

FILED

2020 NOV -9 PM 3:38

CIVIL DISTRICT COURT

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

FILED: _____

WHELSEY RICHARD NAPOLEON CLERK, CIVIL DISTRICT COURT DEPUTY CLERK 421 LOYOLA AVENUE - ROOM 402

MOTION TO SUBPOENA RODERICK "RICO" ALVENDIA UNDER CODE OF EVIDENCE ARTICLE 508

NOW INTO COURT, through undersigned counsel, come Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS01221002 ("Underwriters"), who file this motion to subpoena Roderick "Rico" Alvendia under Code of Evidence art 508 for the following reasons:

- A. Plaintiffs Cajun Conti, LLC, Cajun Cuisine-1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill ("Cajun") have repeatedly relied upon Mayor LaFoya Cantrell's March 16, 2020 proclamation regarding the "property loss and damage caused by the SARS-CoV-2 Coronavirus as the foundation of their coverage claim. Specifically, Paragraph 37 of Plaintiffs' Second Supplemental and Amended Petition for Declaratory Judgment states: "Mayor Cantrell's Order recognized that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person-to-person and the propensity to attach to surfaces causing property loss and damage in certain circumstances."
B. Underwriters recently discovered evidence that Mr. Alvendia, counsel for Cajun, engaged in an undisclosed and successful manipulation of Mayor Cantrell's March 16, 2020 proclamation to include language expressly designed to advance Cajun's litigation position and the litigation position of "thousands" of potential plaintiffs.
C. None of Mr. Alvendia's communications are protected from disclosure by any privilege. As explained in the attached memorandum, subpoenas to Mr. Alvendia are the only way for Underwriters to investigate the full extent of Mr. Alvendia's role in shaping the Mayor's March 16, 2020 Order that sits at the heart of Cajun's purported claim.
D. Further, Underwriters contemporaneously seek to amend their Answer to assert affirmative defenses that include, without limitation, estoppel and unclean hands, which will preclude any recovery in this matter. The requested subpoenas and trial testimony are the only mechanism available to Underwriters to investigate these case-dispositive defenses.

WHEREFORE, Underwriters pray, after due proceedings are had, that the Court grant them leave under Code of Evidence article 508 to issue the attached subpoenas to Roderick

VERIFIED [Signature] 11-10-20

“Rico” Alvendia and, further, that Mr. Alvendia be compelled to respond to the subpoena *duces tecum* and testify at trial on the merits in this case.

Respectfully submitted,

PHELPS DUNBAR LLP

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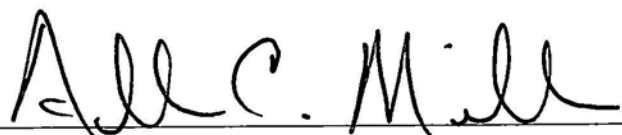
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**ATTORNEYS FOR CERTAIN
UNDERWRITERS AT LLOYD’S, LONDON
SUBSCRIBING TO POLICY NO.
AVS011221002**

CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of November, 2020, delivered a copy of the foregoing to all known counsel of record by United States Mail, proper postage prepaid, Electronic Mail and/or Facsimile.



FILED

2020 NOV -9 PM 3: 28

CIVIL
DISTRICT COURT

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

FILED: _____

DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF MOTION TO SUBPOENA RODERICK "RICO"
ALVENDIA UNDER CODE OF EVIDENCE ARTICLE 508**

MAY IT PLEASE THE COURT:

Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters") respectfully submit this memorandum in support of their motion to subpoena Roderick "Rico" Alvendia under Code of Evidence art. 508. Mr. Alvendia is enrolled as counsel of record for plaintiffs Cajun Conti, LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill ("Cajun").

I. FACTUAL BACKGROUND

A. Cajun's Reliance on Mayor Cantrell's March 16, 2020 Mayoral Proclamation

The Court is familiar with the facts and claims at issue in this action, which is currently set for trial beginning on November 16, 2020. Underwriters will not belabor this filing with a full restatement of the operative facts. The specific issue at hand arises from Cajun's consistent reliance on a March 16, 2020 proclamation from New Orleans Mayor LaToya Cantrell concerning the SARS-CoV-2 Coronavirus' ability to cause "property damage." For example:

- "Mayor, LaToya Cantrell[] acknowledged the known presence of COVID-19 in New Orleans and its ability to cause property loss or damage in her proclamation filed with this Court, providing that: There is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread to person to person [sic] and the property **to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage** in certain circumstances."¹

¹ Cajun's Opposition to Underwriters' Motion for Summary Judgment, p.2 (formatting modified, footnote omitted, bolding original).

VERIFIED

- “Both Mayor Cantrell and Governor Edwards correctly identified that the virus attaches to surfaces, causing physical loss or damage to property and a physical contamination of property as part of their reasoning for issuing their orders.”²
- “Whether Mayor LaToya Cantrell correctly provided that COVID-19 attached to surfaces for prolonged periods of time thereby causing property loss and damage [so as to create a genuine issue of fact].”³

Likewise, Cajun’s expert, Dr. Lemuel Moye, considered Mayor Cantrell’s statement regarding the Coronavirus’ ability to cause “damage” to property, reasoning: “It is more likely than not that the Mayor and Governors [sic] reasoning that SARS-CoV-2 attaches to surfaces . . . causes property loss and damage was scientifically supported.”⁴

Astonishingly, Cajun’s corporate representatives relied heavily upon Cajun’s own manipulation of the March 16, 2020 Order:

Q: But can you tell me whether or not the property located at 739 Conti has been damaged as a result of COVID-19?

A: From my understanding, it has.

* * *

Q: And where did you obtain that understanding:

A: Various websites, CDC. **I think the mayor may have mentioned it as well.**

1442 Deposition of Cajun Conti LLC (Tiffany Thoman). Indeed, Ms. Thoman mentioned the Mayor’s March 16, 2020 Order no less than five times in her deposition as the source of her knowledge that COVID-19 caused “damage to Cajun’s property.” See 1442 Deposition of Cajun Conti LLC at p. 23, ln 18 – p. 25, ln 1; see also p. 32:16, 33:5, 35:11, 39:24, 40:7. See Ex. “E.”

Lastly, when asked in discovery to identify documents and witnesses to support Plaintiffs’ contention that “COVID-19 is known to have been in and on properties within a one-mile radius from the insured premises . . .” Cajun’s sole evidence is the March 16, 2020 Order and the sole witness identified is Mayor Cantrell – clearly they do not intend to call Mayor Cantrell. See Ex. “F.”

² *Id.* at p.16.

³ Cajun’s Statement of “Material Facts Which Are Genuinely In Dispute,” No. 2.

⁴ See Cajun’s Opposition to Underwriters’ Motion for Summary Judgment, Ex. 1, Report, ¶ 75(E).

B. Roderick “Rico” Alvendia’s Communications with Mayor Cantrell’s Office

On November 5, 2020, the City of New Orleans issued a response to Public Request “NOLA Request no. 20-2624” (the “Records”). The Records are attached as Ex. “A.” Beginning at page 79, the Records contain apparently incomplete⁵ text messages exchanged between, on information and belief, Mr. Davis (Mayor Cantrell’s executive counsel) and Mr. Alvendia. Underwriters have supplied the text messages in the “Appendix” section below. The messages demonstrate that Mr. Alvendia texted pictures of Business Income policy language and requested that Mr. Davis include purportedly damaging relevant language in Mayor Cantrell’s forthcoming proclamation:

Cliff here is an edited version of language to include in an emergency order :

"Additionally, this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage due to its propensity to attach to surfaces for prolonged periods of time. "

Records, p.80. Then, contrary to the position taken by Cajun in this litigation, Mr. Alvendia lamented that Governor John Bel Edwards’ emergency order did not say enough about property damage.

Cliff, the Governor’s latest order sadly does not have this language above in it yet.

Finally on Sunday May 15, 2020 at 7:02 p.m.—the day before Mayor Cantrell issued the relevant proclamation—Mr. Alvendia texted:

⁵ See discussion below.

Sun, Mar 15, 7:02 PM

Cliff, please consider using this language in any future emergency order/proclamation By LaToya. It will allow thousands of business owners to make business interruption claims under their existing insurance policies:

"This order is given because of the propensity of the virus to spread person to person AND also because the virus physically is causing property loss and damage due to its propensity to attach to surfaces for prolonged periods of time."

NOLA Request no. 20-2624 081

Records, p.81. The next day, Mayor Cantrell issued an order that read, in pertinent part:

WHEREAS, there is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances; and

Ex. "D," Cantrell Proclamation (3-16-20), p.2. Cajun failed to disclose Mr. Alvendia's requests to have the Mayoral Proclamation include language expressly designed to implicate insurance coverage, and "allow thousands of business owners to make business interruption claims."

C. The Relevance of the Requested Discovery

Underwriters have attached their draft subpoena *duces tecum* trial subpoena as Exs. B.1 and B.2, which are designed to secure the relevant testimony.

First, Underwriters contemporaneously seek to amend their answer to assert, *inter alia*, the affirmative defense of unclean hands and estoppel based on Mr. Alvendia's undisclosed communications with Mayor Cantrell's office (Mr. Davis) concerning language that, per Mr. Alvendia, was designed to assist plaintiff attorneys in their efforts to establish physical damage in "thousands" of forthcoming lawsuits, including Cajun's. Underwriters are entitled to discovery to determine the extent to which Mr. Alvendia engaged in efforts to manufacture

evidence to support Cajun's (and other) business interruption coverage claims in New Orleans. Indeed, the acts to manipulate the Mayor's Order may indeed label this litigation as the proverbial "fruit of the poisonous tree."

It appears Mr. Alvendia may have also contacted Governor Edwards' office to secure similar statements:

Cliff, the Governor's latest order sadly does not have this language above in it yet.

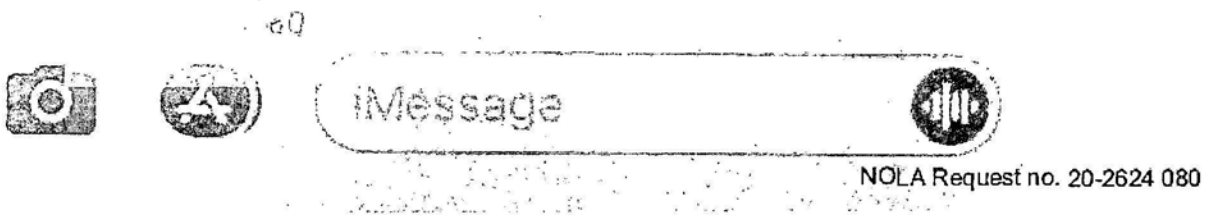
This text message strongly suggests that Mr. Alvendia, or one of his colleagues, contacted persons associated with Governor Edwards to make similar requests. Underwriters are entitled to discovery concerning Mr. Alvendia's communications with other public officials in an attempt to manipulate the language used in COVID-19 civil authority orders with the intent of later relying on those Orders in this litigation.

Second, on the merits, Cajun has postured that Mayor Cantrell's statement regarding "property loss and damage" was a considered conclusion based on independent findings and discretion.⁶ However, (and astonishingly) it appears the decision making process was directly manipulated by actions of Cajun's counsel with the cooperation of Mr. Davis. Underwriters are entitled to fully traverse this issue as well.

Third, Cajun has repeatedly urged that the absence of a virus exclusion in the subject policy is important because, otherwise, the subject "all risks" policy would provide coverage. However, Mr. Alvendia's text messages unambiguously demonstrate his concern that the COVID-19 pandemic and its related "stay at home" orders were **not** enough to trigger a basic Business Income endorsement and that an additional proclamation regarding property damage caused by the Coronavirus would "allow thousands of business owners to make business interruption claims under their existing policies[.]" Underwriters assert that Mr. Alvendia's testimony and communications with Mr. Davis will conclusively controvert Cajun's litigation position that the absence of a virus exclusion in the subject policy is relevant in this case.

⁶ Cajun's Opposition to Underwriters' Motion for Summary Judgment, p.2 ("Mayor Cantrell . . . identified that the virus attaches to surfaces, causing physical loss or damage to property and a physical contamination of property as part of their reasoning for issuing their orders.") (formatting modified, footnote omitted, bolding original).

Finally, it is worth noting that the City of New Orleans appears to have omitted communications in its response. As evidenced in the Appendix, below, the City of New Orleans did not provide any text messages sent to Mr. Alvendia from Mr. Davis. However, one of the screenshots evidences that there was an Apple “iMessage” response, which Mr. Alvendia “emphasized”:



Highlighting supplied. The attached subpoena *duces tecum* will enable Underwriters to see the totality of an obviously incomplete production by the City of New Orleans.

II. THE PROPOSED SUBPOENAS ARE WARRANTED UNDER CODE OF EVIDENCE ART. 508

The issues in this case involve matters of national implications. Although counsel is generally protected from individual subpoenas in civil matters, such subpoenas are permitted when certain conditions are satisfied. The first condition is that “it has been determined that the information sought is not protected from disclosure by any applicable privilege or work product rule[.]” Article 508(A). Neither Cajun nor Mr. Alvendia can claim that Mr. Alvendia’s communications with non-clients are privileged. First, the communications were not made for the purpose of “facilitating the rendition of professional legal services to [Cajun]” as required to establish the attorney-client privilege. La. Code Evid. art. 506(B). Second, Mr. Alvendia’s communication was not made to any person listed in Article 506(B)(1)-(6) so as to preserve the attorney-client privilege. Instead, his communications were directed to a public official. Third, the communications at issue predate the COVID-19 “stay at home” orders, meaning that they predate the claim being litigated here. Fourth, Mr. Alvendia enrolled as counsel of record in this case on July 17, 2020,⁷ months after the relevant communications occurred, meaning there is no evidence that he was Cajun’s counsel in March 2020.

Any attempted invocation of the work-product doctrine would also fail. “The purposes of the work-product rule are both to provide an attorney a ‘zone of privacy’ within which he is free

⁷ Ex. “C” (July 17, 2020 Motion to Enroll).

to evaluate and prepare his case without scrutiny by his adversary and to assist clients in obtaining complete legal advice.” *Landis v. Moreau*, 00-1157 (La. 02/21/01), 779 So. 2d 691, 697. These communications have nothing to do with Mr. Alvendia’s evaluation of Cajun’s case or advice to Cajun. But even if the communications were preparatory to this litigation, Mr. Alvendia’s communications with a non-privy, third-party public official fall outside of any cognizable “zone of privacy.”

All that remain are the considerations set forth in Article 508(A)(1)-(4). Underwriters address each in turn. First, Underwriters’ subpoenas are, for the reasons stated in Section (I)(C), “essential to the successful completion of an ongoing investigation, [are] essential to the case of the party seeking the information, and [are] not merely peripheral, cumulative, or speculative.” Article 508(A)(1).

Next, the subpoenas are designed to “seek[] the information [and] not to harass the attorney or his client.” Article 508(A)(2). Underwriters do not seek any privileged information from Mr. Alvendia or Mr. Davis, and their subpoenas are not “harassing” because they relate to Mr. Alvendia’s role in manipulating Mayor Cantrell’s March 16, 2020 order sitting at the heart of this litigation.

Further, and as set forth in the attached exhibits, “the subpoena[s] list[] the information sought with particularity, [are] reasonably limited as to subject matter and period of time, and give[] timely notice.” Article 508(A)(3). To the extent that Cajun objects that it was not provided with “timely notice,” that issue is not the fault of Underwriters. Cajun’s counsel has advertised that “[o]n March 16th 2020, [counsel] filed the first Covid-19 lawsuit” in the country.⁸ Further, Cajun has insisted on obtaining a trial date as quickly as possible. Cajun cannot have it both ways, *i.e.*, it cannot put its foot on the accelerator to get to rapid trial date while failing to disclose its own counsel’s direct role in crafting the language of a civil authority order used as a sword against Underwriters. Moreover, the documents (text messages and emails) requested in Underwriters’ subpoena *duces tecum* can be easily identified and produced without the need for a privilege log as outlined above.

⁸ See <https://gmhatlaw.com/john-w-houghtaling> (accessed 11/6/20); <https://gmhatlaw.com/news/2020/3/31/new-orleans-restaurant-sues-for-coronavirus-interruption-cover> (accessed 11/6/20).

Last, “[t]here is no practicable alternative means of obtaining the information.” Article 508(A)(4). With respect to Underwriters’ affirmative defense of unclean hands and estoppel, Mr. Alvendia is the only person who can provide relevant testimony. Further, Underwriters have no way to determine which other public officials, if any, Mr. Alvendia communicated with, meaning that there is no way for Underwriters to determine the additional witness(es) it needs to subpoena for trial. Only Mr. Alvendia can speak to the totality of the pressure exerted on state and local officials to include language that would be relied upon to affect similar lawsuits across the state.

III. CONCLUSION

For the reasons stated above, Underwriters respectfully ask, after due proceedings are had, for the Court to grant leave under Code of Evidence article 508 to issue the attached subpoenas to Roderick “Rico” Alvendia and, further, that Mr. Alvendia be compelled to respond to the subpoena *duces tecum* and be deposed in advance of trial on the merits in this case.

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IV. APPENDIX

9:43



Rico >

pay the cost to repair or replace damaged parts of fire extinguishing equipment if the damage:

- (1) Results in discharge of any substance from an automatic fire protection system; or
- (2) Is directly caused by freezing.

f. Business Income

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

Business Income means the:

- (1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- (2) Continuing normal operating expenses incurred, including payroll.

g. Extra Expense

We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property

Cliff here is an edited version of language to include in an emergency order :

"Additionally, this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage due to its propensity to attach to surfaces for prolonged periods

NOLA Request no. 20-2624 079

9:44



Rico >

Business Income means the:

- (1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- (2) Continuing normal operating expenses incurred, including payroll.

g. Extra Expense
 We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property

Cliff here is an edited version of language to include in an emergency order :



"Additionally, this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage due to its propensity to attach to surfaces for prolonged periods of time. "

Cliff, the Governor's latest order sadly does not have this language above in it yet.

Please consider including this in Latoya's next order



iMessage



NOLA Request no. 20-2624 080

9:42



Rico >

Sun, Mar 15, 7:02 PM

Cliff, please consider using this language in any future emergency order/proclamation By LaToya. It will allow thousands of business owners to make business interruption claims under their existing insurance policies:

"This order is given because of the propensity of the virus to spread person to person AND also because the virus physically is causing property loss and damage due to its propensity to attach to surfaces for prolonged periods of time."

NOLA Request no. 20-2624 081

* * *

Respectfully submitted,

PHELPS DUNBAR LLP

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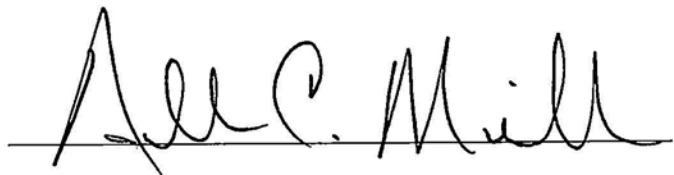
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**ATTORNEYS FOR CERTAIN
UNDERWRITERS AT LLOYD'S, LONDON
SUBSCRIBING TO POLICY NO.
AVS011221002**

CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of November, 2020, delivered a copy of the foregoing to all known counsel of record by United States Mail, proper postage prepaid, Electronic Mail and/or Facsimile.



FILED

2020 NOV -9 PM 3:39

CIVIL DISTRICT COURT

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

FILED: _____
DEPUTY CLERK

RULE TO SHOW CAUSE

Considering the foregoing *Motion to Subpoena Roderick "Rico" Alvendia under Code of Evidence art. 508* filed on behalf of Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters):

Plaintiffs are hereby ordered to show cause, on the _____ day of _____, 2020, at _____ a.m., as to why the *Motion to Subpoena Roderick "Rico" Alvendia under Code of Evidence art. 508* on behalf of Underwriters should not be granted.

New Orleans, Louisiana this _____ day of _____, 2020.

HONORABLE PAULETTE IRONS
JUDGE, CIVIL DISTRICT COURT

[SERVICE INFORMATION ON FOLLOWING PAGE]

VERIFIED

**PLEASE SERVE EXECUTED RULE WITH
MOTION AND MEMORANDUM IN SUPPORT:**

Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC dba Oceana Grill

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