BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re: NATIONAL SKI PASS INSURANCE LITIGATION MDL No. 1:20-P-113

BRIEF IN SUPPORT OF MOTION FOR TRANSFER AND COORDINATION OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407 and Rule 6.2 of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, Movant James Bradley ("Plaintiff") respectfully moves the Panel to centralize Related Actions for coordinated or consolidated pretrial proceedings.

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1407 and Rule 6.2(e) of the Rules of Procedure of the U.S. Judicial Panel on Multidistrict Litigation (the "Panel"), Plaintiff in the action captioned *Bradley v. United Specialty Insurance Company,* 4:20-cv-520-JM, currently pending in the United States District Court for the Eastern District of Arkansas, respectfully submits this brief in support of this motion to transfer and coordinate at least seven Related Actions. Plaintiff's case arises out of United Specialty Insurance Company ("USIC")'s refusal to pay Plaintiff under an insurance policy from USIC purchased simultaneously with his 2019-2020 Season Ski Pass ("Epic Pass"). Vail Corporation d/b/a Vail Resorts Management Company ("Vail Resorts") issued the Epic Pass to Plaintiff. On March 15, 2020, Vail Resorts announced the premature and early closure of all of its North American resorts ("Destination Resorts") for the remainder of the 2019-2020 ski season due to the emergence of COVID-19, thereby eliminating Plaintiff's ability to fully utilize his Epic Pass.

Plaintiff now seeks to join all cases involving any similarly situated Plaintiffs who, in connection with the purchase of a 2019-2020 ski pass, paid the optional, additional fee for

insurance coverage and whose subsequent insurance claims made were similarly denied. Transfer and coordination is appropriate, and Plaintiff requests that the Panel transfer all cases identified in the Schedule of Related Actions (the "Schedule"), as well as subsequently filed tag-along actions, to the Eastern District of Arkansas.

The actions listed in the Schedule are putative class actions brought by ski pass consumers who also paid a premium to purchase insurance. Each of these submitted claims to their applicable insurance companies for the unused value of their insured ski passes after the early season closure announcement and each were denied reimbursement. To date, seven actions have been filed against multiple insurance companies. Each action concerns an insurance policy sold to ski pass consumers by an insurance company in connection with ski passes issued by varying ski resorts for the 2019-2020 ski season. The putative classes behind each Related Action are comprised solely of insured ski pass purchasers who elected to pay an optional additional fee for insurance on their ski passes. None of the Related Actions concern ski pass purchasers who did not purchase the optional insurance.

28 U.S.C. § 1407 ("Section 1407") states that civil actions pending in different districts which involve one or more common questions of fact may be transferred to any district for coordinated or consolidated pretrial proceedings. At least six additional, identical actions have been filed nation-wide. Forums in which actions are pending possess a comparable evidentiary nexus or relevant business presence. Accordingly, centralization and coordination in the Eastern District of Arkansas will best further the objectives of Section 1407, which does not require that the transferee court sit in a district in which the case might have been filed under standard jurisdiction-and-venue analysis.

The docket of the Eastern District of Arkansas indicates that centralization and

coordination in the District of Arkansas is appropriate. There are no pending MDL proceedings in the Eastern District of Arkansas, nor has it recently been assigned an MDL matter. Accordingly, Plaintiff respectfully requests the Related Actions be transferred to and coordinated in the Eastern District of Arkansas.

II. RELEVANT FACTS

Each of the Related Actions on the Schedule allege claims against insurance companies arising out of virtually identical factual circumstances. Plaintiff here purchased, for the 2019-2020, the Epic Pass and the available USIC insurance. The material facts of Plaintiff's case and t hose of the cases listed in the schedule only differ with regards to the issuer of the ski pass and/or company that insured it.

In Plaintiff's case, the Epic Pass granted access to over thirty-four (34) Destination Resorts across the country; which were all closed on March 15, 2020 due to COVID-19. Despite the fact that the closures rendered the Epic Passes unusable for a substantial portion of the 2019-2020 ski season, Defendant refused to issue any refunds to Plaintiff or to any similarly situated person. Plaintiffs in the Related Actions experienced substantially similar circumstances with the insurance on the ski passes they purchased. Specifically, each were also denied a refund despite purchasing an insurance policy for the ski passes which was intended to grant them access to different Destination Resorts and similar ski destinations before they closed due to COVID-19.

The scope of actions fit for consolidation and transfer is not limited solely to actions brought by Epic Pass insurance purchasers against USIC. Just as Plaintiff paid for the optional, additional fee for ski pass insurance from USIC in connection with his purchase of an Epic Pass from Vail Resorts, many Plaintiffs paid optional, additional fees for similar insurance in

connection with the purchase of an "Ikon Pass" from Alterra Mountain Company ("Alterra").

Ikon Pass's "Ski Pass Preserver" policy is underwritten by Arch Insurance Company ("Arch") and administered by Out of Towne, LLC d/b/a Red Sky Travel Insurance ("Red Sky"). Like Vail Resorts, Alterra also announced in March 2020 the early closure of its Destination Resorts for the remainder of the 2019-20 ski season due to the emergence of COVID-19. A vast majority of Destination Resorts are owned either by Vail Resorts or by Alterra, and the claims brought by Alterra's Ikon Pass holders against insurers Arch and Red Sky mirror the claims brought by Vail Resorts' Epic Pass holders against insurer USIC.

Plaintiff seeks to join all such actions, along with all other actions against insurance companies that have been unjustly enriched, because they denied the claims of individuals who paid an optional, additional fee for insurance on ski passes purchased before early closure of applicable pass-accessible Destination Resorts or similar ski destinations due to COVID-19.

Each of the Related Actions on the Schedule also seek to certify similar nationwide classes of persons who purchased an insured ski pass for the 2019-2020 ski season and who, after the COVID-19 closure, submitted a claim for the unused portion and were denied.

III. ARGUMENT

A. Legal Standard

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to *any district* "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407 (emphasis added). The Panel typically considers the following four factors in deciding whether to transfer a case:

a. The elimination of duplication in discovery;

b. The avoidance of conflicting rules and schedules;

c. The reduction of litigation costs; and

d. The conservation of time and effort of the parties, attorneys, witness, and courts.

Pursuant to § 1407(a), transfer and centralization is appropriate where (1) the pending actions involve one or more common questions of fact; (2) transfer will aid the convenience of the parties, and 3) transfer will promote the just and efficient conduct of such actions. In these instances, transfer and centralization streamlines discovery, avoids conflicting rulings and scheduling issues, minimizes costs and conserves time and resources of the parties, witnesses and the courts. *See Manual For Complex Litigation* § 20.131 (4th ed. 2016). As discussed below, these factors weigh heavily in favor of transfer and centralization of the Related Actions in the Eastern District of Arkansas.

The Related Actions meet the requirements for centralization under § 1407(a). All Related Actions share common questions of fact and law with little to no variation. Transfer is appropriate in cases sharing common factual issues in order to avoid duplication of discovery efforts and prevent inconsistent rulings. *See In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 823 (J.P.M.L. 1979); *In re Antibiotic Drugs*, 309 F. Supp. 155, 156 (J.P.M.L. 1970) ("[T]he applicability of different legal principles will not prevent the transfer of an action under § 1407 if the requisite common questions of fact exist."). Section 1407 is operative not only where there is multidistrict litigation involving common plaintiffs or defendants. *In re Western Liquid Ashphalt*, 309 F. Supp. 157 (Jud. Pan. Mult. Lit. 1970). Section 1407 is satisfied because all Related Actions referenced in the Schedule arise from the same operative facts. Specifically, both USIC and Arch have refused to issue any refunds for insured passes rendered unusable due to the closure of all Pass-accessible ski areas for the remainder of the 2019-2020 ski season, and

purchasers of insured ski passes seek to recover under the same legal theories. Transfer and centralization undoubtedly is appropriate as it exceeds the requirements necessary under Section 1407. *In re Zyprexa Prod. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004) ("[T]ransfer under Section 1407 does not require a complete identity or even majority of common factual issues as a prerequisite to transfer"). Because the Related Actions seek to certify overlapping classes, centralization will guard against inconsistent rulings and inconsistent class determinations. *See In re U. S. Fin. Sec. Litig.*, 375 F. Supp. 1403, 1404 (J.P.M.L. 1974) ("the prevalence of common factual issues and similar class allegations necessitates transfer of all actions to a single district for coordinated or consolidated pretrial proceedings under Section 1407 in order to prevent duplication of discovery and eliminate the possibility of inconsistent or overlapping class determinations.").

Therefore, the transferee judge should undoubtedly find the Related Actions feasible to coordinate.

B. Consolidation Is The Most Convenient, Just, and Efficient Method of Coordinating Pretrial Proceedings for This Litigation.

All relevant factors strongly favor consolidation. Many more actions will likely be added to the seven pending actions in this litigation, making a compelling case for centralization. This Panel has previously held that a number of procedurally similar actions will make the case for centralization compelling, and has routinely ordered centralized proceedings in cases involving even fewer lawsuits. *See In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, 763 F. Supp. 2d 1377, 1378 (U.S. Jud. Pan. Mult. Lit. 2011); *In re: Fontainebleau Las Vegas Contract Litig.*, 657 F. Supp. 2d 1374, 1375 (U.S. Jud. Pan. Mult. Lit. 2009) (centralizing proceedings for litigation involving **two** actions filed in separate districts); *In re Mobile Telecommunications Techs., LLC Patent Litig.*, 222 F. Supp. 3d 1337 (U.S. Jud. Pan.

Mult. Lit. 2016) (granting transfer motion consisting of fourteen actions pending in two districts); *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Practices Litig.*, 190 F. Supp. 3d 1361, 1362 (U.S. Jud. Pan. Mult. Lit. 2016) (ordering centralized proceedings for litigation involving eighteen actions pending in eighteen districts); *In re Anheuser-Busch Beer Labeling Mktg. & Sales Practices Litig.*, 949 F. Supp. 2d 1371, 1372 (U.S. Jud. Pan. Mult. Lit. 2013) (centralizing six actions pending in six districts); *In re Anheuser-Busch Beer Labeling Marketing and Sales Practices Litigation*, 949 F. Supp. 2d at 1369 (centralizing seven actions pending in five districts); *In re: 5-Hour Energy Mktg. & Sales Practices Litig.*, 949 F. Supp. 2d 1357 (U.S. Jud. Pan. Mult. Lit. 2013) (centralizing nine actions pending in eight districts); *In re Fosamax Products Liab. Litig.*, 444 F. Supp. 2d 1347, 1348 (J.P.M.L. 2006) (granting transfer motion for litigation involving eighteen actions in five districts).

The likelihood of inconsistent rulings and the amount of resources that would be consumed in the overlapping prosecution, defense, and adjudication of pretrial proceedings in seven substantially similar putative class actions are indicative of the original purpose for which Section 1407 was enacted.

Centralization is even more appropriate in this instance, as every individual lawsuit is at a significantly similar procedural posture. Neither the production of documents nor depositions of any witnesses have taken place. There have been no substantive rulings to date in any of the actions. Given the number of procedurally similar actions involved, and that new putative class actions concerning the same facts will continue to be filed, the Plaintiffs and Defendants involved in this litigation will benefit from centralized proceedings.

C. Each Related Action Involves Multiple Common Factual Allegations

The claims and allegations at issue in each of the seven actions stem from a breach

contract between the applicable insurance company and the Plaintiffs. Liability in each of the actions will thus turn on the same alleged questions of fact. *In re Auto Body Shop Antitrust Litig.*, 37 F. Supp. 3d 1388, 1390 (U.S. Jud. Pan. Mult. Lit. 2014) ("Transfer under section 1407 does not require a complete identity of common factual issues or parties as a prerequisite to transfer, and the presence of additional facts or differing legal theories is not significant where, as here, the actions still arise from a common factual core.").

The legal and factual similarities in the instant cases surpass other matters that have been deemed suitable for centralization. *See In re: Discover Card Payment Protection Plan Marketing & Sales Practices Litigation,* 764 F. Supp.2d at 1343 (finding the Panel ordered centralization of four actions because each involved the marketing, sale, operation and/or administration of Discover's payment protection plan). In *In re: Discover*, the Panel issued the order over the objection of one plaintiff that her action, which alleged that Discover marketed payment protection plans to individuals without inquiring as to whether they qualify for benefits, was factually distinct from the other claims because those claims focused on Discover's alleged enrolling of individuals in the plans without their consent, charging higher fees than disclosed, and requiring onerous steps to terminate the plan. *Id.* The Panel agreed that the objecting plaintiff's allegations were "somewhat different" from the other complaints and concluded, "the actions were sufficiently similar and contained enough overlapping facts concerning the marketing of the Discover payment protection plan to benefit from centralized proceedings." *Id.*

Here, the seven actions contain substantially similar allegations that arise from an identical factual core. While centralization requires only a single common question of law or fact, there is a clear overlap in this instance between the various claims and allegations. Each Related Action alleges an insurance company effectively denying insurance coverage for losses

resulting from the closure of ski resorts due to COVID-19. Lastly, these claims will each involve the production of virtually identical documents and witnesses and would most appropriately and justly be transferred for centralized proceedings.

D. The Eastern District of Arkansas is the Most Appropriate Transferee Forum Because Each of the Actions Involves Multiple Common Factual Allegations

The Judicial Panel on Multidistrict Litigation (the "Panel") should transfer the seven virtually- identical and potentially overlapping class actions, filed in seven different federal courts, to the Hon. Jay Moody of the U.S. District Court for the Eastern District of Arkansas. The actions all involve the same breach of contract claims. Without consolidation in one transferee court, there exists a significant threat of overlapping classes, inconsistent rulings and results, gross inefficiency among many federal courts, and prejudice to the Defendants caused by duplicative motions practice and discovery.

Putative class action plaintiffs, all customers of the applicable defendant insurance companies involved in connection with the purchase of insured ski passes, have filed overlapping class actions alleging defendant insurance companies breached the terms of their policies in at least one of the following ways:

A) The COVID-19 closure of all certain ski resorts in the United States constituted a quarantine under the terms of the applicable policies because it was an unforeseen event, occurrence, or circumstance that restrained class-members from entering upon and using the facilities of ski resorts for the purposes permitted by the insured ski pass;

B) The governmental orders applicable to plaintiffs were an "unforeseen event, occurrence, or circumstance" that constituted a quarantine by restraining class members from traveling to the applicable ski resorts, engaging in activities, and using the insured ski pass for its intended purpose;

C) Defendant insurance companies breached the terms of their policies;

D) Plaintiffs sustained damages as a result of the insurance companies' breach of

contract;

E) Plaintiffs are entitled to damages, restitution, and/or other equitable relief; and

F) Class plaintiffs, or any subset class plaintiffs, are entitled to declaratory relief stating the proper construction and/or interpretation of the applicable policies.

The actions broadly allege the same core facts: (1) Plaintiffs all purchased ski pass insurance from the applicable insurance company; (2) each insurance company issued a policy to purchasers of insured ski passes; (3) the policies are valid and enforceable contracts between the applicable insurance company and each Plaintiff; (4) Plaintiffs substantially performed their obligations pursuant to the terms of the appliable policy; (5) Plaintiffs suffered a loss as defined by the terms of the applicable policies; and (6) the insurance companies failed to compensate Plaintiffs for their respective losses as required by their policies.

These actions present the quintessential case for consolidation under 28 U.S.C. § 1407(a). Consolidation will (1) avoid encumbering multiple federal courts with duplicative work, including addressing the same affirmative defenses, discovery efforts, and class-action issues, and will (2) eliminate the risk of inconsistent results.

In determining the most appropriate forum for centralization under 28 U.S.C. § 1407, relevant factors include "the site of the occurrence of the common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges." *Manual for Complex Litigation* § 20.131 (4th ed. 2016). The District of Arkansas has the judicial expertise, resources, and favorable caseload to conduct efficient pretrial proceedings in these actions and is centrally located. Alternatively, the Honorable Joseph Goodwin of the United States District Court for the Southern District of West Virginia has substantial experience overseeing complex multi-district litigation and is in the process of closing various transvaginal mech MDLs.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Panel enter an Order transferring the Related Actions to the Eastern District of Arkansas.

Dated: June 16, 2020

By: /s/ Derek H. Potts

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