

STATE OF VERMONT

SUPERIOR COURT  
CHITTENDEN UNIT

CIVIL DIVISION

JACOB R. KENT, ANNE B. VERA,  
THOMAS R. 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.

Case No. 617-6-15 Cncv

**PLAINTIFFS' FILING IN RESPONSE TO THE COURT'S APRIL 15, 2020  
ORDER & MOTION TO CONDUCT THE MAY 11, 2020 FINAL APPROVAL  
HEARING REMOTELY IN THE "INTERESTS OF JUSTICE"  
PURSUANT TO ADMINISTRATIVE ORDER NO. 49**

In response to the Court's April 15, 2020 Order, Plaintiffs Jacob Kent, Anne Vera, Thomas Mahar, David Carter, and Barbara Carter, respectfully submit the following response and request for an order, in the "interests of justice," permitting the Final Approval Hearing, currently set for May 11, 2020, to be conducted telephonically on that date. Although the final approval hearing in this case is not an emergency, holding the hearing telephonically is in the "interests of justice," as contemplated by Administrative Order No. 49, and in the interests of the more than 50,000 Vermont residents who have submitted claims to participate in the Settlement. The only objection to the Settlement came from an individual who is

demonstrably not a class member and, in Plaintiffs' view, the hearing could be conducted effectively and efficiently by telephone or videoconference.

In support of their response and motion under Administrative Order No. 49, Plaintiffs state as follows:

1. A motion for preliminary approval of the Class Action Settlement Agreement was filed with this Court, along with the Settlement Agreement, on October 17, 2019. In response to questions from the Court, the Agreement was amended and resubmitted on November 15, 2019. On January 9, 2020, the Settlement received preliminary approval and notice was issued to potential class members, advising them of the right to submit claims by March 26, 2020. More than 50,000 of them did.

2. The deadline to submit a claim has now passed and the Settlement Administrator has begun processing claims in preparation for distributing funds to those class members who submitted valid claims, subject to Court approval. All that remains is for Plaintiffs to file their final approval motion by April 28 and for the Court to rule on the motion after a hearing. Plaintiffs are prepared to meet that deadline despite the public health crisis.

3. While Plaintiffs do not dispute that the May 11 hearing is a "nonemergency" hearing, it is in the "interests of justice" that the hearing go forward so the Court can rule on final approval, and if approved, the Settlement Administrator can distribute checks to class members. Administrative Order No. 49 expressly contemplates conducting remote hearings and there are no technological

barriers to conducting such a hearing in this case. Indeed, the Parties have participated in previous hearings telephonically.

**A. Administrative Order No. 49 permits the Court to conduct remote hearings if they are deemed to be in the interest of justice.**

4. On March 16, 2020, the Vermont Supreme Court issued Administrative Order No. 49 “[d]ue to the outbreak of the novel coronavirus, COVID-19.” To date, AO No. 49 has been revised on March 18, March 20, March 24,<sup>1</sup> and April 9, 2020.

5. Among other things, AO No. 49 provides: “Effective March 17, and notwithstanding any rule or timeline inconsistent with this guidance, all nonemergency Superior Court hearings, whether evidentiary or nonevidentiary, will be postponed.” AO No. 49, ¶ 3.

6. The Vermont Supreme Court’s Order, however, provides a number of exceptions, including:

Any other matter where the Chief Superior Judge concludes that the interests of justice require that the matter be heard during the course of this suspension. A party seeking an exception must file a motion in the court in which the case is pending, and any party who objects must file its written opposition within three days after the motion is filed. The court will refer the motion to the Chief Superior Judge for resolution.

*Id.* ¶ 3(a).

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<sup>1</sup> See Vermont Judiciary, Administrative Order, \*\*\*UPDATE: March 24, 2020\*\*\* (“The Chief Superior Judge, in consultation with the State Court Administrator, may both assign venue for certain proceedings if all participants can participate remotely and assign a change in venue if necessary to ensure access to justice and efficient administration of justice.”), *available at* <https://www.vermontjudiciary.org/news/information-regarding-coronavirus-disease-2019-covid-19-and-court-operations> (last visited Apr. 15, 2020).

7. AO No. 49 permits remote participation in nonevidentiary hearings:

Notwithstanding the provisions of V.R.C.P. 43.1 and V.R.P.P. 43.1, or any other rule inconsistent with this order, parties and counsel may participate in all nonevidentiary proceedings remotely by telephone without seeking permission by motion. The party participating by telephone is responsible for calling the court at the time of hearing. Where feasible, parties may participate by video appearance as approved by the judge. Parties or counsel must make advance arrangements to appear by video. Appearance by telephone or video for evidentiary hearings will continue to be governed by the provisions of V.R.C.P. 43.1 and V.R.P.P. 43.1.

*Id.* ¶ 5.

8. The Vermont Supreme Court's April 9 amendment extended AO No. 49 from April 15 to May 31, 2020.

**B. It is in the “interests of justice” to finalize the Class Action Settlement Agreement and permit the Administrator to distribute the funds to those class members who submitted valid claims.**

9. It is in the “interests of justice” to hold the final approval hearing telephonically on May 11 because postponing the hearing will delay distribution of the settlement funds to the 50,285 residents of Chittenden, Franklin, and Grand Isle Counties who have submitted claims. This Court previously referred to this matter as one of “high public importance.” Oct. 1, 2018 Hearing Tr. at 43:20 (Oct. 1, 2018).

10. The deadline for submitting claims, opt outs and objections was March 26, 2020. As of April 10, 2020, the Settlement Administrator had received:

(a) 50,285 claims; (b) 14 opt outs; and (c) one objection from an individual who states that she has lived in the District of Columbia since 2009. As such she is not a

member of the Settlement Class, and has no standing to object. Thus, there is and will be no opposition to the motion for final approval.

11. Finally, postponing final approval will delay the funding of the balance of the Settlement Fund since the defendants' obligation to deposit the remaining \$750,000 is triggered by the Court's grant of final approval. *See Am. Class Action Settlement Agreement* ¶¶ 1.13, 3.2(b).

12. A delay in the ruling on final approval will result in additional administrative expense that will be borne by the Settlement Class. There is an additional administrative cost associated with maintaining bank accounts and the settlement website. The settlement website and the Class Notice both advise Class Members that May 11 is the final approval hearing date. Any delay, even a modest one, is likely to generate inquiries to the Settlement Administrator from claimants wondering about the status of their payment, requiring the Administrator to spend time and resources responding and further depleting the common fund. Moreover, if the delay is substantial, the likelihood that some Class Members addresses will change increases, requiring further time and expense to update addresses, or causing checks to be returned as undeliverable.

13. The Class Action Settlement has already been subjected to significant scrutiny from the Court. For example, on November 4, 2019, Plaintiffs submitted their responses to the Court's initial questions about the settlement. *See Pls.' Resps. to Entry Regarding Motion* (Nov. 4, 2019). On November 25, 2019, the Court conducted a preliminary fairness hearing to consider the settlement. At that

hearing the Court raised a number of issues concerning the terms of the Class Action Settlement Agreement. On December 18, 2019, the parties submitted a revised Class Action Settlement Agreement in response to the issues the Court raised at the November 25 hearing. *See, e.g.*, Pls.’ Summary Chart of the Amended Class Action Settlement Agreement (Dec. 18, 2019).

14. If the Court has additional concerns, either before or after Plaintiffs file their motion for final approval, Plaintiffs could address those in writing in advance of the May 11 hearing.

**C. It is unclear when the emergency declarations will be lifted to permit the final approval hearing in any other manner than remotely.**

15. In addition to Vermont Supreme Court’s Order, the Governor of Vermont’s emergency declaration was recently extended until May 15. Likewise, the City of Burlington has issued emergency declarations related to enforcement of the Governor’s order and concerning the City’s “shared streets social distancing” initiative. It is uncertain when the current restrictions on public gathering will loosen to such a point that an in-person final approval hearing could occur.

16. Other courts have considered and conducted final approval hearing remotely and permitted settlement funds to be distributed to the class during this public health crisis. *See, e.g., French on behalf of First Transit, Inc.*, No.: 18-CV-1648-CAB-MSB, 2020 WL 1849587, \*1 (S.D. Cal. Apr. 13, 2020) (“This matter is before the Court on the Plaintiffs’ unopposed motion for final approval of class action settlement and motion for attorneys’ fees, costs, administrative fees and service awards [Doc. No. 51]. The Court held a telephonic hearing on these motions

on April 13, 2020.”); *Wood v. AmeriHealth Caritas Servs., LLC*, No. 17-3697, No. 19-21942020, WL 1694549, \*1 (E.D. Pa. Apr. 7, 2020) (“After reviewing the parties’ submissions, including the Settlement Agreement, and holding a telephonic final approval hearing.”); *id.*, \*1 n.2 (“After a March 27, 2020 telephone conference with counsel for the parties (ECF No. 124), the Court determined that to protect the health and safety of the public, staff, and judicial officers from exposure to or spread of COVID-19, the final approval hearing would take place via an on the record telephone conference with no proceedings conducted in the James A. Byrne U.S. Courthouse. Notice of the call-in number for the telephonic proceeding was placed on the public docket on March 31, 2020. (ECF No. 125.) No one dialed in to the final approval hearing to object on behalf of the class.”); *Kramer v. XPO Logistics, Inc.*, No. 3:16-cv-07039-WHO Consolidated with 3:17-cv-04009-JSC, 2020 WL 1643712, \*1 (N.D. Cal. Apr. 2, 2020) (“Plaintiffs’ motion for an order granting final approval of class action settlement and motion for attorneys’ fees duly came on for telephonic hearing on April 1, 2020, before the Honorable William H. Orrick.”); *Moukengeschaie v. Eltman, Eltman & Cooper, P.C., et al.*, No. 14-cv-07539-MKB-CLP (“MINUTE ENTRY for Fairness Hearing proceeding re 156 held before Chief Magistrate Judge Cheryl Pollak on 4/1/2020. Appearance for plaintiff: Brian L. Bromberg \ Jonathan Robert Miller. Appearance for defendant: Jonathan M. Robbin \ Donald S. Maurice. Fairness hearing. Report to issue. (FTR Log #12:33 - 12:50) (Caggiano, Diana) (Entered: 04/02/2020).” (E.D.N.Y. Apr. 2, 2020); *Prince v. Global Credit & Collection Corp., et al.*, No. 1:19-cv-04769 (N.D. Ill. Apr. 1, 2020)

(“MINUTE entry before the Honorable Young B. Kim: The final approval hearing scheduled for May 14, 2020, at 11:00 a.m. in courtroom 1019 will proceed as scheduled. In the event an in-person hearing is not feasible because of the current public health crisis, all interested in appearing for the final approval hearing may appear telephonically.”).

17. Moreover, courts have regularly conducted final approval hearings by telephone under “normal” circumstances. *See, e.g., Wise v. Ulta Salon, Cosmetics & Fragrance Inc.*, Lead Case No. 1:17-cv-00853-DAD-EPG, Member Case No. 1:18-cv-00750-DAD-BAM, 2020 WL 1492672, \*1 (E.D. Cal. Mar. 27, 2020) (permitting defendants’ counsel to appear by telephone); *Bykov v. DC Transp. Servs., Inc.*, No. 2:18-cv-1691 DB, 2020 WL 1030650, \*1 (E.D. Cal. Mar. 3, 2020) (permitting plaintiff’s counsel to appear by telephone).

18. In addition to counsel in Burlington, Plaintiffs’ counsel who would attend any in-person hearing reside in the District of Columbia, Massachusetts, and West Virginia, and it would require significant travel, including air travel, to get to Burlington for an in-person hearing. Like Vermont, all of these jurisdictions have each issued COVID-19 orders limiting non-essential travel and prohibiting large gatherings.

19. Plaintiffs’ counsel could contact the non-class member who filed an objection so that she could participate by telephone as well if she wishes.

20. None of Defendants’ counsel has indicated that they would not be available to participate in a remote hearing on May 11 and presumably, since the

date was previously set they would still be able to participate remotely in the previously-scheduled hearing.

21. For the reasons stated herein, there is good cause that permitting *all counsel* to participate in the May 11 final approval hearing by telephone will be in the “interests of justice” and of public health. This will permit Plaintiffs’ counsel and the Settlement Administrator to work as efficiently as possible in taking the final steps necessary to finalize the settlement and distributing the funds to the class which is currently underway.

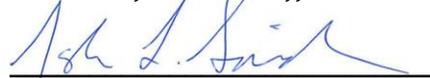
22. Finally, while a short continuance of the final approval hearing by days or weeks might not present massive logistical problems, a delay measured in months likely will. None of us know how long this public health crisis will last and when the Court will be able to resume to normal or near-normal operations. There are no technological barriers to conducting a remote final approval hearing. Plaintiffs respectfully request that the Court grant their motion and hold the final approval hearing in this case on May 11 as scheduled, and further order participation by telephone or other remote means in the “interests of justice.”

Dated at Burlington, Vermont, this 16th day of April, 2020.

Respectfully submitted,

*Counsel for Plaintiffs*

By:



Joshua L. Simonds  
THE BURLINGTON LAW PRACTICE  
2 Church Street, Suite 2-G  
Burlington, Vermont 05401  
T: 802.651.5370

F: 802.651.5374  
[jls@burlingtonlawpractice.com](mailto:jls@burlingtonlawpractice.com)

John Roddy (Vt. PHV No. 9000976)  
Benjamin P. Lajoie (Vt. PHV No. 900111)  
BAILEY & GLASSER LLP  
99 High Street, Suite 304  
Boston, Massachusetts 02110  
T: 617.439.6730  
F: 617.951.3954  
[jroddy@baileyglasser.com](mailto:jroddy@baileyglasser.com)  
[blajoie@baileyglasser.com](mailto:blajoie@baileyglasser.com)

Eric B. Snyder (Vt. PHV No. 9001107)  
BAILEY & GLASSER LLP  
209 Capitol Street  
Charleston, West Virginia 25301  
T: 304.345.6555  
F: 304.342.1110  
[esnyder@baileyglasser.com](mailto:esnyder@baileyglasser.com)

Michael L. Murphy (Vt. PHV No. 9000978)  
BAILEY & GLASSER LLP  
1055 Thomas Jefferson St. NW  
Suite 540  
Washington, DC 20007  
T: 202.463.2101  
F: 202.463.2103  
[mmurphy@baileyglasser.com](mailto:mmurphy@baileyglasser.com)

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of April 2020, the *Plaintiffs' Filing in Response to the Court's April 15, 2020 Order & Motion to Conduct the May 11, 2020 Final Approval Hearing Remotely in the "Interests Of Justice" Pursuant to Administrative Order No. 49* was served via email on all counsel of record.

By:



Joshua L. Simonds

**THE BURLINGTON LAW PRACTICE**

2 Church Street, Suite 2-G

Burlington, Vermont 05401

T: (802) 651-5370

[jls@burlingtonlawpractice.com](mailto:jls@burlingtonlawpractice.com)