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August 13, 2020

Our File No. 18737-0537

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**VIA FACSIMILE (504-592-9128)**

Honorable Chelsey Richard Napoleon  
Clerk of Court – Parish of Orleans  
402 Civil Courts Building  
421 Loyola Avenue  
New Orleans, Louisiana 70112

Re: *Cajun Conti, LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC dba Oceana Grill vs. Certain Underwriters at Lloyd's, London, et al.*  
Suit No. 2020-02558, Section/Division "M-13"

Dear Ms. Napoleon:

Please find attached Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002's *Amended Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity, Rule to Show Cause and Memorandum in Support of Amended Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity*, for fax-filing in the above referenced matter. Once we have received your fax conformation, we will forward the original, necessary copies and filing fees.

**Additionally, we will be including 13 pages of exhibits when we forward the original pleading to you. As such, we ask that you please include those pages in your quote for the filing.**

If you have any questions, please do not hesitate to ask. Thank you for your cooperation and courtesies in this matter.

Very truly yours,  
PHELPS DUNBAR LLP

Virginia Y. Dodd

VYD:orl

Attachments

cc: Judge Paulette R. Irons (via facsimile: 504-558-0257)  
John W. Houghtaling/Kevin R. Sloan/Jennifer Perez (via facsimile: 504-456-8624)  
Daniel E. Davillier (via facsimile: 504-582-6985)

## CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

## STATE OF LOUISIANA

NUMBER 2020-02558

SECTION "M-13"

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND  
CAJUN CUISINE LLC d/b/a OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK**AMENDED PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION  
AND DILATORY EXCEPTION OF PREMATUREITY**

NOW INTO COURT, through undersigned counsel, come defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters"), who submit this Amended Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity ("Amended Exceptions") in light of Plaintiffs' First Supplemental and Amended Petition for Declaratory Judgment. Underwriters' exceptions are submitted pursuant La. C.C.P. art. 927(5) and La. C.C.P. art. 926(1).

1.

Underwriters previously filed Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens ("Original Exceptions"), for which the Rule to Show Cause was set for July 23, 2020. Those exceptions were fully briefed by both Underwriters and Plaintiffs.

2.

On July 22, 2020, Plaintiffs filed Plaintiffs' First Supplemental and Amended Petition for Declaratory Judgment ("Amended Petition"). By agreement, the Parties agreed to postpone the hearing on the Original Exceptions to allow Underwriters time to review the Amended Petition and modify the Original Exceptions as appropriate.

3.

Underwriters have previously agreed the Precautionary Declinatory Exception of Lis Pendens is moot in light of Plaintiffs' amended complaint in another matter, *Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill vs. Certain Underwriters at Lloyd's, London and Kenneth Jones*, Suit No. 2019-11354, Section 13, Civil District Court for the Parish of Orleans, State of Louisiana ("the Fire Suit").

4.

Otherwise, Underwriters' position remains the same and, therefore, they re-assert their Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity.

WHEREFORE, Underwriters pray that their amended peremptory exception of no cause of action and/or dilatory exception of prematurity be granted and the claims against them be dismissed, with prejudice, with Plaintiffs to bear all costs.

Respectfully submitted,

**PHELPS DUNBAR**

BY: 

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**ATTORNEYS FOR DEFENDANTS,  
 CERTAIN UNDERWRITERS AT LLOYD'S,  
 LONDON SUBSCRIBING TO POLICY NO.  
 AVS011221002**

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day of 13<sup>th</sup> day of August, 2020, delivered a copy of the foregoing *Amended Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity* to all known counsel of record by United States Mail, proper postage prepaid, e-mail and/or facsimile.



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Virginia Y. Dodd

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

**STATE OF LOUISIANA**

**NUMBER 2020-02558**

**SECTION "M-13"**

**CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND  
CAJUN CUISINE LLC d/b/a OCEANA GRILL**

**VERSUS**

**CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.**

**FILED: \_\_\_\_\_**

**\_\_\_\_\_  
DEPUTY CLERK**

**RULE TO SHOW CAUSE**

Upon review of and consideration of the Amended Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Memorandum in Support thereto, filed on behalf of Defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002;

IT IS HEREBY ORDERED that Plaintiffs, Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill appear before this Honorable Court on the 20th day of August, 2020 at 9:00 o'clock a.m. and show cause why the Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens should not be maintained/granted.

Signed this the \_\_\_\_\_ day of \_\_\_\_\_, 2020 in New Orleans, Louisiana.

\_\_\_\_\_  
Honorable Paulette R. Irons  
Judge, Civil District Court of Orleans Parish

**[SERVICE INFORMATION ON FOLLOWING PAGE]**

**PLEASE SERVE AMENDED PEREMPTORY EXCEPTIONS  
OF NO CAUSE OF ACTION AND  
DILATORY EXCEPTION OF PREMATURITY,  
MEMORANDUM IN SUPPORT THEREOF,  
AND RULE TO SHOW CAUSE ON:**

Plaintiffs,

Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill  
Through their Counsel of Record as follows:

John W. Houghtaling, II  
Jennifer Perez  
Kevin Sloan  
GAUTHIER MURPHY & HOUGHTALING, LLC  
3500 N. Hullen Street  
Metairie, Louisiana 70002

And

Daniel E. Davillier  
DAVILLIER LAW GROUP, LLC  
935 Gravier Street, Suite 1702  
New Orleans, Louisiana 70112

## CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

## STATE OF LOUISIANA

NUMBER 2020-02558

SECTION/DIVISION "M-13"

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND  
CAJUN CUISINE LLC D/B/A OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

FILED: \_\_\_\_\_

DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF AMENDED PEREMPTORY EXCEPTION  
OF NO CAUSE OF ACTION AND DILATORY EXCEPTION OF PREMATURITY**

MAY IT PLEASE THE COURT:

Defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters"), submit this Memorandum in Support of Amended Peremptory Exception of No Cause of Action and Declinatory Exception off Prematurity as to the claims filed against them by Cajun Conti, LLC, Cajun Cuisine 1, LLC, and Cajun Cuisine, LLC d/b/a Oceana Grill (collectively "Plaintiffs") in Plaintiffs' First Supplemental and Amended Petition for Declaratory Judgment ("Amended Petition").

**INTRODUCTORY STATEMENT**

As before, the Amended Petition seeks declaratory relief under a policy of property insurance for civil authority benefits arising out of the "novel coronavirus," also known as "SARS-CoV-2," and the disease the virus causes: COVID-19.<sup>1</sup> Further, despite amending their allegations, the Amended Petition still fails to state a cause of action against Underwriters and remains premature. The principal defect that existed before remains: a declaratory judgment action brought before the claim has been fully adjusted and a formal position taken by Underwriters such that a justiciable controversy is present.

Thus, the Amended Complaint must fall for the same reasons asserted by Underwriters in their previous exceptions. First, the Petition does not present a justiciable controversy (*i.e.*, "an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, ....")<sup>2</sup> and cannot be maintained because this Honorable Court lacks jurisdiction to decide abstract, hypothetical controversies, or render advisory opinions. Second, Plaintiffs' demand for a

<sup>1</sup> For simplicity, the virus and the disease it causes will be referred to collectively as "COVID-19."

<sup>2</sup> *Abbott v. Parker*, 259 La. 279, 249 So.2d 908, 918 (1971), *appeal dismissed*, 404 U.S. 931, 92 S.Ct. 281, 30 L.Ed.2d 244 (1971).

declaration of rights under the Policy is premature and not ripe for adjudication because Plaintiffs filed this suit without first satisfying the loss reporting obligations imposed upon them under their insurance contract.

### **ALLEGATIONS OF THE PETITION**

#### **The Original Petition**

On March 16, 2020, Plaintiffs filed the first known lawsuit to have been filed in the United States as a result of COVID-19.<sup>3</sup> Plaintiffs sued Underwriters, Governor John B. Edwards, and The State of Louisiana. As to Governor Edwards and The State of Louisiana, Plaintiffs sought a declaration as to whether certain governmental orders apply to Plaintiffs' restaurant business. Those defendants have since been dismissed.

As to Underwriters, Plaintiffs asked the Court to issue an advisory opinion on the scope of insurance coverage available for theoretical losses, which, at the time of filing, had neither been incurred by Plaintiffs nor even reported to Underwriters.

In response to these allegations, Underwriters filed certain exceptions, which were fully briefed and were set for hearing on July 23, 2020.

#### **The Amended Petition**

On July 22, 2020, Plaintiffs filed the Amended Petition.<sup>4</sup> Despite being on notice of Underwriters' exceptions and the arguments raised therein, Plaintiffs' allegations remained largely the same.

The additional allegations include anecdotal commentary with respect to SARS and a settlement with an unknown insurer respect to claims related to SARS.<sup>5</sup> This unrelated claim on an unrelated policy that resulted in a voluntary settlement is hardly dispositive of any of the issues here and does nothing to move *Plaintiffs'* claims. Likewise, neither does the reference to the following paragraphs with respect to the introduction of virus and pandemic exclusions in insurance policies.<sup>6</sup>

Indeed, the allegations with respect to this matter do not begin until Paragraph 15 of the Amended Complaint, wherein it is alleged Underwriters issued a policy of insurance to the Plaintiffs for certain property. Thereafter and through Paragraph 24, the Amended Petition makes allegations as to what Plaintiffs claim the Policy covers. Beginning at Paragraph 25 and through

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<sup>3</sup> Ex. "A".

<sup>4</sup> Ex. "B".

<sup>5</sup> *Id.* at ¶¶ 8-9.

<sup>6</sup> *Id.* at ¶¶ 10-14.



Paragraph 29, Plaintiffs make certain assertions as to the impact of COVID-19 *generally*. Next, Plaintiffs make certain statements with respect to orders issued in Louisiana and New Orleans.<sup>7</sup> Plaintiffs revert back to general allegations with respect to property and property insurance in Paragraphs 45-47, 51-53.

As to Underwriters, Plaintiffs can only allege the following:

- "... Lloyd's has accepted the policy premiums with no intention of providing any coverage due to direct physical loss and/or from a civil authority order shutdown due a virus or pandemic";
- ... "Lloyd's has denied hundreds of business interruption claims across the nation due to COVID-19 losses on policies without virus or pandemic exclusions *similar* to the plaintiffs' policy";
- "Lloyd's does not define the term 'physical loss' within the policy";
- "Under information and belief, Lloyd's believes 'physical loss' to be 'structural damage';
- "In an effort to cease litigation, plaintiffs submitted a proposed consent judgment to Lloyd's, which provided that the policy extends business interruption coverage for COVID-19 losses as a result of civil authority order shutdown and dangerous property condition created by the virus' attachment to surfaces as recognized by Mayor Cantrell's Orders";
- "Lloyd's declined the proposed consent judgment"; and
- "COVID-19's impact to plaintiffs' business is real and debilitating. As Lloyd's declines the extension of coverage under its policy, businesses throughout the French Quarter and our community are permanently closing its doors."

*Id.* at 43, 44, 49, 50, 54, 55, and 56 (*emphasis added*).

**A. Whether the Petition Asserts a Justiciable Controversy Against Underwriters Is Determined Solely By the Facts Alleged in the Petition.**

For this Honorable Court to be vested with jurisdiction, the Petition must present a justiciable controversy, *i.e.*, an existing and substantial dispute between parties with real adverse interests. Absent an actual dispute or controversy, the court cannot be "seized of jurisdiction in the first instance," and the Court lacks jurisdiction to entertain this action for declaratory relief. An exception of no cause of action tests whether the *Petition* asserts a justiciable controversy against Underwriters. No evidence may be introduced to support or controvert an exception of no cause of action, and the exception is triable on the face of the Petition alone. The sufficiency of Plaintiffs' cause of action therefore turns on whether they may properly seek declaratory judgment based solely on the facts alleged in the Petition.

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<sup>7</sup> *Id.* at ¶¶ -38.

Louisiana Code of Civil Procedure Article 1871 governs declaratory judgment proceedings, providing Louisiana courts authority to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Like actions for conventional judgments, basic to the exercise of procedures for declaratory relief, the action must present a justiciable controversy. The Louisiana Supreme Court defined a justiciable controversy in the context of an action for declaratory relief as follows:

A “justiciable controversy” connotes ... an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further ... the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

*Abbott v. Parker*, 259 La. 279, 249 So.2d 908, 918 (1971), appeal dismissed, 404 U.S. 931, 92 S.Ct. 281, 30 L.Ed.2d 244 (1971).

“Without doubt, for a court to entertain an action for declaratory relief, there must be a justiciable controversy and the question presented must be real and not theoretical.”<sup>8</sup> “A court must refuse to entertain an action for a declaration of rights if the issue presented is based on a contingency that may or may not arise. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely.”<sup>9</sup>

This action does not present a justiciable controversy.<sup>10</sup> As an initial matter, Plaintiffs fail to allege the threshold requirement to state a cause of action against Underwriters: a dispute. The sole allegations against Underwriters are (1) that they issued the Policy; and (2) “[b]ased on information or belief” Underwriters “accepted the policy premiums with no intention of providing any coverage due to direct physical loss and/or from a civil authority shutdown due to a global pandemic virus.” These allegations do not present a real, active dispute between the parties.

Indeed, the Petition is devoid of the most basic elements of any actual insurance coverage dispute: an insured and an insurer taking contrary positions on coverage with a respect to a claim that has actually been submitted to the insurer for losses that have actually been sustained as the result of events that have actually occurred. In sum, the factual allegations fail to present any

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<sup>8</sup> *Am. Waste & Pollution Control Co. v. St. Martin Par. Police Jury*, 627 So.2d 158, 162 (La. 1993); *Abbott*, 249 So.2d at 918.

<sup>9</sup> *Norfolk S. Corp. v. Cal. Union Ins. Co.*, 2002-0369, 2002-0371 and 2002-0372 (La. App. 1 Cir. 9/12/03); 859 So.2d 167, 185 (gathering cases) (emphasis added).

<sup>10</sup> Notwithstanding the Plaintiffs’ utter failure to report the claim as required by the Policy and respond to Underwriters’ inquiries with respect to Plaintiffs’ claim, Underwriters reserve the right to formally take a coverage position based on the limited and incomplete information alleged in the Amended Petition, which may render this issue moot.

dispute between the parties, let alone an existing actual and substantial dispute which is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

The longstanding prohibition against issuing advisory opinions based on contingent or hypothetical events forecloses the relief Plaintiffs seek. As the Louisiana Supreme Court admonished, “[a] court must refuse to entertain an action for a delineation of rights if the issue presented is ... based on a contingency which may or may not arise.” *American Waste & Pollution Control Co. v. St. Martin Parish Police Jury*, 627 So.2d 158, 162 (La. 1993). Applying this principle, Louisiana courts—including the Fourth Circuit—have declined to render declaratory relief where, as here, the issue presented is based on a contingency that may or may not arise. For example, in *Certain Underwriters at Lloyd’s, London, v. Zulu Soc. Aid & Pleasure Club*, 2011 La. App. Unpub. LEXIS 790, 2011-0767 (La. App. 4 Cir. 12/28/11); 81 So.3d 1018, writ denied 2012 La. LEXIS 897 (La. Mar. 30, 2012), the Fourth Circuit affirmed the trial court’s grant of an exception of no cause of action with respect to the declaratory judgment action filed by Certain Underwriters at Lloyd’s, London wherein Underwriters sought a declaration that they owed no duty to defend or indemnify their insured with respect to personal injury lawsuits filed against the insured for injuries resulting from the tossing of coconuts from the insured’s Mardi Gras float. The Fourth Circuit agreed that no justiciable controversy was presented because the insurer’s obligations under the policy hinged on a contingency that may or may not occur: whether the insured would be found liable in the underlying personal injury suits. Here, as in *Zulu*, the coverage issues presented hinge on contingencies that may or may not arise, rendering plaintiffs’ request for declaratory relief improper.

Similarly, in *Ventura Prop. Mgmt v. Hous. Auth. of New Orleans*, 815 So.2d 324, 2002 La. App. LEXIS 1380, 2001-1297 (La. App. 4 Cir. 03/27/02), the Fourth Circuit held that plaintiffs’ declaratory judgment action involving the rights of the parties under an indemnity and hold harmless agreement failed to present a justiciable controversy because the contractual indemnity obligations were contingent upon a determination of liability in several underlying lawsuits. If there were no finding of liability in the first instance, the request for a declaration of rights under the indemnity agreement would be rendered moot. Here, as in *Ventura*, the Court is being asked render declaratory relief under a contract of insurance where the coverage issues presented are based on contingencies that may or may not arise. As in *Ventura*, this Court should decline plaintiffs’ request for declaratory relief.

Nor can Plaintiffs manufacture a justiciable controversy by presenting Underwriters with a Consent Judgment that is rife with cherry-picked assertions of fact coupled with self-serving legal conclusions. Again, whether a justiciable controversy has been presented must be determined solely by reference to the well-pleaded allegations set forth in the petition, which must be accepted as true for purposes of adjudicating the exception of no cause of action. The allegations set forth in the Petition fail to present a justiciable controversy.

**B. Rendering A Declaratory Judgment In This Matter Would Not Terminate the Uncertainty Giving Rise to This Proceeding.**

Plaintiffs are asking this Court to determine in the abstract whether contamination from Coronavirus would constitute direct physical loss to insured property within the meaning of the policy. Plaintiffs are likewise asking the Court to determine in the abstract whether the policy provides coverage to plaintiffs for “*any* civil authority orders shutting down or limiting operations of restaurants in the New Orleans area”<sup>11</sup> due to physical loss from Coronavirus contamination. This request presumptively includes *future* orders not yet in place. In addition to being procedurally improper, deciding these coverage issues in the abstract would only serve to foster uncertainty—as this theoretical exercise would deprive the parties and the Court from making an informed decision based on real world events that (when and if they do occur) may bare directly on the coverage questions presented. For example, if and when the presence of the virus is detected at the insured premises, did the presence of the virus physically damage the insured property, and if so, how and to what extent? Was the insured able to disinfect the property within 72 hours—before the applicable period of restoration commences (and thus before business interruption coverage is triggered)? Would the factual circumstances presented in the context of an actual claim implicate other coverage exclusions in the policy, such as, for example, the loss of market exclusion or the exclusion for loss caused by acts or decisions of any governmental body? Was the loss of business income actually caused by the physical contamination of the insured premises or by some other factor(s), such as the general fear of patrons from venturing out during a pandemic? What might “any future civil authority” order(s) actually prohibit? Will the hypothetical future orders completely prohibit access to the insured’s property or merely limit capacity or hours of operation or type of services that may be provided? When the future hypothetical civil authority order(s) are issued, will the insured or its employees or its customers continue to access the insured

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<sup>11</sup> Ex. “B” at ¶60 (*emphasis added*).

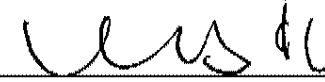
property? Will the hypothetical future civil authority orders be issued in response to physical damage to property located within a one mile radius of the insured premises? Will the hypothetical future civil authority orders be issued within the policy period? These are just some of the questions that bare directly on the coverage issues presented, and these questions can only be answered by the occurrence of actual events giving rise to an actual claim that is actually presented to Underwriters. Unless and until Plaintiffs actually submit a claim for an actual loss sustained as a result of actual events, there can be no definitive adjudication of coverage under the Policy. Any judgment issued now—based on incomplete, unresolved, and hypothetical facts—would only serve to foster uncertainty, sow confusion, risk inconsistent judgments, and potentially result in significant prejudice to the parties. For these additional reasons, Underwriters urge this Court to exercise its discretion under Louisiana Code of Civil Procedure Article 1876, which provides that a trial court “may refuse to render a declaratory judgment or decree where [as here] such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding.”

#### CONCLUSION

For the foregoing reasons, Underwriters respectfully urge the Court to sustain their Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity.

Respectfully submitted,

**PHELPS DUNBAR LLP**

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**ATTORNEYS FOR DEFENDANTS,  
 CERTAIN UNDERWRITERS AT  
 LLOYD'S, LONDON SUBSCRIBING TO  
 POLICY NO. AVS011221002**

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 13<sup>th</sup> day of August, 2020, served a copy of the foregoing *Memorandum In Support of Amended Peremptory Exception of No Cause of Action and Dilatory Exception of Prematurity* on counsel for all parties to this proceeding, by mailing the same by United States mail properly addressed, and first-class postage prepaid and/or facsimile and/or electronic mail.




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Virginia Y. Dodd