phelps

Phelps Dunbar LLP
II City Plaza
400 Convention Street
Suite 1100
Baton Rouge, LA 70802
225 346 0285

July 21, 2020

Our File No. 18737-0537

Virginia Y. Dodd
Partner
ginger.dodd@phelps.com
Direct 225 376 0269

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 *Reply Brief in Support of Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens,* 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.

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
Attachment
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/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

REPLY BRIEF IN SUPPORT OF PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION, DILATORY EXCEPTION OF PREMATURITY AND PRECAUTIONARY DECLINATORY EXCEPTION OF LIS PENDENS

MAY IT PLEASE THE COURT:

Defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters"), respectfully submit this Reply Brief in Support of Underwriters' Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens concerning the Petition for Declaratory Judgment ("Petition") filed by plaintiffs, Cajun Conti, LLC, Cajun Cuisine 1, LLC, and Cajun Cuisine, LLC d/b/a Oceana Grill (collectively "Plaintiffs").

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

In their Opposition, Plaintiffs seek to defeat Underwriters' Exception of No Cause of Action by relying on factual assertions that appear nowhere in their Petition and are, in many instances, at odds with the facts that were actually pled. This is improper. The law is well settled that an exception of no cause of action is triable on the face of the petition alone.[1] In determining whether the Petition presents a justiciable controversy, the Court may look no further than the four corners of the Petition.

Thus constrained, the hypothetical and contingent nature of Plaintiffs' request for declaratory relief is readily apparent. For example, in contrast to several of the statements made

[1] *Deutsche Bank Nat'l Tr. Co.*, 2017 La. App. LEXIS 1867 (quoting *Moses*, 174 So.3d at 229-230).

in their Opposition regarding the shutdown of their business operations,[2] Plaintiffs fail to allege that their restaurant actually ceased operations. To the contrary, in Paragraph 18 of the Petition, Plaintiffs assert that "[a] declaratory judgment determining that the coverage provided will *prevent* plaintiffs from being left without vital coverage ... *should operations cease due to a global pandemic virus and civil authorities' responses*." (emphasis added). While Plaintiffs allege in Paragraph 23 of the Petition that "contamination by the Coronavirus *would be* a direct physical loss needing remediation to clean the surfaces of the establishment[,]" Plaintiffs do not allege that their property was actually contaminated by the virus or that their property otherwise actually sustained any direct physical damage. Indeed, Plaintiffs specifically allege in Paragraph 37 that they "do not seek any determination of whether the Coronavirus is physically in the insured premises[.]" And yet, while Plaintiffs do not allege that the event that they contend might trigger business interruption coverage actually occurred, Plaintiffs nevertheless "seek the Court to affirm ... that the policy provides business income coverage *in the event* that the coronavirus has contaminated the insured premises." Pet. at Par. 36 (emphasis added).

Likewise, while Plaintiffs do not allege that (i) any neighboring properties within a one mile radius of their business actually sustained direct physical loss from Coronavirus contamination, or (ii) that in response to such direct physical loss to neighboring properties, a civil authority order was issued that actually prohibited access to the insured property, Plaintiffs nevertheless "seek the Court to affirm ... the policy provides coverage to plaintiffs *for any future civil authority shutdowns* of restaurants in the New Orleans area due to physical loss from Coronavirus contamination[ ]" Pet. at Par. 36 (emphasis added). The hypothetical and contingent nature of Plaintiffs' request for declaratory relief is self-evident from the face of the Petition. Plaintiffs cannot cure these deficiencies by relying upon assertions of fact that have not occurred and were not pled.

The longstanding prohibition against issuing advisory opinions based on contingent or hypothetical events forecloses the relief Plaintiffs seek. As the Louisiana Supreme Court

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[2] *See e.g.*, Opp. at p. 4 ("Oceana Grill has been shutdown and continues to operate in a limited capacity..."); *Id.* at p. 5 ("The interruption (and corollary coverage) was initiated on March 16, 2020 and has continued for months."); Id. at 7 ("Oceana Grill ... has stood empty for months.")

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 that are not alleged in the

Petition coupled with self-serving legal conclusions that are unsupported by the facts that were actually pled. 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.

Contrary to Plaintiffs' assertion, any judgment rendered in this case would not terminate the uncertainty or (hypothetical) controversy giving rise to this proceeding. In the absence of any allegation that Plaintiffs' property was actually contaminated by the Coronavirus, 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 *future* civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination." 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 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."

C. Underwriters' Declinatory Exception of Lis Pendens Has Been Rendered Moot.

Out of an abundance of caution, Underwriters urged the Declinatory Exception of Lis Pendens so as to avoid having the same coverage issues litigated simultaneously in two separate lawsuits. In light of Plaintiffs' voluntary dismissal of their Second Supplemental and Amending Petition in the fire-related lawsuit, Underwriters agree that their Declinatory Exception of Lis Pendens has been rendered moot. Accordingly, Underwriters hereby withdraw their Exception of Lis Pendens.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Underwriters' Memorandum in Support of their Exceptions, Underwriters respectfully urge the Court to sustain their Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity, and dismiss the Petition for Declaratory Judgment.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: _____

Virginia Y. Dodd, Bar Roll No. 25275
Heather S. Duplantis, Bar Roll No. 30294
Kevin W. Welsh, Bar Roll No. 35380
II City Plaza | 400 Convention Street,
Suite 1100
Baton Rouge, Louisiana 70802-5618
Telephone: 225-346-0285
Facsimile: 225-381-9197
Email: Ginger.Dodd@phelps.com
Heather.Duplantis@phelps.com
Kevin.Welsh@phelps.com

-and-

Allen Miller, Bar No. 26423
Thomas H. Peyton, Bar No. 32635
365 Canal Street, Suite 2000
New Orleans, Louisiana 70130-6534
Telephone: 504-566-1311
Facsimile: 504-568-9130
E-mail: Allen.Miller@phelps.com
Thomas.Peyton@phelps.com

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 21st day of July, 2020, served a copy of the foregoing *Reply Brief In Support of Peremptory Exception of No Cause of Action, Dilatory Exception of Prematurity and Precautionary Declinatory Exception of Lis Pendens* 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.

_____
Virginia Y. Dodd