 2010). If the Supreme Court held that a higher pleading standard applied, the case might terminate.

The third criterion of Rule 5(b) is similarly satisfied as to the second issue. If the Supreme Court held that the complaint in this case satisfied the Vermont pleading standard as articulated in Colby and Bock and reversed this court's denial of the motion to dismiss, the case might terminate. But that issue is not truly a controlling *question of law* as contemplated by the

first criterion of Rule 5(b). Instead, defendants are "merely arguing with this Court's application of [the] law to the facts in this particular case, and that is not an appropriate use of" Rule 5(b). U.S. ex rel. Elliott v. Brickman Grp. Ltd., LLC, 845 F. Supp. 2d 858, 867 (S.D. Ohio 2012) (holding that two of defendant's questions for appeal could "be disposed of quickly because they are not the pure questions of law that § 1292(b) demands. Instead, Defendant's . . . questions call for an application of law to the facts, something that is 'not appropriate' under § 1292(b)."). Interlocutory appeals are "not appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts." Id. at 867–68; *see also* Mamani v. Berzain, No. 14-15128, 2016 WL 3349086, at *7 (11th Cir. June 16, 2016) ("[T]he issue raised here is not the kind of pure or abstract question of law contemplated . . . . [T]he defendants ask us to decide whether the specific facts alleged by these particular plaintiffs state . . . claims for relief under the [Act]."); Ahrenholz v. Bd. of Trustees of Univ. of Illinois, 219 F.3d 674, 676–77 (7th Cir. 2000) ("We think [the framers of section 1292(b)] used 'question of law' in much the same way a lay person might, as referring to a 'pure' question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case."); Gierum v. Kontrick, No. 01 C 4370, 2002 WL 226857, at *3 (N.D. Ill. Feb. 14, 2002) (noting that, in most cases, a determination of whether a complaint as filed states a claim upon which relief may be granted does not involve a "pure question of law" or "abstract legal issue" for purposes of an interlocutory appeal); Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3931 (3d ed.) ("Appeals have frequently been allowed on the question whether the plaintiff has stated a claim if the problem is a difficult one of substantive law, *rather than a mere matter of properly*

one of substantive law, *rather than a mere matter of properly pleading a claim sought to be brought within a recognized and generally sufficient legal theory.*") (emphasis added).

The court further concludes that neither of the issues involve "substantial ground for difference of opinion." V.R.A.P. 5(b). Rule 5(b) "does not supersede the trial court's authority and responsibility to decide difficult legal issues." Pyramid, 141 Vt. at 306. Trial courts "should not be 'bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression.'" Id. (quoting Wright & Miller, 16 Federal Practice and Procedure § 3930, at 157). Thus, courts should "place little stock in the vehemence of disagreeing counsel." Id. (citing Wright & Miller, 16 Federal Practice and Procedure § 3930, at 157 n.6). As our Supreme Court has further explained:

> Nor should the trial courts be swayed by the unique character of a particular issue. [Interlocutory appeal] was not intended merely to provide review of difficult rulings in hard cases. [It] was not designed to substitute wholesale appellate certainty for trial court uncertainty . . . . Rather, there is a limited construction to the "substantial ground for disagreement" criterion.
>
> [A] standard consistent with the policy underlying this criterion would require a trial court to believe that a reasonable appellate judge could vote for reversal of the challenged order. Unless an order triggers this degree of doubt in the mind of a trial judge, certification of the order is improper.

Pyramid, 141 Vt. at 306–07 (citations omitted).

The "substantial ground for difference of opinion" criterion often refers to inconsistent decisions within the circuit or among circuits as to a particular legal issue. As the Ninth Circuit has stated:

> To determine if a "substantial ground for difference of opinion" exists under § 1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the

> the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." However, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." . . . That settled law might be applied differently does not establish a substantial ground for difference of opinion.

Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010); *See also, e.g.*, Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3930 n.12 (3d ed.) (collecting cases); In re Flor, 79 F.3d 281, 284 (2d Cir. 1996) ("the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion"); White v. Nix, 43 F.3d 374, 378 (8th Cir. 1994) ("identification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for disagreement") (quotation omitted).

In permitting an interlocutory appeal in Text Messaging, which involved an antitrust claim, Judge Posner stressed that the federal pleading standard was in flux due to the recent Twombly and Iqbal decisions. Text Messaging, 630 F.3d at 626–27; *see also* In re Chocolate Confectionary Antitrust Litig., 607 F. Supp. 2d 701, 707 (M.D. Pa. 2009) (finding substantial ground for difference of opinion and permitting interlocutory appeal from denial of motion to dismiss in antirust class action where "the Twombly standard is in its infancy and . . . capable jurists may disagree about its effect on plaintiffs' pleading obligations. Such disagreement could lead to differing outcomes between this matter and analogous cases addressing motions similar to those raised by defendants"). Unlike the federal pleading standard, the Vermont pleading standard at issue in this case is well settled. Our Supreme Court has twice explicitly declined to adopt Twombly's pleading standard. *See* Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 n.1, 184 Vt. 1 ("[W]e . . . are in no way bound by federal jurisprudence in interpreting our state pleading rules.

We recently reaffirmed our minimal notice pleading standard . . . and are unpersuaded by the dissent's argument that we should now abandon it for a heightened standard.") (citations omitted); Bock v. Gold, 2008 VT 81, ¶5 n.*, 184 Vt. 575 ("As we noted recently, our dissenting colleagues' reliance on [Twombly] is misplaced."). Thus, there is no substantial ground for difference of opinion as to what the pleading standard should be in Vermont, or whether Vermont should adopt Twombly for all or certain types of complaints. *See* Kirkland & Ellis v. CMI Corp., No. 95 C 7457, 1996 WL 674072, at *4 (N.D. Ill. Nov. 19, 1996) (citing Walker v. Eastern Air Lines, Inc., 785 F. Supp. 1168, 1174 (S.D.N.Y. 1992)) ("If a controlling court of appeals has decided the issue, no substantial ground for difference of opinion exists and there is no reason for an immediate appeal.").

In contrast with the issue presented in Text Messaging, this case involves a "routine application[] of well-settled legal standards to facts alleged in a complaint" which, Judge Posner pointed out, are generally not appropriate for interlocutory appeal. Text Messaging, 630 F.3d at 626; *see also* Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Associates, P.C, No. 1:14-CV-2211-AT, 2015 WL 10551424, at *4 (N.D. Ga. Nov. 16, 2015) ("The application of settled law to this case's somewhat new facts does not present a substantial ground for difference of opinion warranting certification."). This might well be a "difficult ruling" in a "hard case," but that alone does not justify interlocutory appellate review. Pyramid, 141 Vt. at 306–07. The issue could be considered "novel," but only in the sense that factual allegations in different complaints are virtually never identical. Any complaint that presents a close call on a 12(b)(6) motion to dismiss does not automatically satisfy Rule 5(b). If defendants could point to contrary trial court decisions involving antitrust or price-fixing claims, that might provide some basis for finding a substantial ground for difference of opinion. However, defendants have identified no such cases

under the Vermont pleading standard, and "a dearth of cases" does not constitute such disagreement. Union Cty., Iowa v. Piper Jaffray & Co., 525 F.3d 643, 647 (8th Cir. 2008).

Defendants point to the "plus factors" primarily relied upon by this court in denying the motion to dismiss, and argue that none of those are appropriately considered as plus factors. They also cite to federal case law and this court's ruling observing that courts have had difficulty defining what facts may properly be considered plus factors. However, defendants' arguments do not demonstrate any substantial ground for difference of opinion. First, defendants contend that discrepancies between retail prices and terminal rack costs do not suggest illegal conspiracy any more than independent, parallel conduct. However, there is no real debate that such discrepancies, taken together with other allegations, can place parallel conduct in a context which suggests an illegal price-fixing agreement. *See* Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323–24 (2d Cir. 2010) (allegation that none of defendants reduced prices for Internet music despite dramatic cost reductions, taken together with other allegations, placed parallel conduct in context that suggested price-fixing agreement); In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010) (Posner, J.) (complaint alleged that "in the face of steeply falling costs, the defendants increased their prices").

Defendants argue that the "follow the leader" effect also explains the temporary price and profit margin reductions immediately prior to legislative hearings investigating high gas prices in Vermont. Defendant attempt to analyze each "plus factor" independently. However, the factual allegations must be considered as a whole. While the temporary price and profit margin reductions alone would likely be insufficient from which to infer a conspiracy, the court's ruling was that those reductions *along with other allegations* were sufficient to state a claim.

Finally, defendants claim that the allegations of "pretextual" and "false" explanations as to the price discrepancy between the class area and elsewhere are inappropriate plus factors. As defendants acknowledge, there is no dispute that the lack of a legitimate, independent explanation for price discrepancies can suggest a conspiracy when combined with other factors. *See* In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322–23 (3d Cir. 2010) (quoting Twombly, 550 U.S. at 567) ("allegations of conspiracy are deficient if there are 'obvious alternative explanation[s]' for the facts alleged"); In re Travel Agent Comm'n Antitrust Litig. ("Tam Travel"), 583 F.3d 896, 908–09 (6th Cir. 2009); LaFlamme v. Societe Air France, 702 F. Supp. 2d 136, 151–52 (E.D.N.Y. 2010); In re Graphics Processing Units Antitrust Litigation, 527 F.Supp.2d 1011, 1022 (N.D. Cal. 2007); *Cf.* Interstate Circuit v. United States, 306 U.S. 208, 224 (1939). Again, this would be insufficient on its own, but when combined with other factors, it suggests a conspiracy.

Defendants contend that they have offered explanations for the differences among markets at the legislative hearings and at oral argument. Defendants argue that (1) the reason for higher prices in Chittenden county is (in part) differences in market structure between the class area and elsewhere in the state and New England, and (2) plaintiffs have not alleged that other markets are comparable to the class area. As the court noted in its written order denying the motion to dismiss, plaintiffs did in fact allege that profit margins in the class area exceeded the margins in *comparative* markets in Vermont and throughout the country. *See* Ruling on Defendants' Motion to Dismiss at 25 n.18. Moreover, plaintiffs' complaint anticipated defendants' explanations regarding market structure, alleging that there is little justification for the price difference between markets, that major costs vary little or not at all, and that to the

extent some costs in Rutland are lower, those cost differences cannot explain the price differential. *See* id.

If there were other cases holding that the above alleged facts are not legitimate plus factors from which a price-fixing conspiracy could be inferred, that might constitute a substantial ground for difference of opinion. However, there is no real debate that each of those factors, when taken together with other alleged facts, can point toward a conspiracy. The court examined all of the alleged facts in the complaint, with the exception of those stricken, and determined that those facts when considered together suggested a conspiracy. The determination of whether price-fixing claims are sufficient under Rule 12(b)(6) is undoubtedly case-specific, and this case in particular presented a close call. However, many judicial determinations concern difficult, case-specific questions. That does not mean they involve a "substantial ground for difference of opinion" under the rules for permitting interlocutory appeals. V.R.A.P. 5(b)(1); Pyramid, 141 Vt. at 306–07.

Order

Defendants' motion for interlocutory appeal is denied.

Dated at Burlington this 21st day of July, 2016.

Helen M. Toor
Superior Court Judge

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ENTRY REGARDING MOTION

Kent vs. R.L. Vallee, Inc. et al 617-6-15 Cncv

Title:

Motion Protective Order/Stay of Discovery Pending Disposition of Motion for Interlocutory Appeal.

No. 21

Filed on: May 25, 2016

Filed By: Coffin, Tristram J., Attorney for:
Defendant R.L. Vallee, Inc.

Response filed on 05/26/16 by Attorney Behm
Joinder in Motion for Prot. Order/Stay of Discovery Pending Disposition of Defs Motion for Interlocutory Appeal

Response filed on 05/31/16 by Attorney Kirby
Defendant Wesco, Inc.'s Notice of Joinder in Defendant R.L. Vallee, Inc.'s Motion for a Protective Order/Stay of Discovery Pending Final Disposition of Defendants' Motion for Interlocutory Appeal and Certificate of Service filed.

Response filed on 05/31/16 by Attorney Hemley
Defendant Champlain Oil Company, Inc.'s Joinder in Motion for Protective Order/ Stay of Discovery Pending Final Disposition of Defendants' Motion for Interlocutory Appeal and Certificate of Service filed.

Response filed on 06/08/16 by Attorney Simonds
Plaintiffs' Opposition to Defendants' Motion to Stay Discovery and Motion to Compel Responsive Pleading filed with Certificate of Service;

Response filed on 06/24/16 by Attorney Coffin
Defendant R.L. Vallee, Inc.'s Reply to Plaintiffs' Opposition to Motion for Protective Order/Stay of Discovery, Certificate of Service;

___ Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

✓ Other

Moot. However, the court will address the issue of discovery scheduling at the upcoming hearing on 8/15.

Judge

7/21/16
Date

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Date copies sent to: 07/21/16 Clerk's Initials CJKM

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STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Chittenden Unit — Docket No. 617-6-15 Cncv

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DOCUMENT COVER SHEET

Ruling and Decision on Motion