CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2020-02558 **DIVISION " M "**

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC dba Oceana Grill, who file respectfully this opposition to Certain Underwriters at Lloyd's, London's ("Defendant" or "Lloyd's") Motion in Limine ("Motion"). The motion ought be denied in its totality as: (1) parol evidence is proper due to the ambiguous terms of the policy; (2) evidence of the policy author's intent is proper due to the Defendants' testimony that they fully relied on the author's expertise to create the coverage language; (3) evidence of the policy author's regulatory admissions concerning policy language at issue in the instant suit is proper; (4) evidence of the defendants' investigation of Oceana's claim is proper because it was the process by which the terms of the policy were interpreted by the defendants to deny coverage; (5) expert witnesses have a duty to provide informed testimony to this Court with the current information and data available; (6) the offering of demonstrative evidence should not be denied as a matter of law; (7) evidence demonstrating the physical loss or damage required under the policy is proper, including the economic losses supporting the loss of use and dangerous property condition resulting from the viral contamination.

I. Parol evidence is proper due to the ambiguous terms of the policy.

This Court has already denied the defendants' multiple motions attempting to establish that there is no ambiguity in their policy and ought to maintain its previous decisions. The Court has received multiple filings and heard oral arguments relating to the ambiguity found in the defendants' policy on several occasions. *See* ¶66 of Plaintiffs' Second Amended Petition; p. 19 of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment; p.2 of Plaintiffs' Opposition to Lloyd's Motion to Exclude Charles Miller; and p. 2 of Plaintiffs' Opposition to Lloyd's Motion for Protective Order. Indeed, the Court acknowledged that the terms are ambiguous in finding that

there is a genuine issue of material fact regarding "direct physical loss or damage" – meaning the defendants' narrow interpretation of the undefined terms cannot be the only interpretation possible or reasonable. *See* Reasons for Decision Denying Defendants' Motion for Summary Judgment.

It is an undisputable fact that the undefined terms of "direct physical loss or damage" may be read in various reasonable manners and are, therefore, ambiguous. *See McAvey v. Lee*, 260 F.3d 359, 365 (5th Cir. 2001) Unbiased courts across the nation have recently demonstrated this fact as they have determined, as a matter of law, that the distinct terms "direct physical loss or damage" include the loss of use of property for its intended purpose. *Perry Street Brewing Co., LLC v. Mutual of Enumclaw Ins. Co.*, No. 20-2-02212-32, Order Granting Plaintiffs' Motion for Partial Summary Judgment Re: Coverage Grant (Wash. Sup. Ct. Nov. 23, 2020); *North State Deli, LLC dba Lucky's Delicatessen et al. v. The Cincinnati Ins. Co, et al.,* No. 20-CVS-02569, Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgement (N.C. Sup. Ct Oct. 9, 2020)[1] This is in complete contradiction to the defendants' position that "direct physical loss or damage" may only be interpreted to mean destruction or ruin of property.[2]

Indeed, the courts even directly address the parol evidence introduced by defendants' counsel, the Merriam-Webster Dictionary, in viewing that the definition of "loss" includes destruction, ruin, or deprivation (i.e. the act of losing possession). Notably, defendants only cited to the part of the definition which benefitted their viewpoint in an attempt to manipulate this Court.[3] Considering the full plain, ordinary, and popular meaning of "loss," a lay person such as the plaintiffs would understand that a "direct physical loss" includes the inability to physically use property for its intended purpose, i.e., Oceana suffered a loss of its property because it was deprived from using it due to the dangerous property conditions caused by COVID-19 and the subsequent civil authority orders. The defendants own use of parol evidence to explain what the terms "physical loss or damage" mean demonstrates the ambiguity found in the policy. Defendants cannot use parol evidence to persuade this Court of their interpretation of the terms of their policy and claim there is no ambiguity. As the undefined terms may be interpreted in various ways, rending them ambiguous, the use of parol evidence is proper.

[1] *See* Case Law attached as Exhibit 1.
[2] *See* Motion for Summary Judgment Hearing Transcript at p. 8 attached as Exhibit 2.
[3] *See* Complete Merriam-Webster's Dictionary Definition of Loss attached as Exhibit 3. *See also* Exhibit 1.

II. Evidence of the policy author's intent is proper due to the Defendants' testimony that they fully relied on the author's expertise to create the coverage language.

As defendants' corporate representative, defendants produced Mr. Ethan Gow of Avondale Underwriting Associates ("Avondale").[4] Defendants retained Avondale as the managing general underwriter who was tasked with underwriting and producing a policy to Oceana on behalf of the defendants. *Id* at 95. Defendant's corporate representative has testified and made the following key admissions:

- Defendants gave Avondale full authority to bind them to a contract of insurance with Oceana, the insured, on their behalf. *Id.* at 111.
- There are "huge variations between premium, deductibles" depending on the coverage afforded by the policy and the insured. *Id.* at 118
- A policy with a lower, decrease of risk for the defendants decreases the costs for insureds. *Id*. at 127.
- A policy with an increased risk for the defendants would increase the costs for insureds. *Id.* at 127-128.
- On behalf of the defendants, Avondale issues and issued Oceana an ISO-based policy. *Id.* at 133.
- ISO-based policies are made up of ISO forms that provided coverage terms. *Id.* at 134.
- The defendants purchase and subscribe to ISO to have access to standardized policy language forms. *Id.* at 136. These forms were sold to Oceana.
- Defendants do not have the expertise to draft their own policy forms and depend on ISO to author the policy forms and terms. *Id.* at 139.
- Defendants use ISO for their standardize forms that are vetted by insurance commissioners to lower risk of judgments against the forms of insurance and for the "ability to pass that burden off on professionals." *Id.*
- Oceana's premiums are based off the ISO forms utilized. *Id.* at 140.
- Endorsements to a policy take away or add coverage. *Id.* at 141.
- Endorsements that lower the defendants' liabilities would reduce the premiums paid by the insured. Higher risks increase the premium rates. *Id.* at 142 -144.
- Defendants try to keep up to date on the ISO forms available to its consumers such as Oceana. *Id.* at 149.
- Defendants do not use every ISO form available in every policy. *Id.* at 157.
- Defendants utilize the 2006 ISO Virus Exclusion form today. *Id.*
- The 2006 ISO Virus Exclusion says that the endorsement changes the policy and "we will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress. Illness, or disease." *Id.* at 161.

[4] *See* Plaintiffs' Motion to Compel Exhibit 4 at p 87.

- Defendants provide that the policy language is clear to people who work in the insurance industry and while insureds may not understand the language, they have ability to ask other professional for help in understanding their policy. *Id.* 164-168.

- Premiums paid by the insured not utilized in the payment of claims is reverted to the defendants at the end of the policy term. *Id.* at 189.

As the policy is ambiguous, parol evidence is appropriate to determine the intent of the parties regarding the coverage terms. As admitted by the defendants, all policy language is drafted by ISO on their behalf. The defendants bind themselves to the terms drafted by ISO without question. Therefore, ISO's intent in drafting the policy language given to Oceana is relevant as to the interpretation of the binding terms between the parties. ISO issues "ISO circulars" available to their consumers explaining the contents of their policy forms, including the interpretation of its terms and filings to state commissioners which impacts their forms.[5] As ISO's consumer, the defendants had access to these forms via their Avondale agent. The ISO circulars and forms available to the defendants at the time of the issuing of Oceana's policy is relevant in interpreting the terms of the policy, particularly because the form admittedly affected the rates charged to Oceana. As these forms are available to the defendants in creating all ISO-based forms, evidence of ISO-based policies including the virus exclusion are also relevant.

III. Evidence of the policy author's regulatory admissions concerning policy language at issue in the instant policy is proper.

The regulatory admissions of the author of the defendants' policy is relevant to the interpretations of the policy terms as they shed light on the intent of the terms included in the policy forms. In 2006, after the SARS pandemic, ISO contacted members associated with the Louisiana Insurance Department to submit a new endorsement seeking to exclude losses due to virus or bacteria covered under their policy.[6] Thereafter, ISO issued a circular available to the defendants explaining the filing to the Louisiana Insurance Department and why it was filed:

> Disease causing agents may render a product impure (change its quality or substance) or enable the spread of disease by their presence on interior building or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, **potential claims involve the cost of replacement of property (for example, the milk), costs of decontamination (for example, interior building surfaces), and business interruption (time element) losses.** (emphasis added)

This is a clear admission by the defendants' policy author that viral contaminations cause a property loss or damage resulting in claims for the decontamination of that property and business

[5] *See* ISO Circulars at https://www.verisk.com/insurance/products/circulars-on-isonet/.
[6] *See* ISO July 6, 2006 Circular attached as Exhibit 4.

interruption under their policy absent a virus exclusion. This is at the heart of this suit and the interpretation of terms in question. The admission by the defendants' author to regulatory agencies is relevant as it directly affected the rates charged to Oceana; and also the protections afforded to consumers, such as Oceana, in the defendants transaction of the business of insurance in the State of Louisiana. Defendants now try to hide these admissions in an attempt to justify the denial of coverage and acceptance of a higher premium for a policy without a clear virus exclusion.

IV. Evidence of the defendants' investigation of Oceana's claim is proper because it was the process by which the terms of the policy were interpreted by the defendants to deny coverage.

As defendants' second corporate representative, defendants produced Mr. Gregory Donoian of the North American Risk Services company, a third-party administrating firm hired by the defendants to adjust the claim on their behalf. ("NARS"). The defendant testified that the coverage determination was made after a formal investigation of the claim, in which the adjuster made the decision on coverage with the market – i.e. the defendants.[7] Defendants also provided that they supplied the NARS adjusters with handling guidelines of specific requirements regarding the investigation parameters – including how to make coverage calls.[8] As the interpretation of the terms of the policy during the defendants investigation led to the denial of coverage giving rise to this suit, it is relevant evidence.[9]

V. Expert witnesses have a duty to provide informed testimony to this Court with the current information and data available.

While viral contaminations are not a new occurrence, the data relating to the COVID-19 increases daily – both scientifically and legally. As attorneys have the duty to advise the Court of relevant caselaw, the experts in this case seek to also provide the Court relevant information as it becomes available to assist in providing an informed opinion. Neither plaintiffs nor their experts seek to introduce new theories, conclusions, or surprise evidence. Rather, experts ought to be able to provide the current data available to the public regarding the same subject previously provided in their testimony. This is relevant information that would not prejudice the defendants as they already have knowledge of the subject and conclusions made by the experts.

VI. The offering of demonstrative evidence should not be denied as a matter of law.

Demonstrative evidence traditionally has no independent probative value, and its primary purpose is to illustrate the testimony of a witness to help the factfinder understand the issues.

[7] *See* Plaintiffs' Motion to Compel Exhibit 4 at p 73-76.
[8] *Id.* at p 60-63.
[9] *See* Denial Letter attached as Exhibit 5.

Animations are pure demonstrative trial aids. They are computer generated drawings assembled frame by frame that, when viewed sequentially, produce the image of motion. Their reliability is completely dependent upon the expert's testimony and credibility, i.e. illustrate factual findings and conclusions of the expert, illustrate factual findings. *See Constans v. Choctaw Transport, Inc*., 97-0863 (La.App. 4 Cir. 12/23/97),712 So.2d 885. Demonstrative evidence, whether a model, a chart, or a photograph is used simply to lend clarity and interest to oral testimony and is merely incorporated by reference into a witness' testimony. *See, e.g., Anderson v. State*, 223 N.W.2d 879, 886-87 (Wis. 1974); *Wilson v. Woods*, 163 F.3d 935 (E.D. La. 1999).

A blanket denial of all demonstrative evidence without any specific objection to the particular demonstrative aid would be prejudicial to the plaintiffs at trial. Plaintiffs attempted to conduct an exhibit exchange with defendants several times prior to the original November 16 trial to no avail. Exhibit exchange is now scheduled between the parties for December 8. Should the defendants have an objection to the plaintiffs' demonstrative aids, they may do so prior to or at the commencement of trial without prejudice. All of plaintiffs' demonstrative aids are relevant to their witness's testimony as they help illustrate the testimony and facts presented to the factfinder. They are further reliable as they are not independent from the witness's testimony. For example, the plaintiffs anticipate a demonstrative aid showing the layout of the insured property where the property loss or damage occurred. Therefore, demonstrative aids ought not be denied during trial.

VII. Evidence demonstrating the physical loss or damage required under the policy is proper, including the economic losses supporting the loss of use and dangerous property condition resulting from the viral contamination.

The coverage issue before the Court turns on the phrase "direct physical loss or damage." Plaintiffs contend that these terms include loss of use of the properties intended purpose and the dangerous property condition created by the COVID-19 contamination. Evidence that COVID-19 causes such loss or damage, which defendants deny, is the effect on the capacity of the property. The traditional sit-down restaurant has a capacity of approximately 500 people, which it has been unable to use due to the viral contamination. This is evidenced by the insured's general profit and loss statements. Plaintiffs do not proffer this information to quantify damages. The insured's economic losses depict the physical loss and damage sustained under both the property and business interruption policy, which is required under the policy to extend coverage.

Similarly, the relative wealth or poverty of the parties is proper insofar as it relates to the rates collected for insurance coverage, and the property and business the insured sought coverage for.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Motion in Limine filed by defendants, Certain Underwriters at Lloyd's, London, should be denied in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all known counsel of record by either hand-delivery, electronic delivery, facsimile transmission, or U.S. Mail, postage prepaid, this 2th day of December 2020.

JENNIFER PEREZ