

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

IN RE: SOCIETY INSURANCE CO.  
COVID-19 BUSINESS INTERRUPTION  
PROTECTION INSURANCE LITIGATION

This Document Relates to All Cases

MDL No. 2964  
**20-cv-5965**

Master Docket No. 20 C 5965

Judge Edmond E. Chang

Magistrate Judge Jeffrey I. Cummings

**PLAINTIFFS' RESPONSE IN OPPOSITION TO SOCIETY'S MOTION  
FOR LEAVE TO FILE 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**

Plaintiffs, by their undersigned counsel, respectfully submit this response in opposition to Society's Motion for Leave to File 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 (Dkt. No. 175 ("Motion for Leave")). For the reasons set forth herein, this Court should deny Society's motion.

1. Consistent with its company-wide decision to reflexively deny each of its policyholders' business interruption insurance claims, Defendant, Society Insurance ("Society"), has also taken every step possible to hinder its policyholders' litigation of those denied claims.

2. Those steps include, but are by no means limited to, Society's efforts to keep these cases fragmented, including its persistent refusal to acknowledge that, despite its efforts before the

Judicial Panel on Multidistrict Litigation to halt the Panel’s formation of this MDL proceeding,<sup>1</sup> the JPML did, in fact, form it. Society is thus required to abide by the tenets of 28 U.S.C. § 1407, and MDL-related jurisprudence, face the reality of this MDL litigation, and actually defend this MDL case, rather than try to undermine the MDL process and attempt to separately litigate each of the underlying, constituent actions. Society’s present motion is just the latest iteration of that strategy.

3. In addition to ignoring the tenets of 28 U.S.C. § 1407, Society’s present motion is also based on its misreading of the purpose and effect of the Court’s directive in Paragraph 3 of Case Management Order No. 1 (Dkt. No. 18) (“CMO No. 1”). By CMO No. 1, which the Court

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<sup>1</sup> At the September 24, 2020 JPML hearing on this matter, Society’s lead counsel in this litigation strongly opposed formation of this MDL proceeding. See September 24, 2020 Transcript of Oral Argument via Video Teleconference at, e.g., 11:11-12 (opposing the “imposition of an MDL” over these constituent actions). In her argument opposing consolidation, Society’s counsel discussed the purported dissimilarities among the constituent actions, see *id.* at, e.g., 12:11-21, contending that Society’s goal was to not “inconvenience plaintiffs” and that, rather than forming a Society MDL proceeding, the JPML should permit the litigants in the constituent actions to engage in “1404 transfer reassignment. . .and informal coordination,” *id.* at 11:22-24—before being called out by Judge Kennelly for actually *opposing* such measures. *Id.* at 13:21-24 (“JUDGE KENNELLY: I am looking at a document that’s called Society’s Response in Opposition to JD 1455 Inc.’s Motion to Reassign Cases as Related, where [Society] basically argues that the local rule doesn’t apply.”). The bottom line is that Society has opposed this MDL proceeding from the outset and has taken every possible step to undermine and otherwise hinder it, including by its present motion.

But it doesn’t stop there. Society’s representation before the JPML that the purported differences among the constituent actions comprising this MDL proceeding preclude them from being subject to what she characterized a “one-size-fits-all” inquiry, *id.* at 11:21-22, is directly belied by its counsel’s recent representations, before the United States Court of Appeals for the Seventh Circuit, on behalf of her clients the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies—*amici curiae* in *TJBC, Inc. v. The Cincinnati Insurance Company*, Appeal No. 21-1203 (7th Cir. 2021) (7th Cir. Dkt. No. 35)—that directly speak to the uniformity of the underlying policies. See 7th Cir. Dkt. No. 35 at, e.g., 1 (collectively discussing, among other things, the “history and purpose the history and purpose of commercial property insurance policies,” and arguing that that entire category of insurance policies—which, by definition, encompasses all of the policies at issue in this litigation—was “never intended to provide coverage for economic losses untethered to physical loss or physical damage”—a position that contradicts this Court’s earlier rulings). Society and/or its counsel, will thus clearly say anything, at any time—contradictions and inconsistencies notwithstanding—to advance its spurious positions. But mere self-interested sophistry, untethered to reality, should be rejected, and this Court should not give Society a free pass to upend proper MDL litigation structure and process based on such an approach.

entered at the very earliest stages of this MDL litigation, the Court set a course to deal with various issues in the early, pre-organizational, stage of this case. Paragraph 3 of CMO No. 1, says: “[o]n review of the pleadings and briefs filed so far, the Court’s preliminary assessment on the most expeditious way forward is to decide bellwether case dispositive and issue-dispositive motions on an earlier track.” *Id.* From there, the Court established a procedure by which it would adjudicate bellwether issues contained in the bellwether motions that Society filed against the pleadings in *Big Onion*, *Valley Lodge*, and *Rising Dough*—the three cases that the Court designated as bellwether cases for that purpose. The Court carried that process out through to its conclusion—which is now the subject of Society’s pending §1292(b) motion.

4. Society’s current attempt to expand the scope of this highly-circumscribed facet of CMO No. 1 to later stages of this litigation both disregards the limited nature of that initial bellwether process and, again, finds Society proposing a course of action that would unwind the JPML’s ruling and affirmatively undermine the purpose and function of MDL litigation. As discussed above, Society doesn’t get to attack each of the constituent actions comprising this MDL in this manner. Indeed, Society argued against the formation of this MDL proceeding before the JPML and lost that fight (*see* note 1, above).<sup>2</sup> These cases have been centralized for all pretrial proceedings.

5. That fact—and the impropriety of Society’s proposed course of action—is heightened by the pendency of Plaintiffs’ Rule 15 motion, which, if granted, will result in an operative master pleading in this MDL litigation and establish a streamlined and efficient course

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<sup>2</sup> Plaintiffs recognize that certain Individual Plaintiffs and Class Plaintiffs also opposed consolidation before the JPML, but, unlike Society, those Plaintiffs have accepted the reality that this case has been centralized in the MDL for all pretrial proceedings and are cooperatively working to advance this litigation as expeditiously as possible.

of action, putting common issues front and center for the Court’s consideration, and for Society’s defense of the claims asserted therein. By contrast, Society’s proposed course of action, as set forth in its motion, ignores all of that and tries to create an alternate reality untethered to the actual facts and the applicable jurisprudence. *See, e.g., Gelboim v. Bank of America Corp.*, 574 U.S. 405, n.3 (2015) (“Parties may elect to file a ‘master complaint’ and a corresponding ‘consolidated answer’, which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings. *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 590–592 (C.A.6 2013).”).

6. Finally, the inefficiency and inequity of Society’s proposed motion is epitomized in Society’s statement that it intends to seek dismissal, with prejudice, of 1823 Wise, LLC’s claims and 1300 Restaurant Corp.’s claims. *See* Motion for Leave at ¶¶ 5-6. At this point, those plaintiffs are absent class members in the pending class action cases—and would be absent class members in one or more of the classes asserted in the Master Amended Consolidated Complaint, should the Court grant Plaintiffs’ pending Rule 15 motion. For Society to presently demand the dismissal of those plaintiffs/absent class members from this case, *with prejudice*, may improperly strip them of their ability to participate in a classwide resolution of this litigation—literally denying them due process—and merely adds further insult to the injury that Society has already visited on these—and other—policyholders by refusing them the coverage for which they contracted.

**WHEREFORE**, for the foregoing reasons, the Court should deny Society's Motion for Leave.

Dated: May 12, 2021

Respectfully submitted,

*/s/ Adam J. Levitt*

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**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 12th day of May, 2021.

*/s/ Adam J. Levitt* \_\_\_\_\_

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