

sure that the card being used is “live” — that is, that it is a valid card.

The second charge is the debit hold. Debit card holds are required by card network rules and the bank issuing the debit/credit card is responsible for the length of the hold.

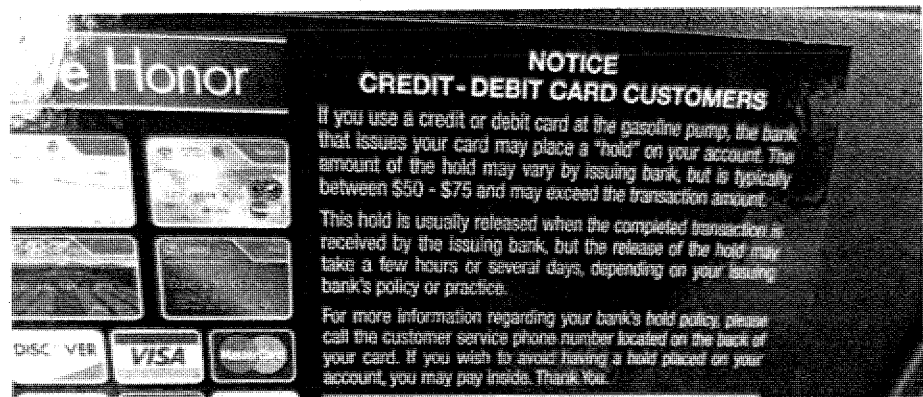
The amount of a hold varies from retailer to retailer, who set the limit based on a variety of factors. Most commonly, holds are between \$75 and \$125 and are designed to cover the maximum cost of a fill-up. Retailers with higher hold amounts may have more traffic from vehicles with larger gas tanks, such as trucks.

It's not the retailer who is responsible for continuing the hold, since credit/debit card network rules make it impossible for the retailer to extend the hold. Also, retailers have nothing to gain from holding onto their customers' money — it freezes accounts that could be used to spend money in the store. Ultimately, it is the banks that can reap added benefits from holds, such as assessing overdraft fees that happen as a result of unanticipated holds.

The amount of the hold and the time of a hold may vary, but the length of a hold is significantly affected by how the card is used. PIN-debit transactions are real-time transactions (that is, they are processed at roughly the speed of digital transmissions) and holds should be released immediately. However, so-called signature-based debit transactions — those where customers do not use a PIN — are processed like a credit card transaction and have longer hold times that could take several days to clear.

Signature-based debit transactions holds, like the holds on credit cards that can affect a customer's spending limit, can remain for 48 to 72 hours, since the processing times are slower. Generally, they should last a shorter period of time because retailers conduct “batch” transactions at least daily; any time that the hold lasts beyond that time for signature-based debit is due to bank settlement processes.

For PIN-based debit transactions, which are real-time, online transactions, the hold should last only minutes. When a customer swipes their card and the pump says “authorizing,” that is when the hold is being charged to their account. After the fill-up is complete, the issuing bank is automatically notified, and the hold amount should immediately change to the amount that the customer actually purchased.



Payment Card Authorization Limits Also Confuse Consumers

Authorization limits imposed by some banks can force retailers to cut off gasoline sales at a pre-set amount, related to the hold amount for payments by plastic. Set the limit too high operators risk ire over high holds; set the limit too low and they risk irritating drivers of large-tank vehicles such as SUVs that are unavailable to completely fill up.

This situation forces retailers to select one of two bad options. One choice is to adhere to this authorization limit and hope that affected consumers don't take out their frustration on the store by refusing to return. If these frustrated customers do not immediately drive away and instead stay to continue fueling up, they must initiate a second "fill-up" authorization, which further alienates customers and adds more costs for retailers because of the fixed-cost pricing component of swipe fees on the second sale.

The other option is to allow customers exceed this authorization limit. Retailers who choose this option risk having part of the charge denied by the bank (known as "Reason Code 96"), even if the card is not fraudulent, and lose getting credited for the amount of the sale above the limit. Still, many retailers have taken on this risk to reduce customer inconvenience. (Consumers are still assessed the full amount if the retailer is denied payment in this situation, but the bank, not the retailer, keeps the additional money. With low gasoline margins, a handful of these chargebacks can wipe out the day's gasoline profits.)

Protecting Consumers From Fraud

Debit and credit cards also create concerns related to data security, and retailers take steps to protect their customers. One way is to ask customers at the pump to enter a 5-digit ZIP code associated with their credit card before fueling. The concept is that someone who has a stolen card is much less likely to know the ZIP code associated with the card, especially at a store near a highly trafficked road, where people could be coming from a much greater distance than the immediate area.

This information is not used for marketing purposes, as it often is in other retail settings where customers are asked for their ZIP code or phone number. It is purely to verify the owner of the card.

Thieves often test cards to see if they are still "live" at places where they don't have to engage in a face-to-face transaction, such as the gas pump and risk having the card confiscated. After a successful test, the thieves may then try it at retail locations. So, by requiring a ZIP, it may limit options for the thief. And it could also reduce gas costs. A 2011 analysis for the California Senate's Judiciary Committee explained that credit card companies provided financial incentives to use ZIP code verification at the pump. The credit card processor may view these transactions as less risky and may opt to offer discounts to stations requiring ZIP verification.

If customers do not enter their ZIP code or enter an incorrect one, the pump will not dispense fuel. Unfortunately, this adds a level of inconvenience for law-abiding customers. And it can be even more inconvenient for visitors travelling from other countries, especially Canada, which has a 6-digit postal code that is a com-

bination of letters and numbers. But there are some workarounds besides going inside to get the pump authorized. One other option suggested by some experts is for Canadians to enter the numbers in their postal code, plus an additional two zeroes. So, if a Canadian billing address is H2W 1L2, the customer would enter 21200.

Protecting Consumers From Data Breaches

Fuel dispensers can be attractive targets for thieves looking to steal credit and debit card information by “skimming,” an aggressive tactic used to illegally obtain consumer card data for fraudulent purposes.

The cost of skimming incidents goes beyond the monetary risk or cost at any location. These types of thefts often are very high profile, and companies that have been the targets of a data breach find that consumers are sometimes more hesitant to stop at their locations, whether or not the retailer was at fault. Just as consumers will treat a convenience store as “lucky” for selling a winning lottery ticket, they may also consider a store to be bad luck if it suffers a data breach.

Skimming occurs when a third-party card-reading device is installed either outside or inside a fuel dispenser, which then allows a thief to capture credit and debit card information.

Skimming equipment can be difficult to identify, especially when it’s hidden inside the dispenser. There are two types of skimmers.

External Skimmers:

External skimmers can be quickly installed by criminals who don’t need to gain access to the inside of a dispenser.

The most common technique used is a keypad overlay that matches up with the buttons of the legitimate keypad below it and presses them when operated, but records or transmits the keylog of the PIN entered by wireless. This device, or group of devices installed illicitly on an unattended location (typically ATM or gas dispenser) is colloquially known as a “skimmer.”

The criminals come back to collect the device, which now contains consumer data. Until the thieves collect the skimmer, data may not have been accessed. Therefore, it is essential that if a skimmer has been identified that it is not immediately removed. Retailers typically are told to take the dispenser offline and notify law enforcement, but to also keep the skimmer in place so that the criminals can be apprehended when they return to collect it.

Here are some things that retailers and consumers alike should look for related to external skimmers:

- **Look to see if the keypad is raised to an unusually high level.** While thin, the overlays will still be obvious if you look closely.
- **Look to see if the keypad is secure.** Many overlays are secured in a way where they may be crooked or not adhered fully. They may feel loose compared to a

proper keypad. Run your finger around the keypad to see if it feels right.

- **Look for telltale visuals.** If a keypad appears new yet the rest of the dispenser is weather beaten, that could be a signal a skimmer has been recently installed.

Internal skimmers:

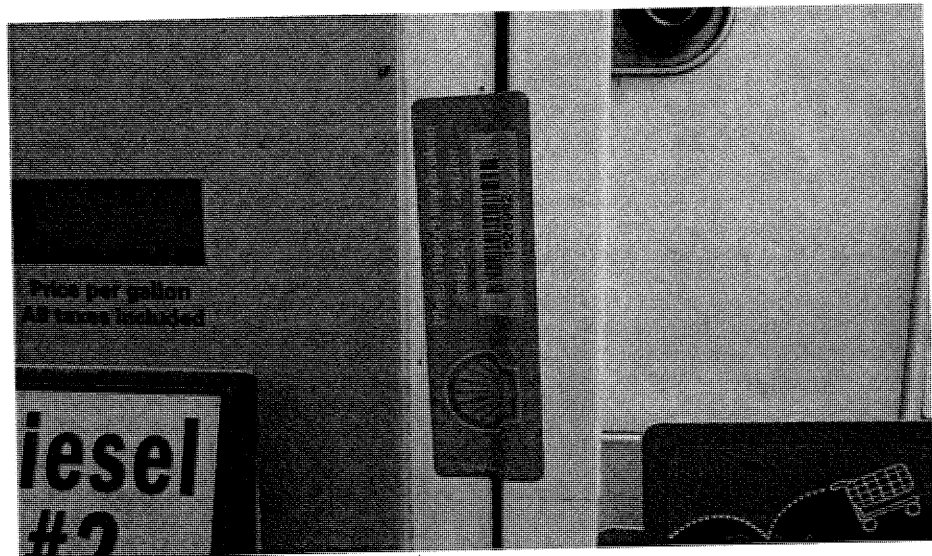
Internal skimmers are attached inside a fuel dispenser. They are more difficult to install and more difficult to notice.

Skimmers, formally called “portable magstripe readers,” are box-like devices usually 2 to 3 inches long. They can be purchased for about \$400. Criminals can obtain a skimmer and preprogrammed laptop for about \$1,000.

To install these skimmers, criminals need access to the dispenser. There are two methods to gain access. One is by using a key used to open the dispenser, but most criminals gain access by prying open the door. To do so, they often leave signs of entry, whether a panel door that appears misaligned after forced entry or telltale signs like scratches and other marks indicating forced entry.

To guard against this type of skimmer, retailers regularly inspect their dispensers to detect signs of entry. They may also use tamper-evident labels on door entries, which help identify potential security breaches if skimming devices are inserted at fuel dispensers. If the label is lifted to open a dispenser door and insert a skimming device, a “void” message appears on the label, providing a visual alert to store employees so that additional action can be taken. Because the labels clearly indicate that they prevent tampering, the labels also assure customers that their data is secure, and discourage criminals targeting the store.

If a customer believes that a dispenser may have been comprised, the first course of action is to treat the area as a crime scene. For one, don't touch anything in case a criminal was dumb enough to leave fingerprints. Report what has been found to the retailer so that they can immediately take the affected dispenser offline and contact law enforcement.



More Changes Coming in 2015

With data security a growing concern, there are continuing actions to address data security. Many larger retailers were subject to new Payment Card Industry (PCI) Data Security Standards beginning January 1, 2015. These “level 1” retailers are the first wave of retailers that must implement new controls. Retailers that process fewer transactions will be phased in to also conform over a multi-year period.

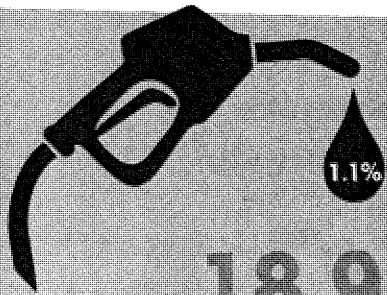
Later in 2015, card issuers will be required to replace traditional credit and debit cards that have magnetic stripes on the back with new cards featuring EMV technology. EMV (an acronym for Europay, MasterCard and Visa) requires that embedded chips be used in cards, a practice common in the rest of the world. The chips in these cards, when used in conjunction with PINs (known as “Chip & PIN”), have reduced fraud in other countries. However, the credit card companies and banks in the United States intend to issue cards without PINs, which will likely undercut the security benefits of the new cards.

Retailers will face added costs in upgrading their terminals and software to accept EMV. And retailers who don't upgrade by October 15, 2015, may be liable for the cost of fraudulent purchases. Roughly one-third of all retailers today have upgraded by the beginning of 2015. (The deadline to comply at gas dispensers is not until 2017.)

Some card issuers, however, have backed off on their previous commitments to deliver EMV cards. Their argument is that the benefits don't justify the costs.

If PIN isn't required for EMV, the card issuers' concern may become a self-fulfilling prophecy. Meanwhile, retailers want proven fraud-reduction measures like PIN included because they currently pay more of the costs associated with fraud than the banks do, especially at the pump. With EMV, retailers will want to see if the swipe fees that they pay will decrease, since the card companies have long argued that the cost of fraud was a major component of swipe fees. What will the future hold? Well, it's in the cards.

A glance at the industry...



1.1%

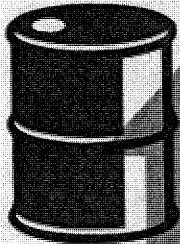
U.S. gasoline demand increased 1.1% to 8.9 million barrels per day in 2014.

(Source: U.S. Energy Information Administration, Short-Term Energy Outlook, January 2015)

18.9¢

Over the past five years, retailer gross margins have averaged 5.7% (18.9 cents per gallon).

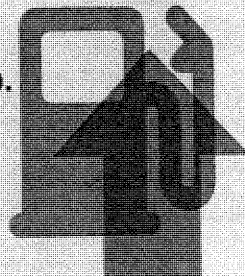
(Source: OPIS)



A \$1 change in the price of a barrel of oil roughly translates to a 2.4¢ change per gallon at the pump.

(Based on 42 gallons in a barrel of oil)

\$1/barrel → 2.4¢/gallon



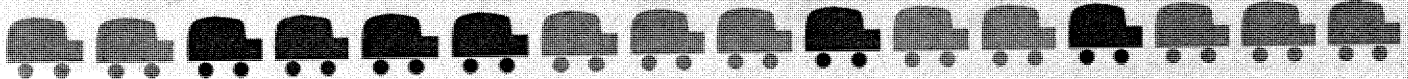
2014
16.8 m SOLD

A total of 16.8 million light-vehicles were sold in 2014, the strongest sales year since 2006.

(Source: WardsAuto.com)

There are 253.6 million registered vehicles in the United States.

(Source: U.S. Federal Highway Administration)



Where Does Your Fill Up Go?



- 65% Crude Oil
- 12% Post-refinery
- 13% Taxes
- 11% Refining

(Source: U.S. Energy Information Administration)

There are **127,588 convenience stores** selling motor fuels in the United States.

Less than 500 of these stores are owned by one of the five major oil companies.

(Source: NACS/Nielsen 2015 Convenience Industry Store Count)

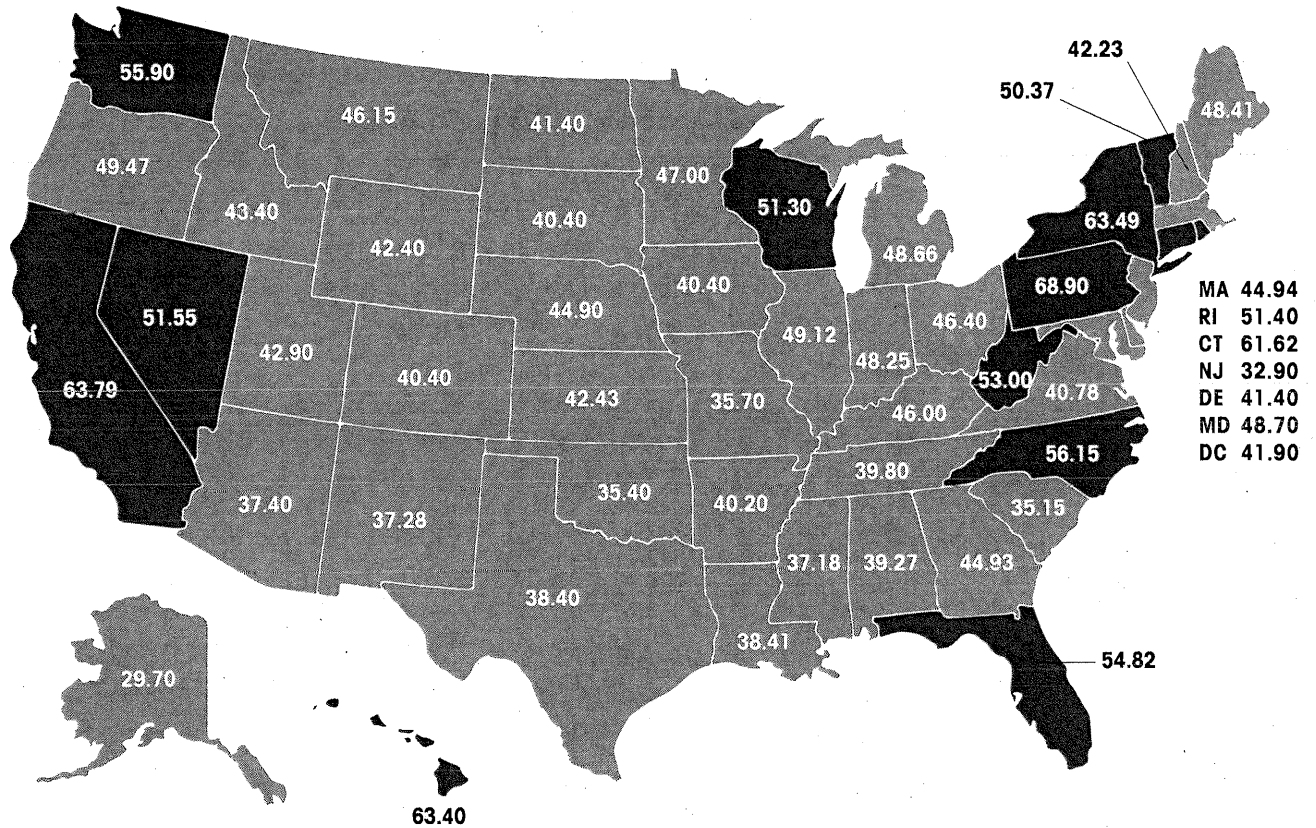


GASOLINE TAXES

Combined local, state and federal (cents/gallon)
(as of January 16, 2015)

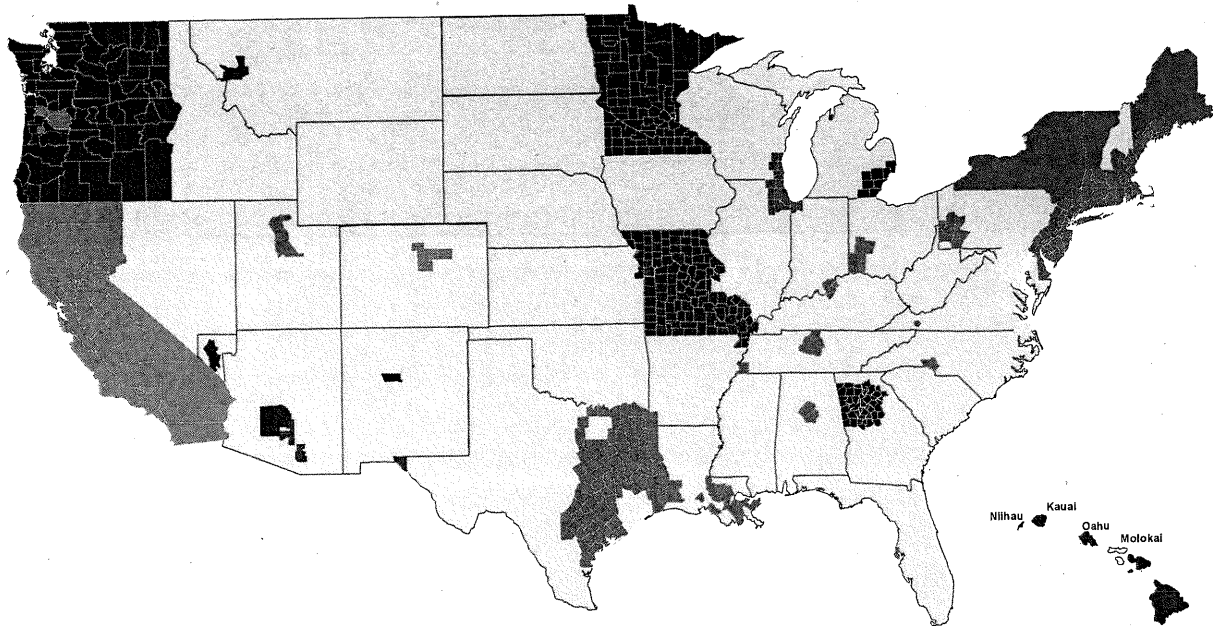
U.S. Average: 48.29 cents/gallon

- Greater than 49.5 cents/gallon
- 40.0 – 49.5 cents/gallon
- Less than 40.0 cents/gallon



Source: American Petroleum Institute.
This report is provided for informational purposes only and should not be relied upon or used for compliance purposes.

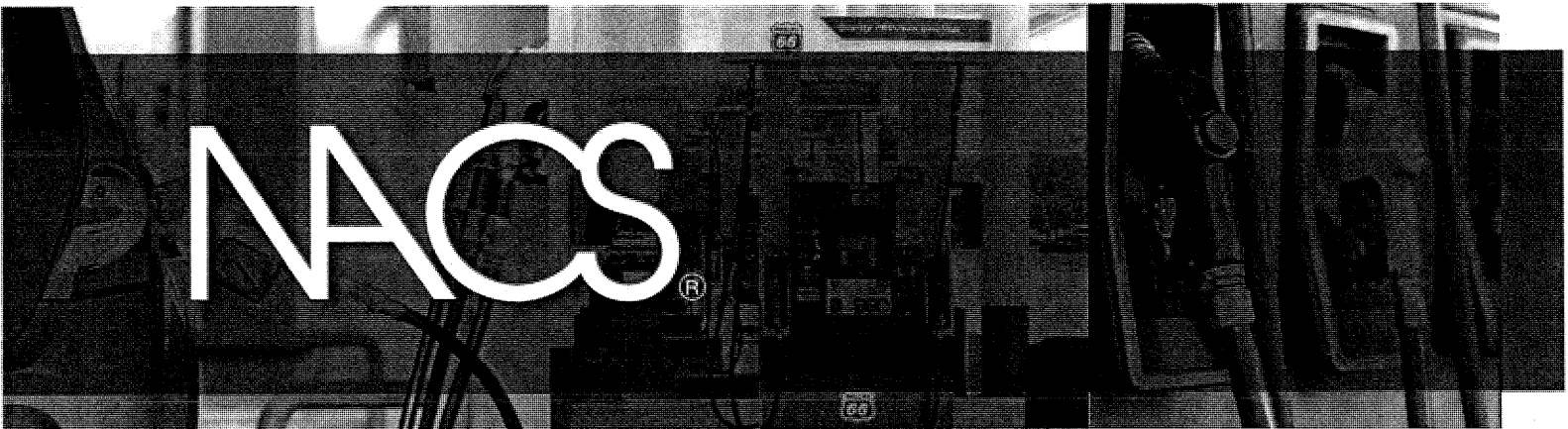
U.S. GASOLINE REQUIREMENTS



- | | |
|-----------------------|-----------------------------------|
| ■ Oxygenated Fuels | ■ CHI/MIL RFG w/ Ethanol |
| ■ CA RFG | ■ N RFG w/ Ethanol |
| ■ CA OXY RFG | ■ S RFG w/ Ethanol |
| ■ AZ CBG | ■ 7.0 RVP |
| ■ Oxy Fuels / 7.8 RVP | ■ 7.8 RVP |
| ■ Oxy Fuels / 7.0 RVP | ■ 7.8 RVP No 1 psi EtOH Allowance |
| □ Conventional | ■ Conv, No 1 psi EtOH allowance |

Source: Exxon Mobil

This map is not intended to provide legal advice or to be used as guidance for state and/or federal fuel requirements, including but not limited to oxy fuel or RFG compliance requirements. ExxonMobil makes no representations or warranties, express or otherwise, as to the accuracy or completeness of this map.



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NACS | 1600 Duke Street, Alexandria, VA 22314

www.nacsonline.com

From: Abrams, Jill
Sent: Wednesday, March 04, 2015 10:58 AM
To: 'John.Platt@usdoj.gov'
Cc: Morgan, Wendy; Powers, Michael
Subject: Gas Prices-3pm today?

Hi John,
Just want to confirm that you and Chris are available today at 3pm. If so, I'll circulate call-in infl.
Jill

My email address has changed to jill.abrams@state.vt.us.

Jill S. Abrams

Assistant Attorney General
Public Protection Division
Vermont Office of the Attorney General
109 State Street
Montpelier, VT 05609
P: 802.828.1106
F: 802.828.2154

From: Abrams, Jill
Sent: Wednesday, March 04, 2015 11:11 AM
To: Morgan, Wendy
Subject: RE: Gas Prices-Tel. w/ John Platt and Chris Taylor from FTC

I think we said Thurs, but I'll double-check. My email to him bounced back. Do you have a phone # or email for him?

-----Original Appointment-----

From: Morgan, Wendy
Sent: Wednesday, March 04, 2015 9:22 AM
To: Abrams, Jill
Subject: Declined: Gas Prices-Tel. w/ John Platt and Chris Taylor from FTC
When: Thursday, March 05, 2015 3:00 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: AGO - 109 State 2nd Floor Porch Conf Rm

Was this supposed to be today?

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To: 'John.Platt@usdoj.gov'
Cc: Morgan, Wendy; Powers, Michael
Subject: Gas Prices-3pm today?

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Jill

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Jill S. Abrams

Assistant Attorney General
Public Protection Division
Vermont Office of the Attorney General
109 State Street
Montpelier, VT 05609
P: 802.828.1106
F: 802.828.2154

From: Kriger, Ryan
Sent: Tuesday, April 07, 2015 11:12 AM
To: Morgan, Wendy
Subject: Gas Pricing Timeline
Attachments: Gas Pricing Timeline.docx

Let me know if you want more than this in the timeline.

Gas Pricing Timeline

- September 2007 – ERSGroup Issues “Report on Petroleum Products Markets in the Northeast,” a report prepared for the Attorneys General of Maine, Massachusetts, New Hampshire, New York, and Vermont (I have the report, I assume Julie Brill worked on this)

2011-12 Leg session

- 2012 – Vermont passes criminal antitrust bill with protection for whistleblowers (one argument for doing so, made in committee) was that it would give us another tool to fight possible gas price collusion)
- July 16, 2012 – AG Sorrell writes to FTC asking the agency to investigate Vermont’s gasoline prices (press release online)

2012-13 Leg session

- January 22, 2013 – AG Sorrell speaks at hearing on gas prices in Statehouse (afternoon)
- January 22, 2013 – Wendy attends Colchester HS hearing on gas prices (evening)
- April 2, 2013 – Ryan testifies before House Transportation re H.476 (Pearson’s bill)

2013-14 Leg session

- November 22, 2013 – Ryan speaks to VT Petroleum Dealer’s association about H.476 at Capitol Plaza

2014-15 Leg session

- January 22, 2015 – Ryan speaks at hearing on gas prices in Statehouse
- January 28, 2015 – Ryan testifies before Senate Ag on Gas Pricing
- February 2015 – Wendy & Jill testify before Senate Ag on Gas Pricing

From: Morgan, Wendy
Sent: Friday, May 01, 2015 4:01 PM
To: Cornell-Brown, Rowan
Subject: FW: gas pricing in VT
Attachments: VT Comparison Graph.xlsx

Importance: High

Can you print this on an 8-1/2 by 11 in color? Thx

From: Stephanie Newton [mailto:snewton@opisnet.com]
Sent: Friday, May 01, 2015 3:52 PM
To: Morgan, Wendy; Ben Brockwell
Subject: RE: gas pricing in VT

Hi Wendy! Attached, please find the graph that you requested. Please let me know if you have any questions, or if you need anything else.

Thanks and have a great weekend!

Stephanie Newton

Retail Pricing Mgr.

Oil Price Information Service

3349 Highway 138

Bldg. D, Ste. D

Wall, NJ 07719

E-mail: snewton@opisnet.com

Direct Phone: 732-730-2542

Direct Fax: 301-287-2843



From: Morgan, Wendy [mailto:wendy.morgan@state.vt.us]
Sent: Friday, May 01, 2015 3:46 PM
To: Ben Brockwell
Cc: Stephanie Newton
Subject: RE: gas pricing in VT

Terrific – thanks so much!!

From: Ben Brockwell [mailto:bbrockwell@opisnet.com]
Sent: Friday, May 01, 2015 3:26 PM
To: Morgan, Wendy
Cc: Stephanie Newton

Subject: RE: gas pricing in VT
Importance: High

Wendy,

We will have a graph for you by close of business today.

Weekly prices from January 2012 to present.

The graph will be x axis – time, y axis retail price

Comparing Vermont state gasoline average with average excluding the four counties you mentioned compared to an average of those four counties.

Stephanie Newton on our staff is compiling this now.

Cheers

Ben

From: Morgan, Wendy [<mailto:wendy.morgan@state.vt.us>]
Sent: Friday, May 01, 2015 2:34 PM
To: Ben Brockwell
Subject: gas pricing in VT

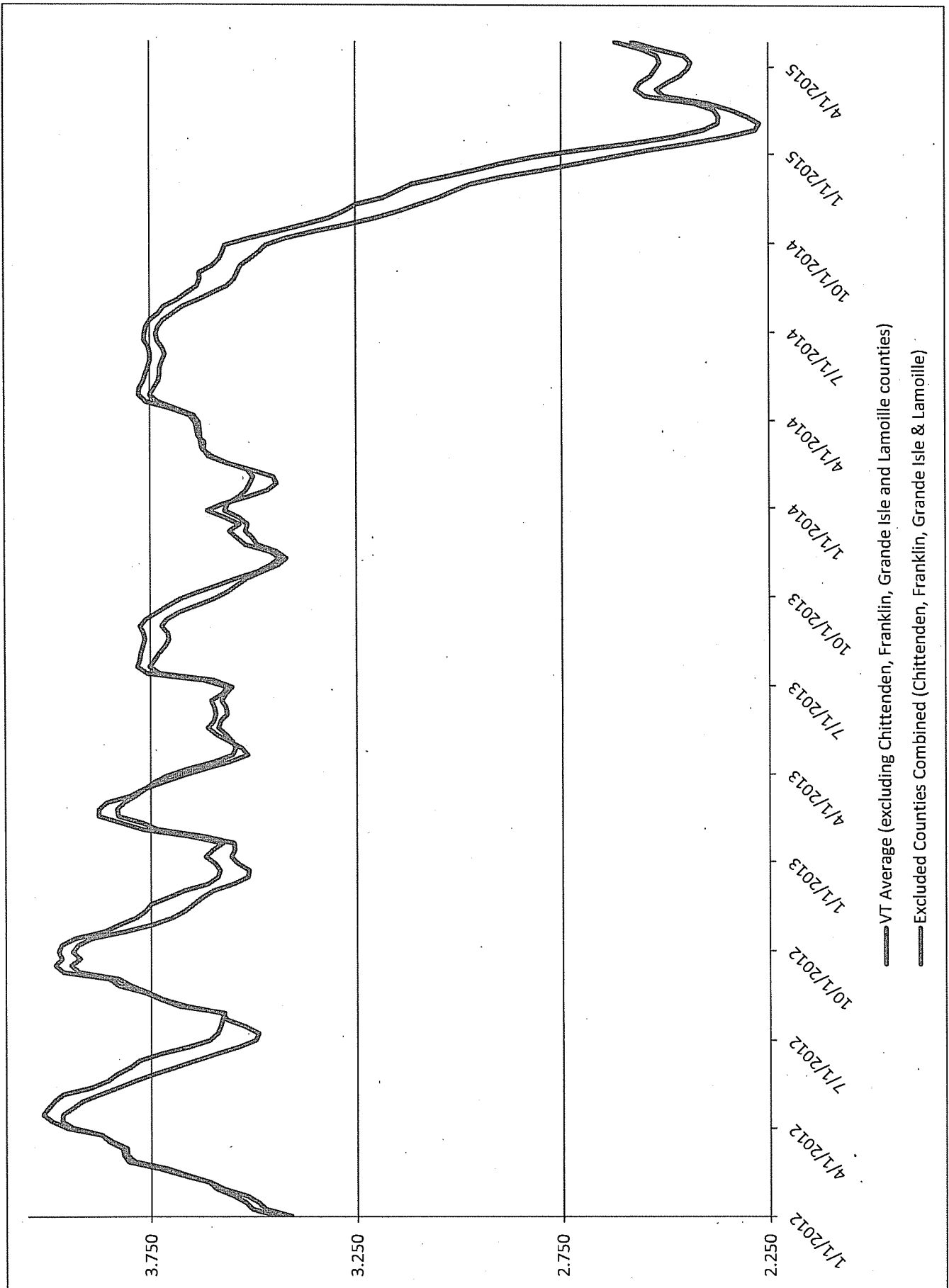
Dear Mr. Brockwell,

Dan McLean of Senator Sanders office suggested I write you with a bit of an emergency request coming out of legislation that is being considered in the Vermont Senate, perhaps as early as Monday.

Is there any possibility that I could speak with you today? I will be here until 5pm if it is possible to speak by then. If not, and you have another later time or time over the weekend, please let me know and I'll do whatever I can to be available.

Many thanks for your consideration,

Wendy Morgan, Chief
Public Protection Division
Office of the Vermont Attorney General
109 State Street
Montpelier VT 05609-1001
(802) 828-5586



From: Kriger, Ryan
Sent: Monday, June 22, 2015 2:40 PM
To: Van Tassel, AJ (aj.vantassel@state.vt.us); Abrams, Jill
Cc: Morgan, Wendy
Subject: FW: Gas Price Gouging class action suit filed

Ryan G. Kriger
Assistant Attorney General
Vermont Office of the Attorney General
Public Protection Division
109 State Street
Montpelier, VT 05609-1001
ph: (802) 828-3170
ryan.kriger@state.vt.us

From: Ryan Kriger [mailto:ryan.kriger@gmail.com]
Sent: Monday, June 22, 2015 2:40 PM
To: Kriger, Ryan
Subject: Fwd: Gas Price Gouging class action suit filed

----- Forwarded message -----

From: **Christopher Pearson** <CPearson@leg.state.vt.us>
Date: Mon, Jun 22, 2015 at 2:36 PM
Subject: Gas Price Gouging class action suit filed
To: Maria Royle <MROYLE@leg.state.vt.us>, Shap Smith <SSmith@leg.state.vt.us>, Ryan Kriger <ryan.kriger@gmail.com>, Jean O'Sullivan <osullivan.jean231@gmail.com>, Bill Botzow <BBotzow@leg.state.vt.us>, Robert Starr <RStarr@leg.state.vt.us>, Patrick Brennan <PBrennan@leg.state.vt.us>, Stephen Carr <SCarr@leg.state.vt.us>, Wendy Morgan <wendy.morgan@state.vt.us>

Colleagues,

Over the past few years you have all played a part in the discussion we have generated on high gas prices in Northwestern Vermont. You may be interested to see this lawsuit was filed today. <http://baileyandglasser.com/vermont-gasoline-companies-have-been-gouging-customers-for-years/>

Hope you're enjoying the summer break,

Chris

Christopher Pearson
State Representative
House Health Care Committee
802-860-3933

From: Kriger, Ryan
Sent: Monday, June 22, 2015 5:01 PM
To: Young, Susanne
Cc: Morgan, Wendy
Subject: FW: Gas Price Gouging class action suit filed

Susanne,

You should be aware of the class action lawsuit filed regarding gasoline price fixing in Vermont. The link is below. AG Sorrell might receive questions about it.

-Ryan

Ryan G. Kriger
Assistant Attorney General
Vermont Office of the Attorney General
Public Protection Division
109 State Street
Montpelier, VT 05609-1001
ph: (802) 828-3170
ryan.kriger@state.vt.us

From: Ryan Kriger [mailto:ryan.kriger@gmail.com]
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To: Kriger, Ryan
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Christopher Pearson
State Representative
House Health Care Committee
802-860-3933

From: Kriger, Ryan
Sent: Tuesday, June 23, 2015 3:19 PM
To: Morgan, Wendy
Subject: RE: Gas Price Gouging class action suit filed

Synopsis of the complaint:

- Alleges violations of VT Consumer Protection Act, and unjust enrichment, for agreeing to fix prices of wholesale and retail gas
- Specific behavior includes:
 - Expressly and through signaling behavior agreeing to fix prices (no specific examples)
 - Having numerous opportunities to meet to collude, including at Vermont Petroleum Association and Retail and Grocers Association meetings
 - Meeting secretly in out-of-the way locations to collude (no specifics given)
 - Controlling gas prices of "independent" retailers
 - Providing pretextual and deceptive explanations for higher prices at hearings and elsewhere
 - Using environmental regulations to block competition
- Seeks treble damages and injunctive relief
- Class Plaintiff is Jacob Kent of Fairfax, Defendants are R.L. Vallee, SB Collins, Wesco, Champlain Oil Co
- Attorneys are Bailey & Glasser out of Boston, DC, Illinois; Local Counsel is Joshua Simonds of The Burlington Law Practice

Ryan G. Kriger

Assistant Attorney General
Vermont Office of the Attorney General
Public Protection Division
109 State Street
Montpelier, VT 05609-1001
ph: (802) 828-3170
ryan.kriger@state.vt.us

From: Morgan, Wendy
Sent: Monday, June 22, 2015 5:15 PM
To: Young, Susanne
Cc: Kriger, Ryan
Subject: RE: Gas Price Gouging class action suit filed

Ryan will send you a brief synopsis of the complaint tomorrow.

From: Kriger, Ryan
Sent: Monday, June 22, 2015 5:01 PM
To: Young, Susanne
Cc: Morgan, Wendy
Subject: FW: Gas Price Gouging class action suit filed

Susanne,

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-Ryan

Ryan G. Kriger

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Vermont Office of the Attorney General
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109 State Street
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ph: (802) 828-3170
ryan.kriger@state.vt.us

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Chris

Christopher Pearson
State Representative
House Health Care Committee
802-860-3933

From: Abrams, Jill
Sent: Wednesday, July 15, 2015 10:12 AM
To: Morgan, Wendy
Subject: RE: Gas prices

Thx

From: Morgan, Wendy
Sent: Wednesday, July 15, 2015 10:11 AM
To: Abrams, Jill
Subject: RE: Gas prices

See docs

From: Abrams, Jill
Sent: Wednesday, July 15, 2015 9:03 AM
To: Morgan, Wendy
Subject: Gas prices

By any chance, did you end up with my marked up copy of the Kent v. Vallee complaint we looked at during the meeting in B'ton with Ben Sirota? I want to call the plaintiffs' lawyers today. I only have a clean copy and am trying to avoid re-doing the analysis.

My email address has changed to jill.abrams@state.vt.us.

Jill S. Abrams

Assistant Attorney General
Public Protection Division
Vermont Office of the Attorney General
109 State Street
Montpelier, VT 05609
P: 802.828.1106
F: 802.828.2154

From: Abrams, Jill
Sent: Monday, July 27, 2015 2:38 PM
To: Kriger, Ryan;Morgan, Wendy
Subject: Meeting with Gas Price Class Action Lawyers

The class action lawyers send me the note below saying they will be in Burlington 8/5-8/6. I think it makes sense to meet with them but I don't know if they'll have more to tell me than what I heard on the phone. I'm happy to meet with them myself, but also happy for company if you're interested.

From: Michael L. Murphy [mailto:MMurphy@baileyglasser.com]
Sent: Monday, July 27, 2015 1:16 PM
To: Abrams, Jill <jill.abrams@vermont.gov>
Subject: RE: VT Fuel Dealers Conference Call

Jill –

Ora and I are hoping to be up there morning of August 5 and through the afternoon of the August 6. Will you be around?

Mike

Michael L. Murphy
Attorney
Bailey & Glasser LLP
T: 202.463.2101

From: Abrams, Jill [mailto:jill.abrams@state.vt.us]
Sent: Friday, July 17, 2015 1:32 PM
To: 'Joshua Simonds'; Michael L. Murphy; John Roddy; Ora N. Nwabueze; Patrick O. Muench; Cary Joshi
Subject: RE: VT Fuel Dealers Conference Call

Since that doesn't work, do you want to call my direct number? 802-828-1106.

From: Joshua Simonds [mailto:jls@burlingtonlawpractice.com]
Sent: Friday, July 17, 2015 1:30 PM
To: Abrams, Jill; Michael L. Murphy; John Roddy; Ora N. Nwabueze; Patrick O. Muench; Cary Joshi
Subject: VT Fuel Dealers Conference Call

Typo

The conference pass is 558-7007#

Joshua L. Simonds, Esq.
The Burlington Law Practice, PLLC
2 Church Street, Suite 2G
Burlington, VT 05401
t. 802 651-5370
f. 802 651-5374

From: Kriger, Ryan
Sent: Monday, July 27, 2015 3:59 PM
To: Abrams, Jill;Morgan, Wendy
Subject: RE: Meeting with Gas Price Class Action Lawyers

I could go if you believe it worthwhile.

Ryan G. Kriger
Assistant Attorney General
Vermont Office of the Attorney General
Public Protection Division
109 State Street
Montpelier, VT 05609-1001
ph: (802) 828-3170
ryan.kriger@vermont.gov

PLEASE NOTE THAT MY EMAIL ADDRESS HAS CHANGED. IT IS NOW ryan.kriger@vermont.gov

From: Abrams, Jill
Sent: Monday, July 27, 2015 2:38 PM
To: Kriger, Ryan; Morgan, Wendy
Subject: Meeting with Gas Price Class Action Lawyers

The class action lawyers send me the note below saying they will be in Burlington 8/5-8/6. I think it makes sense to meet with them but I don't know if they'll have more to tell me than what I heard on the phone. I'm happy to meet with them myself, but also happy for company if you're interested.

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From: Abrams, Jill [<mailto:jill.abrams@state.vt.us>]

Sent: Friday, July 17, 2015 1:32 PM

To: 'Joshua Simonds'; Michael L. Murphy; John Roddy; Ora N. Nwabueze; Patrick O. Muench; Cary Joshi

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Subject: VT Fuel Dealers Conference Call

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Joshua L. Simonds, Esq.
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From: Abrams, Jill
Sent: Tuesday, October 06, 2015 9:47 AM
To: Kriger, Ryan
Cc: Morgan, Wendy
Subject: Gas Price Class Action Motions
Attachments: FW: Champlain Oil Company, Inc.'s Motion to Dismiss and supporting Memorandum;
FW: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - S.B. Collins' Motion to Dismiss and
Memorandum of Law in Support; FW: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - R.L.
Vallee's Motion to Dismiss and Memorandum of Law in Support of Motion; FW: Wesco's
Motion to Dismiss -- filed today

Class counsel forwarded these to me.

From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:31 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Wesco's Motion to Dismiss -- filed today
Attachments: Certificate of Service for Wesco Motion to Dismiss.pdf; Wesco Motion to Dismiss.pdf; Letter to clerk filing Motion to Dismiss.pdf

FYI

From: David V. Kirby [mailto:david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>]
Sent: Monday, October 05, 2015 6:09 PM
To: jbehm@sheeheyvt.com<mailto:jbehm@sheeheyvt.com>; Tristram J. Coffin; Walter Judge; Kevin Lumpkin; pmuench@baileyglasser.com<mailto:pmuench@baileyglasser.com>; mmurphy@baileyglasser.com<mailto:mmurphy@baileyglasser.com>; rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>; Ora N. Nwabueze; 'Barbara O'Connor'; jroddy@baileyglasser.com<mailto:jroddy@baileyglasser.com>; Joshua Simonds; rhemley@gravelshea.com<mailto:rhemley@gravelshea.com>; 'Matthew B. Byrne'; Linda Bradford Barron
Subject: Wesco's Motion to Dismiss -- filed today

All,

Today we filed by hand Defendant Wesco, Inc.'s Motion To Dismiss The First Amended Complaint And Memorandum In Support Thereof And Notice Of Joinder and Certificate of Service. We attach copies of these documents as well as our filing letter.

Best,

David

David V. Kirby
O'Connor & Kirby, P.C.
174 Battery Street, 3rd Floor
Burlington, VT 05401
Tel: (802) 863-0112
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Michael L. Murphy
Attorney
Bailey & Glasser LLP
T: 202.463.2101

STATE OF VERMONT

SUPERIOR COURT

CIVIL DIVISION

CHITTENDEN UNIT

Docket No. 617-6-15 Cnev

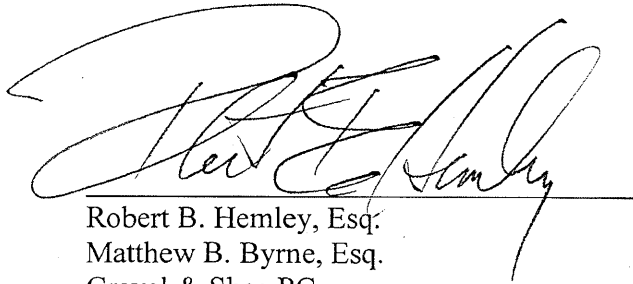
JACOB R. KENT, ANNE B. VERA,)
THOMAS R. MAHAR and DAWN M.)
MAHAR, DAVID C. CARTER and)
BARBARA CARTER and all others)
similarly situated,)
Plaintiffs)
)
v.)
)
R.L. VALLEE, INC., SB COLLINS, INC.,)
WESCO, INC. and CHAMPLAIN OIL)
COMPANY, INC.,)
Defendants)

DEFENDANT CHAMPLAIN OIL COMPANY, INC.'S MOTION TO DISMISS

Defendant, Champlain Oil Company, Inc., by their attorneys, Gravel & Shea PC, hereby move this Court to dismiss the Plaintiffs' First Amended Class Action Complaint. A

Memorandum of Law accompanies this motion and explains the basis for dismissal in more detail.

Dated: Burlington, Vermont
October 5, 2015



Robert B. Hemley, Esq.
 Matthew B. Byrne, Esq.
 Gravel & Shea PC
 76 St. Paul Street, 7th Floor, P. O. Box 369
 Burlington, VT 05402-0369
 (802) 658-0220
 rhemley@gravelshea.com
 mbyrne@gravelshea.com
 For Defendant Champlain Oil Company, Inc.

STATE OF VERMONT

SUPERIOR COURT

CIVIL DIVISION

CHITTENDEN UNIT

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 CHAMPLAIN OIL COMPANY, INC.'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Preliminary Statement

Plaintiffs have alleged high gas prices and then assumed that because prices are high, an illegal price fixing conspiracy exists. Substantive anti-trust law does not allow Plaintiffs to take that logical leap. Plaintiffs' Complaint must, but does not, explain why the facts alleged show a price fixing conspiracy exists and not independent decisions by Defendants.

Plaintiffs' conspiracy allegations are purely conclusory. They do not allege who actually agreed to this conspiracy, what the agreement was, when the agreement was reached, or where it was reached. Plaintiffs fall back on fraudulent concealment to excuse their lack of factual allegations. By alleging fraud, however, Plaintiffs accepted a *higher*, not lower, pleading burden. Rather than excusing a lack of detail, Plaintiffs must allege more detail.

The only allegations that Plaintiffs make against Champlain are based on testimony before the Vermont General Assembly. Under the First Amendment of the United States Constitution, these allegations cannot serve as a basis for imposing liability against Champlain.

Finally, Plaintiffs' First Amended Complaint suffers from another defect. If the facts of the First Amended Complaint are sufficient, then Plaintiffs brought this case four years too late. The applicable statute of limitations is six years. Plaintiffs, however, allege a conspiracy starting in January 2005. As a result, Plaintiffs' First Amended Complaint is more than four years too late.

Allegations of Amended Complaint

Plaintiffs make two specific allegations against Champlain. First, in paragraph 84a, Plaintiffs allege that "the sales manager for Defendant Champlain testified that higher prices in the Class Area could be attributed to delivery expense from the terminal to the station, which he noted was 'one of the largest expenses for our company' and which 'applies different amounts to the company's cost and structure.'"

Second, in paragraph 84c, Plaintiffs allege that "the sales manager for Defendant Champlain testified that higher prices in the Class Area were caused by the terminal cost of product (i.e., the cost of fuel at the Burlington terminal is higher than in other areas of Vermont because it [sic] supplied by train)." The remainder of the allegations of the complaint make allegations against an undefined group of "Defendants."

The allegations refer to testimony given by Steve Petryka before various Vermont legislative committees. On January 22, 2013, Steve Pietryka testified before a joint meeting of the House Committee on Transportation, the House Commerce Committee, and the House Judiciary Committee on H. 476. (Exhibit A.) That bill would have provided funds for various

investigations of pricing and market share in the wholesale and retail gasoline business. (Exhibit B.) It did not pass the House.

Mr. Pietryka testified about factors affecting gasoline pricing. He noted correctly that “[t]here are many variables that affect the pricing of gasoline pricing in Vermont.” 1/22/2013 Hr. Tr. at 81. He then chose to focus on four categories that he thought were the most important. “Terminal and cost of product, delivery expense, overhead and pricing.” *Id.* Mr. Pietryka then went on to discuss each of the factors and his opinions about them.

On January 22, 2015, Steve Pietryka also testified before the Joint Meeting of the House Committee on Transportation, the House Commerce Committee, and the House Judiciary Committee on H. 484. That bill included a Section 23 that added reporting requirements for gasoline wholesalers. Section 23 also had a section empowering the Attorney General to investigate pricing in the industry. The General Assembly removed Section 23 from the final bill, Act 39. (Exhibit C.)

Mr. Pietryka again testified about various factors affecting pricing of gasoline. For example, he discussed the cost of installing new underground storage tanks. 1/22/2015 Tr. at 48 (Exhibit D). He also explained that the gasoline industry is heavily regulated. *Id.* at 47. He also detailed why several independent retailers did not lower their gas prices as the wholesale gas price went down in early 2015. *Id.* at 53.

Standard of Review

A court may grant a Rule 12(b)(6) motion to dismiss when the plaintiff fails “to state a claim upon which relief can be granted.” V. R. Civ. P. 12(b)(6). A complaint must set forth facts which would give rise to liability. *See Powers v. Office of Child Support*, 173 Vt. 390, 395, 795 A.2d 1259, 1263 (2002). The purpose of a motion to dismiss is to test the law underlying a claim.

Id. As long as the Court accepts the factual allegations as true, the Court is in the best position to resolve disputed legal issues. *Ondovchik Family Ltd. P'ship v. Agency of Transp.*, 2010 VT 35, ¶ 8, 187 Vt. 556, 996 A.2d 1179.

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” V. R. Civ. P. 9(b); see also *Fercenia v. Guiduli*, 2003 VT 50, ¶ 14 (holding that the failure to allege with specificity allegations of fiduciary relationship also failed to state a claim for fraudulent concealment).

Argument

I. THE FIRST AMENDMENT PROTECTS THE RIGHT TO PETITION THE GOVERNMENT FOR EVEN ANTI-COMPETITIVE GOALS.

The First Amendment protects the right to petition the government. The Supreme Court long ago recognized that Congress did not intend for the Sherman Act to impair the right to petition the Government. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960). “We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.” *Id.* at 136.

The Vermont Superior Court has recognized that the *Noerr-Pennington* doctrine applies to preempt state law claims that incorporate petitioning activity as a basis for liability. *Mylan Techs., Inc. v. Zydus Noveltech, Inc.*, No. 41-1-09 CnC, 2015 Vt. Super. LEXIS 10, *31 (April 7, 2015 Vt. Super. Ct.); see also *Mylan Techs., Inc. v. Zydus Noveltech, Inc.*, No. 41-1-09 CnC, at 8-12 (May 17, 2011 Vt. Super. Ct.). This is consistent with several other state courts that have recognized the applicability of the *Noerr-Pennington* doctrine to their state anti-trust or other statutes. See, e.g., *Holzrichter v. County of Cook*, 231 Ill. App. 3d 256, 267, 595 N.E.2d 1237, 1244 (1992)

(“Plaintiff’s broad and general objections to the AMA’s role in lobbying for certain legislation or

advocating specialization among its members is not within the court's power to address in the abstract, moreover."); *Village Supermarket, Inc. v. Mayfair Supermarkets, Inc.*, 269 N.J. Super. 224, 230, 634 A.2d 1381, 1384 (1993); *Boeing Co. v. Sierracin Corp.*, 108 Wash. 2d 38, 56, 738 P.2d 665, 677 (1987).

While Plaintiffs allege that Steve Pietryka's testimony does not explain the whole story, the *Noerr-Pennington* doctrine protects even false information given to the legislative branch. In *California Motor Transport Co. v. Trucking Unlimited*, the Supreme Court recognized that *Noerr* protected false communications designed to influence the legislature. "The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics." 404 U.S. 508, 512 (1971); see also *First American Title Co. v. South Dakota Land Title Assoc.*, 714 F.2d 1439 (8th Cir. 1983) ("The district court made no specific findings in this regard, but to characterize these statements as 'misrepresentations' and to withhold *Noerr-Pennington* protection on account of this would result in undermining the doctrine itself.")

Nor can Plaintiffs establish that the legislative lobbying was a sham. The only specific allegations against Champlain involve the testimony of sales manager, Steve Pietryka, before a joint meeting of several legislative committees. See FAC ¶¶ 84a & 84c. All of his testimony was for the purpose of petitioning the General Assembly to avoid more onerous regulatory requirements. Those efforts were successful. A successful lobbying campaign cannot be labeled a sham. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 58 (1992) (holding that successful effort to influence government cannot be described as a sham); *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876 (10th Cir. 2005) (holding that non-governmental defendants were immune under *Noerr-Pennington* for successful lobbying efforts); *Fisherman's Best v. Recreational Fishing Alliance*, 310 F.3d 183, 191 (4th Cir. 2000) (holding

that successful lobbying effort cannot be a sham); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 397 (7th Cir. 1993)(same). As a result, the allegation in paragraphs 84a and 84c cannot serve as a basis to impose liability.

II. PLAINTIFFS FAIL TO ALLEGE A CONSPIRACY TO FIX PRICES.

Plaintiffs' conspiracy allegations are particularly sparse. Outside of First Amendment protected activity, the most detail Plaintiffs allege is: "Defendants discussed and formed their anticompetitive agreements during secret meetings and conversations, often conducted at undisclosed, out of the way locations. No one other than the co-conspirators was invited to or present at these meetings. Defendants conducted these meetings in secrecy to prevent the discovery of their conspiracy by the Plaintiffs and the Class." FAC ¶ 79. The allegations are so vague that they could appear in any complaint alleging a conspiracy. The allegations do not identify who agreed, to what they agreed, when they agreed, where they agreed, and how they agreed.

Federal courts have long held that conclusory anti-trust allegations are not enough. Prior to the Supreme Court's ground breaking decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2006), federal courts of appeals recognized that "Dismissal of bare bones allegations of anti-trust conspiracy without any supporting facts is appropriate." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1993) (internal quotations and citations omitted). In *Estate Constr.*, the Fourth Circuit dismissed the Complaint because the complaint lacked "completely any allegations of communications, meetings, or other means through which one might infer the existence of a conspiracy. Nor does it provide any details of the time, place and alleged effect of the conspiracy." *Id.* at 221; *see also In re Musical Instrs. & Equip. Antitrust Litig.*, No. 12-56674, 2015 U.S. App. LEXIS 14960, * 20 (9th Cir. Aug. 25, 2015) ("The district court found that

plaintiffs failed to identify in their complaint ‘who is alleged to have conspired with whom, what exactly they agreed to, and how the alleged conspiracy was organized and carried out.’”); *Lombardo’s, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985) (“A conclusory allegation of conspiracy to restrain trade will not survive a motion to dismiss”).

Twombly is most famous for its holdings about pleading standards, but *Twombly* is also an important case about substantive antitrust law. The concern in *Twombly* about conclusory pleading of conspiracies reflects a deeper substantive concern that anti-trust law inadvertently bar legal conduct.

Prior to *Twombly*, federal courts developed substantive rules that try to separate the legal from the illegal. These substantive standards should govern the application of the state consumer fraud act. “The purpose behind both state and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct.” *Elkins v. Microsoft*, 174 Vt. 328, 336-37 (2002).

The substantive standards of the Sherman Act prohibit actual *agreements*, not individual pricing decisions. Conscious parallelism is permitted under the Sherman Act.¹ “The statute does not require sellers to compete; it just forbids their agreeing or conspiring not to compete.” *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011). In other words, it is perfectly legal to look out the door to determine what the price a competitor sells a product at and then match that price. “Even ‘conscious parallelism,’ a common reaction of ‘firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions’ is ‘not in itself unlawful.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-

¹ “Conscious parallelism is a phenomenon of oligopolistic markets in which firms might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.” *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011).

54 (2006) quoting *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

“[P]roof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action.” *Id.* at 554 citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). “[A]t the summary judgment stage, a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.” *Id.* at 554 citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

To distinguish between illegal price fixing and legal independent action (conscious parallelism), courts have developed pleading and evidentiary standards that the plaintiff must alleged and then prove. *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011).² These standards are sometimes referred to as “plus factors.” *Id.*; see also *In re Musical Instrs. & Equip. Antitrust Litig.*, 2015 U.S. App. LEXIS 14960, at * 16 (“This court has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain ‘plus factors’.”)

Many plus factors “simply demonstrate that a given market is chronically non-competitive, without helping to explain whether agreement or conscious parallelism is the cause.” *White*, 635 F.3d at 581. To avoid dismissal, plaintiffs must explain how the plus factors are more consistent with a price fixing conspiracy than conscious parallelism.

Plaintiffs attempt to allege plus factors, but Plaintiffs have not alleged why these plus factors distinguish an illegal conspiracy from legal conscious parallelism. Instead, Plaintiffs’ point of comparison is between the market as it exists today and a theoretical competitive market.

² In their complaint, plaintiffs try to reverse the burden of pleading and proof by alleging that Defendants have no truthful explanation for the pricing. See FAC ¶ 11 (“no legitimate explanation has been provided by Defendants for this aberration.”); & *id.* ¶ 13 (“individuals involved with the Defendant companies and their lobbyists have consistently failed to provide an adequate explanation for the high prices charged in the Class Area.”)

See, e.g., FAC ¶ 11 (prices of gasoline are “well-beyond what would be charged in a competitive and collusion-free market”); FAC ¶ 13 (“Defendant companies and their lobbyists have consistently failed to provide an adequate explanation for the higher prices charged in the Class Area.”)

Plaintiffs’ failure to allege that a conspiracy is more likely than conscious parallelism is fatal to their complaint. *See Twombly*, 550 U.S. at 555 (“In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.”); *see also Estate Constr.*, 14 F.3d at 221; *Lombardo’s Inc.*, 753 F.2d at 975.

Courts have rejected similar uses of plus factors that defendants have proffered in this case. For example, Plaintiffs’ generalized pricing and profit allegations, FAC ¶¶ 7a-e, 65, 71, give no indication that the profits are a result of a conspiracy instead of conscious parallelism. “Because supracompetitive prices – prices above what they would be in a perfectly competitive market – can result from both lawful conscious parallelism and an unlawful agreement to fix prices, antitrust doctrine has developed evidentiary standards to minimize the risk that legal conduct will be chilled or punished.” *White v. R. M. Parker Co.*, 635 F.3d 571, 577 (1st Cir. 2011). In *White*, the Court held that the presence of supra competitive prices for gasoline on Martha’s Vineyard was insufficient to avoid summary judgment in a price fixing case.

Plaintiffs also allege that Defendants acted against their economic self-interests by not selling gasoline to independent retailers at a price below the price that they sold gasoline to their own stations and by not engaging in a price war with the other Defendants. But Plaintiffs’ allegations fail to establish an inference that Defendants reached an agreement with respect to prices. “[W]e must exercise prudence in labeling a given action as being contrary to the actor’s economic interests, lest we be too quick to second-guess well-intentioned business judgments of

all kinds.” *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003). “The concept of ‘action against self-interest’ is ambiguous and one of its meanings could merely constitute a restatement of interdependence.” *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co.*, 166 F.3d 112, 122 (3rd Cir. 1999). “Thus, if a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot be a plus factor.” *Williamson Oil*, 346 F.3d at 1310.

As for initiating a price war with competitors (FAC ¶¶66-67), Plaintiffs do not explain that the increased market share would be sustainable in an industry like the gasoline industry. In fact, based on Plaintiffs’ own allegations, it would not be. In an inelastic market with a homogenous product (FAC ¶ 41), starting a price war for gasoline is not likely to lead to lasting customer loyalty or lasting increase sales. Because the market is inelastic, the total number of customers will not change based on a price difference. Any competition that exists will be for existing customers. But, because gasoline prices are required to be public, 9 Vt. Stat. Ann. § 4110, any significant price difference can be easily detected and matched. Hence, there is no real long term gain to destroying your profits to pick up a temporary gain in market share. This is particularly true when there is a large investment involved in opening a gas station that needs to be recouped over a number of years.

In a similar context of the minimum advertised price for the musical instrument industry, the Ninth Circuit held that Plaintiffs had failed to establish that a conspiracy existed:

Plaintiffs allege that defendant manufacturers acted against self-interest by adopting MAP policies with Guitar Center. Again, plaintiffs fail to account for conscious parallelism and the pressures of an interdependent market. An action that would seem against self-interest in a competitive market may just as well reflect market interdependence giving rise to conscious parallelism. For example, each firm in an interdependent market expects that a widely unfollowed price increase will be rescinded. But as long as prices

can be easily readjusted without persistent negative consequences, one firm can risk being the first to raise prices, confident that if its price is followed, all firms will benefit. By that process (“follow the leader”), supra competitive prices and other anticompetitive practices, once initiated, can spread through a market without any prior agreement.

In re Musical Instrs. & Equip. Antitrust Litig., No. 12-56674, 2015 U.S. App. LEXIS 14960, * 20 (9th Cir. Aug. 25, 2015).

Plaintiffs’ inconsistent allegations also demonstrate that there is no conspiracy or agreement. Plaintiffs allege a truly large conspiracy. They allege the fixing of prices on a daily basis for three grades of gasoline. The price fixing affected 118 locations throughout three counties. (FAC ¶ 44). The conspiracy involved both the retail and the wholesale distribution of gasoline. (FAC ¶ 44.) The conspiracy lasted over ten years. (*See, e.g.* FAC ¶ 2.) With such a large conspiracy, the only evidence of an actual conspiracy that Plaintiffs can muster is that a couple of golf games occurred at unknown times with unknown participants discussing (or not) unknown topics.

But Plaintiffs’ conspiracy allegations are not only improbable, they are impossible because of Plaintiffs’ other allegations. Despite the size of the conspiracy, two of the six wholesale distributors were not part of the conspiracy. (FAC ¶ 44.) In addition, 40% of the retail gasoline market was not owned or controlled by the Defendants. *Id.*

Yet, Plaintiffs also allege that it makes no economic sense not to engage in price cutting. For example, Plaintiffs allege that “it would be in the economic self-interest of one of the stations to undercut the prices being charged by the other stations.” (FAC ¶ 66) Plaintiffs also allege that “rational profit-motivated competitors would decrease prices and take market share.” (FAC ¶ 67). With two wholesale distributors and 40% of the retail stations operating independently of Defendants, the theoretical price cutting should be happening with or without the alleged

conspiracy. Over the ten year period, if Plaintiffs' theory were correct, Plaintiffs' own allegations show that the conspiracy should expire under the weight of the competitive pressures of the market place as the two non-conspiracy wholesalers and 40% of retailers grabbed market share away from the alleged conspirators. Plaintiffs' own allegations establish that some other factor is causing the pricing differences. Ironically, Plaintiffs' own allegations establish that a price fixing conspiracy cannot exist. Plaintiffs have pled themselves out of court. *See Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1991)("Plaintiffs can plead themselves out of court").

Plaintiffs' allegations about golf tournaments and other social occasions, FAC ¶ 59, do not warrant any inference of a conspiracy. "The mere existence of parallel conduct or social contacts of the nature alleged here is insufficient to establish a conspiracy." *Souza v. Estate of Bishop*, 821 F.2d 1332, 1333 (9th Cir. 1987).

Plaintiffs' allegations concerning pre-textual explanations, FAC ¶ 7g, 74-75, are addressed in the First Amendment section above. Plaintiffs do not allege the use of deed restrictions and Vermont's environmental laws, FAC ¶ 7f & ¶ 7g, against Champlain Oil.

The sum of Plaintiffs' allegations does not add up to a price fixing conspiracy. Plaintiffs allege no facts of a direct conspiracy. Moreover, the plus factors that Plaintiffs assert do not explain why a price fixing conspiracy is more likely than conscious parallelism. As a result, the complaint must be dismissed.

III. PLAINTIFFS FAILED TO ALLEGE FRAUD WITH PARTICULARITY.

Plaintiffs attempt to excuse the lack of detail by claiming that there is fraudulent concealment of the conspiracy. Plaintiffs allege that "Defendants and their co-conspirators intended to and did effectively, affirmatively and fraudulently conceal their unlawful conduct and the existence of their unlawful conduct, combination or conspiracy from Plaintiffs and the Class,

and intended their communications with each other and their resulting actions be kept secret from Plaintiffs and Class.” FAC ¶ 76.

By alleging fraud, Plaintiffs have assumed a higher burden. Rule 9 serves “three main purposes: (1) protecting a defendant’s reputation from harm; (2) minimizing ‘strike suits’ and ‘fishing expeditions’; and (3) providing notice of the claim to the adverse party.” *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994). “To meet the particularity requirements, a complaint must specify the identity of the person making the representation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.” *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990). “[T]he plaintiff who pleads fraud must reasonably notify the defendants of their purported role in the scheme.” *Vicom, Inc.*, 20 F.3d at 778 (citation and internal quotation omitted). “Therefore, in a case involving multiple defendants, such as the one before us, the complaint should inform each defendant of the nature of his alleged participation in the fraud.” *Id.*; *Am. Dental Assoc. v. CIGNA Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (“The plaintiff must allege facts with respect to each defendant’s participation in the fraud.”); *Sears*, 912 F.2d at 893 (“A complaint that attributes misrepresentations to all defendants, lumped together for pleading purposes, generally is insufficient.”)

Courts have also held that consumer fraud and unjust enrichment must be alleged with particularity when Plaintiffs base these claims on fraudulent actions. *See, e.g. Dimuro v. Clinique Labs, LLC.*, 572 Fed. Appx. 27, 30 (2d Cir. 2014); *In re Shop-Vac Mktg. & Sales Practices Litig.*, 964 F. Supp. 2d 355 (M.D. Pa. 2013); *Thompson v. Jiffy Lube Int’l, Inc.*, No. 05-1203-WEB, 2006 U.S. Dist. LEXIS 39113, (D. Kan. June 13, 2006); *Steinberger v. McVey*, 234 Ariz. 125, 141 (Ct. App. 2014); *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 183 (Minn. Ct. App. 2012).

Plaintiffs' Complaint is based on fraud. FAC ¶¶ 76-91. Plaintiffs must allege facts with the particularity required by Rule 9. Because they have failed to do so, the Complaint should be dismissed.

IV. PLAINTIFFS' CLAIMS ARE UNTIMELY.

As discussed above, Plaintiffs have failed to state a claim. If, however, the Court determines that Plaintiffs have alleged enough to state a claim, then Plaintiffs' claims are time barred.

The Court should dismiss any case where the Complaint reveals that the statute of limitations has expired. "Since averments of time and place are material for testing the sufficiency of a complaint, defenses based on a failure to comply with the applicable statute of limitations are properly raised in a motion to dismiss." *Bethel v. Mount Anthony Union High Sch. Dist.*, 173 Vt. 622, 634 (2002).

Under Vermont law, a claim accrues when Plaintiffs are in possession of enough facts to pursue and investigate a claim:

A cause of action is generally said to accrue upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. Thus, the statute of limitations begins to run when the plaintiff has notice of information that would put a reasonable person on inquiry, and the plaintiff is ultimately chargeable with notice of all the facts that could be obtained by the exercise of reasonable diligence in prosecuting the inquiry.

Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 7. The principles of notice inquiry apply equally to fraud cases. *Howe Ctr., Ltd v. Suburban Propane, L.P.*, No. 702-9-08, 2010 Vt. LEXIS 65,

*11.

The essential facts that form the basis of the First Amended Complaint have been publicly known and available for more than ten years prior to the filing of the Complaint. If these facts are sufficient to state a claim, then Plaintiffs have had sufficient information for four more years than the statute of limitations allows. Here, Plaintiffs allege supra-competitive pricing from January 1, 2005 to the present. FAC ¶ 2. Thus, the first acts committed pursuant to this conspiracy happened more than ten years ago. Plaintiffs allege as much in their First Amended Complaint. “Average retail gasoline prices in the Class Area have been inexplicably and persistently higher than elsewhere in the state – such as Middlebury and Rutland – and other areas of the northeast and the United States.” FAC ¶ 5. Plaintiffs further allege that “Defendants’ gross wholesale and retail profits also have been inordinate. *Throughout the Class period* [starting in January 2005] these profits have periodically been: (1) twice the national average; (2) second highest out of 450 gasoline markets measured in the United States; and (3) highest within New England.” *Id.* (emphasis added throughout).

Plaintiffs also allege that “*Throughout the Class Period* the Defendants’ wholesale and retail prices have been nearly identical.” *Id.* ¶ 7a. Moreover, “[*t]hroughout this period* the Defendants’ wholesale and retail prices have increased, decreased or held steady in nearly identical fashion.” *Id.* ¶ 7b. Plaintiffs also alleged that “[*d]uring the Class Period* and within the Class Area, Defendants, on numerous occasions, instituted wholesale prices increases and decreases in the same or similar amounts to become effective on the same day or within a short period of time of each other.” *Id.* ¶ 61. Plaintiffs also allege that *during the Class Period*, the retail prices at over 100 stations moved virtually in lockstep and that *during the Class Period*, Defendants were able to obtain exorbitant profits. *Id.* ¶¶ 62-63. In particular, Plaintiffs allege that *throughout the Class Period*, gas at SB Collins sold for two cents more than at Champlain and Wesco and three cents more that gas sold at RL Vallee. Plaintiffs also allege that for “*nearly the*

entire Class Period,” the average daily price for unleaded gasoline was higher than in Rutland. *Id.*

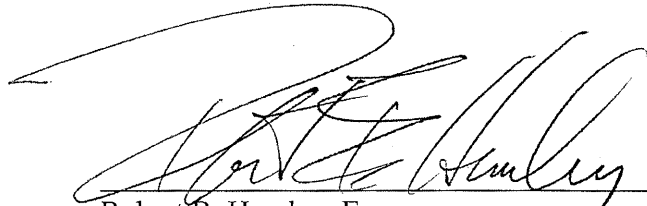
¶ 68. Finally, Plaintiffs allege that the Vermont Petroleum Association and the Vermont Retail Grocers Association provided Plaintiffs a forum to fix prices *through the Class Period*. *Id.* ¶ 59.

If the behavior described above provides a sufficient basis to give rise to a claim for anti-trust conspiracy, then Plaintiffs have been in possession of that information for far more than the six year statute of limitations. 12 V.S.A. § 511. As a result, the statute of limitations bars the Complaint.

Conclusion

The Court should dismiss the Complaint because Plaintiffs have failed to allege a conspiracy.

Dated: Burlington, Vermont
October 5, 2015

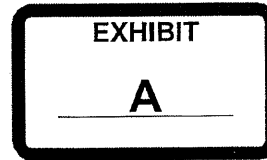


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STATE OF VERMONT
VERMONT HOUSE COMMITTEE

IN RE: GASOLINE PRICING IN VERMONT)

JOINT MEETING OF THE HOUSE
COMMITTEE ON TRANSPORTATION,
HOUSE COMMERCE COMMITTEE,
HOUSE JUDICIARY COMMITTEE

Recorded on Tuesday, January 22, 2013
Vermont State House, Room 11
Montpelier, VT
Commencing at 2:30 p.m.

Present:

Opening Remarks:

Representative Bill Lippert, Chair
Representative Bob Botzow, Chair
Representative Pat Brennan, Chair

Other Members from the House Transportation Committee,
House Commerce Committee, House Judiciary Committee

Guest Speakers:

Bernie Sanders, U.S. Senator
William Sorrell, Vermont Attorney General
Fred Rozell, Retail Pricing Director, Oil Price
Information Services
Daniel McLean, Senior Press Advisor to Senator
Sanders
Greg Laskoski, Senior Petroleum Analyst
Joe Choquette, Lobbyist, Vermont Petroleum
Association
Skip Vallee, CEO, RL Vallee, Inc.
Steve Pietryka, Sales Manager, Champlain Oil Co.,
Inc.
Representative Ronald E. Hubert, Gasoline Retailer

Transcriber: Pamela Mayo Hamel

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Guest Speakers:

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Gregg Laskoski (via telephone)

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Joe Choquette

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1 TUESDAY, JANUARY 22, 2013; 2:30 P.M.

2 -----
3 CHAIR LIPPERT: We're having a Joint
4 Committee Hearing today between the House Commerce,
5 House Transportation and House Judiciary Committee,
6 and this hearing this afternoon is the first of a
7 two-part set of hearings. This afternoon we have
8 invited witnesses to testify. A number of them are
9 going to be testifying by the speaker phone, some
10 others will be here in person. And this evening we
11 will be holding a public hearing at 7:00 p.m. at the
12 Colchester High School in Colchester to hear from
13 members of the public.

14 My name's Bill Lippert, I chair the House
15 Judiciary Committee, my colleagues Representative
16 Bob Botzow and Representative Brennan are going to
17 work together to work our way through the testimony
18 this afternoon.

19 Before the session started, before this
20 Legislative session started, I had many constituents
21 approach me both in-person and by our front-porch
22 forum in Hinesburg raising concerns, questions, and
23 for some people, some sense of (unclear), that as
24 they traveled between communities in Vermont, there
25 were tremendous disparities in the pricing of

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1 gasoline at the pump. That as -- and actually I
2 personally was experiencing, because I've traveled
3 outside of Chittenden County, going south to
4 Middlebury or south further on 22A, I've watched the
5 prices drop and only wondered what was going on.
6 Finally I, one day, traveled from Hinesburg over to
7 Montpelier, and again, the prices dropped sometimes
8 20 cents, sometimes more.

9 I found myself personally wondering, what's
10 happening here? And with the number of constituent
11 concerns about this being raised, again in-person
12 (unclear) and other venues, I made a decision which
13 I found was echoed by a number of my other
14 colleagues, and the decision was to both contact
15 Senator Sanders' Office, who had already been
16 looking into these issues, to understanding what
17 Senator Sanders' Office has come to understand with
18 his staff and hearings, and also to speak with the
19 Speaker of the House to express my concerns that we
20 also look at these issues at the state level, and to
21 look at is there -- you know, understand what's
22 happening and what we might do, if anything, at the
23 state level.

24 Having convened, Peter Smith asked the
25 Transportation, Commerce and Judiciary Committees to

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1 hold a hearing, and this is what brings us here
2 today. We're here to understand what the market
3 situation is in Vermont, generally, particularly
4 some of us have been motivated by what we see as
5 disparity in the Chittenden County market, and to
6 hear from experts, as well as those directly
7 involved, for us to understand what is the -- what
8 are the facts, what is the situation, and to look at
9 exploring today, or perhaps even at a later time,
10 what, if anything, we might do to address what we
11 hear today.

12 So with that, I'd like to turn it over to
13 Representative Bob Botzow and Brennan for comments,
14 and then we'll move on to testimony.

15 CHAIR BOTZOW: One thinks everybody who is
16 interested in this should be here today (unclear)
17 cover so much that we need to know. Vermonters
18 don't understand how gas pricing works and want to
19 understand, and wherever it's possible, they want to
20 be. From the Commerce point of view, we know that
21 going to work and school, we rely very much on their
22 car. They come from an extremely rural community.
23 I represent Pownal, (unclear) borders both New York
24 and Massachusetts, two other states, and everybody
25 drinks from the same pot over in Albany, at that

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1 time, and there are large disparities.

2 We are here mostly to understand the
3 Vermont piece, not all the other markets, but it is
4 astonishing the way it works. And we all have our
5 stories. Mine is simple, is that for 40 years, I'd
6 been going to San Diego, (unclear), my wife's family
7 lives, and we go see them, and for the first time in
8 40 years, the gas price is actually lower in San
9 Diego than it is in Vermont, and not just one
10 company station, but many.

11 So these kinds of unpredictable (unclear)
12 -- can't understand pieces are difficult for us, and
13 that kind of volatility, markets and businesses hate
14 volatility, but so do consumers. I think we want to
15 do the best we can to make sure people know what
16 they need to know, and that we have the tools that
17 could best address their needs, thank you.

18 CHAIR BRENNAN: So I would like to just
19 piggy-back on the comments from Representative
20 Botzow and Lippert, and say that this is more of an
21 informational meeting. We're not here to
22 investigate gas prices in Vermont, we're here for
23 information.

24 I think as Legislators we hear on a
25 day-to-day basis from constituents that are worried,

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1 afraid and just generally concerned about gas
2 pricing, and there's certain disparity in certain
3 parts of the state, so that's what we're here today
4 to discuss and hopefully gather information so we
5 can better relate that to constituents.

6 We're going to start off today, and I'm
7 going to be listing the testimony and the people who
8 will be testifying. I'd like to ask committee
9 members, there are over 30 of us here, the
10 question-and-answer period in the time frame we have
11 to do IT will be very tough, so I'm going to have TO
12 limit the questions maybe to two per person -- two
13 per the people testifying here, so -- you know,
14 we've got ten minutes for each person, 20 for some,
15 it's a two-hour time frame we're working with, so
16 we're going to have to be really cognizant of the
17 time.

18 Senator Sanders, are you with us?

19 (unclear).

20 Fran, you'll able to hear me where you are,
21 right?

22 FRAN: Well, they can hear me when I
23 (unclear).

24 CHAIR: Okay.

25 FRAN: So I'm sure (unclear).

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1 CHAIR: Let us -- (unclear) Fran, could you
2 check on that for us; --

3 FRAN: Yeah, yeah.

4 CHAIR: -- I'd like to have him lead off.
5 The type of questions (unclear). (laughter)
6 (people speaking in background)

7 CHAIR: So in the interest of time, let me
8 just list off some of the people who will be
9 testifying today. Leading off, hopefully, will be
10 Senator Sanders; the Attorney General Bill Sorrell;
11 fred Rozell from Retail Pricing, "Otis" we call him;
12 Dan McLean, Senior Press Advisor to Bernie; Gregg
13 Laskoski.

14 SENATOR SANDERS: Can you hear me?

15 CHAIR: Yes.

16 SENATOR SANDERS: Okay.

17 CHAIR: You're here.

18 SENATOR SANDERS: I am down in Washington
19 but I can hear you anyhow.

20 (laughter)

21 CHAIR: Welcome. We've just started to
22 make introductions of people who will be testifying,
23 but you're up first, so we'd like to hear from you,
24 Senator.

25 SENATOR SANDERS: Great. Well, let me

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1 begin by thanking all of the committees for coming
2 together on what I consider to be a very very
3 important issue.

4 I get calls from people very frequently,
5 who tell my office that the problem around the state
6 and elsewhere -- they go down to Middlebury, to
7 Rutland, to Springfield, to White River Junction,
8 they go out-of-state, and for some reason, the
9 prices that they pay for a gallon of gas are
10 substantially lower than they are in Chittenden
11 County, Franklin County, Grand Isle County, Lamoille
12 County. And people want to know why, what's the
13 reason?

14 And as you know, last summer, we launched
15 an investigation into that issue, and the issue is
16 not only why gas prices are higher in northwestern
17 Vermont, but the question is also why gas prices in
18 general are higher in Vermont than in other states.
19 So I'm glad that you all are pursuing this issue,
20 and let me briefly tell you what my thoughts are.

21 What we have found, looking at the numbers,
22 is that over the last several years, people in
23 northwestern Vermont typically pay 20 to 30 cents
24 more per gallon of gas than elsewhere in Vermont; in
25 other words, you can go down Route 7, you go from

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1 St. Albans or Burlington to Middlebury, and as often
2 if not you're paying 20, 25 cents more for a gallon
3 of gas. Are these people paying more because of
4 some structural reason, is it a transportation call?
5 And the answer that we have learned is basically it
6 is not.

7 What became clear is that in northwestern
8 Vermont, three gas distributors control more than
9 half of the filling stations, and the four largest
10 filling station owners control nearly two-thirds of
11 the gas stations, and that's at least 118 stations
12 in northwestern Vermont. And the results of this
13 consolidation, in my view, competition is at best
14 very limited. Where wholesale prices fall, gas
15 prices throughout the country fall much more rapidly
16 than they do in the state of Vermont. And that's
17 something that we want to find out exactly what's
18 happening.

19 The Federal Trade Commission, at my
20 request, determined the gas prices in the greater
21 Burlington area this past summer were as much as 43
22 cents more per gallon than they should have been
23 based on their computer projections. Recently the
24 consumer web page GasBuddy.com reported that Vermont
25 has the sixth highest average price of gasoline in

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1 the entire country. GasBuddy puzzled over that fact
2 because Vermont has a lot of State gas tax compared
3 to other states.

4 During the Senate hearing that I held last
5 summer on this issue, a pricing expert from the Oil
6 Price Information Service testified that gasoline
7 prices in northwestern Vermont are higher because of
8 a lack of vigorous competition. Market
9 consolidation and the lack of vigorous competition
10 have laid the Chittenden, Grand Isle and Franklin
11 County region one of the most lucrative regions to
12 sell gas in the entire country. The consolidation
13 is even more noticeable in Franklin County with just
14 two companies; SB Collins and R & L Vallee own more
15 than half of the filling stations according to the
16 State ownership (unclear-one word).

17 Northwestern Vermont has been particularly
18 lucrative for gas dealers. The region was the 11th
19 most-profitable place in the United States to sell
20 gas last year according to OPIS. In 2012, the 13
21 markets throughout the country had an average annual
22 profit margin of at least 30 cents a gallon, and
23 northwestern Vermont was one of them averaging about
24 32 cents a gallon in the market for each gallon of
25 gas sold.

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1 Now why is it, why is it that prices are so
2 much higher in northwestern Vermont? Some will
3 argue that maybe it is transportation cost, but we
4 heard, during the Senate hearing, that it would cost
5 no more, at most, than a nickel a gallon for all
6 gasoline 75 (unclear) at about 6 cents a gallon to
7 haul a tanker of gas 100 miles.

8 I think the bottom line here is not
9 terribly complicated. For one, we are in the middle
10 of a repression, we are a rural state, and people in
11 Vermont, as you all know, often travel long
12 distances to and from their job. Thousands and
13 thousands of Vermonters travel 50 miles or more to
14 their job, 50 miles or more back home. And in my
15 view, what you have is a situation where a handful
16 of distributors are controlling the market to a very
17 significant degree.

18 Now the price of the market, are they doing
19 something that is quote, unquote, illegal? Hard to
20 determine. Do I believe that they get on the
21 telephone every morning and act in a collusive way
22 and say: How much are you going to charge tomorrow
23 and I'll charge the same price? No, I doubt that
24 very very much.

25 I think what we have heard, almost

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1 acknowledged, is that the way that they do pricing
2 is to look out the window and see what the other guy
3 is charging. And when you do not have vigorous
4 competition, the kind of competition that you'll
5 have in Middlebury, Rutland or Springfield, and
6 other towns, especially towns closest to the New
7 Hampshire border, they look out the window, there is
8 no incentive, no price incentive to lower prices.

9 So what I hope very much is that you will
10 take a hard look at this issue, and it's something
11 that we would look forward to working with you on.
12 We will see what Federal revenues there are. The
13 bottom line for me is people are getting ripped off,
14 including many working families who just cannot
15 afford to pay 10, 15, 20 cents a gallon more than
16 they should be paying. I think the answer is very
17 simple; lower level of owners who control the market
18 have no incentive to go forward with vigorous price
19 competition.

20 And I would look forward to working with
21 you to see what we can do to lower our gas prices,
22 not only in northwestern Vermont, which are higher
23 than the rest of the state, but throughout the state
24 of Vermont which in many ways are higher than other
25 states around the country.

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1 So thank you very very much for looking at
2 this issue. I think that it is exactly what your
3 constituents want you to do, and my office looks
4 forward to working with you.

5 CHAIR: Thank you, Senator, it's a pleasure
6 having you on the phone here today.

7 SENATOR SANDERS: Thank you very much.

8 CHAIR: Our next speaker today will be the
9 Attorney General, Bill Sorrell. Thanks for coming.

10 ATTORNEY GENERAL SORRELL: Thank you for
11 asking me. I already had the pleasure at least more
12 than once of being before the Judiciary Committee
13 and at least once the Commerce Committee with --
14 nice being before the Transportation Committee,
15 also. I'm mindful of the fact that I think I've got
16 eight to ten minutes, so I'm going to move rather
17 quickly, and I don't want to re-plow over ground
18 that Senator Sanders has also mentioned.

19 But I'm joined here by my Public Protection
20 Division Chief, Wendy Morgan, and Ryan Kriger, who
21 constitutes the smallest antitrust unit of any
22 Attorney General's Office in the country, but
23 because we don't have a lot of resources doesn't
24 mean that we're not intensely-interested in
25 antitrust issues, generally, and in fuel pricing,

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1 particularly, and we have a history of that.

2 I joined with AGs from several other
3 northeastern states in 2007 and contracted for a
4 very long report on petroleum pricing in the
5 northeast -- have that. A good size -- a good
6 portion of it is on gasoline pricing, we have that
7 information available.

8 I also wrote the chair of the Federal Trade
9 Commission this past summer about what I saw on the
10 campaign trail and the wide-pricing disparities for
11 no, at least to me, discernible reasons why the
12 great difference in prices between Chittenden and
13 Franklin and 25 miles south, or so. And actually, I
14 visited the Federal Trade Commission in Washington
15 just a few weeks ago to talk about what other states
16 are doing on gasoline pricing and what we might be
17 able to do.

18 I agree with Senator Sanders that
19 competition, enhancing competition is key. I think
20 the current matter before the District Corps
21 Environmental Commission concerning the COSTCO
22 application for -- to become a gas station is
23 something of huge importance to competition in the
24 Chittenden-Franklin area. I think COSTCO has
25 suggested, itself, that if it was up and running

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1 today, it would be charging something in the 15 to
2 17 cents, or so, a gallon less per gallon than is
3 currently being charged. It's of course of interest
4 that at least one of the would-be COSTCO competitors
5 is appealing the Colchester permission for the
6 COSTCO gasoline station.

7 I believe the District Core Commission is
8 scheduled to issue its decision on or before
9 tomorrow, so stay tuned on that. But we already
10 have several appeals to the Environmental Court on
11 that matter, but -- so that's something that's
12 really important to us in the northwest to foster
13 enhanced competition.

14 But also the Legislature has some real
15 opportunities to consider measures that would foster
16 enhancement in the gasoline-fuel arena. Let me
17 first thank you for responding to our proposal this
18 past session, where we asked that you criminalize
19 various antitrust violations and you put in
20 statute-affirmative protections for whistle-blowers.
21 Because in the collusion area, a whistle-blower
22 coming forward can be very very important to
23 antitrust regulators.

24 But a couple of -- among the things that
25 you might consider during this session, you might

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1 consider following the lead of Maine, which requires
2 a report, at least to the Maine AG's Office, of all
3 gasoline sales by station-by owner on an annual
4 basis, so we can see volume of sales and by which
5 owners, and that can be very helpful to us, in and
6 of itself. But also in conjunction with the second
7 action that Maine has taken, and because we, given
8 the fact that we have antitrust enforcement
9 jurisdiction, we, from time to time, are called upon
10 to pass upon, to give our blessing, if you will, to
11 mergers or acquisitions in various industries,
12 whether it's the satellite dish area for TVs, or
13 airline mergers, dairy industry mergers, and the
14 like.

15 And what Maine has done, and we would like
16 you to consider, is require for the purchase by
17 one -- by at the wholesale level or the retail level
18 of another wholesaler or other retailers an advance
19 notice requirement coming to our office. So that we
20 can take a quick look at whether this proposed
21 merger between, say, two of the top four
22 wholesalers, or amongst the retailers which could
23 enhance consolidation, arguably thereby reduce
24 competition, that we would have enough advance
25 notice that we could seek to block such a merger

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1 going forward if the facts warrant it.

2 There is another action in this arena that
3 a number of states, and I believe the District of
4 Columbia have done, and that requires the so-called
5 divorcement of ownership largely by refiners, which
6 wouldn't apply so much for us, refiners that own
7 retail outlets. But you might consider a statute
8 that would require divorcement of retail stations
9 owned by wholesalers at certain levels of
10 consolidation.

11 I will just say even -- my time is running
12 out -- that that is -- there's controversy where
13 there are divorcement statutes, and there are some
14 economists of the view that divorcement statutes in
15 fact result in an increase in gasoline costs at the
16 pump.

17 A couple of states limit profit margins.
18 We're just starting to look into those, so I'm not
19 conversant on that, but that being said, we have a
20 situation that's not good for consumers. We don't
21 have the evidence right now of outward violations of
22 the antitrust laws, but we think that we look for
23 more competition, and we hope that through this
24 session you might consider actions that could foster
25 enhanced competition in the fuel-oil marketplace

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1 going forward.

2 CHAIR: Thanks, Bill. We do -- if you'd
3 stay put for a second here, we do have a few minutes
4 for questions from the committee members if there
5 are any, maybe two. Anybody want to throw one out
6 there? Bill, go ahead.

7 COMMITTEE MEMBER: Briefly. Am I correct
8 in understanding that, the states that have
9 divorcement statutes on the books, there are in fact
10 some states that tie the divorcement issue between
11 distributor and retailer, --

12 ATTORNEY GENERAL SORRELL: Yes.

13 COMMITTEE MEMBER: -- not just for the
14 refiner.

15 ATTORNEY GENERAL SORRELL: No, it's --

16 COMMITTEE MEMBER: But this is not --
17 that's not a new concept.

18 ATTORNEY GENERAL SORRELL: That is not a
19 new concept. It's fewer than the states that
20 basically look at the refiner level, but
21 Vermont would -- if you were inclined to go that
22 way, Vermont would not be the first state to do it
23 at the wholesaler-distributor level.

24 COMMITTEE MEMBER: And do we have -- oh,
25 I'm sorry.

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1 CHAIR: Go ahead, Bill, go ahead.

2 COMMITTEE MEMBER: Do we have
3 information -- you're indicating that one of the
4 possible steps would be to require more information.
5 As to the information, it seems like we have a hard
6 time accurately analyzing the situation in any given
7 -- over a period of time, because you really need to
8 be looking over a period of time on it at the
9 moment.

10 ATTORNEY GENERAL SORRELL: Yes.

11 COMMITTEE MEMBER: And does your office or
12 does Vermont -- is there any other office in Vermont
13 which collects ongoing data that would be the kind
14 of data that you're referring to that may be best?

15 ATTORNEY GENERAL SORRELL: I believe the
16 data that Senator Sanders' Office used to compile
17 its report looking at four wholesalers -- four
18 owners, rather, comprising about 64 percent of the
19 market in the northern counties, and of retail
20 stations, and three of them over 54 percent, I
21 believe that's information from the Vermont
22 Department of Agriculture, but I -- my understanding
23 is what the Department of Agriculture receives right
24 now would be less efficient and effective than what
25 the Maine statute does for our office to be able to

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1 take a look at a proposed merger and make a
2 relatively prompt decision on whether we think --
3 there'd be no negative or minimal negative impact on
4 competition as opposed to potentially a dramatic
5 impact.

6 CHAIR: Mike, do you have a question?

7 COMMITTEE MEMBER: Bill, do we know what
8 the spread was, during this period between stations
9 in Chittenden County, whether -- you know, we're
10 talking a lot about the chains, but we're not the
11 independents. Do we know what prices they were
12 charging, and is that enough choice for people in
13 Chittenden County? It seems to me that the
14 independents might have a good opportunity to get
15 more customers if they were able to lower their
16 prices, and if the spreads were that high --

17 ATTORNEY GENERAL SORRELL: It's fair -- and
18 the reason I talk about the COSTCO situation as
19 enhancing competition is that -- and look to Joe
20 Gett (phonetic) or somebody else to speak to that --
21 but I don't believe that there were wide disparities
22 in the charges or the gas -- per gallon charges
23 between independent gas stations and those owned by
24 the four, and whether it's a situation where the
25 independents looked out the window and saw what the

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1 larger competitor across the intersection was
2 charging and chose to charge the same or not, but I
3 saw no reports of independents charging
4 significantly less than what the sort of the market
5 numbers were in Chittenden and Franklin and Grand
6 Isle Counties.

7 CHAIR: We'll take one more question from
8 Representative Couch.

9 REPRESENTATIVE COUCH: Bill, I'm interested
10 in just what we can do. Where do we cross the line
11 into interstate commerce and start getting the
12 handcuffs put on us?

13 ATTORNEY GENERAL SORRELL: This is just
14 reporting, that we're talking about here, that other
15 states have done, and the District of Columbia, so I
16 don't think we're talking about Constitutional
17 dimensions here. Now if you get -- if you do take a
18 look at divorcement, then you've got to take a look
19 at reasonable periods of time -- what are the
20 triggering levels to require divorcement, and over
21 what sort of period of time?

22 So for example, just by analogy, back when
23 the State banned highway billboards, you allowed a
24 period of time to essentially capitalize your
25 investment and get your value back, so it's not like

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1 you pass a statute, it's going to have an effective
2 date of July 1, and as of July 15, all of those that
3 are -- would be subject to the legislation have to
4 go about and have a fire sale for divestment, so --
5 and if you have too quick a period of time there
6 where there's not, then it's essentially a
7 governmental taking that can have Constitutional
8 dimensions to it.

9 CHAIR: Thank you, Bill.

10 ATTORNEY GENERAL SORRELL: Thank you.

11 COMMITTEE MEMBER: Have (unclear), if --
12 and obviously we've made no decisions, but we're
13 gathering information here, if we were to look at
14 any issues, such as divorcement, I think the
15 Judiciary Committee, in particular, would be wanting
16 very much to examine issues that come up in terms of
17 Constitutionality and limitation and where the
18 (unclear).

19 ATTORNEY GENERAL SORRELL: Right, thank
20 you.

21 COMMITTEE MEMBER: Thank you, thanks.

22 CHAIR: Next up we have Fred Rozell, who is
23 the retail pricing director for OPIS, and that's Oil
24 Price Information Services.

25 (phone ringing)

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1 MR. ROZELL: This is Fred. Hello?

2 CHAIR: Hi; Fred? Looking for Fred Rozell.

3 MR. ROZELL: Yeah, hi, this is he.

4 CHAIR: Fred, Pat Brennan, Chair of the
5 House Transportation Committee. You're here with
6 House Transportation, Judiciary and Commerce today.

7 MR. ROZELL: Hello.

8 CHAIR: For the record, as you identify
9 yourself -- and tell us a little bit about what you
10 do.

11 MR. ROZELL: My name's Fred Rozell, I am
12 the retail pricing director for OPIS. I handle all
13 the business relationships and kind of run the
14 retail business for OPIS.

15 COMMITTEE MEMBER: Could you tell us what
16 the full name of "OPIS" is just for the record
17 and --

18 MR. ROZELL: It's Oil Price Information
19 Service.

20 CHAIR: Great. Thanks for participating
21 today. Could you -- I'm going to leave it up to
22 you, you've got testimony prepared or thereabouts.
23 We talked earlier, and I guess just waiting to hear
24 from you, and if time permits, we may have a couple
25 questions. Is that fine?

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1 MR. ROZELL: That's fine, I thought it was
2 more of a question-answer.

3 CHAIR: No, actually we're just -- we're
4 just interested to hear how you operate and how you
5 go about, you know, your price information, come
6 about that and the science behind it, I guess.

7 MR. ROZELL: Okay, sure. So we have
8 relationships with some of the fleet car companies,
9 so we're able to capture a price when a transaction
10 occurs. So somebody who's a fleet -- and when I say
11 fleet, that would be somebody who's driving a
12 vehicle for business purposes. So that could be
13 somebody like from a cable company, or a carpet
14 cleaner, or at-home nurse, who has to drive to a
15 particular -- outside of an office to a location.

16 And the reason why they use fleet cars is
17 so that the company can track expenses; it kind of
18 cuts down on fraud and allows the management to make
19 sure that somebody's not using the company vehicle
20 on the weekends to take trips, and things like that.
21 So it's a way for them to monitor their fuel
22 expenses. And because they're really only focused
23 on fuel, the purchases that are made are all
24 fuel-related, so you don't have to worry about
25 somebody using the card to buy a sandwich or

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1 something else at the store, everything is
2 track-tor'd (phonetic) out, and it's just the fuel,
3 so we get the actual transaction cost.

4 We also have companies submit their prices
5 directly to us, and we're -- our core business,
6 actually the way OPIS was started, was publishing
7 what the wholesale price was at the terminal. And
8 we started that business back in 1980, and we
9 generally have become the bench mark by the industry
10 -- this is when the buying, selling fuel at the
11 wholesale terminal or what we call the rack
12 location.

13 With our retail data, we're able to show
14 some gross margin data, if you're interested in it,
15 and the way we do that is, every station -- we make
16 some assumptions. So we take every station in the
17 country, and we match it back to an OPIS-rack city
18 location, and we do that by proximity. So if a
19 station is closer to terminal A than terminal B, we
20 use terminal A as the rack location. In reality,
21 somebody -- there might be a cheaper price at a
22 different terminal that's further away, and somebody
23 may go get the product from the further rack. But
24 for the most part, our methodology is we just use
25 the closest.

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1 We also make sure that we're using the
2 correct product. So if a station's in an area that
3 requires to formulate a gasoline, we would make sure
4 that we're matching and using a reformulated price,
5 we wouldn't be using a conventional-blend price. If
6 it is a conventional market, and there is
7 conventional fuel or conventional fuel with ethanol,
8 we will use whatever's cheapest at the rack, so that
9 would factor in. Historically, wouldn't be any tax
10 advantage to using ethanol, we would factor that in
11 and use whichever product was cheaper. We felt that
12 that would be the way that someone would price their
13 product. So if they had the option of using a
14 conventional blend or a conventional blend with
15 ethanol, we would use whatever's cheapest.

16 The other assumption we make is that if the
17 station is a branded station, so that would be if
18 it's a Shell, or a Chevron, or a BP Station, we
19 would be using the correct branded price at the
20 local rack. So let's say it was a BP Station, we
21 would be using a BP-branded rack price. If there
22 was not a BP-branded rack price at the closest rack,
23 we would be using the branded average, so that'd be
24 an average called the branded-rack prices at that
25 closest rack. And if it was an unbranded station,

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1 where it was affiliated with a refiner, we would use
2 the unbranded average at the closest rack.

3 In reality, if a station's doing a lot of
4 volume, they might be buying better than the
5 unbranded average, they could have a deal where
6 they're paying the lowest price at the closest rack
7 or the second-lowest price or -- there's a lot of
8 different deals off our numbers that we publish at
9 the rack level. But a lot of those we're not privy
10 to, so we just have to base what we -- or how we
11 create the margin on what we do know.

12 We collect all the tax data, as well, so we
13 calculate all local, State, Federal taxes -- when
14 there are ethanol credits, we took that into
15 consideration. Some states, some areas are real
16 easy; some are very complicated, where they have
17 sales tax and they have local taxes that are based
18 on the -- with the wholesale prices, and they could
19 be different from town to town, but that's only a
20 handful of areas.

21 Most of the areas are -- you have a State
22 and Federal tax, you could have a county tax.
23 Illinois tends to be probably the most complicated
24 of all the local taxes, but -- once we factor out
25 those taxes, we compare the retail price less the

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1 taxes to the rack price that's published, and we
2 calculate what we call the gross margin.

3 We also do factor out a penny-and-a-half
4 for freight. We don't collect freight rates, and
5 we've been using the penny-and-a-half since we've
6 started collecting the -- or putting the margin data
7 together. That's probably a bit low these days, but
8 there are diesel surcharges with the higher cost of
9 diesel. But because we don't have a good source for
10 how each station is -- what the charge is from
11 terminal to station, we've just kept the
12 penny-and-a-half, and we let others, if they look at
13 the data, they can kind of factor in the freight
14 charge.

15 The other thing that we don't include in
16 our gross margin is the credit card fees. And
17 credit card fees could be anywhere from 2 to 3
18 percent depending on the card, and so that's all but
19 the gross pump price. So if the price is \$4.00 a
20 gallon and there's a 3 percent charge, it's a little
21 higher than if it's \$3.00 and a 4 percent charge, so
22 you'd have that to kind of think about. And
23 finally, we don't factor in any other overhead, it's
24 simply a gross margin of the fuel price less the
25 wholesale price less any applicable taxes.

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1 And that's basically how we put the data
2 together. It's used by a lot of industry people who
3 use it if they're opening a store in certain areas
4 if they want to get some historical data to kind of
5 determine whether they can make a go of it in that
6 market based on expected volumes, or whether it's
7 not a good deal or not, or, you know, however they
8 kind of factor in the financials. And then a lot of
9 companies use it as a bench mark to see how they're
10 doing versus what they are -- you know, what we're
11 showing. So if their margins are down and we're
12 showing margins going up, you know, they need to
13 kind of rework how they price or -- or devines
14 (phonetic) are down and margins are up, and they
15 want to factor -- make a change in how -- the price
16 it, they --- at that optimum level between profit
17 and volume.

18 COMMITTEE MEMBER: Can I ask -- given that
19 understanding of how you arrive at your analysis,
20 what can you tell us in terms of your analysis THAT
21 -- with regard to either Vermont markets, in
22 general, or the northwestern markets in Vermont? I
23 believe that the number statement that you made may
24 be derived from your analysis.

25 MR. ROZELL: Well, looking at the data, it

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1 appears that the metropolitan area OF Burlington is
2 in the top 15 for highest margins.

3 COMMITTEE MEMBER: Top 15 in the what?

4 MR. ROZELL: That is what, you know, the
5 data shows.

6 MEMBER: That's in the United States?

7 MR. ROZELL: In the United States, yes.

8 COMMITTEE MEMBER: In the United States.

9 MR. ROZELL: Now again, we're probably
10 factoring the transportation a little bit low for
11 that.

12 CHAIR: So backing up just a hair, Fred,
13 could you define "rack prices" again for those of us
14 who might have missed it, there are few -- you went
15 through that fairly quickly. You talked about it
16 quite often, so --

17 MR. ROZELL: Sure. So the price at the
18 rack is what the oil company charges a distributor,
19 and it's pretty much what their distributor price
20 is. So the oil company will set their price for --
21 at a terminal, and that's the price that their
22 distributor would pay and pick that product up at
23 the terminal and then redistribute that to the
24 retailer.

25 So if you're a distributor, you may have

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1 agreements, or you may have your own stores that you
2 operate, you may have agreements with individual
3 station owners that you'll supply them with product,
4 and you will charge them maybe a penny-and-a-half or
5 two cents over the OPIS-published rack price at that
6 local terminal.

7 Now if you're doing, you know, tremendous
8 amounts of volume, you might get a better deal than
9 that, but for the most part, there's a profit that
10 the distributor is going to add on the service
11 that -- again. So a lot of stations, like Shell
12 Stations, for example, Shell doesn't even know that
13 they exist, I mean they know that they exist, that
14 there's a Shell station there, but they don't know
15 the -- or they don't have a contract with or
16 agreements with that individual station owner, they
17 deal stricter, but then will deal with the
18 individual station owner.

19 CHAIR: Thank you. We've got about five
20 minutes for questions. Bill.

21 COMMITTEE MEMBER: Just a quick one. Who
22 has access to your information and how? Maybe to
23 put it better, does the public have access to your
24 information, or is it proprietary to your customers?

25 MR. ROZELL: Well, anybody who subscribes

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1 would have access to our data, we sell it to really
2 anybody who would want to get the information.

3 Sometimes reporters will want to see the data, you
4 know, it depends on what they're looking at.

5 Sometimes I'm a little hesitant in some cases
6 because the margins will fluctuate. You know, when
7 prices are going up, you'll see that the retailer is
8 getting squeezed, because if you're a retail
9 station, and you have -- you kind of want to have a
10 certain amount of volume because you don't really
11 make that much money on the gas sales, you want to
12 get people in the store, you want to get a lot of
13 traffic.

14 So if your competition isn't raising their
15 price, you're not going to raise your price, or you
16 may -- will go up like a penny or two to get -- kind
17 of -- recoup some of the increased cost, but if you
18 go up too high, you could lose in-store traffic, so
19 it's a little bit difficult to kind of -- it's more
20 of a slow-up. And then on the same token, when
21 wholesale prices are dropping rapidly, a lot of
22 times they don't necessarily just drop it right
23 away, or hold it, but if the competition drops a
24 penny or two, they'll drop a penny or two, so it's
25 sort of a game between the margin you want to earn

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1 and the amount of traffic you want to get in the
2 store.

3 COMMITTEE MEMBER: Do any public entities
4 subscribe -- how many subscribers do you have, what
5 is the cost?

6 MR. ROZELL: Well, we have a -- we have
7 thousands of subscribers --

8 COMMITTEE MEMBER: Are any of them public,
9 such as --

10 MR. ROZELL: -- of the various product that
11 we have, and the cost depends on exactly what you're
12 looking to get. So, you know, we could provide
13 actual station data, we can provide, you know, a
14 roll-up of what the margins are. So the most basic
15 of product that we have is the Retail Fuel Watch,
16 and that's roughly \$900 per year to subscribe to,
17 and that's a weekly pdf that looks at market
18 averages, market margins and things like that.

19 And most of the people who subscribe to
20 that are either retailers, who are kind of just
21 bench-marking their own performance to see how
22 margins are doing, it's a pretty easy, quick glance,
23 you can see what's going on. We have a lot of
24 analysts who look at public companies, so if
25 somebody's analyzing like COSTCO, or The Pantry, or

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1 some of the public convenience store chains that are
2 out there, they kind of monitor what margins are
3 doing because that kind of indicates how earnings
4 are going to go when they do their quarterly
5 earnings.

6 COMMITTEE MEMBER: Thank you.

7 CHAIR: Bob.

8 COMMITTEE MEMBER: I wanted to ask you
9 about the oil companies and the prices they charge
10 to a distributor.

11 MR. ROZELL: Hm-hmm.

12 COMMITTEE MEMBER: Do they charge the same
13 price to like all distributors throughout the
14 country, or are there markets where they give better
15 pricing due to volume, or what's that relationship
16 there?

17 MR. ROZELL: They charge -- well, the
18 prices vary from area to area, it's based on what
19 the refinery prices are. So it's kind of -- it's
20 fairly complicated. You have the New York
21 Mercantile Exchange, which is where the futures
22 market is, and a lot of times, prices are based on
23 the futures prices. And then you have the stock
24 markets which are the Gulf Coast -- this is like
25 where the refining centers are, and they have the

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1 prices out of those refinery gate. So look at the
2 Gulf Coast, which is where you have a cluster of
3 refineries, you have a price out of the refinery,
4 and that's a stock price, that changes everyday.

5 And then that product is shipped into the
6 Colonial Pipeline, as an example, and there's fees
7 that you pay through the Colonial Pipeline. So the
8 longer the trip is, the more expensive the product
9 becomes. So as you ship product off in Atlanta and
10 up towards Baltimore, and that could go all the way
11 up to the New York Harbor area, you know, the longer
12 that trip, the more expensive the product is.

13 CHAIR: Okay, thank you, Fred -- do you
14 have one more?

15 COMMITTEE MEMBER: Yeah, I'd like to ask
16 you again just for the contents because it's harder
17 for me to understand. Like I said, I believe the
18 Chittenden County-Burlington, Vermont market, is
19 that what you were referring to earlier, --

20 MR. ROZELL: Yes.

21 COMMITTEE MEMBER: -- is in the top 15 in
22 the country?

23 MR. ROZELL: Yes.

24 COMMITTEE MEMBER: How many markets have
25 you analyzed, I mean what -- top 15 out of what

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1 number of markets?

2 MR. ROZELL: We have about 400 metro areas
3 in the country.

4 COMMITTEE MEMBER: Okay, so top 15 out of
5 400 markets that you've analyzed, is that --

6 MR. ROZELL: I'm sorry, I couldn't hear
7 that.

8 COMMITTEE MEMBER: So when you say "the top
9 15 in the country," that's the top 15 out of
10 approximately 400 market areas that you're
11 analyzing?

12 MR. ROZELL: Yeah, and that's just the
13 margin portion of it, so --

14 COMMITTEE MEMBER: I'm just trying to get
15 the context because if the top 15 is 20, it doesn't
16 mean -- you know, the top 15, if it's 400, is a very
17 different perspective, so that's the tussle. Can
18 you -- is there anything you can say about the
19 Vermont market, in general? I think someone had
20 referred earlier that the Vermont market generally,
21 not just the northwestern corner of Vermont, do you
22 analyze it in terms of that size market, or is your
23 data not analyzed in that kind of a situation?

24 MR. ROZELL: Hold on a second, let me take
25 a look here for a second. We have all the data at

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1 the station level, and we roll everything up from
2 the station level. So if I'm looking at your county
3 by county average, you've got 14 counties where we
4 have gas prices, --

5 COMMITTEE MEMBER: Yeah, we have 14
6 counties.

7 MR. ROZELL: -- and it ranges from a high
8 of 32 cents to a low of 21 cents or 22 cents per
9 gallon, and that's a gross margin.

10 COMMITTEE MEMBER: And what's the national
11 average?

12 MR. ROZELL: And that's -- so Windham
13 County looks to be in the -- the county that has the
14 lowest margins. You have 52 stations, roughly, with
15 an average market of 22 cents, and -- Lamoille --
16 I'm not sure if I'm saying that correctly, --

17 COMMITTEE MEMBER: You are.

18 MR. ROZELL: -- there's only about 19
19 stations there, and you have about a margin of 33
20 cents. Again, these are gross margins, so they're
21 not including credit card fees --

22 COMMITTEE MEMBER: No, I understand.

23 MR. ROZELL: -- or other --

24 COMMITTEE MEMBER: We understand there's
25 some variables here, still. But if we looked at

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1 your data more closely, we could look and see the
2 what the counties are in Vermont, each and every --

3 MR. ROZELL: That's correct.

4 COMMITTEE MEMBER: You said that it can be
5 considered a market in your 400 (unclear).

6 MR. ROZELL: Right, and generally what
7 happens is in more -- in areas where there's fewer
8 stations, sometimes you'll see -- or margins are a
9 little bit stronger than in areas where there's, you
10 know, a lot of stations, and they're really
11 competing to get those people in the store.

12 COMMITTEE MEMBER: Thank you.

13 CHAIR: Thank you, Mr. Rozell, appreciate
14 your testifying today.

15 MR. ROZELL: No problem.

16 CHAIR: Next up we've got Daniel McLean,
17 who's the Senior Press Advisor for Senator Sanders'
18 Office, and I believe he's here. Welcome.

19 MR. MCLEAN: Thank you very much for your
20 interest. I'm -- as you said, my name is Daniel
21 McLean, and I've helped lead Senator Sanders'
22 investigation of gas prices that Vermonters are
23 facing, and I'm not here to testify, per se, I just
24 wanted to enter into the record, give you all an
25 opportunity to review it when you have a chance, the

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1 whole transcript of a hearing that Senator Sanders
2 held in Burlington in August on precisely this
3 issue. And I think you'll find some of the same
4 issues going into different aspects of what we're
5 talking about today.

6 I also would like to take just a quick
7 moment to go over some of the testimony that Ben
8 Brockwell, who's also with the Oil Pricing
9 Information Service, provided at that hearing.
10 Unfortunately Mr. Brockwell was not able to attend
11 today, and what he said provides another insight
12 here, and I will just add a couple lines from what
13 he said. And this is already in the record, I just
14 wanted to highlight a few items for you.

15 And this is just directly -- direct
16 testimony from Ben Brockwell, who, again, he is
17 director of data pricing for the Oil Price
18 Information Service, and you just heard from his
19 colleague. This is the August hearing in
20 Burlington.

21 He says: It was brought to my attention by
22 Senator Sanders' Office that Burlington prices for a
23 long period -- in his estimation -- were higher than
24 the industry average. OPIS, among other things,
25 surveys probably 150,000 retail gasoline stations on

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1 a daily basis, solely the solid data base of what
2 stations charge by location, by brand, by grade of
3 fuel.

4 I took some of that data back in 2009
5 looking at wholesale-rack prices in Burlington
6 versus retail pump prices. I then compared
7 Burlington to other cities in Vermont, and compared
8 Vermont to the northeast, and then compared that to
9 the U.S. average. It was apparent to me that your
10 market, for a long time, has been a great market for
11 a gasoline retailer, sell gasoline in terms of
12 margin above its cost.

13 And then he outlines through here, and you
14 will see it his criteria of going through -- and
15 these are some of the things that we've already
16 talked about, about the taxes, and markets, and
17 different real estate costs that fuel sellers have
18 to contend with. I also just want to add this other
19 section.

20 He talks about -- Senator Sanders
21 requested -- tried to explain why prices were higher
22 here, and he says: I asked our retail group to give
23 me some independent data that would indicate to me
24 what a low-cost competitor, in a market, what kind
25 of impact that had. My retail group did an analysis

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1 between North Jersey prices that do not have
2 low-cost providers like the Burlington market. It
3 shows consistently a 16-a-cent-gallon to
4 24-cent-a-gallon difference in price.

5 And he later adds: We can debate it all we
6 want, but statistics show that having a low-cost
7 provider in the marketplace changes the competition
8 and changes the pricing model.

9 Lastly, he adds: At the end of the day,
10 Ladies and Gentlemen, these retail stations and
11 these distributors are my customers, so I'm not here
12 to condemn them or to make them look bad, believe
13 me, I was asked to evaluate the market condition.

14 And he notes: I was taken to task by one
15 of the distributors as saying I guess they can
16 charge whatever they want to charge in Burlington
17 because that looks like what they are doing. I am
18 open, Senator, to anybody offering an explanation.

19 And then he concludes: I certainly think
20 competition ought to be looked at, and competition
21 seems to be a factor. Places that have low-cost
22 providers are consistently cheaper than places that
23 do not.

24 And with that, I will leave you the full
25 testimony, and I have a couple copies, and if you

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1 need more, we're happy to provide that.

2 CHAIR: Thank you. Yeah, if you could
3 leave those right there, we'll make copies for the
4 committee members who want it.

5 COMMITTEE MEMBER: Those are full copies of
6 the entire transcript here?

7 MR. MCLEAN: It is.

8 COMMITTEE MEMBER: Of the entire hearing?

9 MR. MCLEAN: It is.

10 COMMITTEE MEMBER: Okay.

11 CHAIR: So I'm going to hold questions now,
12 and we'll move on to Gregg Laskoski, who's the
13 senior petroleum analyst for GasBuddy.com.

14 (phone ringing)

15 MR. LASKOSKI: Gregg Laskoski.

16 CHAIR: Hi, Gregg, Pat Brennan with House
17 Transportation. I'm here with the Commerce and
18 Judiciary Committees of the House. Thank you for
19 joining us.

20 MR. LASKOSKI: Can I get your name again,
21 please?

22 CHAIR: Pat Brennan, B-R-E-N-N-A-N.

23 MR. LASKOSKI: Good afternoon.

24 CHAIR: How are you?

25 MR. LASKOSKI: Very good, thank you.

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1 CHAIR: Good. So I guess we'd like to
2 start off with -- give us a little history about
3 what you do, how you do it, and then lead on -- lead
4 in from there, if you would.

5 MR. LASKOSKI: Sure. I'm a senior
6 petroleum analyst with GasBuddy.com. GasBuddy is a
7 network of 250 web sites that basically gives
8 consumers, throughout the United States and Canada,
9 a way to find the lowest-priced gasoline in their
10 neighborhood. We operate web sites, such as Boston
11 Gas Prices, Vermont Gas Prices.com, Chicago Gas
12 Prices.com, et cetera. And people can go on-line at
13 any time and punch in a zip code, and it will show
14 them literally the lowest-priced stations all the
15 way up to the highest-priced stations in that
16 particular area.

17 In addition to that, we track the state
18 of -- we track retail gasoline prices from 140,000
19 stations, and we have a network of people who submit
20 that information on a voluntary basis. We have
21 incentives and various things, you know, such as
22 prizes, but it's quite remarkable. And on top of
23 all that, we just launched a free app that people
24 can get, or a Smart phone, that will also help them
25 access the same information, and we've had 25

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1 million people download that app.

2 COMMITTEE MEMBER: I just missed --

3 MR. LASKOSKI: I -- my --

4 COMMITTEE MEMBER: -- I guess with the
5 (unclear-speaking over each other).

6 MR. LASKOSKI: -- my role with GasBuddy is
7 to answer reporters' questions, to provide
8 commentary. I've been doing this for a number of
9 years, because before joining GasBuddy, I was doing
10 similar -- performing a similar function for Triple
11 A Oil Club South based in Tampa. The only
12 difference was with Oil Club South, I was following
13 prices in Florida, Georgia, Tennessee and Puerto
14 Rico. Now with GasBuddy, I'm following prices
15 nationwide.

16 CHAIR: Thank you. What can you tell us
17 about what you know about the situation in Vermont
18 and maybe some -- including some other New England
19 states?

20 MR. LASKOSKI: Well, you probably already
21 heard from a number of people explaining the various
22 factors that, at any particular point in time, can
23 have an influence on the retail price of gasoline.
24 Is that accurate?

25 COMMITTEE MEMBER: That's accurate, yeah.

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1 MR. LASKOSKI: Okay. One of the things
2 that we see, when we look at New England states, I
3 can tell you that Vermont is in a position where
4 there's only one state in New England that has lower
5 gasoline taxes, and that's New Hampshire. New
6 Hampshire's combined Federal and State taxes on
7 gasoline is 38 cents a gallon; whereas, Vermont's is
8 45.1 cents per gallon.

9 When we look elsewhere in New England, we
10 see Massachusetts is at 51.4 cents per gallon, and
11 the comparison between those two states is
12 interesting, because with a difference of 6.3 cents
13 per gallon, one would ordinarily expect that the
14 retail gasoline prices in Massachusetts would
15 probably be higher than those of Vermont, but just
16 the opposite is true.

17 When we look at the state average prices
18 for a 24-month period, from January of 2011 to
19 December of 2012, there were only two occasions when
20 the average price for the month in Vermont was less
21 than the average price for Massachusetts. There
22 were two occasions during that period when they were
23 even, that would be May of 2011 and August of 2012,
24 and the two times when Vermont's price was lower
25 than Massachusetts was also in 2011 during the month

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1 of July and August. But every other month, we saw
2 significantly higher prices -- and I should
3 backtrack a little bit before I say significantly.

4 Let me give you some numbers, and you can
5 determine what's significant or not. When we look
6 at 2012, we see in January, for instance, Vermont's
7 average was 3.48 versus Massachusetts' average at
8 3.41. When we get to -- let's see -- when we get to
9 May, May of 2012, the Vermont average is 3.85 a
10 gallon, while Massachusetts is 3.74 a gallon, so now
11 we're at a 11-cent difference. When we get to June
12 of 2012, Vermont's average price was 3.66 a gallon,
13 so Massachusetts, 3.49, a 17-cent difference, and
14 it's quite puzzling, to say the least.

15 COMMITTEE MEMBER: Can you -- because the
16 numbers went by fast, can you remind us the net
17 taxes in Vermont per gallon versus the net taxes in
18 Massachusetts that you first described?

19 MR. LASKOSKI: Yes. And the data that I'm
20 citing right now can be found on the American
21 Petroleum Institute's web site, they have a
22 graphic -- it's a map of the United States that is
23 specifically for gasoline taxes, and it gives
24 combined local, State and Federal taxes. And the
25 most recent one I think was just done this year. So

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1 the Vermont combined gasoline taxes are 45.1 cents
2 per gallon. Massachusetts combined gasoline tax is
3 51.4 cents per gallon. New Hampshire is 38.0.
4 Maine is 49.9. Rhode Island is 51.4 and Connecticut
5 is 63.4. All those are cents per gallon.

6 COMMITTEE MEMBER: Thank you, it's helpful.
7 You were making the comparison between Massachusetts
8 and Vermont; do you remember what the tax
9 differential was?

10 MR. LASKOSKI: Yes, it was 6.3 cents
11 difference between Massachusetts and Vermont with
12 Massachusetts' taxes being greater.

13 CHAIR: Okay, any questions for -- yes,
14 George.

15 COMMITTEE MEMBER: Hi. When you do average
16 gas prices, you're averaging the price that's listed
17 on the pump that's been collected by your folks
18 setting in prices, or are you factoring into your
19 algorithm the number of gallons sold at X price?

20 MR. LASKOSKI: No, sir, I believe we are
21 simply taking the price at the pump.

22 COMMITTEE MEMBER: So therefore, the
23 average price actually in Vermont is probably higher
24 than what you're quoting because the greatest amount
25 of gas is sold in Chittenden County which is the

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1 highest price.

2 MR. LASKOSKI: I wouldn't dispute that.

3 COMMITTEE MEMBER: Thank you.

4 CHAIR: Anyone else? Questions for Gregg?

5 COMMITTEE MEMBER: Do you or anybody else
6 that you know do the same thing for number 2 fuel
7 oil?

8 MR. LASKOSKI: I'm sorry, can you repeat
9 that, please?

10 COMMITTEE MEMBER: Do you, or anyone else,
11 that you're aware of, do the same service for number
12 2 fuel oil?

13 MR. LASKOSKI: No, sir, none, that I'm
14 aware of.

15 COMMITTEE MEMBER: Because I keep wondering
16 about the relationship between fuel oil and gas.

17 MR. LASKOSKI: I'm not sure I could tell
18 you that.

19 COMMITTEE MEMBER: Thank you.

20 CHAIR: Thank you. I've got time for one
21 more question. Any further questions? Guess not.
22 Thank you, Gregg, appreciate you testifying today.

23 MR. LASKOSKI: My pleasure. If there's one
24 thing I could add, --

25 CHAIR: Sure.

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1 MR. LASKOSKI: -- I don't know how much
2 time you have, but --

3 CHAIR: Yeah --

4 MR. LASKOSKI: -- one of the things that we
5 find very interesting is that, especially when we
6 look at gas prices, one of the things that's most
7 intriguing, and we saw this in 2012, was what
8 happens when gasoline prices spike. And in 2012,
9 virtually every time gas prices spiked, it was
10 because of problems at refineries.

11 So one of the things that we would
12 encourage, and, you know, in a free-market system,
13 it's a difficult to get a ball through here, but we
14 would encourage refineries to have greater
15 transparency, to let us know, not just us, but let
16 you, elected officials know what the real conditions
17 are when problems arise.

18 CHAIR: Thank you, it's a great idea.
19 Well, thanks again for being here with us today.

20 MR. LASKOSKI: My pleasure, thank you.

21 CHAIR: Next up we have Joe Choquette who
22 is with the Petroleum Association of Vermont.

23 MR. CHOQUETTE: Thank you, Mr. Chair. I
24 have a hand-out which I'll send around. And that'll
25 be coming around, but I will explain it as I go

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1 along.

2 Chairman Brennan, Chairman Lippert,
3 Chairman Botzow, thank you for the opportunity to
4 provide our perspective on gasoline prices in
5 Burlington, in the Burlington area and across
6 Vermont.

7 My name is Joe Choquette, I represent the
8 Vermont Petroleum Association, which is a group of
9 companies that provide gasoline and diesel fuel to
10 branded and unbranded gasoline stations in Vermont.
11 In Vermont, there are approximately 75-licensed
12 wholesale distributors. In general, these are
13 long-time legacy businesses that are now in their
14 second and third generation of family ownership.
15 They have come to supply this area after major oil
16 companies sold their assets and stopped doing
17 business here because of low volumes and shrinking
18 profits. None of these are major oil companies, two
19 of them will speak with you today.

20 We believe there is rigorous competition
21 among gasoline vendors in northwestern Vermont and
22 around the state. The challenge is to explain why
23 gasoline prices vary from place to place and why
24 they seem to have been higher in some areas of
25 Vermont than in others. Other witnesses will

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1 address some of the elements that contribute to the
2 cost of the product, but here is the basic formula:

3 The biggest factor determining gasoline
4 prices is the underlying cost of crude oil, and this
5 is generally reflected in the wholesale prices
6 charged at the terminal or rack -- and at the top of
7 my hand-out there, you'll see the retail price three
8 different days in Burlington and the rack price
9 three different days at the Burlington terminal.

10 COMMITTEE MEMBER: This is the same rack
11 price that was referred to in earlier testimony --

12 MR. CHOQUETTE: Yes, this is the branded
13 rack price, and the fellow from Opis did a very nice
14 job of explaining what that is to you, I mean there
15 are different rack prices for different
16 distributors, but this would be considered the
17 average rack price, I think. After that, the cost
18 of getting the product to the market, state and
19 local taxes, and credit card fees, make up a
20 significant component. Margins vary, and
21 competition among vendors is the most significant
22 factor in setting a final price.

23 I provided three examples of how wholesale
24 prices at the Burlington terminal related to prices
25 on the street in the last week-and-a-half, and I'd

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1 be happy to talk about those in more detail, if
2 asked. Above the fixed cost listed there, and those
3 are fixed costs, which you have to pay every time,
4 are the operating costs of the distributor and the
5 station.

6 The National Association of Convenience
7 Stores estimates that the average cost of running a
8 gasoline station is about 15 cents per gallon. It
9 is difficult to reach and maintain that margin, as
10 you will see from my hand-out, and that is why
11 nearly every gasoline outlet is now engaged in some
12 other business, from convenience store, to donut
13 shop, to pet food vendor. Comparing Vermont prices
14 to the national average and to other states, Vermont
15 is consistently within a few cents of most other New
16 York -- northeastern states, I'm sorry, except New
17 Hampshire which has lower taxes.

18 The northeast, in general, is more
19 expensive than the south and midwest, and that is at
20 the top of my second hand-out. The average price, I
21 think it was taken on January 16th, in the different
22 markets, northeast, midwest, Gulf Coast, and so on,
23 and you'll see that there's considerable variation.

24 According to many sources, the northeast
25 differential might reflect the more expensive crude

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1 oil that is used in northeast refineries, Brent
2 North Sea Crude, which is consistently sold at more
3 than \$20 per barrel, more than bench mark grades
4 used in the south and west, West Texas Intermediate.

5 Likewise the northeast market is more
6 difficult to serve. The nation's pipeline network
7 ends in New Jersey, and the region poses unique
8 challenges for transporting refined products to and
9 through New England, including adverse weather and
10 limited rail service.

11 So in Vermont, on average, is about the
12 same as Maine and Massachusetts; why do prices vary
13 from one town to the next? Because our geography
14 and circumstances create naturally-defined markets
15 within which competitors act. Some of them have
16 been noted; Rutland, Middlebury and the New
17 Hampshire border.

18 Along the border, Vermonters have to
19 compete with New Hampshire's gas tax which is 7
20 cents per gallon cheaper than Vermont's. This
21 creates intense pressure to cut prices to the bone
22 to keep customers on the Vermont side of the border.
23 In Middlebury, a pair of car-lock operations take
24 advantage of the fact that there are no people to
25 pay to operate the station, and other expenses are

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1 minimal.

2 COMMITTEE MEMBER: Can you -- the phrase
3 you used --

4 MR. CHOQUETTE: I used the phrase "a
5 car-lock." "A car-lock" is a system that's
6 unattended by any people, but you have a card from
7 the oil company that you can go up to the pump, put
8 the card in and pump your gas and go away, so there
9 are no people, or they have no expenses of personnel
10 to run the station, so that makes it more affordable
11 for somebody to charge a lower price.

12 COMMITTEE MEMBER: And they're not using
13 branded -- Visa, Master Card, American Express,
14 either, it's their own card.

15 MR. CHOQUETTE: They're using a card that's
16 specific to the distributor, in this case, in most
17 cases.

18 Other markets are dominated by other
19 factors. In the Burlington area, there is
20 consistently at least a 14-cent-per-gallon
21 difference between the high price and the low price.
22 You just heard from GasBuddy.com. Anybody with a
23 cell phone in the room can go on GasBuddy's web site
24 right now and demonstrate that there's a difference
25 of 14 cents -- it was actually 15 cents this

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1 morning, between the high price and the low price in
2 the Burlington area.

3 But consumers don't always flock to the
4 low-priced outlet, and many buy their fuel at the
5 highest-priced outlet. The fastest way to reduce
6 prices in any of these areas is for everybody to buy
7 gas at the low-price vendor.

8 A fact sheet posted on Senator Bernie
9 Sanders' web site provides an inaccurate look at the
10 competition in northwestern Vermont. The analysis
11 counts all the stations served by three distributors
12 as though three owners were controlling the price at
13 all these outlets. In fact the three largest
14 distributors in Chittenden County operate a total of
15 23 stations, but deliver to a much larger network of
16 74 independent dealers.

17 In Vermont, as elsewhere, it is the station
18 owner or operator who sets the price. Even
19 accepting that a (recording glitch) dealers, and
20 only 44 are operated by seven distributors operating
21 four or more stores each. We recognize that the
22 difference between the wholesale rack price for
23 gasoline at the Burlington terminal and the average
24 retail price in the Burlington area is above the
25 national and regional average, from time to time.

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1 But the petroleum industry is a volatile
2 industry, and such periods are routinely offset by
3 times when the difference between rack price and
4 retail price is narrow and often negative. This was
5 true during many periods of October 2011 through
6 March 2012, and it is true today.

7 Gross margins are not profits. From the
8 gross difference between wholesale and retail,
9 distributors and dealers have to meet the cost of
10 running their business. Credit card fees alone cost
11 about 10 cents per gallon. It costs a
12 million-and-a-half dollars to erect, to build a
13 convenience store from scratch, and an estimated
14 250,000 to replace three underground petroleum
15 storage tanks and two multiple-product dispensers.
16 Finally, sales volume varies considerably, and low
17 volumes mean slow turnover and sluggish profits.

18 Vermont, as a state, has the lowest volume
19 of gasoline sales of all 48 of the Continental
20 United States and a second only to Alaska among all
21 50. Despite that, today, there is at least a
22 15-cent per gallon difference between the high price
23 in Burlington and the low price in Burlington.
24 Consumers have many choices. The fastest way to
25 reduce prices is for everybody to buy gas at the

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1 lowest-priced vendor.

2 I've described in my handouts, and I'd be
3 happy to answer any questions.

4 CHAIR: Any questions for Joe?

5 COMMITTEE MEMBER: A couple. I just want
6 to mention, do credit card fees vary by state, or
7 regardless is it the same across?

8 MR. CHOQUETTE: They generally vary
9 slightly by credit card vendor, so whether it's
10 Master Card, or Visa, or American Express, they each
11 have a different scenario.

12 COMMITTEE MEMBER: Okay. And do diesel
13 fuel prices sort of exhibit the same differential in
14 price between state gasoline prices?

15 MR. CHOQUETTE: I don't know the -- I have
16 not looked at that, so I'm not going to -- I don't
17 know, I'd have to look at the -- but there is, on
18 the back page of my hand-out, actually, diesel
19 prices are articulated, but I didn't look at them
20 carefully.

21 COMMITTEE MEMBER: Okay. And just one
22 other question that -- so earlier, that you were in
23 the room, we heard testimony about the average gross
24 margin being 32 to 21 cents in Vermont, and you're
25 very significantly different. Is there a reason in

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1 the way you calculated it and your gross margin
2 would be different from theirs?

3 MR. CHOQUETTE: No, but, you know, we do
4 admit that the margins, you know, expand and
5 contract throughout the year, so right now, as a
6 matter of fact, the margins that I've calculated,
7 and those are fixed costs, show a tighter -- or
8 almost a zero margin for people who are operating in
9 Burlington this week. But in fairness, -- and I
10 testified at Congressman Sanders' hearing, so you
11 can read my testimony, but when he held his hearing,
12 margins were considerably bigger than they are now,
13 and that's the way the business is. They -- at
14 times, margins are wide, and at times, they're very
15 narrow, and some times negative.

16 COMMITTEE MEMBER: Thank you.

17 CHAIR: Yes.

18 COMMITTEE MEMBER: I take it from your
19 testimony that you don't believe Vermont
20 distributors and retailers are making excess
21 profits; is that fair?

22 MR. CHOQUETTE: That's correct, but --

23 COMMITTEE MEMBER: Given that, would you
24 also conclude that your membership would not have a
25 problem with a recoupment of excess profits

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1 within --

2 MR. CHOQUETTE: The proposals that I've
3 heard mentioned all would require some level of
4 involvement, I guess that's my concern with them.
5 What is an excess profit? I mean people have to --
6 one of our distributors that's going to testify has
7 480 employees, you know, how are you going to -- you
8 know, how are you going to determine what's an
9 excess profit in order to recapture it, so --

10 COMMITTEE MEMBER: Well, you said -- you
11 indicated you didn't think your membership,
12 distributors and retailers were making excess
13 profits, so I assume there's some way to objectively
14 ascertain that perhaps by comparison with national
15 figures or regional figures.

16 MR. CHOQUETTE: Well, I've articulated some
17 of the reasons why costs here are higher than in
18 some other areas of the country, I don't know how
19 you would determine what is an excess profit.

20 CHAIR: Anyone else? Diane.

21 COMMITTEE MEMBER: Sure, thank you. Joe,
22 I'm just a little confused on the statement that you
23 said Vermont has the lowest consumption of gasoline?

24 MR. CHOQUETTE: Yeah, we sell the fewest
25 gallons of any -- of the 48 Continental United

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1 States, and 49th, including Alaska and Hawaii.

2 COMMITTEE MEMBER: I'm just a little
3 confused with jiving that with the fact that we --
4 that looking at our roads, coming up from --
5 we've -- traveling in Vermont about 7 billion miles,
6 billion miles a year on our roads, and from what I
7 understand that, we -- you know, something that we
8 use close over 300 million gallons of gas, so you're
9 saying that's one of the lowest-fuel consumption
10 and --

11 MR. CHOQUETTE: That's even lower than
12 Rhode Island which is a, you know, considerable
13 smaller --

14 (unclear-people speaking over each other)

15 MR. CHOQUETTE: It's in total --

16 COMMITTEE MEMBER: That's in total, or --

17 MR. CHOQUETTE: That's in total gallons.

18 COMMITTEE MEMBER: Total gallons.

19 (unclear-people speaking over each other)

20 MR. CHOQUETTE: I can -- I'll provide that,
21 that's not a mysterious -- you know, there are
22 plenty of charts about how many gallons each state
23 sells, and I'm happy to provide that.

24 CHAIR: We have questions from Bill.

25 COMMITTEE MEMBER: Just a quick one.

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1 What's the state after now, the gas -- what's the
2 state of gas station infrastructure in Burlington?
3 Are there any in Vermont rusty, is it worn out --

4 MR. CHOQUETTE: You know, I'm going to let
5 the -- we have two distributors here who own
6 stations here, and I think I'm going to defer to
7 them on that. Yeah, it's a combination, as they'll
8 probably tell you.

9 CHAIR: We have time for two more. Bob.

10 COMMITTEE MEMBER: What gas station is
11 selling for 15 cents less?

12 MR. CHOQUETTE: I would have to go on the
13 web site to -- usually it's the Riverside one,
14 right? I think --

15 COMMITTEE MEMBER: I live in Chittenden
16 County, and I buy gas there, and I've never seen
17 that discrepancy. You're saying there's a --
18 pardon?

19 COMMITTEE MEMBER: I have.

20 COMMITTEE MEMBER: You have, 15 cents.

21 MR. CHOQUETTE: I'm saying you can go on
22 GasBuddy's site and find that right now, I didn't
23 make that up.

24 COMMITTEE MEMBER: (unclear) 10 cents,
25 GasBuddy.

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1 COMMITTEE MEMBER: Yeah, 10 cents.

2 MR. CHOQUETTE: It was 15 this morning, I,
3 you know --

4 COMMITTEE MEMBER: I knew you would
5 testify, Joe.

6 (laughter)

7 CHAIR: One more. George.

8 COMMITTEE MEMBER: Well, I have a little
9 problem on the credit card fee deal here. Credit
10 card fees are typically based on a base charge for
11 the transaction, itself, and then a spreading
12 percentage going down for the volume -- for the
13 total cost. So if gas is at a higher price, whether
14 it's making that break, I don't have the slightest
15 idea, but this would tend to suggest it's a fixed
16 fee, and I don't believe it is a fixed fee.

17 MR. CHOQUETTE: My understanding is that,
18 to the retailer, it's a fixed percentage of the
19 total sale price.

20 COMMITTEE MEMBER: Can I ask for one
21 clarification, Joe? I think I heard you say that
22 Vermont tried to maybe -- you said, from time to
23 time, that the prices were higher than -- than what?

24 MR. CHOQUETTE: That are than the national
25 average.

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1 COMMITTEE MEMBER: And I guess I was trying
2 to jive that, I don't know what the time to time is,
3 but all I was -- I was trying to compare the
4 testimony we heard earlier, where it sounded like
5 Vermont prices were pretty consistently higher.

6 MR. CHOQUETTE: Well, I've actually been
7 representing the industry since '86, so I've been
8 around for a long time, and I've seen it go both
9 sides of the curve, and probably over time, I would
10 think that it probably evens out to about the
11 national average, so my analysis is not confined to
12 three years.

13 COMMITTEE MEMBER: (unclear) would you have
14 kept the data that's being presented by the Oil
15 Price Information Services?

16 MR. CHOQUETTE: No, no.

17 COMMITTEE MEMBER: So you're not really --

18 MR. CHOQUETTE: I'm not disputing their
19 figures.

20 COMMITTEE MEMBER: Their data would be
21 consistent with anything you'd be looking at trying
22 to understand (unclear).

23 MR. CHOQUETTE: I think their data is
24 probably pretty accurate.

25 CHAIR: Thank you, Joe.

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1 MR. CHOQUETTE: Thank you.

2 CHAIR: Appreciate it. Next up is Skip
3 Vallee, CEO of RL Vallee. Appreciate you coming,
4 Skip, --

5 MR. VALLEE: Thank you.

6 CHAIR: -- (unclear).

7 MR. VALLEE: Chairman Lippert, Chairman
8 Brennan, Chairman Botzow, members of the various
9 committees that are here today, I want to thank you
10 for affording me the opportunity to testify.

11 My name is Skip Vallee, and I am chairman
12 and CEO of RL Vallee, Incorporated, a company
13 founded by my grandfather, and one that had been
14 part of the Vermont landscape for the past 71 years.
15 We operate 28 convenience stores in Vermont, seven
16 in New York and one in New Hampshire, mostly under
17 the Maplefields brand. We also --

18 CHAIR: Excuse me, just one second.

19 MR. VALLEE: Yeah.

20 CHAIR: Those mics are very directional.
21 The little skinny one, if you could aim that right
22 at yourself, it'll pick up --

23 MR. VALLEE: There we go. How's that;
24 better?

25 COMMITTEE MEMBER: Thank you very much.

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1 COMMITTEE MEMBER: Thank you.

2 MR. VALLEE: Thank you. We also -- excuse
3 me -- also deliver motor fuel to 21 independent
4 customers in Vermont. We are a growing company and
5 today employ 480 proud Vermonters. Our success is
6 rooted in our commitment to the customer. We
7 believe in setting a high standard for convenience
8 stores in the region.

9 Our customers should find bathrooms with
10 fresh flowers and spotless floors, not broken
11 urinals and cockroaches. Although for obvious
12 reasons I don't usually hang out in front of the
13 bathroom door, more than once I've heard an exiting
14 flatlander, say, "Hey, Mary, you've got to come see
15 this bathroom.

16 We also believe that folks should feel safe
17 in an airy, light, open atmosphere. We believe that
18 multiple choices of piping hot Green Mountain coffee
19 and made-to-order dining should be a customer
20 expectation, not a surprise. And we believe that
21 the first thing our customers should see, when they
22 walk into one of our stores, is a cheerful face.

23 Of course one element of our customer
24 experience is what they pay for our products,
25 including gasoline. And on that score, we couldn't

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1 be more transparent and obvious.

2 What other industry advertises the price
3 for its product on a 5 by 12 sign hung on a 14-inch
4 pole? It's no secret to us that the cost of living
5 in Vermont is high. Income taxes, property taxes,
6 even sales and use gas taxes are a real challenge
7 and should be a top priority for our elected
8 officials.

9 During the most recent political campaign,
10 certain politicians running for re-election
11 attempted to make political hay by pointing out the
12 prices in northwestern Vermont are higher than the
13 national average. A web site purports to eliminate
14 profit margin. Conveniently forgotten are costs
15 both common to the industry and unique to Vermont.
16 As a business owner, I have to operate based on
17 facts, and so, too, should those who are running for
18 office.

19 Not mentioned on the web site, but common
20 to all convenience stores, are number of costs that
21 impact the price of goods. They include labor,
22 environmental compliance, repair, health-care
23 insurance and utility costs.

24 One less obvious but very important common
25 cost is credit cards which had a lot of discussion

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1 today. Few people realize that when you pay at the
2 pump with your credit card, 2 to 3 percent of that
3 goes to the credit card company, that's 8 to 12
4 cents a gallon.

5 In addition, Vermont has many higher costs
6 unique to our industry and us. First, -- and Joe
7 touched on this a little bit, we are supplied by
8 east coast refineries that use primarily
9 Brent-priced crude. That is crude from world
10 markets. Most refineries in the central part of the
11 country, whose pricing contributes to lowering the
12 national average that everybody refers to, use WTI
13 crude, whose price is based on the cost at Cushing,
14 Oklahoma.

15 Cushing is currently overflowing with oil
16 coming from midwest fracking, North Dakota oil
17 fields and Canadian Oil Sands. The difference
18 between Brent and WTI has recently been, as Joe
19 pointed out, about \$20 a barrel, that's 48 cents a
20 gallon. To get WTI crude to the East Coast by rail
21 is roughly 35 cents a gallon. To get WTI or
22 Canadian crude to Montreal and then to Portland via
23 a pipeline is about 12 cents a gallon. So the price
24 of northeast product could decline by 36 cents a
25 gallon if we had pipeline access to Oil Sands and

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1 mid-western crude, that's \$111 million of
2 Vermonters' monies that's going to Saudi Sheiks.

3 Of course many principal people will say
4 that Canadian Oil Sands are from an inappropriate
5 source, citing global warming concerns, but to these
6 folks, I would reiterate my earlier statement about
7 having to base decisions on fact. The fact is, that
8 if we exclude major sources of oil, it could cost
9 Vermonters 36 cents a gallon, and we're feeling that
10 impact now because we do not have access to the
11 cheaper crude from the midwest.

12 Second, our business, like many Vermont
13 service businesses, is often home to first-time or
14 part-time associates just beginning the work
15 journey. These jobs are typically near or slightly
16 above minimum wage. Vermont's wage is 18 percent
17 higher than our neighbors. I figure that's 2 cents
18 a gallon. So we asked the question about why is
19 Vermont higher? Two cents on the gallon is I think
20 directly attributable to our higher minimum wage.

21 We should also consider property tax
22 expenses. Not only are they burdensome for
23 families, they are very high for businesses. For
24 example, a property tax on my site in Champlain, New
25 York is \$21,000. Our property tax for a similar

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1 site in St. Albans is \$56,000. So compared to
2 states with no property taxes, I've calculated
3 that's about another 1.25 cents a gallon.

4 Another common challenge we face is most
5 Vermont law enforcement authorities are reluctant to
6 pursue people who drive off without paying. So on a
7 20-gallon fill-up, that's about \$75. I've
8 calculated that, across all the gallons, that's
9 another half-cent a gallon that retail distributors
10 must eat.

11 Finally, as has been discussed earlier, we
12 have to acknowledge that northwest Vermont is at the
13 end of the supply line. Freight from Albany to
14 Rutland and Portland to White River is a heck of a
15 lot less than freight from Albany to Swanton or
16 Portland to St. Albans.

17 Certain political figures with a bully
18 pulpit have extolled the lower-price promises for
19 the out-of-state, big-bucks, multi-national
20 corporation COSTCO Wholesale. While I have no basis
21 to evaluate the validity of these price promises, I
22 can judge this billion dollar corporation on its
23 other promises, and there is cause for concern.

24 They promise to comply with the existing
25 Act 250 permit, but violated it for well over a

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1 decade. It promises a progressive corporate agenda,
2 but brags about killing car-check. It argues for
3 raising taxes on a majority of Vermont's small
4 businesses, but it accelerated its dividend in the
5 2012 to avoid the tax increase. It promises to pave
6 over a class II wetland. It promises to violate
7 Vermont's new no-net degradation rule and release
8 more phosphorus into Lake Champlain. It promises to
9 further congest Vermont's most dysfunctional
10 intersection.

11 Just as Vermonters are increasingly wary of
12 ridge-line destruction in the name of clean wind
13 energy, so, too, must we be aware of violating our
14 marred environmental laws in the name of theoretical
15 lower prices.

16 I'd like to end where I began, with my
17 customers; for my company, for three generations,
18 they have been our focus. We are a Vermont company
19 with deep roots, not just in St. Albans where we got
20 our start, but also in places like Woodstock. More
21 than a year after Tropical Storm Irene, the
22 devastated people in town still thank us for the
23 foresight of a generator, for making them
24 bottled-water coffee for weeks, and for serving as
25 an emergency distribution center. Also, our rural

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1 Colchester customers who appreciated the speedy
2 response, candor and compensation for their troubles
3 when a supplier delivered us a bad load of gasoline.
4 This is not service you can depend on from a large
5 out-of-state business. And not to mention all our
6 customers who join our annual fund-raiser for
7 Fletcher Allen Children's Hospital.

8 One of the most rewarding was the other day
9 I just spent with our customers who overflowed our
10 newly rebuilt site in House District Lamoille-
11 Washington 1 in Morrisville. Cheerful, wide-eyed,
12 and feeling that he owned the place, one customer
13 said to me, "It's about damn time you opened again."

14 Thank you, and I'm willing to take your
15 questions.

16 CHAIR: Kirk.

17 COMMITTEE MEMBER: Thanks, Skip. Skip,
18 what do you think the Legislature should do, if
19 anything, and what do you think we should not do,
20 and why?

21 MR. VALLEE: Well, I think that -- these
22 are -- I think there's this impression that this
23 market does not operate fully and freely. And by
24 the way, the lowest price, I think, on GasBuddy is
25 my site in Colchester. There was a question earlier

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1 about where Joe recommended that people should go, I
2 would recommend that is a nice place to go.

3 (laughter)

4 COMMITTEE MEMBER: Can we get the address?

5 MR. VALLEE: Okay. And I think this is a
6 very -- I mean there's a lot of debate about, you
7 know, St. Albans being less than Chittenden County
8 sometimes in price. First of all, there's a freight
9 difference, okay? You've got to get the stuff from
10 Burlington or from Albany to St. Albans, okay, so
11 there's always -- if you're looking completely at
12 cost, number one.

13 Number two, Colchester has -- or the
14 greater Burlington area has a lot in big traffic
15 flows in some of the other things, which allows
16 people to build bigger sites, that have bigger
17 volume, that are more competitive, and we're blessed
18 with having a couple of those sites. So if the
19 price in Franklin County gets too high, people from
20 Franklin County, and I'm from Franklin County,
21 commute, a lot of them, to Chittenden County. If
22 you're priced too high in Franklin County, they're
23 going to buy in Chittenden County for that segment,
24 and that puts pressure overall on the market even to
25 get lower prices.

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1 So I think in the to-do list, you want to
2 continue to promote the competition that I view is
3 endemic in the market, okay? What I don't think you
4 want to do is to do things that are unrelated to the
5 price issues that are of concern here, okay? Work
6 on some of the issues that are -- that I just
7 discussed, about getting lower-priced product to
8 Vermont. That's 36 cents a gallon on average that a
9 midwest operator can have by having a lower-priced
10 WTI crude, okay? So I think that -- I think that,
11 you know, continuing to promote an open and
12 competitive atmosphere, I think, is probably on the
13 to-do list.

14 CHAIR: Doug.

15 MR. VALLEE: Yes, sir.

16 COMMITTEE MEMBER: (unclear) the stations
17 and everything, and in fact if you could help me out
18 there, in which you listed out cost per gallon of
19 it, and I'm wondering about your financing cost,
20 (unclear).

21 MR. VALLEE: Yeah.

22 COMMITTEE MEMBER: And I want to know about
23 changes in that -- well, (unclear) the Commerce
24 Committee pay attention to those things, and I want
25 to know, you know, how this is working in terms of

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1 you going to the credit markets, where there's more
2 painful, less painful in this same period of time
3 that you can discuss?

4 MR. VALLEE: Yeah, I mean what I tried to
5 do, to put in perspective with the cents per gallon,
6 is not to talk about all of our costs. For example,
7 I didn't give you a cents per gallon on labor
8 because it changes on a big-volume site -- I mean it
9 costs, depending on whether you have food or not,
10 roughly the same in labor on running, you know, one
11 side versus another, okay?

12 So if you've got a big volume site, across
13 that labor amount, you're going to have a lower
14 cost. What I tried to do in my testimony is to say,
15 hey, here are four things that are unique to
16 Vermont, where if we're going to compare ourself, as
17 many have done, to other states, we are unique our
18 cost structure, okay? WTI crude, you know, the
19 drive-off thing is a small thing, but it's a real
20 irritant to those of us who, you know, watch people
21 run away and don't get chased down even after we've
22 collected all the evidence.

23 Property taxes and minimum wage. You can
24 obviously apply those same things to the other
25 factor. Financing is a question. Part of it is a

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1 question of how much of your own cash you're putting
2 into a station versus how much you're borrowing,
3 and, you know, we are blessed with access to
4 capital, and frankly, interest rates are running
5 kind of low.

6 So if you were going to replace tanks and
7 do other things right now, this would be a good time
8 to do it, given the fact that interest rates are
9 low.

10 COMMITTEE MEMBER: I think when I look at
11 it, I think you're basically saying, what you're
12 trying to compete upon is an attractive workplace,
13 one; and then two, you say that you need the margins
14 that you have because you have extraordinary
15 expenses compared to other people and other places.
16 And does that really hold up throughout the state
17 and elsewhere?

18 MR. VALLEE: Yeah, I'm not -- I'm dealing
19 with one part of the question -- there was two
20 questions here. Why do prices vary within the
21 state, but another issue raised repeatedly is, why
22 is Vermont more expensive, okay? You've got to take
23 out the State gas tax issue. What I'm trying to say
24 is it should be more expensive, okay? Because we
25 have some unique things here, some of it unique

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1 because we're in the northeast, some of it unique
2 because we're Vermont, and let's not forget about
3 those things when we're doing an analysis, okay?
4 I'm not saying that we're -- I just want to make
5 that point with respect to those Vermont versus the
6 rest of the country's analyses.

7 COMMITTEE MEMBER: Mr. Vallee, is it not
8 true that improvements to the western rail corridor
9 could only help competition?

10 MR. VALLEE: Listen, any time that you have
11 pressure on the use of your product, that's going to
12 result in a lower price. So if people are taking
13 railroad rather than driving in aggregate, you know,
14 I would have to see what kind of numbers are that
15 that would have -- that would have an impact on
16 pricing.

17 COMMITTEE MEMBER: In terms of getting your
18 product, no.

19 MR. VALLEE: Oh, in terms of getting the
20 product, I'm sorry, I thought you were -- there is
21 rail now into Burlington, so that doesn't change it.
22 The Burlington terminal is fed by rail from Albany.
23 The issues there are more with the operator than
24 with rail.

25 I think a lot of the analysis uses the

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1 Burlington terminal's rack price as sort of a cost
2 and adds freight, but I would say half the time we
3 arrive at the terminal, we're unable to get product
4 because the allocation is up for the day, so you
5 need -- there's a cost there that's not added into
6 all these analyses, it's run by a company, has a
7 monopolistic-rural position in Burlington, and, you
8 know, we scream and holler and yell, and there's not
9 much we can do. But our trucks go and have to come
10 back to St. Albans empty many times.

11 COMMITTEE MEMBER: So I think I have a
12 question, but you just piqued my interest there with
13 this monopoly on -- you're talking rail.

14 MR. VALLEE: No, I'm saying that --

15 COMMITTEE MEMBER: (unclear) to Burlington?

16 MR. VALLEE: -- supply into Burlington
17 comes by rail from Albany.

18 COMMITTEE MEMBER: Okay, and --

19 MR. VALLEE: And that terminal is
20 controlled by one corporation.

21 COMMITTEE MEMBER: And has a certain
22 allocation per day?

23 MR. VALLEE: Per day for each of --

24 COMMITTEE MEMBER: So I can move in there?

25 MR. VALLEE: That's correct. So we show

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1 up, and if somebody else has taken the allocation,
2 we drive back to St. Albans empty. And it happens
3 everyday.

4 COMMITTEE MEMBER: And that's a rail
5 operator.

6 MR. VALLEE: No, it's not the rail -- the
7 rail operator is an intermediary, so Wilson and his
8 crowd are just the -- that's not the issue, it's the
9 operator of the terminal.

10 COMMITTEE MEMBER: Okay, I thought I -- I
11 just sort of (unclear).

12 CHAIR: Sid.

13 COMMITTEE MEMBER: Yeah, I understand the
14 (unclear) if you're comparing us with other states,
15 and that's a different analysis than in-state which
16 really drove a lot of the desire to look into this
17 area. I filled up my gas tank when I left southern
18 Vermont yesterday evening in Dummerston, and it was
19 at a convenience station which has the same place of
20 employees you've talked about, pays taxes, I used my
21 credit card, I paid 3.37 a gallon.

22 We had testimony earlier that the price for
23 moving a gallon of gas 120 miles, and I drove 123
24 miles, was about a penny-and-a-half or 2 cents a
25 gallon. So I still haven't gotten my answer around

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1 why the prices in Chittenden County and Franklin
2 County and Lamoille County and Grand Isle County
3 aren't 3.37 a gallon when that station is operating
4 profitably at that price.

5 MR. VALLEE: Well, first of all, I dispute
6 this notion that you can haul gasoline from
7 Dummerston to Swanton for a penny-and-a-half. If
8 you can do that, you can have all my business, okay?
9 My view is Dummerston to St. Albans is probably on
10 the order of 8 or 9 cents a gallon, okay? So
11 listen, one of the things we do everyday is we try
12 to find cheaper freight. If you can find a vendor
13 for me that'll haul for a penny-and-a-half from
14 Dummerston to Swanton, you know, that's a new
15 business model that I encourage anybody, you know,
16 to pursue.

17 CHAIR: Okay, we've got to -- we can --

18 COMMITTEE MEMBER: I can't resist saying
19 that congratulations on your ability to promote
20 flowers in rest rooms in gas stations. I mean this
21 genuinely, I think the billboard on Route 7 -- or
22 Route 4, that's the only billboard I ever stopped to
23 take a picture of where I think it says something
24 (unclear).

25 MR. VALLEE: And that's something very

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1 unique to us, very unique to Vermont, and it's about
2 a half-a-cent a gallon.

3 (laughter)

4 CHAIR: Thanks for being here.

5 Next up is Steve Pietryka, sales manager
6 for Champlain Oil. Thanks for coming, Steve.

7 MR. PIETRYKA: Thank you. First of all,
8 I've been told by plenty of people that putting the
9 microphone in front of me is dangerous, so hopefully
10 everybody will be fine and I won't blow anybody out
11 there.

12 Anyways, Chairman and Committee Members,
13 thank you for having me here, appreciate the
14 opportunity. My name is Steve Pietryka, and I'm the
15 sales manager for Champlain Oil Company.

16 Champlain Oil is a 65-year-old company that
17 is now in its third generation of ownership and
18 supplies 83 dealers and locations and operates 29
19 locations in Vermont.

20 There are many variables that affect the
21 pricing of gasoline pricing in Vermont, but I'd like
22 to break it down into four categories, and I think
23 the most important: Terminal and cost of product,
24 delivery expense, overhead and pricing.

25 First off, is terminals. Before you can

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1 discuss specific areas of Vermont, you need to
2 understand how products are distributed. There are
3 five terminals of motor fuels which all distribute
4 pickup products. Albany, New York covers
5 southwestern Vermont up to Brandon and east of
6 Quechee. Boston, Mass. covers southeastern Vermont
7 up to White River Junction. Portland, Maine covers
8 northeastern Vermont from Bradford north. Montreal
9 covers northwestern Vermont down to Burlington, and
10 Burlington covers Chittenden County east to Barre
11 and up to Hardwick. Generally in that area they can
12 have some overlaps, obviously.

13 Three of these terminals are considered
14 deep water. Albany is supplied, as you've already
15 heard, by barge; and Burlington, as you've already
16 heard, is supplied by train. At all five of these
17 terminals, the prices are different, and Burlington
18 is the highest because it is supplied by train. Our
19 price changes at each terminal everyday. Sometimes
20 it's only one cent; other times it's as much as 10
21 cents and can be up or down depending on the
22 direction of crude cost or the traders in New York.

23 When you examine why one town might be more
24 or less than another, you have to examine many
25 variables. Did a location incur higher price or

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1 lower price because of the timing of the purchase?
2 Do they have higher-cost product where they need to
3 cover their cost? There's also an issue of
4 turnover. If the location doesn't sell much volume,
5 they will take longer to sell their inventory and
6 could be at a higher price until it is sold.

7 Delivery expense. Another variable is the
8 cost of trucking. The more miles you travel, the
9 greater the cost. Trucking is one of the largest
10 expenses for our company. A tractor-trailer costs
11 \$250,000, and the cost of operation is \$2.65 per
12 mile, certainly not an insignificant expenditure.
13 That being said, each company is different. Some
14 choose to haul their own product, and others hire a
15 contractor common area; that, in itself, applies
16 different amounts to the company's cost and
17 structure.

18 Overhead. One factor that is often
19 overlooked in any business is what does it take to
20 turn on the lights on each day, sell product and
21 make a profit? Each location has different
22 overhead, so I'm going to generalize, but you
23 certainly can imagine that building a location in
24 Chittenden County would cost more than a rural town
25 because of the different land values in cost. A new

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1 location today which has been already talked about
2 cost as much as 1.5 million, and just tank
3 installation will run 200 to \$250,000. These are
4 very high numbers for an industry that is seeing
5 declining volumes.

6 As Joe Choquette said, the majors pulled
7 out of Vermont in the '70s because there wasn't
8 enough profit or volume to justify the investment.
9 So it was left to the distributors to supply the
10 state, and I think we've done a very good job of it.
11 We had to incur the expense of replacing underground
12 tanks, installing vapor recovery, upgrading pumps to
13 comply with new credit card regulations, and I can
14 tell you none of these were cheap.

15 Vermont is classified as a tourist state;
16 skiing in the winter, foliage in the fall and people
17 just trying to get away in the summer. Any one of
18 these seasons that doesn't go well, whether it's a
19 January thaw, Hurricane Irene or the high price of
20 gas nationally can be disastrous for our industry.

21 Competition. Motor fuel sales are the only
22 business I know that advertises its price industry
23 for all its customers to see and make an educated
24 decision, and I know you've already heard that.
25 There's no limit in what can be charged, but most

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1 stations try to be competitive simply because they
2 don't want to lose sales or volume. Some use
3 gasoline to drive inside sales, while others just
4 match competition.

5 Does anyone really know the price of milk
6 before they walk into a store? No, but chances are,
7 the large-chain grocery store sells it for less than
8 a small individual store. The same goes for the
9 products that a convenience store sells, not just
10 gasoline, not all store-bought items that are the
11 same price, nor do they sell them at the same price.
12 The customer has the right to shop where he or she
13 chooses.

14 Likewise, as an example, does anyone know
15 the price of a hotel room before they walk in the
16 door? No. But certain hotels charge more than
17 others and charge more during certain times of the
18 year surrounding local events or seasonal
19 conditions.

20 The point I'm trying to make is that it
21 doesn't matter what the product is. If you want to
22 shop around, you can always find different prices,
23 that's the free-market system. We aren't regulated
24 on what we can charge, but there's a fine line
25 between being competitive and making a profit.

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1 Another issue is, and you've heard this
2 today plenty of times, but I'm going to reiterate
3 it, the State has a difference of gas tax with New
4 Hampshire which is currently around 7 cents.
5 Imagine if you operate a location in one of the
6 following towns; Wells River, Fairlee, White River,
7 Ascutney, Springfield, Bellows Falls or Brattleboro.
8 Those towns have close proximity to New Hampshire,
9 and it's very easy to drive across the border. So
10 many locations are forced to match the New Hampshire
11 price therefore make less margin. This in turn can
12 spread farther west into Vermont because the towns
13 adjacent to the ones I mentioned then have to remain
14 competitive, so it can have a domino effect.

15 In summary, the Vermont motor fuel business
16 is like any other; there's not much margin so
17 companies try to make it up by volume. It's very
18 competitive, and the price is always on the street
19 for everyone to see. As we continue to see
20 declining volumes because of motor-fuel-efficient
21 vehicles and driving habits, car pooling, et cetera,
22 the pressure's really going to be on the Vermont
23 distributors to survive because the cost of overhead
24 will continue to rise.

25 Vermont has had the highest volume of

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1 gasoline sales in 2006 at 361 million. It has been
2 steadily declining since then, and in 2012, it will
3 be 320 million. That's a loss of 41 million gallons
4 in six years. Not only is this a problem for the
5 distributors, it's an issue for the State and your
6 revenues, as I've seen it discussed on the TV this
7 week. You're struggling to find money to make up
8 the difference, and so are we.

9 The State makes 26.7 cents per gallon, and
10 we, as an industry, don't make anywhere near that,
11 and then need to take out our expenses, including
12 the credit card fees which we've talked about, which
13 anywhere 8 to 10 to 12 cents depending on the price
14 of gas. The only way we can survive is to make a
15 reasonable margin.

16 I thank you for your time, and I'll be
17 happy to answer any of your questions.

18 CHAIR: Thank you. Questions for Steve?

19 MR. PIETRYKA: That was easy.

20 COMMITTEE MEMBER: Just a quick one. What
21 was the period of time when you went through all the
22 change -- from when the majors withdraw, what --

23 MR. PIETRYKA: That was in the '70's.

24 COMMITTEE MEMBER: In the '70's.

25 MR. PIETRYKA: Yeah. I was born then.

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1 (laughter)

2 COMMITTEE MEMBER: (unclear). So that's 40
3 years --

4 MR. PIETRYKA: Yeah.

5 COMMITTEE MEMBER: -- that you're
6 discussing now.

7 MR. PIETRYKA: As a point of reference.
8 Okay.

9 COMMITTEE MEMBER: Trying to understand it.

10 CHAIR: Anyone else?

11 COMMITTEE MEMBER: I've got one.

12 MR. PIETRYKA: Sure.

13 COMMITTEE MEMBER: I'm just wondering,
14 thanks for coming in today.

15 MR. PIETRYKA: You're welcome.

16 COMMITTEE MEMBER: What is your industry
17 looking at, at innovating to other alternative
18 sources? People drive electric vehicles, natural
19 gas pumps -- if I pull into your gas station 15
20 years from now, I'd like and hopefully would see a
21 whole new -- feeling.

22 MR. PIETRYKA: And you probably will. I
23 don't own the company, so I can't speak directly to
24 that, but we have already been looking at the CNG,
25 which is compressed natural gas. You've seen that

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1 in buses throughout the state and some in the
2 county, and Chittenden County. We started to look
3 at how we can, if we're doing an installation
4 now, --

5 COMMITTEE MEMBER: Right.

6 MR. PIETRYKA: -- how we should plan for
7 that down the road. And again, it's a perfect
8 example because what that does is, it adds to our
9 cost of an installation, but is it cheaper now to
10 invest it now or wait until later, then start to dig
11 up all over again? But we are, as a company, and I
12 can't speak for all the other companies in Vermont,
13 but at this point, we are looking at that. We've
14 also looked at that, and we're doing, almost on any
15 installation we do now, we've looked at diesel fuel,
16 where we didn't have it at a lot of our outlets over
17 the years, but we do now.

18 COMMITTEE MEMBER: I think we would be
19 interested in hearing that how you are approaching
20 those changes, and how could we be of a best
21 interest to make that happen? Are you able to
22 answer that now?

23 MR. PIETRYKA: I'm not prepared, I mean I
24 know we're looking into it from the infrastructure.

25 COMMITTEE MEMBER: Right.

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1 MR. PIETRYKA: As far as how you guys could
2 help yet, I don't know.

3 COMMITTEE MEMBER: Conversation for later,
4 but --

5 MR. PIETRYKA: Yes, yeah.

6 CHAIR: Bill.

7 COMMITTEE MEMBER: I do have one other
8 question.

9 MR. PIETRYKA: Sure.

10 COMMITTEE MEMBER: Earlier we heard
11 testimony on the difference between Massachusetts,
12 with its higher tax, and Vermont, the fallacy, the
13 puzzle that -- how would you answer the fact that
14 being puzzled, since there's that difference in the
15 taxes from Massachusetts, but yet they undersell us,
16 we need you to answer that to --

17 MR. PIETRYKA: I'm not puzzled by it at
18 all, okay? And I will say a little bit of what Joe
19 Choquette did and what Skip Vallee did.
20 Massachusetts' population is very much greater than
21 the state of Vermont without a doubt. There's many
22 many more millions of gallons of gasoline going
23 through the state of Massachusetts than there are
24 Vermont; therefore, the competition is driving hard.
25 I can't comment, because I don't own a

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1 station in Massachusetts, as to why somebody may be
2 pricing 3.49, and the competition across the road
3 may be \$3.55. It goes back to what I said in the
4 statement. Everybody has their own niche, whether
5 it be the best -- the flowers in rest rooms in the
6 state, or whether there be something in their store,
7 the overhead cost of each individual store is
8 defined by that owner.

9 So to compare Massachusetts to Vermont,
10 you're not comparing apples to oranges in terms of
11 volume throughout the state. This state has a lot
12 of miles to drive. Unfortunately before you're
13 surprised that, you know, we're 49th, it's because
14 of population, but it's primarily driven by their
15 competitors. And I dare say if I were in
16 Massachusetts at a few stations today, based on the
17 cost of product today, and I went into an individual
18 retail and said, boy, I bet you would like to be 15
19 cents higher, or 20, he'd say, "Oh, my God, yes, but
20 I'm trying to survive."

21 The logic is -- and I'm not saying I'm a
22 proponent of the logic -- will I give up 10 cents a
23 gallon based on whatever my gallons are a day to get
24 somebody into my store that may buy a grinder, a
25 soda, a pack of chips that I made 100 percent on or

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1 50 percent on? That's a calculated risk each one of
2 the companies has to decide on and each individual.
3 So I don't -- I think it's a snapshot in time that
4 we're higher now.

5 I'll go back to what Joe Choquette said
6 before. If you look at it long term, yeah, maybe in
7 the last year there's been some fluctuations that --
8 but it's been crazy in the last year. We went
9 through Hurricane Irene. Skip's right, we had
10 places doing the exact same thing with us, calling
11 us and thanking us that we got them product; that
12 they were able to serve their ambulance and their
13 local police, and whatnot, because we were able to
14 get them product. We paid dearly for that product,
15 but we did not go out and raise our prices because
16 we knew this kind of effect could happen.

17 So I don't think you're comparing apples to
18 oranges with Vermont and Massachusetts versus the
19 diversity, the amount of people that live in
20 Massachusetts versus the rural Vermont.

21 COMMITTEE MEMBER: I'm thinking actually
22 rural Massachusetts which is just a few miles away
23 from me, and, you know, pretty sparse, same kind of
24 thing, and I'm just trying to ask this question on
25 behalf of my constituents who ask me the question.

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1 MR. PIETRYKA: Sure.

2 COMMITTEE MEMBER: And I honestly don't
3 know how to answer in a way that they will look at
4 me with a straight face, and say, "Oh, I
5 understand," and I think that's our real
6 problem right there.

7 MR. PIETRYKA: Sure. And what I said in my
8 last statement was, that's true, same thing in
9 southern Vermont, where you've got people that are
10 paying less than New Hampshire, so they have no
11 choice but to compete. Somewhere in Massachusetts,
12 and I figure suburban or urban area, maybe 15 miles
13 from there, 20 miles from there, somebody's lowered
14 their price, it's trickled to the next town. That
15 town now says: Hey, I'm 3.39, but they're 3.45, the
16 next town it trickles over.

17 The same thing I said in our statement,
18 that it spreads, because again, once it starts and
19 once competition, whoever they are, has brought the
20 price down, you've either got the choice of saying
21 I'm uncompetitive and I'm okay with that, is it
22 hurting my inside sales? That's a decision each
23 individual has to make.

24 CHAIR: Thank you. There are a couple
25 further questions, but in the interest of time, I

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1 promised to get people out at a reasonable time.
2 Hopefully you can hang around for another ten
3 minutes --

4 MR. PIETRYKA: Sure, I'm here.

5 CHAIR: -- (unclear) because we've got one
6 more person --

7 MR. PIETRYKA: Sure.

8 CHAIR: -- to testify, thank you.

9 MR. PIETRYKA: Thank you.

10 CHAIR: Ron Hubert, Representative from
11 Milton, here today as a gasoline consumer. Thanks
12 for coming.

13 REPRESENTATIVE HUBERT: Thank you. For the
14 record, I'm Representative Ron Hubert, but I'm here
15 today as the co-owner of Middle Road Market in
16 Milton, Vermont. And I'm here to testify on the gas
17 prices, and I am a owner in Chittenden County.

18 Just to dispel some of the things that have
19 been said earlier today, how it works is there's a
20 rack price. I entered into a contract with my gas
21 supplier 14 years ago, and I've been doing it every
22 year since because they've been good to me. You
23 enter into a contract with a supplier for more than
24 one reason, but the main reason is, is that you have
25 a fixed price. You know what you're paying for it,

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1 you don't have the games that can be played or the
2 games that people are saying that are being in the
3 marketplace today.

4 What happens with that is not only do I
5 have a set price, but I also have a set amount of
6 volume that I'm guaranteed. When we had the
7 hurricane down in New Orleans, and we were short on
8 supply, I was still guaranteed my normal supply;
9 therefore, I was still able to operate my business.
10 That is a very valuable asset to someone who's an
11 independent.

12 And just in case anybody doesn't know, in
13 the gas station and the convenience store business,
14 I'd be considered a dinosaur. I've had my store for
15 25 years. The average person in this business as an
16 independent lasts five to seven, so I have a pretty
17 good knowledge of what's going on in the marketplace
18 out there and how this is done.

19 What happens after I get that, there's a --
20 there's two charges. One is a bad word in the State
21 House, and that's a profit to my oil dealer. If
22 they don't actually turn a profit, they can't
23 deliver that fuel to me, and if they can't deliver
24 that fuel to me, I have no way of selling that to my
25 customers.

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1 The other part of that contract is a
2 transportation fee. No one seems to want to admit
3 that it costs money to deliver that fuel to me on a
4 daily, weekly or monthly basis.

5 Then we move on to the fixed costs. I do
6 not have card readers, that is a business decision
7 by me. I want you to walk into my store, it's the
8 way I market my store. I want to see your face, I
9 want you to buy a newspaper, I want you to buy a cup
10 of coffee, I want you to buy something I actually
11 make money on. Contrary to what is being said here
12 today, the amount of money that is being thrown
13 around, any one of the experts can walk into my
14 store tomorrow morning and guarantee me the profits
15 that they're saying that I'm given, I'll take them
16 in a heartbeat.

17 As a matter of fact, if the State of
18 Vermont wants to match what you receive with no
19 investment, I'll take it. If you want to give me
20 the amount of money the Federal Government receives
21 in taxes, I'll take it. Because I don't make
22 anywhere near that amount in my gas prices. And I'd
23 be glad to take any questions you folks have.

24 CHAIR: Questions. Jeff.

25 COMMITTEE MEMBER: I just -- I'm not quite

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1 sure I understand the guaranteed price in the
2 contract that --

3 REPRESENTATIVE HUBERT: What happens is, is
4 I used to be a member of OPIS, but because of the
5 cost of getting the rack prices, I dropped them
6 three years ago. What happens is, is I can call at
7 any time, I can look up on the internet now, I can
8 check and I can know exactly what the rack price is
9 in Burlington, I can know exactly what the rack
10 price is in Albany.

11 After that, I have two things -- and we
12 have to be very careful here. When you enter into a
13 contract and a contract between two businesses, that
14 excludes the State of Vermont from being involved
15 into what the exact amounts are of those contracts.
16 So if you want me to use generalities, I will, but I
17 caution you not to get into the middle of a contract
18 between two businesses.

19 Then in my contract what it says, is I will
20 pay X number over rack price for a profit for my oil
21 company. After that, there is a delivery fee, that
22 is set in stone. And I am sure that my
23 supplier (laughter in background) would love to
24 renegotiate that fee that he is charging me for a
25 delivery fee, and we won't go there. At that point,

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1 that is what I pay for gasoline. I am free to then
2 charge whatever I think I can. Everybody charges a
3 different amount.

4 In the Town of Milton today, it'll go
5 anywhere from \$3.51 to \$3.55, and in case anybody's
6 wondering, I do have the highest price in gasoline
7 in the Town of Milton, I am the one at 3.55. But at
8 the same time, you can walk into my store and buy a
9 lot of other things that are less. It is the way I
10 choose to market my business.

11 Those who don't know me know that I am at
12 my store at 5 a.m., five days a week before I come
13 down here to be with you lovely folks, and I talk to
14 a ton of people on a daily basis, and trust me, I
15 have been well-prepped on how to answer these
16 questions because I do it on a daily basis.

17 (laughter)

18 COMMITTEE MEMBER: A technical -- just so I
19 understand, so the amount that you pay are the rack
20 prices, is that a percentage, or a set amount; and
21 how long is that contract life, is it for a whole
22 year or --

23 REPRESENTATIVE HUBERT: My contract that I
24 presently have has one year left, I signed a
25 three-year deal on the last time, and I'm hoping if

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1 we can keep things square we can move forward with
2 that -- just in case anybody wants to negotiate
3 while we're here.

4 (laughter)

5 CHAIR: Kirk.

6 COMMITTEE MEMBER: Since I couldn't ask
7 this question before, I don't know if you can answer
8 it, are terminal problems at Burlington a problem
9 with allotments that you've heard since you talk to
10 people?

11 MR. HUBERT: I can tell you that, again,
12 I'm one of the old-fashioned ones. I still control
13 when I get a delivery, how much I get and what the
14 product mix will be. I will call my supplier three
15 days in advance, and I will pre-buy. And I will
16 say, -- if I called in today, I would say on Friday
17 night, I want a load; I want 7800 of regular and I
18 want 700 of high-test. Where am I getting it? Am I
19 getting it from Albany, or am I getting it from
20 Burlington? And I will have that answer.

21 When I get my slip, because of my contract,
22 it doesn't really matter to me, because my contract
23 states Albany, because when I signed my contract 14
24 years ago, that is the terminal we chose because we
25 weren't sure that you were going to allow them to

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1 continue to have the terminal in Burlington.

2 CHAIR: Anyone else? Great. Thank you,
3 Ron.

4 MR. HUBERT: Thank you, all.

5 CHAIR: And I'd like to thank everyone for
6 coming. (unclear).

7 (End of recording)

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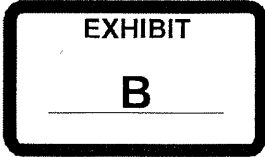
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C E R T I F I C A T E

I, PAMELA MAYO HAMEL, hereby certify that the foregoing pages, numbered 3 through 100, inclusive, are a true, accurate and complete transcription, to the best of my ability, of a Recorded Joint Meeting of the House Committee on Transportation, House Commerce and House Judiciary Committees, on January 22, 2013, at 2:30 p.m., IN RE: GASOLINE PRICING IN VERMONT.

Pamela Mayo Hamel

Pamela Mayo Hamel



H.476

An act relating to the monitoring of Vermont's motor fuel oil industry

Detailed Status

2013 - 2014 Legislative Session

Body	Journal/Calendar	Location	Full Status
House	3/1/2013 HJ 29 P. 290	In Committee	Read First Time and Referred to the Committee on Commerce and Economic Development
House	3/12/2013 HJ 30 P. 307	House of Representatives	Rep. Botzow of Pownal moved to commit bill to the committee on Transportation which was agreed to.

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H.476

Introduced by Representative Pearson of Burlington

Referred to Committee on

Date:

Subject: Commerce and trade; motor fuel; market share; pricing; reporting

Statement of purpose of bill as introduced: This bill proposes to establish mechanisms for monitoring market conduct within Vermont's motor fuel oil industry.

An act relating to the monitoring of Vermont's motor fuel oil industry

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 9 V.S.A. chapter 110A is added to read:

CHAPTER 110A. MOTOR FUEL OIL PRICING

AND MARKET SHARE

§ 4119. DEFINITIONS

(a) As used in this chapter:

(1) "Affiliate" means any person who controls, is controlled by, or is under common control with any other person.

(2) "Control of dealer" means the power, whether or not exercised, to establish, fix, or direct the retail price of motor fuel sold by a dealer, through ownership of stock in or assets used by the dealer or through contract, agency,

1 consignment, or otherwise, whether that power can be exercised directly or
2 indirectly or through parent corporations, subsidiaries, related persons and
3 entities, or affiliates.

4 (3) "Dealer" means a person that sells, through a service station, filling
5 station or otherwise, motor fuel oil to an end user for consumption in the State.

6 (4) "Motor fuel oil" means internal combustion fuel sold for use in
7 motor vehicles as defined in 23 V.S.A. § 4(21).

8 (5) "Motor fuel oil sales" means the wholesale or retail sale of motor
9 fuel oil.

10 (6) "Wholesaler" means a person that sells motor fuel oil for resale
11 through dealers.

12 § 4119a. WHOLESALER MARKET SHARE REPORT

13 Annually, beginning April 1, 2014, a wholesaler shall report to the Attorney
14 General, for the prior calendar year beginning January 1 and ending
15 December 31:

16 (1) the total number of gallons of motor fuel oil sold by the wholesaler
17 to each dealer not controlled by the wholesaler during any portion of the
18 reporting period;

19 (2) the total number of gallons of motor fuel oil supplied by the
20 wholesaler to each dealer controlled by the wholesaler during any portion of
21 the reporting period; and

1 (3) the total number of gallons of motor fuel oil sold by the wholesaler
2 from a bulk storage facility or depot directly to an end user for consumption in
3 the State.

4 § 4119b. ACQUISITION OF MOTOR FUEL OIL ASSETS; NOTICE

5 (a) A person shall provide notice as required under subsection (b) of this
6 section if he or she intends to acquire, directly or indirectly, from a business
7 engaged in motor fuel oil sales in this State:

8 (1) controlling stock; or

9 (2) substantial assets that include those used in motor fuel oil sales.

10 (b) The person acquiring stock or assets under subsection (a) of this section
11 shall provide notice of the acquisition to the Attorney General at least 60 days
12 prior to the date of acquisition. That period may be shortened with the consent
13 of the Attorney General.

14 § 4119c. INVESTIGATIONS

15 The Attorney General may investigate market shares held by dealers, other
16 issues relating to an acquisition under section 4119b of this chapter, and
17 wholesale and retail motor fuel oil prices, pursuant to his or her investigatory
18 powers established under chapter 63 of this title.

19 § 4119d. CONFIDENTIALITY

20 Information received under section 4119a of this chapter by the Attorney
21 General is confidential and exempt from public inspection and copying under

1 the Public Records Act until April 1 of the year after which it has been
2 reported to the Attorney General. Thereafter the information may be disclosed
3 consistent with the requirements of the Public Records Act.

4 § 4119e. ENFORCEMENT

5 A violation of this chapter constitutes an unfair and deceptive act and
6 practice in commerce under section 2453 of this title.

7 § 4119f. RULEMAKING

8 The Attorney General may adopt rules necessary to implement this chapter.

9 Sec. 2. PRICE MONITORING; APPROPRIATION

10 (a) The General Assembly finds that the Attorney General requires
11 necessary data to investigate the motor fuel oil industry in Vermont for the
12 purpose of determining whether unfair methods of competition or unfair or
13 deceptive acts or practices are occurring within the motor fuel oil industry in
14 violation of 9 V.S.A. chapter 63.

15 (b) In fiscal year 2014, the amount of \$5,000.00 is appropriated from the
16 Transportation Fund to the Office of the Attorney General for the purpose of
17 obtaining commercially available motor fuel oil price information in a manner
18 consistent with the objective specified in subsection (a) of this section.

19 Sec. 3. EFFECTIVE DATE

20 This act shall take effect on July 1, 2013.

No. 39
2015

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No. 39. An act relating to miscellaneous agricultural subjects.

(H.484)

It is hereby enacted by the General Assembly of the State of Vermont:

* * * Agricultural Water Quality; Financial Assistance * * *

Sec. 1. 6 V.S.A. § 4815(c) is amended to read:

(c) ~~For purposes of As used in~~ this section, “waste storage facility” means an impoundment made for the purpose of storing agricultural waste by constructing an embankment, excavating a pit or dugout, fabricating an ~~in ground or above ground~~ inground and aboveground structure, or any combination thereof. ~~This section does not apply to concrete slabs used for agricultural waste management.~~

Sec. 2. 6 V.S.A. § 4820 is amended to read:

§ 4820. DEFINITIONS

~~For purposes of As used in~~ this subchapter:

(1) “AAPs” means “accepted agricultural practices” as defined by the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets pursuant to subchapter 1 of this chapter.

(2) “Secretary” means the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets.

(3) “Agency” means the ~~agency of agriculture, food and markets~~ Agency of Agriculture, Food and Markets.

* * *

(6) "Good standing" means the participant:

(A) does not have an active enforcement violation that has reached a final order with the Secretary; or

(B) is in compliance with all terms of a current grant agreement or contract with the Agency.

Sec. 3. 6 V.S.A. § 4821 is amended to read:

§ 4821. ASSISTANCE PROGRAM CREATED; ADMINISTRATION

(a) Program created. A program is created to provide ~~state~~ State financial assistance to Vermont farmers in support of their voluntary construction of on-farm improvements and maintenance of acceptable operating standards designed to abate nonpoint source agricultural waste discharges into the waters of the ~~state~~ State of Vermont, consistent with goals of the federal Water Pollution Control Act and with ~~state~~ State water quality standards. The program shall be conducted in a manner which makes maximum use of federal financial aid for the same purpose, as provided by this subchapter, and which seeks to use the least costly methods available to accomplish the abatement required. The construction of temporary fencing intended to exclude livestock from entering surface waters of the ~~state~~ State shall be an on-farm improvement eligible for assistance under this subchapter when subject to a maintenance agreement entered into with the ~~agency of agriculture, food and markets~~ Agency of Agriculture, Food and Markets.

(b) Program administration. The ~~secretary~~ Secretary shall:

(1) ~~administer~~ Shall administer the ~~state~~ State assistance program, for which purpose the ~~secretary~~ Secretary shall coordinate with officials of the U.S. Department of Agriculture or other federal agencies, and shall adopt rules pursuant to 3 V.S.A. chapter 25 of Title 3 concerning farmer application and eligibility requirements, financial assistance award priorities, and other administrative and enforcement conditions; ~~and~~.

(2) ~~may~~ May provide technical assistance to individual farmers with the preparation of on-farm agricultural waste management plans, applications for ~~state~~ State and federal financial assistance awards, installation of on-farm improvements, and maintenance of acceptable operating standards during the ~~life of a state assistance award contract~~ term of the program grant agreement. For this purpose, ~~state~~ State employees of the ~~agency~~ Agency shall cooperate with federal employees of the U.S. Department of Agriculture or other federal agencies.

Sec. 4. 6 V.S.A. § 4822 is amended to read:

§ 4822. ELIGIBILITY FOR STATE ASSISTANCE

Vermont farmers shall be eligible to receive available ~~state~~ State financial assistance with the installation of on-farm improvements designed to control agricultural nonpoint source waste discharges, provided that:

(1) for farmers who also seek federal financial assistance for this purpose, the improvements:

(A) are eligible for federal assistance through programs of the U.S. Department of Agriculture; and

(B) are consistent with a “nutrient management plan” prepared by the Vermont field office of the NRCS, or with an animal waste management plan based on standards equivalent to those of the NRCS; or

(2) for farmers who decline to seek or accept federal financial assistance for this purpose, the improvements:

(A) are determined by the ~~secretary~~ Secretary to be equivalent to those eligible for federal assistance through programs of the U.S. Department of Agriculture; and

(B) are consistent with an animal waste management plan based on standards determined by the ~~secretary~~ Secretary to be equivalent to those of the NRCS; and

(3) improvements will be constructed on a farm that is in good standing with the Secretary at the time of the award on all grant agreements, contract awards, or enforcement proceedings.

Sec. 5. 6 V.S.A. § 4824 is amended to read:

§ 4824. STATE FINANCIAL ASSISTANCE AWARDS

(a) State grant. State financial assistance awarded under this subchapter shall be in the form of a grant. When a State grant is intended to match federal financial assistance for the same on-farm improvement project, the State grant shall be awarded only when the federal financial assistance has also been

approved or awarded. An applicant for a State grant shall pay at least 10 percent of the total eligible project cost. The dollar amount of a State grant shall be equal to the total eligible project cost, less 10 percent of the total as paid by the applicant, and less the amount of any federal assistance awarded, except that a State grant shall not exceed 90 percent of the total eligible project cost.

(b) ~~Farmer contract.~~ A State grant awarded to an applicant under this subchapter shall be awarded in accordance with a State ~~contract~~ grant containing ~~contract~~ terms substantially the same as those required for receipt of a federal award for the same purpose from the U.S. Department of Agriculture, except as provided by the Secretary by rule.

Sec. 6. 6 V.S.A. § 4826 is amended to read:

§ 4826. COST ASSISTANCE FOR WASTE STORAGE FACILITIES

(a) The owner or operator of a farm required under section 4815 of this title to design, construct, or modify a waste storage facility may apply in writing to the Secretary of Agriculture, Food and Markets for cost assistance. Using ~~state~~ State or federal funds, or both, a State assistance grant shall be awarded, subject to the availability of funds, to applicants. Such grants shall not exceed 90 percent of the cost of an adequately sized and designed waste storage facility and the equipment eligible for Natural Resources Conservation Service cost share assistance. Application for a State assistance grant shall be made in the manner prescribed by the Secretary. ~~As used in this section, "waste storage~~

~~facility” means an impoundment made for the purpose of storing agricultural waste by constructing an embankment, excavating a pit or dugout, fabricating an in-ground or above-ground structure, or any combination thereof. This section shall apply to concrete slabs used for agricultural waste management.~~

(b) If the Secretary lacks adequate funds necessary for the cost assistance awards required by subsection (a) of this section, the Secretary shall appear before the Emergency Board, as soon as possible, and shall request that necessary funds be provided. If the Emergency Board fails to provide adequate funds, the design and construction requirements for waste storage facilities under subsection 4815(b) of this title and the AAPs for groundwater, as they relate to a waste storage facility, shall be suspended for a farm with a waste storage facility subject to the requirements of subsection 4815(b) of this title until adequate funding becomes available. Suspension of the design and construction requirements of subsection 4815(b) of this title does not relieve an owner or operator of a farm permitted under section 4858 or 4851 of this title from the remaining requirements of the owner’s or operator’s permit, including discharge standards, groundwater protection, nutrient management planning, and land application of manure. This subsection does not apply to farms permitted under 10 V.S.A. § 1263 ~~or farms permitted under section 4851 of this title.~~

(c) The owner or operator of a farm with a waste storage facility may apply in writing to the Secretary of Agriculture, Food and Markets for a State

assistance grant for the costs of complying with the U.S. Department of Agriculture Natural Resources Conservation Service requirements for inspection of a waste storage facility. Such grants shall not exceed 90 percent of the cost of the inspection of the waste storage facility. Application for a State assistance grant shall be made in the manner prescribed by the Secretary.

Sec. 7. 6 V.S.A. § 4827(e) and (f) are amended to read:

(e) If the Secretary or the applicable U.S. Department of Agriculture conservation programs lack adequate funds necessary for the financial assistance required by subsection (a) of this section, the requirement to develop and implement a nutrient management plan under State statute or State regulation shall be suspended until adequate funding becomes available. Suspension of a State-required nutrient management plan does not relieve an owner or operator of a farm permitted under section 4858 ~~or 4851~~ of this title of the remaining requirements of a State permit, including discharge standards, groundwater protection, and land application of manure. This subsection does not apply to farms permitted under 10 V.S.A. § 1263 ~~or farms permitted under section 4851 of this title.~~

(f) The Secretary may ~~contract~~ enter into grants with natural resources conservation districts, the University of Vermont Extension Service, and other persons and organizations to aid in the implementation of the incentive grants program under subsection (a) of this section and to assist farmers in the development and implementation of nutrient management plans.

Sec. 8. 6 V.S.A. § 4828 is amended to read:

§ 4828. CAPITAL EQUIPMENT ASSISTANCE PROGRAM

(a) It is the purpose of this section to provide assistance to contract applicators, nonprofit organizations, and farms to purchase or use innovative equipment that will aid in the reduction of surface runoff of agricultural wastes to ~~state~~ State waters, improve water quality of State waters, reduce odors from manure application, decrease greenhouse gas emissions, and reduce costs to farmers.

(b) The capital equipment assistance program is created in the Agency of Agriculture, Food and Markets to provide farms, nonprofit organizations, and custom applicators in Vermont with State financial assistance for the purchase of new or innovative equipment to improve manure application or nutrient management plan implementation.

(c) Assistance under this section shall in each fiscal year be allocated according to the following priorities and as further defined ~~by rule~~ by the Secretary:

(1) First priority shall be given to capital equipment to be used on farm sites that are serviced by custom applicators and nonprofit organizations and that are located in descending order within the boundaries of:

- (A) the Lake Champlain Basin;
- (B) the Lake Memphremagog Basin;
- (C) the Connecticut River Basin; and

(D) the Hudson River Basin.

(2) Next priority shall be given to capital equipment to be used at a farm site which is located in descending order within the boundaries of:

(A) the Lake Champlain Basin;

(B) the Lake Memphremagog Basin;

(C) the Connecticut River Basin; and

(D) the Hudson River Basin.

(d) [Repealed.]

Sec. 9. 6 V.S.A. § 4849 is amended to read:

§ 4849. RECYCLING ANIMAL WASTE NUTRIENTS

In order to best use the nutrients of animal waste generated by large farm operations, the ~~agency of agriculture, food and markets~~ Agency of Agriculture, Food and Markets together with the ~~department of public service~~ Department of Public Service shall use available resources to inform large farm operations of appropriate methods and resources available to digest and compost their animal wastes, and to capture methane for beneficial uses.

Sec. 10. 6 V.S.A. § 4850 is amended to read:

§ 4850. DEFINITIONS

~~For purposes of~~ As used in this subchapter:

(1) "Domestic fowl" means laying-hens, broilers, ducks, ~~and turkeys, or~~ any other number or type of fowl that the Secretary deems domestic fowl.

(2) "Livestock" means cattle, mature cow/calf pairs, youngstock, heifers, bulls, swine, sheep, or goats, horses, or any other number and type of domestic animal that the Secretary deems livestock.

Sec. 11. 6 V.S.A. § 4851 is amended to read:

§ 4851. PERMIT REQUIREMENTS FOR LARGE FARM OPERATIONS

(a) No person shall, without a permit from the ~~secretary~~ Secretary, construct a new barn, or expand an existing barn, designed to house more than 700 mature dairy animals, 1,000 cattle or cow/calf pairs, 1,000 veal calves, 2,500 swine weighing over 55 pounds, 10,000 swine weighing less than 55 pounds, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 30,000 laying hens or broilers with a liquid manure handling system, 82,000 laying hens without a liquid manure handling system, 125,000 chickens other than laying hens without a liquid manure handling system, 5,000 ducks with a liquid manure handling system, or 30,000 ducks without a liquid manure handling system. No permit shall be required to replace an existing barn in use for livestock or domestic fowl production at its existing capacity. ~~The secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets, in consultation with the ~~secretary of natural resources~~ Secretary of Natural Resources, shall review any application for a permit under this section with regard to water quality impacts and, prior to approval of a permit under this subsection, shall issue a written determination regarding whether the applicant has established that there will be no unpermitted discharge to waters of the

~~state~~ State pursuant to the federal regulations for concentrated animal feeding operations. If upon review of an application for a permit under this subsection, ~~the secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets determines that the permit applicant may be discharging to waters of the ~~state~~ State, ~~the secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets and ~~the secretary of natural resources~~ Secretary of Natural Resources shall respond to the discharge in accordance with the memorandum of understanding regarding concentrated animal feeding operations under subsection 4810(b) of this title. ~~The secretary of natural resources~~ Secretary of Natural Resources may require a large farm to obtain a permit under 10 V.S.A. § 1263 pursuant to federal regulations for concentrated animal feeding operations.

(b) A person shall apply for a permit in order to operate a farm which exceeds 700 mature dairy animals, 1,000 cattle or cow/calf pairs, 1,000 veal calves, 2,500 swine weighing over 55 pounds, 10,000 swine weighing less than 55 pounds, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 30,000 laying hens or broilers with a liquid manure handling system, 82,000 laying hens without a liquid manure handling system, 125,000 chickens other than laying hens without a liquid manure handling system, 5,000 ducks with a liquid manure handling system, or 30,000 ducks if the livestock or domestic fowl are in a barn or adjacent barns owned by the same person, or if the barns share a common border or have a common waste disposal system. In order to receive

this permit, the person shall demonstrate to the ~~secretary~~ Secretary that the farm has an adequately sized manure management system to accommodate the wastes generated and a nutrient management plan to dispose of wastes in accordance with accepted agricultural practices adopted under this chapter and current U.S. Department of Agriculture nutrient management standards.

(c) The ~~secretary~~ Secretary shall approve, condition, or disapprove the application within 45 business days of the date of receipt of a complete application for a permit under this section. Failure to act within the 45 business days shall be deemed approval.

(d) A person seeking a permit under this section shall apply in writing to the ~~secretary~~ Secretary. The application shall include a description of the proposed barn or expansion of livestock or domestic fowl; a proposed nutrient management plan to accommodate the number of livestock or domestic fowl the barn is designed to house or the farm is intending to expand to; and a description of the manure management system to be used to accommodate agricultural wastes.

(e) The ~~secretary~~ Secretary may condition or deny a permit on the basis of odor, noise, traffic, insects, flies, or other pests.

(f) Before granting a permit under this section, the ~~secretary~~ Secretary shall make an affirmative finding that the animal wastes generated by the construction or expansion will be stored so as not to generate runoff from a 25-year, 24-hour storm event and shall be disposed of, in accordance with the

accepted agricultural practices adopted under this chapter and current
U.S. Department of Agriculture nutrient management standards.

(g) A farm that is permitted under this section and that withdraws more than 57,600 gallons of groundwater per day averaged over any 30 consecutive-day period shall annually report estimated water use to the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets. The ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets shall share information reported under this subsection with the ~~agency of natural resources~~ Agency of Natural Resources.

Sec. 12. 6 V.S.A. § 4856 is amended to read:

§ 4856. ~~RECYCLING ANIMAL WASTE NUTRIENTS~~

~~In order best to use the nutrients of animal waste generated by farms to which this subchapter applies, the agency of agriculture, food and markets, together with the department of public service, shall use available resources to inform operators of such farms of appropriate methods and resources available to digest and compost their animal wastes and to capture methane for beneficial uses. [Repealed.]~~

Sec. 13. 6 V.S.A. § 4857 is amended to read:

§ 4857. DEFINITIONS

~~For purposes of~~ As used in this subchapter:

(1) “Animal feeding operation” (AFO) means a lot or facility where the livestock or domestic fowl have been, are, or will be stabled or confined and

fed or maintained for a total of 45 days or more in any 12-month period, and crops, vegetation, or forage growth are not sustained in the normal growing season over any portion of the lot or facility. Two or more individual farms qualifying as an AFO which are under common ownership and which adjoin each other or use a common area or system for the disposal of waste, shall be considered to be a single AFO if the combined number of livestock or domestic fowl resulting qualifies as a medium farm as defined in subdivision (2) of this section.

(2) "Medium farm" is an AFO which houses 200 to 699 mature dairy animals, 300 to 999 cattle or cow/calf pairs, 300 to 999 veal calves, 750 to 2,499 swine weighing over 55 pounds, 3,000 to 9,999 swine weighing less than 55 pounds, 150 to 499 horses, 3,000 to 9,999 sheep or lambs, 16,500 to 54,999 turkeys, 9,000 to 29,999 laying hens or broilers with a liquid manure handling system, 25,000 to 81,999 laying hens without a liquid manure handling system, 37,500 to 124,999 chickens other than laying hens without a liquid manure handling system, 1,500 to 4,999 ducks with a liquid manure handling system or 10,000 to 29,999 ducks without a liquid manure handling system.

(3) "Small farm" is an AFO which houses no more than 199 mature dairy animals, 299 cattle or cow/calf pairs, 299 veal calves, 749 swine weighing over 55 pounds, 2,999 swine weighing less than 55 pounds, 149 horses, 2,999 sheep or lambs, 16,499 turkeys, 8,999 laying hens or broilers with a liquid manure handling system, 24,999 laying hens without a liquid

manure handling system, 37,499 chickens other than laying hens without a liquid manure handling system, 1,499 ducks with a liquid manure handling system or 9,999 ducks without a liquid manure handling system.

(4) "Domestic fowl" means laying hens, broilers, ducks, and turkeys, or any other number or type of fowl that the Secretary deems domestic fowl.

(5) "Livestock" means cattle, swine, sheep, goats, and horses, or any other number and type of domestic animal that the Secretary deems livestock.

Sec. 14. 6 V.S.A. § 4858(c) is amended to read:

(c)(1) Medium farm general permit. The owner or operator of a medium farm seeking coverage under a general permit adopted pursuant to this section shall certify to the ~~secretary~~ Secretary within a period specified in the permit, and in a manner specified by the ~~secretary~~ Secretary, that the medium farm does comply with permit requirements regarding an adequately sized and designed manure management system to accommodate the wastes generated and a nutrient management plan to dispose of wastes in accordance with accepted agricultural practices adopted under this chapter and current U.S. Department of Agriculture nutrient management standards. Any certification or notice of intent to comply submitted under this subdivision shall be kept on file at the ~~agency of agriculture, food and markets~~ Agency of Agriculture, Food and Markets. The ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets, in consultation with the ~~secretary of natural resources~~ Secretary of Natural Resources, shall review any certification or

notice of intent to comply submitted under this subdivision with regard to the water quality impacts of the medium farm for which the owner or operator is seeking coverage, and, within 18 months of receiving the certification or notice of intent to comply, shall verify whether the owner or operator of the medium farm has established that there will be no unpermitted discharge to waters of the ~~state~~ State pursuant to the federal regulations for concentrated animal feeding operations. If upon review of a medium farm granted coverage under the general permit adopted pursuant to this subsection, the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets determines that the permit applicant may be discharging to waters of the ~~state~~ State, the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets and the ~~secretary of natural resources~~ Secretary of Natural Resources shall respond to the discharge in accordance with the memorandum of understanding regarding concentrated animal feeding operations under subsection 4810(b) of this title.

* * *

(d) Medium and small farms; individual permit. The ~~secretary~~ Secretary may require the owner or operator of a small or medium farm to obtain an individual permit to operate after review of the farm's history of compliance, application of accepted agricultural practices, the use of an experimental or alternative technology or method to meet a ~~state~~ State performance standard, or other factors set forth by rule. The owner or operator of a small farm may

apply to the ~~secretary~~ Secretary for an individual permit to operate under this section. To receive an individual permit, an applicant shall in a manner prescribed by rule demonstrate that the farm has an adequately sized and designed manure management system to accommodate the wastes generated and a nutrient management plan to dispose of wastes in accordance with accepted agricultural practices adopted under this chapter and current U.S. Department of Agriculture nutrient management standards, including setback requirements for waste application. An individual permit shall be valid for no more than five years. Any application for an individual permit filed under this subsection shall be kept on file at the ~~agency of agriculture, food and markets~~ Agency of Agriculture, Food and Markets. The ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets, in consultation with the ~~agency of natural resources~~ Agency of Natural Resources, shall review any application for a permit under this subsection and, prior to issuance of an individual permit under this subsection, shall issue a written determination regarding whether the permit applicant has established that there will be no unpermitted discharge to waters of the state State pursuant to federal regulations for concentrated animal feeding operations. If, upon review of an application for a permit under this subsection, the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets that the permit applicant may be discharging to waters of the state State, the ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and

~~Markets and the secretary of natural resources~~ Secretary of Natural Resources shall respond to the discharge in accordance with the memorandum of understanding regarding concentrated animal feeding operations under subsection 4810(b) of this title. The ~~secretary of natural resources~~ Secretary of Natural Resources may require a medium or small farm to obtain a permit under 10 V.S.A. § 1263 pursuant to federal regulations for concentrated animal feeding operations. Coverage of a medium farm under a general permit adopted pursuant to this section or an individual permit issued to a medium or small farm under this section is rendered void by the issuance of a permit to a farm under 10 V.S.A. § 1263.

Sec. 15. 6 V.S.A. chapter 215, subchapter 6 is amended to read:

Subchapter 6. Vermont ~~Agricultural Buffer~~ Critical Area Seeding
and Filter Strip Program

§ 4900. VERMONT ~~AGRICULTURAL BUFFER~~ SEEDING AND FILTER
STRIP PROGRAM

(a) The ~~secretary of agriculture, food and markets~~ Secretary of Agriculture,
Food and Markets is authorized to develop a Vermont ~~agricultural buffer~~
critical source area seeding and filter strip program in addition to the federal
conservation reserve enhancement program in order to compensate farmers for
establishing and maintaining harvestable perennial vegetative ~~buffers and~~
~~installing conservation practices in ditch networks~~ grassed waterways and filter
strips on agricultural ~~land~~ cropland perpendicular and adjacent to the surface

waters of the ~~state~~ State, including ditches. Eligible acreage would include annually tilled cropland or a portion of cropland currently cropped as hay that will not be rotated into an annual crop for a 10-year period of time. Acreage that is currently managed as hay shall have a prior history of rotation as corn or other annual commodity crop.

(b) ~~The establishment and annual incentive payments from the agency of agriculture, food and markets under the Vermont agricultural buffer program shall not exceed the combined federal and state payment that the relevant agricultural land or conservation practice would be eligible for under the federal conservation reserve enhancement program or another approved conservation program. The incentive payment~~ Incentive payments from the Agency of Agriculture, Food and Markets shall be made annually at the end of the cropping season for a nonrenewable five-year period at the outset of a 10-year agreement to establish or maintain the acreage as harvestable grassed waterway or filter strip.

(c) ~~The secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets may establish by procedure financial and technical criteria for the implementation and operation of the Vermont ~~agricultural buffer~~ critical source area seeding and filter strip program.

(d) Land enrolled in the Vermont agricultural buffer program shall be considered to be in "active use" as that term is defined in 32 V.S.A.

§ 3752(15).

(e) As used in this section, “surface waters” means all rivers, streams, ditches, creeks, brooks, reservoirs, ponds, lakes, and springs which are contained within, flow through, or border upon the ~~state~~ State or any portion of it.

Sec. 16. 6 V.S.A. § 4951 is amended to read:

§ 4951. FARM AGRONOMIC PRACTICES PROGRAM

(a) The Farm Agronomic Practices Assistance Program is created in the Agency of Agriculture, Food and Markets to provide the farms of Vermont with State financial assistance for the implementation of soil-based practices that improve soil quality and nutrient retention, increase crop production, minimize erosion potential, and reduce agricultural waste discharges. The following practices ~~shall~~ may be eligible for assistance to farms under the grant program:

- (1) conservation crop rotation;
- (2) cover cropping;
- (3) strip cropping;
- (4) cross-slope tillage;
- (5) zone or no-tillage;
- (6) pre-sidedress nitrate tests;
- (7) annual maintenance of a nutrient management plan that is no longer receiving funding under a State or federal contract, provided the maximum

assistance provided to a farmer under this subdivision shall be \$2,000.00 per year;

(8) educational and instructional activities to inform the farmers and citizens of Vermont of:

(A) the impact on Vermont waters of agricultural waste discharges;

(B) the federal and State requirements for controlling agricultural waste discharges;

(9) implementing alternative manure application techniques; and

(10) additional soil erosion reduction practices.

(b) Funding available under section 4827 of this title for nutrient management planning may be used to fund practices under this section.

* * * Agency of Agriculture, Food and Markets Permitting * * *

Sec. 17. 6 V.S.A. § 1 is amended to read:

§ 1. GENERAL POWERS OF AGENCY; SECRETARY OF
AGRICULTURE, FOOD AND MARKETS

(a) ~~The agency of agriculture, food and markets~~ Agency of Agriculture, Food and Markets shall be administered by a ~~secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets. ~~The secretary~~ Secretary shall supervise and be responsible for the execution and enforcement of all laws relating to agriculture and standards of weight and measure. ~~The secretary~~ Secretary may:

* * *

(13) notwithstanding any law to the contrary in this title or Title 9 or 20, issue all licenses, permits, registrations, or certificates under a program administered by the ~~secretary~~ Secretary for a term of up to three years; renew and issue such licenses, permits, registrations, and certificates on any calendar cycle; collect any annual fee set by law for such multiyear licensure, permit, registration, or certificate on a pro-rated basis which shall not exceed 150 percent of the annual fee for an 18-month cycle, 200 percent of the annual fee for a two-year cycle, or 300 percent of the annual fee for a three-year cycle; and conduct inspections at regulated premises at least once every three years when inspection is required by law. The authority to mandate licenses, permits, registrations, or certificates for more than one year shall not extend to any program administered by the ~~secretary~~ Secretary where the annual fee is more than \$125.00. The Secretary shall only provide refunds for overpayments of \$25.00 or more on a license, permit, registration, or certificate issued by the Secretary;

* * *

* * * Dairy Operations; Drugs * * *

Sec. 18. 6 V.S.A. § 2744a is amended to read:

§ 2744a. DRUGS

(a) No producer shall sell or offer for sale milk which contains any drug or drugs in excess of tolerances established by the United States Food and Drug Administration in the Code of Federal Regulations.

~~(1) In the event that milk from a dairy farm contains a drug, no more milk produced by that producer shall be received by any milk dealer or handler until a sample of at least one complete milking has been collected and found negative. In the event of a second violation within a 12-month period, no more milk produced by that producer shall be received by any milk dealer or handler for a period of up to two days and until a sample of at least one complete milking has been collected and found negative. In the event of a third violation within a 12-month period, the secretary shall, at a minimum, take the same action as required for a second violation and may prohibit the producer from selling milk in this state. No handler or dealer shall accept milk from a producer whose ability to sell milk is suspended or terminated.~~

~~(2) In lieu of suspending a producer's ability to sell milk, the secretary may issue an administrative penalty. The amount of the penalty shall not exceed the value of the milk which could have been prohibited from sale. A producer who fails to pay an administrative penalty, after opportunity for hearing, shall have his or her ability to sell milk suspended until the penalty is paid. In lieu of suspending a producer's ability to sell milk, the secretary may accept the assessment by the milk dealer or handler, against the producer, of damages beyond the milk dealer's or handler's control that occurred as a result of purchasing the contaminated milk, as an equivalent penalty.~~

(1) In the event that milk from a dairy producer contains a drug residue:

(A) No more milk from that producer shall be received by any milk dealer or handler until a sample of at least one complete milking has been collected and found negative.

(B) If a second drug residue violation occurs within 12 months of the first violation, no more milk from that producer shall be received by any milk dealer or handler until a sample of at least one complete milking has been collected and found negative. The producer shall have an administrative penalty equal to the value of one day of milk production assessed.

(C) If a third drug residue violation occurs within 12 months of the first violation, no more milk from that producer shall be received by any milk dealer or handler until a sample of at least one complete milking has been collected and found negative. The producer shall have an administrative penalty equal to the value of two days of milk production assessed. A hearing shall be warned to determine if the producer will be allowed to continue to ship milk.

(2) No handler or dealer shall accept milk from:

(A) a producer after a drug residue violation has occurred until a sample of at least one complete milking has been found negative; or

(B) a producer whose ability to sell milk is suspended or terminated.

(3) A producer who fails to pay an administrative penalty issued under this section within 30 days of issuance of a citation for violation of this section shall have his or her ability to sell milk suspended until the administrative

penalty is paid. In lieu of suspending a producer's ability to sell milk, the Secretary may accept the assessment by the milk dealer against the producer.

~~(3)~~(4) Notwithstanding the provisions of subsection (c) of this section, the ~~secretary~~ Secretary may at any time issue an emergency order prohibiting a producer from selling and a handler from accepting any milk until the milk tests negative for drugs.

(b)(1) No producer shall sell ~~livestock~~ for slaughter ~~which contains~~ livestock with bodily tissue containing any drug or drugs in excess of tolerances established by the ~~United States~~ U.S. Food and Drug Administration in the Code of Federal Regulations.

(2) In the event that bodily tissue obtained from livestock intended for slaughter is found to contain a drug or drugs in excess of levels established by the ~~United States~~ U.S. Food and Drug Administration in the Code of Federal Regulations at the time of sale, the ~~secretary~~ Secretary may assess an administrative penalty not to exceed \$1,000.00 for each violation and may require the farm to participate in a program approved by the Agency intended to mitigate further selling of animals for food that contain violative drug residues in their tissue.

(c) Before issuing an order or administrative penalty under this section, the ~~secretary~~ Secretary shall provide the producer and the handler or dealer an opportunity for hearing.

* * * Weights and Measures * * *

Sec. 19. 9 V.S.A. § 2633 is amended to read:

§ 2633. SPECIFIC POWERS AND DUTIES OF SECRETARY;

REGULATIONS

(a) The Secretary shall issue from time to time reasonable regulations for the enforcement of this chapter, which regulations shall have the force and effect of law. These regulations may include (1) standards of net weight, measure, or count, and reasonable standards of fill, for any commodity in package form, (2) rules governing the technical and reporting procedures to be followed and the report and record forms and marks of approval and rejection to be used by inspectors of weights and measures in the discharge of their official duties, (3) exemptions from the sealing or marking requirements of section 2639 of this title with respect to weights and measures of such character or size that such sealing or marking would be inappropriate, impracticable, or damaging to the apparatus in question. These regulations shall include specifications, tolerances, and other technical requirements for weights and measures of the character of those specified in section 2635 of this title, designed to eliminate from use, without prejudice to apparatus that conforms as closely as practicable to the official standards, those (1) that are not accurate, (2) that are of such construction that they are faulty—that is, that are not reasonably permanent in their adjustment or will not repeat their indications correctly—or (3) that facilitate the perpetration of fraud.

(b) The specifications, tolerances, and other technical requirements for commercial, law enforcement, data gathering, and other weighing and measuring devices, as adopted by the national conference on weights and measures and published in National Institute of Standards and Technology Handbook 44, "Specifications, Tolerances, and other Technical Requirements for Weighing and Measuring Devices," and supplements thereto, or revisions thereof, shall apply to weighing and measuring devices in the State, except insofar as modified or rejected by regulation.

(c) The uniform regulation for packaging and labeling, the uniform regulation for unit pricing, and the uniform regulation for the method of sale of commodities, except for bread, as adopted by the national conference on weights and measures, and published by the National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," together with amendments, supplements, and revisions thereto, are adopted as part of this chapter except as modified or rejected by regulation.

* * * VEDA; Water Quality Initiatives * * *

Sec. 20. 10 V.S.A. § 280a is amended to read:

§ 280a. ELIGIBLE PROJECTS; AUTHORIZED FINANCING PROGRAMS

(a) The Authority may develop, modify, and implement any existing or new financing program, provided that any specific project that benefits from such program shall meet the criteria contained in the Vermont Sustainable Jobs Strategy adopted under section 280b of this title, and provided further that the

program shall meet the criteria contained in the Vermont Sustainable Jobs Strategy adopted under section 280b of this title. These programs may include:

* * *

(11) a program that would award grants made to eligible and qualified recipients as directed by the Agency of Agriculture, Food and Markets or the Agency of Natural Resources for the purpose of funding ~~stream stability and conservation reserve enhancement environmental~~ water quality initiatives approved by the agencies, provided that the maximum amount of grants awarded by the Authority pursuant to the program shall not exceed \$1,340,238.00 in the aggregate.

* * *

Sec. 21. VEDA FINANCING OF WATER QUALITY INITIATIVES

Notwithstanding 32 V.S.A. § 706, the Vermont Economic Development Authority is authorized to transfer to the Agency of Agriculture, Food and Markets funds held by VEDA for water quality programs pursuant to 10 V.S.A. § 280a(11).

* * * Working Lands Enterprise Program * * *

Sec. 22. 6 V.S.A. § 4604 is amended to read:

§ 4604. LEGISLATIVE INTENT

It is the intent of the General Assembly in adopting this subchapter to create a working lands enterprise board to administer a fund and develop policy recommendations to:

* * *

(8) increase the amount of State investment in working lands enterprises, particularly when it leverages private and philanthropic funds; and

(9) support the people and businesses that depend on Vermont's renewable land-based resources and the sustainable and productive use of the land by coordinating and integrating financial products and programs; and

(10) provide priority funding to agricultural and forest product enterprises. The priority for funding agricultural and forest product enterprises is not intended to exclude funding for technical assistance that directly supports enterprise development.

Sec. 23. 6 V.S.A. § 4606(b) is amended to read:

(b) Organization of Board. The Board shall be composed of:

(1) the Secretary of Agriculture, Food and Markets or designee, who shall serve as chair;

(2) the Commissioner of Forests, Parks and Recreation or designee;

(3) the Secretary of Commerce and Community Development or designee;

(4) the following members appointed by the Speaker of the House:

(A) one member who is a ~~representative of the Vermont forest industry who is also a~~ consulting forester;

(B) one member who is actively engaged in ~~commodity~~ maple production;

(C) one member who is actively engaged in on-farm value-added processing;

(D) one member who is actively engaged in manufacturing or distribution of Vermont agricultural products; and

(E) one member with expertise in sales, marketing, or market development;

(5) the following members appointed by the Senate Committee on Committees:

(A) one member who is actively engaged in wood products manufacturing;

(B) one member ~~who is a representative of one of the two largest membership-based agricultural organizations in Vermont who is not a dairy farmer~~ involved in production agriculture whose primary enterprise is not fluid milk;

(C) one member who is actively engaged in primary wood processing or logging;

(D) one member who is an agriculture and forestry enterprise funder; and

(E) one member who is a person with expertise in rural economic development; and

(6) the following members appointed by the Governor:

(A) one member who is a representative of Vermont's dairy industry who is also a dairy farmer;

(B) one member who is a representative of ~~a membership-based forestland owner organization~~ Vermont's forestry industry who is also a working forest landowner;

(C) one member with expertise in land planning and conservation efforts that support Vermont's working landscape; and

(D) one member who is an employee of a Vermont institution engaged in agriculture or forestry education, training, or research; and

~~(7) the following members appointed by the Vermont Agricultural and Forest Products Development Board:~~

~~(A) one member who is actively engaged in value-added agricultural products manufacturing; and~~

~~(B) two members actively engaged in providing marketing assistance, market development, or business and financial planning;~~

~~(8)~~(7) the following members, who shall serve as ex officio, nonvoting members:

(A) the Manager of the Vermont Economic Development Authority or designee;

(B) the Executive Director of the Vermont Sustainable Jobs Fund or designee; and

(C) the Executive Director of the Vermont Housing Conservation Board or designee.

Sec. 24. 6 V.S.A. § 4607 is amended to read:

§ 4607. POWERS AND DUTIES OF THE VERMONT WORKING LANDS
ENTERPRISE BOARD

(a) Duties. The Vermont Working Lands Enterprise Board is charged with:

(1) optimizing the agricultural and forest use of Vermont lands and other agricultural resources;

(2) expanding existing markets and identifying and developing new profitable in-state and out-of-state markets for food, fiber, forest products, and value-added agricultural products, including farm-derived renewable energy; and

(3) identifying opportunities and challenges related to access to capital, infrastructure, product development, marketing, training, research, and education.

(b) Powers. The Vermont Working Lands Enterprise Board shall have the authority:

(1) to design and conduct an ongoing public engagement process, which may include taking testimony and receiving information from any party interested in the Board's activities;

(2) to gain information through the use of experts, consultants, and data to perform analysis as needed;

(3) to request services from State economists, State administrative agencies, and State programs;

(4) to obtain information from other planning entities, including the Farm to Plate Investment Program;

(5) to serve as a resource for and make recommendations to the Administration and the General Assembly on ways to improve Vermont's laws, regulations, and policies in order to attain the goals set forth in section 4604 of this title;

(1)(6) to establish an application process and eligibility criteria for awarding grants, loans, incentives, and other investments in agricultural and forestry enterprises and in food and forest systems, provided that the Board shall prioritize assistance under this chapter to a person engaged in farming or forestry before providing assistance to a nonprofit organization or nonprofit corporation for a project that competes with a person engaged in farming or forestry;

(2)(7) to award grants and other investments, which may include loans underwritten and administered through the Vermont Economic Development Authority;

(3)(8) to enter into performance contracts with one or more persons in order to provide investment and services to agricultural and forestry enterprises, including:

(A) technical assistance and product research services;

(B) marketing assistance, market development, and business and financial planning;

(C) organizational, regulatory, and development assistance; and

(D) feasibility studies of facilities or capital investments to optimize construction and other cost efficiencies;

~~(4)~~(9) to identify workforce needs and programs in order to develop training and incentive opportunities for the agriculture and forest product sectors after consulting with the Department of Labor;

~~(5)~~(10) to identify strategic statewide infrastructure and investment priorities considering:

(A) leveraging opportunities;

(B) economic clusters;

(C) return-on-investment analysis;

(D) other considerations the Board determines appropriate; and

~~(6)~~(11) ~~to pursue and accept grants or other funding from any public or private source and to administer such grants or funding consistent with their terms.~~ to develop an annual operating budget, and:

(A) solicit and accept any grants, gifts, or appropriations necessary to implement the budget pursuant to 32 V.S.A. § 5; and

(B) expend any monies necessary to carry out the purposes of this section.

~~(b)(c)~~ Staff support. The Agency of Agriculture, Food and Markets shall provide administrative support to the extent authorized by the Secretary of Agriculture, Food and Markets, and with the assistance of the Department of Forests, Parks and Recreation to the extent authorized by the Commissioner of Forests, Parks and Recreation, in order to support the ~~board~~ Board in the performance of its duties pursuant to this section.

Sec. 25. REPEAL OF VERMONT AGRICULTURAL AND FOREST
PRODUCTS DEVELOPMENT BOARD

6 V.S.A. § 2966 (Agricultural and Forest Products Development Board)
shall be repealed on July 1, 2015.

Sec. 26. [Deleted.]

* * *Animal Shelter Working Group* * *

Sec. 26a. ANIMAL SHELTER WORKING GROUP

(a) Creation. There is created an Animal Shelter Working Group for the purpose of making a recommendation to the House Committee on Agriculture and Forest Products and the Senate Committee on Agriculture regarding the appropriate statutory standards and requirements for adequate shelter of animals.

(b) Membership. The Animal Shelter Working Group shall be composed of:

(1) the Chair of the House Committee on Agriculture and Forest Products or designee;

(2) a representative of the Vermont Humane Federation (VHF), to be appointed by the VHF;

(3) a representative of the Vermont Veterinary Medical Association, to be appointed by the Association; and

(4) a representative of the Vermont Federation of Dog Clubs, to be appointed by the Federation.

(c) Additional members. The members of the Animal Shelter Working Group may vote to add additional members to the Working Group. Additional members shall have the same powers and authority of members designated under subsection (b) of this section.

(d) Purpose. The Animal Shelter Working shall convene to propose draft legislation designed to amend and improve the statutory requirements for adequate shelter of animals in the State of Vermont.

(e) Assistance. For purposes of scheduling meetings and preparing recommended legislation, the Animal Shelter Working Group shall have the assistance of the Office of Legislative Council and the Joint Fiscal Office.

(f) Report. On or before January 15, 2016, the Animal Shelter Working Group shall submit to the Senate Committee on Agriculture and the House Committee on Agriculture and Forest Products a written report containing the findings of the Animal Shelter Working Group. The report shall include recommendations as to whether and how the existing State requirements for the

shelter of animals should be amended. The report may be in the form of proposed legislation.

(g) Meetings.

(1) The Chair of the House Committee on Agriculture and Forest Products or designee shall be the Chair of the working group.

(2) The Chair shall call all meetings of the Animal Shelter Working Group, the first of which shall occur on or before September 1, 2015.

(h) Reimbursement. Members of the Animal Shelter Working Group shall not be entitled to compensation or reimbursement of expenses for participation in the Working Group.

Sec. 27. [Deleted.]

Sec. 28. [Deleted.]

* * * Unpasteurized Milk * * *

Sec. 29. 6 V.S.A. chapter 152 is amended to read:

CHAPTER 152. SALE OF UNPASTEURIZED (RAW) MILK

* * *

§ 2777. STANDARDS FOR THE SALE OF UNPASTEURIZED (RAW)

MILK

* * *

(c) Unpasteurized milk operations shall conform to reasonable sanitary standards, including:

(1)(A) Unpasteurized milk shall be derived from healthy animals which are subject to appropriate veterinary care, including ~~tuberculosis and brucellosis testing and~~ rabies vaccination, according to accepted ~~testing and vaccinations~~ vaccination standards as established by the Agency.

(B) A producer shall ensure that all ruminant animals are tested for brucellosis and tuberculosis, according to accepted testing standards established by the Agency, prior to the sale of unpasteurized milk.

(C) A producer shall ensure that dairy animals entering the producer's milking herd, including those born on the farm, are tested for brucellosis and tuberculosis, according to accepted testing standards established by the Agency, prior to the animal's milk being sold to consumers, unless:

(i) The dairy animal has a negative U.S. Department of Agriculture approved test for brucellosis within 30 days prior to importation into the State, in which case a brucellosis test shall not be required;

(ii) The dairy animal has a negative U.S. Department of Agriculture approved tuberculosis test within 60 days prior to importation into the State, in which case a tuberculosis test shall not be required;

(iii) The dairy animal leaves and subsequently reenters the producer's herd from a state or Canadian province that is classified as "certified free" of brucellosis and "accredited free" of tuberculosis or an

equivalent classification, in which case a brucellosis or tuberculosis test shall not be required.

(D) ~~Test A producer shall post test results and verification of vaccinations shall be posted on the farm in a prominent place and be easily visible~~ make results available to customers and the Agency.

* * *

(d) Unpasteurized milk shall conform to the following production and marketing standards:

* * *

(6) Customer inspection and notification.

(A) ~~Prior to selling milk to a new customer, the new customer shall visit the farm and the~~ The producer shall provide the customer with the opportunity to tour the farm and any area associated with the milking operation. The producer shall permit the customer to return to the farm at a reasonable time and at reasonable intervals to reinspect any areas associated with the milking operation.

* * *

(e) ~~Producers~~ A producer selling 87.5 or fewer gallons (350 quarts) of unpasteurized milk per week shall meet the requirements of subsections (a) through (d) of this section and shall sell unpasteurized milk only from the farm on which it was produced. A producer selling 87.5 or fewer gallons of unpasteurized milk may choose to meet the requirements of subsection (f) of

this section, in which case the producer may deliver in accordance with section 2778 of this title.

(f) ~~Producers~~ A producer selling ~~6~~ more than 87.5 gallons to ~~280~~ 350 gallons (more than 350 to ~~1,120~~ 1,400 quarts) of unpasteurized milk per week shall meet the requirements of subsections (a) through (d) of this section as well as the following standards:

* * *

(3) Testing.

(A) A producer shall have unpasteurized milk tested twice per month by a U.S. Food and Drug Administration accredited laboratory using accredited lab approved testing containers. Milk shall be tested for the following and the results shall be below these limits:

- (i) total bacterial (aerobic) count: 15,000 cfu/ml (cattle and goats);
- (ii) total coliform count: 10 cfu/ml (cattle and goats);
- (iii) somatic cell count: 225,000/ml (cattle); 500,000/ml (goats).

(B) The producer shall ~~assure~~ ensure that all test results are forwarded to the Agency, by the laboratory, upon completion of testing or within five days of receipt of the results by the producer.

* * *

(D) The Secretary shall issue a warning to a producer when any two out of four consecutive, monthly tests exceed the limits. The Secretary shall have the authority to suspend unpasteurized milk sales if any three out of five

consecutive, monthly tests exceed the limits until an acceptable sample result is achieved. The Secretary shall not require a warning to the consumer based on a high test result.

* * *

(6) ~~Prearranged~~ Off-farm delivery. ~~Prearranged~~ The delivery of unpasteurized milk is permitted and shall be in compliance with section 2778 of this title.

(g) The sale of more than ~~280~~ 350 gallons (~~1,120~~ 1,400 quarts) of unpasteurized milk in any one week is prohibited.

§ 2778. DELIVERY OF UNPASTEURIZED (RAW) MILK

(a) Delivery of unpasteurized milk off the farm is permitted only within the State of Vermont and only of milk produced by ~~these producers~~ a producer meeting the requirements of subsection 2777(f) of this chapter.

(b) Delivery shall conform to the following requirements:

(1) Delivery shall be to ~~customers who have~~ a customer who has:

~~(A) visited the farm as required under subdivision 2777(d)(4) of this title; and~~

~~(B) purchased milk in advance either by a one-time payment or through a subscription. Milk is purchased in advance of delivery when payment is provided prior to delivery at the customer's home or prior to commencement of the farmers' market where the customer receives delivery.~~

(2) ~~Delivery shall be~~ A producer may deliver directly to the customer:

(A) at the customer's home or into a refrigerated unit at the customer's home if such unit is capable of maintaining the unpasteurized milk at 40 degrees Fahrenheit or lower until obtained by the customer;

(B) at a farmers' market, as that term is defined in section 5001 of this title, where the producer is a vendor;

(3) During delivery, unpasteurized milk shall be protected from exposure to direct sunlight.

(4) During delivery, unpasteurized milk shall be kept at 40 degrees Fahrenheit or lower at all times.

(c) A producer may contract with another individual to deliver the unpasteurized milk in accordance with this section. The producer shall be jointly and severally liable for the delivery of the unpasteurized milk in accordance with this section.

(d) Prior to delivery at a farmers' market under this section, a producer shall submit to the Agency of Agriculture, Food and Markets, ~~on a form provided by the Agency,~~ written or electronic notice of intent to deliver unpasteurized milk at a farmers' market. The notice shall:

(1) include the producer's name and proof of registration;

(2) identify the farmers' market or markets where the producer will deliver milk; and

(3) specify the day or days of the week on which delivery will be made at a farmers' market.

(e) A producer delivering unpasteurized milk at a farmers' market under this section shall display the registration required under subdivision 2777(f)(4) of this title and the sign required under subdivision 2777(d)(6) on the farmers' market stall or stand in a prominent manner that is clearly visible to consumers.

* * * Effective Dates * * *

Sec. 30. EFFECTIVE DATES

(a) This section and Sec. 29 (unpasteurized milk) shall take effect on passage.

(b) The remainder of the act shall take effect on July 1, 2015.

Date Governor signed bill: May 28, 2015

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1 THURSDAY, JANUARY 22, 2015; 5:00 P.M.

2 -----
3 CHAIR: (recording start) -- start in the
4 interest of time. We'll do a quick spin around the
5 room and introduce ourselves.

6 First of all, before we do that, I'd just
7 like to say that I'd like to thank you all for
8 coming. We're going to be talking about gas-pricing
9 in northwestern Vermont, and any other part of
10 Vermont that you might want to talk about today, and
11 talking a little bit a bill that's being introduced,
12 but this hearing is not totally about that bill, or
13 about that bill at all, but we can discuss it. It's
14 going to be talked about by -- the sponsor of the
15 bill is here, so we'll get into that a little bit,
16 and we're going to take some scheduled hearing, and
17 then we'll hear from members of the public --

18 And if you would like to speak, Shirley has
19 a sign-up sheet -- where? Right over here on this
20 table. Please sign it, and we will take you in the
21 order that you signed. So please sign up if you'd
22 like to speak after the scheduled presenters.

23 So -- we'll start with Representative
24 McCormick, and we'll go right around the corner
25 here.

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1 REPRESENTATIVE MCCORMICK: Curt McCormick
2 from Burlington.

3 REPRESENTATIVE BURKE: Mollie Burke from
4 Brattleboro.

5 REPRESENTATIVE QUIMBY: Connie Quimby from
6 Concord.

7 REPRESENTATIVE MUMLEY: Mark Mumley,
8 Cavendish, Wethersfield.

9 REPRESENTATIVE RUSSELL: Herb Russell,
10 Rutland City.

11 REPRESENTATIVE BISSONETTE: Clem
12 Bissonette, Winooski (unclear) Burlington.

13 REPRESENTATIVE MURPHY: Barbara Murphy,
14 Fairfax.

15 REPRESENTATIVE SHAW: Loren Shaw, Derby,
16 Vermont.

17 REPRESENTATIVE CORCORAN: Tim Corcoran from
18 Bennington.

19 REPRESENTATIVE BRENNAN: Pat Brennan,
20 Colchester.

21 REPRESENTATIVE BOTZOW: Bill Botzow, I
22 represent Pownal and Woodford.

23 REPRESENTATIVE MARCOTTE: Mike Marcotte
24 from Coventry.

25 REPRESENTATIVE KITZMILLER: Warren

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1 Kitzmiller from Montpelier, you're sitting in my
2 district.

3 UNIDENTIFIED SPEAKER: (unclear) saying
4 that.

5 REPRESENTATIVE (unclear): (unclear)
6 Brandon.

7 REPRESENTATIVE DAKIN: Maureen Dakin from
8 Colchester.

9 REPRESENTATIVE O'SULLIVAN: Jean O'Sullivan
10 from Burlington.

11 REPRESENTATIVE STEWART: Valerie Stuart
12 from Brattleboro.

13 REPRESENTATIVE BASER: Fred Baser from
14 Bristol, Monkton, Lincoln and Starksboro.

15 REPRESENTATIVE PARENT: Corey Parent from
16 St. Albans City and Town.

17 CHAIR: Okay, thank you, and we also have a
18 few other legislators in the room, so if you'd like
19 to introduce yourselves quickly. We'll go around,
20 Bob, Senator Stark, Senator Stark from (unclear).
21 (unclear).

22 REPRESENTATIVE MEMBER: From Derby.

23 REPRESENTATIVE MEMBER: Morrystown, Elmore
24 (unclear).

25 REPRESENTATIVE MEMBER: (unclear)

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1 Colchester.

2 REPRESENTATIVE MEMBER: (unclear).

3 REPRESENTATIVE MEMBER: (unclear),

4 Burlington.

5 REPRESENTATIVE PEARSON: Chris Pearson,

6 Burlington.

7 REPRESENTATIVE MEMBER: (unclear).

8 REPRESENTATIVE MEMBER: (unclear).

9 CHAIR: That's it? Thank you. So we're
10 going to call up Chris Pearson who is the sponsor of
11 a bill that he had or will have in (unclear).

12 REPRESENTATIVE PEARSON: Yes, yes, and it
13 is out there in the bins, (unclear) the lunch lounge
14 if you want a copy later.

15 CHAIR: Welcome.

16 REPRESENTATIVE PEARSON: Thank you,
17 (unclear). My name's Chris Pearson from (unclear-10
18 minutes).

19 REPRESENTATIVE MEMBER: Are you aware,
20 trucking gasoline, one shoe doesn't fit all, plus
21 all the mileage, have you done any research on that?

22 REPRESENTATIVE PEARSON: I haven't,
23 personally, but most of the gas in northwestern
24 Vermont comes out of Albany. So you say, well, all
25 right, you know, Middlebury's a little further up

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1 the road than Rutland (unclear).

2 REPRESENTATIVE MEMBER: I think we need to
3 be really careful because the free-enterprise system
4 is what built this country and built this state, and
5 I think you want to really be careful. I mean I'm
6 all for digging into it, I think that's a great
7 thing that you're doing, but you want to really be
8 careful. Now if it's price-fixing, that's another
9 whole ball game (unclear), that's why I asked you if
10 there was any differential between the stations.

11 REPRESENTATIVE PEARSON: Well, and I guess
12 I would say I'm not happy about regulating
13 (unclear). What I am suggesting is (unclear), we
14 need more tools to be able (unclear).

15 REPRESENTATIVE MEMBER: More tools mean
16 more money (unclear).

17 REPRESENTATIVE PEARSON: (unclear).

18 REPRESENTATIVE MEMBER: (unclear) keep them
19 tools growing to be proficient at it. It may be
20 good for a while but maybe not over the long period,
21 I don't -- I don't know (unclear).

22 CHAIR: Representative Russell.

23 REPRESENTATIVE RUSSELL: (unclear).

24 REPRESENTATIVE PEARSON: Yeah, I should say
25 that because other people (unclear).

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1 CHAIR: Representative Dakin.

2 REPRESENTATIVE DAKIN: Thank you.

3 Representative Pearson, a couple of questions. Are
4 you aware of any other industry that we require this
5 information from in Vermont?

6 REPRESENTATIVE PEARSON: Well, we
7 (unclear), in Vermont, some of them fuel-related,
8 unclear-2 mins.)

9 REPRESENTATIVE DAKIN: Thank you very much,
10 and I meant to, before I asked you the question, I
11 wanted everyone to know in full disclosure that I
12 will be not voting on any of these bills. I will be
13 participating in the discussions and asking
14 questions because I have a conflict of interest.
15 And the conflict of interest is in this room at the
16 moment, and I would like the group to welcome, you
17 may not later on, (laughter) but I would like to
18 introduce from Champlain Oil my youngest brother
19 Steve Pietryka from (unclear).

20 CHAIR: Welcome, Steve.

21 REPRESENTATIVE DAKIN: So my next -- I just
22 have two quick ones, Representative Brennan. The
23 privacy issues I notice are addressed in the bill,
24 the confidentiality, and that sort of thing, but it
25 seems to me that the -- and I've had a quick look at

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1 the bill -- that the information goes to the
2 Attorney General, and it remains confidential for
3 three years, two years, three years, but there's no
4 other -- it's not shared with the Legislature,
5 correct?

6 REPRESENTATIVE PEARSON: Correct.

7 REPRESENTATIVE DAKIN: Okay, I think that
8 may be a problem.

9 And I have a question -- you have many
10 co-sponsors on this, but are you the primary sponsor
11 -- are you introducing this bill on behalf of the
12 Attorney General's Office?

13 REPRESENTATIVE PEARSON: I wouldn't say
14 that, I work with (unclear).

15 REPRESENTATIVE DAKIN: All right, thank
16 you.

17 CHAIR: All right, thank you, Chris,
18 appreciate it.

19 REPRESENTATIVE PEARSON: Thank you very
20 much.

21 CHAIR: So next up we will hear from Dan
22 McLean, Senior Press Advisor for the Office of
23 Senator Sanders.

24 UNIDENTIFIED SPEAKER: (unclear).

25 CHAIR: I'll just take a moment to help

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1 people, I know Dan has a lot of information for us,
2 and it has been posted on the Commerce Committee's
3 web page, and for those that see that, if you have
4 an Ipad, or so, if you go to the committee web page,
5 and you look under "documents and handouts," and you
6 click on that, you will see for Thursday, today, you
7 will see what you submitted electronically for us to
8 look at.

9 I think at the moment Shirley is coming, is
10 not -- she's printed out some for the rest of the
11 folks, for folks here who are not Ipad, you know,
12 workers, or so, so there are some other copies on
13 paper.

14 UNIDENTIFIED SPEAKER: (unclear).

15 CHAIR: Excuse me?

16 UNIDENTIFIED SPEAKER: (unclear).

17 CHAIR: No, we'll let you continue --

18 UNIDENTIFIED SPEAKER: Yeah.

19 CHAIR: I think it'll work.

20 MR. MCLEAN: My name is Dan McLean and
21 (unclear).

22 CHAIR: Could you raise it just up a
23 little?

24 MR. MCLEAN: (unclear-1 min.59 secs.) --
25 market share and the extent that individual

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1 companies have -- the extent that individual
2 companies have -- what their market share is to the
3 extent that they serve as the other filling
4 stations.

5 Now the only apparent reason for widespread
6 price disparity between northwestern Vermont and the
7 rest of the state really is a lack of vigorous
8 competition, and that was the finding during our
9 Senate Hearing, and one -- the person who will be
10 testifying next by telephone, from the Oil Price
11 Information Service, is Ben Brockwell, and he can
12 speak more extensively to his analysis of this
13 market. He did testify during Senator Sanders'
14 hearing, as well, in 2012.

15 Once again, even as oil and gas prices are
16 falling significantly, Vermonters living in
17 northwestern Vermont have been forced to pay
18 substantially more than they would if they'd lived
19 in a different part of Vermont where gasoline
20 markets are more competitive. Today the average
21 price of gas in northwestern Vermont is 2.48 a
22 gallon, that's according to Triple A's Daily Fuel
23 Gauge, which also gets its data from OPIS. That's
24 44 cents more than the national average, and that's
25 2.48 a gallon in northwestern Vermont, it's 48 cents

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1 higher than the lowest prices in Vermont. There's
2 no economic justification, aside from the lack of
3 vigorous competition that explains why these wide
4 prices vary and continue to exist.

5 Now local gas distributors can be very
6 competitive when they want to be, but too often the
7 prices at the pump are higher in Chittenden, Grand
8 Isle and Franklin County than other parts of the
9 state. This lack of vigorous competition can be
10 seen in added profit margins, and those higher
11 profit margins are something that we can track with
12 the data from the Oil Price Information Service.
13 And consistently northwestern Vermont, which is
14 known as the Burlington market, is one of the most
15 lucrative markets in the United States to sell
16 gasoline.

17 As Representative Pearson mentioned, most
18 recently from December 30th to January 12th, those
19 two weeks, each one of those two weeks, that market,
20 northwestern Vermont was the secondmost profitable
21 in the country with a profit margin twice the
22 national average. The week prior, it was the fifth
23 most profitable.

24 Now it's worth noting that in the -- and
25 I'll go through quickly some of the data that I

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1 provided that you have a packet of. It's easy to
2 get lost in the numbers here, so I just tried to
3 look at some of the ones that present the
4 information as clearly as I could.

5 Now in the month ending at the end of
6 December, this is a time period when the wholesale
7 prices were dropping a lot, and in fact from OPIS
8 data, in the month ending December 29th, wholesale
9 prices fell more than 50 cents, so that's the price
10 that the wholesalers were actually paying for the
11 fuel. The price of the product, the price of
12 gasoline at the pump fell 26 cents; in other words,
13 the price of the commodity was falling a lot faster
14 than was reflected in the price at the pump.

15 So in that one month, with the wholesale
16 prices falling, 50.6 cents a gallon, and the price
17 is just falling 26 cents, there's a 24-cent gap of
18 what the filling station was paying for it, what the
19 wholesaler was paying for it and what the ultimate
20 price at the pump was.

21 A way to explain the lower prices in other
22 parts of the state, gas distributors often argue
23 that this is a result of transportation costs;
24 that's true, to some degree, but not to the extent
25 that is argued. This morning, and this is in your

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1 packet, the price difference between buying a gallon
2 of fuel, of regular unleaded gasoline wholesale at
3 the Albany terminal versus the Burlington terminal
4 was 5 cents. So it is true that it costs 5 cents
5 more to get the fuel to northwestern Vermont, but a
6 nickel.

7 There is another way you can provide --
8 that you can pick up fuel in Albany, you can put it
9 on a truck and transport it to southern Vermont, and
10 you can also pick up fuel at the Burlington terminal
11 and do the same. And during the 2012 testimony in
12 the Senate Hearing, Ben Brockwell said that the
13 prices to transport fuel, based on his knowledge,
14 was -- it would cost 4.6 cents a gallon, and this is
15 2012 data, so it may be a little bit higher, 4.6
16 cents a gallon to transport it up to 75 miles, 6
17 cents gallon for 100 miles and 13 cents a gallon for
18 200 miles. In other words, you could draw a line
19 radius around the terminal, and that's how much it
20 would cost you.

21 So for example, today the prices -- the
22 lowest in Vermont are down in Bellows Falls, so
23 that's at \$2.10 or 2.14 in White River Junction,
24 that's 90 miles away. I don't understand why you
25 couldn't add on that transportation cost, call it a

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1 dime, and then you would, that's overestimating it,
2 and that should be easily able to haul it up the
3 road 90 miles, and then theoretically, you could be
4 able to get fuel here for two and a quarter, and
5 meanwhile it's 2.48, and that's after prices have
6 fallen more substantially in the last week, or so.

7 So quickly let me just go through the
8 packet that you have on-line, and on there, it'll
9 show a GasBuddy chart that reflects when the last
10 time the Burlington prices, the Vermont prices and
11 the U.S. average were all the same, and that was
12 back in April. So this is something that does
13 occur. And what tends to happen is when the
14 wholesale prices fall, that is where the prices
15 become misaligned, and that happens more so in
16 northwestern Vermont.

17 So when the wholesale prices fall, the
18 prices at the pump do fall but not nearly as fast as
19 the wholesale prices are falling. And other parts
20 of the country, in other parts of the state, prices
21 do follow with those wholesale prices down. So
22 that's what you really see here on the first chart.

23 And the other data really just backs up
24 some of the remarks that I made, and I can just skip
25 through to make sure there wasn't another thing in

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1 here that I wanted to make sure to mention. But in
2 short, these documents are the last three weeks of
3 something the Oil Price Information Service puts
4 out, it's called the Retail Fuel Watch, and our
5 office subscribes to OPIS, and we get this data, and
6 we also get the rack prices, which is the wholesale
7 prices everyday from Burlington and everyday from
8 Albany.

9 And the reason we did that is, when we
10 first started looking at this issue, we had no idea
11 what the wholesaler was paying for the fuel. Well,
12 now we know, and let me give you, for example, the
13 prices.

14 Today you could buy fuel at the Albany
15 terminal for 139.7, that's before taxes, that's
16 before transportation costs, that's what you could,
17 per gallon, fill up your truck with. In Burlington,
18 and this is the price as of 10 a.m. this morning, is
19 the average rack price or the wholesale price, it
20 was 144.8, so that's just under a nickel. So that
21 is the real cost of the difference of picking up in
22 the terminal in Albany versus Burlington.

23 And that historically was one of the
24 explanations that we had heard of markets in the
25 southern part of the state, that they're closer to

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1 the Albany terminal, and so on and so forth, when
2 the fact of the matter is, you can pay a nickel more
3 and get it in Chittenden County, so that would
4 account for a nickel's difference, the rest is -- at
5 the conclusion of the Senate Hearing was the lack of
6 vigorous competition.

7 So I'm happy to take any questions, and I
8 think Mr. Brockwell is available by phone to answer
9 questions about -- this is all their data, we just
10 follow it closely.

11 CHAIR: All right, so first of all, we'll
12 take questions from (unclear), try to keep it to
13 one, two to three. And Loren?

14 REPRESENTATIVE MEMBER: When gas prices go
15 down, that dealer still may have 20,000 gallons of
16 gasoline in the tank, you can't expect him to be
17 dropping that instantaneously. It takes -- I don't
18 know how long, it depends on the volume of station
19 (unclear). Did you take that into consideration?

20 MR. MCLEAN: I think that's probably true,
21 but we also see very competitive markets in towns
22 like Barton, and I haven't analyzed the volume flow,
23 and I think Representative Pearson's legislation may
24 help provide more information to that question, but
25 in smaller markets, that seemed to have lower

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1 prices, that wouldn't seem to be a factor --

2 REPRESENTATIVE MEMBER: (unclear) Urban
3 Oil, they do their own manufacture, they do it all,
4 they even go through their own crude oil in some --
5 they could probably (unclear) anybody if they really
6 wanted to.

7 And also the 1.44 price, Dan, --

8 MR. MCLEAN: Yeah.

9 REPRESENTATIVE MEMBER: -- did that include
10 the taxes, --

11 MR. MCLEAN: It does not.

12 REPRESENTATIVE MEMBER: -- the State and
13 Federal? It doesn't.

14 MR. MCLEAN: No, that's --

15 REPRESENTATIVE MEMBER: That's what we need
16 to really go by to (unclear).

17 CHAIR: Just talking about another 50 cents
18 on -- 50 cents here, right?

19 MR. MCLEAN: Well, one of the reasons we
20 used the profit margin, and just to explain briefly
21 why that is a good number, because you can in fact
22 compare apples to apples, the Burlington market
23 versus San Francisco versus Atlanta, --

24 REPRESENTATIVE MEMBER: Whatever.

25 Mr. MCLEAN: -- because it subtracts out

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1 the wholesale cost of that region, it subtracts out
2 the transportation cost and the related state taxes,
3 so all --

4 REPRESENTATIVE MEMBER: So all your
5 transportation on top of this, would that be
6 included in transportation, the 1.44?

7 MR. MCLEAN: No, that's just literally what
8 you would pay for at the terminal.

9 REPRESENTATIVE MEMBER: Hm-hmm.

10 MR. MCLEAN: And then you have --

11 REPRESENTATIVE MEMBER: You get a 1.44 plus
12 transportation.

13 MR. MCLEAN: Right, plus the taxes.

14 CHAIR: Anyone else?

15 REPRESENTATIVE MEMBER: It seems that one
16 of the better ways to compare all this is
17 similarly-situated markets, and I'm sure there are
18 markets around the country that are somewhat similar
19 to the market across Vermont, one. Given that, you
20 know, each market may have some particular
21 characteristics that would lead to a differential;
22 are you really aware of any particular
23 characteristic that would cause this market here to
24 have that large a differential when you're comparing
25 it to similarly-situated markets elsewhere?

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1 MR. MCLEAN: It's a good question. The
2 geography is a little bit unique. The northern
3 border is Canada, you're not going to scoot over to
4 Canada for a deal on gas, and you're likely not
5 going to take a ferry to Plattsburgh, so you're kind
6 of stuck in northwestern Vermont. I mean where are
7 you going to go?

8 CHAIR: We might also give Ben a (unclear)
9 that question.

10 MR. MCLEAN: Yeah, he's much more familiar
11 with the -- there's 450 markets, I want to say it's
12 ranked number 2, that's out of 450, or so, metro
13 markets in the U.S.

14 REPRESENTATIVE MEMBER: We'll forward my
15 question.

16 MR. MCLEAN: Okay.

17 REPRESENTATIVE MEMBER: Just to add on sort
18 of what Bill was asking, during your research, have
19 you like looked at the cost analysis that one of
20 these business owners had as far as benefits they
21 pay out, the rent, things that they have to absorb
22 to run the business, in and of itself?

23 MR. MCLEAN: I'm sure that would -- of
24 course, yes, so the profit margin does not
25 include -- we usually are putting it as a gross

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1 profit margin.

2 REPRESENTATIVE MEMBER: Yeah.

3 MR. MCLEAN: So if it's -- the national is
4 roughly 30 cents, and Burlington's been 66, roughly,
5 most recently. Those figures do not include credit
6 card swipes, they do not include staff, they do not
7 include land fees, they don't include those costs of
8 running a business, but those are constants for all
9 of these markets. So yes, they --

10 REPRESENTATIVE MEMBER: Which they would
11 vary, I would assume.

12 MR. MCLEAN: They would vary, but I would
13 imagine that running a gas station in New York is
14 more expensive than running it in Burlington. But
15 no, I don't have the data precisely of what it costs
16 to rent a station on Shelburne Road, no.

17 REPRESENTATIVE MEMBER: Thank you.

18 CHAIR: Very good, thank you, Dan. So
19 Mr. Brockwell, are you still with us?

20 MR. BROCKWELL: I'm still with you, yes,
21 (unclear).

22 CHAIR: Well, very good, thank you for
23 participating, and I'd like to introduce (unclear)
24 Brockwell, he is the director of data pricing and
25 information services -- Data Price Informational

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1 Services, correct?

2 MR. BROCKWELL: Yes, (unclear) we weren't
3 sure what OPIS (unclear), but Oil Price Information
4 Service. Just by way of brief introduction, this is
5 a privately-held company based in (unclear). For 35
6 years we've been tracking wholesale retail gasoline
7 prices across locations around the country. And I
8 was asked by Senator Sanders' Office, and by Dan,
9 specifically, as you mentioned, a couple years ago
10 (unclear-87 secs.)

11 So I was asked to do an analysis to see if
12 I could explain any (unclear-6 mins.69 secs.)

13 CHAIR: Thank you. I have a key that I
14 brought with me here that lists Burlington as having
15 the highest -- currently, and I'm asking you if it's
16 current, I believe it is, the highest profit margin
17 in the country, Burlington, Vermont, 66.4 percent.
18 Is that -- you know, you explained away the credit
19 card charges and a few others, the overhead and
20 stuff, but just going by that number, am I correct
21 with the --

22 MR. BROCKWELL: Yeah, I'm not sure exactly
23 what it is you're looking at. (unclear) publish
24 that information every Thursday, and today
25 (unclear), so I don't know if that's actually

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1 correct for today, but I do know that in recent
2 weeks, for the past four or six weeks or couple of
3 months, (unclear). I do know that the Burlington
4 market has been among the most profitable in the
5 country as expressed by gross margins calculated by
6 retail fuel (unclear). (unclear) top regionally, in
7 terms of the northeast, and I think it's been in the
8 top 10, even in the top 20 (unclear). There was a
9 period of time where -- I'm just recalling this
10 (unclear), there was a period of time where it was
11 consistently at the top tier of pricing (unclear)
12 so -- (unclear-88 secs.)

13 CHAIR: Okay, thank you. We've got time
14 for a question, maybe, if anybody has one or --
15 yeah, Bill.

16 REPRESENTATIVE MEMBER: You know, I know
17 that I asked you earlier, but a slightly different
18 way to look at it is that, do you look at or is
19 there a way to measure the relative competitiveness
20 of markets?

21 MR. BROCKWELL: I'm sure we can do that, I
22 mean again, I -- we produce (unclear-14 secs.) They
23 want to see how their price strategy is affecting
24 their margins (unclear) over time. Actually, I
25 think Jim's speaking, you know, retail stations

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1 priced competitively based on what they define as
2 their competition. And I don't know (unclear), I
3 don't know if I'm looking at a station on the corner
4 of an intersection. I don't necessarily know how
5 that station prices against a station two miles way,
6 three miles away, four miles away.

7 What I think one could do is, you take the
8 individual stations and compare -- because I think
9 we can track these prices on a daily basis, and that
10 is how -- whether or not a station or a group of
11 stations (unclear) at the same time or not at the
12 same time. So I mean there's a way to do that, I
13 would (unclear-73 secs.)

14 REPRESENTATIVE MEMBER: Thank you.

15 CHAIR: Thank you, Mr. Brockwell, and I
16 appreciate you taking the time out of your busy
17 schedule to be with us tonight. I think That that's
18 it. If you want to hang in there and listen to some
19 testimony, you're welcome; if not, you can leave us
20 at any time.

21 MR. BROCKWELL: Thank you, (unclear) going
22 to leave, I've got some other things to take care
23 for people before heading out.

24 CHAIR: That's fine, I --

25 MR. BROCKWELL: (unclear) available, my

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1 contact information is there, so please let me know
2 if I can be of assistance.

3 CHAIR: We'll do, thanks again.

4 MR. BROCKWELL: Thank you so much, bye-bye.

5 CHAIR: So next up we have Ryan Kriger, the
6 Assistant Attorney General. Thanks for coming,
7 Ryan.

8 ASST. ATT. GEN, KRIGER: Thank you. So I'm
9 an Assistant Attorney General in the Vermont
10 Attorney General's Office Public Protection
11 Division, and one of my responsibilities is
12 enforcement of antitrust law. I just would like to
13 thank the Legislature, we appreciate you holding
14 these hearings on this important issue.

15 It's already been explained why we're here
16 and why there are concerns about the pricing of gas
17 in the northwest portion of the state. From an
18 antitrust perspective, when you see pricing like
19 this, you say, okay, well, this could be indicative
20 of anti-competitive conduct, it could be indicative
21 of collusion or price-fixing, or it could be
22 indicative of what we call price-following or
23 price-signaling behavior. The former obviously is
24 illegal; the latter is not.

25 Price-following, price-signaling takes

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1 place in most industries. You want to set your
2 prices, you look at what your competitors are doing,
3 and you set your prices accordingly. The retail
4 gasoline industry is one that is usually used as a
5 case book example of price-following behavior,
6 because the prices are posted on big signs in front
7 of all of the gas stations, and it is very easy to
8 figure out what your price is based on what your
9 competitors are doing. That said, that doesn't
10 necessarily explain why there would be such a huge
11 discrepancy.

12 In a market, if the profit margins are very
13 high, what the economic theory would tell us is that
14 some company, maybe an independent, would become
15 what's called a maverick, and would say, well, I can
16 get more market share by dropping my prices, and
17 then, you know, I'll make a profit. That has not
18 happened, that's curious. But that alone is not
19 necessarily indicative that there's price-fixing
20 going on.

21 So just looking at what's happening in
22 Burlington, that alone may not be enough to go to
23 court and prove that there's a conspiracy going on.
24 To prove a conspiracy going on, you need actual
25 evidence of a conspiracy. Looking at your

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1 opponent's signs is not a conspiracy; talking to
2 each other, that's a conspiracy.

3 The last gas station conspiracy that I was
4 able to find in the United States happened in
5 Michigan in 2011. There were four gas stations,
6 they invited a fifth gas station owner to join their
7 conspiracy, that gas station owner went to the
8 Attorney General's Office, wore a wire, recorded the
9 conversations, people went to prison. That is a
10 level of evidence you need to be able to show a
11 price-fixing conspiracy in this area.

12 And the bill that we are supporting will
13 hopefully help with that situation. Now one of the
14 outgrowths of that Michigan case, a few years ago I
15 was here advocating that we have criminal liability,
16 as many or most other states already had, and the
17 antitrust laws, we now have those. Since the
18 criminal liability has been put into place, no
19 whistle-blowers have come forward, no one's come
20 forward to say that there has been any sort of
21 conspiracy.

22 There was, in the summer of 2012, the
23 Attorney General and Senator Sanders wrote letters
24 to the Federal Trade Commission requesting that they
25 do a further investigation, and they declined to do

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1 so.

2 So let me -- one other basic overview point
3 is that price-following behavior, price-signaling is
4 a lot harder to do in a highly-competitive
5 environment and a lot easier to do in a very
6 concentrated environment. So one of the things that
7 this bill tries to do is say, okay, well, this is a
8 fairly concentrated market already, let's at least
9 try to stop it from becoming more concentrated, if
10 in a certain market becoming more concentrated, is
11 going to harm competition.

12 So what it does is first -- the first part
13 of the bill would have wholesalers, as has already
14 been explained by Representative Pearson,
15 wholesalers would report their volume of gas sold to
16 various retailers once a year. That would work with
17 the second part of the bill, which would require
18 basically pre-acquisition or pre-merger notification
19 to our office if one gas station or one wholesaler
20 wants to acquire the other. If we were to receive a
21 report that two gas stations were going to merge,
22 that alone doesn't really tell our office much
23 unless we know what that market looks like. Are
24 there 10 gas stations in that market, or are there
25 two gas stations in that market which are about to

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1 become a monopoly? That's where having that
2 market-share information becomes critical to making
3 that analysis, and that is not information that we
4 would be able to acquire from OPIS, that's
5 information that we're going to need to get, at the
6 time.

7 And we will want to, if we get that
8 notification, we'll want to turn it around very very
9 quickly, we don't want to stand in the way of any
10 sort of merger that is going to be a competitive
11 merger, so we want to have that information at our
12 fingertips when it happens. And in the event when
13 that merger takes place, the two merging companies
14 don't want to be public that they're acquiring each
15 other any earlier than it has to, they don't want us
16 going to all the competitors, and saying, will you
17 let us know our market share, because that's going
18 to red-flag everybody that something is going on in
19 the market, which is why it's helpful up front so
20 that we can make that determination.

21 And the -- and I should note a question --
22 some questions were asked about other sorts of
23 reporting. So in our office, at least, we have a
24 data base that requires reporting from
25 pharmaceutical companies, biologics companies and

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1 medical-device companies. We have banned a lot of
2 gift-giving to medical providers in our state, but
3 we do allow certain allowable gifts, and they all
4 must be reported to the State, to the Attorney
5 General's Office. In the paid fund-raisers area, we
6 also require reporting to our office.

7 In terms of the notion of having to report
8 mergers or acquisitions ahead of time, that language
9 is actually borrowed heavily from a similar statute
10 in Maine, so we would not be the first state to be
11 doing something like this in this area. In fact
12 within the state of Vermont, when health care
13 providers want to merge or acquire each other, they
14 used to have to report to VISHGET (phonetic), now
15 they have to report to Green Mountain (unclear)
16 Board ahead of time, and they have to get what's
17 called a certificate of need (unclear). If insurers
18 want to merge, and those insurers are domiciled in
19 the state, they have to report to DFI ahead of time,
20 and they have to get approval from DFI.

21 If banks or credit unions, state-issued
22 banks or credit unions, who also merge, they have to
23 report to DFI, so the notion of an industry
24 requiring this sort of reporting and timing
25 regulation is not unusual.

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1 Let me quickly explain the understanding
2 behind the third part, which is this whistle-blower
3 incentivizing statute. And what that's borrowed
4 from is the False Claims Act, which is a Federal
5 statute, and it basically makes it illegal to
6 defraud the Federal Government. One of the area it
7 gets implemented heavily is Medicaid fraud, so you
8 see there has been -- it's a very easy area to
9 defraud the Government, it happens a lot, tens of
10 millions of dollars, and the Health Claims Act
11 imposes penalties, and it imposes heavy incentives
12 for people not to defraud the Government.

13 And it has a whistle-blower provision,
14 whereby if someone brings information of fraud to
15 the Government by bringing what's called a Qui tam
16 suit, they may be able to receive 10 to 25 percent
17 of the final penalty from the Government. We're
18 talking tens of millions of dollars. And the reason
19 for this is because otherwise it would be extremely
20 difficult for the Government to find this sort of
21 fraud, and it has been extremely effective in
22 cutting down fraud for the Government.

23 So we thought to ourselves, well, we put
24 criminal liability in place, no one's come forward,
25 well, what if there was an incentive? It said:

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1 Okay, if you are a whistle-blower, maybe there is
2 someone who knows something that doesn't want to
3 come forward, because for a million reasons why you
4 wouldn't want to come forward, maybe some of these
5 incentives would help to bring forward someone who
6 knows something. And if no one comes forward with
7 any information, well, maybe that will give us more
8 confidence that maybe there's not a problem in that
9 area in terms of an illegal-pricing conspiracy.
10 It's just kind of a creative way to try to move the
11 ball forward on this issue.

12 And those are my comments, I'll take any
13 questions.

14 CHAIR: Questions for Ryan, anyone? No?
15 (unclear) now one quick one before you leave. You
16 mentioned incentives. I haven't read the bill, yet.
17 Are there incentives in this bill for
18 whistle-blowing?

19 ASST. ATT. GEN. KRIGER: What it states is
20 that if you bring evidence of anti-competitive
21 conspiracy to the Attorney General's Office and
22 cooperate with the Attorney General's Office with
23 some caveats, and that evidence is necessary and
24 involved in a successful prosecution or settlement,
25 then that whistle-blower could receive between 10

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1 and 25 percent of any fines or penalties that are
2 set.

3 CHAIR: Thank you. Next up we have Joe
4 Choquette, who is the lobbyist for the Vermont
5 Petroleum Association. Are you coming up with
6 Steve?

7 MR. CHOQUETTE: Steve Pietryka, yes, --

8 CHAIR: Steve Pietryka, who is the sales
9 manager --

10 MR. CHOQUETTE: (unclear) little brother.

11 CHAIR: Little brother.

12 MR. CHOQUETTE: When I invited him, I
13 honestly (unclear).

14 (laughter)

15 MR. PIETRYKA: That's true.

16 CHAIR: Joe, yeah, just move that mic
17 (unclear). You've got room, (unclear) that cord.

18 MR. CHOQUETTE: Thank you very much.

19 CHAIR: Thanks for coming.

20 MR. CHOQUETTE: Chairman Botzow, Chairman
21 Brennan and members of the committee, my name is Joe
22 Choquette, and I'm here representing the Vermont
23 Petroleum Association, which is a division of the
24 Vermont Retail and Grocers Association.

25 VPA is a trade group that serves the

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1 Government affairs' needs of Vermont roughly 64
2 motor-fuel distributors. These are companies that
3 provide gasoline and diesel fuel to both branded and
4 unbranded stations throughout the state, and they
5 also supply independent owners.

6 Steve here is a sales manager with
7 Champlain Oil. He's here to help me answer any
8 questions that you may have that I don't have
9 immediate day-to-day knowledge of.

10 Northwest prices have been compared to
11 state and national averages, and nationwide, prices
12 have fallen a \$1.23 from a year ago according to
13 GasBuddy.com. State-wide, they have fallen a \$1.08.
14 And in Chittenden County, they've fallen by a
15 dollar.

16 A great deal of misinformation has been
17 released about the gasoline industry in Vermont, and
18 I want to provide those facts. According to the
19 National Association of Convenience Stores, which
20 tracks these things, there are 105 convenience
21 stores in Chittenden County; 61 are operated by
22 independent dealers, and 44 are operated by the six
23 distributors operating four or more stores, so there
24 aren't just three distributors, you know, there are
25 six that are operating their own stores in

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1 Chittenden County. Now that means that at least 68
2 different pricing decisions are made everyday, the
3 61 independents and the six distributors.

4 When dealers set their prices in
5 Burlington, or Berlin, or Brattleboro, they don't
6 look at the national average, they don't look at the
7 state-wide average, they don't find out what's going
8 on in Rutland or in Randolph; instead, they consider
9 their own business circumstances, the cost of the
10 product sold, the cost of running the business and
11 what competitors in the immediate area are doing.
12 It's easy to do. We post our prices on 5-by-12-foot
13 signs 14 feet above the highway.

14 Profitability in this industry is cyclical,
15 although margins can be significant at times, as
16 they have been shown to be here; they can also be
17 nonexistent and sometimes negative at other times.
18 Business owners hope to balance the highs and the
19 lows and lined up with a reasonable profit at the
20 end. The fact that prices vary so much across the
21 state -- prices vary across the State and within
22 regions is proof that competition exists. And the
23 data that NAT's (phonetic) provided us reveals as
24 population to store density and the density of store
25 ownership that is more competitive than the national

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1 and regional average and not less so.

2 Chittenden County has 1400, roughly, people
3 per retail outlet. Across the northeast, there are
4 2800 people per store, and nationally, about 2600.
5 So there are more independent stations competing for
6 your business here than elsewhere, and with 61
7 dealers in the area and six chains, at least 67
8 individuals set the price everyday. Consumers have
9 a big role to play in bringing prices down. The
10 most important thing for station owners is
11 maintaining their share of the market in the area
12 they compete in.

13 There's a difference of more than 22 cents
14 a gallon between the high price and the low price in
15 Burlington right now. You can go on GasBuddy, and
16 you can find the high price and the low price.
17 Within the last week, the price has been as much as
18 37 cents a gallon. If the majority of the consumers
19 in this area always shopped at the lowest-priced
20 station, all the prices would come down, that's the
21 way it works.

22 But consumers don't apparently shop that
23 way. Drivers buy gasoline at places that are
24 convenient to their house or where they work. They
25 buy by brand because they have a certain credit

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1 card, or they go to a place that honors the discount
2 they got by shopping at the local grocery store.
3 And the new one is, if you pay by using your cell
4 phone with a direct debit out of your bank account,
5 you get another 10 cents off per gallon. So a lot
6 of what you see on the street isn't necessarily what
7 people are paying.

8 The competitive market doesn't necessarily
9 guarantee bargain-basement prices. Vermont has the
10 lowest volume of gasoline sales in all of the lower
11 48 states and more stores per capita than others.
12 This means there are fewer gallons for individual
13 dealers to recover the cost of high taxes, high
14 property costs, high labor costs and high insurance
15 costs. These costs are perceived to be higher in
16 northwestern Vermont than in other parts of the
17 state.

18 An underlying theme is that some owners are
19 somehow acting together to control the price. If
20 this is true, then the Attorney General should
21 investigate and bring these people to justice.
22 Federal and State laws prohibit collusive behavior
23 with fines available of up to \$100 million. The
24 Attorney's General's Office has all the authority it
25 needs to investigate and prosecute any bad actors.

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1 If anybody is engaging in any such behavior, they
2 should be apprehended and prosecuted.

3 One public figure has made a big deal out
4 of the fact that several distributors won't meet
5 with him to discuss pricing. Of course they won't,
6 that is a violation of the law, whether it's with a
7 member of Congress or people sitting around the
8 coffee shop.

9 So to summarize, the facts confirm that
10 this is a very competitive market, but competition
11 doesn't necessarily guarantee bargain-basement
12 prices. Consumers have to be a big part of the
13 equation and shop for the lowest price. There was a
14 difference of 22 cents a gallon between the high and
15 the low in Burlington this morning, and if everybody
16 went there, all the prices would come down.

17 And I'd be happy -- Steve and I would be
18 happy to answer any questions you have about our
19 business or the markets.

20 CHAIR: Steve, did you want to add anything
21 to that?

22 MR. PIETRYKA: I'm fine (unclear).

23 CHAIR: You're here for -- you're backup?

24 MR. PIETRYKA: I'm here to answer
25 questions.

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1 CHAIR: Loren?

2 REPRESENTATIVE MEMBER: So do you think the
3 price of real estate taxes are higher in Chittenden
4 County than they are in the rest of the state?

5 MR. CHOQUETTE: That's yours, Steve.

6 MR. PIETRYKA: I don't have the knowledge,
7 I mean I believe Chittenden County is higher, but I
8 don't have county by county or town by town --

9 REPRESENTATIVE MEMBER: Do they have a
10 surcharge -- I know they have a tax surcharge on
11 some items. Are they taxing the gasoline?

12 MR. PIETRYKA: No, there's no -- no,
13 there's no gasoline tax.

14 REPRESENTATIVE MEMBER: I would think that
15 would be a lot more money to do business in
16 Chittenden County than it would any other (unclear).

17 MR. CHOQUETTE: I would agree with you.

18 CHAIR: Anyone else? Representative
19 Sullivan?

20 REPRESENTATIVE SULLIVAN: Thank you, and
21 thank you for your testimony. I'm just -- I need
22 you to walk me through this. We just had testimony
23 on the phone and from Senator Sanders' Office, both
24 saying clearly that there is no competition -- that
25 the problem is the lack of competition. You've just

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1 cited multiple -- tell me how, bridge this
2 difference. Why am I hearing two entirely different
3 stories?

4 MR. PIETRYKA: I don't know, I mean
5 (unclear).

6 REPRESENTATIVE MEMBER: I mean you look
7 around at Vermont and the amount of gas stations we
8 have, there's certain communities now that will not
9 allow another one. It's prohibited because there's
10 too many, but still, consequently, you're looking
11 for customers because you're not preventing me from
12 making a living somewhere where I'd want to. So
13 Joe's stat saying how hard we fight for a customer
14 is very true. It's difficult to maintain customers
15 because the competition is tough.

16 REPRESENTATIVE MEMBER: I'm still mystified
17 as to why very competent individuals are so widely
18 (unclear) testimony.

19 MR. PIETRYKA: Well, I would be glad to sit
20 and talk to any of them and give them my version
21 (unclear).

22 (laughter)

23 MR. CHOQUETTE: I would point out that
24 Steve is talking about two different levels of
25 competition or areas. There's a competition on the

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1 street, you know, for retail price, which is, you
2 know, 61 independent dealers and six, I guess,
3 chains that own four or more, but his business
4 competes for the dealers, so they -- and they
5 routinely, you know, knock on each other's door and
6 try to steal the business away.

7 So you'll see, you know, Mike might be a
8 Mobil, but, you know, someday you might drive by
9 Mike's store, and the next day he'll be an Irving.
10 And that's because Mike, you know, has been
11 persuaded to change.

12 CHAIR: Curt.

13 REPRESENTATIVE MEMBER: (unclear).

14 MR. CHOQUETTE: Yeah, 61 independent
15 dealers and the six, I guess, the six distributors.
16 So the distributors, if you key up, I'll give you
17 some numbers. Champlain Oil has four stores I think
18 that they own and operate in the Burlington area,
19 they deliver to seven. So Steve probably makes the
20 decision for four, and the seven people that they
21 deliver to make their own decision to their --

22 REPRESENTATIVE MEMBER: So the decision
23 (unclear).

24 MR. CHOQUETTE: The 67, right.

25 REPRESENTATIVE MEMBER: And (unclear).

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1 MR. CHOQUETTE: There was a 22-cent
2 difference I think this morning, but it's been
3 changing so fast I'm going to -- you know, I --

4 REPRESENTATIVE MEMBER: (unclear) 22-cent
5 difference.

6 MR. CHOQUETTE: Yes, yeah.

7 REPRESENTATIVE MEMBER: (unclear).

8 MR. CHOQUETTE: In Chittenden County.

9 REPRESENTATIVE MEMBER: I'd like to ask, if
10 I can -- my job takes me a lot of places around the
11 state and probably the only one in here who's been
12 where I have been in the last day. Yesterday I was
13 in the Northeast Kingdom, down through Bradford,
14 Lyndonville and through the Quechee-White River
15 area, ended up in Manchester and back in the Rutland
16 area this morning, and back again up the Route 7
17 corridor today and Vergennes, down Shelburne Road,
18 down Williston Road, out into Susie Wilson Road,
19 (unclear), Williston, and -- since yesterday
20 morning, so I'll be glad, when I do get home
21 tonight, that that (unclear).

22 But generally speaking, there's always the
23 renegade on both sides. Generally speaking, I found
24 \$2.35 and \$2.44 in that entire area. Yes, there is
25 someone who lists 2.29, and yes, there is the ones

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1 at 2.50 if you look at -- the places I've been, yes,
2 in the last day. And I know you all have GasBuddy,
3 but I can sit here and tell you with my own eyes,
4 with my own mouth that I saw these in the last
5 day-and-a-half.

6 REPRESENTATIVE MEMBER: (unclear).

7 CHAIR: Representative Russell.

8 REPRESENTATIVE RUSSELL: (unclear).

9 REPRESENTATIVE MEMBER: I made the comment
10 that there's certain towns and certain counties now
11 that won't allow another gas station to be built.

12 REPRESENTATIVE MEMBER: (unclear).

13 REPRESENTATIVE MEMBER: I'm pretty sure
14 Shelburne Road is one of them, but I don't know
15 actually which towns don't, but I do know there are
16 towns that have regulations in their town that are
17 prohibiting other gas stations because the thought
18 is there's too many now.

19 REPRESENTATIVE MEMBER: How about Rutland?

20 REPRESENTATIVE MEMBER: I'm in the Rutland
21 area, and I'm not aware of that in Rutland now.

22 REPRESENTATIVE MEMBER: (unclear).

23 CHAIR: Representative Botzow.

24 REPRESENTATIVE BOTZOW: I just have two
25 questions. The first one is sort of (unclear), it's

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1 not -- when was the last time a business with a
2 different ownership came and opened a place where
3 you could buy gas in the area that we're talking
4 about?

5 MR. CHOQUETTE: That might be Champlain Oil
6 in Ferrisburg.

7 MR. PIETRYKA: We just opened our
8 Ferrisburg store in the last ten days.

9 REPRESENTATIVE BOTZOW: But you are an
10 existing business, and that would be a branch. I'm
11 wondering when was the last time that a new business
12 selling the same product came into the market?

13 REPRESENTATIVE MEMBER: Yeah, I can --

14 CHAIR: That is a good question.

15 MR. CHOQUETTE: Yeah, I think you remember
16 it last -- Well, remember the Transportation
17 Committee remember last session that Tom Folly from
18 Summit Distributors came in. That business evolved
19 from the one that was in White River Junction,
20 Johnson & Dix -- yeah, which the people retired and
21 they split up their business, and it went in a
22 couple different directions, and I think that was
23 about four years ago.

24 REPRESENTATIVE MEMBER: Different name, but
25 the business was existing (unclear).

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1 REPRESENTATIVE MEMBER: Where were they?

2 MR. CHOQUETTE: The business, itself, was
3 located in Lebanon, New Hampshire.

4 REPRESENTATIVE MEMBER: And did they sell
5 into the northwest area of Vermont? I'm just
6 wondering if we just sort of have the same players
7 for a long time which built a culture and not --
8 there's most places, that I know around, is the
9 little rejuvenation of one time because somebody
10 comes in. And it leads to sort of -- what I'm
11 really trying to understand is that it seems that
12 there are -- there's probably many many business
13 philosophies. If you want me to characterize it, on
14 one end, you have charge what the market will bear;
15 on the other end, you have undercut the other guy
16 and to get margin markets bear.

17 Is there a culture on that parameter that
18 is different to northwest Vermont because it seems
19 that that culture is different when I drive the
20 length of the state, like you, twice a week, and I
21 drive through -- come from and drive through
22 different areas. Not Burlington, but I do go there
23 often for other needs of business. I'm just
24 wondering, is there an explainable cultural
25 difference in how people markets (unclear) than

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1 there are in other parts of the State where it seems
2 to be more --

3 MR. CHOQUETTE: It's quite different at
4 least by appearance.

5 MR. PIETRYKA: Got a lot in that -- thing.
6 (laughter)

7 MR. PIETRYKA: Let me start by trying to
8 answer for you. As an example, Rutland County,
9 Rutland area, Midway Oil happens to be located
10 there. You go through Rutland, most, not all, a lot
11 of the stations in Rutland are under (unclear)
12 Midway Oil, as is Stewart's is very prevalent down
13 in the Rutland area. They're a New York company,
14 but they have many outlets throughout the Rutland
15 area. Champlain Oil happens to be based in South
16 Burlington; SB Collins happens to be based up in
17 St. Albans.

18 So a lot of it is the fact of where we are
19 and where the business grew from, no different than
20 Sherman V. Allen in the Rutland area. His business
21 is put on (unclear) down in that area. So there's
22 no culture, but there is the --

23 REPRESENTATIVE MEMBER: (unclear) Vallee
24 because of that, and I said the best thing New
25 Hampshire did for us last year was raise the gas

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1 tax, they raised it 4 cents.

2 REPRESENTATIVE MEMBER: So let me ask this
3 question, is that if the profit margins are so high
4 according to these statistics, why aren't other
5 companies opening up in your area?

6 MR. PIETRYKA: I can answer that.

7 Right now, -- and I just was having this
8 conversation with one of my customers in the White
9 River area, and I won't (unclear), yet, and he's in
10 a position now that he's got to decide if things are
11 all -- he's got to decide whether or not he wants to
12 stay in the gasoline business. He called me this
13 afternoon, you know, "What does it cost for an
14 installation these days?" And I asked him what is
15 he looking at? And he was looking at four pumps and
16 a canopy and all the technology. And I said, you're
17 looking at about \$250,000. And he was floored, he
18 said, "Excuse me?" I said, you're looking at about
19 \$250,000, minimum, to do what you're talking about.

20 So the people that want to get into
21 business, I've got more people that I have right now
22 that would like to probably get out of that than
23 want to get into it because of the past and the
24 regulations that go with that industry. Our
25 industry is heavily-regulated, not to complain about

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1 it, but it is.

2 So you don't have a whole lot of
3 independent businessmen or women that want to have
4 the wherewithal or take out a pocketful of money,
5 they're not choosing to go into our business in this
6 state.

7 MEMBER REPRESENTATIVE: Arguing that the
8 profit margin's not high enough to stimulate
9 competition?

10 MR. PIETRYKA: I'm arguing that there is
11 not enough profit for an independent owner to be
12 able to sell gas, with the 700,000 people in this
13 state, that -- he would not live -- he or she would
14 not live long enough to sell enough product -- you
15 can hit a calculator, as well as I can, you can go
16 to a bank and find out what the interest is, and
17 take it out of \$250,000 and figure out you're making
18 10 cents, 20 cents a gallon, and that may be less,
19 and start saying how many years is this going to be
20 broad-break even, never mind making any money, I
21 mean just break even.

22 CHAIR: Thank you for your answers, but the
23 constant -- only because I want to get to the core
24 of something that we seem to revisit again and again
25 and again, and I'm sure we would prefer not to

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1 (unclear) and again and again and again, and I'll
2 leave it there.

3 MR. PIETRYKA: Thank you.

4 CHAIR: Thank you.

5 MEMBER REPRESENTATIVE: I have one more
6 question. When you mentioned the 61 independents,
7 44 -- I call them the big boys, but, you know, we
8 all are careful, how many of those independents are
9 supplied by a big boy?

10 MR. PIETRYKA: I've got that information.
11 Give me a second for that. I've got -- I mean I can
12 give you that quote, and we go by year (unclear).

13 MEMBER REPRESENTATIVE: Right, I think we
14 I'll know what I mean, --

15 MR. PIETRYKA: It might be just a term for
16 it, but --

17 MEMBER REPRESENTATIVE: (unclear).

18 MR. PIETRYKA: Ah, geez. Let me -- I'll
19 just run down this list real quick, --

20 REPRESENTATIVE MEMBER: Okay, yeah.

21 MR. PIETRYKA: -- just get the math done.
22 There's 35 dealer stations. Handy at 18 stations;
23 Westville, 14; (unclear) 14; RL Vallee, 7; Go-Go, 7
24 and Cumberland Farms, 6. Now those are places that
25 will be immediate area that was discussed. Does

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1 Champlain Oil have more (unclear) than that?
2 Absolutely. So doesn't RL Gado (phonetic). Of
3 those 61, most of them are under contract with a
4 variety of those. I think they look more when
5 they're with us, I wish they were.

6 CHAIR: I hear you there. My point is,
7 they're getting -- these 61 independents are
8 basically -- and this is the Burlington area,
9 Chittenden County area -- are getting their fuel
10 from a variety of the larger suppliers who are the
11 other owners of the other 44 stations, they own
12 their own chains.

13 MR. CHOQUETTE: But they're required to
14 deliver their fuel to these owners at the same price
15 they deliver to their own station.

16 CHAIR: Thank you for answering my next
17 question. (laughter) You must have read that.

18 MR. PIETRYKA: Yeah, he read that.

19 CHAIR: Okay, that's important.

20 MR. CHOQUETTE: And that's by Federal Law.
21 The Robinson-Patman Act says that you can't treat
22 any competitors in a service area differently than
23 any other.

24 MEMBER REPRESENTATIVE: All right.

25 CHAIR: So I've got to tell you, and I'm

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1 not here to put anybody on the spot, but I (unclear)
2 phone calls, and frankly I'm kind of fed up with it,
3 and that's our job, to take phone calls and take
4 complaints, but I'd like to have an answer. You
5 know, I don't like telling a constituent of mine
6 that, oh, yeah, the price is higher in Chittenden
7 County because this guy puts fresh flowers in his
8 bathroom, and that's what we sat here and listened
9 to -- (laughter) -- two years ago, you were here,
10 Joe. That doesn't fly with people.

11 I can explain away a nickel from Albany to
12 Chittenden County, okay, and I can explain away the
13 higher cost of being in business, the higher cost of
14 labor, insurance and all of that stuff. But I want
15 to back up and tell you that -- and I'm not going to
16 mention names, but I had a guy call me once, and
17 said, "Can you stop to my station on the way to
18 Montpelier?" Last year. I said, sure, I went to
19 school with the guy, so I know him. He said, "I
20 want to show you something." He threw his invoice
21 down on the counter, said "Take a look at this,
22 here's my price."

23 He showed me a (unclear), okay, he said,
24 "Now look at my sign, they're the same." This guy
25 has a three-bay mechanical operation, thank God for

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1 him because he's surviving -- hope I just didn't
2 give away his identity.

3 MEMBER REPRESENTATIVE: You did.

4 CHAIR: But, you know, he's not -- it's a
5 wash on the fuel, and when he pumps it, he's losing
6 money. So -- now you're telling me that if he's
7 paying, at the time, I think it was, I don't know,
8 2.60 back then, I'm not sure, that this distributor
9 is selling to himself at 2.60 also at some of his
10 private stations?

11 MR. CHOQUETTE: I am. I said that this was
12 a cyclical business, that margins go up and margins
13 go down, and they can be zero or negative. And
14 these guys, you know, the heroes will tell you that
15 a year ago margins were --

16 MR. PIETRYKA: Again, I don't want to take
17 everybody's time, it's a complicated business, it's
18 a complicated answer. But really what has happened
19 with Chittenden County this summer, fall, whatever
20 you want to call it, whenever this started, more
21 times than not in industry is what -- you just
22 described that, that people make zilch, especially
23 when they're taking your credit card fees and all
24 that kind of stuff. But they use it as a (unclear)
25 to get in the door.

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1 More and more of the independent dealers,
2 that I have out there, are finding it harder and
3 harder to get by, as we hear you all day long in the
4 State House, on every industry, but they're finding
5 it harder and harder to get by. So what happened
6 this year was totally unforeseen, and certainly by
7 me, and I'm in the industry. Wholesale starts
8 bombing, I expect it, I mean we found (unclear) of
9 it. What had happened is, in my humble opinion, is
10 all of a sudden these dealers who were struggling,
11 and I'm charging receivables, I can vouch for that,
12 I think rapidly started thinking, you know what?
13 This is once in a lifetime, let me make a little
14 money. Let me be able to get through the winter
15 because winter up here is a tough time -- knowing
16 that many times when the price falls they go out and
17 drop the price, and the next day, your OPIS would be
18 up 10 cents, and they're like oh, boy, I was down 8,
19 it went up 10 -- and going up is always much harder
20 than going down. You get retail, you go up, it's
21 much harder.

22 So what happened is, you got a time when
23 everybody was stunned that the wholesale kept
24 falling, and that's the good news, we're all here
25 saying the price of gas is down. No one expected

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1 the gas to be down at the bear price it is right
2 now. And what you're seeing basically in my
3 transport -- where I've been in the last couple of
4 days, it's all catching up. It's just a matter of
5 some towns go a little quicker than others, but they
6 all catch up. They're always within range.

7 But again, and Joe's pointed this out,
8 there's always going to be somebody who's the
9 cheapest, there's always going to be somebody who's
10 the most. I mean I can go to Wal-Mart and get a
11 bottle of water way cheaper than I can at a
12 convenience store. So the business is complicated,
13 and it's tough on the independent dealer, too, when
14 they know they're making a little bit of money, that
15 their tank is going to be decertified by the State,
16 at some point. And they're saying, okay, how am I
17 going to make money to be able to install that new
18 tank and pump?

19 It's very complicated, but I can sit here
20 and tell you that if we were sitting here a year
21 ago, like Joe said -- I would love to have been
22 sitting here a year ago, because I could sit here
23 and show you that every dealer and every wholesaler
24 was losing money. So yeah, for a few months, were
25 people making some money? Yes. Was it egregious?

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1 No. I mean these small independent owners, like you
2 are, that are just trying to make a living.
3 Consequences are, okay, they can't make a living,
4 they close up shop, their four, five, 10 employees
5 go to the unemployment line, and we come back here
6 and talk about the State economy. It's a tough
7 business, it's a cyclical business, and it's the
8 dog-chasing its tail sometimes.

9 CHAIR: (unclear).

10 MEMBER REPRESENTATIVE: Joe -- either one
11 of you. You mentioned there are places that
12 (unclear). But do you have any idea of what amount
13 of stations actually have closed? Say within the
14 past three or five years, or something, just, you
15 know, they go out of town, like --

16 MR. PIETRYKA: Oh, we could get that
17 information, but like just in the last couple of --
18 last six months, we pulled our tanks in our location
19 in Johnson, Vermont, we've sold our location in
20 Winooski, Vermont, because it was not
21 financially-feasible to make it work with the
22 current volumes and the current state of (unclear).
23 So I mean I -- we could provide you that, but I
24 don't have it off the top of my head.

25 MEMBER REPRESENTATIVE: Maybe you're

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1 (unclear).

2 REPRESENTATIVE MEMBER: I don't know, I
3 don't know the answer to that --

4 MR. PIETRYKA: I mean we could -- we could
5 (unclear).

6 (people speaking over each other)

7 CHAIR: So I don't want to cut you short,
8 but to be respectful, we have one more person on the
9 list, so I'm going to stop you there. And to be
10 respectful to the public that showed up, we have
11 some people clearly that have signed up to speak,
12 too, that we can put them in at 6:30, so --

13 MR. PIETRYKA: Thank you.

14 MR. CHOQUETTE: Thanks a lot.

15 CHAIR: Up next, Jim Harrison, who is the
16 President of the Vermont Retail Grocers'
17 Association. Jim, thanks for coming.

18 MR. HARRISON: Good evening, (unclear).

19 CHAIR: Sure you are. (laughter)

20 MR. HARRISON: What else would I be doing?
21 By way of introduction, I'm Jim Harrison, and I
22 represent the Vermont Retailer Grocers' Association,
23 and as Joe Choquette mentioned earlier, we're sort
24 of joined at the hip. Joe represents our petroleum
25 distributors, and I represent the stores through

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1 the Retail and Grocers' Association.

2 Vermont's a small state, and the more
3 complicated we make it with different associations,
4 it makes it inefficient. As Warren knows,
5 Representative Kitzmiller knows, that we merged with
6 the retail association to avoid some of that
7 duplication.

8 Anyhow, on the retail side. Our members
9 include a wide variety of retail stores today. A
10 large number of them are considered convenience,
11 country or small independents that retail gasoline.
12 We believe in open and fair markets. We do not
13 support uneven playing fields, like where a
14 certain -- as an example, on-line retailers can sell
15 to Vermonters without collecting sales taxes, but
16 others do have to collect.

17 Retailers have to balance a large number of
18 factors when they -- how they do business and stay
19 in business -- with the recent increase in minimum
20 wage, for example. One store I visited yesterday
21 gave each of their employees a corresponding
22 increase in pay because they felt for them that was
23 the right thing to do, and they wanted to do that.
24 However, they needed to make some adjustments, and
25 they're going through that adjustment process,

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1 because at the end of the day, it's a zero, some
2 gain.

3 One of the things they did was increase the
4 cup of their coffee 14 cents. That may sound
5 modest, but some of the customers did not think that
6 it was modest, that it was going to cost them extra
7 for their shot of caffeine each day. So there's no
8 easy to answer, but that was one of the things,
9 decisions they made. They could have increased the
10 price of the jar of pimentos, but they wouldn't sell
11 enough pimentos, they doubled the price to make a
12 difference.

13 If I could explain how every business, or
14 for that matter, every consumer made their
15 decisions, I wouldn't be sitting here tonight.

16 Last week, while traveling on Shelburne
17 Road in South Burlington, there were two branded
18 stations right across the street from each other,
19 right across, and there was a turn-around that you
20 could, you know, change direction. The price
21 difference at that snapshot, when I was going
22 through, was 7 cents a gallon. Now we've all made a
23 different decision. For some people, you know, the
24 extra dollar for that fill-up to your tank or less,
25 is not worth it. I'm going this direction, time is

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1 tight, I'm going to be bumped; others maybe turn
2 around and do it, that's a choice we make. I can't
3 explain why there's a 22-cent difference, tomorrow
4 it may be a 15-cent difference between the high and
5 the low.

6 In the Burlington area, I know there's a
7 lot of different traffic patterns and there's a lot
8 of cars on the road -- it sounds like Mr. Pietryka
9 is one of those cars on the road. (laughter)
10 Riverside Ave. oftentimes is one of the lower-priced
11 areas. It's not that far from, you know, Williston
12 Road, Shelburne Road, or Route 15, Pearl Street, I
13 mean it's really not. But it is what it is, and
14 maybe, you know, for the dollar or the \$2.00, it's
15 just not worth the difference. And there are many
16 times that I, as a consumer, probably feel the same
17 way; other times, I like to save my pennies.

18 We have this ongoing argument with my
19 father-in-law who's 89. He shops at a warehouse
20 club whenever he can. He drives 15 miles to get
21 there through all the traffic, and then he buys
22 cases of stuff. And whenever my wife goes to visit
23 him, she's just so frustrated because she's throwing
24 out outdated yogurt and other things because, you
25 know, the two of them cannot consume that much

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1 product. Well, in his eyes, he's saved 10 cents or
2 whatever it is. Everybody's different, and we all
3 look for different things.

4 More specifically getting into the
5 legislation (unclear), and I have no idea where you
6 folks, the committee members are going to go and
7 what you're going to look at, but right now you have
8 a bill that (unclear). The legislation adds a
9 barrier of selling one's business by requiring a new
10 hurdle and approval by the Attorney General's
11 Office.

12 When Representative Marcotte, and I know
13 he's young, but someday when he decides that it's
14 time to sell his store, and because he so happens to
15 retail gasoline, he's got to now go to the Attorney
16 General's Office 60 days ahead of time and get the
17 wholesale approved, if he can. What if the Attorney
18 General's Office looks at him and says: Geez, we
19 don't really know that Jimmy Quick Store, you know,
20 (unclear) to this person. Now okay, that buyer is
21 out and we've got to find a new buyer. By then, he
22 loses business because people on the street hear
23 that he's selling.

24 Most store owners, when they sell, they try
25 to keep it quiet, they don't want to lose customers

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1 because, you know, things are changing. You know,
2 you're going to be -- you're out the door, whatever.
3 It just gets complicated, it adds legal costs
4 through the whole transaction, and it adds
5 potentially discouraging buyers for fear they may
6 get (unclear). And in some cases, you know,
7 competition is actually enhanced by selling a store.
8 In some cases, the market has five locations, it no
9 longer supports five, and someone's got to, you
10 know, leave the market, and sometimes they sell out
11 even if it's their level that property is (unclear)
12 independent owner because it may be the only answer
13 for them. There are just a lot of things.

14 Ultimately we believe it will lead to a
15 lower price (unclear) seller out of business. And
16 these independent stations, stores (unclear). As
17 was mentioned earlier, the average -- the number of
18 people per store in Vermont (unclear), but it also
19 means that stores have less volume on average in
20 which to spread out the fixed product.

21 You know, property taxes don't change
22 because we sold fewer gallons per customer. So you
23 have -- you know, there's a lot of (unclear), your
24 mortgage payment that came, you know, your license
25 fees don't change. So there are things that do make

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1 it more expensive because you're operating, on the
2 average, a smaller bargain location.

3 As was also mentioned before, there are
4 both Federal and State laws against price-fixing or
5 collusion. These laws could be enforced if they're
6 a violation. I also believe, and I'm not a lawyer,
7 so I haven't studied the green book that much, but I
8 believe we have whistle-blower protections on the
9 book for failure to report unlawful conduct by the
10 employer; if we don't, we should.

11 If you operate a repair shop, for example,
12 and your owner, your boss, your manager tells you to
13 take that used oil and dump it out back, apparently
14 that's against the law, and that employee ought to
15 be able to report that to somebody, and hopefully
16 they do. That's just wrong.

17 But the bill says we're going to give you
18 an incentive, we're going to give you a cut. It's
19 like being the lawyer on a contingency basis, wow.
20 I just might win the lottery here. What that leads
21 to is a whole bunch of witch-hunts by either
22 disgruntled employees or others that hope to win
23 that lottery. That's just, from my perspective,
24 that's just bad public policy. Yes, (unclear)
25 whistle-blower; no, don't provide the incentive by

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1 (unclear) settlement we get, wow.

2 I also urge the (unclear) not to do
3 something because we think that someone is making a
4 profit (unclear). Potentially adding more red tape
5 to the (unclear) can ultimately increase costs.
6 (unclear).

7 CHAIR: Thank you. Quickly, (unclear).

8 MEMBER REPRESENTATIVE: The lady ago asked
9 questions, you're (unclear). (laughter).

10 CHAIR: Jim, thanks, appreciate it. Thank
11 you for sticking around. So a couple people from
12 the public, and I believe you put your name --
13 Richard Barnes from the Sandri Company.

14 MR. BARNES: Yes.

15 CHAIR: Anybody else out there want to
16 speak? As soon as we're done, we have two speakers
17 left. Just raise your hand, we'll have you up here,
18 thank you.

19 MR. BARNES: My name is Richard Barnes, I
20 am senior-vice president of the Sandri Companies.
21 We operate out of Greenfield, Massachusetts, and we
22 supply the Sunoco stations here in Vermont. We also
23 do that in western New Hampshire, eastern New York
24 and western Massachusetts. The gasoline business is
25 doing something I've been associated with for some

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1 50 years, and I've seen the goods and the bads and
2 the uglies.

3 Some of you, I'm sure, can remember we had
4 raging price controls when we had the shortages in
5 '72, '78, '79, and then now recently. During those
6 times, sometimes the gasoline merchants, we were
7 lucky and made extra money, and then there's been
8 other times that we've been not on the other side,
9 you know, very very competitive, so --

10 And the other one thing I would like to
11 address is the change in the sale of gasoline and
12 the way things are done, particularly here in the
13 northeast. Used to be all the major oil companies
14 Mobil, Sunoco, Exxon Mobil used to own all the
15 properties, pretty well controlled the distribution,
16 did all the refining (unclear) terminal several
17 years, 20 years ago.

18 They changed their minds, withdrew from
19 these areas, like St. Albans, and they then sold
20 their distribution either to distributors like
21 ourselves, or the other ones that had been mentioned
22 here, and we operated those, or we leased them, or
23 whatever. And recently we have been doing the same
24 thing, we have sold a lot -- some of our locations
25 to independent operators, and they now buy from us

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1 and then resale and operate their businesses because
2 they can do it better than we can do it, and it
3 makes to grow a business and an asset.

4 We think that that's good for us, and we
5 think it is very good for the economy, and I think
6 that, if you folks remember, you have been saying,
7 you know, "Buy Vermont -- I see your ads everyday,
8 you know, "Work in Vermont," and do those things,
9 and we see that as a good thing, and we see that as
10 a long-term benefit to the whole state. That's all
11 of our current -- the situation.

12 I am here to really oppose this bill, from
13 the fact that I really don't want to report anymore,
14 we do a lot of reporting to everybody. I find that
15 it's, what I call onerous, because you're asking my
16 employees to maybe do something they shouldn't do if
17 they want to get (unclear) for an extra piece of
18 money. I think that our business records should be
19 kept private, they're our records.

20 We do reporting to the very similar State
21 agencies already, and if the Attorney General really
22 wanted to do that, then he can go to those State
23 agencies and subpoena those records of our business
24 (unclear). That pretty well completes everything
25 I've got to say. If you have any questions, I'd be

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1 more than happy to answer; if not; I'll get out of
2 your way.

3 CHAIR: Thank you, appreciate you coming.

4 MR. BARNES: Thank you very much for
5 letting me testify.

6 CHAIR: Terrance Keating. Still here?
7 Come on up. (unclear). Just give your name and
8 where you're from for the record.

9 MR. KEATING: Terrance Keating, I reside in
10 Fletcher, Vermont. Seems to me the discussion this
11 evening have alluded to the issue of price-fixing,
12 and so on, and I've been listening to that for a few
13 years, haven't fixed the problem, mostly discussion
14 on fixing it. I think what will fix the problem is
15 competition.

16 Unfortunately right now, we have
17 regulations that are here to protect Vermonters,
18 whether it be environmental, zoning, planning, and
19 so on, and those regulations are being used despite
20 the competition. And I think the Legislature, you
21 guys, and the executive branch and the judicial
22 branch, have it in your power to streamline those
23 regulations. I think down here in Montpelier
24 (unclear). (laughter)

25 UNIDENTIFIED SPEAKER: (unclear).

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1 MR. KEATING: I'm not a supporter of
2 Wal-Mart, by any means, but I'd rather see Wal-mart
3 make 3 or 5 cents a gallon, or COSTCO make 3 or 5
4 cents a gallon, than to see these three distribution
5 guys making 35 cents a gallon, that's not fair that
6 way. So I think you have it in your power to do
7 something, and to see that process out, so that
8 there is competition. And then I think if you were
9 to do that, the taxpayers, like myself, would be
10 more inclined to support any kind of gas tax you
11 might want to put in place to help with that other
12 big problem we associate, the deficit. (unclear
13 12-secs.)

14 CHAIR: So -- my turn. Just so you know,
15 whenever we do a gas tax, transportation -- all
16 right, so I'm going to talk transportation for a
17 minute, not commerce. The gas tax doesn't go
18 anywhere near anymore the deficit in the general
19 fund, we hang to that money like glue. I'm not
20 saying it never happened in the past, but going
21 forward, anything we do with gas taxes, and stuff,
22 stays in transportation, just for the record.

23 (laughter)

24 Anybody else? No one. Where are all those
25 people that were calling me? (laughter) Somewhere.

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1 So, -- okay, well, anyway, thank you for coming. I
2 appreciate everybody, some of you have traveled a
3 long ways, and it was great to have you. Have a
4 good evening.

5 (End of recording)

6

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In Re: Gasoline Pricing in Vermont

House Joint Committee - Transportation, Commerce and Judiciary - Committee Meeting - 1/22/2015

C E R T I F I C A T E

I, PAMELA MAYO HAMEL, hereby certify that the foregoing pages, numbered 3 through 68, inclusive, are a true, accurate and complete transcription, to the best of my ability, of a Recorded Joint Hearing with House Transportation, House Commerce, House Judiciary and some Senate Committees, on January 22, 2015, at 5:00 p.m., Rm. 35, in the matter of IN RE: GASOLINE PRICING IN VERMONT.

Pamela Mayo Hamel

Pamela Mayo Hamel

STATE OF VERMONT

SUPERIOR COURT

CIVIL DIVISION

CHITTENDEN UNIT

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)

CERTIFICATE OF SERVICE

I, Robert B. Hemley, Esq., attorney for Defendant Champlain Oil Company, Inc., certify that, on October 5, 2015, I served Defendant's Motion to Dismiss and Memorandum in Support of Motion to Dismiss on the counsel of record as follows:

Via E-mail and First-Class Mail, Postage Prepaid

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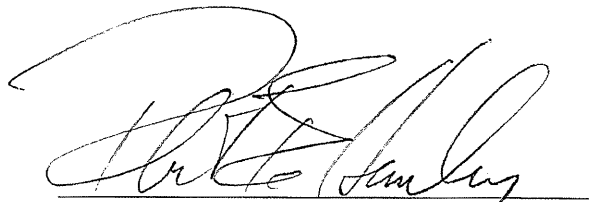
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Dated: Burlington, Vermont
October 5, 2015



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For Defendant Champlain Oil Company, Inc.

From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:32 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - R.L. Vallee's Motion to Dismiss and Memorandum of Law in Support of Motion
Attachments: 1977_001.pdf; 1978_001.pdf; 1979_001.pdf

From: Walter Judge [mailto:WJudge@drm.com<mailto:WJudge@drm.com>]
Sent: Monday, October 05, 2015 3:49 PM
To: 'Joshua Simonds'; 'jroddy@baileyglasser.com<mailto:jroddy@baileyglasser.com>';
'mmurphy@baileyglasser.com<mailto:mmurphy@baileyglasser.com>';
'onwabueze@baileyglasser.com<mailto:onwabueze@baileyglasser.com>';
'pmuench@baileyglasser.com<mailto:pmuench@baileyglasser.com>';
'rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>';
'rbehm@sheeheyvt.com<mailto:rbehm@sheeheyvt.com>';
'sreyome@sheeheyvt.com<mailto:sreyome@sheeheyvt.com>'
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barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>; Tristram J. Coffin
Subject: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - R.L. Vallee's Motion to Dismiss and Memorandum of Law in Support of Motion

Please see the attached, which was just filed. Hard copies are going out in today's mail.

Regards,

Walter E. Judge, Jr.<<http://www.drm.com/team/walter-judge-jr>> | Director | Litigation Group Downs Rachlin Martin
PLLC | Business Sense · Legal Ingenuity
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Also admitted in MA, ME.

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October 5, 2015

WALTER E. JUDGE, JR.
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wjudge@drm.com

VIA HAND DELIVERY

Christine Brock, Clerk
Vermont Superior Court
Chittenden Civil Division
175 Main Street
P.O. Box 187
Burlington, VT 05402-0187

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

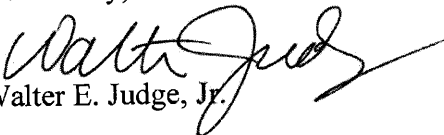
Dear Christine:

Enclosed for filing with the Court please find:

1. R.L. Vallee, Inc.'s Motion to Dismiss and Memorandum of Law in Support of Motion; and
2. Certificate of Service.

Thank you for your assistance.

Yours truly,


Walter E. Judge, Jr.

Enclosures

cc: Joshua L. Simonds, Esq. (w/encs.) (via electronic mail and first class mail)
Michael L. Murphy, Esq. (w/encs.) (via electronic mail and first class mail)
John Roddy, Esq. (w/encs.) (via electronic mail and first class mail)
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R. Jeffrey Behm, Esq. (w/encs.) (via electronic mail and first class mail)
Robert B. Hemley, Esq. (w/encs.) (via electronic mail and first class mail)
Tristram J. Coffin, Esq. (w/encs.) (via electronic mail)

16232588.1

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 DISMISS PLAINTIFFS' FIRST
AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND
AND MEMORANDUM OF LAW IN SUPPORT**

MOTION TO DISMISS

Defendant R.L. Vallee, Inc. ("Vallee") hereby moves the Court to dismiss Plaintiffs Jacob R. Kent, Anne B. Vera, Thomas R. Mahar and Dawn M. Mahar, and David C. Carter and Barbara Carter's First Amended Class Action Complaint and Jury Demand ("Complaint") pursuant to Vermont Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). While Plaintiffs claim in conclusory, and cloak and dagger, fashion that Defendants formed a cabal through "secret meetings and conversations, often conducted at undisclosed, out-of-the-way locations" to conspire to fix gasoline prices, Plaintiffs conspicuously fail to allege any facts in the Complaint of these meetings and conversations—no dates, times, places, participants, discussions, or

Downs
Rachlin
Martin PLLC

outcomes. Complaint at ¶ 79. That is because those meetings and conversations never took place.

Once Plaintiffs' threadbare allegations of a secret cabal are appropriately discounted, the remaining factual allegations in the Complaint describe nothing more than entirely lawful parallel pricing behavior, which in no way violates the Vermont Consumer Protection Act ("VCPA") or the antitrust precedent upon which it is based.

Attempting to avoid the inevitable dismissal that would befall a complaint that fails to adequately plead any direct evidence of a price-fixing conspiracy, Plaintiffs also allege a series of "plus factors" to support the *inference* of a conspiracy among Defendants—motive and opportunity to conspire, level pricing at a time of falling costs, the nature of the northern Vermont gasoline market, participation in the public licensing and permitting processes, membership in trade groups, and the use of restrictive deed covenants in real estate transactions. However, courts have routinely held that these "plus factors" are insufficient to state a claim of antitrust conspiracy to illegally fix prices, and they are likewise insufficient here.

The Court should therefore DISMISS the Complaint WITH PREJUDICE. As further support for its Motion, Vallee relies on the following Memorandum of Law.

MEMORANDUM OF LAW

Introduction and Summary of Argument

To overcome a motion to dismiss an antitrust conspiracy claim, a plaintiff must "allege enough facts to support the inference that a conspiracy actually existed." *Mayor of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). This can be done one of two ways: (i) by alleging direct evidence that the defendants entered into an unlawful conspiracy, or (ii) by

alleging circumstantial facts—“plus factors” in antitrust parlance—supporting the inference that a conspiracy existed. *Id.*

Here, the Complaint alleges a “highly effective, long-lasting and concealed” conspiracy to fix gasoline prices in three Vermont counties over a ten-year period. Complaint at ¶ 1. That is a mere conclusion. What is missing from the Complaint are allegations of facts showing that Defendants agreed to fix prices. Across more than 100 paragraphs and sub-paragraphs, the Complaint does not contain a single allegation of a meeting, a conversation, or a communication in which named individuals agreed to fix gasoline prices. Plaintiffs cannot and do not allege when or where this purported conspiracy began, how it was maintained, the methods of communication supposedly used to carry it out, or which individuals participated in it. Plaintiffs allege “secret meetings and conversations,” but they are surprisingly shy about sharing any details about these events in the Complaint. Conclusions styled as factual allegations are entitled to no weight on a motion to dismiss.

Also entitled to no weight are Plaintiffs’ self-serving, and circular assertions that “[for] the purpose of fomenting and effectuating their combination and conspiracy, Defendants and their co-conspirators did those things which they combined and conspired to do.” *Id.* at ¶ 57. Again, this is a conclusion and not an allegation of fact. A fair review of Plaintiffs’ filing shows that the Complaint improperly “assumes a conspiracy first, and then sets out to ‘prove’ it.” *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1034 (8th Cir. 2000) (“...a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly”).

Unable to allege direct evidence of a price-fixing conspiracy, Plaintiffs instead attempt to plead one through circumstantial evidence, but their alleged circumstantial evidence does not, as a matter of law, support an inference of agreement. Plaintiffs begin by alleging that Defendants—who operate in an industry where sellers publicly post their prices on huge, tall signs for all to see—kept their retail prices at or near the same level across a period of years, even when wholesale costs declined. But these allegations—which ask the Court to infer a conspiracy—also fail to pass muster under well-established antitrust precedent holding that such “conscious parallelism” may not support the inference of antitrust conspiracy because it is entirely consistent with lawful, economically rational commercial conduct. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

Plaintiffs then attempt to plug the holes in their Complaint with references to so-called “plus factors,” straining to support the *inference* that Defendants’ lawful conduct actually hid an unlawful conspiracy. This attempt also fails, as Plaintiffs rely on (i) legally impermissible considerations such as Defendants’ exercise of their First Amendment rights and lawful membership in trade groups and associations, (ii) factually and legally irrelevant market considerations over which Defendants have no control, and (iii) lawful conduct by individual Defendants taken outside of the Class Area. Try as Plaintiffs might, none of these allegations can transform Defendants’ lawful business conduct into antitrust violations.

Plaintiffs also spend considerable effort in the Complaint reciting the various rounds of legislative hearings concerning Defendants’ pricing practices, including requests that the Federal Trade Commission (“FTC”) investigate. Complaint at ¶¶ 8-10. While the Complaint is quick to cite gas pricing information concerning Greater Burlington allegedly provided by the FTC, Plaintiffs conveniently fail to mention that the FTC—a federal agency charged with antitrust

enforcement—declined the requests to investigate and that the legislative hearings yielded no evidence of illegal price fixing and led to no governmental enforcement action.¹

As set forth in greater detail in the Sections below, the Complaint should be dismissed with prejudice in its entirety for the following reasons:

- Plaintiffs have made only bare, conclusory allegations of direct collusion, alleging “secret meetings and conversations, often conducted at undisclosed, out-of-the-way locations” with absolutely no facts pled to support the idea that these meetings happened anywhere other than in Plaintiffs’ imaginations. These types of unsupported statements do not constitute “factual allegations” for pleading purposes, and fail under both federal and Vermont pleading standards. Therefore they should be given no consideration by the Court.
- Plaintiffs completely fail to posit any factual allegations of direct collusive behavior among Defendants that survive federal or state pleading requirements. The remaining factual allegations of the Complaint, even if accepted as true, do not give rise to an *inference* of antitrust conspiracy. Plaintiffs have made no factual allegations that can support such an inference.
- Given Plaintiffs’ failure to offer any proof of a direct conspiracy and/or those “secret meetings,” they have asserted, at best, an allegation of parallel pricing conduct. As numerous courts have found, parallel pricing is a phenomenon explainable by wholly legal market actions and rational pricing behavior. Courts have uniformly found that

¹ In testimony on behalf of the Vermont Attorney General’s Office before a joint hearing of the Vermont House Committee on Commerce and Economic Development and the Vermont House Committee on Transportation on January 22, 2015 (the “Joint Hearing”), Vermont Assistant Attorney General Ryan Kriger (“AAG Kriger”) stated: “[t]o prove a conspiracy going on you need actual evidence of a conspiracy. Looking at your opponent’s signs is not a conspiracy. Talking to each other, that’s a conspiracy. [Proof of owners actually talking to each other about setting prices] is the level of evidence you need to be able to show a price-fixing conspiracy in this area.”

parallel pricing conduct based on independent market decisions by competitors is not illegal and cannot support an inference of antitrust conspiracy.

- Given their inability to plead allegations showing existence of a price-fixing conspiracy, Plaintiffs urge the Court to consider various so-called “plus factors” as a basis for inferring collusive behavior. However, the “plus factors” that are alleged in this case—executive and legislative branch government inquiries which have gone nowhere, activity in the permitting process, and deed restrictions and involvement in trade associations—have routinely been held insufficient to support an inference of an antitrust conspiracy.

In sum, Plaintiffs have alleged no set of facts which would be considered direct evidence of collusive behavior. Nor have they alleged the type of “plus factors” that other courts have found adequate to support an inference of an illegal price-fixing conspiracy. The Complaint should be dismissed in its entirety.

**Plaintiffs’ Factual Allegations Indicate Legal Conduct
and Fail to Support a Direct or Inferred Antitrust Conspiracy**

1. Allegations of Parallel Pricing

Plaintiffs are six individuals who reside in Chittenden, Franklin, and Grand Isle Counties—which they identify as the “Class Area”—and who have made retail purchases of unleaded gasoline there in the past ten years. Complaint at ¶¶ 2, 17-24. Vallee and Defendants SB Collins, Inc. (“Collins”), Wesco, Inc. (“Wesco”), and Champlain Oil Company, Inc. (“Champlain”) are four wholesalers and retailers of gasoline who, according to Plaintiffs, together own 64% of gas stations in the Class Area. *Id.* at ¶¶ 5, 25-28. Plaintiffs claim that from January 1, 2005 to the present (the “Class Period”), Defendants’ gasoline prices moved ‘virtually

in lockstep' and that at points during that time period both gasoline prices in the Class Area and Defendants' profits were among the highest in the nation. *Id.* at ¶¶ 2, 5, 7-8, 63. Plaintiffs attribute this price consistency to what they allege is a "highly effective, long-lasting and concealed agreement[]" among Defendants to fix gasoline prices in the Class Area and thereby take exorbitant profits. *Id.* at ¶ 1; see also *id.* at ¶¶ 15 ("Defendants agreed to increase, decrease, and maintain their prices at or near the same time and by the same amount") and 45 ("Defendants have routinely controlled the price of unleaded gasoline in the Class Area through coordination of pricing amongst themselves").

According to Plaintiffs, Defendants' prices have remained within a few cents per gallon of each other, and their market shares within the Class Area consistent, even at times of declining costs when "[b]ut for the conspiracy, it would be in the economic self-interest of one of the stations to undercut the prices being charged by the other stations...[i]n such periods, rational, profit-motivated competitors would decrease prices and take market share." *Id.* at ¶¶ 65-67, 69-73. Plaintiffs point to this alleged price and market share stability, and the fact "[t]here is no competitive market explanation" for consistently high gasoline prices in the Class Area, as "a hallmark of price-fixing" for which "[t]here is little justification." *Id.* at ¶¶ 68-70.

2. Allegations of the Nature of the Gasoline Market in the Class Area

Plaintiffs point to what they allege are characteristics of the gasoline market in the Class Area that make it "ripe" for price fixing. They say that "[d]emand for unleaded gasoline is highly inelastic and thus the quantity demanded...changes little in response to price changes," both because there is no ready substitute for gasoline and because it would be inefficient to travel outside the Class Area to purchase gasoline. *Id.* at ¶¶ 41-43. Plaintiffs also argue that price fixing is facilitated by the fact Defendants collectively own 60% of the gas stations in Chittenden

County, 69% of the stations in Franklin County, and 75% of the stations in Grand Isle County, as well as by “numerous barriers to entry at the gasoline station level,” including required environmental permits, legal limitations on the number of gas stations in the Class Area, community objections to new stations, and the expense and complexity of operating gas stations and storing gasoline for sale. *Id.* at ¶¶ 44, 47-48. Plaintiffs do not claim Defendants are responsible for these inherent attributes of the gasoline market in the Class Area or that these attributes are the product of Defendants’ alleged conspiracy.

3. Allegations of Defendants’ Participation in Permitting Processes, Membership In Trade Associations, and Use of Deed Restrictions in Real Estate Transactions

Plaintiffs point to what they claim are “Defendants’ intractable and bad faith lobbying efforts” and “willingness to engage in aggressive, cynical lobbying and legal efforts through the use of Vermont Act 250 and parts of the zoning process to suppress competition” as evidence of antitrust conspiracy. *Id.* at ¶¶ 48-49. Specifically, they allege that in 2010 Vallee “oppos[ed] Walmart’s bid to build a discount store [in the Class Area] until it was written into the permit that ‘there shall be no sale of gasoline for automobiles,’” and that “Vallee has partnered with Wesco since 2007 to oppose Costco’s plans to build a filling station” in the Class Area. *Id.* at ¶¶ 50-51. Plaintiffs also claim that participation by Vallee in real estate transactions, restricting the future use of the properties, and Environmental Court proceedings, all of which were outside the Class Area (in Washington (Plainfield) and Caledonia (St. Johnsbury) Counties), are evidence of collusion by Defendants to fix gasoline prices in the Class Area. *Id.* at ¶¶ 52-54. Plaintiffs do not allege that the other Defendants participated in Vallee’s actions in those faraway towns or explain how isolated transactions outside the Class Area could impact pricing within it.

Although they do not allege a single meeting at or communication in which Defendants agreed to fix gasoline prices, Plaintiff allege what they say were “numerous opportunities to meet and discuss the fixing of gas prices within the Class Area.” *Id.* at ¶ 59. They point to Defendants’ membership in the Vermont Petroleum Association (“VPA”), a trade group that is a division of the Vermont Retail and Grocers Association (“VRGA”), as providing “ample opportunities to discuss wholesale and retail gas prices” at “meetings and more informal events such as golf tournaments,” but do not allege that any Defendants attended these meetings or events either individually or as a group. *Id.* Plaintiffs further claim that Defendants’ reliance on a VPA lobbyist to represent their interests before legislative committees is evidence of an antitrust conspiracy. *Id.*

4. Allegations of Governmental Investigations Into Gasoline Prices in the Class Area

Much of the Complaint focuses on legislative hearings into gasoline prices in the Class Area—none of which, it should be underscored, have resulted in any governmental enforcement action against Defendants. Plaintiffs point to requests by Vermont’s Attorney General and one of its U.S. Senators that the FTC investigate pricing in the Class Area and hearings held by the U.S. Senate Committee on Energy and Natural Resources as well as hearings by the Vermont Legislature into gasoline pricing in the Class Area. *Id.* at ¶¶ 8-10, 12, 74.² Plaintiffs claim that retail gasoline price reductions at Defendants’ stations in the lead-up to these hearings and price increases following their completion support the inference of antitrust conspiracy, but they cannot and do not allege that either the federal or state government took any action against Defendants based on information gathered in these hearings or that the resolution of these

² In testimony at the Joint Hearing, AAG Kriger stated: “[t]here was, in the summer of 2012, the Attorney General and Senator Sanders wrote letters to the Federal Trade Commission requesting that they do a further investigation, and they declined to do so.”

multiple hearings indicated any official finding of price fixing or other wrongdoing. *Id.* at ¶¶ 11-12, 74.

Plaintiffs additionally point to what they allege are unsatisfactory responses by Defendants (or their representatives) to questioning at the legislative hearings as evidence of price-fixing, saying, “no legitimate explanation has been provided by the Defendants” for prices in the Class Area. *Id.* at ¶¶ 11, 13. They say Defendants’ responses to legislative questioning have been “pretextual, nonresponsive, incomplete, and false” and were “mocked by a Vermont state representative.” *Id.* at ¶ 13. Plaintiffs also fault Defendants for discussing factors such as the other services provided at their gasoline stations, freight and transportation costs, taxation rates, wholesale prices, and labor and compliance costs when questioned by legislators, since in Plaintiffs’ view Defendants’ responses were “insufficient to explain the higher prices within the Class Area.” *Id.* at ¶¶ 82-86. Plaintiffs treat Defendants’ inability to explain gasoline pricing in the Class Areas to their satisfaction as supporting the inference of an antitrust conspiracy. That position has no support in antitrust law.

Argument

1. Plaintiffs’ Unsupported Statements of “Secret Meetings and Conversations” Do Not Constitute Factual Allegations for Pleading Purposes Under Either Federal or Vermont Standards

Plaintiffs’ allegations of Defendants’ collusive behavior lack any factual content and must be disregarded by the Court under applicable pleading standards. As examples of Plaintiffs’ vacuous allegations concerning Defendants’ affirmative agreement to conspire:

Defendants and their co-conspirators did those things which they combined and conspired to do, including, among other things, discussing, forming, and implementing agreements to raise and maintain at artificially high levels the prices for gasoline. Complaint, ¶ 57.

Defendants discussed and formed their anticompetitive agreements during secret meetings and conversations, often conducted at undisclosed, out-of-the-way locations. Complaint, ¶ 79.

The price for gasoline sold by the Defendants and those they supply in the Class Area is artificially high and noncompetitive because the Defendants control the market as an active and effective cartel. Complaint, ¶ 56.

Throughout the Class Period the Defendants expressly and through signaling behavior agreed to fix wholesale gas prices. Complaint, ¶ 58.

Defendants engaged in a successful, illegal price-fixing conspiracy that by its very nature was inherently self-concealing. Complaint, ¶ 77.

These are exactly the types of empty statements the Vermont Supreme Court has disregarded when considering a motion under Rule 12(b)(6).³ *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10 (observing that conclusory statements are not factual allegations for Rule 12(b)(6) purposes, since “courts [are] not required to accept as true ‘[c]onclusory allegations or legal conclusions masquerading as factual conclusions’ in [the] 12(b)(6) analysis.” *Id.* at ¶ 10 (quoting *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d. Cir. 2002))).

The United States Supreme Court is of like mind on this issue. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007) (“the complaint leaves no doubt that plaintiffs rest their [price-fixing] claim on descriptions of parallel conduct and not on any independent allegation of actual agreement...[a]lthough in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations”); see also *In re*

³ Numerous courts have also recognized that “[b]are conclusory allegations of [antitrust] conspiracy, without any facts or investigation, will violate Rule 11” obligations of reasonable inquiry and factual basis for statements made in court filings. *In re Publication Paper Antitrust Litig.*, No. 3:05-cv-0463, 2005 BL 33510 (D. Conn. September 6, 2005) at * 4; see also *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1496 (D. D.C. 1984) (“even in complex antitrust cases, plaintiffs may not rely on bare allegations coupled with the hope that something could be developed at trial to support those allegations”) and *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684, 690 (S.D.N.Y. 1987) (“Rule 11 place[s] upon [counsel] an affirmative obligation to conduct a reasonable inquiry into the relevant facts” before alleging antitrust conspiracy...[w]ere it otherwise, pleading would require no more than a list of names and a vivid imagination.”)

Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 326 (3d Cir. 2010) (“bare assertions” that defendants agreed to fix prices cannot support inference of antitrust conspiracy).

Indeed, beyond their entirely conclusory nature, the Court must also reject Plaintiffs’ allegations of “secret meetings and communications” because they entirely fail to describe purported actions by individual Defendants and instead only claim “they” took a series of broadly undifferentiated but wrongful actions in the service of an equally broad and undifferentiated purported “conspiracy.” See *SD3, LLC v. Black & Decker (U.S.), Inc.*, No. 14-cv-1746, 2015 BL 297407 at *6-7 (4th Cir. Sept. 15, 2015) (“[a] plaintiff in a [price-fixing] case cannot assemble some collection of defendants and then make vague, non-specific allegations against all of them as a group... if it fails to allege particular facts against a particular defendant, then the defendant must be dismissed. In other words, the complaint must specify how these defendants [were] involved in the alleged conspiracy, without relying on indeterminate assertions against all defendants”) (quotations omitted). Plaintiffs make serious allegations in their Complaint, and their accompanying press release, that Defendants expressly agreed to fix gasoline prices in the Class Area. Plaintiffs do not, however, provide even a scintilla of factual support for those allegations. Therefore, under federal and state pleading standards, the Court should disregard those conclusory and inflammatory allegations for purposes of Rule 12(b)(6).

2. The United States Supreme Court’s Decision in *Bell Atlantic Corp. v. Twombly* Must Inform the Court’s Antitrust Analysis

Rule 12(b)(6) directs dismissal of complaints for “failure to state a claim upon which relief can be granted.” “In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would

entitle the plaintiff to relief.” *Colby*, 2008 VT at ¶ 5. When Plaintiffs’ conclusory “factual” allegations are appropriately disregarded by the Court, it is clear that the Complaint does not meet the Rule 12(b)(6) standard articulated under *Colby*.

The Vermont Supreme Court has declined to strictly follow the lead of the United States Supreme Court, which in *Twombly* abandoned the “no set of facts” standard in favor of requiring a complaint to contain “[f]actual allegations [sufficient] to raise a right to relief above the speculative level” and do more than “create[] a suspicion [of] a legally cognizable right of action” in order to survive a motion to dismiss in the federal courts. 550 U.S. at 555-562; see *Colby*, 2008 VT at ¶ 5 n.1 (Vermont courts are not “bound by federal jurisprudence in interpreting our state pleading rules”).

Notwithstanding the Vermont Supreme Court’s maintenance of the “no set of facts” standard for procedural purposes, the interconnectedness of federal and state antitrust law and the uniform standard of commercial conduct they intend dictates that *Twombly* has an important role to play in the Court’s evaluation of the substantive inferences that may be drawn from Plaintiffs’ allegations. Although Plaintiffs have brought their price-fixing claims pursuant to the VCPA, 9 V.S.A. §§ 2451 *et seq.*, the viability of their claims ultimately rests on federal law. Complaint at ¶ 2, Counts I & II. The purpose of the VCPA “is to complement the enforcement of federal statutes and decisions governing unfair methods of competition, unfair or deceptive acts or practices, and anti-competitive practices.” 9 V.S.A. § 2451. The Vermont Supreme Court has observed that the “purpose behind both [the VCPA] and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct.” *Elkins v. Microsoft Corp.*, 174 Vt. 328, 336 (2002) (quotation omitted); see also 9 VSA §§ 2453(b) (interpretation of VCPA “will be guided by the construction of

similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act”) and 2453a(c) (interpretation of VCPA “shall be guided by the construction of federal antitrust law”). Thus, the Vermont Supreme Court has looked to federal law to hold that “[a]n agreement among competitors to fix prices is unlawful *per se*” under the VCPA. See *State v. Heritage Realty of Vermont*, 137 Vt. 425, 429 (1979) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)); see also Complaint at ¶ 1 (alleging that price-fixing “agreements are *per se* violations of the [VCPA]”). The Vermont Supreme Court has also repeatedly looked to federal antitrust precedent to determine the inferences that may be drawn from particular facts, including parallel pricing behavior of the kind alleged by Plaintiffs here. See *Heritage Realty*, 137 Vt. at 429-30 (citing, *inter alia*, *Theatre Enterprises, Inc. v. Paramount Film Distr. Corp.*, 346 U.S. 537, 540-41 (1954)); see also *Franklin Cnty. Sheriff's Office v. St. Albans City Police Dep't*, 2012 VT 62, ¶ 21 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986)) and *Peabody v. P.J.'s Auto Village, Inc.*, 153 Vt. 55, 57 (1989) (adopting federal definition of “deceptive acts” for VCPA purposes).

Twombly is not only, or even primarily, a case about the proper interpretation of the Federal Rules of Civil Procedure; rather, it is one in a series of cases in which the United States Supreme Court delineated the permissible inferences that may be drawn from particular facts at different stages of an antitrust proceeding. See 555 U.S. at 554 (noting that “we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence” and citing, *inter alia*, *Theatre Enterprises* and *Matsushita* in addressing permissible inferences from allegations of parallel business conduct). See also *e.g. Floors-N-More v. Freight Liquidators*, 142 F. Supp. 2d 496, 501 (S.D.N.Y. 2001) (“[t]he plaintiff must do more than allege the existence of a conspiracy—it must allege some facts in support of the claim”); *Telectronics*

Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 837 (S.D.N.Y. 1988) (dismissing complaint which alleged that the defendants “conspired and contracted [with each other] to restrain trade”). The Vermont Supreme Court can be expected to heed its statutory mandate, *Russell v. Atkins*, 165 Vt. 176, 182 (1996), and look to federal antitrust precedent when evaluating the inferences that may be drawn from particular factual allegations at the pleading stage just as it previously looked to *Theatre Enterprises* for evidentiary sufficiency and *Matsushita* for summary judgment purposes. This Court should therefore look to *Twombly*, and the lineage of federal antitrust law that preceded it, when it evaluates whether Plaintiffs have placed their allegations of Defendants’ parallel pricing in enough context to be suggestive of unlawful agreement to survive a motion to dismiss.⁴ See 550 U.S. at 554 (plaintiff’s “offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently”); *Green v. Springfield Med. Care Sys., Inc.*, No. 5:13-cv-00168-cr, 2014 BL 178855 (D. Vt. July 24, 2014) at *15 and n.8 (treating Vermont and federal antitrust standards as identical and noting that “dismissal of Plaintiff’s claims under the [V]CPA and the [federal] Sherman Act turn on the threshold issue of whether Plaintiff has proffered admissible evidence of the alleged collusion or conspiracy”); *Bergman v. Spruce Peak Realty*, 847 F. Supp. 2d 653, 672 (D. Vt. 2010) (explaining that a VCPA claim must allege facts “with sufficient particularity to notify Defendants of the who, what, when, where and how of the claim”) (internal quotations omitted); *Allen v. Dairy Farmers of America, Inc.*, 748 F. Supp. 2d 323, 333 (D. Vt. 2010) (“[T]o allege an agreement between antitrust co-conspirators

⁴ The Florida courts have already recognized that, despite the fact that they are not bound by the United States Supreme Court when interpreting state pleading rules, their legislature’s intent that federal antitrust precedent guide the interpretation of state antitrust law means “that Florida courts should look to *Twombly* in determining whether an agreement in violation of the Florida Antitrust law can be reasonably inferred from the alleged facts.” *MYD Marine Distributor, Inc. v. Intl. Paint Ltd.*, 76 So. 3d 42, 46-47 & n.4 (Fla. 4th DCA 2011) (noting prior state court reliance on federal precedent to determine extent to which antitrust inference may be drawn from particular facts at various stages of trial sequence and observing that “the same standard is applicable in evaluating the sufficiency of an antitrust claim where...the plaintiffs’ conclusion of concerted action is based on inferences from the alleged facts”).

[under the Sherman Act], the complaint must allege facts such as a specific time, place or person involved in the alleged conspiracies”).

3. Plaintiffs Have Alleged Nothing More Than Lawful Conscious Parallel Pricing Behavior By Defendants

A. Allegations that Defendants Operate in an Oligopolistic Market Cannot Support an Inference of Price Fixing

The Complaint predicates its charges of a price-fixing conspiracy on allegations of consciously parallel business conduct—that Defendants intentionally maintained their gasoline prices at or near the same level and increased or decreased prices at roughly the same time—not on any direct evidence that Defendants expressly agreed to coordinate pricing for anticompetitive effect. It is indisputable that “[p]rice uniformity among competitors does not, of itself, violate the antitrust laws [since i]f it is the result of independently reached pricing decisions, the element of ‘agreement’ necessary to establish an illegal price-fixing conspiracy is absent.” *Heritage Realty*, 137 Vt. at 430 (quoting *Theatre Enterprises*, 346 U.S. at 540). To support an antitrust inference, “[t]here must be evidence that tends to exclude the possibility that [alleged conspirators] were acting independently,” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1983); see also *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003) (noting “distin[ction] between altogether lawful, independent, consciously parallel decision-making within an oligopoly on the one hand, and illegal, collusive price fixing on the other”).

The United States Supreme Court has defined conscious parallelism as a “process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.” *Brooke*

Group, 509 U.S. at 227. Both the United States Supreme Court and the lower federal courts have repeatedly stated that the fact that a defendant or defendants operate in an oligopolistic market—one in which there are a limited number of sellers and significant barriers to entry such that each market participant can independently match its competitors’ prices via independent action without the need for agreement—does not mean they have engaged in price fixing or other prohibited behavior.⁵ See, e.g. *id.* at 227-229; *Insurance Brokerage Antitrust Litigation*, 618 F.3d at 322-24; *Williamson Oil*, 346 F.3d at 1300; *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 570-71 (11th Cir. 1998). Antitrust law “does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors.” *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011).

“[G]eographically constrained gasoline market[s] with publicly posted prices” such as the Class Area identified by Plaintiffs are recognized as potentially oligopolistic markets predisposed to supracompetitive pricing behaviors “without the need for agreement among the producers” because they feature “market transactions that are immediately known in every detail by customers and rivals.” *Id.* at 577 (observing that island gasoline market had, *inter alia*, limited participants, restricted alternative fuel sources, and high barriers to entry); see also *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 658 (7th Cir. 2002) (distinguishing between “evidence of noncompetitive behavior” and “evidence that the structure of the market was conducive to such behavior”). Nor can Plaintiffs’ allegations that Defendants’ prices held steady with each other and even rose at times of purportedly declining wholesale costs and that

⁵ Plaintiffs have alleged that the Class Area is an oligopolistic gasoline market. Vallee, therefore, treats these and all other factual allegations as true for purposes of this Motion.

Defendants enjoyed “abnormally high” profits throughout the Class Period support the inference that such price stability and/or profits were the product of a conspiracy rather than lawful and rational conscious parallelism. As the *White* court noted, “changes in pricing patterns and profit levels may be useful in identifying the beginning of a conspiracy, immediately after which conspirators may successfully raise prices without reference to costs[, but do not support the inference of conspiracy] when they are stable over time, because that factual context undermines any inference that the pricing behavior represents a sudden shift marking the *beginning* of a price-fixing conspiracy.” *Id.* at 581 (where plaintiffs alleged defendants maintained high prices in the face of falling costs during 2004-05, but alleged conspiracy beginning in 1999, price stability could not support inference of conspiracy) (emphases in original).

At the outset, it is important to note that Plaintiffs’ allegations are impermissibly lodged against “Defendants” as an undifferentiated group and make no attempt, as they must to state an antitrust claim, to allege actions by individual Defendants in the service of the supposed conspiracy. *SD3, LLC*, 2015 BL 297407 at *6-7. This requirement of specificity regarding the antitrust actions of particular defendants, and the insufficiency of showing purported wrongdoing by an undifferentiated group, is longstanding. See, e.g., *AD/SAT. Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (antitrust plaintiffs must make a “factual showing that each defendant conspired in violation of the antitrust laws”).

Plaintiffs’ allegations that Defendants acted contrary to both their own individual interests and to accepted economic theory by failing to undercut each other’s pricing and seize greater market share at times of declining costs are similarly incapable of supporting antitrust inferences because they do no more than describe entirely lawful, rational economic behavior by market participants. Numerous courts have recognized that in oligopolistic markets like that

alleged by Plaintiffs, “competitor firms realize that attempts to cut prices usually reduce revenue without increasing any firm’s market share, but that simple price leadership [i.e., monitoring and matching competitors’ prices] in such a market can readily increase all competitors’ revenues.” *City of Tuscaloosa*, 158 F.3d at 570; see also *Insurance Brokerage Antitrust Litig.*, 618 F.3d at 321 (price leadership is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market” as by anticompetitive agreement) (quoting *Twombly*, 555 U.S. at 554). Plaintiffs’ claim that Defendants’ failure to lower their gasoline prices in a bid to increase individual revenues, market share, or profits indicates the existence of a price-fixing conspiracy rests on a fundamentally flawed premise: that such behavior is necessarily inconsistent with each Defendant’s rational economic self-interest. See *White*, 635 F.3d at 581 (evidence that defendants set supracompetitive prices that did not decline when their costs declined shows nothing more than that they made their pricing decisions in an oligopolistic market).

In fact, a cursory review of relevant precedent reveals antitrust law’s express recognition that it is rational for participants in oligopolistic markets, as the Class Area is alleged to be, to engage in conscious parallelism, rather than the price undercutting Plaintiffs argue for, as a means to maximize revenues and reduce risk of loss. Such rational and lawful behavior cannot support the inference of antitrust conspiracy, even where plaintiffs claim that consumers would benefit more from price competition and that sellers should therefore lower prices. See *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (“The concept of ‘action against self-interest’ is ambiguous and one of its meanings could merely constitute a restatement of interdependence...refusing to raise or lower prices unless rivals do the same could be against a firm’s self-interest but nevertheless could spring from independent behavior...no conspiracy

should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons"); see also *White*, 635 F.3d at 575 (impermissible for antitrust violation to be based on independent decisions, even where such decisions lead to higher prices for consumers).

Nor can the particular characteristics of the gasoline market in the Class Area, which Plaintiffs claim facilitated price-fixing by Defendants, support an inference of conspiracy. Plaintiffs do not claim that most of these market traits are caused by Defendants either individually or collusively. At least one characteristic—community objections to the operation of gas stations—is clearly the responsibility of the putative class that Plaintiffs seek to represent. Complaint at ¶ 48. Moreover, antitrust precedent is plain that “[h]igh barriers to entry and inelastic demand are two hallmarks of oligopolistic markets susceptible to parallel pricing practices, but neither helps to distinguish between agreement and mere conscious parallelism as the root cause of these practices.” *White*, 635 F.3d at 582 (fact that local regulatory agency resisted issuing permits for new gas stations and that gasoline consumers did not adjust fuel consumption in response to price changes was not responsibility of defendants and could not support inference of antitrust conspiracy). And while it is true that markets like that in the Class Area tend to produce “stable market shares over time...it is also likely that conscious parallelism would be sufficient to maintain stable relative market shares in a stable market for a basic commodity protected from new entry.” *Id.* The inherent characteristics of the gasoline market in the Class Area are not the responsibility of Defendants and cannot support the inference that they

conspired to fix prices at supracompetitive levels, even if those characteristics result in higher prices at the pump for consumers.⁶

As the foregoing demonstrates, the majority of Plaintiffs' allegations—about the nature of the market, stability of pricing and market shares over time, rising or stable prices at time of declining costs, and high profits—are either outside Defendants' control or consistent with rational and entirely lawful commercial behavior by firms operating in oligopolistic markets allegedly like that in the Class Area.

As the United States Supreme Court has repeatedly emphasized, treating such ambiguous facts as suggestive of unlawful collusion risks “chill[ing] the very [free market] conduct the antitrust laws were designed to protect.” *Matsushita*, 475 U.S. at 594; see also *id.* at 597 n.21 (“conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy”). Such an inference of unlawful collusion from factual allegations of entirely legal commercial conduct is impermissible under the VCPA and the federal antitrust laws with which it is intended to harmonize. 9 V.S.A. § 2451; *Elkins v. Microsoft Corp.*, 174 Vt. 336. Plaintiffs' allegations of consciously parallel pricing cannot support an inference of conspiracy under any pleading standard.

B. Plaintiffs Have Not Alleged the “Plus Factors” Required to Support an Inference of a Price-Fixing Conspiracy

When, as here, Plaintiffs make conclusory allegations of “secret meetings and conversations” to fix prices, Complaint at ¶ 79, but cannot allege actual facts showing direct agreement to fix prices among competitors, such allegations are insufficient under all pleading

⁶ Vallee does not concede that the Class Area has featured higher gasoline prices for consumers over the ten years focused on in the Complaint, and rejects Plaintiffs' use of cherry-picked samples over a total of 23 days in 2009-2010 to support claims of elevated prices over the ten-year alleged Class Period. See Complaint at ¶ 68.

standards, as discussed *supra*. To save their case from dismissal, Plaintiffs must then try to “establish that it is plausible that defendants are engaged in more than mere conscious parallelism, by pleading and later producing evidence pointing toward conspiracy, sometimes referred to as ‘plus factors.’” *White*, 635 F.3d at 577; see also *Baby Food Antitrust Litig.*, 166 F.3d at 122 (plus factors “are necessary conditions for the conspiracy inference...[t]hey show that the allegedly wrongful conduct of the defense was conscious and not the product of independent business decisions”).

Here, Plaintiffs have alleged as plus factors (i) Defendants’ participation in permitting and licensing processes, (ii) membership in trade groups that provided “opportunities to conspire,” (iii) governmental hearings into gasoline prices in the Class Area, and (iv) Vallee’s use of property restrictions in the context of certain real estate transactions. As discussed below, none of these allegations can support the inference that Defendants conspired to fix gasoline prices in the Class Area.

i. Defendants’ Exercise of First Amendment Rights Cannot Support an Inference of a Price-Fixing Conspiracy

Plaintiffs allege that Defendants have used lobbying, legal efforts, and participation in “the zoning process to suppress competition by using the courts to forbid use of nearby properties as gas stations.” Complaint at ¶ 49. Plaintiffs point to three acts of alleged permitting abuse they claim support the inference of a conspiracy, two of which involve only Vallee (opposing Walmart’s bid to open a store in Franklin County until the permit for that store prohibited the sale of gasoline, and participating in Environmental Court proceedings to ensure a Washington County station (outside the Class Area) could sell only biodiesel, not gasoline) and one of which involves only Vallee and Wesco (ongoing efforts since 2007 to prevent Costco

from building a filling station in Chittenden County). Even accepting these allegations, including those about Defendants' motivations, as true, such facts cannot support the inference of antitrust conspiracy because allowing them to do so would violate Defendants' First Amendment right to petition the government.

For more than fifty years the United States Supreme Court has held that antitrust law “does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular actions with respect to a law that would produce a restraint or a monopoly,” and could not do so without violating the First Amendment. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); see also *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965) (even if purpose of defendant's public participation was to suppress or destroy competition, such “anticompetitive purpose d[oes] not illegalize the conduct there involved...*Noerr* shields from [antitrust law] a concerted effort to influence public officials regardless of intent or purpose”). Under the *Noerr-Pennington* doctrine, participation in government processes is absolutely shielded from antitrust liability so long as that participation is aimed at procuring favorable (even if anticompetitive) government action; only if a defendant participates solely to impose delay and expense and “with no expectation of achieving denial of the license” at issue may antitrust liability theoretically follow. *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

Plaintiffs' allegations place Defendants' actions squarely within the *Noerr-Pennington* doctrine's protections. With regard to the Walmart allegation, Plaintiffs concede that Vallee's efforts—which it allegedly undertook independent of any other Defendant—bore fruit and resulted in a permit containing the restriction Vallee sought, meaning it may not form the basis of antitrust liability. Complaint at ¶ 50. With regard to the biodiesel station in Plainfield—

which is outside the Class Area and where Vallee again is alleged to have acted independently of any other Defendant—Plaintiffs also concede that Vallee’s alleged participation yielded the permit restriction it sought, meaning it may not form the basis of antitrust liability. *Id.* at ¶ 53. And with regard to Plaintiffs’ allegations that Vallee and Wesco have worked together since 2007 to oppose Costco’s plans to build a filling station in Colchester, Vallee and Wesco are statutorily entitled to invoke these rights, *see* 10 V.S.A. Chapter 151, and Plaintiffs have alleged no facts to support the inference that Defendants have participated in these proceedings solely to impose delay rather than with a legitimate hope of achieving their purpose as necessary to prevent application of the *Noerr-Pennington* doctrine. Complaint at ¶ 51.

Plaintiffs also allege that “Defendants collectively agreed to rely on a single representative and lobbyist for the VPA to present their case” at a series of government hearings. Complaint at ¶ 59; but see *id.* at ¶ 84 (referring to “Defendants and their cadre of lobbyists”). But in similar circumstances, the *White* court held that the retention of a lobbyist for purposes of influencing government regulators was “a legitimate exercise of [the] right to petition...[i]ndeed, these actions are well within those actions which the Supreme Court sought to protect from chilling effects” by limiting the antitrust inferences that may be drawn from lawful commercial or political activity. 635 F.3d at 583; see also *Matsushita*, 475 U.S. at 594 (“mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect”). Plaintiffs may not use Defendants’ exercise of their right to petition the government, engage in permitting or licensing processes, or otherwise exercise rights guaranteed by the Constitution as predicates for antitrust liability or as means to harass Defendants and impose unjustified litigation costs. See *Music Ctr. S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995) (allowing

antitrust suit based on constitutionally protected behavior to move beyond motion to dismiss stage “would have the effect of encouraging antitrust ‘strike suits’, and effectively chill the First Amendment rights which *Noerr* immunity was intended to protect”).

ii. Membership in Trade Associations and Resulting “Opportunities to Conspire” Cannot Support an Inference of a Price-Fixing Conspiracy

Plaintiffs allege that “Defendants had numerous opportunities to meet and discuss the fixing of gas prices within the Class Area” through their memberships in the VPA and VRGA and the “trade association meetings and more informal events such as golf tournaments” those umbrella organizations sponsor. Complaint at ¶ 59. They have not, however, alleged any facts—not a single date, time, place, participant—regarding meetings or informal events attended, discussions they claim occurred at these events, or changes in pricing or other market behavior they allege happened in the wake of such get-togethers. Nor have they alleged specific actions or communications by specific Defendants during these meetings, instead resorting to broad-brush group accusations that cannot state an antitrust claim. *SD3, LLC*, 2015 BL 297407 at *6-7. Without some fact-based allegation of collusive conduct by particular Defendants produced by these meetings, Plaintiffs cannot use Defendants’ trade association membership to support the inference of an antitrust conspiracy.

“[M]embership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement.” *LaFlamme v. Societe Air France*, 702 F.Supp.2d 136, 148 (E.D.N.Y. 2010). Similarly, “[a]ttendance at industry trade shows and events, however, is presumed legitimate and is not a basis from which to infer a conspiracy, without more.” *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007); see also *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (“Gathering information about

pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions”). Moreover, “a finding of concerted action based on the defendants’ status as members of [a trade group] would seriously undermine the standards articulated by the Supreme Court...an antitrust plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.” *AD/SAT Div. of Skylight, Inc.*, 181 F.3d at 234. At a more general level, “a mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because [the defendants’] presence at such trade meetings is more likely explained by their lawful, free-market behavior.” *Tam Travel Inc. v. Delta Airlines Inc.*, 583 F.3d 896, 910 (6th Cir. 2009).

Here, Plaintiffs have alleged nothing more than Defendants’ bare membership in trade associations that periodically hold meetings and more informal events—indeed, although Plaintiffs have pled Defendants’ *membership* in the VPA and VRGA they have not alleged Defendants’ attendance at any association gatherings either individually or collectively. Nor have Plaintiffs pointed to any changes in pricing or market behavior temporally related to association events that could plausibly support the inference that, even if they had attended, Defendants had discussed and agreed to collude there and had subsequently put their plan into action. See *id.* at 910-11 (fact that defendants “gathered at industry trade association meetings during the seven-year period when [they] reduced commission rates should not weigh heavily in favor of suspecting collusion”) and *Insurance Brokerage Antitrust Litig.*, 618 F.3d. at 349 (“neither defendants’ membership in the [trade association], nor their common adoption of the

trade group's suggestions, plausibly suggest conspiracy...[w]hile these allegations indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently"); see also *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 444 (S.D.N.Y. 2014) (“[w]hile meetings among competitors undoubtedly provide opportunities to conspire, deeming those opportunities as proof of a conspiracy would condemn independent professional associations”). Plaintiffs may not use Defendants’ presumptively legitimate memberships in trade groups and the speculative “opportunities to conspire” they provide to support the inference of antitrust conspiracy. As elsewhere, Plaintiffs have failed to give their allegations the necessary factual support.

iii. Allegations of Governmental Investigations into Gasoline Pricing in the Class Area Cannot Support an Inference of a Price-Fixing Conspiracy

Plaintiffs spend much of their lengthy Complaint alleging various aspects of prior governmental inquiries into gasoline pricing in the Class Area: letters of concern by a U.S. Senator and the Vermont Attorney General; legislative hearings at the state and federal levels; responses by Defendants to questioning at these hearings that Plaintiffs deem unsatisfactory, evasive, or pretextual; and a posturing state legislator’s mocking take on Defendants’ responses. See Complaint at ¶¶ 8-10, 74-75, 82-87. Notably lacking from Plaintiffs’ allegations, however, is an acknowledgement that these hearings uncovered no evidence of collusion or other wrongdoing and resulted in no governmental action being taken against Defendants. The mere fact these hearings and preliminary inquiries took place cannot support the inference that Defendants engaged in a price-fixing scheme. Indeed, the absence of an allegation that any

enforcement action was taken supports the opposite inference—that there was no wrongdoing to uncover.⁷

Several courts have held in analogous circumstances that the existence of a government investigation into price-fixing claims does not support the inference of conspiracy for civil antitrust purposes. See, e.g., *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (“plaintiffs point out that the Antitrust Division of the Department of Justice has served defendants with subpoenas and is conducting a grand jury investigation [into alleged price fixing]. The investigation, however, carries no weight in pleading an antitrust conspiracy claim. It is unknown whether the investigation will result in indictments or nothing at all”) and *In re Static Random Access Memory Antitrust Litigation*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (“the existence of the [Department of Justice] investigation [into alleged price-fixing by defendants] does not support Plaintiffs’ antitrust conspiracy claims” where outcome of investigation was unknown).

Here, as in *Graphics Processing Units* and *Static Random Access Memory*, Plaintiffs have not alleged that the government investigation at issue uncovered any evidence of wrongdoing or resulted in adverse governmental action against any Defendants, and their bare allegations of hearings into pricing issues cannot support the inference of antitrust conspiracy. Moreover, according to Plaintiffs’ own allegations the Defendants appeared at these hearings, both in their own capacity and through representatives, and answered questions from legislators demanding explanations for pricing patterns in the Class Area. The fact Plaintiffs are dissatisfied

⁷ In testimony at the Joint Hearing, AAG Kriger stated: “[f]rom an antitrust perspective, when you see pricing like this, you say, ok, well, this could be indicative of anti-competitive conduct, it could be indicative of collusion or price-fixing. Or, it could be indicative of what we call price-following or price-signaling behavior. The former obviously is illegal, the latter is not. Price-following, price signaling, takes place in most industries. You want to set your prices? You look at what your competitors are doing and you set your prices accordingly.”

with Defendants' responses to legislators' questions, and self-servingly allege the responses were "pretextual, misleading, and failed to address the central question at the hearings," does not make the hearings themselves, or the back and forth they involved, evidence of a price-fixing conspiracy. Cf. *In re Text Messaging Antitrust Litig.*, No. 08-cv-7082, 2009 BL 293106 (N.D. Ill. December 10, 2009) at *7 (defendants' failure to respond to congressional demand for explanation of apparently supracompetitive pricing could not support inference of antitrust conspiracy).

iv. Vallee's Real Estate Transactions Outside the Class Area Cannot Support an Inference of a Price-Fixing Conspiracy

Plaintiffs' final factual allegations are that Vallee—significantly, without the participation of any of the other Defendants—conditioned its participation in two real estate transactions on a requirement that the other party to the transaction contractually refrain from selling gasoline in the future. Complaint at ¶¶ 52, 54. Here, it is important to bear in mind that Plaintiffs have founded their claims on the alleged existence of a price-fixing conspiracy among multiple independent market participants. Plaintiffs' allegations regarding Vallee's real estate transactions cannot support the necessary inference of conspiracy for a number of reasons, both logical and legal. First, the alleged transactions involved only Vallee, and Plaintiffs have not alleged any facts to support an inference that other Defendants participated in or were even aware of them, let alone that the transactions in question were part of an agreement to fix prices as necessary to a conspiracy claim. Even more significantly, both transactions took place in counties that are not even part of the Class Area: one in Plainfield, in Washington County, and one in St. Johnsbury, in Caledonia County. Plaintiffs have not alleged any facts to support the inference that contractual restrictions prohibiting the sale of gasoline at a single Washington

County location, or the substitution of one gasoline-selling location for another in St. Johnsbury, would impact prices in the Class Area, let alone that any such impact was the result of collusive action by Defendants.

Moreover, Plaintiffs' attempt to use these transactions to support their conspiracy claims conflicts with longstanding precedent recognizing that deed restrictions and other covenants not to compete actually enhance competition and overall commercial activity by increasing the alienability of property. See *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (covenant not to compete is lawful if ancillary to sale of assets or other contract because it "merely enhances the value of the contract, or permits the 'enjoyment of [its] fruits'") (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)); see also *Hu v. Huey*, 325 Fed. Appx. 436, 439 (7th Cir. 2009) (observing that "[r]estrictive covenants in lease agreements do not violate antitrust laws unless they unreasonably restrict trade" and holding that restrictive covenant relating only to single property in area served by multiple businesses could not support finding of antitrust violation). Plaintiffs have alleged nothing to support the inference that these run-of-the-mill transactions entered into independently by Vallee outside the Class Area had any impact on gasoline prices inside the Class Area, let alone were part of a deliberate scheme among Defendants to do so.

4. Plaintiffs Fail to State a Claim for Unjust Enrichment Because They Have Not Shown It Would Be Unjust For Defendants to Be Paid For Gasoline Purchased By Consumers

As set forth above in detail, Plaintiffs have failed to allege a price-fixing conspiracy or even that Defendants did anything other than lawfully conduct business in an allegedly oligopolistic market whose inherent characteristics lend themselves to supracompetitive pricing. Nor have Plaintiffs alleged that they purchased gasoline from stations in the Class Area with the

expectation that the seller would not retain the monies they exchanged for the gasoline Plaintiffs received and, presumably, consumed in driving their vehicles. These facts—which show the existence of contracts for the purchase and sale of gasoline—cannot support a claim for unjust enrichment.

Unjust enrichment arises when “[t]he law implies a promise to pay [because] a party receives a benefit and the retention of the benefit [without making payment] would be inequitable.” *JW, LLC v. Ayer*, 2014 VT 71, ¶ 22 (quotation omitted). To make out a claim for unjust enrichment, a plaintiff must show that he or she: (1) conferred a benefit on a defendant, (2) the defendant accepted the benefit, and (3) it would be inequitable for the defendant not to compensate the plaintiff for the value received. *DJ Painting, Inc. v. Baraw Enters., Inc.*, 172 Vt. 239, 242 (2001). Importantly for the present case, “retention of a benefit is not unjust where defendants have paid for it.” *Ray Reilly's Tire Mart, Inc. v. F. P. Elnicki, Inc.*, 149 Vt. 37, 39 (1987).

Here, there is no claim that Defendants did not ‘compensate’ or ‘pay’ Plaintiffs for the benefit they received, i.e., that Defendants did not give Plaintiffs gasoline in exchange for money; each putative Plaintiff recites that he or she “purchased unleaded gasoline at one or more of the Defendants’ gas stations or independent gas stations supplied by Defendants” (implicitly forgoing gasoline purchases from one of the many retailers not part of the alleged “cartel”). Complaint at ¶¶ 17-20, 22-23. Nor do Plaintiffs allege facts showing a traditional “overcharge” in which a seller offers a good at one price but then deceptively charges a higher price in the consummated transaction. In fact, Plaintiffs have alleged nothing to show that they did not see the posted price, pull up to the pump, and elect to purchase gasoline at that posted price as normally occurs. Plaintiffs’ claim is not that they did not agree to the price of the gasoline they

purchased in advance, but rather that the price they agreed to was higher than it should have been because of Defendants' wrongful price-fixing behavior. The obvious and fatal flaw with this theory is that, as discussed extensively above, Plaintiffs have not alleged facts showing anything other than lawful commercial conduct by Defendants. See *In re Flonase Antitrust Litig.*, 798 F.Supp.2d 619, 629 (E.D. Pa. 2011) (collecting cases and observing that allegations insufficient to show antitrust violation cannot support unjust enrichment claim). Without legally sufficient allegations of wrongful behavior by the merchants it targets, the Complaint cannot show that Defendants have inequitably retained a benefit conferred by Plaintiffs as necessary to proceed under the theory of unjust enrichment. Their claim should be dismissed.

Conclusion

The Complaint should be dismissed in its entirety, with prejudice.

(1) The only conduct Plaintiffs have alleged by Defendants—even if accepted as true—is lawful, parallel pricing. Plaintiffs have presented no factual allegations of direct collusion among Defendants, and instead plead only conclusory statements of “secret meetings and conversations” for which they are able to lay no factual foundation.

(2) Given their failure to properly allege evidence of direct collusion, under Vermont law (which looks to substantive federal antitrust law) Plaintiffs have failed to state a claim of direct proof of the conspiracy.

(3) Plaintiffs allege Defendants operate in a market with inherent characteristics that make it conducive to supracompetitive pricing. Plaintiffs have, however, alleged no facts showing these characteristics result from an agreement among Defendants. Plaintiffs' allegations of price and market share stability over time and “action against economic self-

interest” cannot support the inference of antitrust conspiracy because these allegations ignore the economically rational and completely lawful explanation for Defendants’ pricing patterns.

(4) Plaintiffs’ allegations of so-called “plus factors” are insufficient to support an inference of antitrust conspiracy from otherwise lawful parallel pricing. Plaintiffs’ allegations of Defendants’ participation in permitting and licensing processes are protected from antitrust liability by the First Amendment, and their membership in trade groups enjoys a presumption of legitimacy Plaintiffs have failed to rebut. Plaintiffs’ allegations of government investigations that did not lead to charges or other enforcement actions against Defendants serve only to undercut their claims. Their allegations of a single Defendant’s use of deed covenants in two real estate transactions outside the Class Area are irrelevant.

(5) Plaintiffs have failed to allege facts sufficient to support the inference Defendants engaged in a price-fixing conspiracy, and their allegations of Defendant’s lawful commercial conduct and their own purchase of gasoline from stations with publicly listed prices cannot state a claim for unjust enrichment.

WHEREFORE, Defendant R.L. Vallee, Inc. respectfully requests that the Court DISMISS Plaintiffs' First Amended Class Action Complaint and Jury Demand WITH PREJUDICE and grant all other relief as is just and proper.

Burlington, Vermont
October 5, 2015

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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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant R.L. Vallee, Inc.'s Motion to Dismiss and Memorandum in Support of Motion to Dismiss was served via First Class Mail and electronic mail on October 5, 2015, on the following attorneys of record:

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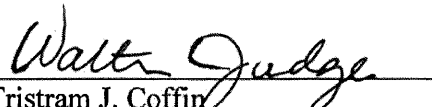
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Attachments: Brock 2015-10-05.pdf; COS 2015-10-05.pdf; SB Collins Motion to Dismiss.pdf

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STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 617-6-15 Cnev

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

v.)

R.L. VALLEE, INC., S.B. COLLINS, INC.,)
WESCO, INC. and CHAMPLAIN OIL)
COMPANY, INC.)
Defendants.)

CERTIFICATE OF SERVICE

I, R. Jeffrey Behm, counsel for Defendant S.B. Collins, Inc., do hereby certify that on October 5, 2015, I caused a copy of Defendant S.B. Collins, Inc.'s Motion To Dismiss For Failure To State A Claim to be delivered via U.S. Mail postage prepaid addressed as follows:

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STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 617-6-15 Cnev

JACOB R. KENT, ANNE B. VERA,)
THOMAS R. MARHAR and DAWN M.)
MAHAR, DAVID C. CARTER and)
BARBARA CARTER and all others)
Similarly situated)
Plaintiffs,)
v.)
R.L. VALLEE, INC., S.B. COLLINS, INC.,)
WESCO, INC. and CHAMPLAIN OIL)
COMPANY, INC.)
Defendants.)

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant S.B. Collins, Inc. ("S.B. Collins"), by and through its attorneys, Sheehey Furlong & Behm P.C., moves this Court to dismiss the Complaint pursuant to V.R.C.P. 12(b)(6) for failure to state a claim upon which relief may be granted. In support of its Motion, S.B. Collins relies upon the following Memorandum of Law and Exhibits.

Memorandum

I. Introduction.

The Plaintiffs' sprawling class action Complaint makes sweeping but legally deficient allegations that four Vermont businesses fixed the price of gasoline over a long, unspecified period in three northwestern Vermont counties. The Plaintiffs fail to state a claim because they do not, and cannot, make any factually specific allegations regarding the fundamental and critical element of a price fixing charge: that competitors agreed or conspired to fix prices. Although their Complaint mouths the words agreement and conspiracy, the Plaintiffs'

allegations concerning those concepts are wholly conclusory and unmoored from any particular, plausible factual basis.

Boiled to its essence, the Complaint asserts that the Defendants have supposedly charged identical and higher than competitive prices in the alleged market, and further alleges that the only inference that can be drawn from such facts is that the four Defendants *must have* met and agreed to fix those prices at some unknown time in some unknown place for some unknown duration. The Plaintiffs could not be more clearly wrong in alleging that a price fixing agreement is the only explanation for supra competitive, parallel pricing in a concentrated market with high entry barriers like the one they allege exists in their Complaint.

The courts and antitrust commentators have uniformly recognized that parallel conduct by sellers is a natural consequence of market concentration, and that parallel pricing in such markets frequently occurs without an agreement. Because even supra competitive prices arrived at through consciously parallel behavior are lawful in the absence of an agreement, allegations like those in Plaintiffs' Complaint are deficient as a matter of law. As stated by the United States Supreme Court, parallel conduct by sellers does not suggest conspiracy, and a conclusory allegation that there was an agreement between the sellers at some unidentified point does not supply an adequate basis to support an illegal price fixing claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).¹

Accordingly, in *Twombly*, the Court dismissed a price fixing complaint because, like here, it contained only conclusory allegations of agreement. In rejecting bare allegations of parallel conduct and naked conclusions of conspiracy as being insufficient, the Court held that a

¹ *Twombly* involved a claim made under section one of the Sherman Act, 15 U.S.C.A. § 1, the primary federal law outlawing price fixing. As explained in more detail below, although Plaintiffs have brought their price fixing claim pursuant to Vermont's Consumer Protection Act, 9 V.S.A. §§ 2451 *et seq.*, whether there is a price fixing violation will ultimately be determined based on whether the pricing at issue violates the federal antitrust laws.

price fixing complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* Plaintiffs’ Complaint consists only of allegations that the Defendants engaged in parallel, supra competitive pricing and conclusory assertions that somewhere, sometime and somehow they entered into a secret, unevicenced agreement. That is not enough, and Plaintiffs’ Complaint should be dismissed.

Although Vermont’s Supreme Court passed on the opportunity to adopt the *Twombly* standard in two sharply divided 2008 decisions, as explained in more detail in Section II of this Memorandum, those cases are significantly distinguishable from the instant matter. Neither was an antitrust case. As *Twombly* emphasized, antitrust discovery is almost always extremely expensive, and justifies requiring a plaintiff to provide some factual basis before permitting it to proceed with costly discovery. The discovery requests already served by Plaintiffs in this case are extraordinarily broad and will impose very heavy costs upon Defendants. Furthermore, the plaintiffs in the 2008 cases were individuals (a prison inmate and a disabled employee) with very limited resources and abilities relative to the defendants (the State of Vermont). That is certainly not the case here. Applying *Twombly* to judge the sufficiency of Plaintiffs’ Complaint is thus compatible with existing Vermont case law and this Court should do so.

II. Standard of Review.

Although Plaintiffs’ Complaint is riddled with inaccurate allegations, for purposes of this Motion, this Court must accept as true the facts alleged in the Complaint. *See Richards v. Town of Norwich*, 169 Vt. 44, 49 (1999). If, accepting Plaintiffs’ factual allegations as true, there exist no facts or circumstances that would entitle them to relief, the Court should dismiss the Complaint. V.R.C.P. 12(b)(6).

To satisfy Rule 8 in a price-fixing case, the Complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” *Id.* In cases in which the complaint alleges only parallel conduct, the allegations “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* A complaint that only makes allegations of parallel conduct and a bare assertion of conspiracy must be dismissed. Parallel pricing may provide some support for a price fixing claim, “but without some further factual enhancement [they] stop[] short of the line between possibility and plausibility.” *Id.*

Since *Twombly* was decided in 2007, the Vermont Supreme Court has not had frequent occasion to consider whether to adopt it as the standard for interpreting V.R.C.P. 8, and it has never done so in the context of an antitrust case. In two 2008 cases, the Vermont Supreme Court resisted the adoption of *Twombly* without much discussion, over the strong objection from two dissenting justices. See *Colby v. Umbrella, Inc.*, 2008 VT 20, 184 Vt. 1; *Bock v. Gold*, 2008 VT 81, 184 Vt. 575.

This Court may apply *Twombly* here consistent with Vermont Supreme Court precedent because neither *Colby* nor *Bock* was a case involving alleged violations of federal antitrust law.² It is appropriate to apply *Twombly* in an antitrust case like this one because a claim for violation of antitrust laws is a “a unique type of claim prone to burdensome discovery requests.” *Starr v. County of Los Angeles*, 659 F.3d 850, 852 (9th Cir. 2011). Even before the United States

² Because the substantive law on antitrust is nearly all federal law, it is appropriate to interpret Vermont’s Rule 8 consistently with the “almost identical” federal rule in antitrust cases. Reporter’s Notes to V.R.C.P. 8. Indeed, Vermont courts frequently look to analogous federal rules for guidance in interpretation. *E.g.*, *Wright v. Honeywell Int’l, Inc.*, 2009 VT 123, ¶ 10, 187 Vt. 123 (“To the extent that the Vermont rule mirrors the comparable federal rule, we look to federal precedent to aid our interpretation of our rule.”); *State v. Amidon*, 2008 VT 122, ¶ 16, 185 Vt. 1 (“[W]hen our rule is identical to its federal counterpart, we look to federal cases interpreting the federal rule for guidance.”); *Mobbs v. Cent. Vermont Ry., Inc.*, 155 Vt. 210, 215 (1990) (when Vermont rule is “substantially similar” to federal rule, courts “look to federal case law for guidance.”).

Supreme Court decided *Twombly*, courts were cautioning against allowing bare-bones antitrust cases to proceed past the pleading stage: “[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.” *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J.).

As the Court explained in *Twombly*, antitrust discovery is almost always extensive, expansive, and expensive: “[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery.” 550 U.S. at 559. This case is no different. Indeed, Plaintiffs have already served broad discovery requests that would require Defendants to produce virtually every scrap of paper and bit of electronic data in their possession. *See* Exhibit A attached hereto.

The courts in Florida appear to be adopting just this approach on the same issue. In *MYD Marine Distributor, Inc. v. International Paint Ltd.*, 76 So.3d 42 (2011), the Florida appellate court held that “Florida courts should look to *Twombly* in determining whether an agreement in violation of the state antitrust law can be *reasonably* inferred from the alleged facts.” *Id.* at 47 n.4 (emphasis in original). At the same time, Florida courts do not apply *Twombly* in cases outside of the antitrust context. *E.g.*, *Wendt v. La Costa Beach Resort Condominium Assoc., Inc.*, 14 So.3d 1179, 1181 (2009); *Baker v. Batmasian*, No. 502014CA008594XXXXMB, 2015 WL 1324856 at *1 (Fla. Cir. Ct. Mar. 25, 2015) (“Motions [to dismiss] should be granted only when the party seeking dismissal has conclusively demonstrated that plaintiff could prove no set of facts whatsoever in support of the cause of action.”).

Further, the Vermont Supreme Court’s reluctance to adopt a heightened pleading standard in the *Colby* and *Bock* cases was based on materially different facts than the instant

case, and thus those cases are distinguishable. The plaintiffs in *Colby* and *Bock* (a prison inmate and a disabled state employee) had limited resources and abilities relative to those of the defendants (the State), and the Court's reluctance to hold those plaintiffs to the higher pleading standard articulated in *Twombly* was understandable. In stark contrast, the named Plaintiffs in this case enjoy support from six attorneys at three law firms across five states, including a national class action firm that, by its own description, is "competent and experienced in complex civil litigation," (Complaint at ¶ 38.) The Defendants, on the other hand, are Vermont family-owned businesses.

Because *Colby* and *Bock* do not involve alleged antitrust violations and because they are factually distinguishable from this case, this Court may apply the *Twombly* standard to this antitrust price fixing case consistent with Vermont Supreme Court precedent, and it should do so.³

III. Relevant Price Fixing Law.

In their Complaint, Plaintiffs allege that Defendants agreed to fix prices of wholesale and retail gasoline in violation of the Vermont Consumer Protection Act ("VCPA"), 9 V.S.A. §§ 2451 *et seq.* When analyzing a claim under the VCPA, Vermont courts are "guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act." 9 V.S.A. § 2453(b).

The Federal Trade Commission Act ("FTC Act") bans "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1). Section one of the Sherman Act bans "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. All violations of the Sherman Act are violations

³ In the alternative, this Court may adopt the standards articulated in *Twombly*, and the line of federal antitrust law preceding it, as appropriate guiding authority on the *substantive* principles of antitrust law, consistent with the directive of 9 V.S.A. § 2453a(c). *See generally* Motion to Dismiss filed by Co-Defendant R.L. Vallee, Inc.

of the FTC Act. *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 186 (D. Vt. 1969) (“[A]ny activity that violates . . . the Sherman Act . . . also violates § 5(a)(1) of the FTCA.”) (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953)).

“In general, practices challenged under the Sherman Act are struck down only if they are unreasonable and anticompetitive.” *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (2011). Agreements between competitors to fix prices are presumed to be anticompetitive and thus are *per se* illegal. *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). In contrast, independent decisions by market participants that have an anticompetitive result are not illegal. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). In other words, the law “does not require sellers to compete; it just forbids their agreeing or conspiring not to compete.” *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 627 (7th Cir. 2010) (Posner, J.).

Here, Plaintiffs have pled facts that suggest that the putative class market is oligopolistic – that is, it has relatively few sellers, high entry barriers, and relatively inelastic demand (i.e., demand that does not fluctuate much in response to price changes). Oligopolistic markets are susceptible to and are frequently characterized by conscious parallelism (or economic interdependence) in pricing:

[C]onscious parallelism is the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm’s market share, but that simple price leadership in such a market can readily increase all competitors’ revenues.

City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 570 (11th Cir. 1998) (citations omitted). Oligopoly pricing is termed “interdependent” because, although “each seller may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other” sellers. P. Areeda and H. Hovencamp, *Antitrust Law*,

¶ 1429a p. 207 (2d. ed. 2003) (interdependent behavior is an inevitable result of an oligopolistic market).

Because such parallel pricing occurs without agreement or conspiracy, federal courts have unanimously held that conscious parallelism is not unlawful under either the Sherman Act or the FTC Act. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032-33 (8th Cir. 2000) (“Evidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws.”); *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 139 (2d Cir. 1984) (“[C]onsciously parallel pricing of an identical product does not violate the antitrust laws” including § 5 of the FTC Act).

IV. Discussion.

A. To Survive Dismissal, Plaintiffs Must Plead Facts To Suggest Agreement Rather Than Conscious Parallelism.

A plaintiff may allege one of two kinds of agreement that violate the antitrust laws: express agreement or tacit agreement. When a plaintiff alleges express agreement, “a bare assertion of conspiracy will not suffice” to sustain a claim. *Twombly*, 550 U.S. at 557. “Without more, . . . a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.” *Id.* at 556-57. Even before *Twombly*, courts held that “[a] general allegation of conspiracy . . . without a statement of the facts constituting the conspiracy, is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action.” *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979); *see also Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220-21 (4th Cir. 1994).

A tacit agreement requires evidence excluding the possibility of independent action and demonstrating competitors had a meeting of the minds and “a conscious commitment to a

common scheme designed to achieve an unlawful objective.” *Monsanto v. Spray-Rite Services Corp.*, 465 U.S. 752, 764 (1984) (quotations and citations omitted). In oligopolistic markets, like the one alleged in the instant complaint, uniform behavior can just as easily be the result of conscious parallelism as tacit agreement. For that reason, courts require that in order to state a claim, a plaintiff must place his allegations “in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Twombly*, 550 U.S. at 557; *see also White*, 635 F.3d at 577 (“Plaintiffs must establish that it is plausible that defendants are engaged in more than mere conscious parallelism, by pleading . . . evidence pointing toward conspiracy.”) (citing *Twombly*, 550 U.S. at 556).

These required additional facts, often called plus factors, “ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors. In other words, the factors serve as proxies for direct evidence of an agreement.” *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 360 (3d Cir. 2004) (internal quotations omitted); *see also 6 Areeda & Hovenkamp, Antitrust Law* ¶ 1434a p. 241 (2d ed. 2003) (“[T]he courts have been very clear that mere parallelism, including interdependent conscious parallelism, cannot support a conspiracy finding unless there are additional or ‘plus’ factors.”).

B. Plaintiffs Have Not Adequately Pled Agreement.

i. The Complaint Contains Only Conclusory Allegations of Express Agreement.

Plaintiffs’ Complaint contains only one theory of agreement to fix prices: that the Defendants expressly agreed to do so. The most Plaintiffs say about the alleged express agreement is that it was reached “during secret meetings and conversations, often conducted at undisclosed, out-of-the-way locations,” at which no one but the Defendants was present.

(Complaint at ¶ 79.) The Complaint fails to identify who attended the meetings, what was said, when they occurred, or any other detail regarding the alleged agreement.

Plaintiffs' allegation is so vague, free of detail, and conclusory that it could be inserted verbatim into any price fixing complaint on any subject matter against any set of defendants in any location and for any period of time. It is less of an allegation than it is an excuse for its complete dearth of detail. It begs for the question: if Plaintiffs know absolutely nothing about the alleged meeting or agreement, how do they know there was one? It suffices to say at this point, however, that the allegation is patently insufficient to state a price fixing claim both before and after the *Twombly* case. *E.g., Larry R. George Sales Co.* 587 F.2d at 273 (5th Cir. 1979); *White*, 635 F.3d at 575.

ii. The Complaint Does Not Allege a Tacit Agreement and Does Not Adequately Set Forth Such An Agreement.

The Complaint contains no allegation directly stating that the Defendants reached a tacit agreement to fix prices. Moreover, even if it did make such an allegation, the Complaint lacks allegations of "plus factors" that suggest a tacit agreement to fix prices rather than mere conscious parallelism. For those reasons, Plaintiffs' allegations are insufficient to state a claim.

Plaintiffs repeatedly assert that the gasoline market alleged in their Complaint is concentrated among relatively few sellers, has high barriers to entry and inelastic demand, and has yielded supra competitive prices and seller profits. (Complaint at ¶¶ 5, 7, 41-55, 68.)⁴ These allegations do not serve as plus factors that negate an inference of conscious parallel pricing. To

⁴ Plaintiffs also allege that the Defendants act as both wholesalers and retailers in the alleged market, although they do not explain how that fact relates to the alleged conspiracy. In any event, it is clear that vertical integration is not a plus factor suggestive of agreement. *See White*, 635 F.3d at 584 ("Nothing forbids producers from selling in two different levels of the same market, here the wholesale and retail levels."); *see also* 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1435i p. 267 (vertical integration is too often justifiable to be considered as an undesirable practice facilitating conspiracy).

the contrary, they simply allege market conditions under which parallel pricing thrives, along with some of the typical consequences of such pricing.

“High barriers to entry and inelastic demand are two hallmarks of oligopolistic markets susceptible to successful parallel pricing practice, *but neither helps to distinguish between agreement and mere conscious parallelism* as the root cause of those practices.” *White*, 635 F.3d at 582 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n. 15 (1986)) (emphasis added). A market “in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws” even when such prices are “supra competitive” or occur in “lock step.” *E.I du Pont*, 729 F.2d at 139 (reversing finding that certain pricing practices violated § 5 of the FTC Act).

Where parallel conduct, high prices, and high profits are stable over time, as alleged in Plaintiffs’ Complaint, they are at least as indicative of conscious parallelism as agreement: “Pricing behaviors do not function as ‘plus factors’ when they are stable over time, because that factual context undermines any inference that the pricing behavior represents a sudden shift marking the *beginning* of a price-fixing conspiracy.” *White*, 635 F.3d at 581. Nor is the allegation that the Defendants’ market shares have remained stable over time (Complaint at ¶ 46) a plus factor, as conscious parallelism enables market participants “to maintain stable relative market shares.” *Id.* at 582.

In short, none of the factors described in the preceding paragraphs are plus factors. Rather, they only confirm that the alleged market has conditions that are “conducive to conscious parallelism.” *Id.* Further, it is hardly surprising that retail gasoline prices parallel one another when one considers the free availability of pricing data for retail gasoline stations. Compared to many industries where pricing data is less transparent, gasoline pricing data is *mandated* to be

public. 9 V.S.A. § 4110. Indeed, viewing and responding to competitors' prices is even easier in the digital age with the advent of websites and apps that track gasoline prices on a minute-by-minute basis. See, e.g., Gas Buddy (<http://www.gasbuddy.com>).⁵

Plaintiffs next allege that prices are higher in the alleged three-county market than they are elsewhere in Vermont, and that the higher prices are indicative of conspiracy. (Complaint at ¶¶ 68, 70.) Yet, it is hardly surprising that different markets yield different average prices. If a market is oligopolistic, as Plaintiffs allege the three-county market is here, higher prices are expected there – not because of any agreement, but because of the natural characteristics of the market itself. See *White*, 635 F.3d at 582 (variation in prices does not indicate collusion where market with higher prices is susceptible to conscious parallelism). Because the Plaintiffs allege that the three-county market is oligopolistic and that the markets elsewhere in Vermont are not, it is not a plus factor to allege that the prices are higher in the putative market than outside of it.

After alleging that environmental laws, zoning regulations, community opposition, and the cost and complexity of storing and dispensing gasoline have raised entry barriers (Complaint at ¶ 48), the Complaint then implausibly alleges that Defendants have contributed to erecting those barriers through deed restrictions, litigation, and lobbying and testifying before the legislature.

The allegation that Defendants created restrictive deed covenants refers to a fairly ordinary business practice⁶ (Complaint at ¶¶ 7, 48) and, moreover, it does not assert that any such deed restrictions were imposed as a result of *collusive* rather than individual action by the

⁵ The Vermont Attorney General recommends that consumers use Gas Buddy “to obtain information about local gasoline prices.” See Vermont Attorney General, Gasoline Pricing (<http://ago.vermont.gov/focus/consumer-info/fuel/gasoline-pricing.php>).

⁶ It is also worth noting that covenants in commercial property deeds imposing reasonable restrictions on competitors are lawful and are common across the spectrum of businesses. E.g., *Vermont National Bank v. Chittenden Trust Co.*, 143 Vt. 257, 261-62 (1983).

Defendants. Independent conduct creates no inference of agreement. Furthermore, the only three deed covenants specifically alleged in the Complaint all relate to property owned by a single defendant (not S.B. Collins) located *outside* of the alleged three-county market (Complaint at ¶¶ 52-54). These restrictions could not have had even a theoretical effect on entry barriers *inside* of the alleged market. In short, the deed covenant allegations cannot serve as a plus factor.

Finally, the Plaintiffs' allegations that some Defendants have participated in legal proceedings, engaged in lobbying efforts, and given testimony before legislative committees⁷ are not plus factors for a variety of reasons. It suffices to say, however, that all of those activities are protected by the First Amendment and cannot form any basis for liability. The leading United States Supreme Court case on the issue, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), makes clear that it does not violate the antitrust laws for businesses to act together to participate in the legislative process: "[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly." *Id.* at 136; *see also Mylan Technologies, Inc. v. Zydus Noveltch, Inc.*, No 41-1-09 CnC, 2015 WL 3935320 at *9-10 (Vt. Super. Apr. 7, 2015) (applying *Noerr* to state law claims).

The Supreme Court later applied *Noerr* to hold that the same First Amendment protection applies to participation in legal proceedings: "Litigation has a *Noerr* immunity that cannot be taken away, no matter what the claimant's motive, unless it is objectively baseless."

Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49, 54 (1993)

⁷ The Complaint does not allege that S.B. Collins ever gave testimony before a legislative committee or participated in a legal proceeding. Indeed, the *only* allegation regarding statements made by S.B. Collins is that its President answered a question from an unidentified media outlet at some unidentified point as to the reason for the difference in prices between Burlington and Middlebury by saying "I don't have an answer for that." (Complaint at ¶ 13.) Plaintiffs do not allege whether they believe that answer was accurate or why it is possibly relevant to anything.

(quotation omitted). Because *Noerr* affords First Amendment protection to participation in court proceedings and in the legislative process, Plaintiffs' allegations of such activity cannot serve as plus factors.

In sum, whether Plaintiffs meant to plead a tacit agreement shown by plus factors indicating conspiracy rather than conscious parallelism, they have utterly failed to do so. None of the Plaintiffs' allegations suggests price fixing rather than agreement-free, parallel pricing occurring in the oligopolistic market they allege in their own Complaint. Because Plaintiffs have wholly failed to allege any factual basis or context to support a price fixing agreement (express or tacit), this Court should dismiss the Complaint.

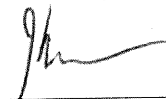
V. Conclusion.

For the foregoing reasons, this Court should dismiss the Complaint for failure to state a claim under V.R.C.P. 12(b)(6).

DATED at Burlington, Vermont this 5th day of October, 2015.

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EXHIBIT A

SUPERIOR COURT
CHITTENDEN UNIT

STATE OF VERMONT

CIVIL DIVISION

JACOB R. KENT, ANNE B. VERA,
THOMAS R. MAHAR, 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.

Case No. 617-6-15 Cncv

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANT SB COLLINS, INC.

Pursuant to Vermont Rule of Civil Procedure 33, Plaintiffs Jacob Kent, Anne B. Vera, Thomas R. Mahar, Dawn M. Mahar, David C. Carter, Barbara Carter, and all others similarly situated ("Plaintiffs"), by and through counsel, hereby propound the following interrogatories to SB Collins, Inc. ("SB Collins") to be answered separately and fully in writing and signed under oath within forty-five (45) days after service of the summons and amended complaint or such time as the Court may order at the offices of Joshua Simonds, The Burlington Law Practice, PLLC, 2 Church Street, Suite 2-G, Burlington, VT 05401.

DEFINITIONS AND INSTRUCTIONS

For the purposes of these Interrogatories, the following definitions shall apply:

1. "Concerning" means describing, discussing, constituting, containing, considering, embodying, evaluating, mentioning, memorializing, supporting, collaborating, demonstrating, proving, evidencing, showing, refuting, disputing, rebutting, regarding, controverting, contradicting, made in connection with or by reason of, or derived or arising therefrom.
2. "Agent" means any past or present director, officer, counsel, shareholder, member, representative, contractor, consultant or employee of any person or entity or any person that assisted, acted for, or purported to assist or act for or on behalf of such person or entity.
3. "Cause of Action" means the above captioned case, Case No. 617-6-15 Cncv pending in the Superior Court of the State of Vermont, Chittenden Unit, Civil Division.
4. "Communicate" or "Communication" means any written or other transmission or exchange of words, thoughts or ideas to another person or entity, whether person-to-person, in a group, in a meeting, by telephone, by letter, by telex, facsimile, electronic mail, texting, or by any other process or medium, electronic or otherwise.
5. "State" and "Describe" means to: (a) describe fully by reference to underlying facts rather than ultimate facts or conclusions of fact or law; (b) particularize as to: (i) date and time, (ii) place, (iii) manner, and (iv) identity of

person or persons involved, including the present residence address and name and address of employer.

6. "Document" or "Documents" have the broadest meaning permissible under the Vermont Rules of Civil Procedure and include, by way of example and not limitation, the original and all copies and translations of any information in any written, recorded, electronic, or graphic form, including all memoranda, notes, inter-office and intra-office Communications, telegrams, letters, e-mail, computer models, spreadsheets, data, reports, accounts, records, calendars, diaries, minutes, contracts or other legal documents, insurance policies, telephonic or personal Communications, tape recordings, microfilm, film, stenographic notes, bulletins, notices, computer data and other data or information sources in any written, printed or recorded matter of any character in the possession, custody or control of you, your attorneys, Agents, or other persons under your control. Without limiting the foregoing, the term "Document" or "Documents" shall include any copy which differs in any respect from the original or other versions of the document, such as copies containing notations, insertions, corrections, marginal notes or any other variations.

7. "Include," "Includes," and "Including" shall be construed to mean "without limitation."

8. "Person," means any natural person or any business, legal or governmental entity or association.

9. When referring to a Person, "Identify" means give, to the extent known, the person's (i) full name, (ii) present or last known address, and (iii) when referring to a natural person, the present or last known place of employment. Once a person has been identified in accordance with this paragraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

10. When referring to Documents, "Identify" means give, to the extent known the (i) type of Document, (ii) title of the Document (iii) general subject matter, (iv) date of the Document; and (v) author(s), addressee(s), and recipient(s). Whenever the identification of a Document is requested, you may, in lieu of such identification, attach a true and legible copy of such Document to your answers to these requests, with the understanding that counsel may inspect the original Document at a mutually agreed time and place.

11. "Acquire," "Acquiring" and "Acquisition" means to lease, option or purchase.

12. "Interest" means any economic interest, financial interest, ownership interest, equitable interest, or any legal or equitable right or privilege to wholly or partially exercise any dominion or control directly or indirectly, actually or virtually.

13. "Class Area" means the area of Vermont encompassing Chittenden County, Franklin County and Grand Isle County.

14. "Class Period" means the time period from January 1, 2005 to the present.

15. "Gasoline" means a refined petroleum product used as fuel for internal combustion engines, including automobiles.

16. "Terminal" means a Gasoline facility in which Gasoline arrives by pipeline, ship or barge and is sold to Gasoline Suppliers.

17. "Terminal Price" or "Rack Price" means the price paid for Gasoline at the Terminal.

18. "Gasoline Supplier" or "Gasoline Wholesaler" means those entities that Acquire Gasoline at the Terminal and sell that Gasoline to Retail Gasoline Stations.

19. "Retail Gasoline Station" means the full- or self-service Retail Gasoline pumps and underground gasoline storage tanks at a site whether or not there are also convenience stores, automobile service bays, or any other business associated with the Retail Gasoline Station.

20. "Wholesale Gasoline" means Gasoline sold or delivered to Retail Gasoline Stations for subsequent sale to consumers.

21. "Retail Gasoline" means Gasoline purchased by consumers from Retail Gasoline Stations.

22. "Senate Hearings" means the hearings before the United States Senate Committee on Energy and Natural Resources held on August 6, 2012 in Burlington, Vermont.

23. "2013 Committee Hearings" means the hearings on January 22, 2013 before the Joint Committee of the Vermont House of Representatives Transportation Committee, Judiciary Committee, and Commerce Committee.

24. "2015 Committee Hearings" means the hearings on January 22, 2015 before the Vermont House of Representatives Commerce and Economic Committee.

25. "RL Vallee" means Defendant R.L. Vallee, Inc., a Vermont corporation, including any of its predecessors or successors in interest, affiliates, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, Agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

26. "SB Collins" means SB Collins, Inc., a Vermont corporation, including any of its predecessors or successors in interest, affiliates, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, Agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

27. "Wesco" means Champlain Farms/Wesco, Inc., a Vermont corporation, including any of its predecessors or successors in interest, parents, subsidiaries,

divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

28. "Champlain" means Champlain Oil Company, Inc., a Vermont corporation, including any of its predecessors or successors in interest, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

29. "VPA" means the Vermont Petroleum Association, including any of its predecessors or successors in interest, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time. The term VPA explicitly includes Joseph Choquette III and also explicitly includes the Vermont Retail and Grocers Association.

30. "You" and/or "Your," and all variants thereof, shall refer to SB Collins including any of its predecessors or successors in interest, present and former

affiliates, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, members, shareholders, partners, representatives, advisors, accountants, Agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

31. The present tense includes the past and future tenses. The singular includes the plural, and the plural includes the singular. "All" means "any and all;" "any" means "any and all;" "And" and "or" encompass both "and" and "or;" words in the masculine, feminine or neuter form shall include each of the other genders.

INSTRUCTIONS

1. These Interrogatories require that You respond in a manner that satisfies the requirements of the Vermont Rules of Civil Procedure and shall be deemed continuing pursuant to Vermont Rule of Civil Procedure 26.

2. Where knowledge or information in Your possession or control is requested or inquired of, such request or inquiry also seeks knowledge or information in the possession or control of Your employers, prospective employers, former employers, employees, former employees, representatives, relatives, friends, Agents, independent contractors, consultants, attorneys, affiliates or any other Person or public or private entity acting on Your behalf.

3. Each answer should be preceded by the identification and verbatim quote of the interrogatory to which the answer responds.

4. Each interrogatory should be answered separately and fully in writing and under oath.

5. If an interrogatory cannot be answered in full, it should be answered to the extent possible, with an explanation as to why the remainder cannot be answered, disclosing whatever information, knowledge, or belief You do have with respect to the unanswered portion, including the names and addresses of any Persons or entities having further information.

6. All interrogatories should be answered on the basis of Your knowledge or information and belief. If any answer is given on information and belief, that fact should be stated in the answer. All interrogatories should include all information available to You as of the date of the answers and responses, including information obtained by or in the possession of Your Agents and representatives, and any other person acting on Your behalf.

7. If You assert a privilege, in whole or in part, with respect to any interrogatory, or You object to answering an interrogatory, in whole or in part, on any ground, You shall answer all remaining parts of the interrogatory, state the nature of the privilege or objection, including work product, that is being claimed, the facts sufficient to support Your claim of privilege or objection. You shall also Identify each item of information, Communication, Document, or part thereof upon which the privilege is

claimed, including: (a) the type and title of the Document or Communications; (b) the general subject matter of the Document or Communication; (c) the date of the Document or Communication; (d) the author of the Document or Person who Communicated the information; (e) the recipient or addressees of the Document or Communication and the entity with which the recipient or addressee is affiliated; (f) the signer of the Document and the entity with which the signer is affiliated; (g) each Person now in possession of the original or a copy of the Document, information, or Communication; (h) such other information as is sufficient to establish the privilege and/or immunity claimed; and (i) the number of the interrogatory to which the Document, information, or Communication is responsive.

8. If You object to any interrogatory on the basis that it is overbroad, respond to that interrogatory narrowed in such a way as to render it not overbroad in Your opinion and state the extent to which You have narrowed the interrogatory for purposes of Your response.

9. If in answering these interrogatories, You claim any ambiguity in a question, instruction or definition, set forth the matter deemed ambiguous and the construction used in answering the interrogatory.

10. If any of the following interrogatories call for identification or reference to Documents that You know to be missing, destroyed or otherwise disposed of, identify such Documents and give particular details as to the disposition of each Document, the identity of the Person last known to have

the document in his or her possession or subject to his or her or its control, and the identity of each person You have reason to believe had knowledge of its contents or received a copy of the document.

11. Plaintiffs reserve the right to amend, supplement, and/or modify the interrogatories contained herein.

12. Unless otherwise stated, the time period covering these Interrogatories is January 1, 2005 to the present.

INTERROGATORIES

1. Describe Your policies or practices directed to compliance with the Vermont Consumer Protection Act ("VCPA"), 9 V.S.A. §§ 2451-2480g.

2. Describe Your policies or practices regarding the retention, destruction, disposal or preservation of Documents.

3. Identify the Person(s) answering these Interrogatories and the numbered Interrogatory about which each Person has knowledge.

4. Identify all Persons who have or may have information, Documents, or knowledge relating to this Cause of Action, including the claims and allegations contained in Plaintiffs' complaint in this Cause of Action. For every Person Identified, include their respective position, including their title, group, division, department, and immediate supervisor. If the Person Identified had more than one position, Identify every position. For every Person, include a summary of the facts known to each Person.

5. Identify all Persons who currently are, or previously were during the Class Period, employed at or acting on behalf of SB Collins, whose responsibilities Concerned or Included: (i) Retail Gasoline prices in the Class Area; (ii) Wholesale Gasoline prices in the Class Area; or (iii) Gasoline distribution in the Class Area.

6. Identify and Describe every Communication You have had with any defendant named in this Cause of Action.

7. State Your percentage or share of Wholesale and Retail Gasoline sales in the Class Area for each year in the Class Period (by volume, by dollars, and by number of Retail Gasoline Stations.)

8. Identify all Persons who acted as Your Agent, including contractors and employees, who delivered Wholesale Gasoline to any Retail Gasoline Station in the Class Area during the Class Period whether owned by You or another Person. For each Agent, provide their most recent name, address, and telephone number (cellular or otherwise) available to You.

9. Identify every Gasoline Station located in the Class Area in which You had or have an Interest during the Class Period. For every Gasoline Station You Identify in responding to this Interrogatory, Identify: (i) the type of Your interest; (ii) the extent of Your Interest; (iii) when You Acquired Your Interest; (iv) if and when You sold Your Interest; and (v) the name and address of the Gasoline Station.

10. Identify every Gasoline Station listed in response to the previous interrogatory to which You did not provide all of their Wholesale Gasoline requirements during the Class Period. For every Gasoline Station You Identify in responding this Interrogatory, Identify: (i) the name and address of the Gasoline Station; (ii) all other Wholesale Gasoline suppliers for each Gasoline Station; and (iii) estimates for each Gasoline Station of Your share of total Wholesale Gasoline deliveries from all suppliers.

11. Identify every Gasoline Station located in the Class Area that You leased from another Person and that You operated during the Class Period. For every Gasoline Station You Identify in responding to this Interrogatory, Identify: (i) the name and address of the Gasoline station; (ii) the Person from whom You leased the Gasoline Station; (iii) the landlord of the Gasoline Station if different than the Person from whom You leased the Gasoline Station; and (iv) the dates that You operated the Gasoline Station.

12. Identify every Gasoline Station listed in response to the previous interrogatory to which You did not provide all of their Wholesale Gasoline requirements during the Class Period. For every Gasoline Station You Identify in responding this Interrogatory, Identify: (i) the name and address of the Gasoline Station; (ii) all other Wholesale Gasoline suppliers for each Gasoline Station; and (iii) estimates for each Gasoline Station of Your share of total Wholesale Gasoline deliveries from all suppliers.

13. Identify every Gasoline Station located in the Class Area that You owned and that was operated by a Person unaffiliated with You during the Class Period. For every Gasoline Station You Identify in responding to this Interrogatory, Identify: (i) the name and address of the Gasoline station; (ii) the Person to whom You leased the Gasoline Station; (iii) the landlord of the Gasoline Station if different than the Person to whom You leased the Gasoline Station; and (iv) the dates that the Gasoline Station was operated by an unaffiliated Person.

14. Identify every Gasoline Station listed in response to the previous interrogatory to which You did not provide all of their Wholesale Gasoline requirements during the Class Period. For every Gasoline Station You Identify in responding this Interrogatory, Identify: (i) the name and address of the Gasoline Station; (ii) all other Wholesale Gasoline suppliers for each Gasoline Station; and (iii) estimates for each Gasoline Station of Your share of total Wholesale Gasoline deliveries from all suppliers.

15. Identify every Gasoline Station located in Class Area to which You, or any entity in which You have an Interest, have sold or supplied Gasoline. For every Gasoline Station You Identify in responding to this Interrogatory, Identify: (i) the time period in which Gasoline was sold or supplied to the Gasoline Station; (ii) the amount of Gasoline, by week, sold or supplied to each Gasoline Station; (iii) the price(s) charged, by week, to each Gasoline

Station for the Gasoline; and (iv) whether You were the sole supplier of Gasoline to the Gasoline Station.

16. Identify every Gasoline Station listed in response to the previous interrogatory to which You did not provide all of their Wholesale Gasoline requirements during the Class Period. For every Gasoline Station You Identify in responding this Interrogatory, Identify: (i) the name and address of the Gasoline Station; (ii) all other Wholesale Gasoline suppliers for each Gasoline Station; and (iii) estimates for each Gasoline Station of Your share of total Wholesale Gasoline deliveries from all suppliers.

17. Identify every gas pump or tank owned by You that is in use by a Retail Gasoline Station not owned by You. For each such Retail Gasoline Station, provide the address, contact person, and telephone number.

18. Identify the price(s) paid by You, or any entity in which You have an interest, by week, for the Gasoline You Acquired at the Terminal.

19. Identify every Gasoline Station not owned or operated by You that Acquired Wholesale Gasoline from You. For every Gasoline Station identified in this Interrogatory, Identify: (i) the name and address of the Gasoline Station; (ii) the owner of the Gasoline Station; and (iii) the dates in which You supplied the Wholesale Gasoline.

20. For every Gasoline Station Identified in the previous Interrogatory, Identify those Gasoline Stations that Acquired from You less than its full Gasoline requirements. For each Gasoline Station Identified in this

Interrogatory, Identify its other Gasoline suppliers and estimate the percentage of the Gasoline Station's full requirements that were supplied by Your Wholesale Gasoline operation.

21. Identify every Agreement You have had with Gasoline Stations located in the Class Area to sell, supply or otherwise provide Gasoline to those Gasoline Stations.

22. Identify all Real Property You have Acquired or sold within the Class Area during the Class Period. For all Real Property You Identify for this Interrogatory, Identify all Agreements related to each Acquisition or sale, including any deed restrictions Concerning those Acquisitions or sales.

23. Identify every Gasoline Station outside of the Class Area to which You sold Gasoline during the Class Period. In responding to this Interrogatory, include: (i) the name and address of the Gasoline Station; and (ii) the Gasoline Station owner.

24. Identify every Wholesale Gasoline delivery vehicle, distinguished by volume-carrying capacity, owned or leased by You during the Class Period. For every vehicle Identified in response to those Interrogatory, specify the dates You owned or leased the vehicles.

25. Identify every Wholesale Gasoline delivery vehicle, distinguished by volume-carrying capacity, owned or leased by Persons unaffiliated with You and which was under contract with You to deliver Gasoline to Your retail Gasoline Station customers (whether or not owned by You). Identify

Your aggregate gross profits, by week, for the sale of Gasoline to Retail Gasoline Stations in the Class Area.

26. Identify Your aggregate net profits, by week, for the sale of Gasoline to Retail Gasoline Stations in the Class Area.

27. Identify Your aggregate gross profits, by week, for the sale of Retail Gasoline at Gasoline Stations in which You have an Interest.

28. Identify Your aggregate gross profits, by week, for the sale of Retail Gasoline at Gasoline Stations in which You have an Interest.

29. Identify every meeting, conference, event or gathering, formal or informal You have attended with any Person related to or involved with RL Vallee, Wesco, Champlain, or the VPA.

30. Identify every meeting, conference, event or gathering, formal or informal, sponsored by or in any way Concerning the VPA that You attended or are aware of. This Interrogatory includes any meeting, conference, event or gathering in which any Person involved with the VPA was present.

31. Identify every telephone call, go to meeting, or electronic conference or Communication Concerning the VPA that You attended or are aware of.

32. Identify all transportation costs incurred by You, by week, to transport Gasoline from a Terminal to Retail Gasoline Stations within the Class Area.

33. Identify all taxes incurred by You, by year, in operating Retail Gasoline Stations within the Class Area.
34. Identify all Terminal Costs, by week, in Acquiring Gasoline from a Terminal for sale or distribution within the Class Area.
35. Identify all costs incurred by You related to fuel reformulations for Gasoline sold or distributed by You within the Class Area.
36. Identify all fees associated with customers' use of credit cards at Retail Gasoline Stations within the Class Area in which You have an Interest. This Interrogatory includes any benefit You receive from the customers' use of credit cards.
37. Identify all Documents related to any fees or charges payable to You associated with customers use of credit cards at Retail Gasoline Stations within the Class Area in which You have an Interest.
38. Identify all labor costs, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
39. Identify all repair costs, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
40. Identify all storage tank costs, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
41. Identify all costs, by Retail Gasoline Station, incurred by You in building every Retail Gasoline Station in which You have an interest.

42. Identify all property taxes, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
43. Identify all environmental compliance costs, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
44. Identify all utility costs, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
45. Identify all costs, by Retail Gasoline Station, incurred by You caused by individuals driving off from Your Retail Gasoline Stations after obtaining Gasoline and without paying for that Gasoline.
46. Identify all costs related to maintaining adequate inventory levels of Gasoline, by Retail Gasoline Station, incurred by You in operating every Retail Gasoline Station in which You have an interest.
47. Identify all costs, by Retail Gasoline Station, incurred by You in placing flowers within every Retail Gasoline Station in which You have an interest.
48. Describe in detail your estimates of the total economic value of SB Collins separately for each year from 2005 to the present, including all amounts, calculations, formulas, methodologies, assumptions.
49. Identify all Persons who will offer testimony on Your behalf at any hearing or trial in this Cause of Action. For each Person You Identify, describe the general scope and substance of that Person's anticipated testimony

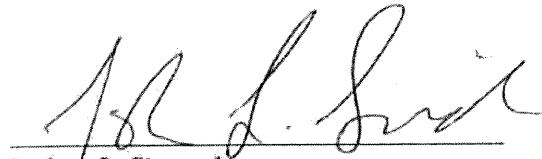
50. Identify all expert or opinion witnesses whom You intend to call any hearing or trial in this Cause of Action. For each Person You Identify, describe the general scope and substance of that Person's anticipated testimony.

51. List all businesses, including names, contract Persons and addresses, that use any point of sale ("POS") service or device offered by You.

52. Identify and Describe every proceeding, formal or informal, related to Vermont Act 250 that you have been involved in during the Class Period.

8/4/15

By:



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Counsel for Plaintiffs

* *Pro hac vice* applications submitted

SUPERIOR COURT
CHITTENDEN UNIT

STATE OF VERMONT

CIVIL DIVISION

JACOB R. KENT, ANNE B. VERA,
THOMAS R. MAHAR, 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.

Case No. 617-6-15 Cnev

**PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION
TO DEFENDANT SB COLLINS, INC.**

Pursuant to Vermont Rule of Civil Procedure 34, Plaintiffs Jacob Kent, Anne B. Vera, Thomas R. Mahar, Dawn M. Mahar, David C. Carter and all others similarly situated ("Plaintiffs"), by and through counsel, hereby propound the following requests for production of documents and things to Defendant SB Collins, Inc. ("SB Collins"). Plaintiffs request that SB Collins produce for inspection and copying the following articles, documents or things in its possession, custody or control. The requested articles, documents or things requested are to be produced according to the definitions and instructions set forth below and made available at the offices of Joshua Simonds, The Burlington Law Practice, PLLC, 2 Church Street, Suite 2-G, Burlington, VT 05401,

within forty-five (45) days after service of the summons and amended complaint or at such other time and location as ordered by the Court.

DEFINITIONS

For the purposes of these Requests for Production, the following definitions shall apply:

1. "Concerning" means describing, discussing, constituting, containing, considering, embodying, evaluating, mentioning, memorializing, supporting, collaborating, demonstrating, proving, evidencing, showing, refuting, disputing, rebutting, regarding, controverting, contradicting, made in connection with or by reason of, or derived or arising therefrom.
2. "Agent" means any past or present director, officer, counsel, shareholder, member, representative, consultant or employee of any person or entity or any person that assisted, acted for, or purported to assist or act for or on behalf of such person or entity.
3. "Cause of Action" means the above captioned case, Case No. 617-6-15 Cncv pending in the Superior Court of the State of Vermont, Chittenden Unit, Civil Division.
4. "Communicate" or "Communication" means any written or other transmission or exchange of words, thoughts or ideas to another person or entity, whether person-to-person, in a group, in a meeting, by telephone, by letter, by telex, facsimile, electronic mail, texting, or by any other process or medium, electronic or otherwise.
5. "Document" or "Documents" have the broadest meaning permissible under the Vermont Rules of Civil Procedure and Include, by way of example and not limitation,

the original and all copies and translations of any information in any written, recorded, electronic, or graphic form, including all memoranda, notes, inter-office and intra-office communications, telegrams, letters, e-mail, computer models, spreadsheets, data, reports, accounts, records, calendars, diaries, minutes, contracts or other legal documents, insurance policies, telephonic or personal communications, tape recordings, microfilm, film, stenographic notes, bulletins, notices, computer data and other data or information sources in any written, printed or recorded matter of any character in the possession, custody or control of you, your attorneys, agents, or other persons under your control. Without limiting the foregoing, the term "Document" or "Documents" shall include any copy which differs in any respect from the original or other versions of the document, such as copies containing notations, insertions, corrections, marginal notes or any other variations.

6. "Include," "Includes," and "Including" shall be construed to mean "without limitation."

7. "Person," means any natural person or any business, legal or governmental entity or association.

8. "Acquire," "Acquiring" and "Acquisition" means to lease, option or purchase.

9. "Interest" means any economic interest, financial interest, ownership interest, equitable interest, or any legal or equitable right or privilege to wholly or partially exercise any dominion or control directly or indirectly, actually or virtually.

10. "Class Area" means the area of Vermont encompassing Chittenden County, Franklin County and Grand Isle County.

11. "Class Period" means the time period from January 1, 2005 to the present.
12. "Gasoline" means a refined petroleum product used as fuel for internal combustion engines, including automobiles.
13. "Terminal" means a Gasoline facility in which Gasoline arrives by pipeline, ship or barge and is sold to Gasoline Suppliers.
14. "Terminal Price" or "Rack Price" means the price paid for Gasoline at the Terminal.
15. "Gasoline Supplier" or "Gasoline Wholesaler" means those entities that Acquire Gasoline at the Terminal and sell that Gasoline to Retail Gasoline Stations.
16. "Retail Gasoline Station" means the full- or self-service Retail Gasoline pumps and underground gasoline storage tanks at a site whether or not there are also convenience stores, automobile service bays, or any other business associated with the Retail Gasoline Station.
17. "Wholesale Gasoline" means Gasoline sold or delivered to Retail Gasoline Stations for subsequent sale to consumers.
18. "Retail Gasoline" means Gasoline purchased by consumers from Retail Gasoline Stations.
19. "Senate Hearings" means the hearings before the United States Senate Committee on Energy and Natural Resources held on August 6, 2012 in Burlington, Vermont.

20. "2013 Committee Hearings" means the hearings on January 22, 2013 before the Joint Committee of the Vermont House of Representatives Transportation Committee, Judiciary Committee, and Commerce Committee.

21. "2015 Committee Hearings" means the hearings on January 22, 2015 before the Vermont House of Representatives Commerce and Economic Committee.

22. "RL Vallee" means Defendant R.L. Vallee, Inc., a Vermont corporation, including any of its predecessors or successors in interest, affiliates, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, Agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

23. "SB Collins" means SB Collins, Inc., a Vermont corporation, including any of its predecessors or successors in interest, affiliates, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, Agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

24. "Wesco" means Champlain Farms/Wesco, Inc., a Vermont corporation, including any of its predecessors or successors in interest, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors,

accountants, agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

25. "Champlain" means Champlain Oil Company, Inc., a Vermont corporation, including any of its predecessors or successors in interest, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

26. "VPA" means the Vermont Petroleum Association, including any of its predecessors or successors in interest, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, representatives, advisors, accountants, agents, attorneys, associates or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time. The term VPA explicitly includes Joseph Choquette III and also explicitly includes the Vermont Retail and Grocers Association.

27. "You" and/or "Your," and all variants thereof, shall refer to SB Collins including any of its predecessors or successors in interest, present and former affiliates, parents, subsidiaries, divisions, departments, offices and, for each of the foregoing, and present or former directors, officers, executives, trustees, employees, members, shareholders, partners, representatives, advisors, accountants, agents, attorneys, associates,

independent contractors or any other person(s) known, believed, or suspected to be acting or purporting to act on its behalf, now or at any previous time.

28. The present tense includes the past and future tenses. The singular includes the plural, and the plural includes the singular. "All" means "any and all;" "any" means "any and all;" "And" and "or" encompass both "and" and "or;" words in the masculine, feminine or neuter form shall include each of the other genders.

INSTRUCTIONS

1. These requests require that You produce Documents in a manner that satisfies the requirements of Vermont Rule of Civil Procedure 34 and shall be deemed continuing to the extent required under Vermont Rule of Civil Procedure 26.
2. Where knowledge or information in Your possession or control is requested or inquired of, such request or inquiry also seeks knowledge or information in the possession or control of Your employers, prospective employers, former employers, employees, former employees, representatives, relatives, friends, Agents, independent contractors, consultants, attorneys, affiliates or any other Person or public or private entity acting on Your behalf.
3. Each answer should be preceded by the identification and verbatim quote of the request to which the answer responds.
4. Each request should be answered separately and fully in writing.
5. If a request cannot be answered in full, it should be answered to the extent possible, with an explanation as to why the remainder cannot be answered, disclosing

whatever information, knowledge, or belief You do have with respect to the unanswered portion, Including the names and addresses of any Persons or entities having further information.

6. All requests should be answered on the basis of Your knowledge or information and belief. If any answer is given on information and belief, that fact should be stated in the answer. All requests should Include all information available to You as of the date of the answers and responses, Including information obtained by or in the possession of Your Agents and representatives, and any other person acting on Your behalf.

7. If You assert a privilege, in whole or in part, with respect to any request, or You object to answering an request, in whole or in part, on any ground, You shall answer all remaining parts of the request, state the nature of the privilege or objection, Including work product, that is being claimed, and the facts sufficient to support Your claim of privilege or objection, You shall also identify each item of information, Communication, Document, or part thereof upon which the privilege is claimed, Including: (a) the type and title of the Document or Communications; (b) the general subject matter of the Document or Communication; (c) the date of the Document or Communication; (d) the author of the Document or Person who communicated the information; (e) the recipient or addressees of the Document or Communication and the entity with which the recipient or addressee is affiliated; (f) the signer of the Document and the entity with which the signer is affiliated; (g) each Person now in possession of the original or a copy of the Document, information, or Communication; (h) such other

information as is sufficient to establish the privilege and/or immunity claimed; and (i) the number of the request to which the Document, information, or Communication is responsive.

8. If You object to any request on the basis that it is overbroad, respond to that request narrowed in such a way as to render it not overbroad in Your opinion and state the extent to which You have narrowed the request for purposes of Your response.

9. If in answering these requests, You claim any ambiguity in a question, instruction or definition, set forth the matter deemed ambiguous and the construction used in answering the request.

10. If any of the following requests call for identification or reference to Documents that You know to be missing, destroyed or otherwise disposed of, identify such Documents and give particular details as to the disposition of each Document, the identity of the Person last known to have the document in his or her possession or subject to his or her or its control, and the identity of each person You have reason to believe had knowledge of its contents or received a copy of the document.

11. Plaintiffs wish to meet and confer with Defendants regarding protocols for the production of electronically stored information ("ESI") governing productions in this matter.

12. Plaintiffs reserve the right to amend, supplement, and/or modify the requests contained herein.

13. Unless otherwise stated, the time period covering these requests is January 1, 2005 to the present.

REQUESTS

1. All Documents relating to Your policies or practices directed to compliance with the Vermont Consumer Protection Act ("VCPA"), 9 V.S.A. §§ 2451-2480g.
2. All Documents sufficient to show the manner in which you have maintained records relating to Gasoline, including Documents sufficient to describe all electronic data processing systems, programs and outputs used to record, store, compute, analyze or retrieve electronically stored information relating to your pricing, production, distribution, marketing or sale of Gasoline.
3. Documents related to Your policies or practices with respect to the retention, destruction, disposal or preservation of Documents.
4. Documents sufficient to show your organizational structure throughout the Class Period, including but not limited to, departments, divisions, parents, subsidiaries, joint ventures, affiliates, or other sub-units that were engaged in the sale of Gasoline, including, where applicable, the percentage of any stock or other interests owned by each entity.
5. All organizational charts and/or documents identifying any Person acting in any capacity related to Your Wholesale Gasoline or Retail Gasoline businesses.
6. All Documents Identifying all Persons who have participated in your Wholesale Gasoline business, including employees or contractors who have delivered Gasoline from a Terminal to any Retail Gasoline Station whether owned by You or not.

7. All Documents and Communications You identified, gathered, reviewed, referred to, considered, and/or relied on to answer any of Plaintiffs' First Set of Interrogatories directed to You and served in this Cause of Action.

8. All of Your calendars; travel records; expense reports; telephone records; trade association materials; Diaries; to-do lists; appointment notes; expense reports; and telephone number/call logs.

9. Documents sufficient to show changes in supply, demand, pricing or discounting for Wholesale or Retail Gasoline.

10. All business plans, planning analyses, budgets, forecasts, or sales or profit projections relating to Wholesale or Retail Gasoline.

11. All invoices associated with Your Wholesale or Retail Gasoline businesses.

12. All documents relating to policies, methods, formulas or factors to be used in determining, computing or quoting prices for Wholesale or Retail Gasoline.

13. All documents related to Your published prices, price lists, price schedules, price announcements and price changes for Wholesale or Retail Gasoline.

14. All documents relating to Your or any other Person's percentage or share of Wholesale or Retail Gasoline sales in the Class Area (by volume, by dollars, and by number of Retail Gasoline Stations.)

15. Documents that show the identity of other Person's engaged in the Wholesale or Retail Gasoline business in the Class Area.

16. All Your monthly, quarterly, and yearly: (i) general ledgers; (ii) detailed balance sheets; (iii) detailed cash flow statements; (iv) detailed profit and loss

statements; (v) bank feasibility reports; (vi) monthly income statements; (vii) annual income statements; and (viii) federal, state, or local government tax filings.

17. All Your monthly and annual income statements for both Your Wholesale Gasoline operations and your Retail Gasoline Station operations. Provide separate income and expense reports if Your business records distinguish income and expenses between wholly owned (or leased) and operated Gasoline Stations, on the one hand, and those owned by You but operated under contracts with unaffiliated Persons, on the other hand.

18. All externally and internally produced assessments of Retail Gasoline market conditions and competition anywhere in the Class Area.

19. All externally and internally produced assessments of Wholesale Gasoline market conditions and competition anywhere in the Class Area.

20. All Documents and Communications Concerning: (i) Gasoline Station openings or closings in the Class Area; (ii) changes in Gasoline Station ownership in the Class Area; (iii) deed restrictions on land in the Class Area; and (iii) attempts to open new Gasoline Stations by Yourself or other Persons in the Class Area.

21. All Documents prepared for or disclosed to any actual or potential lender, investor, bank, financial institution, or acquirer Concerning all or any part of Your operations in the Class Area.

22. All Documents Concerning: (i) financial valuations; (ii) financial projections; (iii) business plans; and (iv) offering memoranda created by You or anyone for all or any part of Your operations.

23. For each of Your Acquisitions of real property in the Class Area, all Documents Concerning or sufficient to show: (i) detailed cash flow statements; (ii) detailed profit and loss statements; (iii) internal rate of return (IRR); (iv) return on investment (ROI); (v) return on equity (ROE); and (vi) return on debt (ROD).

24. For each Gasoline Station located in the Class Area that You leased from another Person and that You operated during the Class Period, all Documents concerning those leases including copies of the leases and communications related to those leases.

25. For each Gasoline Station, gasoline pump or gasoline storage tank located in the Class Area that You owned but that was operated by a Person unaffiliated with You, all Documents concerning those arrangements including all contracts and agreements with the those Persons and all communications Concerning those contracts and agreements.

26. With respect to Your Retail Gasoline Stations, all Documents Concerning or sufficient to show actual, projected or estimated: (i) detailed cash flow statements; (ii) detailed profit and loss statements; (iii) internal rate of return (IRR); (iv) return on investment (ROI); (v) return on equity (ROE); and (vi) return on debt (ROD).

27. With respect to Your Wholesale Gasoline operations, all Documents Concerning or sufficient to show actual, projected or estimated: (i) detailed cash flow statements; (ii) detailed profit and loss statements; (iii) internal rate of return (IRR); (iv) return on investment (ROI); (v) return on equity (ROE); and (vi) return on debt (ROD).

28. Documents Concerning meetings or Communications with RL Vallee, Wesco, Champlain, or VPA Concerning the purchase, sale, distribution, marketing, pricing of or competition related to Gasoline, Wholesale Gasoline or Retail Gasoline.

29. Communications between You and any Person selling Wholesale Gasoline in the Class Area related to Gasoline.

30. Communications between You and any Person selling Retail Gasoline in the Class Area related to Gasoline.

31. Documents Concerning meetings or Communications with the VPA.

32. Communications between You and any Person Concerning the Senate Hearings.

33. Communications between You and any Person Concerning the 2013 Committee Hearings.

34. Communications between You and any Person Concerning the 2015 Committee Hearings.

35. Documents Concerning Your Acquisition of Gasoline at a Terminal, including: (i) invoices showing the seller and the Terminal location; (ii) Acquisition date; (iii) volume of Gasoline purchased by grade; (iv) unit prices gross and net of any discounts; (v) contracts or agreements to which You are or were a party; (vi) amounts, per day, of Gasoline Acquired at a Terminal; (vii) price(s), per day, of Gasoline Acquired at a Terminal. This request includes all electronic general ledger spreadsheets logging or identifying Your Acquisition of Gasoline at a Terminal.

36. For each sale of Wholesale Gasoline to stations in the Class Area (whether owned or operated by You or others), provide billing invoices Identifying: (i) the Gasoline Station's owner; (ii) the name and address of the purchasing Gasoline Station; (iii) the delivery date of the Wholesale Gasoline; (iv) the volume of Wholesale Gasoline delivered by grade; and (v) the unit price gross and net of any discount of the Wholesale Gasoline. If sales to Gasoline Stations owned by You are handled by bookkeeping transfers, then, in addition to the non-price information listed above, provide records showing the unit transfer price for each Gasoline grade delivered to each Gasoline Station. This request includes all electronic company general ledger spreadsheets logging Wholesale Gasoline sales.

37. Documents Concerning Your sale of Retail Gasoline, by grade, including (i) amounts, per day, of Gasoline sold by Your Retail Gasoline Stations; (ii) price(s), per day, charged by Your Retail Gasoline Stations.

38. Documents Concerning the daily Retail Gasoline prices by grade during the Class Period at any Gasoline Station selling Gasoline delivered by Your Wholesale Gasoline operation.

39. Communications to employees of Gasoline Stations You operate (whether owned or leased) specifying the mechanism or process by which daily Retail Gasoline prices are to be set for each grade of Gasoline.

40. Documents Concerning Your gross profits from the sale of Retail Gasoline within the Class Area.

41. Documents Concerning Your gross profits from the sale of Retail Gasoline outside of the Class Area.

42. Documents Concerning Your gross profits from the sale of Wholesale Gasoline within the Class Area.

43. Documents Concerning Your gross profits from the sale of Wholesale Gasoline outside of the Class Area.

44. For any sale of Gasoline to Gasoline Stations outside of the Class Area, Documents Concerning: (i) the name and address of the Gasoline Station; (ii) the Gasoline Station owner; (iii) the date(s) of sale of Gasoline; (iv) the volume of Gasoline sales by grade, and unit price gross and net of discounts.

45. Documents Concerning all Retail Gasoline Stations located in the Class Area in which You had or have an Interest during the Class Period, Including: (i) Agreements related to the Acquisition or Sale of the Gasoline Station; (ii) Amounts of Gasoline sold; and (iii) Prices of Gasoline Sold

46. Documents Concerning all Gasoline Stations located in the Class Area in which You or any entity in which You have an Interest, have sold or supplied Wholesale Gasoline including: (i) Agreements governing the relationship; (ii) Amounts of Gasoline supplied; and (iii) Prices of Gasoline supplied.

47. Documents Concerning any Wholesale Gasoline delivery vehicles owned or leased by You.

48. Documents Concerning the number of round trips made, per day, between a Terminal and any Gasoline Station by any Wholesale Gasoline delivery vehicle owned or leased by You.

49. Documents Concerning any Whole Gasoline delivery vehicles owned or leased by Persons unaffiliated with You but which delivered Gasoline to Retail Gasoline Stations owned or operated by You.

50. Documents Concerning the number of round trips made, per day, between a Terminal and any Gasoline Station by any Wholesale Gasoline delivery vehicle owned or leased by Persons unaffiliated with You but which delivered Gasoline to Retail Gasoline Stations owned or operated by You.

51. Documents, including contracts, agreements and correspondence, between You and each of the unaffiliated Wholesale Gasoline delivery companies referenced in the previous two requests.

52. All logs of daily Retail Gasoline price instructions from You to (i) any of the Gasoline Stations You own or operated stations (whether owned or leased) and (ii) any Gasoline Stations operated by Persons other than You for which the leases and/or operating agreements reference on prices set by You.

53. All contracts or agreements between You and any Gasoline Station detailing or Concerning operating requirements (including resale prices for Gasoline) for all Gasoline Stations: (i) owned and operated by You; (ii) owned by You but operated by other Persons; (iii) owned by Persons other than You but operated by You;

and (iv) that purchased Wholesale Gasoline from You and were not already included in (i), (ii), or (iii).

54. Documents Concerning acquisition of Gasoline at a Terminal.

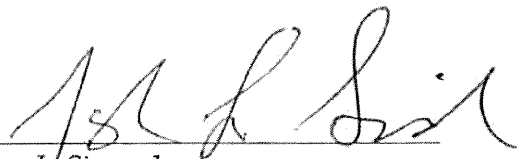
55. All Documents related to any point of sale (POS) business You engage in.

56. All Documents relating to any actions by You to conceal or avoid detection by any Person of Communications, understandings, or agreements between You and any other Person regarding the price or supply of Wholesale or Retail Gasoline.

57. All Documents relating to Your ability to pay damages or fines in connection with any public prosecution or private litigation alleging any violation of the Vermont antitrust laws.

8/7/15

By:


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Telephone: (802) 651-5370
jls@burlingtonlawpractice.com

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(*pro hac vice* application to be submitted)

Counsel for Plaintiffs

* *Pro hac vice* applications pending

SHEEHEY FURLONG & BEHM
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PAUL D. SHEEHEY (1919-2004)

HAND DELIVERED

October 5, 2015

Christine Brock, Superior Court Clerk
Vermont Superior Court
Chittenden Civil Division
P.O. Box 187
Burlington, VT 05402

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

Dear Christine:

I enclose for filing in the above matter Defendant S.B. Collins, Inc.'s Motion To Dismiss For Failure To State A Claim, together with a Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.



Kevin A. Lumpkin

KAL/srr
Enclosures

cc: Joshua L. Simonds, Esq.
Robert B. Hemley, Esq.
Tristram J. Coffin, Esq.
David V. Kirby, Esq.

From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:35 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Champlain Oil Company, Inc.'s Motion to Dismiss and supporting Memorandum
Attachments: #1054290-v1-Champlain Oil Company Inc s Motion to Dismiss and Memorandum in Support of Motion to Dimiss.pdf

FYI

Sent from my iPhone

Begin forwarded message:

From: "Linda Bradford Barron" <lbarron@gravelshea.com<mailto:lbarron@gravelshea.com>>
To: "'R. Jeffrey Behm'" <JBehm@sheeheyvt.com<mailto:JBehm@sheeheyvt.com>>, "'Tristram J. Coffin (TCoffin@drm.com<mailto:TCoffin@drm.com>)" <TCoffin@drm.com<mailto:TCoffin@drm.com>>, "'Walter E. Judge, Jr. (wjudge@drm.com<mailto:wjudge@drm.com>)" <wjudge@drm.com<mailto:wjudge@drm.com>>, "'David V. Kirby (david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>)" <david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>>, "'Kevin Lumpkin (KLumpkin@sheeheyvt.com<mailto:KLumpkin@sheeheyvt.com>)" <KLumpkin@sheeheyvt.com<mailto:KLumpkin@sheeheyvt.com>>, "Patrick O. Muench" <PMuench@baileyglasser.com<mailto:PMuench@baileyglasser.com>>, "Michael L. Murphy" <MMurphy@baileyglasser.com<mailto:MMurphy@baileyglasser.com>>, "'rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>" <rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>>, "Ora N. Nwabueze" <ONwabueze@baileyglasser.com<mailto:ONwabueze@baileyglasser.com>>, "Barbara O'Connor (barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>)" <barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>>, "John Roddy" <JRoddy@baileyglasser.com<mailto:JRoddy@baileyglasser.com>>, "'Joshua L. Simonds (jls@burlingtonlawpractice.com<mailto:jls@burlingtonlawpractice.com>)" <jls@burlingtonlawpractice.com<mailto:jls@burlingtonlawpractice.com>>, "Stacey Reyome" <SReyome@sheeheyvt.com<mailto:SReyome@sheeheyvt.com>>, "Mary Bouchard (MBouchard@sheeheyvt.com<mailto:MBouchard@sheeheyvt.com>)" <MBouchard@sheeheyvt.com<mailto:MBouchard@sheeheyvt.com>>
Cc: "Robert B. Hemley" <rhemley@gravelshea.com<mailto:rhemley@gravelshea.com>>, "Matthew B. Byrne" <mbyrne@gravelshea.com<mailto:mbyrne@gravelshea.com>>
Subject: Champlain Oil Company, Inc.'s Motion to Dismiss and supporting Memorandum

Linda Bradford Barron | Legal Assistant

Gravel & Shea PC

76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369

802-658-0220 (phone) | 802-658-1456 (fax) lbarron@gravelshea.com<mailto:lbarron@gravelshea.com> |

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<#1054304-v1-Brock re Champlain Oil Company, Inc.s Motion to Dismiss.PDF> <#1054290-v1-Champlain Oil Company, Inc.s Motion to Dismiss and Memorandum in Support of Motion to Dimiss.PDF>

Michael L. Murphy
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Patrick O. Muench
Attorney
Bailey & Glasser LLP
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Cary Joshi
Bailey & Glasser LLP
T: 304.345.6555

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant Wesco, Inc.'s **Defendant Wesco, Inc.'s Motion To Dismiss The First Amended Complaint And Memorandum In Support Thereof And Notice Of Joinder** and **this Certificate of Service** were served via U.S.

Mail and email on October 5, 2015, on the following attorneys of record:

Joshua L. Simonds, Esq.
The Burlington Law Practice, PLLC
2 Church Street, Suite 2G
Burlington, VT 05401

Tristram J. Coffin, Esq.
Downs, Rachlin & Martin, PLLC
199 Main Street
P.O. Box 190
Burlington VT 05402-0190

Robert Hemley, Esq.
Gravel & Shea, PC
76 St. Paul Street, 7th Floor
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Burlington, VT 05402-0369

R. Jeffrey Behm, Esq.
Sheehey, Furlong & Behm, PC
30 Main Street, 6th Floor
P.O. Box 66
Burlington, VT 05402-0066

Dated: Venice, CA
October 5, 2015

David V. Kirby
O'Connor & Kirby, P.C.
174 Battery St., 3rd Floor
Burlington, Vermont 05401
(802) 863-0112
David@KirbyOConnor.com

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 617-6-15 Cnev

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,

David V. Kirby
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174 Battery St., 3rd Floor
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(802) 863-0112
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Admitted in NY, VT and IL

(802) 863-0112

BARBARA E. O'CONNOR
Admitted in NY, VT, CT and CA

(802) 865-5980 (facsimile)

October 5, 2015

Christine Brock, Clerk
Vermont Superior Court
Chittenden Civil Division
175 Main Street
P.O. Box 187
Burlington, VT 05402-0187

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

Dear Ms. Brock,

Enclosed for filing please find **Defendant Wesco, Inc.'s Motion to Dismiss the First Amended Complaint and Memorandum in Support Thereof and Notice of Joinder and Certificate of Service** for same.

Sincerely,

David V. Kirby
O'Connor & Kirby, P.C.
David@KirbyOConnor.com

CC: Service List

From: Abrams, Jill
Sent: Friday, October 09, 2015 9:38 AM
To: Morgan, Wendy
Subject: RE: Gas Price Class Action Motions

Yup. I forwarded the briefs to you and Ryan on 10/6. I doubt Sirotkin wants to read them, but wanted you to know we have them in case he does.

From: Morgan, Wendy
Sent: Friday, October 09, 2015 9:34 AM
To: Abrams, Jill <jill.abrams@vermont.gov>
Subject: RE: Gas Price Class Action Motions

Thx – goodness moving slowly

From: Abrams, Jill
Sent: Friday, October 09, 2015 9:06 AM
To: Morgan, Wendy; Kriger, Ryan
Subject: RE: Gas Price Class Action Motions

The defendants just filed their motions to dismiss.

From: Morgan, Wendy
Sent: Friday, October 09, 2015 8:55 AM
To: Abrams, Jill <jill.abrams@vermont.gov>; Kriger, Ryan <ryan.kriger@vermont.gov>
Subject: RE: Gas Price Class Action Motions

Can one of you give me current status? Michael Sirotkin asked me Wednesday and I'd like to email him.

From: Abrams, Jill
Sent: Tuesday, October 06, 2015 9:47 AM
To: Kriger, Ryan
Cc: Morgan, Wendy
Subject: Gas Price Class Action Motions

Class counsel forwarded these to me.

From: Abrams, Jill
Sent: Friday, October 09, 2015 9:06 AM
To: Morgan, Wendy; Kriger, Ryan
Subject: RE: Gas Price Class Action Motions

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To: Kriger, Ryan
Cc: Morgan, Wendy
Subject: Gas Price Class Action Motions

Class counsel forwarded these to me.

From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:35 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Champlain Oil Company, Inc.'s Motion to Dismiss and supporting Memorandum
Attachments: #1054290-v1-Champlain Oil Company Inc s Motion to Dismiss and Memorandum in Support of Motion to Dimiss.pdf

FYI

Sent from my iPhone

Begin forwarded message:

From: "Linda Bradford Barron" <lbarron@gravelshea.com<mailto:lbarron@gravelshea.com>>
To: "'R. Jeffrey Behm'" <JBehm@sheeheyvt.com<mailto:JBehm@sheeheyvt.com>>, "'Tristram J. Coffin (TCoffin@drm.com<mailto:TCoffin@drm.com>)'<TCoffin@drm.com<mailto:TCoffin@drm.com>>, "'Walter E. Judge, Jr. (wjudge@drm.com<mailto:wjudge@drm.com>)'<wjudge@drm.com<mailto:wjudge@drm.com>>, "'David V. Kirby (david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>)'<david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>>, "'Kevin Lumpkin (KLumpkin@sheeheyvt.com<mailto:KLumpkin@sheeheyvt.com>)'<KLumpkin@sheeheyvt.com<mailto:KLumpkin@sheeheyvt.com>>, "Patrick O. Muench" <PMuench@baileyglasser.com<mailto:PMuench@baileyglasser.com>>, "Michael L. Murphy" <MMurphy@baileyglasser.com<mailto:MMurphy@baileyglasser.com>>, "'rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>'" <rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>>, "Ora N. Nwabueze" <ONwabueze@baileyglasser.com<mailto:ONwabueze@baileyglasser.com>>, "'Barbara O'Connor (barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>)'<barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>>, "John Roddy" <JRoddy@baileyglasser.com<mailto:JRoddy@baileyglasser.com>>, "'Joshua L. Simonds (jls@burlingtonlawpractice.com<mailto:jls@burlingtonlawpractice.com>)'<jls@burlingtonlawpractice.com<mailto:jls@burlingtonlawpractice.com>>, "Stacey Reyome" <SReyome@sheeheyvt.com<mailto:SReyome@sheeheyvt.com>>, "Mary Bouchard (MBouchard@sheeheyvt.com<mailto:MBouchard@sheeheyvt.com>)'<MBouchard@sheeheyvt.com<mailto:MBouchard@sheeheyvt.com>>
Cc: "Robert B. Hemley" <rhemley@gravelshea.com<mailto:rhemley@gravelshea.com>>, "Matthew B. Byrne" <mbyrne@gravelshea.com<mailto:mbyrne@gravelshea.com>>
Subject: Champlain Oil Company, Inc.'s Motion to Dismiss and supporting Memorandum

Linda Bradford Barron | Legal Assistant

Gravel & Shea PC

76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369

802-658-0220 (phone) | 802-658-1456 (fax) lbarron@gravelshea.com<mailto:lbarron@gravelshea.com> |

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<#1054304-v1-Brock re Champlain Oil Company, Inc.s Motion to Dismiss.PDF> <#1054290-v1-Champlain Oil Company, Inc.s Motion to Dismiss and Memorandum in Support of Motion to Dimiss.PDF>

Michael L. Murphy
Attorney
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T: 202.463.2101

Patrick O. Muench
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T: 217.528.1177

Cary Joshi
Bailey & Glasser LLP
T: 304.345.6555

From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:33 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - S.B. Collins' Motion to Dismiss and Memorandum of Law in Support
Attachments: Brock 2015-10-05.pdf; COS 2015-10-05.pdf; SB Collins Motion to Dismiss.pdf

From: Stacey Reyome [mailto:sreyome@sheeheyvt.com]
Sent: Monday, October 05, 2015 4:11 PM
To: 'Linda Bradford Barron' <lbarron@gravelshea.com>; R. Jeffrey Behm <jbehm@sheeheyvt.com>; 'Tristram J. Coffin (TCoffin@drm.com)' <TCoffin@drm.com>; 'Walter E. Judge, Jr. (wjudge@drm.com)' <wjudge@drm.com>; 'David V. Kirby (david@kirbyoconnor.com)' <david@kirbyoconnor.com>; Kevin Lumpkin <KLumpkin@sheeheyvt.com>; Patrick O. Muench <PMuench@baileyglasser.com>; Michael L. Murphy <MMurphy@baileyglasser.com>; 'rwmurphy@lawfirmmurphy.com' <rwmurphy@lawfirmmurphy.com>; Ora N. Nwabueze <ONwabueze@baileyglasser.com>; 'Barbara O'Connor (barbara@kirbyoconnor.com)' <barbara@kirbyoconnor.com>; John Roddy <JRoddy@baileyglasser.com>; 'Joshua L. Simonds (jls@burlingtonlawpractice.com)' <jls@burlingtonlawpractice.com>; Mary Bouchard <mbouchard@sheeheyvt.com>; Matthew B. Byrne <mbyrne@gravelshea.com>; Robert B. Hemley <rhemley@gravelshea.com>
Subject: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - S.B. Collins' Motion to Dismiss and Memorandum of Law in Support

Attached.

Stacey R. Reyome
Legal Administrative Assistant
SHEEHEY FURLONG & BEHM P.C.
30 Main Street, 6th Floor
PO Box 66
Burlington, VT 05402-0066
(802) 864-9891 (voice)
(802) 864-6815 (fax)
sreyome@sheeheyvt.com<mailto:sreyome@sheeheyvt.com>

Please take a moment to visit our enhanced website at www.sheeheyvt.com<http://www.sheeheyvt.com/>.
CONFIDENTIALITY NOTICE: This email is intended only for the use of the recipient(s) named above and may be subject to the attorney-client and/or work product privileges, neither of which is waived by this transmission. If you received this email in error, please immediately notify the sender by reply email or phone (802-864-9891) and destroy this communication. Thank you.

Michael L. Murphy
Attorney
Bailey & Glasser LLP
T: 202.463.2101

Ora N. Nwabueze
Bailey & Glasser LLP
T: 202.463.2101

From: Linda Bradford Barron [mailto:lbarron@gravelshea.com]
Sent: Monday, October 05, 2015 10:11 AM
To: R. Jeffrey Behm; 'Tristram J. Coffin (TCoffin@drm.com<mailto:TCoffin@drm.com>); 'Walter E. Judge, Jr. (wjudge@drm.com<mailto:wjudge@drm.com>); 'David V. Kirby (david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>); Kevin Lumpkin; 'pmuench@baileyglasser.com'; 'mmurphy@baileyglasser.com'; 'rwmurphy@lawfirmmurphy.com'; 'onwabueze@baileyglasser.com'; 'Barbara O'Connor (barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>); 'jroddy@baileyglasser.com'; 'Joshua L. Simonds (jls@burlingtonlawpractice.com<mailto:jls@burlingtonlawpractice.com>); Stacey Reyome; Mary Bouchard
Cc: Robert B. Hemley; Matthew B. Byrne
Subject: Champlain Oil Company, Inc.'s Motion to Dismiss and supporting Memorandum

Linda Bradford Barron | Legal Assistant
Gravel & Shea PC

76 St. Paul Street, 7th Floor | P. O. Box 369 | Burlington, VT 05402-0369
802-658-0220 (phone) | 802-658-1456 (fax) lbarron@gravelshea.com<mailto:lbarron@gravelshea.com> |
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From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:32 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - R.L. Vallee's Motion to Dismiss and Memorandum of Law in Support of Motion
Attachments: 1977_001.pdf; 1978_001.pdf; 1979_001.pdf

From: Walter Judge [mailto:WJudge@drm.com<mailto:WJudge@drm.com>]
Sent: Monday, October 05, 2015 3:49 PM
To: 'Joshua Simonds'; 'jroddy@baileyglasser.com<mailto:jroddy@baileyglasser.com>';
'mmurphy@baileyglasser.com<mailto:mmurphy@baileyglasser.com>';
'onwabueze@baileyglasser.com<mailto:onwabueze@baileyglasser.com>';
'pmuench@baileyglasser.com<mailto:pmuench@baileyglasser.com>';
'rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>';
'rbehm@sheeheyvt.com<mailto:rbehm@sheeheyvt.com>';
'sreyome@sheeheyvt.com<mailto:sreyome@sheeheyvt.com>'
(sreyome@sheeheyvt.com<mailto:sreyome@sheeheyvt.com>);
'mbouchard@sheeheyvt.com<mailto:mbouchard@sheeheyvt.com>'
(mbouchard@sheeheyvt.com<mailto:mbouchard@sheeheyvt.com>); Kevin Lumpkin
(KLumpkin@sheeheyvt.com<mailto:KLumpkin@sheeheyvt.com>); 'Robert B. Hemley'; Matthew B. Byrne;
'david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>'
(david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>);
barbara@kirbyoconnor.com<mailto:barbara@kirbyoconnor.com>; Tristram J. Coffin
Subject: Jacob R. Kent, et al. v. R.L. Vallee, Inc., et al. - R.L. Vallee's Motion to Dismiss and Memorandum of Law in Support of Motion

Please see the attached, which was just filed. Hard copies are going out in today's mail.

Regards,

Walter E. Judge, Jr.<<http://www.drm.com/team/walter-judge-jr>> | Director | Litigation Group Downs Rachlin Martin
PLLC | Business Sense · Legal Ingenuity
199 Main Street, PO Box 190 | Burlington, VT 05402-0190
Direct: 802-846-8326 | Mobile: 802-343-6887 | Main: 802-863-2375 | Fax: 802-862-7512
wjudge@drm.com<mailto:wjudge@drm.com> | www.drm.com<<http://www.drm.com/>>
<https://www.linkedin.com/in/walterjudge>

Also admitted in MA, ME.

Michael L. Murphy
Attorney
Bailey & Glasser LLP
T: 202.463.2101

From: Michael L. Murphy <MMurphy@baileyglasser.com>
Sent: Monday, October 05, 2015 9:31 PM
To: Abrams, Jill
Cc: Ora N. Nwabueze; Michael L. Murphy
Subject: FW: Wesco's Motion to Dismiss -- filed today
Attachments: Certificate of Service for Wesco Motion to Dismiss.pdf; Wesco Motion to Dismiss.pdf; Letter to clerk filing Motion to Dismiss.pdf

FYI

From: David V. Kirby [mailto:david@kirbyoconnor.com<mailto:david@kirbyoconnor.com>]
Sent: Monday, October 05, 2015 6:09 PM
To: jbehm@sheeheyvt.com<mailto:jbehm@sheeheyvt.com>; Tristram J. Coffin; Walter Judge; Kevin Lumpkin; pmuench@baileyglasser.com<mailto:pmuench@baileyglasser.com>; mmurphy@baileyglasser.com<mailto:mmurphy@baileyglasser.com>; rwmurphy@lawfirmmurphy.com<mailto:rwmurphy@lawfirmmurphy.com>; Ora N. Nwabueze; 'Barbara O'Connor'; jroddy@baileyglasser.com<mailto:jroddy@baileyglasser.com>; Joshua Simonds; rhemley@gravelshea.com<mailto:rhemley@gravelshea.com>; 'Matthew B. Byrne'; Linda Bradford Barron
Subject: Wesco's Motion to Dismiss -- filed today

All,

Today we filed by hand Defendant Wesco, Inc.'s Motion To Dismiss The First Amended Complaint And Memorandum In Support Thereof And Notice Of Joinder and Certificate of Service. We attach copies of these documents as well as our filing letter.

Best,

David

David V. Kirby
O'Connor & Kirby, P.C.
174 Battery Street, 3rd Floor
Burlington, VT 05401
Tel: (802) 863-0112
Fax: (802) 865-5980
David@KirbyOConnor.com<mailto:David@KirbyOConnor.com>
Web site: www.KirbyOConnor.com<http://www.KirbyOConnor.com>

Michael L. Murphy
Attorney
Bailey & Glasser LLP
T: 202.463.2101

From: Abrams, Jill
Sent: Tuesday, November 10, 2015 9:23 AM
To: Morgan, Wendy
Subject: RE: Gasoline distributors want price-fixing lawsuit dismissed | VTDigger

Yes. Thanks.

-----Original Message-----

From: Morgan, Wendy
Sent: Tuesday, November 10, 2015 9:16 AM
To: Abrams, Jill <jill.abrams@vermont.gov>; Kriger, Ryan <ryan.kriger@vermont.gov>
Subject: Gasoline distributors want price-fixing lawsuit dismissed | VTDigger

I assume you have seen, but in case not

http://vtdigger.org/2015/11/09/gasoline-distributors-want-price-fixing-lawsuit-dismissed/?utm_source=VTDigger+Subscribers+and+Donors&utm_campaign=6fe1272706-Weekly+Update&utm_medium=email&utm_term=0_dc3c5486db-6fe1272706-405577533

From: Abrams, Jill
Sent: Thursday, December 17, 2015 11:28 AM
To: Kriger, Ryan; Sorrell, Bill; Morgan, Wendy; Murnane, Janet
Subject: RE: Gasoline Prices

Nor have I.

From: Kriger, Ryan
Sent: Thursday, December 17, 2015 10:37 AM
To: Sorrell, Bill <bill.sorrell@vermont.gov>; Morgan, Wendy <wendy.morgan@vermont.gov>; Murnane, Janet <janet.murnane@vermont.gov>
Cc: Abrams, Jill <jill.abrams@vermont.gov>
Subject: RE: Gasoline Prices

I personally haven't heard anything.

Ryan G. Kriger
Assistant Attorney General
Vermont Office of the Attorney General
Public Protection Division
109 State Street
Montpelier, VT 05609-1001
ph: (802) 828-3170
ryan.kriger@vermont.gov

PLEASE NOTE THAT MY EMAIL ADDRESS HAS CHANGED. IT IS NOW ryan.kriger@vermont.gov

From: Sorrell, Bill
Sent: Thursday, December 17, 2015 10:35 AM
To: Morgan, Wendy; Kriger, Ryan; Murnane, Janet
Subject: Gasoline Prices

Channel 22 is on my VM asking if we're receiving any complaints about gas prices in VT, particularly in the northwestern part of the state. I'm now aware of any such nor of great disparities between Chittenden and Franklin Counties and elsewhere in the state.

Are there any? I want to call her back.

Thanks.

Bill Sorrell

Attorney General of Vermont
109 State Street
Montpelier, VT 05609
(802) 828-3173
PLEASE NOTE EMAIL ADDRESS CHANGE
NEW ADDRESS: bill.sorrell@vermont.gov

From: Murnane, Janet
Sent: Thursday, December 17, 2015 12:07 PM
To: Sorrell, Bill;Morgan, Wendy;Kriger, Ryan
Subject: RE: Gasoline Prices
Attachments: 2015 Gasoline pricing intakes.csv

In 2015, CAP received 6 phone calls about gasoline pricing. Bill, you can expand the "I" column to see the complaint summary. We didn't get the consumer's location on all the complaints (unless you can deduce from the phone number).

From: Sorrell, Bill
Sent: Thursday, December 17, 2015 10:35 AM
To: Morgan, Wendy; Kriger, Ryan; Murnane, Janet
Subject: Gasoline Prices

Channel 22 is on my VM asking if we're receiving any complaints about gas prices in VT, particularly in the northwestern part of the state. I'm now aware of any such nor of great disparities between Chittenden and Franklin Counties and elsewhere in the state.

Are there any? I want to call her back.

Thanks.

Bill Sorrell

Attorney General of Vermont
109 State Street
Montpelier, VT 05609
(802) 828-3173
PLEASE NOTE EMAIL ADDRESS CHANGE
NEW ADDRESS: bill.sorrell@vermont.gov