STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
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., and
CHAMPLAIN OIL COMPANY, INC.,

Defendants.

DEFENDANT R.L. VALLEE, INC.'S MOTION TO SET DISCOVERY AND ALTERNATE DISPUTE RESOLUTION SCHEDULE

Defendant R.L. Vallee, Inc. ("Vallee") hereby moves the Court to enter the staged, three-phased Discovery/Alternate Dispute Resolution Stipulation and Order ("Proposed Order") attached as **Exhibit A**. Vallee's Proposed Order fairly balances the putative class Plaintiffs' right to discovery on their gasoline price-fixing claims with the massive burden that antitrust discovery will impose on Vallee and the other family-owned business Defendants. Division of the pretrial process into sequential phases of merits discovery, possible summary judgment motions, and class certification discovery is a proper exercise of the Court's discretion given the largely distinct factual issues presented by the merits and class certification in this case. Moreover, Vallee's suggested approach to discovery is appropriate here given the significant possibility that Plaintiffs will be unable to carry their burden of showing the existence of triable issues of fact on their price-fixing claims, and will therefore see their claims fail as a matter of

law at summary judgment, thus obviating the need for the punishing expense of class certification discovery. As further support for its request that the Court structure discovery as set forth in the Proposed Order, Vallee relies on the following Memorandum of Law.

1. Relevant Background

Purporting to represent a putative class composed of all retail purchasers of gasoline in Chittenden, Grand Isle, and Franklin counties over a period of ten years, the named Plaintiffs sued Vallee and co-Defendants Champlain Oil Company, Inc., S.B. Collins, Inc., and Wesco, Inc. on June 22, 2015 and then amended their Complaint on July 30, 2015. Vallee and the other Defendants moved to dismiss the Amended Complaint for failure to state a claim, and later moved to strike various unsupported and conclusory allegations that the four defendants had 'conducted secret meetings at which they set gasoline prices for the Class Area at artificially high prices.'

After extensive briefing and oral argument on these motions, the Court granted Defendants' motion to strike and largely denied their motions to dismiss, though it did reject Plaintiffs' arguments regarding tolling of the statute of limitations and thus limited the case to alleged acts taken and damages incurred in the six years prior to their filing suit. In its ruling, the Court noted that

> [i]t could be that no evidence exists that reasonably supports the [Amended Complaint's] allegations [and that i]t is possible the discovery will turn up insufficient evidence to support plaintiffs' claims, and the case will not survive summary judgment. However, that is not the question to be resolved here…Plaintiffs' allegations of parallel conduct and plus factors are enough to survive a 12(b)(6) motion to dismiss under Vermont's 'exceedingly low' pleading standard.

Ruling on Motion to Dismiss at 36. Defendants have since moved for leave to proceed with an interlocutory appeal of this ruling, in part based on the implications of this "exceedingly low"

pleading standard for defendants in antitrust cases like this one, where, despite the reality that "the court will be guided by substantive federal antitrust law in determining what inferences may be drawn from what facts," *id.* at 18-19, and even Plaintiffs' tacit concession that their Amended Complaint would have been dismissed had it been filed in federal court, Vallee and the other companies now face discovery costs likely to run into the millions of dollars.

When it decided that Plaintiffs had made a sufficient showing to justify sending their case to discovery under Vermont's 'exceedingly low' pleading standard, the Court identified three 'plus factors'—allegations that could possibly support a finding that otherwise innocent parallel pricing behavior actually flows from an unlawful anticompetitive agreement: (1) asserted discrepancies between Defendants' retail gasoline prices and terminal rack costs; (2) alleged temporary retail gasoline price reductions at Defendants' stations before legislative hearings into their pricing at a time of rising wholesale costs; and (3) Defendants purported inability to provide "a rational explanation for the[ir] pricing behavior at legislative hearings." *Id.* at 31. As discussed in greater detail below, Vallee's Proposed Order seeks to structure discovery around these three categories, which are the only 'plus factors' the Court found Plaintiffs had adequately alleged.

2. Given the Weakness of Plaintiffs' Allegations of Price-Fixing and the Fact that Merits Discovery Will Focus Largely on Information Distinct from the Information Relevant to Class Certification, the Court Should Exercise Its Discretion to Allow Defendants an Opportunity to Challenge Plaintiffs' Substantive Case at Summary Judgment Before Proceeding into Expensive Class Certification Discovery

The Court has broad discretion to structure and order discovery, including whether particular aspects of discovery be had under "specified terms and conditions." V.R.C.P. 26(c); see also *Schmitt v. Lalancette*, 2003 VT 24, ¶¶ 9-10. When considering whether to divide antitrust discovery into stages as requested by Vallee here, courts must "balance the need to

promote effective case management, the need to prevent potential abuse, and the need to protect the rights of all parties." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 172 (D.D.C. 2009). Phased discovery, and division of the discovery period "into merits and class certification to facilitate early resolution" is proper where "it promotes fairness and efficiency." *Id.* A "prime consideration[]" in this analysis is "whether merits-based discovery is sufficiently intermingled with class [certification]-based discovery" such that the two should proceed together or, conversely, whether the two are sufficiently distinct that (1) they may practically be separated into distinct stages and (2) the completion of one stage may, with accompanying motion practice, terminate the litigation without requiring the parties to proceed into the second stage at all. *In re Plastics Additives Antitrust Litigation*, No. 2:03-cv-02038, 2004 BL 4449 at *3-4 (E.D. Pa. Nov. 30, 2004); see also *Hemy v. Perdue Farms, Inc.*, No. 11-888, 2013 BL 414016 at *4-6 (D.N.J. Nov. 07, 2013) (bifurcating discovery in class action in interest of fairness and efficiency where merits discovery would "involve the production and review of large numbers of documents not directly related to the issues of class certification" and "Defendant is being asked to bear the cost of producing this extensive discovery").

Here, the scope of merits and class certification discovery are sufficiently distinct that separation of the discovery period into stages will promote fairness and efficiency. Merits discovery will focus primarily on information relevant to Plaintiffs' price-fixing claim: direct and/or circumstantial evidence of express or tacit agreement among the four Defendants to coordinate the retail and wholesale pricing of gasoline and keep those prices above the level they would otherwise occupy in a free market; and evidence of the sales the four Defendants made over the period during which they allegedly fixed prices. This discovery will largely focus on information in the Defendants' possession: pricing, accounting, and bookkeeping records; store

location and sales information; relevant communications between the Defendants, if any; and depositions of the Defendants and their agents.

By contrast, class certification discovery will focus very little on the actions and motivations of the Defendants, and has nothing to do with whether Plaintiffs can establish liability. Instead, it will focus on matters such as consumption and other behavior patterns within the three counties that make up the purported Class Area and the areas that border it, and whether those patterns demonstrate a sufficient level of commonality that class litigation is appropriate; the adequacy of the named Plaintiffs as class representatives, including any potential conflicts they may have with the interests of the putative class as a whole; and sophisticated and expensive expert analysis and deposition testimony about the implications of Class Area consumption and behavior patterns for the class certification process. Based on Defendants' consultation with experienced antitrust practitioners, it is this aspect of discovery that will be the most burdensome, particularly in light of the expensive econometric analysis of underlying data it will require.

While there will inevitably be some overlap between these two spheres of discovery, their basic separateness means that discovery may be staged as proposed by the Defendants without unduly complicating or duplicating the work of the parties or creating additional discovery-related motion practice for the Court. See *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 933 (N.D. Ill. 2013) (bifurcating discovery in class action and stating that "[w]hile the Court recognizes that the class certification and merits issues may overlap in some respects, this alone is not enough to overcome the efficiency benefits to be gained from bifurcated discovery"). Plaintiffs will not be prejudiced by a discovery structure that enables them to learn whether triable issues exist with regard to their substantive price-fixing claims before they litigate

whether they can represent thousands of people on such claims; indeed, learning the validity of their case before attempting to act on behalf of such a large group would seem to be a hallmark of responsible class stewardship. Moreover, structuring discovery with two initial merits phases followed by opportunities to move for summary judgment on Plaintiffs' substantive price-fixing claims before addressing class certification is a fair way to balance Plaintiffs' right to discovery on the substance of their case with Defendants' interests in moderating, to the extent possible, the crushing burden discovery imposes on class action defendants, particularly in the antitrust context. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2424 n.7 (2014) (Thomas, J., concurring) (noting that "[w]ith vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial" and that "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies") (quotations omitted).

The dangers warned of by Justice Thomas in *Halliburton* are abundantly present here. Plaintiffs' Amended Complaint barely survived a motion to dismiss under an 'exceedingly low' pleading standard, but that survival does not mean the Court should simply turn Plaintiffs loose to impose millions of dollars of discovery costs on these four Defendants before the viability of their substantive claims is tested at summary judgment. See *In re Plastics Additives Antitrust Litigation*, 2004 BL 4449 at *3-4 (staged discovery proper where results of initial phase may terminate litigation without requiring the parties to proceed into the second stage at all).[1] Plaintiffs will suffer no prejudice from the phasing of discovery as suggested by Defendants, and

[1] It should be borne in mind that the discovery burdens in a case like this are completely unbalanced. Plaintiffs bear almost no discovery burdens. Such an imbalance supports Vallee's position in favor of a phased process, since it and its co-defendants will suffer all the costs and expenses of unrestricted discovery.

Defendants' proposed discovery schedule falls well within the Court's power to structure discovery so as to balance the interests of the parties. The Court should adopt Defendants' Proposed Order and allow merits discovery followed by a summary judgment period before the case moves into class certification, if it does at all.

3. Plaintiffs' Proposal for Unstructured Discovery Is Disconnected from the Facts of This Case and Will Serve Only to Impose Massive and Unjustified Costs on Defendants

As discussed above, class certification and the crushing expense of class-action antitrust discovery are powerful forces that push defendants to large settlements even in weak and unsupported antitrust actions like the present case. It is therefore understandable that Plaintiffs wish to maximize these impacts on the Defendants here, both by seeking class certification before any testing of the merits of their case and by ratcheting up the costs imposed on Vallee and the other Defendants as quickly as possible. But the arguments set forth in Plaintiffs' Status Report and Request to Submit Additional Interim Status Report on June 6, 2016 ("Status Report") do nothing to change the fact that Defendants' Proposed Order represents a much fairer balancing of the parties' respective interests. See Defendants' Status Report dated June 10, 2016.

Plaintiffs contend, without analysis or explanation, that phased discovery "is inappropriate because the certification evidence is closely intertwined with, and indistinguishable from, the merits evidence." Status Report at 3. However, Plaintiffs do not explain why this is the case and, in fact, as discussed *supra* at Part 2, it is not: merits evidence is primarily focused on Defendants' behavior, while class certification evidence will focus primarily on consumer behavior and purchasing patterns in the Class Area and its surroundings. While there will of

course be some overlap between these spheres, they are hardly 'indistinguishable'—quite the opposite—and Plaintiffs have marshaled no facts to show otherwise.

Similarly unfounded are Plaintiffs' boilerplate arguments that phased discovery will result in duplication of effort and expense, increased motion practice, or "endless disputes over what is 'merit' versus 'class' discovery." Status Report at 4. Plaintiffs premise their argument in favor of an unstructured melee of discovery on a public interest in the expeditious resolution of private antitrust litigation, *id.*, but ignore that it is Defendants' Proposed Order that prioritizes resolution of the merits of the purported antitrust violation at issue here by focusing the first phases of discovery on evidence of price-fixing—the public interest Plaintiffs' purportedly want to protect—and leaving the issue of class certification to one side until the Court determines whether there is a substantive antitrust question to be tried. The real public interest here is in determining whether unlawful commercial conduct is in fact occurring, not in facilitating 'resolution' of insubstantial antitrust claims through the exertion of settlement pressures created by outsized discovery costs.

Plaintiffs also push two red herrings on the Court regarding Defendants' Proposed Order: that it depends on a false distinction between direct and circumstantial evidence, and that it will needlessly impose additional burdens on "third parties, whom tend to be a substantial source of discovery in antitrust matters." Status Report at 3-4. With regard to the role of third-party discovery, Plaintiffs have offered neither authority for the proposition that it plays a significant role in antitrust litigation generally nor any facts to support their contention that it will play a significant role here. Indeed, it is difficult to see how the merits of this case, which depend on proof of the four Defendants' pricing behavior and coordination (or lack thereof) with each

other, will require much third party evidence, and Plaintiffs have done nothing but blandly assert otherwise.

Plaintiffs' contention that the Proposed Order "ignores the distinctions between direct and circumstantial evidence, each of which is adequate to prove conspiracy, and flatly ignores the import of the latter in antitrust cases" is both disingenuous and simply inaccurate. Status Report at 3. What the Proposed Order in fact does is divide merits discovery into two stages: one based on the allegations of the Complaint that the Court found barely justified denial of the motions to dismiss and allowing this case into discovery at all, as well as evidence of Defendants' own actions; and the other targeting 'everything else.' It is hardly unfair, or prejudicial, to limit the initial phase of discovery to the allegations the Court found stated Plaintiffs' claim and to then to give Defendants the opportunity to seek summary judgment on the basis of Plaintiffs' own vision of their case. If, after the first phase of discovery is complete, Plaintiffs believe they cannot fully respond to a summary judgment motion premised on discovery of direct and plus factor conspiracy evidence, they may "show[] by affidavit that, for specified reasons, [they] cannot present facts essential to justify [their] opposition" without further discovery, describe in detail what that additional necessary discovery is, and then obtain it in Phase II as envisioned by the Proposed Order. See V.R.C.P. 56(d). Such a procedure is eminently reasonable. It gives Plaintiffs a full opportunity to investigate and then make their price-fixing case. It fairly balances Plaintiffs' legitimate litigation interests—which reside in determination of the truth or falsity of their bare allegations of price-fixing, not in the imposition of devastating costs in the service of extorting a settlement in a weak case—against Defendants' right to be protected against excessive and unnecessary burdens and expenses. It is Defendants'

Proposed Order, not Plaintiffs' 'anything goes' proposal, that sets forth a balanced, fair, and manageable approach to discovery in this case.

Finally, the Court should reject Plaintiffs' position that Defendants should have to bear 80% of the costs of mediation as yet another attempt to shift all the costs of this speculative litigation onto the Defendants. Plaintiffs' argument that "any cost-sharing arrangements should be calculated on a *pro rata* basis" ignores the fact that there are six named Plaintiffs in this case, each of whom has asserted that he or she will vigorously represent the interests of thousands of consumers in a three-county area. Asking each of these Plaintiffs to bear roughly 8.2% of the cost of mediation as part of their duty to the purported class is hardly unfair, and indeed an unwillingness to shoulder such a minimal burden suggests that these Plaintiffs are not fit to oversee the sprawling litigation they have initiated.

4. Conclusion

WHEREFORE, for the foregoing reasons, Defendant R.L. Vallee, Inc. respectfully requests that the Court adopt its proposed staged, three-phased Discovery/Alternate Dispute Resolution Stipulation and Order and enter that Order for purposes of discovery in this case.

Burlington, Vermont
July 18, 2016

DOWNS RACHLIN MARTIN PLLC

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EXHIBIT A

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,
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Defendants

DISCOVERY/ALTERNATE DISPUTE RESOLUTION STIPULATION AND ORDER

The parties in the above-entitled action stipulate that the Court may order the following ADR and Discovery Schedule:

1. Except as specified below, all pretrial motions, except those based on circumstances that arise after the cut-off date or a motion to dismiss for lack of subject matter jurisdiction shall be filed by _____. Motions in Limine must be filed by the date of Jury Drawing on issues known to counsel at that time.

2. Third parties shall be brought into the action pursuant to V.R.C.P. 14 no later than Not Applicable.

3. Discovery shall proceed in three phases. During Phase One, discovery shall be limited to direct evidence of conspiracy and the three plus factors that the Court identified in its May 6, 2016 opinion as the basis for permitting discovery in the case: (a) oligopolistic structure of the market; (b) parallel price movements prior to the 2012 and 2013 public gas hearings; (c) proof of collusion from the statements made at the hearings. During Phase Two, discovery can be taken of any indirect proof of price-fixing conspiracy. During Phase Three, discovery may be taken on class certification issues. There will be a period for the Court to consider summary judgment motions after the first two phases of discovery and motions for class certification after the third phase of discovery.. The schedule for the phases of discovery is as follows:

   (a) Phase One Discovery

i. Phase One Discovery will begin after the Superior Court and Supreme Court Rulings on the Motion for Interlocutory Appeal, or, if granted, upon disposition of such appeal in a manner permitting the case to proceed to discovery. Phase One will continue for 360 days.

ii. Written discovery shall be served within 45 days of the commencement of Phase One.

iii. Depositions of fact witnesses can be taken within 300 days of the commencement of Phase One.

iv. Plaintiffs' Phase One expert witness disclosures shall be made within 240 days of the commencement of Phase One.

v. Defendants' Phase One expert witness disclosures shall be made within 300 days of the commencement of Phase One.

vi. Depositions of Phase One experts shall occur within 330 days of the commencement of Phase One.

vii. Motions for summary judgment may be filed 400 days after the commencement of Phase One.

(b) Phase Two Discovery

i. Phase Two will begin the day after the an opinion is entered denying summary judgment after Phase One or, if no summary judgment motions are filed after Phase One, 400 days after the commencement of the Phase One discovery period. Phase Two will continue for 180 days.

ii. Written discovery shall be served within 45 days of the commencement of Phase Two.

iii. Depositions of fact witnesses can be taken within 150 days of the commencement of Phase Two.

iv. Plaintiffs' Phase Two expert witness disclosures shall be made within 120 days of the commencement of Phase Two.

v. Defendants' Phase One expert witness disclosures shall be made within 150 days of the commencement of Phase Two.

vi. Depositions of Phase Two experts shall occur within 180 days of the commencement of Phase Two.

vii. Motions for summary judgment may be filed 240 days after the commencement of Phase Two.

(c) Phase Three Discovery

i. Phase Three will begin the day after an opinion is entered denying summary judgment after Phase Two or, if no summary judgment motions are filed after Phase Two, 240 days after the commencement of the Phase Two discovery period Phase Three will continue for 240 days.

ii. Written discovery shall be served within 45 days of the commencement of Phase Three.

iii. Depositions of fact witnesses can be taken within 180 days of the commencement of Phase Three.

iv. Plaintiffs' Phase Three expert witness disclosures shall be made within 120 days of the commencement of Phase Three.

v. Defendants' Phase One expert witness disclosures shall be made within 180 days of the commencement of Phase Three.

vi. Depositions of Phase Three experts shall occur within 240 days of the commencement of Phase Three.

4. The parties acknowledge that Defendants have sought an interlocutory appeal from the Court's order dated May 6, 2016 denying their motions to dismiss. They agree that discovery will be stayed (the "Stay") during the pendency of that motion. Should the motion and/or the appeal be denied, discovery shall commence with the same time intervals between tasks as is contemplated by this Stipulation and Order.

5. The parties agree to Mediation with _____, to take place no later than 360 days after commencement of Phase One. The Plaintiffs and the group of Defendants will each be responsible for one half of the mediator's fees.

6. Discovery shall be complete and the case ready for trial within 60 days of the Court's decision certifying a class after completion of Phase Three. The estimated length of trial is 45days.

_____ _____
Attorney for Plaintiff Date

_____ _____ _____ _____
Attorney for Defendant Date Attorney for Defendant Date

Attorney for Defendant	Date	Attorney for Defendant	Date

APPROVED AND ORDERED:

Presiding Judge, Vermont Superior Court Chittenden Civil Division	Date

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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., and CHAMPLAIN OIL COMPANY, INC.,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant R.L. Valle, Inc.'s Motion to Set Discovery and Alternate Dispute Resolution Schedule was served via First Class Mail and electronic mail on July 18, 2016, on the following attorneys of record:

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July 18, 2016

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July 18, 2016

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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 Motion to Set Discovery and Alternate Dispute Resolution Schedule and a Certificate of Service.

Thank you for your assistance.

Sincerely,

Tristram J. Coffin

Enclosures

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