BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re: **MDL No. 2928**
Hotel Industry Sex Trafficking Litigation

RESPONSE OF HILTON DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATED PRETRIAL PROCEEDINGS

In accordance with Rule 6.1(c) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation (the "Panel"), Hilton Worldwide Holdings Inc., Hilton Domestic Operating Company Inc., Hilton Franchise Holding LLC, and Hilton Management LLC ("Hilton")—franchisors or affiliates in some of the underlying cases—oppose the Motion for Transfer of Actions to the Southern District of Ohio (Eastern Division) Pursuant to 28 U.S.C. § 1407 for Consolidated Pretrial Proceedings.

INTRODUCTION

The underlying cases involve claims by sex trafficking victims ("Movants") that members of the hotel industry—including hotel owners, franchisors, and other individual and corporate defendants—should be liable under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). The TVPRA provides trafficking victims with a civil cause of action against both the perpetrators of their trafficking and "whoever knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in an act in violation of this [human trafficking] chapter." 18 U.S.C. § 1595(a). Many of the complaints in the underlying cases also include claims under various state laws.[1]

[1] The state laws at issue in these cases include: Florida common law negligence; Florida civil aiding and abetting law; Florida civil conspiracy law; Georgia RICO; Georgia common law negligence; Massachusetts common law negligence; Massachusetts premises liability law; Massachusetts unjust enrichment law; New Hampshire common law negligence; New Hampshire

Each underlying case arises from a distinct alleged scheme perpetrated by different traffickers at different hotels across the country. The cases do not allege an industry-wide conspiracy to engage in sex trafficking. To the contrary, each case will require significant fact-finding into the unique sex trafficking venture alleged by each plaintiff. And, with Movants' assertion that they have approximately 1,500 cases waiting to be filed and so little known about the venue of those cases or plaintiffs' theories, consolidation is premature and would not currently serve the interests of justice and efficiency.

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 coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The Panel may only permit a transfer if the Panel determines that the transfer will be "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id*.

ARGUMENT

Movants seek an unprecedented consolidation. This is not a mass tort case. There is no common cause behind the alleged injuries. There are no common injuries. The only common thread tying together over 60 different defendants in the underlying cases is that they are hotel industry defendants accused of violating the TVPRA. That is not enough, because a common legal

negligent supervision and training law; New Hampshire unjust enrichment law; New Mexico sex trafficking statute; New Mexico common law negligence; New York sex trafficking statute; New York common law negligence; Ohio common law negligence; Ohio premises liability law; Ohio unjust enrichment law; Pennsylvania sex trafficking statute; Texas sex trafficking statute; Texas common law negligence; Washington common law negligence; Washington common law outrage; Washington Criminal Profiteering Act; Washington Sexual Exploitation of Children Act; Washington ratification and vicarious liability law; Washington unjust enrichment law; and Washington civil conspiracy law. This universe of state law claims is certain to expand with each new case that is filed.

theory without more is insufficient to justify consolidation. *See In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (consolidation not warranted where cases share a common question of law but few, if any, common questions of fact). Indeed, because the facts in each case are unique, discovery will not overlap in any meaningful way. *Compare, e.g.*, *L.W. v. Hilton Worldwide Holdings Inc., et al.*, Case No. 4:19 cv 04172 (S.D. Tex.) (claims against Hilton allege plaintiff paid for hotel rooms herself, trafficker monitored the payment, and hotel should have been aware of the trafficking because plaintiff requested to use the front desk phone), *with Jane Doe 1 v. Red Roof Inns, Inc., et al.*, Case No. 1:19-cv-03840 (N.D. Ga.) (claims against Hilton allege that front desk clerks hid the trafficking from the hotel in exchange for payment in cash and drugs).

To be sure, the factual *questions* in each case may sound similar—*e.g.*, what amount of control a defendant exercised over a franchise location, or whether a hotel knew or should have known of the trafficking. But the factual *answers* necessarily will be different in each case. And consolidation is only proper where "common questions of fact," not "individual questions of fact," predominate. *See In re Asbestos Sch. Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *see also In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1339 (J.P.M.L. 2012) (denying motion where "the litigation may focus to a large extent on individual questions of fact concerning the circumstances of each patient's alleged injuries"). With potentially hundreds or thousands of cases that will be brought by new plaintiffs with unique stories, what questions of fact they have in common (if any) is not yet discernible. And because the current cases turn on individual questions of fact, consolidation now would only hinder the interests of justice and efficiency.

I. Individual questions of fact predominate.

Consolidation does not serve the interests of justice and efficiency where individual questions of fact predominate, even if there exist common questions of fact. *See In re Xytex Corp. Sperm Donor Prods. Liab. Litig.*, 223 F. Supp. 3d 1351, 1352 (J.P.M.L. 2016) (consolidation not warranted where each individual action would require examination of different representations made to plaintiffs at different times, which would predominate over any common questions of fact); *In re Westinghouse Elec. Corp. Emp't Discrimination Litig.*, 438 F. Supp. 937, 938–39 (J.P.M.L. 1977) (consolidation not warranted in employment discrimination cases where individual factual issues of discrimination against plaintiffs would predominate over any common questions of fact).

The factual issues underlying a TVPRA claim are unique to each alleged sex trafficking venture. To prove up a TVPRA claim, a plaintiff must show that the defendant (1) "knowingly benefit[ed]" (2) "from participation in a venture" (3) "which [the defendant] knew or should have known" was a sex trafficking venture. 18 U.S.C. § 1595(a). The first and third elements contain scienter requirements that relate to the specific trafficking venture alleged in the complaint, and both elements necessarily entail fact-specific inquiries. As a result, plaintiffs in the underlying cases will attempt to establish each defendant's knowledge about each particular sex trafficking venture. Based on the allegations in the complaints, Hilton anticipates that plaintiffs will seek to establish the length of time plaintiffs were trafficked at the hotels; plaintiffs' visible conditions and whether hotel staff witnessed their conditions; whether the traffickers would openly escort plaintiffs around the hotels; the amount of foot traffic around the hotels related to the trafficking; the extent of interactions between plaintiffs or their traffickers and hotel staff; whether plaintiff has participated in a criminal prosecution of the trafficker; whether customers complained about sex trafficking at the hotels; the video surveillance at the hotel; hotel staff observations of

plaintiffs' rooms; and whether hotel staff facilitated the trafficking. Each of these factual inquiries will necessarily predominate in the underlying cases—and the facts in each case necessarily will be different.

Beyond these unique scienter issues, the second element of a TVPRA claim—participation in a venture—raises further unique issues. As relevant to Hilton, a key factual issue in the underlying cases is the level of control that the franchisor defendants exercise over the hotels. Whether a particular franchisor defendant can be liable for the acts of its franchise hotel will turn on the unique relationship between the franchisor and its franchise hotel. Each case, therefore, presents unique questions of fact regarding the existence of the requisite relationship.

In numerous ways, individual questions of fact currently pervade the underlying cases, weighing heavily against consolidation.

II. Movants have not identified common questions of fact.

Movants present a list of purported common questions of fact in support of their request for consolidation. Doc. 1-1 at 9. But each purported common question of fact is in reality a question of law, a question of fact that is not common among the cases, or a question of fact that is irrelevant to the underlying claims:

- "Each of the related cases requires adjudication of the standards and duties imposed under the TVPRA as a prerequisite." Doc. 1-1 at 9. Any question about the TVPRA's standards and duties is a **question of law**. If Movants were correct that this is a common question of fact, all RICO and antitrust cases across the country should be consolidated because they require adjudication of statutory standards and duties. *See In re Nat. Gas Liquids Regulation Lit*., 434 F. Supp. 665, 667–68 (J.P.M.L. 1977) ("[S]ince these actions raise a common question of law and share few, if any, common questions of fact, transfer under Section 1407 is unwarranted."); *In re Pension Fund Class Action Lit.*, 360 F. Supp. 1400, 1401 (J.P.M.L. 1973) ("[W]e find that the actions in this litigation involve predominantly, if not entirely, questions of law and that transfer under Section 1407 would neither serve the convenience of the parties and witnesses nor promote the just and efficient conduct of the litigation.").

- "[T]he nature and extent of sex trafficking within at [sic] Defendants' properties and in the hotel industry as a whole." Doc. 1-1 at 9. To begin with, the nature and extent of sex

trafficking within any particular property is **not common** across the underlying cases. *See* Section I, *supra*. Indeed, discovery regarding a sex trafficking venture at any one hotel will not overlap with discovery regarding a sex trafficking venture at a different hotel. In addition, the nature and extent of sex trafficking in the hotel industry as a whole is **not relevant** because a TVPRA claim turns on knowledge of a *specific* trafficking venture.

- "[W]hether Defendants violated regulations related to the human trafficking [sic] including the TVPRA, 18 US.C. § 1595(a) [sic]." Doc. 1-1 at 9. This is a **question of law**.

- "[T]he facts giving rise to Defendants [sic] knowledge or constructive knowledge of sex trafficking ventures." Doc. 1-1 at 9. This is a question of fact that is **not common** across the underlying cases, as the facts—including any given hotel staff member's knowledge at any given hotel—differ from alleged venture to alleged venture. *See* Section I, *supra.*

- "[W]hether Defendants knew the sex trafficking involved minors." Doc. 1-1 at 9. This question of fact is **not common** across the underlying cases. As with the defendants' knowledge, whether a particular sex trafficking venture involved minors will vary from case to case. *See* Section I, *supra*.

- "[W]hat if any steps Defendants took to prevent human trafficking ventures that they knew or should have known occurred on their premises." Doc. 1-1 at 9. This question of fact is **not common** across the underlying cases. This question, of course, depends on the assumption that a defendant knew or should have known that a trafficking venture occurred on its property—which is itself an individual question of fact. Moreover, the steps that a particular defendant took after any such incident will necessarily vary from defendant to defendant, and from case to case.

- "[W]hether Defendants concealed negative information from consumers and or government." Doc. 1-1 at 9. This question of fact is **not relevant** to any element of a TVPRA claim.

In addition, Movants' attempt to shoehorn this case into the mass tort context is unavailing. The cases cited by Movants relied on a "common factual core" of complex questions central to every case. In the mass tort product liability context, the common factual core is whether a particular product caused a particular harm—a question answerable uniformly across all consolidated cases through expert and fact discovery. *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig.*, 268 F. Supp. 3d 1356, 1359 (J.P.M.L. 2017) (holding "[u]nique legal theories and factual allegations in a particular action . . . are not significant where all the actions arise from a common factual core," where common question was market

dominance of the EpiPen); *see also In re Incretin Mimetics Prods. Liab. Litig*., 968 F. Supp. 2d 1345, 1346–47 (J.P.M.L 2013) (focusing on whether four medications caused pancreatic cancer); *In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig.*, 936 F. Supp. 2d 1379, 1379 (J.P.M.L. 2013) (focusing on common question of whether acetaminophen caused liver damage). Here, the core factual questions in each underlying case relate to different victims trafficked by different perpetrators at different hotels. There is no common factual core.

Other cases cited by Movants are equally far afield. These cases involved industry-wide conspiracies or injuries—that is, injuries with a singular cause that affect a host of victims. *See In re Checking Account Overdraft Fee Litig.*, 626 F. Supp. 2d 1333, 1335 (J.P.M.L. 2009) (focusing on industry-wide bank posting policies regarding imposition of overdraft fees); *In re Pharmacy Benefit Managers Antitrust Litig*., 452 F. Supp. 2d j1352, 1353 (J.P.M.L. 2006) (whether there was a single price-fixing conspiracy among defendants); *In re Janus Mutual Funds Investment Litig.*, 310 F. Supp. 2d 1359, 1361 (J.P.M.L. 2004) (focusing on consolidated, market-wide mutual fund trading practices of defendants); *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378, 1380 (J.P.M.L. 2002) (whether there was an industry-wide conspiracy to inflate the price of prescription drugs). Movants here have not alleged an industry-wide conspiracy. Instead, each case stands on its own set of unique factual allegations. And Movants do not cite a single instance where the Panel has consolidated cases solely because they invoke the same statutory cause of action.

III. The underlying cases involve different types of defendants.

Moreover, the varied nature of the defendants in the underlying cases renders consolidation especially improper. *First*, it is well settled that consolidation is likely inconvenient where the named defendants vary from action to action. *See In re Proton-Pump Inhibitor Prods. Liab. Litig.*, 273 F. Supp. 3d 1360, 1361–62 (J.P.M.L. 2017) ("Centralization thus appears unlikely to serve

the convenience of most, if not all, defendants and their witnesses" where the named defendants varied from action to action.); *In re Ambulatory Pain Pump–Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010) (denying centralization of 102 actions, in part because "most, if not all, defendants [were] named in only a minority of actions," and several were sued in "but a handful"); *In re Table Saw Prods. Liab. Litig*., 641 F. Supp. 2d 1384, 1385 (J.P.M.L. 2009) (denying centralization of 42 actions, where, *inter alia*, no defendant was sued in all actions, and several entities were named in, at most, two or three).

No defendant here is named in every case. Most cases focus on between one and four hotels and their owners, managers, or franchisors. The cases do not allege an industry-wide conspiracy of any kind. There is almost no overlap between the local hotel franchisee defendants from case to case. There is also little overlap between the franchisor defendants: Hilton is named in six cases, Wyndham in eleven, Marriott in one, Choice in ten, Intercontinental in one, Best Western in three, and Red Roof Inns in six. There is no reason that the thirty-odd defendants in a case pending in the Northern District of Georgia, many of which are local Georgia hotel operators, should be dragged into a dispute about an alleged trafficking venture at a Washington hotel. *Jane Doe 1 v. Red Roof Inns, Inc. et al*., Case No. 1:19-cv-03840 (N.D. Ga.); *M.L. v. craigslist, Inc. et al.*, Case No. 3:19-cv-06153 (W.D. Wash.). And there is no benefit to be had by consolidating a Houston case with a singular claim against a Hilton-brand hotel, with a ten-defendant case in Ohio where there is no overlap between the parties, discovery, or relevant facts. *L.W. v. Hilton Worldwide Holdings Inc. et al.,* Case No. 4:19-cv-04172 (S.D. Tex.); *M.A. v. Wyndham Hotels & Resorts, Inc. et al.*, Case No. 2:19-cv-00849 (S.D. Ohio). Consolidation would not resolve any of these cases more efficiently.

Second, consolidation would be unhelpful because nearly all of the discovery will be defendant-specific. *See In re Proton-Pump Inhibitor*, 273 F. Supp. 3d at 1361–62 ("[A] significant amount of the discovery in these actions appears almost certain to be defendant-specific. . . . Each [drug] has a unique development, testing, and marketing history, and each was approved by the FDA at different times."); *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (centralized management of cases inappropriate because claims "against each manufacturer will involve unique product—and defendant-specific issues . . . that will overwhelm the few common issues"). As explained above, each particular defendant's liability will rise and fall on that defendant's own circumstances. Discovery regarding that defendant, therefore, will having nothing to do with the other defendants.

Third, the Panel has recognized that the presence of multiple defendants, especially competitors, weighs against centralization. *See In re Proton-Pump Inhibitor Prods.*, 273 F. Supp. 3d at 1361–62 ("Centralizing competing defendants in the same MDL likely would complicate case management due to the need to protect trade secret and confidential information."). Here, the defendants are competitors, and the practices, procedures, and training employed by the various hotels includes confidential information that would complicate attempts to consolidate the underlying cases.

IV. The convenience of the parties, witnesses, and judiciary further weighs against consolidation at this time.

Convenience currently counsels in favor of letting each case proceed independently. The underlying cases raise issues under the laws of at least ten different states—a universe of issues and state laws that will only expand if additional cases are filed. *See* note 1, *supra*. Many cases allege violations of state statutes or common law. *Id.* If the cases are consolidated, the transferee court will have to decide motions to dismiss and other dispositive motions involving dozens of

different fact patterns, interpreting the laws of different states in each motion. Indeed, motions to dismiss are already under consideration in some cases and already decided in others. Consolidation would only bog down proceedings and confuse the myriad unique issues. Each case would proceed much more efficiently on its own.

Moreover, while Movants have not identified common questions of fact that would predominate these cases, it is possible that as discovery progresses, such common issues of fact will be revealed. Until that happens, consolidation is premature. Movants' assertion that there are "approximately 1,500" similar sex trafficking cases waiting to be filed against the hotel industry underscores the point. It is not clear where those cases will be brought or which defendants will be implicated. Thus, it is premature not only to claim a common set of core factual questions, but also to determine a "geographically convenient" transferee court where the vast majority of cases have not yet been filed. *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, 268 F. Supp. 3d at 1360 (articulating a preference for a "geographically central forum" for nationwide multidistrict litigation). Indeed, one would expect to see the plurality of future cases filed where human trafficking is most prevalent in the United States—cities like Houston or Atlanta, according to statistics cited by plaintiffs themselves.[2] There are simply not enough cases filed at this time to identify a central and convenient venue for all involved.

CONCLUSION

The underlying cases do not currently share common questions of fact, and consolidation would not promote a just or efficient resolution. For the foregoing reasons, the Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Consolidated Pretrial Proceedings should be denied.

[2] National Human Trafficking Hotline, *Ranking of the 100 Most Populous U.S. Cities: 12/7/2007–12/31/2016*, https://humantraffickinghotline.org/sites/default/files/100%20Most%20Populous%20Cities%20Report.pdf.

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Respectfully submitted,

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