UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: SOCIETY INSURANCE CO. COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION	)	MDL No. 2964
	)	Master Docket No. 20 C 5965
	)	Judge Edmond E. Chang
	)	Magistrate Judge Jeffrey I. Cummings
This Document Relates to All Cases	)	

SOCIETY'S Fed. R. Civ. P. 12(b)(6) MOTION APPLYING THE COURT'S BELLWETHER RULING TO DISMISS ALL CLAIMS IN MDL ACTIONS PREMISED UPON CIVIL AUTHORITY AND/OR CONTAMINATION PROVISIONS OF THE SOCIETY POLICIES, INCLUDING DISMISSAL OF TWO COMPLAINTS ALLEGING SOLELY CIVIL AUTHORITY CLAIMS.

I. PRELIMINARY STATEMENT

In Case Management Order No. 1, this Court stated that "its preliminary assessment on the most expeditious way forward [in this MDL] is to decide bellwether case dispositive and issue-dispositive motions on an earlier track." *See* Case Management Order No. 1, ECF No. 18, Oct 12, 2020, at 3. The Court subsequently decided to address dispositive motions in three bellwether actions, and designated *Big Onion Tavern Group, LLC, et al. v. Society Ins.*, No. 1:20-cv-02005; *Valley Lodge Corp. v. Society Ins.*, No. 1:20-cv-02813; and *Rising Dough, Inc., et al. v. Society Ins.*, No. 1:20-cv-05981 as the bellwether cases. *See* Minute Entry, ECF No. 69, Nov. 2, 2020. Under a bellwether approach, one or a few specific underlying cases are addressed in an MDL proceeding first, with the goal of resolving certain issues in the bellwether cases that

can provide guidance for the other cases.[1] The case efficiencies of the bellwether approach are realized by applying applicable determinations made in the bellwether cases to other actions coordinated within the MDL.[2] Consistent with those settled case-management principles, in this motion, Society seeks to have this Court's ruling on case-dispositive and issue-dispositive legal rulings in the bellwether cases applied to the remaining cases centralized in this MDL.

On February 22, 2021, this Court issued a decision on Society's motions to dismiss or for summary judgment on bellwether claims, and granted Society summary judgment on coverage theories under the Civil Authority and Contamination provisions, finding there is no coverage under the Society policies for such claims. Based on these issue-dispositive legal rulings in that bellwether claim ruling, non-bellwether claims in the underlying MDL complaints that are premised upon Civil Authority and/or Contamination provisions in the Society policies do not state plausible claims for relief. Thirty-nine remaining MDL actions allege claims by which the MDL plaintiffs seek to recover COVID-19 losses under the Civil Authority and/or Contamination provisions in Society's policies.[3] In addition, the 1823 Wise, LLC ("1823 Wise") and 1300 Restaurant Corp. ("1300 Restaurant") Complaints against Society Insurance Co. ("Society"), seek to recover solely under the Civil Authority provisions in Society's policies alleged business interruption losses that they claim were caused by COVID-19 closure orders. As such, the 1823 Wise and 1300 Restaurant Complaints, and all claims alleged in the remaining

---

[1] MDL courts often use bellwether cases "to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis." *See* Manual for Complex Litigation (Fourth) § 22.315 (2004).

[2] Indeed, Plaintiffs acknowledged that "[b]ellwether motions to dismiss were selected so the court would not need to decide all of the dispositive motions on the Court's docket that Society had filed in each case." ECF 174 at 3.

[3] The bellwether actions are not included in this count as our understanding is that the relevant counts in those lawsuits have been dismissed pursuant to this Court's February 22, 2021 Order.

non-bellwether MDL actions that are premised upon Civil Authority and/or Contamination provisions, should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

II. FACTS

As noted above, as a part of this ongoing multi-district proceeding, to streamline the COVID-19-related business interruption claims against Society that are centralized here for pretrial matters, this Court selected three cases for deciding case-dispositive and issue-dispositive bellwether motions—*Big Onion*, *Valley Lodge*, and *Rising Dough*. *See* Minute Entry, ECF No. 69, Nov. 2, 2020. In the *Rising Dough* action, Society filed a Rule 12(b)(6) motion to dismiss, and in the *Big Onion* and *Valley Lodge* actions Society filed a Rule 12(b)(6) motion to dismiss, or in the alternative, a motion for summary judgment. The bellwether cases were selected to test the parties' case-dispositive and issue-dispositive arguments, with the goal of advancing the just and efficient resolution of pretrial issues, including motions to dismiss and for summary judgment, in the cases centralized here. As this Court noted, "for the coverage cases to move forward, it is worth addressing the other coverage theories advanced by the Plaintiffs. A decision now makes sense because, as it turns out, the other coverage theories can be decided on the current record. . ." *See* Memorandum Opinion and Order, ECF No. 131, Feb. 22, 2021, at 24.

On February 22, 2021, this Court granted summary judgment to Society in the bellwether cases with respect to the COVID-19 business interruption claims brought under Civil Authority and Contamination coverage provisions in the Society policies. *See* Memorandum Opinion and Order, ECF No. 131, Feb. 22, 2021. Explaining that, even if Plaintiffs were correct that the government shutdown orders in their various jurisdictions were a covered "action of civil authority":

> [T]he problem for the Plaintiffs is that the action of the civil authority must "prohibit[] access" to the premises and the surrounding area. Specifically, the policy's text requires

> that the civil authority "prohibit[] access to the described premises," *and* that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within the area." Businessowners Special Property Coverage Form, 5.k. As Society correctly observes, even if the general public is prohibited from congregating in the covered premises, there is no allegation that employees are outright prohibited from accessing the premises—or from accessing the immediately surrounding areas, for that matter. Indeed, for some of the Plaintiffs, take-out customers and in-room dining guests may access the premises (and the immediately surrounding areas). The Civil Authority coverage is not triggered by mere "loss of" property; there must be "prohibited" "access." The Plaintiffs' claims for coverage under this provision must be dismissed.

Id. at 25. Because the "prohibited access" prerequisite to Civil Authority coverage was not satisfied, this Court dismissed the bellwether plaintiffs' coverage claims under the Civil Authority provision. *Id.*

In granting Society's summary judgment motion in connection with Contamination coverage under the Society policies, this Court rejected the coverage theories presented by the Plaintiffs. The Court emphasized that the contamination provisions require that the Plaintiffs' "operations" be "suspended" due to "contamination." [Businessowners Special Property Coverage Form, 5.m.]. The Court recognized that the Plaintiffs have maintained operations during the pandemic, and "the suspensions of business have not been caused by contamination of the premises, machinery, or equipment themselves." As the Court went on to explain:

> Like the flaw in the Civil Authority coverage theory, there has been no "action by a public health or other governmental authority that *prohibits* access to the described premises or production of your product." (emphasis added). *Id.* § 5.m(2)(a). The Plaintiffs have not been prohibited from accessing the premises, and many have continued to produce food for take-out and delivery purposes. . . And given the definition of "contamination," there is no loss of income due to "contamination threat" or "publicity" from contamination, Businessowners Special Property Coverage Form, 5.m(2)(b), (c), because it is not the premises, machinery, or equipment themselves that have been contaminated.

See Memorandum Opinion and Order, ECF No. 131, Feb. 22, 2021.

Thirty-nine remaining non-bellwether actions centralized in this Court allege claims premised upon these same Civil Authority and/or Contamination coverage provisions. The claims implicated are listed in Exhibit 1.[4] Further, 1823 Wise and 1300 Restaurant filed Complaints against Society on October 2, 2020 and October 5, 2020, respectively, solely alleging claims under Civil Authority coverage provisions in their Society policies. *See 1823 Wise LLC v. Society Insurance Inc.*, No. 1:20-cv-05877; *1300 Restaurant Corp v. Society Insurance Inc.*, No. 1:20-cv-05934. These Complaints are substantially the same. Paragraph 16 in each of these Complaints reads: "The Policies include 'Civil Authority' coverage, pursuant to which [Society] promised to pay for the loss of income and necessary expenses sustained by Plaintiff." Paragraphs 19 and 20 in each of these Complaints refer to COVID-19 closure orders that allegedly "trigger[ed] the Civil Authority coverage under the Policies."

III. ARGUMENT AND AUTHORITIES

A. General Standards Under Rule 12(b)(6)

For any claims brought under the Civil Authority or Contamination coverage provisions of the Society policies to proceed, Plaintiffs' Complaints "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Even assuming the Complaints' factual allegations to be true, the allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545. Where this standard is not met, a court must grant a movant's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

[4] As a result of the way some pleadings are drafted, it is not possible to determine whether they are intended to include Civil Authority or Contamination coverage allegations. As such, omission of these pleadings from Exhibit 1 is not a waiver.

B. All Claims Premised on Civil Authority and/or Contamination Coverage Provisions in All MDL Cases Should be Dismissed

Thirty-nine of the remaining MDL actions allege claims premised on Civil Authority and/or Contamination coverage provisions under the Society policies. These claims should be dismissed. This Court held unequivocally in its February 22, 2021 Order that "neither the Civil Authority nor the Contamination provisions are viable theories of coverage under the [Society] policy." *See* Memorandum Opinion and Order, ECF No. 131, Feb. 22, 2021 at 28.

Under the issue-dispositive legal rulings in this Court's bellwether decision, any non-bellwether claim based on Civil Authority coverage provisions in the Society policies cannot, on its face, state a plausible claim for which relief can be granted. This Court's ruling in the bellwether cases regarding Contamination coverage is also applicable here: "[T]he Plaintiffs have maintained operations during the pandemic, and the suspensions of business have not been caused by contamination of the premises, machinery, or equipment *themselves*." *Id.* at 26 (emphasis in original). Therefore, any claim based on Contamination coverage provisions in the Society policies cannot, on its face, state a plausible claim for which relief can be granted. As such, in line with the purpose of the bellwether mechanism to allow the Court to streamline this MDL proceeding, this Court should dismiss from the remaining MDL actions all claims that are premised on Civil Authority and/or Contamination coverage provisions for failure to state a claim upon which relief can be granted.

C. 1823 Wise's and 1300 Restaurant's Complaints Should Be Dismissed

1823 Wise's and 1300 Restaurant's Complaints assert claims solely under Civil Authority coverage provisions in the Society policies and should be dismissed. This Court's February 22, 2021 Order was clear: as a matter of law, there is no Civil Authority coverage

under the Society policies for business interruption losses caused by COVID-19 closure orders. As this Court held,

> "[t]he Civil Authority coverage is not triggered by mere 'loss of' property; there must be 'prohibited' 'access.' The Plaintiffs' claims for coverage under this provision must be dismissed."

See Memorandum Opinion and Order, ECF No. 131, Feb. 22, 2021 at 25.

Here, 1823 Wise and 1300 Restaurant solely allege coverage under the Civil Authority provisions of their policies. In light of this Court's bellwether issue-dispositive ruling on Civil Authority coverage, on the face of these Complaints, these plaintiffs cannot state a plausible claim for relief. Accordingly, the Court should streamline this MDL proceeding by dismissing these two cases. 1823 Wise's and 1300 Restaurant's Complaints must be dismissed for failure to state a claim upon which relief can be granted.

IV. CONCLUSION

For the foregoing reasons, Society respectfully requests that its motion pursuant to Fed. R. Civ. P. 12(b)(6) be granted, that all claims in non-bellwether cases premised upon Civil Authority and/or Contamination coverage provisions be dismissed with prejudice based on the existing issue-dispositive legal rulings in the bellwether motions, and that the 1823 Wise and 1300 Restaurant Complaints also be dismissed with prejudice.

Dated: May 6, 2021

Respectfully submitted,

/s/ Laura A. Foggan

Laura A. Foggan (admitted *pro hac vice*)
April N. Ross (admitted *pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202-624-2500
lfoggan@crowell.com

aross@crowell.com

PURCELL & WARDROPE, CHTD.
10 South LaSalle Street, Suite 1200
Chicago, Illinois 60603
Telephone: 312-427-3900
tbu@pw-law.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically using the Court's CM/ECF service, which will send notification of such filing to all counsel of record on this 6th day of May, 2021.

/s/ Laura A. Foggan

Laura A. Foggan (admitted *pro hac vice*)
April N. Ross (admitted *pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202-624-2500
lfoggan@crowell.com
aross@crowell.com