

DC-20-17273

CAUSE NO.: _____

Boomerjack’s Grill & Bar,)	
Boomer Jack’s CityView, LLC)	IN THE DISTRICT COURT
)	
Plaintiff)	
)	
v.)	
)	
Members of the Owners First)	
Property Association)	_____ JUDICIAL DISTRICT
Subscribing to Policy No.)	
RBF002134)	
)	
Defendant)	DALLAS COUNTY, TEXAS
)	
)	
)	

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff Boomerjack’s Grill & Bar, Boomer Jack’s CityView, LLC (“Plaintiff” or “Boomerjack’s”), and files this Original Petition complaining of Defendant Members of the Owners First Property Association Subscribing to Policy No.: RBF002134 (“Defendant”), and for cause of action, would respectfully show the Court as follows:

I.
DISCOVERY LEVEL

1. Boomerjack’s intends that discovery be conducted under Level 3 pursuant to Rule 190.4 of the Texas Rules of Civil Procedure.

II.
DISCLOSURE PURSUANT TO DALLAS COUNTY LOCAL RULE 1.08

2. Pursuant to Local Rule 1.08, Boomerjack’s hereby discloses to the Court that this case is related to the following previously-filed case: *Stereo Live, LLC; Stereo Live Dallas, DBA Stereo Live v. Certain Underwriters at Lloyd’s London Subscribing to Policy No. CLU54360, et al.*, in the 298th Judicial District Court of Dallas County, Texas, Cause No. DC-20-11620. This case and the *Stereo Live* case are so related to that a transfer to the 298th District Court would facilitate orderly and efficient disposition of the litigation. Thus, Boomerjack’s respectfully requests transfer of this case to the 298th District Court pursuant to Local Rule 1.06.

III.
INTRODUCTION

3. This case is an action for declaratory judgment arising from Boomerjack’s insurance claim for business interruption, civil authority, and ingress/egress coverages against its insurer, Defendant “Members of the Owners First Property Association Subscribing to Policy No. RBF002134.” Defendant has denied/refused to provide coverage under Boomerjack’s policy for the claims resulting from the nationwide Covid-19 Pandemic.

4. Boomerjack’s is a Texas based sports bar and grill with seventeen locations¹ (hereinafter the “Insured Properties”) in the Dallas-Fort Worth area. It employees over 1,000 Texans. The Insured Properties span Dallas, Tarrant, Collin, Kaufman, and Denton Counties. Through its policy with Defendant, Boomerjack’s purchased insurance coverage that included coverage for business interruptions to Boomerjack’s Insured Properties.

¹ Two of the Seventeen Insured Properties are not a “Boomerjack’s” branded bar and grill. One is the Bedford Ice House, and the other is “Side Car Social”. However, the addresses for both the Bedford Ice House and Side Car Social are listed as Insured Properties under the Policy, and therefore both locations are collectively incorporated within the label “Boomerjack’s” for purposes of the petition.

5. Boomerjack's business has been interrupted by the COVID-19 pandemic and by the related orders of local, state, and national Civil Authorities that were issued due to the actual presence of the virus and the risks of physical loss or damage posed by the virus. Beginning in March of 2020, Boomerjack's business at each of its operational Insured Properties has been drastically reduced, and at times temporarily halted altogether, due to the presence of COVID-19 and the ordered COVID-19 restrictions. As a result, Boomerjack's has suffered, and is suffering, losses that fall within the coverages provided by its Policy.

6. Despite paying \$52,665.00 in premiums to Defendant for coverage and filing a timely claim under the policy, Defendant has failed to pay any amount under the policy and has in effect denied coverage to Boomerjack's.

IV. **PARTIES AND SERVICE**

7. Plaintiff Boomerjack's Grill & Bar, Boomer Jack's CityView, LLC is the collection of Texas Limited Liability Companies doing business under the name "Boomerjack's", "Side-Car Social", or "Bedford Ice-House". Each of the Insured Properties are listed on pages 47-48 of the Policy numbered RBF002134 issued by Defendant. The Policy is attached hereto as Exhibit A. Boomerjack's principal place of business is Tarrant County, Texas, but it has Insured Properties in five counties of the Dallas-Fort Worth area including three locations in Dallas County, Texas.

8. At all relevant times, Boomerjack's was authorized to do business and was doing business in the State of Texas by operating Boomerjack's branded restaurants in and around the greater Dallas Fort-Worth, Texas area.

9. Defendant is a foreign insurance syndicate with a certificate of authority to engage in the business of insurance in the State of Texas. The Policy lists "Lloyd's of London" as the insurer. (Ex. A, second page non-numbered from the beginning), but the Policy itself references

the “Owners First Property Association” as sharing the sublimits of the policy (Ex. A p. 5 of the Declarations). Upon information and belief, the “Owners First Property Association” is the proper name for the Defendant because the Policy discloses the members of Defendant in Appendix A. (Ex. A, non-numbered page following page 48 of the manuscript form). Defendant is authorized to write, sell, and issue insurance policies providing property and business income coverage in Texas. At all times material hereto, Defendant conducted/transacted business through the selling and issuing of insurance policies within the State of Texas, including, but not limited to, selling, and issuing property coverage to Boomerjack’s for properties in Dallas, Dallas County, Texas. Under the terms of the policy of insurance at issue, Defendant has designated the Texas Commissioner of Insurance as its agent for service of process, and Mendes and Mount, LLP as its agent to accept such process from the Texas Commissioner of Insurance. (Exhibit A at pgs. 3 and 35 of the Policy’s Declarations). Accordingly, Defendant can be served with process by serving the Texas Commissioner of Insurance, Agent for Service of Process of Members of the Owners First Property Association at 333 Guadalupe, Austin, Texas 78701. (*Id.*). The Commissioner will forward citation and the petition with discovery to Defendant by and through Mendes and Mount, LLP, 750 7th Avenue, New York, New York 10019-6829. (*Id.*). **ISSUANCE OF CITATION TO THE DEFENDANT VIA THE TEXAS COMMISSIONER OF INSURANCE IS REQUESTED.**

V.
JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action and the parties and damages sought are within the jurisdictional limits of this Court.

11. At all times relevant to this action, Defendant was engaged in substantial business activities within the State of Texas including soliciting and transacting business, and entering

contracts to provide insurance to Boomerjack's and other Texas residents for damage and loss occurring within Texas, including, but not limited to, Dallas County, Texas.

12. Jurisdiction is proper in this Court because the policy of insurance upon which this action is based contains a "Service of Suit" clause which provides Boomerjack's the right to select a Court of competent jurisdiction to hear this matter. (Ex. A at p. 35) The policy states that, in the event the Underwriters fail to pay any amount claimed to be due, the Underwriters "will submit to the jurisdiction of a Court of competent jurisdiction within the United States." (*Id.*). This Petition concerns an insurance policy sold to Texas businesses for the purposes of insuring those Texas businesses and their properties located in Texas. This Petition arises under that insurance policy.

13. Venue is proper in Dallas, Dallas County, Texas, because several of Boomerjack's Insured Properties under the policy giving rise to this cause of action are situated in the City of Dallas in Dallas County, Texas. TEX.CIV.PRAC.REM.CODE §15.032. See Ex. A at 47-48.

VI. **CLAIMS FOR RELIEF**

14. Pursuant to Rule 47 of the Texas Rules of Civil Procedure, Boomerjack's hereby seeks monetary relief within the jurisdictional limits of this court. Boomerjack's specifies that it seeks monetary relief more than \$1,000,000 and judgment for all other relief to which it is deemed justly entitled.

VII. **CONDITIONS PRECEDENT**

15. Pursuant to Texas Rule of Civil Procedure 54, Boomerjack's hereby pleads that all conditions precedent to recovery by it have been performed or have occurred.

VIII. **FACTUAL BACKGROUND**

16. This case stems from the nationwide Covid-19/Coronavirus (“Covid-19”) and an insurance company’s wrongful denial of coverage.

17. Plaintiff operates multiple locations of Boomerjack’s, a Texas based sports bar and grill, located in five counties of the Dallas-Fort Worth area of Texas. There are Boomerjack’s locations in Dallas, Tarrant, Colin, Kaufmann, and Denton counties. Boomerjack’s derives income by selling food and drinks to patrons who visit the bar and grill. Any disruption to Boomerjack’s business that prohibits customers from visiting Boomerjack’s locations causes a negative impact on its business income.

A. THE POLICY

18. To protect its business from unexpected interruptions, slowdowns, and/or shutdowns of their business locations, or to prevent further property damages, Boomerjack’s purchased commercial property insurance from Defendant. The policy number is Policy No.: RBF002134. Boomerjack’s is listed as the insured on the Policy. (Ex. A at pg. 1 of the Declarations). Each of the Insured Properties are listed on pages 47 and 48 of Exhibit. A.

19. Boomerjack’s purchased “Business Interruption” coverage in its policy. (Ex. A at p. 2 of the Owners First Property Association -- Manuscript Form – hereinafter the “Manuscript Form”)), and it insures against “risks of direct physical loss or damage to property insured herein occurring during the period of insurance . . . except as hereinafter excluded. (Ex. A at p. 11 of the Manuscript form).

20. Defendant issued the Policy to Boomerjack’s in return for payment of \$52,665.00. (Ex. A at second non-numbered page). With additional fees, Boomerjack’s paid \$62,430.51 (*Id.*) to purchase the policy to protect itself. “In consideration of the premium payment shown in Declarations, [the] policy insures against risks of direct physical loss or damage to the property

insured herein occurring during the period of insurance.” Ex. A at p. 11, ¶ 7 of the Manuscript Form). The Policy has a coverage period dated March 1, 2020 through March 1, 2021 (Ex. A at p. 1) and covered Boomerjack’s Insured Properties listed in the policy on pages 47-48.

21. Boomerjack’s paid the required premiums under the Policy and performed all its obligations under the Policy.

B. THE COVID-19 PANDEMIC

22. COVID-19 is a new type of coronavirus. (<https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Basics>) The name COVID-19 refers is an abbreviation of “CO” for coronavirus, “VI” for virus, “D” for disease, and “19” for the year 2019. (*Id.*). It is not “pollution.” It is not bacteria. It is a virus. (*Id.*).

23. The World Health Organization declared COVID-19 outbreak a pandemic. The President of the United States declared a nationwide emergency due to COVID-19.

24. As of October 29, 2020, the Center for Disease Control (“CDC”) shows that there have been 8,834,393 cases of COVID-19 in the United States. (https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days).

25. COVID-19 has killed 227,045 people in the United States. (https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) Last accessed October 30, 2020).

26. Texas has had 886,820 cases and 17,819 deaths as of October 29, 2020. (https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9caf_c8b83) (Last accessed Oct. 30, 2020).

27. The existence and presence of COVID-19 triggers coverage under the Policy.

28. COVID-19 is a tangible, physical object that has caused: (a) physical damage at the Insured Properties and throughout surrounding areas and (b) physical loss of use and functionality of the Insured Properties.

29. COVID-19 causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time.

30. The CDC's website explains how COVID-19 spreads:

The virus that causes COVID-19 most commonly spreads between people who are in close contact with one another (within about 6 feet, or 2 arm lengths). It spreads through respiratory **droplets or small particles, such as those in aerosols, produced when an infected person coughs, sneezes, sings, talks, or breathes.**

- a. These **particles can be inhaled** into the nose, mouth, airways, and lungs and cause infection. **This is thought to be the main way the virus spreads.**
- b. Droplets can also land on surfaces and objects and be transferred by touch. A person may get COVID-19 by **touching the surface or object that has the virus on it** and then touching their own mouth, nose, or eyes. Spread from touching surfaces is not thought to be the main way the virus spreads.

It is possible that **COVID-19 may spread through the droplets and airborne particles that are formed when a person who has COVID-19 coughs, sneezes, sings, talks, or breathes.** There is growing evidence that droplets and airborne particles can remain suspended in the air and be breathed in by others, and travel distances beyond 6 feet (for example, during choir practice, in restaurants, or in fitness classes). In general, indoor environments without good ventilation increase this risk.

((<https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Basics>) (Question: How does the virus spread?) (Last accessed Oct. 30, 2020) (emphasis in original).

31. The World Health Organization ("WHO") has confirmed that COVID-19 can exist on objects or surfaces and that the transmission of COVID-19 can occur by indirect contact with surfaces in the immediate environment or with objects that were touched by an infected person hours before. The persistent physical presence of the COVID-19 virus has been affirmed by a study documented in The New England Journal of Medicine establishing that COVID-19 can

remain present in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel. The study's results further confirmed that individual can become infected with COVID-19 through indirect contact with surfaces or objects contacted by an infected person - whether or not the infected person was symptomatic.

32. COVID-19 is widespread in the state of Texas and, in each of the Insured Properties' counties.

33. In Dallas County, based upon information that is publicly available and accessible via the internet, Dallas County Health and Human Services ("DCHHS") reported 1,306 confirmed COVID-19 cases in March 2020. In April, there were 4,543 confirmed COVID-19 cases in Dallas County. In May, there were 6,109 confirmed cases. June saw 15,355 confirmed cases. In July, confirmed cases in Dallas County totaled 18,939. August confirmed cases totaled 8,924. And confirmed cases in September totaled 8,228. As of October 26, 2020, DCHHS reports 93,939 total confirmed cases of COVID-19 in Dallas County, including 1,101 confirmed deaths.

34. Tarrant County, Texas has experienced 66,110 cases of confirmed and suspected COVID-19 including 734 deaths². For the week ending on October 24, 2020, Tarrant County added 3808 new confirmed cases of COVID-19.

35. The Texas Department of State Health Services shows that Collin County, Texas has had 18,247 cases of COVID-19³ including 1,124 active cases as of October 30, 2020.

36. Kaufman County, Texas has had 3,594 cases of COVID-19 and has 120 active cases as of October 30, 2020⁴.

² (<https://www.tarrantcounty.com/en/public-health/disease-control--prevention/coronaviruas.html>) Last accessed Oct. 30, 2020.

³ (<https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83>) Last accessed Oct. 30, 2020

⁴ <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83>

37. Denton County, Texas has had 14,672 cases of COVID-19 including 906 active cases as of October 30, 2020⁵.

38. Given the widespread nature of COVID-19 in Texas and the fact that Boomerjack's employs approximately 1,000 Texans across the Dallas-Fort Worth area, it was inevitable that COVID-19 would be physically present at Boomerjack's. At each operational Insured Properties'⁶, location, at least one staff member tested positive for the virus. There is no doubt that COVID-19 was present at each of the Insured Properties. At times, each operational Insured Properties was shut down due to physical damage caused by COVID-19 and/or the risk of loss posed by COVID-19, or by order of a Civil Authority.

39. The widespread physical presence of COVID-19 in each Insured Properties' county and in proximity to the Insured Properties, and its propensity to cause actual physical damage and to present a risk of physical damage, caused civil authorities to prohibit access to the Insured Properties where the virus was presumed to exist and to pose a risk of transmission, illness and even death, if accessed to the public were permitted.

C. THE COVID-19 RESTRICTION ORDERS

40. In response to the Covid-19 pandemic, Civil Authorities from across the nation began ordering non-essential businesses to close. Texas Counties implemented these orders requiring closed or reduced business. These orders are hereinafter generally referred to as the "Covid-19 Restriction Orders."

41. The Covid-19 Restriction Orders mandated the closure of all "non-essential" businesses. These actions were taken as a direct result of physical damage, and the threat of

⁵ (<https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83>) Last accessed Oct. 30, 2020.

⁶ One Insured Property, the third Dallas location, is set to open in November 2020.

physical damage, caused by Covid-19. At times, the Covid-19 Restriction Orders prevented access to each of the Insured Properties.

42. These COVID-19 Restriction Orders required Boomerjack's business to take out or delivery only. At points in time, each operational Insured Properties was closed due to the COVID-19 Restriction Orders of the counties where the Insured Properties are located and/or orders of the Governor of the State of Texas. At certain points, each operational Insured Premise of Boomerjack's was closed due to the presence of Covid-19 or exposures related to Covid-19.

43. In Dallas County, Texas on March 12, 2020, Dallas County Judge Clay Jenkins issued a Declaration of Local Disaster for Public Health Emergency due to Covid-19, and also an order limiting the size of community gatherings. (Both the disaster declaration and Community Gatherings order from March 12, 2020 are attached hereto as Exhibit. B). Judge Jenkins issued an amended order on March 16, 2020 and mandated that restaurants be limited to providing take out or delivery options only. (Exhibit C). On March 31, 2020, Judge Jenkins issued the Dallas County "Stay Home Work Safe Order. (Exhibit D). This order recognized that Covid-19 "causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time." (Ex. D). The order mandated that all non-essential businesses "cease all activities within the County", and that individuals currently living within Dallas County "to shelter at their place of residence." (Ex. D). It also continued the limitations on restaurants. Judge Jenkins extended this order on April 3, 2020, April 6, 2020, and on April 23, 2020. (Exhibits E, F, and G respectively). The April 23, 2020 order extended the closure of non-essential businesses until May 15, 2020. Ex. G. Dallas County issued additional orders extending, adding, or modifying restrictions, many of which remain in effect as of the date this Petition was filed. Each of the operational Insured Properties in Dallas County were closed because of these COVID-19 Restriction Orders.

44. On March 13, 2020, in Tarrant County the County Judge issued a Declaration of Local Disaster due to Public Health Emergency and the County Commissioners issued a Renewal of Declaration of Local Disaster due to Public Health Emergency on March 17, 2020. (Exhibit H, March 18, 2020 order). The March 18, 2020 Order specifically mandated that restaurants like Boomerjack’s could only provide “take out, delivery, or drive-in, or drive-through services”. Id. at ¶ 5. It also forced bars and taverns to close. Id. at ¶ 6. Tarrant County issued a series of orders extending this state of emergency, and, currently, the local disaster order has been extended until November 30, 2020. (Ex. I, August 25, 2020 Order). The COVID-19 Restriction orders necessitated all Insured Properties in Tarrant County to close for a period.

45. Because of COVID-19, Collin County declared a state of disaster on March 16, 2020, and restaurants were limited to take-out and delivery on March 24, 2020. Exhibit J. This order was rescinded on March 31, 2020. Id. The COVID-19 orders in Collin County, required all Boomerjack’s locations to temporarily cease or to drastically reduce operations for a period of time.

46. Kaufmann County issued its disaster declaration on or around March 18, 2020. On March 24, 2020, restaurants were limited to takeout or delivery only due to Covid-19. (Exhibit K, Kaufmann County Order dated March 24, 2020). Kaufmann County issued additional orders extending, adding or modifying restrictions. On June 29, 2020, Kaufmann County required businesses to develop health and safety plans. (Attached hereto as Exhibit L.) Kaufmann County’s COVID-19 Restriction Orders necessitated that each Insured Properties in Kaufmann County was closed for a period or significantly reduced the amount of business.

47. Denton, County declared a state of emergency due to Covid-19 on March 13, 2020. Ex. M. Local and Statewide orders required Boomerjack's Insured Properties in Denton County to close for a period of time and/or drastically reduce operations.

48. Statewide orders required closure and/or reductions in Boomerjack's operational Insured Properties. Since March 13, 2020, Texas's Governor Abbot issued and extended a disaster declaration for Texas continuing up until September 2020. (Exhibit N, October 7, 2020 Executive Order, to date the latest Executive Order). On March 13, 2020, the Governor of Texas issued executive order "GA 08" a disaster proclamation declaring that the novel coronavirus (Covid-19) posed an imminent threat of disaster for all counties in the State of Texas. (Exhibit O) Executive Order GA 08 mandated that Texans shall avoid gathering in groups of more than 10 people, and it limited restaurants like Boomerjack's to delivery and take-out service only. Executive Order GA 08 was superseded by Executive Order GA 14 and continued restrictions on non-essential businesses until April 30, 2020. (Exhibit P). Since that time Governor Abbott has issued several different Executive Orders allowing Boomerjack's Insured Properties to operate at 25%, 50%, or 75% capacity. Currently, Boomerjack's locations are limited to operate at 75% capacity. Ex. N.

49. Since March of 2020, Boomerjack's Insured Properties have operated at drastically reduced capacity/occupancy, and/or been completely closed due to local and/or Statewide COVID-19 Restriction Orders.

50. The issuances of these Covid-19 Restriction Orders and other similar orders coincided with a massive, national effort to ramp up production of ventilators and personal protective equipment.⁷

⁷ <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>

51. The stated goal of these nationwide orders was to “flatten the curve” of the virus, not eliminate the virus. In invoking the Defense Production Act at or our around the time of the original orders, President Trump wrote that “while the Federal Government, along with State and local governments, have taken preventive and proactive measures to slow the spread of the virus and to treat those affected, the spread of COVID-19 within our Nation’s communities threatens to strain our Nation’s healthcare system.”⁸

52. The Covid-19 Restriction Orders are acts of civil authorities taken in response to concerns regarding availability of healthcare resources and personnel to respond, should a surge in illness outpace available capacity.

53. The President specifically provided in the March 18 Executive Order that it provided the Secretary of Health and Human Services authority under the Defense Production Act to ensure “proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including all applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States.”⁹

54. As a direct and proximate result of the Covid-19 Restriction Orders, access to Boomerjack’s insured properties has been reduced, limited, and/or prohibited.

55. Boomerjack’s losses or damages occurred because of the Covid-19 Restriction Orders. Boomerjack’s has incurred, and continues to incur, as substantial loss of business income and additional expenses covered under the Policy.

56. As a result of Defendant’s denial of coverage, Boomerjack’s has suffered and will continue to suffer significant losses and damages.

⁸ *Id.*

⁹ *Id.*

D. BOOMERJACK’S LOSSES CAUSED BY COVID-19 AND THE COVID-19 RESTRICTION ORDERS ARE COVERED LOSSES UNDER THE POLICY

57. The Policy is an “All Risk” policy in which Defendant agrees to provide coverage for “All Risk of Direct Physical Loss or Damage . . .” (Ex. A p. 1 of the Policy’s Declarations). The Policy further states that it “insures against risks of direct physical loss or damage to property insured herein occurring during the period of insurance . . .” Ex. A at p. 11 of the manuscript form. The Policy is not limited to actual physical loss or damage, but it specifically includes the *risk* of physical loss or damage.

58. The presence of COVID-19, and the risk of the presence of COVID-19, is “physical loss or damage to property.” As Judge Jenkins stated, COVID-19 “is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.” Ex. D. The physical presence of COVID-19 creates property damage, or, at minimum, the risk of loss or property damage. Boomerjack’s has had employees test positive at each of the insured locations.

59. Since March 2020, every Boomerjack’s location in the Dallas Fort-Worth area has either been closed and/or operated at a reduced capacity due the physical presence or COVID-19, the risk of the physical presence of COVID-19, and/or to the COVID-19 Restriction Orders and the physical presence of COVID-19 within the Policy’s five-mile radius from each Insured Premise. It caused great interruption to Boomerjack’s business. Boomerjack’s Policy should provide coverage under the terms of the Policy.

60. The Policy provides business interruption coverage as follows:

BUSINESS INTERRUPTION

(1) Loss of earnings resulting from necessary interruption of business conducted by the Insured, whether total or partial, caused by direct physical loss, damage, or destruction by any of the perils insured herein during the period of insurance, to property insured including while in transit.

(2) If such loss occurs during the period of insurance, it shall be adjusted on the basis of the actual loss sustained by the Insured, consisting of the net profit which is thereby prevented from being earned and of all charges and expenses, including ordinary payroll, only to the extent that these charges and expenses must necessarily continue during the interruption of business and only to the extent to which such charges and expenses would have been incurred had no direct physical loss or damage to Insured Properties occurred.

“Ordinary payroll” is defined to be the entire payroll expense for all employees of the Insured except officers, executives, department managers, employees under contract, and other important employees.

As respects the payroll and payroll related expense of all employees of the Insured, the Insured shall be the sole judge as to the necessity of continuance.

(3) In the event of direct physical loss, damage, or destruction to Insured Properties, caused by any of the perils insured herein which results in an interruption of research and development activities which in themselves would not have produced income during the Period of Recovery, this policy shall insure the actual loss sustained of the continuing fixed charges and expenses, including payroll, directly attributable to such research and development activities.

Ex. A at p. 1-3 of the Manuscript Form, ¶ 6(B), sub paragraphs 1-3.

61. The Policy further provides coverage for “Extra Expense.”

C. EXTRA EXPENSE

(1) Extra Expense reasonably and necessarily incurred by the Insured resulting from direct physical loss or damage to Insured Properties by an insured peril during the period of insurance.

(2) “Extra Expense” means the excess of the total cost during the Period of Recovery chargeable to the operation of the Insured’s business over and above the total cost that would normally have been incurred to conduct the business during the same period had no physical loss or damage insured by this policy occurred.

(Ex. A at p. 4 of the Manuscript Form).

62. COVID-19 has caused Boomerjack’s to suffer business interruption loss as a direct result of the risk of physical loss, actual physical loss, and damage of the type insured under the Policy at each of the Insured Properties. It has also caused Boomerjack’s to incur extra expenses

to continue even limited operations that are beyond those expenses that would have normally been incurred in conduct business absent the presence of COVID-19. These losses and expenses trigger coverage under the Policy's Business Interruption and Extra Expense Provisions.

63. The COVID-19 virus is a tangible, physical object that has caused: (a) physical damage at the Insured Properties and throughout surrounding areas and (b) physical loss of use and functionality of the Insured Properties.

64. The Amended Order of Dallas County Judge Clay Jenkins dated April 3, 2020 expressly states that the COVID-19 virus "is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time." Amended Order of County Judge Clay Jenkins: Safer at Home Order (April 3, 2020). Ex. E. Similarly, Judge Hidalgo of Harris County, Texas recognized the same in Harris County's COVID-19 Restriction Order by stated that the "Covid-19 virus is contagious and spreads through person-to-person contact, especially in group settings", and "COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time." Exhibit. Q Thus, as certain COVID-19 Restriction Orders make clear, the virus is causing physical damage to property through its presence on surfaces. Additionally, courts have repeatedly held that where the insured is prevented from using the business for its intended purpose, that loss is considered a "direct physical loss."

65. Employees at each Boomerjack's location have tested positive for COVID-19 at varying points in time. COVID-19 is and/or has been physically present at Boomerjack's. The virus's presence itself causes "property damage." Therefore, losses resulting from Covid-19 as a "physical loss" are covered under the Business Interruption Coverage.

66. Likewise, there is coverage under Boomerjack's "Civil Authority" coverage.

67. The policy contains coverage for business interruptions caused by the actions of a Civil Authority. The Policy reads:

Interruption by Civil or Military Authority: This policy is extended to insure the actual loss sustained during the period of time when, as a direct result of physical damage by a peril insured against, occurring within the distance specified in the Schedule of Program Sublimits of the premises of the Insured, access to real or personal property of the Insured is impaired by order or action of civil or military authority issued in connection with or following physical damage by a peril insured against. The Insurers' liability shall not exceed the lesser of the number of consecutive days.

Ex. A at p. 6-7, Section F(5).

68. The policy contains coverage for Ingress/Egress. The Policy reads:

Ingress/Egress: This policy is extended to insure the actual loss sustained during the period of time when, as a direct result of physical damage by a peril insured against, occurring within the distance specified in the Schedule or Program Sublimits of the premises of the Insured, access to or access from Insured Properties is prevented. The insurer's liability shall not exceed the lesser of the number of consecutive days.

Ex. A at p. 6-7, Section F(6).

69. Both the "Civil Authority" and "Ingress/Egress" coverages are subject to a five-mile limitation. (Ex. A at Page 6 of the Policy's "Schedule or of Program Sublimits").

70. There has been "physical damage by a peril insured against" within five miles of each Boomerjack's location. COVID-19 is widespread across the Dallas Fort-Worth area. Also, each of the seventeen Insured Properties have medical centers who test for and/or treat COVID-19 Patients, COVID-19 Testing locations, or schools/Universities with confirmed cases within five miles according to Google Maps. See below:

- **131 E Stacy Rd Fairview TX 75069**
 - 2.6 miles away from Medical Center McKinney which treats patients with Covid-19. They recently had a COVID-19 positive patient leave after over 100 days in the hospital.
<https://medicalcityhealthcare.com/about/newsroom/covid-19-patient->

leaves-medical-city-mckinney-after-103-days?location=medical-city-mckinney

- 2.3 miles away from Texas Health Presbyterian Hospital Allen.
- 3.3 miles from Legacy ER and Urgent Care which offers COVID-19 testing.
- **10250 E Technology Blvd Dallas TX 75220**
 - 4.7 miles from UT Southwestern Medical Center (tests and treats for Covid-19)
 - Within five miles of the University of Dallas which has reported positive COVID-19 Cases. (<https://www.udallas.edu/coronavirus/covid-case-report.php>) (Last accessed Nov. 12, 2020).
- **9540 Garland Rd C406 Dallas TX 75218**
 - Less than one mile from City Hospital at White Rock.
 - MedPost Urgent Care shares a wall with this Boomerjack's location. It offers COVID-19 testing.
 - Reinhardt Elementary school is within five miles of this location and has had confirmed positive cases.
- **1200 Davis Blvd #104 Mesquite TX 75149**
 - 1.2 miles to Mesquite Specialty Hospital and Dallas Regional Center Emergency room
 - Across the street from Mesquite High School has approximately 2,634 students. (<https://schools.texastribune.org/districts/mesquite-isd/mesquite-high-school/>). Mesquite High School had its first COVID-19 cases in or around September 2020. (<https://mesquitegazette.com/first-cases-of-covid-19-at-mesquite-isd-schools-reported-p470-121.htm>) (last accessed Nov. 12, 2020).
 - CVS Pharmacy is 2.5 miles away and it offers COVID-19 testing.
 - Baylor Scott & White Medical center is 2.8 miles away and offers COVID-19 testing.
- **6155 Samuel Blvd. #200 Dallas TX 75228**
 - Within five miles of City Hospital at White Rock.
 - Within five miles of Baylor University Medical Center Dallas
 - Within five miles of Rowe Elementary which has had at least one positive case of COVID-19.
(<https://app.powerbi.com/view?r=eyJrIjoiMzdiNmJkMDktNDc1NS00NGQzLTljYzAtMjkzOGEzNTYwZjZkIiwidCI6IjgwMGEwOTRiLTYwYzgtNDJINS1hZmU2LTZjY2I2MzA3NTBjMiIsImMiOiN9>) (Last Accessed Nov. 12, 2020).
- **1892 W. Moore Terrell TX 75160**
 - 1.1 miles from Terrell Urgent Care who offers COVID-19 testing.

- Within 5 miles of Terrell High School which has had confirmed positive cases of COVID-19 (<http://www.terrellisd.org/covid-19>)(Last accessed November 12, 2020).
- **407 W. University Denton TX 76201**
 - Texas Health Presbyterian is within five miles. And they treat covid patients.
 - Texas Women’s University is within 5 miles and has had confirmed cases. (https://docs.google.com/document/d/1sRt5YveD4nRXM7eNldLQxLrYa_pxdRpg0UvaLgPDyKVw/edit) (last accessed November 12, 2020).
- **2600 W 7th #126 Fort Worth TX 76107**
 - Within five miles of the University of North Texas Health Science Center at Fort Worth which has had confirmed positive cases. (<https://www.unthsc.edu/coronavirus/covid-19-cases-at-hsc/>) (Last accessed Nov. 12, 2020).
- **2300 W Airport Frwy #222 Bedford TX 76022**
 - Within five miles of Texas Health Harris Methodist Hospital which treats Covid-19 patients.
 - Within five miles of Bedford Junior High School which has had confirmed positive cases of COVID-19 (<https://www.hebisd.edu/Page/1684>) (Last accessed November 12, 2020).
- **522 Lincoln Square Arlington TX 76011**
 - Within five miles from Texas Health Arlington Hospital which treats Covid-19 positive Patients
 - Within five miles of the University of Texas at Arlington which has reported faculty and students with COVID-19 (<https://www.uta.edu/announcements/coronavirus/confirmed-cases>) (Last accessed Nov. 12, 2020).
- **158 W FM 544 #136 Murphy TX 75094**
 - Within five miles of “Baylor Scott & White Emergency Hospital”
 - Within five miles of McMillen High School in Murphy, Texas which has had confirmed cases of COVID-19 (<https://www.pisd.edu/coviddashboard>) (Last accessed Nov. 12, 2020).
- **4000 Highlands Blvd.#133 Arlington TX 76018**
 - Within five miles of the USMD Hospital at Arlington
 - Within five miles of Williams Elementary School in Arlington Texas which has reported COVID-19 cases. (<https://www.aisd.net/covid-19-dashboard/>) (Last accessed Nov. 12, 2020)
- **6701 Fossil Bluff Dr Fort Worth TX 76137**
 - Within five miles of Medical City Healthcare

- Within five miles of Fossil Hill Middle School which has reported confirmed cases of COVID-19 (<https://veoci.com/v/p/dashboard/uyn4axmq7p>) (last accessed Nov. 12, 2020).
- **2250 W Airport Frwy. #133 Bedford TX 76022**
 - Texas Health Harris Methodist is within 5 miles.
 - Within five miles of Bedford Junior High School which has had confirmed positive cases of COVID-19 (<https://www.hebisd.edu/Page/1684>) (Last accessed November 12, 2020).
- **6001 Interstate 20 Fort Worth TX 76132**
 - Life Care Hospital of Fort Worth is within five miles.
 - Fort Worth Country Day School is within five miles and has confirmed positive cases of COVID-19 (<https://www.fwcd.org/return-to-learning/covid-19-updates>) (Last accessed November 12, 2020).
- **201 West State Hwy 114 Grapevine TX 76051**
 - Within five miles from Baylor, Scott & White Health
 - Within five miles of Grapevine High School which reports positive cases (https://www.gcisd.net/departments/health_services/coronavirus_covid-19/gcisd_covid-19_cases) (Last accessed November 12, 2020).
- **5100 Belt Line Rd, Suite 401 Addison TX 75254**
 - Dallas Medical Center is approximately one mile away.
 - **Greenhill School of Addison, Texas reports COVID-19 cases.** (<https://www.greenhill.org/roadmap-to-reopening>)

71. As detailed above, COVID-19 is causing property damage across the nation, including every county and city where there is an Insured Property. COVID-19 is a “peril insured against” because it is not excluded in the policy. The Policy specifically states that it “insures against risks of direct physical loss or damage to property insured herein occurring during the period of insurance . . .” Ex. A at p. 11

72. Although the Policy contains several different exclusions, the Policy in no way limits or excludes coverage for physical loss or damage resulting from a virus such as Covid-19.

73. The presence of the Covid-19 virus at the Insured Properties and property within a five mile radius of each of the Insured Properties, in proximity to each location, and throughout

each county where Boomerjack's has an Insured Premise caused a physical loss to properties which were deprived of their functionality and rendered unusable.

74. Because of the presence of the virus and because of the restrictions imposed by the COVID-19 Restriction Orders issued due to the presence of the COVID-19, Boomerjack's suffered a physical loss. Boomerjacks was required to drastically reduce its business. Customers were not able to access the restaurants due to the actions of Civil Authorities.

75. All locations listed as an Insured Properties in the Policy, had cases of COVID-19 within a five-mile radius. Therefore, the Civil Authority and Ingress/Egress coverage is triggered.

76. To date, Defendant has denied Boomerjack's coverage under the Policy by failing to issue any payment for losses Boomerjack's incurred for almost nine months as of the time of this filing.

E. DEFENDANT'S WRONGFUL DENIAL OF COVERAGE

77. The Covid-19 Restriction Orders forced Boomerjack's to cease and/or limit its business operations at its Insured Properties indefinitely. As a result of the limitations, Boomerjack's incurred, and continues to incur, substantial losses of Business Income.

78. Boomerjack's made a timely claim for coverage under the Policy on March 20, 2020.

79. The Policy contains no exclusions pertaining to losses caused by viruses or communicable diseases.

80. The Policy does not clearly and unambiguously require physical deformation or alteration of tangible property, nor does the Policy clearly and unambiguously subject coverage at issue in this litigation to Policy exclusionary language.

81. However, on May 6, 2020, Defendant sent Boomerjack's a "reservation of rights letter" concerning its insurance claim and sent an amended reservation of rights letter on May 19, 2020. Attached hereto as Exhibits R and S.

82. In its reservation of rights, Defendant recognized that the policy provided business interruption, civil authority, and extra expense coverage, but cited the policy's "Pollution Exclusion" and "Loss of Market Exclusion." Ex S. None of the cited exclusions apply to the losses incurred by Boomerjack's as a result of the COVID-19 Restriction Orders.

83. Despite Boomerjack's making its claim in March, Defendant has not paid any benefits under the policy.

IX **CAUSES OF ACTION**

A. DECLARATORY RELIEF

84. Boomerjack's repeats and re-alleges each allegation in this Petition and incorporates each allegation into this Count, as if set forth at length herein, in its entirety.

85. Under Texas Civil Practice and Remedies Code § 37.003 et seq., the Court may declare rights, status, and other legal relations whether further relief is or could be claimed. The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

86. An actual controversy has arisen between Boomerjack's and Defendant as to the rights, duties, responsibilities and obligations of the parties in that Defendant disputes and denies one or more of the following facts: a) that there was direct physical loss or damage to the insured properties, b) that there has been actions of civil authority prohibiting access to the insured properties, c) that the physical loss or damage to the insured properties came about from a Covered Cause of Loss, d) that Boomerjack's damages and loss is not excluded by the Policy's exclusions

concerning pollution and loss of market; and e) that Boomerjack's is entitled to coverage for its Business Income and Extra Expense losses under the Policy.

87. Resolution of the duties, responsibilities and obligations of the parties is necessary as no adequate remedy at law exists and a declaration from the Court is needed to resolve the dispute and controversy.

88. Boomerjack's seeks a Declaratory Judgment to determine the following:

1. whether the Covid-19 Restriction Orders constitute a prohibition of access to the Insured Properties by a Civil Authority as defined in the Policy;
2. whether the Covid-19 Restriction Orders caused a direct physical loss or damage to the Insured Properties;
3. whether the Covid-19 Restriction Orders caused damage to on-premises dining establishments and other businesses in the immediate area of the Insured Properties;
4. whether Boomerjack's losses incurred in connection with the Covid-19 Restriction Orders and the interruption of its businesses are insured losses under the Policy;
5. whether the Covid-19 Restriction Orders triggered coverage under the Policy; and
6. whether the Policy's "Pollutants" and "Loss of Market" exclusions are inapplicable.

X
ATTORNEYS' FEES

89. According to Texas Civil Practice and Remedies Code § 37.009, "the court may award costs and reasonable and necessary attorney's fees as are equitable and just."

XI.
DISCOVERY REQUESTS

90. Pursuant to Texas Rule of Civil Procedure 194, Boomerjack's requests that Defendant disclose, within fifty (50) days of the service of this request, the information or material described in Rule 194.2.

XII
REQUESTED RELIEF

WHEREFORE, Boomerjack's prays for relief on the entire Petition, as follows:

Judgment to be entered against Defendant on all causes of action of this Petition as pleaded against Defendant, including but not limited to:

- a.** For a declaration that the Covid-19 Restriction Orders constitute a prohibition of access to the Insured Properties by a Civil Authority as defined in the Policy;
- b.** For a declaration that the Covid-19 Restriction Orders caused a direct physical loss or damage to the Insured Properties;
- c.** For a declaration that the Covid-19 Restriction Orders caused damage to on-premises dining establishments and other businesses in the immediate area of the Insured Properties;
- d.** For a declaration that Boomerjack's losses incurred in connection with the Covid-19 Restriction Orders and the interruption of its businesses are insured losses under the Policy;
- e.** For a declaration that the Covid-19 Restriction Orders triggered coverage under the Policy;
- f.** For a declaration that the Policy's exclusions are inapplicable;
- g.** For attorneys' fees as pleaded;
- h.** For costs;

- i. For any other and further relief, either in at law or in equity, to which Boomerjack's may show itself to be justly entitled.

XIII.
JURY DEMAND

Boomerjack's hereby demands a trial by jury on all claims so triable.

Respectfully Submitted,

FREESE & GOSS, PLLC

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/s/ Kevin Edwards

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ATTORNEYS FOR PLAINTIFF

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Brenda Holland on behalf of Tim Goss
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Status as of 11/20/2020 2:01 PM CST

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