

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

TROY STACY ENTERPRISES INC.,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

THE CINCINNATI INSURANCE
COMPANY,

Defendant.

Judge: Matthew W. McFarland

Civil Action No. 1:20-cv-00312

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION FOR A TEMPORARY
STAY**

Plaintiff, Troy Stacy Enterprises Inc. (“Plaintiff”), individually and on behalf of all others similarly situated (collectively, “Plaintiffs”), respectfully submits this memorandum in support of its motion for a temporary stay, pursuant to this Court’s inherent power to control its docket to ensure the fair and efficient adjudication of matters.

I. BACKGROUND

A. The COVID-19 Pandemic

As the Court knows, our nation is currently in the midst of a deadly pandemic spread by the SARS-CoV-2 virus, often referred to as the “coronavirus” or by one of the names of the disease that it causes, such as “COVID-19.”¹ COVID-19 has spread rapidly throughout the United States and has resulted in more than 2.1 million confirmed cases and more than 116,000 deaths.² In response to the COVID-19 pandemic, states and cities throughout the country issued orders

¹ For ease of reference, the virus will be referred to as “COVID-19” herein.

² <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

requiring suspension of business at a wide range of establishments (the “Closure Orders”). Beginning with California in mid-March, 42 states issued statewide stay-at-home orders, practically preventing all but the most essential economic activity.³

B. Business Interruption Protection Insurance

COVID-19 and the Closure Orders have caused devastating business interruption losses to a wide variety of American businesses, including Plaintiff. Like Plaintiff, many of these affected businesses carry some form of business interruption insurance. However, many insurers, including Defendant The Cincinnati Insurance Company (“Defendant” or “Cincinnati”), have been denying claims for business interruption losses caused by the COVID-19 pandemic because they contend that the policies only cover “direct physical loss or damage” and the COVID-19 pandemic does not qualify. For example, in addition to Cincinnati, The Hartford and Travelers and many other insurers have each declared their intent to dishonor business interruption coverage claims on a nationwide basis.⁴ Rather than let a jury apply the facts of the cases to those five plain and ordinary words—direct physical loss or damage—many insurance companies are now asking courts to “interpret” those words such that they don’t mean what they say.

C. The Current Action

Plaintiff filed this action against Cincinnati on April 19, 2020, alleging that Cincinnati has refused to provide business interruption protection insurance coverage in accordance with the insurance policy issued to it. Plaintiff filed an Amended Complaint on June 22, 2020 and in it alleges the following:

³ <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>

⁴ See <https://www.thehartford.com/coronavirus/businesses>; see also <https://www.travelers.com/about-travelers/covid-19-business-interruption>

- Plaintiff purchased a commercial property insurance policy from Defendant. *See* Amended Complaint, at, e.g., ¶¶ 8, 14 (Dkt. No. 9);
- The property policy provides coverage for all risks of direct physical loss or damage to covered property. *Id.* at ¶¶ 9-13, 21-22;
- Plaintiffs suffered direct physical loss or damage and resulting business interruption losses occasioned by COVID-19. *Id.* at ¶¶ 2-6,;
- Defendant owes coverage to the insured under the insurance agreement. *Id.* at ¶¶ 23-39;
- Defendant has breached its obligation to provide coverage, or there is a dispute as to what that coverage obligation is. *Id.* at ¶ 15, 40; and
- Plaintiffs are entitled to payment or to a declaration of coverage. *Id.* at ¶¶ 52-114.

On June 1, 2020, Cincinnati filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 6) In its motion, Cincinnati makes two principal arguments for dismissal: (1) Plaintiffs did not sustain direct physical loss to property so as to invoke coverage under the insurance policy; and (2) the Civil Authority coverage does not apply because the Closure Orders did not prohibit access to Plaintiffs' premises. (*Id.* at 1-2) Also, on June 1, 2020, Cincinnati filed a Motion to Certify Questions to the Supreme Court of Ohio. (Dkt. No. 7) Cincinnati seeks to certify the following questions to the Ohio Supreme Court: (1) Does the general presence in the community of a virus, such as the novel coronavirus known as SARS-CoV-2, constitute direct physical loss to property?; (2) Does the presence on a premises of a person infected with a virus, such as the novel coronavirus known as SARS-CoV-2, constitute direct physical loss to property at that premises?; and (3) Does the presence on a surface of a virus, such as the novel coronavirus known as SARS-

COV-2, constitute physical loss to property at that promises? (*Id.* at 1) In response to the Motion to Dismiss Plaintiff filed an Amended Complaint. In addition, Defendant agreed to Plaintiff filing an unopposed Motion for an Extension of time to respond to the Motion to Certify until July 6, 2020.

D. JPML Proceedings

Counsel for Plaintiffs currently represent other plaintiffs in seventeen (17) separate class action cases pending in federal courts across the United States, arising from insurance companies' refusal to extend business interruption protection coverage due to the COVID-19 pandemic. On April 21, 2020, Plaintiffs' counsel filed a motion for transfer with the Judicial Panel on Multidistrict Litigation ("JPML"), requesting that the Panel consolidate all federal suits arising out of these companies' refusal to extend business interruption protection coverage due to the COVID-19 pandemic. *See In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2942, Doc. 4 (April 21, 2020). At the time of filing, there were at least sixteen cases in thirteen different districts—with those numbers materially increasing every day. *See In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2942, Doc. No. 4-1 at 10 (April 21, 2020). As of the filing of this motion, there are approximately 150 related cases, including this one, filed on the JPML docket, with that number continuing to increase every day. *See generally In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2942.

As one of the initial movants for JPML transfer, Plaintiffs and their counsel believe that the JPML process needs to proceed through hearing and the Panel's decision on the transfer issue, before the constituent cases—including this one—move forward, for the sake of judicial economy, efficiency, and the goal of avoiding the risk of inconsistent rulings among federal courts. As Plaintiffs explain in their pending JPML transfer motion and reply brief, all of the COVID-19

business interruption actions involve common questions of law and fact that arise from the insurance companies' wrongful denial of coverage. Each of the complaints, including Plaintiffs'

Complaint in this action, allege that:

- The insured purchased a property policy or a similar insurance policy from the defendant insurance company;
- The property policy provides coverage for all risks of direct physical loss or damage to covered property;
- The insured suffered direct physical loss or damage and resulting business interruption losses occasioned by COVID-19;
- The insurer owes coverage to the insured under one or more of the insuring agreements typically found in the standard-form property insurance policies issued in the United States, such as:
 - The business interruption insuring agreement;
 - The civil authority insuring agreement;
 - The Extra Expense insuring agreement;
 - The Sue and Labor insuring agreement;
 - The ingress and egress insuring agreement; and
 - The preservation of property insuring agreement.
- The insurer has breached its obligation to provide coverage, or there is a dispute as to what that coverage obligation is; and
- The policyholder is entitled to payment or to a declaration of coverage.

The material identity of claims and the standardized policy language used across the insurance industry means that any court tasked with resolving one of these lawsuits, including this

lawsuit, will face the same basic legal and factual issues.⁵ These common question of law and fact include the same principal issues set forth in Cincinnati’s Motion to Dismiss and Motion to Certify Questions to the Ohio Supreme Court, including: (1) whether COVID-19 causes “physical damage or loss to property” as that phrase is used in property insurance policies; and (2) whether COVID-19 was present on the insured property or on property sufficiently connected by proximity or in other ways to the insured property such that coverage is triggered. *See In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2942, Doc. No. 4-1 at 6 (April 21, 2020).

In addition, many other common issues are present in each of these cases. For example, any court presiding over one of the COVID-19 insurance cases would likely be asked to decide:

- Whether the phrase “all risks of physical damage or loss of property” includes the risk of disease and virus;
- Whether the insurance industry understood at the time it was selling insurance policies that virus and disease could cause physical damage or loss to property;

⁵ Many of the responses opposing consolidation raise the specter of differences among state laws applying to the business interruption insurance policies at issue. Significantly, however, not a single one of the responses in opposition has identified any significant differences that would lead to materially different outcomes when applied to the policies at issue here. Instead, these case will be decided on the nearly identical policy language used in the insurance industry and how the COVID-19 pandemic unfolded, not small variances in state laws. Indeed, because of the standard form nature of the policies, the precise policy language at issue in any case can be identified and tracked by recording the relevant form numbers listed on what is known as the “declarations” of each policy. By comparing the relatively small number of relevant forms, the cases can be grouped into a manageable number of standard-form-insurance-policy categories. *See In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2942, Declaration of Professor Tom Baker, Doc. 544-1 (June 15, 2020) (attached as Exhibit 1)

- Whether a safer-at-home or self-quarantine order based on the presence of COVID-19 in surrounding property is sufficient to trigger the civil authority coverage in property insurance policies;
- At what point the period of restoration (which determines the amount of business interruption loss) begins and ends in connection with a safer-at-home or self-quarantine order by a civil authority;
- Whether the expenses incurred by closing a business or reducing services in response to a safer-at-home or self-quarantine order by a civil authority constitute “extra expenses” covered by a property policy;
- Whether the expenses incurred by closing a business or reducing services in response to a safer-at-home or self-quarantine order by a civil authority constitute “sue and labor” expenses covered by a property policy; and
- Whether the expenses incurred by closing a business or reducing services in response to a safer-at-home or self-quarantine order by a civil authority constitute “preservation of property expenses” covered by a property policy.

Id. at 7-8. Determination of these and other common issues in a single district, before a single MDL transferee judge, will promote uniform resolution of these key questions, reduce costs for parties and witnesses, promote the efficient prosecution and resolution of all of the cases, and, consequently, provide speedier and more consistent decisions that society as a whole may use to structure the economy and the insurance market. *Id.* at 8-9.

Consolidation will also permit more efficient coordination of discovery, as well as more consistent answers to the basic questions posed in all cases. *Id.* at 7. Plaintiffs in every case will likely seek discovery into the drafting history of standard insurance terms as well as other evidence

concerning the meaning that the insurance industry places upon the phrase “physical damage or loss.” Scientific experts will be required in order to explore the nature of “physical damage or loss” caused by the virus, and very similar expert deposition testimony will be solicited and challenged in all of the lawsuits. Coordination across the cases, therefore, will not only reduce the burden on all parties involved, but also the court.

Although the transfer motions currently remain pending, for these reasons and others, Plaintiffs believe that the JPML is likely to grant the motions. In any event, the JPML’s decision is likely to occur soon and a temporary stay will not significantly delay these proceedings. Consolidated responses to the motions for centralization were filed on June 5, 2020 and reply briefs were filed on June 15, 2020. *Id.* And the motions have already been placed on the JPML’s July 2020 hearing docket.

II. ARGUMENT

This matter should be temporarily stayed in its entirety until the JPML reaches a decision on the pending motions to transfer. District courts have inherent power to control the disposition of cases on their dockets to ensure a fair and efficient adjudication of matters. *Anthony v. BTR Automotive Sealing Sys., Inc.*, 339 F.3d 506, 516 (6th Cir. 2003). The Court has broad discretion to stay proceedings as incidental to the power to control its own docket. *Clinton v. Jones*, 520 U.S. 681, 707 (1997). “Courts have routinely exercised [their] inherent authority to stay pretrial proceedings during the pendency of a motion before the JPML seeking coordinated pretrial proceedings.” *Noble Cnty., Ohio by Noble Cnty. Commissioners v. Cardinal Health*, No. 2:18-cv-1379, 2019 WL 311807, at *1 (S.D. Ohio Jan. 24, 2019). “Indeed, ‘a majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL Panel because of the judicial resources that are

conserved.” *Id.* (quoting *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997)); *see also, e.g., Currey v. Davol, Inc.*, No. 2:18-cv-222, 2018 WL 2538724, at *2-3 (S.D. Ohio June 4, 2018); *Abshire v. Davol, Inc.*, No. 2:18-cv-268, 2018 WL 2538746, at *2-3 (S.D. Ohio June 4, 2018); *State v. United States Environmental Protection Agency*, No. 2:15-cv-2467, 2015 WL 5117699, at *3 (S.D. Ohio Sept. 1, 2015); *Kelly v. Aultman Physician Center*, No. 5:13CV0994, 2013 WL 2358583, at *2-3 (N.D. Ohio May 29, 2013); *Gallo v. E.I. DuPont De Nemours and Co.*, No. 2:11-cv-680, 2011 WL 3876584, at *3-5 (S.D. Ohio Sept. 2, 2011); *Dowler v. Medicine Shoppe*, No. 2:07 cv 848, 2007 WL 2907519, at *2 (S.D. Ohio Oct. 3, 2007); *Bogard v. Morckel*, No. 5:07 CV 0671, 2007 WL 2331891, at *1-2 (N.D. Ohio Aug. 13, 2007). “Courts consider three factors when determining whether to issue a stay of proceedings pending the JPML’s decision on transfer: (1) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact coordinated; (2) hardship and inequity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.” *Noble Cnty., Ohio by Noble Cnty. Commissioners*, 2019 WL 311807, at * 2.

Here, all three factors favor a temporary stay of these proceedings pending the JPML’s adjudication of the pending transfer motions. First, judicial economy clearly favors a temporary stay. This case is currently one of approximately 150 related cases presently constituting proposed MDL No. 2942, with more cases being filed every day. As set forth in detail above, there is a near identity of claims and each of the cases sets forth common questions of law and fact that arise from the wrongful denial of coverage. Determination of common issues in a single district, before a single MDL transferee judge, will promote uniform resolution of key questions, reduce costs for parties and witnesses, promote the efficient prosecution and resolution of all of the cases, and provide speedier and more consistent decisions. Second, Plaintiff will be prejudiced by potentially

duplicative and unnecessary litigation and the potential for inconsistent rulings. Third, Defendant will suffer no prejudice if this case is temporarily stayed while the JPML decides the transfer motions. This case was only recently filed on April 19, 2020 and an Amended Complaint was filed on June 22, 2020. The briefing on the transfer motions was completed on June 15, 2020. And the transfer motions have already been placed on the JPML's July 2020 hearing docket. Thus, a temporary stay will result in only a very slight delay of these proceedings. Accordingly, this Court should temporarily stay this case pending the resolution of the petition before the JPML because it will preserve resources and judicial economy and avoid inconsistent rulings.

III. CONCLUSION

For the foregoing reasons, this Court should temporarily stay this case pending the resolution of the transfer petition before the JPML. A stay of these proceedings pending a decision from the JPML on the pending transfer motions will preserve resources and judicial economy and avoid inconsistent rulings and piecemeal litigation.

Dated: June 22, 2020

Respectfully submitted,

/s/ Kenneth P. Abbarno

Kenneth P. Abbarno

Mark A. DiCello

Mark Abramowitz

DICELLO LEVITT GUTZLER LLC

7556 Mentor Avenue

Mentor, Ohio 44060

Telephone: (440) 953-88

kabbarno@dicellolevitt.com

madicello@dicellolevitt.com

mabramowitz@dicellolevitt.com

Adam J. Levitt

DICELLO LEVITT GUTZLER LLC

Ten North Dearborn Street, Sixth Floor

Chicago, Illinois 60602

Telephone: (312) 214-7900
alevitt@dicellolevitt.com

Mark Lanier*

Alex Brown*

Skip McBride*

THE LANIER LAW FIRM PC

10940 West Sam Houston Parkway North
Suite 100

Houston, Texas 77064

Telephone: (713) 659-5200

WML@lanierlawfirm.com

alex.brown@lanierlawfirm.com

skip.mcbride@lanierlawfirm.com

Timothy W. Burns*

Jeff J. Bowen*

Jesse J. Bair*

Freya K. Bowen*

BURNS BOWEN BAIR LLP

One South Pinckney Street, Suite 930

Madison, Wisconsin 53703

Telephone: (608) 286-2302

tburns@bbblawllp.com

jbowen@bbblawllp.com

jbair@bbblawllp.com

fbowen@bbblawllp.com

Bryan L. Bleichner*
Jeffrey D. Bores*
Christopher P. Renz*
Gary K. Luloff*
CHESTNUT CAMBRONNE PA
100 Washington Avenue South, Suite 1700
Minneapolis, Minnesota 55401
Telephone: (612) 339-7300
bbleichner@chestnutcambronne.com
jbores@chestnutcambronne.com
crenz@chestnutcambronne.com
gluloff@chestnutcambronne.com

Douglas Daniels*
DANIELS & TREDENNICK
6363 Woodway, Suite 700
Houston, Texas 77057
Telephone: (713) 917-0024
douglas.daniels@dtlawyers.com

*Counsel for Plaintiffs
and the Proposed Classes*

*Applications for admission *pro hac vice* to be filed

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed using the United States District Court for the District of Oregon's CM/ECF service, which will send notification of such filing to all counsel of record on this 22nd day of June, 2020.

/s/ Kenneth P. Abbarno
Kenneth P. Abbarno
DICELLO LEVITT GUTZLER LLC