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August 11, 2016

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BY HAND DELIVERY

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

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

Dear Christine:

Enclosed for filing with the Court in the above-referenced matter is Defendants' Reply to Plaintiffs' Response to R.L. Vallee'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

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)
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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., and
CHAMPLAIN OIL COMPANY, INC.,

Defendants.

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

Defendant R.L. Vallee, Inc. ("Vallee") hereby replies to Plaintiffs Jacob Kent, Anne Vera, Thomas and Dawn Mahar, and David and Barbara Carter's Response ("Plaintiffs' Opposition") to Vallee's Motion to Set Discovery and Alternative Dispute Resolution Schedule ("Vallee Motion"). Plaintiffs rely on V.R.C.P. 1's provision that the civil rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action" to support their proposal for unstructured, no-holds-barred discovery. Plaintiffs are of course well aware that this litigation will not be inexpensively determined for Vallee or its co-Defendants Champlain Oil Company, Inc., S.B. Collins, Inc., and Wesco, Inc. regardless of how discovery is structured. But the fight they have mounted against Vallee's proposal to proceed with discovery in stages and determine whether triable issues exist on their substantive claims before descending

into the punishingly expensive class certification stage—a proposal that sets out to balance Plaintiffs' right to build their case against Defendants' interest in not being financially-hammered by speculative litigation—serves only to illuminate their true purpose, which is to use discovery as a financial club with which to force Defendants into settlement.[1]

Nothing in Plaintiffs' Opposition either shows that the Court is barred from exercising its broad discretion to structure discovery or manage the case as Vallee proposes or counsels against such an exercise of fairness and balancing of interests. As 'background' for their Opposition Plaintiffs recite what they contend have been Defendants' litigation delay tactics, but a more appropriate background to the instant dispute is the larger history of this case. Plaintiffs' Complaint is largely a repackaging of the records of state and federal investigations, self-serving political proclamations and press clippings about Defendants' supposed pricing behaviors the result of which was no finding of wrongdoing or official adverse action whatsoever. That Complaint, which all involved have acknowledged—whether tacitly or otherwise—would have been dismissed in the federal courts, courts which have produced the substantive standards that will decide liability, barely survived dismissal under what this Court described as Vermont's "exceedingly low pleading standard." Ruling on Motion to Dismiss at 36.

In light of the actual history of this case, including prior governmental findings that Plaintiffs' claims lack substance and Plaintiffs' own forum-shopping for litigation advantage, as well as the weakness of the as-pled allegations with which Plaintiffs seek to destroy four family-owned Vermont companies, the purposes of the Vermont Rules will be far more effectively

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1 The particular costs of antitrust litigation was a primary factor in driving the federal judiciary to adopt the *Twombley* pleading standard to deal with federal antitrust cases. As we know, Vermont has not applied that standard which makes it all the more important for the Court to manage an antitrust class action case such as this one closely.

served through enactment of Defendants' proposed phased schedule than Plaintiffs' proffered million-dollar free for all. Indeed, it is hard to fathom how Plaintiffs can argue with a discovery schedule that begins with discovery tied directly to the subset of their allegations the Court determined (barely) stated a claim.

Plaintiffs concede, as they must, the Court's broad discretion to manage the case and to structure and limit discovery to promote fairness to all parties. Plaintiffs' Opposition at 5. But they complain Defendants' proposed schedule would "infringe[their] substantive right to investigate relevant facts." *Id.* (quoting *Schmitt v. Lalancette*, 2003 VT 24, ¶ 14 (2003)). Nothing could be further from the truth: Defendants' proposed schedule allows for discovery of all factual issues raised by Plaintiffs' Complaint, whether merits- or class-related, but does so in a structured manner that will permit Defendants to show the non-existence of triable issues of fact on the threshold question of price-fixing conspiracy before Plaintiffs can destroy their businesses or force them into settlement through colossal (and it should be mentioned, entirely one-sided) discovery costs. Plaintiffs concede courts may properly phase discovery to "allow[] the court to resolve the threshold question of whether plaintiffs…have actually accrued claims" and determine whether "Plaintiffs have no cognizable claims against [Defendants]." Plaintiffs' Opposition at 4-5 n.1 (citing *In re Coca Cola Marketing & Sales Practices Litig.*, No. 4:14-md-02555 and *Durling, et al v. Papa John's Int'l Inc.*, No. 16-cv-3592 (S.D.N.Y.)). But that is all Defendants are seeking here: the opportunity to answer the threshold question of whether Plaintiffs can show a triable question of fact on price-fixing before they are permitted to run wild in discovery and impose staggering costs on Defendants.

Plaintiffs' protestations that Defendants' proposed schedule is 'unworkable' and 'unprecedented' are therefore undercut by the cases on which they rely, which show that courts overseeing antitrust discovery have staged discovery and done so in a manner that addresses threshold questions first as requested by Defendants. Similarly misguided are Plaintiffs' complaints that Defendants' proposed schedule contravenes the Court's prior rulings, which found they barely escaped dismissal in light of "all of the alleged facts in the complaint[, which] must be considered as a whole." Plaintiffs' Opposition at 6-7 (quoting Ruling on Motion for Interlocutory Appeal at 7-9. If Plaintiffs were addressing their arguments to the schedule as actually proposed by Defendants, rather than lobbying for the discovery free rein that will give them an upper hand, they would see that Defendants have proposed a schedule that *begins* with discovery relevant to the actual allegations of their Complaint.

Under Defendants' proposed plan, discovery in Phase I would be focused on seeking direct evidence of the conspiracy, in other words, full and searching discovery of any evidence -- documentary, testimonial or otherwise -- that would be direct proof of the existence, scope, aims, membership and workings of the alleged conspiracy. Among the hundreds of thousands of documents, scores of witnesses and terabytes of electronic evidence available for discovery, one would expect that extremely valuable evidence of this allegedly complex and longstanding conspiracy would exist. Or not.

Phase I also permits discovery of indirect or circumstantial evidence of the existence of the conspiracy. Following this Court's decision on the motion to dismiss, however, the discovery of such circumstantial evidence is limited to the three plus factors the Court found to be the basis

for letting the case proceed: oligopolistic structure of the market, price movements prior to the 2012 and 2013 hearings and proof of collusion based on statements made at the hearings..

The case would be managed by a permissible round of summary judgment thereafter, so that the Court can assess, if full discovery into all other types of circumstantial evidence is appropriate based on whether the discovery of these core issues shows there is a triable issue of fact or that discovery is otherwise appropriate.

Plaintiffs raise the specter of 'delay' in the litigation, see Plaintiffs' Opposition at 5, 9, but Defendants' proposal to start by focusing discovery on the allegations of the Complaint followed by an opportunity to move for summary judgment is the option most likely to secure the just, speedy, and (relatively) inexpensive resolution of this case. See V.R.C.P. 1. And—entirely consistent with the letter and spirit of the Vermont Rules—if Plaintiffs need additional discovery to oppose such a motion they need only set forth their needs by affidavit at the appropriate time. See V.R.C.P. 56(d). It should also be noted that the broad, unmanaged discovery plan Plaintiffs propose, on third parties as well as defendants, is itself a formula for contention, motions practice and delay.

Unable to show that Defendants' balanced proposed schedule will prevent them from fully investigating the merits of their claims, Plaintiffs next argue that its adoption would contravene V.R.C.P. 23(c)(1)'s provision that questions of class certification be resolved "[a]s soon as practicable after commencement" of litigation," Plaintiffs' Opposition at 9, though they cite no authority for their implicit proposition that this prong of Rule 23 limits the Court's authority to structure discovery as appropriate in a particular case, including by ordering that merit discovery precede class discovery where the facts make such an approach the fairest and

most efficient way to proceed. Plaintiffs cannot contest that an early showing that they have no substantive case and that Defendants are entitled to summary judgment on the merits of their price-fixing claims would be the most efficient and practical resolution of the expensive and time-consuming class certification question, since it would moot that question entirely. Nor do the bevy of citations Plaintiffs proffer in support of the general proposition that antitrust cases are frequently addressed through class actions, see Plaintiffs' Opposition at 10-12, say anything about whether deferring the certification *in this case* is the fairest and most efficient way to structure discovery.[2] Plaintiffs protestation that under Defendants' proposed schedule they "would not be permitted to move for class certification for years" should be seen for what it is: an attempt to claim a huge lever of litigation advantage brought by experienced class counsel aware that even in weak cases certification functions as a well-recognized instrument of terror used to force companies to settlement just to avoid financial catastrophe. *See* Vallee Motion at 6 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2424 n.7 (2014) (Thomas, J., concurring)).

But this Court is under no obligation to structure discovery so as to grant Plaintiffs that advantage, and nothing in Rule 23 says it is. In fact, the broader interest in obtaining a fair resolution for all parties counsels strongly in favor of addressing merits discovery first and leaving class certification issues for afterward, if they indeed need to be addressed at all, so that the merits (or lack thereof) of Plaintiffs' substantive price-fixing claims, rather than the outsize

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[2] Plaintiffs contend that much of the evidence of price-fixing (or lack thereof) will also be relevant to class certification. Plaintiffs' Opposition at 9-12. This argument significantly weakens their position, as it shows they will effectively be able to make their start on class discovery even as they attempt to gather merits evidence in the initial stages of Defendants' proposed schedule. What staging the certification process permits is for the Defendants to have a period of time for such discovery and expensive expert assessment if, as they predict does not happen, Plaintiffs can prevail in showing a triable issue of fact about the existence of the alleged conspiracy. Any overlapping information Plaintiffs will practically speaking be able to use to assist in developing their certification case.

costs of unfettered discovery or the massive settlement pressure exerted by class certification, is the deciding factor in this case.

4. Conclusion

WHEREFORE, for the foregoing reasons as well as the reasons set forth in its original Motion to Set Discovery and Alternative Dispute Resolution Schedule, 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
August 11, 2016

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STATE OF VERMONT

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Plaintiffs,

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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 Defendants' Reply to Plaintiffs' Response To R.L. Vallee's Motion To Set Discovery And Alternate Dispute Resolution Schedule was served via First Class Mail and electronic mail on August 11, 2016, on the following attorneys of record:

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