

Cause No. _____

INTERNATIONAL DAIRY DELI BAKERY ASSOCIATION <i>Plaintiff,</i>	§ § § § § § § § § §	IN THE DISTRICT COURT OF
v.	§ § § § § § § § § §	HARRIS COUNTY, TEXAS
CERTAIN UNDERWRITERS AT LLOYD’S, SUBSCRIBING TO CERTIFICATE NO. CR0314429 <i>Defendant.</i>	§ § § § § § § § § §	_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

Plaintiff INTERNATIONAL DAIRY DELI BAKERY ASSOCIATION (The “IDDBA” or “Plaintiff”) files this Petition for Declaratory Judgment against UNDERWRITERS AT LLOYD’S, LONDON, subscribing to Certificate No. CR0314429 (“Underwriters”) and would respectfully show the following:

PARTIES

1. Plaintiff is a non-stock corporation organized under the laws of the state of Wisconsin.
2. Upon information and belief, Underwriters is a foreign surplus lines insurance company engaged in the business of insurance in Texas, operating for the purpose of accumulating monetary profit. According to its insurance policy, Underwriters may be served with process by serving **Mendes & Mount, 750 7th Avenue, New York, NY 10019.**

CLAIM FOR RELIEF

3. At this time, Plaintiff seeks non-monetary relief pursuant to the Texas Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

VENUE & JURISDICTION

4. This Court has subject matter jurisdiction under sections 37.003 and 37.004 of the Texas

Civil Practice & Remedies Code. This case involves the interpretation of a written contract, namely, Plaintiff's insurance policy with Underwriters. Because Underwriters is an unincorporated association, the citizenship of each individual Underwriter, or "Name," must be determined in relation to any potential claim of diversity jurisdiction. *See NL Indus. v. OneBeacon Am. Ins. Co.*, 435 F. Supp. 2d 558, 562-63 (N.D. Tex. 2006). In order to establish diversity jurisdiction, Underwriters must establish that the amount in controversy requirement is met as to each severally liable "Name." *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990); *NAG, Ltd v. Certain Underwriters at Lloyds London*, 2017WL490634*5 (E.D. Louisiana 2017).

5. Venue is proper in Harris County under TEX. CIV. PRAC. & REM. CODE section 15.002(a)(1) as all or a substantial part of the events or omissions giving rise to the claims of Plaintiff occurred in Harris County. Namely, Plaintiff's annual conference for which it procured insurance coverage was set to take place at the George R. Brown Convention Center in downtown Houston.

DISCOVERY CONTROL PLAN

6. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.

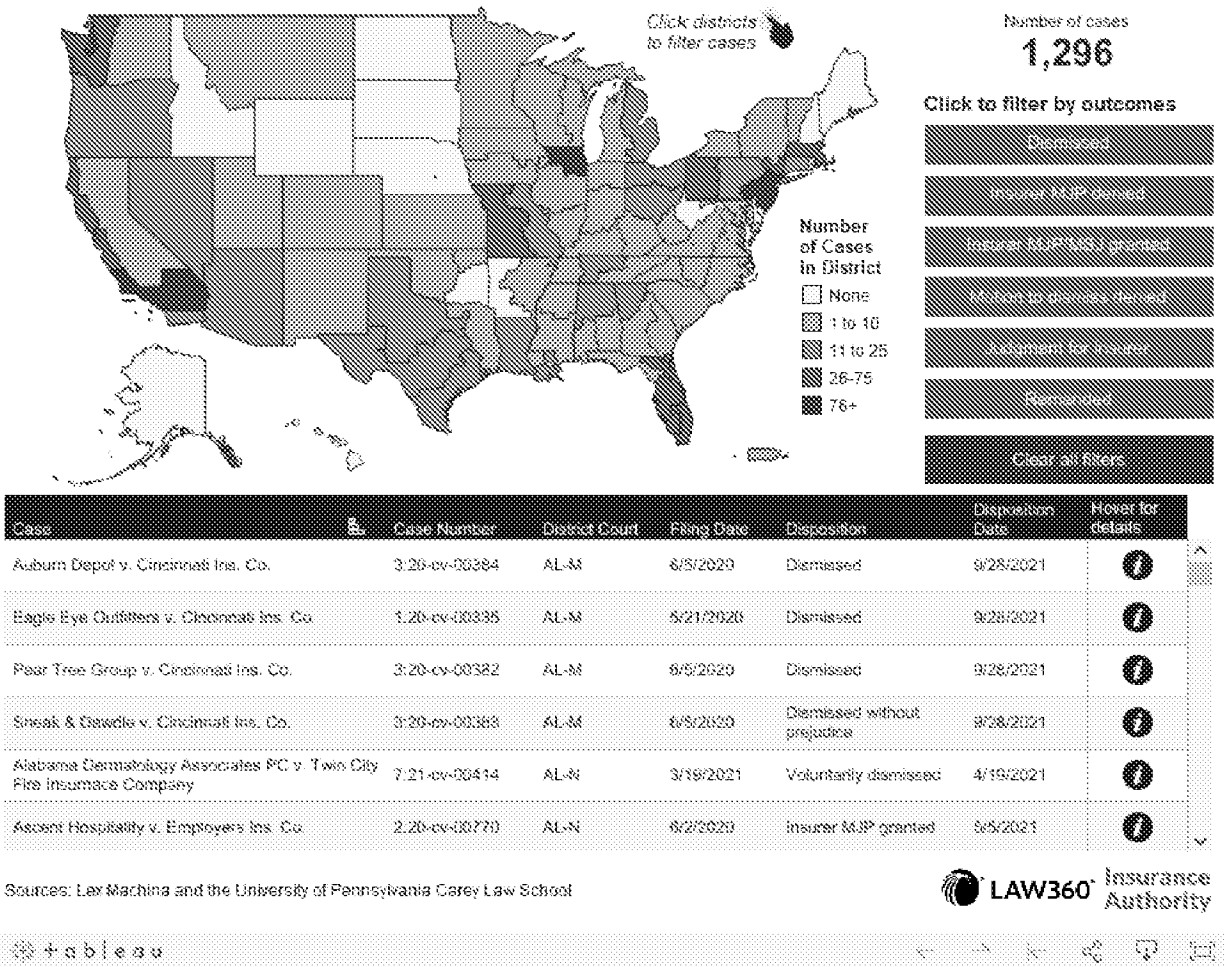
FACTS

7. Throughout the pandemic, there have scores of lawsuits filed by policyholders against their insurance carriers for business interruption losses. According to Law360.com¹, as of November 29, 2021, the number of cases filed in federal courts alone for business interruption losses due to COVID-19 losses was 1,296:

¹ See <https://www.law360.com/insurance-authority/covid-map> (last accessed December 2, 2021).

COVID-19 Case Tracker

Since the pandemic began, more than 1,200 lawsuits have been filed in federal court against insurers seeking coverage for COVID-related losses. UPDATED November 29, 2021



8. As of November 29, 2021, nearly 84% of the 516 cases that had already concluded resulted in a full dismissal.²

9. This is not one of those cases.

The IDDBA

10. The IDDBA is a nonprofit trade association for food retailers, manufacturers, wholesalers, brokers, distributors, and other industry professionals. Its membership includes

² <https://www.law360.com/insurance-authority/articles/1444533/anderson-kill-to-covid-19-policyholders-don-t-give-up> (last accessed Dec. 2, 2021).

more than 1,500 companies ranging from small independent operators to some of the world's largest corporations. Its chief goal is to help its members enhance their economic position by providing opportunities for professional dialogue, education, exchange of industry data and selling opportunities.

11. As with many trade associations, the most important single event every year for the IDDBA is its annual trade show (the “Show”). Each year, the IDDBA’s members gather for three days, usually in a different location, to showcase and sample each other’s products and services, and to network. Additionally, a “who’s who” of celebrities, leadership experts, and motivational speakers come to the Show each year to speak at the gathering. Without question, the Show is critical to the IDDBA’s ongoing viability.

12. The Show is so important to the IDDBA and its members that in June of 2019, the IDDBA took out an event cancellation insurance policy with Underwriters which covered the next three Shows: in Indianapolis in 2020, in Houston in 2021, and in Atlanta in 2022. The policy provided \$8 million in coverage for each Show:

<u>Event Name and Venue</u>	<u>Event Cancellation Limit of Indemnity</u>	<u>Event Dates From To</u>
IDDBA 20 Indiana Convention Center Indianapolis, IN	\$8,000,000	05/31/2020 to 06/02/2020
IDDBA 21 George R. Brown Convention Center Houston, TX	\$8,000,000	06/06/2021 to 06/08/2021
IDDBA 22 Georgia World Congress Center Atlanta, GA	\$8,000,000	06/05/2022 to 06/07/2022

A copy of that policy (the “Policy”) is attached as **Exhibit 1**.

The Policy and its “Communicable Disease Extension”

13. Under a typical commercial “all-risk” insurance policy for which the insured has purchased (optional) business interruption coverage, the insured bears the burden to show that there was direct physical loss of or damage to covered property, which resulted in a loss of

income (as defined by the policy). Unfortunately for many insureds, proving that the novel coronavirus caused “direct physical loss of or damage to covered property” has been a challenging endeavor. Exacerbating the problem for many insureds is a specific policy exclusion for “virus or bacteria,” which presumably would cut off coverage even if the insured could show direct physical loss or damage.

14. The IDDBA’s Policy contains neither such hindrance to proving coverage. The Policy’s Section 2, “Coverage A – Event Cancellation” provides:

Section 2. Coverage A - Event Cancellation

Insuring Clause

Subject to all the terms, conditions, limitations and exclusions stated in this Insurance or of any attached Endorsement.

This insurance indemnifies You for Your Net Loss up to but not exceeding the Limit of Indemnity solely and directly in consequence of:

1. Cancellation, Abandonment, Curtailment or Rescheduling of the Event;
2. Non-appearance of a Principal Speaker (Cover for a principal speaker is only applicable if shown in an attached endorsement);
3. Your failure to vacate the Venue of the Event at the termination of its tenancy;
4. Enforced Reduced Attendance

all due to any unexpected cause beyond Your control and the control of the event organizer, the Participants and any of the sponsors or financial supporters of such parties and any party who performs or would perform any essential function needed for the successful fulfillment of the Event. Inadequate sales or registrations shall not constitute an unexpected cause.

(Policy at § 2) (emphasis added).

15. The “Event” refers to each of the three Shows specifically referenced under the Policy, for the years 2019, 2020, and 2021.

16. “Enforced Reduced Attendance,” another coverage triggering event, “means the enforced inability of Participants to travel to attend the Event solely and directly as a result of the same specific cause not otherwise excluded hereunder.”

17. Unlike the vast majority of commercial policies, IDDBA’s Policy also contains a

“communicable disease” extension, which provides:

Exclusion 8 of Section 8 General Exclusions shall not apply and this Insurance extends to cover the necessary and unavoidable Cancellation, Abandonment, Curtailment or Rescheduling of the Event as a sole and direct result of an outbreak of a communicable disease during the period of insurance.

Notwithstanding the foregoing it is understood and agreed that this Insurance does not cover any loss directly or indirectly arising out of, contributed to or caused by or resulting from or in connection with any threat or fear, whether actual or perceived, of any communicable disease.

18. Notably, this coverage extension not only *covers* the “cancellation” of the Show due to “an outbreak of a communicable disease,” but it specifically overrides Exclusion 8 of the policy, which in the absence of the communicable disease coverage extension would *exclude* coverage for “any infectious or communicable disease in humans” that might otherwise lead to coverage.

IDDBA cancels the Show in 2020, files a claim, and Underwriters pays the claim

19. The 2020 Show was set to take place in Indianapolis, Indiana from May 31 to June 2, 2020. Given the importance and magnitude of the Show to the IDDBA, many months (or, in the case of securing event space, years) of planning go into it to ensure maximum attendance and enjoyment.

20. And so, when the first case of COVID-19 was confirmed in the United States on January 20, 2020³, this cast serious doubt on the Show’s viability for 2020. Over the next several weeks, it became increasingly clear just how serious COVID-19 was. On March 11, the World Health Organization declared COVID-19 a pandemic.⁴ On March 13, President Trump declared a nationwide emergency.⁵ On March 15, U.S. states began shutting down schools⁶, as well as restaurants and bars.⁷

21. It became obvious very quickly that COVID-19 was wreaking havoc on business and

³<https://www.cdc.gov/museum/timeline/covid19.html#~:text=January%2020%2C%202020%20CDC,18%20in%20Washington%20state> (last accessed Dec. 3, 2021).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* (New York City public schools closed)

⁷ *Id.* (Ohio shuts down bars and restaurants)

travel activities. The IDDBA was left with no choice but to cancel the 2020 Show for the first time in its history, doing so on March 30, 2020.

22. Despite the disappointment and devastating economic impact from being forced to cancel its flagship event, the IDDBA felt some comfort because it had possessed the foresight to purchase insurance for the exact type of unforeseeable event – the outbreak of a communicable disease – that had forced it to cancel. Within a day after cancelling the Show, the IDDBA filed an insurance claim with Underwriters.

23. Over the next few months, IDDBA provided Underwriters whatever it requested concerning the claim, including a profit and loss statement, expense ledgers, refunds issued, registration numbers, and other pertinent information that would allow Underwriters to adjust the claim.

24. Eventually, Underwriters paid the claim in the amount of \$4,291,656. *See Exhibit 2, Sworn Statement in Proof of Loss.*

IDDBA reluctantly cancels the 2021 Show

25. Despite the disappointment of cancelling the 2020 Show, the IDDBA immediately went to work planning for the 2021 Show, which was set to take place at the George R. Brown Convention Center in Houston from June 6 to June 8, 2021.

26. The planning for the 2021 Show included securing hotel blocks for participants at nearby hotels, soliciting registration and booth sponsorships from members, and ensuring that the star-studded lineup of speakers for the 2020 show – including TV personality Padma Lakshmi, race car driver Dale Earnhardt, Jr., amongst others – would be available to appear and speak in Houston.

27. The IDDBA remained optimistic as the calendar turned to 2021, securing thousands of

registrants who were eager to get back to the Show for the first time since 2019.

28. Unfortunately, despite the desire of all to return to “pre-COVID” lifestyle, and the optimism offered by the new vaccine rollouts, the specter of the virus continued to rear its ugly head into 2021.

29. As of February 1, 2021, the 14-day average COVID-19 positivity rate for Harris County was at 16%.⁸ Seven-day new case trends hovered at more than 300 per 100,000 residents at the beginning of February 2021.

30. Given the continued pervasiveness of COVID-19 in Harris County, the majority of registrants for the 2021 Show were not permitted to attend, due to company mandated travel restrictions. 29 companies who had previously registered as exhibitors were forced to cancel.

31. On **February 25, 2021**, about three months before the scheduled 2021 Show, the IDDBA Executive Committee made the difficult decision to cancel the Show a second year in a row.

IDDBA files another claim; Underwriters reserves its rights

32. The IDDBA filed an insurance claim with Underwriters under the Policy, just as it had done in 2020.

33. But this time, unfortunately, the response was much different. Instead of working with the IDDBA on adjusting and processing payment on the claim, Underwriters instead issued a reservation of rights letter dated November 24, 2021. *See* **Exhibit 3, Reservation of Rights Letter**.

34. The Reservation of Right letter largely comprises a cut-and-paste job of relevant Policy provisions and exclusions. After that, it cites a March 2, 2021 executive order from Texas Governor Greg Abbott that stated, “businesses may open 100 % and masks are not required in all

⁸ See https://covid-harriscounty.hub.arcgis.com/datasets/24622c48d2e047849dc8b35daff4a745_0/explore (last accessed Dec. 3, 2021).

counties not in an area with high hospitalizations.” (Ex. 3 at 8). Later in the letter, it cites a May 28, 2021 screencap of a tweet from Harris County Judge Lina Hidalgo urging citizens to get the vaccine and to “stay vigilant.” And still later in the letter, it cites a Harris County Public Health chart that purports to show that the “positivity rate was declining [from the February 25, 2021 date of cancellation] until the second week of July.” (*See id.* at 12).

35. None of those assertions, even taken as true, are relevant to a coverage determination. It is beyond cavil that (1) the cancellation of the Show happened on February 25, 2021, and (2) both the “Cancellation ... of the Event” and the “Enforced Reduced Attendance” of the members and exhibitors was due to the *very same* “unexpected cause beyond Your control” that triggered coverage in 2020: the COVID-19 pandemic. Events, conditions, or statistics that happened *after* the cancellation have no bearing on this determination.

36. Simply put, there was coverage for the cancellation of the 2020 Show, and there is coverage for the 2021 Show.

CAUSE OF ACTION – DECLARATORY JUDGMENT

37. Under Texas Civil & Practice and Remedies § 37.001 *eq. seq.*, IDDBA seeks a declaration that:

- There is coverage under Section 2, Coverage A – Event Cancellation under its Policy, for the Cancellation of the 2021 Show;
- No exclusions or policy limitations, including without limitation the General Exclusions under Section 8 of the Policy, apply to limit or exclude coverage under the Policy; and
- Texas law, including the Texas Insurance Code, applies to the dispute.

38. The purpose of a declaratory judgment action is to "be liberally construed and

administered" to fulfill its purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b); *Monk v. Pomberg*, 263 S.W.3d 199, 204 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

39. When the subject matter of a declaratory judgment action is a contract, the contract “may be construed either before or after there has been a breach.” TEX. CIV. PRAC. & REM. CODE § 37.004(b). Although at the time of filing Underwriters had not yet technically denied the claim, its reservation of rights letter was postured to do exactly that. Nonetheless, this action is ripe for adjudication.

PRAYER

Plaintiff respectfully requests that the Court enter a declaratory judgment as detailed herein for the cancellation of its 2021 trade show, grant it “costs and reasonable and necessary attorney’s fees as are equitable and just” under section 37.009 of the Texas Civil Practice & Remedies Code, and grant it any other and further relief to which the Court deems it entitled.

Respectfully submitted,

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