

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE: ERIE COVID-19 BUSINESS) Master Docket Misc. No. 1:21-mc-00001
INTERRUPTION PROTECTION)
INSURANCE LITIGATION) MDL No. 2969
)
This Document Relates to:)
All Cases)

**ORDER APPOINTING LEAD AND LIAISON COUNSEL AND DIRECTING THE
FILING OF CERTAIN SUPPLEMENTAL PAPERS**

In its Initial Status Conference Order (ECF No. 3), the Court informed the parties that it would appoint Plaintiffs' Lead Counsel and Plaintiffs' Liaison Counsel. The Court received three (3) applications, representing a total of six (6) individuals. (ECF Nos. 85, 104, and 105.) The Court then heard from the respective candidates at the Initial Status Conference. After careful consideration of the applicants' written submissions and oral statements as well as the criteria set forth in the Manual for Complex Litigation and Federal Rule of Civil Procedure 23(g), the Court issues the following Order:

1. APPOINTMENT OF INTERIM PLAINTIFFS' CO-LEAD COUNSEL

The Court appoints the following attorneys as Plaintiffs' Co-Lead Counsel:

Kelly K. Iverson
Carlson Lynch, LLP
1133 Penn Ave., 5th Floor
Pittsburgh, PA 15222

Adam M. Moskowitz
The Moskowitz Law Firm PLLC
2 Alhambra Plaza, Suite 601
Coral Gables, FL 33134

Plaintiffs' Co-Lead Counsel will be responsible for coordinating pretrial proceedings on behalf of Plaintiffs. They will have the following responsibilities, and such responsibilities may

be modified by subsequent Order. The responsibilities include, without limitation:

- a.* Determine—after such consultation with other leadership counsel including members of the Plaintiffs’ Steering Committee (“PSC”) (*see* Section 3 below delineating the PSC’s responsibilities), and other co-counsel as appropriate—and present to the Court and opposing parties the position of Plaintiffs as to all matters arising during pretrial proceedings, including but not limited to attending conferences, filing and presenting jointly drafted motions, drafting joint status reports, etc.;
- b.* When a case that arises out of the subject matter of the actions in this MDL is hereinafter filed in this Court or transferred from another Court, Plaintiffs’ Co-Lead Counsel shall advise the Court and the parties so that the Clerk of this Court may post a copy of this Order and other relevant Orders in the separate action. Such will serve to advise the attorneys for the plaintiff(s) in the newly filed or transferred case and to any new defendant(s) in the newly filed or transferred case of this action of the procedural status of this MDL and so that new counsel may make the appropriate entry on the docket for this action;
- c.* Coordinate the initiation and conduct of discovery and other activities on behalf of Plaintiffs consistent with the Federal Rules of Civil Procedure relating to discovery or any other actions directed by any subsequent Order of this Court;
- d.* Coordinate with members of the PSC in management of the litigation and fund the necessary and appropriate costs of Plaintiffs’ discovery and other common benefit efforts, including the maintenance of a Plaintiffs’ document depository;
- e.* Coordinate settlement discussions or other dispute resolution efforts on behalf of Plaintiffs, but not enter binding agreements except to the extent expressly authorized;
- f.* Delegate specific tasks to other Plaintiffs’ counsel in the matter to ensure that pretrial preparation is conducted effectively, efficiently, and economically;
- g.* Monitor the activities of Plaintiffs’ co-counsel to ensure schedules are met and unnecessary expenditures or time and expense are avoided;
- h.* Consider the qualifications of non-leadership Plaintiffs’ counsel for specific tasks;
- i.* Consult with and employ consultants or experts on behalf of Plaintiffs, as necessary;
- j.* Enter into stipulations with opposing counsel as necessary for the conduct of this litigation;
- k.* Prepare and distribute periodic status reports to the parties;
- l.* Maintain adequate time and disbursement records covering service of designated counsel and establishing guidelines as to keeping of time records and expenses;
- m.* Encourage full cooperation and efficiency among all Plaintiffs’ counsel;
- n.* Submit, if appropriate, additional committees and counsel on behalf of Plaintiffs for designation by the Court;
- o.* Perform such other duties as may be incidental to proper coordination of Plaintiffs’ pretrial activities or authorized by further order of the Court.

2. APPOINTMENT OF INTERIM PLAINTIFFS' LIAISON COUNSEL

The Court appoints the following attorney to serve as Plaintiffs' Liaison Counsel:

George L. Stewart
Reed Smith, LLP
225 5th Ave.
Pittsburgh, PA 15222

Plaintiffs' Liaison Counsel will be charged with responsibility for administrative matters as set forth below and as may be modified by subsequent Order. Liaison Counsel will be expected to:

- a. Maintain an up-to-date, comprehensive Service List of Plaintiffs and promptly advise defense counsel of changes to Plaintiffs' Service List;
- b. Receive and distribute to Plaintiffs' Counsel orders, notices, and correspondence from the Court, to the extent such documents are not electronically filed;
- c. Receive and distribute to Plaintiffs' counsel, as appropriate, discovery, pleadings, correspondence, and other documents from defense counsel that are not electronically filed;
- d. Establish and maintain a document depository;
- e. Maintain complete files with copies of all documents served upon them in hard copy or electronic form to make files available to Plaintiffs' counsel upon request;
- f. Revive orders and notices from the Judicial Panel on Multidistrict Litigation pursuant to Rule 5.2(e) of the Panel's Rules of Procedure or from the Court on behalf of all Plaintiffs, and prepare transmittal of copies of such orders and notices to Plaintiffs' counsel;
- g. Assist Plaintiffs' Co-Lead Counsel and the PSC in resolving scheduling conflicts among the parties and coordinating activities, discovery, meetings, and hearings;
- h. Maintain a filed-endorsed copy of this Order, and serve the same on the parties and/or their attorneys in any actions later instituted in, removed to, or transferred to these proceedings;
- i. Maintain records of receipts and disbursements advanced by members of the PSC and received by the PSC, and report in writing to the PSC concerning disbursements and receipts;
- j. Act as the treasurer for any common benefit assessments and expenses;
- k. Arrange monthly conference call numbers and provide the number to the Court and all counsel; and,
- l. Perform other functions necessary to effectuate these responsibilities or as may be expressly authorized by further Orders from the Court or requested by Plaintiffs' Co-Lead Counsel. Further, one or more duties of Plaintiffs' Liaison Counsel as set forth

herein may also be performed by Plaintiffs' Co-Lead Counsel or otherwise at their direction, if in their judgment such reallocation of duties leads to greater efficiency and expense savings. Plaintiffs' Liaison Counsel nonetheless remains responsible for the fulfillment of the obligations set out herein unless relieved of same by further Order.

Notwithstanding the appointment of Plaintiffs' Liaison Counsel, each Plaintiff's counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary. Such Liaison Counsel shall not have the right to bind any party as to any matter without the consent of counsel for that party, except Plaintiffs' Liaison Counsel's own clients. Further, such Liaison Counsel shall remain free to represent the interests and positions of their clients free of any claim (including, without limitation, any claim of conflict) arising from service as Plaintiffs' Liaison Counsel.

3. PLAINTIFFS' STEERING COMMITTEE

To further promote efficient management of the MDL and pursuant to the guidance set forth in the Manual for Complex Litigation (Fourth) § 40.22, the Court hereby establishes a Plaintiffs' Steering Committee ("PSC"). The following individuals, along with Plaintiffs' Co-Lead Counsel and Liaison Counsel, are appointed to the PSC:

Richard Golomb
Golomb & Honik, P.C.
1835 Market St., Suite 2900
Philadelphia, PA 19103

John "Jack" Goodrich
Goodrich & Associates, P.C.
429 4th Ave., Suite 900
900 Law & Finance Building
Pittsburgh, PA 15219

William "Chip" F. Merlin
Merlin Law Group
777 S. Harbour Island Blvd., Suite 950
Tampa, FL 33602

The PSC shall assist Plaintiffs' Co-Lead Counsel and Plaintiffs' Liaison Counsel in coordinating Plaintiffs' pretrial activities, fulfilling the obligations as set forth in Sections 1 and 2 above, and in planning for trial. In addition, the PSC shall, as approved by Plaintiffs' Co-Lead Counsel, establish a federal-state liaison advisory subcommittee of up to three (3) counsel of record in this proceeding, including Mr. Goodrich. The purpose of this subcommittee is to serve as liaison relative to federal and state court proceedings involving cases in which similar issues are raised, including in other cases against the same Defendants. The PSC may create other such committees and subcommittees (made up of counsel of record in this proceeding) as are necessary and proper to efficiently carry out its responsibilities, designate members thereof, and to delegate common benefit work responsibilities to selected counsel (including non-members of the PSC), as may be required for the common benefit of Plaintiffs.

To the extent a committee or subcommittee needs additional support with its common benefit work, it may seek the participation and assistance of non-leadership counsel. However, no common benefit work may be performed by non-leadership counsel without the prior approval of Plaintiffs' Co-Lead Counsel. The Court may amend or expand the PSC upon request from the Plaintiffs' Co-Lead Counsel or on the Court's own motion, if and as circumstances warrant.

4. LEADERSHIP COUNSEL CONFERENCES

Those appointed to Plaintiffs' leadership positions, including the PSC, are expected to confer within fourteen days (14) days of the filing of this Order to establish the leadership structure, allocate responsibilities, institute a billing protocol, and to document the same. Those appointed to Defendants' leadership positions (*see* Section 11 below) are also directed to confer to discuss and document the same as to the organization of matters on behalf of Defendants.

5. TERM OF APPOINTMENT

All appointments, for and to Plaintiffs' and Defendants' leadership responsibilities, are made for an initial one-year period from the date of this Order and will expire on April 30, 2022, unless extended by further Order. The Court may terminate or modify any appointment made by this Order for good cause shown and after notice and an opportunity to be heard, or upon the request of any appointee. Thirty (30) days prior to the expiration of this Order's appointments, counsel may apply for the new appointment term. An appointment application process will be established at an appropriate time in advance of the expiration date. Applications for appointment must detail the nature and scope of the attorney's work on this litigation, including the time and resources that they expended during the previous term.

6. PERSONAL NATURE OF APPOINTMENT

All appointments of specific lawyers by this Order are personal in nature. As such, each appointee must assume personal responsibility for the performance of their responsibilities. No other attorneys, including members of an appointee's law firm, may substitute for the appointee in the fulfillment of their exclusive duties, except with prior approval of the Court. The Court may add or replace appointees on their request, on request of the Plaintiffs' or Defendants' leadership team as to the involved team, or on its own motion, if and as circumstances warrant. Notwithstanding the above, any appointee attorney may utilize the services of a member or associate lawyer of their law firm or law partnership (or appropriate paraprofessional and clerical personnel) to assist them in fulfilling their obligations under this Order when doing so results in representational efficiencies and/or expense savings.

7. CLASS CERTIFICATION

This Order shall not be interpreted by any party or any person as indicative of the Court's decision on the issue of class certification. This Order does not assume that class certification is or is not warranted nor does it foreclose any argument that any party may wish to raise relative to class certification. However, if one or more classes is certified in this matter, counsel appointed to leadership positions or serving as a member of a steering or other committee contemplated by this Order (and members of their immediate family) will be excluded from membership in the class.

8. FUTURE CASE MANAGEMENT CONFERENCES

Prior to any Court-scheduled conference, Plaintiffs' Liaison Counsel and a Defendants' Co-Lead Counsel (*see* Section 11 below) shall submit a proposed joint agenda on the Lead Miscellaneous Docket (21-mc-0001) seven (7) days before the conference.

Plaintiffs' Liaison Counsel and a Defendants' Co-Lead Counsel shall also jointly file on the Lead Miscellaneous Docket a list detailing the names, email addresses, and phone numbers of the attorneys who plan to appear via video or phone (if such is the format of the conference), or in person, at least three (3) full days before such conference, absent urgent circumstances or the setting of such a conference by the Court on shorter notice. The Court will circulate participation instructions via email to those who wish to appear by video and/or phone.

Finally, at least three (3) business days prior to all conferences, Plaintiffs' Co-Lead Counsel and Defendants' Co-Lead Counsel shall each submit a position letter to this Court. The position letter shall set forth the following: (a) a brief recitation of the facts; (b) a discussion of the party's strengths and weaknesses; and (c) the party's settlement posture. To ensure candor, Co-Lead Counsel are directed to fax or email their position letters to Chambers only. All position letters will be kept confidential and will not be shared with opposing counsel.

9. COMMUNICATIONS WITH THE COURT

All communications with the Court must be through Co-Lead Counsel or Liaison Counsel. If circumstances require direct correspondence with the Court by individual counsel, copies of any such communications must simultaneously be served on all Co-Lead Counsel and Liaison Counsel.

10. TIMEKEEPING, COMPENSATION, AND REIMBURSEMENT OF PLAINTIFFS' COUNSEL

The Court will make the final determination as to the compensation and reimbursement of Plaintiffs' counsel, if any. As such, any Plaintiff seeking the award of fees and costs at the end of, or other point in, this litigation must present to the Court clear and definitive records prepared as to the fees and costs incurred. All timekeepers carrying out work for Plaintiffs' common benefit, including PSC members, who may look to any common fund or agreement for reimbursement or compensation shall maintain detailed and contemporaneous time records. Plaintiffs' Co-Lead Counsel are responsible for ensuring that the following guidelines are adhered to by all Plaintiffs' counsel who carry out work for Plaintiffs' common benefit:

- a.* Plaintiffs' Co-Lead Counsel shall maintain detailed billing records that will include a description of each legal service performed, the time required to perform such described legal services, and the billing rate of the timekeeper performing each service. Plaintiffs' Co-Lead Counsel will ensure that all counsel for Plaintiffs keep such billing records. Block billing is not permitted. Time must be recorded by specific task.
- b.* All work performed by any Plaintiffs' counsel shall be coordinated with Plaintiffs' Co-Lead Counsel to avoid duplicative work. Any work performed by Plaintiffs' counsel that has not been coordinated with Plaintiffs' Co-Lead Counsel may not be subject to reimbursement if an award of attorneys' fees is made in this action.

11. INTERIM DEFENSE LEADERSHIP

Defendants requested in the Joint Proposed Agenda to the Court (ECF No. 107) that the following attorneys will serve as their Co-Lead Counsel, and they are so designated:

Adam J. Kaiser
Alston & Bird, LLP
90 Park Ave., 15th Floor
New York, NY 10016-1387

Tiffany L. Powers
Alston & Bird, LLP
1201 West Peachtree St.
Atlanta, GA 30309-3424

Kristin A. Shepard
Alston & Bird, LLP
950 F St., NW
Washington, DC 20004

The leadership responsibilities set forth above, and specifically as stated within Sections 1(a)–(o) of this Order, apply equally to the above appointees as to such enumerated matters on behalf of Defendants to the extent conceptually applicable. Defendants also requested in the Joint Proposed Agenda to the Court (ECF No. 107) that the following attorneys serve as Co-Liaison Counsel. To facilitate the sound administration of these proceedings, each of the following counsel, along with Defendants’ Co-Lead counsel, are appointed as the Defendants’ Steering Committee (“DSC”):

Robert T. Horst
Timoney Knox, LLP
400 Maryland Drive
Fort Washington, PA 19034

Robert M. Runyon III
Timoney Knox, LLP
400 Maryland Drive
Fort Washington, PA 19034

Matthew B. Malamud
Timoney Knox, LLP
400 Maryland Drive
Fort Washington, PA 19034

Paul K. Geer
DiBella, Geer, McAllister & Best, P.C.
20 Stanwix St., 11th Floor
Pittsburgh, PA 15222

Richard DiBella
DiBella, Geer, McAllister & Best, P.C.
20 Stanwix St., 11th Floor
Pittsburgh, PA 15222

Tara L. Maczuzak
DiBella, Geer, McAllister & Best, P.C.
20 Stanwix St., 11th Floor
Pittsburgh, PA 15222

The responsibilities set forth above as to Plaintiffs' Co-Lead Counsel, Plaintiffs' Liaison Counsel, and the PSC/subcommittee members, and specifically as stated within Sections 2(a)–(l) of this Order (excepting Paragraph 10 as well as the obligation to form a federal-state liaison subcommittee), apply equally to Defendants' Co-Lead Counsel and the DSC members as to matters related to the defense of these proceedings, to the extent applicable.

12. STATUS REPORT ORDER

The Court hereby directs Co-Lead Counsel for Plaintiffs and Co-Lead Counsel for Defendants to confer and file status report(s), jointly or separately as noted below, as to procedural or other next steps in light of the following recent events including but not limited to:

- a. Judge Ward's decision in *Ungarean v. CNA*, No. GD-20-006544 (Pa. Com. Pl. Mar. 22, 2021);
- b. Appeal of Judge Ward's July 2020 Order coordinating COVID-19 business interruption loss insurance litigation against Erie Insurance Exchange, *see Tambellini, Inc. v. Erie Ins. Exch.*, Nos. GD-20-005137; GD-20-006901 (Pa. Com. Pl. July 23, 2020), *appeals docketed*, Nos. 902 WDA 2020; 903 WDA 2020 (Pa. Super. Ct. Aug. 31, 2020);

- c. Judge Gibson's decision in *Windber Hosp. v. Travelers Prop. Cas. Co. of Am.*, No. 20-80, 2021 WL 1061849, at * 1 (W.D. Pa. Mar. 18, 2021);
- d. Judge Stickman's decision in *I S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, --- F. Supp. 3d ---, No. 20-862, 2021 WL 147139, at * 1 (W.D. Pa. Jan. 15, 2021), *appeal docketed*, No. 21-1109 (3d Cir. Jan. 21, 2021);
- e. The Third Circuit consolidated appeal of COVID-19 business interruption loss insurance cases, *see* Order, *Wilson v. USI Ins. Servs. LLC*, No. 20-3124 (3d Cir. Apr. 6, 2021), ECF No. 43;
- f. The recent certification of a state law question to the Supreme Court of Ohio on similar issue(s) raised in this MDL, *see Neuro-Comm'n Servs. Inc. v. Cincinnati Ins. Co.*, No. 2021-0130 (Ohio Apr. 14, 2021);
- g. The filing of an unopposed motion to stay in a case arising in the U.S. District Court for the District of New Jersey, *see* Unopposed Motion to Stay Litigation Pending Resolution of Third Circuit Appeal, *Ambulatory Care Ctr. v. Sentinel Ins. Co.*, No. 20-05837 (D.N.J. Apr. 21, 2021), ECF No. 21; and,
- h. The Third Circuit Oral Argument held on April 28, 2021, regarding the appeal of Judge Fischer's decision in *Dianoia's Eatery, LLC, v. Motorists Mut. Ins Co.*, No. 20-787, 2020 WL 5051459, at *1 (W.D. Pa. Aug. 27, 2020), *appeal docketed*, No. 20-2954 (3d Cir. Sept. 24, 2020), *see* ECF No. 49.

Based on the foregoing, the Court hereby ORDERS that counsel shall confer and file a joint status report, or separate status reports if Co-Lead Counsel for Plaintiffs and Co-Lead Counsel for Defendants are unable to reach agreement, proposing procedural and/or other next steps this Court should take to ensure just and efficient disposition of the cases in this MDL. The status report(s) shall be filed on or before May 14, 2021, and shall be filed on the Lead Miscellaneous Docket. The Court would note that it strongly prefers a single joint such report, even if differences of position as to certain discrete matters are noted therein.

s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge

cc: All counsel of record
Date: April 30, 2021