

PARTIES

- 1
2 1. Plaintiff is a California Limited Liability Company with its principal place of
3 business located at 1911 West Malvern Avenue, City of Fullerton, Orange
4 County, State of California.
- 5
6 2. Plaintiff's sole member is Kristina Nguyen who is a citizen of Orange County,
7 California.
- 8
9 3. Plaintiff, owns, operates, manages, and/or controls the business known as
10 Menchie's Frozen Yogurt, at the premises it owns, rents or occupies located
11 at 1911 W. Malvern Avenue, City of Fullerton, Orange County, State of
12 California.
- 13
14 4. Plaintiff is a dine-in self-serve frozen yogurt shop.
- 15
16 5. Defendant is a New Hampshire corporation and maintains its principal place
of business in the State of Massachusetts.
- 17
18 6. At all times, relevant Defendant was licensed to do business in the State of
19 California, selling property and casualty insurance policies to restaurants and
20 other hospitality businesses.
- 21
22 7. Defendant transacts the business of insurance in the State of California and
the basis of this suit arises out of such conduct.
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JURISDICTION AND VENUE

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2 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a). The amount in
3 controversy exceeds \$75,000, exclusive of interest and costs and there is
4 diversity of citizenship among the parties.

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6 9. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) as it is the judicial
7 district in which a substantial part of the events or omissions giving rise to the
8 claim occurred.

9
10 10. Defendant regularly conducts business in this District as a licensed insurance
11 company in the State of California.

12
COVID-19 PANDEMIC

13 11. As the Court is undoubtedly aware, SARS-CoV-2, the novel coronavirus
14 that causes the COVID-19 disease, has caused a global pandemic.

15
EXECUTIVE ORDERS

16 12. On March 4, 2020 California Governor, Gavin Newsom, declared a state of
17 emergency relating to COVID-19.¹

18 13. On March 12, 2020, California Governor Gavin Newsom issued Executive
19 Order N-52-20, ordering California residents to follow guidance from state
20 and local public health officials including social distancing measures.

21 14. On March 19, 2020, California Governor, Gavin Newsom, issued Executive
22 Order N-33-20 also known as the “Stay at Home Order” that would be in
23 effect until further notice.

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¹ See all California Executive Orders available at <https://www.gov.ca.gov/category/executive-orders/>

1 15.Executive Order N-33-20 ordered that, among other things, non-essential
2 businesses and operations to cease.

3 16.Frozen yogurt shops were not among those essential businesses and
4 operations.

5 17.Plaintiff was ordered to close and closed business from March 19, 2020 until
6 May 1, 2020 by the COVID-19 Executive Orders.

7 18.On May 1, 2020, Plaintiff re-opened pursuant to local restrictions which
8 required all patrons to wear face masks, gloves, maintain a six-foot distance
9 from one another, and were not allowed to serve themselves.

10 19.Due to the existence of the COVID-19 Executive Orders issued by California
11 Governor Gavin Newson that ordered the closing of non-essential businesses,
12 including frozen yogurt shops, the Covered Property was not able to function
13 as intended by Plaintiff and Defendant.

14 20.Plaintiff lost the use of the Covered Property, and as a result, Plaintiff was not
15 able to provide its services at the Covered Property and necessarily had to
16 suspend business activities occurring at the Covered Property.

17 21.Plaintiff's loss of use of the Covered Property and Covered Property's
18 inability to function as intended by Plaintiff and Defendant, is a direct physical
19 loss. As a result of this direct physical loss, Plaintiff has suffered loss of
20 business income, has incurred extra expense to minimize the suspension of
21 business and continue its operations, and has suffered other losses and
22 damages.

23 **POLICY**

24 22.On or about January 10, 2020, Plaintiff renewed its contract of insurance with
25 Defendant in the event of a covered loss or damage.

1 23. Defendant issued Plaintiff a Businessowners insurance policy (“Policy”)
2 bearing policy number OD3-D857801. The Policy has an effective date of
3 March 15, 2020 to March 15, 2021. A copy of the Policy in Plaintiff’s
4 possession is attached hereto as Exhibit A. A certified copy of the Policy is in
5 the exclusive control of Defendant, and Plaintiff expects Defendant will
6 produce the certified copy in discovery.

7 24. Under the Policy, Plaintiff agreed to make payments to Defendant in exchange
8 for Defendant’s promise to indemnify Plaintiff for losses including, but not
9 limited to, business income losses at the Covered Property.

10 25. At all times material the Policy was in full force and effect and provided
11 coverage to Plaintiff.

12 26. Section I of the Policy includes coverage for Business Income. (Ex. A at 30).

13 27. Under the Business Income heading, the Policy states that:

14 We will pay for the actual loss of Business Income you sustain
15 due to the necessary “suspension” of your “operations” during
16 the “period of restoration.” The “suspension” must be caused by
17 direct physical loss of or damage to a described premises shown
18 in the Declarations and for which a Business Income Limit
Insurance is shown in the Declarations. The loss or damage must
be caused by or result from a Covered Cause of Loss.

19 (Ex. A at 30).

20
21 28. The Policy defines “suspension” in part as, “[t]he partial slowdown or
22 complete cessation of your business activities.” (Ex. A at 79).

23 29. The Policy defines “operations” as, “[y]our business activities occurring at the
24 described premises.” (Ex. A at 77).

25 30. The Policy defines “period of restoration” in part as,

1 [T]he period of time that: (1) begins: (a) After the number of
2 hours shown as the Business Income Waiting Period in the
3 Declarations after the time of direct physical loss or damage for
4 Business Income Coverage; or (b) Immediately after the time of
5 direct physical loss or damage for Extra Expense Coverage;
6 caused by or resulting from any Covered Cause of Loss at the
7 time described premises.

8 (Ex. A at 77).

9 31. Under the heading Covered Causes of Loss, the Policy defines Covered
10 Causes of Loss as “Risks of Direct Physical Loss unless the loss is a.
11 [e]xcluded in SECTION I – PROPERTY, B. Exclusions; or b. [l]imited in
12 SECTION I – PROPERTY, A. Coverages, 4. Limitations.”

13 (Ex. A at 26).

14 32. The Policy has an exclusion for “[a]ny virus, bacterium or other
15 microorganism that includes or is capable of inducing physical distress, illness
16 or disease.” (Ex. A at 62).

17 33. The Policy’s exclusion due to virus or bacteria does not apply to the business
18 losses incurred by Plaintiff here because they are proximately caused by the
19 COVID-19 Executive Orders issued in response to the COVID-19 pandemic.

20 34. The Policy also provides for extra expenses incurred as a result of direct
21 physical loss, and states in part:

22 We will pay the necessary Extra Expense you incur during the
23 “period of restoration” that you would not have incurred if there
24 had been no direct physical loss or damage to the property at the
25 described premises.

(Ex. A at 32).

35. The Policy also provides for coverage of loss of business income and extra
expense under a “civil authority” provision, and states in part:

1 [W]e will pay for the actual loss of Business Income you sustain
2 and necessary Extra Expense caused by action of civil authority
3 that prohibits access to the described premises due to direct
4 physical loss or damage to property within one mile of the
described premises, provided that both of the following apply:

- 5 (a) Access to the area immediately surrounding the damaged
6 property is prohibited by civil authority as a result of the
7 damage, and the described premises are within that area
8 but are not more than one mile from the damaged property;
9 (b) The action of civil authority is taken in response to
10 dangerous physical conditions resulting from the damage
or continuation of the Covered Cause of Loss that caused
11 the damage, or the action is taken to enable a civil
12 authority to have unimpeded access to the damaged
13 property.

14 (Ex. A at 33).

15 36. The Policy also has a “civil authority” endorsement that modifies the
16 foregoing and states, in part, that:

17 Civil Authority Coverage for Business Income will begin 72
18 hours after the time of the first action of civil authority that
19 prohibits access to the described premises and will apply for a
20 period of up to four consecutive weeks from the date on which
21 such coverage began.

22 (Ex. A at 33).

23 37. The actions and prohibitions by California Governor Gavin Newsom, and his
24 COVID-19 Executive Orders, are actions and prohibitions by a civil authority.

25 38. The COVID-19 Executive Orders constitute a prohibition of access to
Plaintiff’s Covered Property.

39. The COVID-19 Executive Orders trigger coverage under the terms of the
Policy.

1 40.The Policy provides coverage to Plaintiff for any current and future civil
2 authority closure of its business due to physical loss or damage directly from
3 the COVID-19 pandemic under the civil authority coverage parameters.

4 41.The Policy provides business income coverage in the event that the COVID-
5 19 pandemic directly or indirectly causes a loss or damage at the insured
6 premises or immediate area of the Covered Property.

7 42.Plaintiff faithfully paid policy premiums to Defendant to provide all coverage
8 included in the Policy.

9 43.Pursuant to the terms of the Policy, Defendant agreed to pay Plaintiff for
10 Plaintiff's losses detailed herein.

11 44.Plaintiff duly submitted a claim, Number 19-00673746 001, to Defendant.

12 45.May 18, 2020, Defendant denied Plaintiff's claim as not being covered by the
13 Policy.

14 46.Although requested to do so, to date, Defendant has and continues to fail and
15 refuse to pay Plaintiff for the full amount due and owing under the Policy for
16 all of its losses and damages.

17 **COUNT I**
18 **DECLARATORY JUDGMENT**

19 47.Plaintiff repeats and realleges paragraphs one (1) through forty-four (44) of
20 Plaintiff's Complaint as the allegations in Count I of Plaintiff's Complaint.

21 48.Plaintiff and Defendant are in contractual privity with one another.

22 49.Plaintiff has a tangible legal interest under a written contract.

23 50.Defendant has an interest adverse to Plaintiff's interest.
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1 51.Plaintiff has specifically pled facts proving the existence of an actual, current
2 controversy regarding these interests.

3 52.Plaintiff has an interest in the actual controversy.

4 53.There is a fundamental disagreement between the parties admitting of an
5 immediate and definitive termination of the parties' rights, the resolution of
6 which will aid in the termination of the controversy or some part thereof.
7

8 WHEREFORE, Plaintiff, JKR ENTERPRISES, LLC, d/b/a MENCHIE'S
9 FROZEN YOGURT, prays for judgment against Defendant, THE HANOVER
10 INSURANCE COMPANY, in a Declaration that:
11

- 12 a. Plaintiff has sustained direct physical loss;
- 13 b. Plaintiff's loss is a covered loss which is not excluded or limited by the
14 Policy;
- 15 c. Plaintiff's loss is a covered loss resulting from an act or decision of a
16 person, group, organization, or governmental body, and is therefore a
17 covered resulting loss;
- 18 d. Plaintiff has sustained a covered loss of business income due to the
19 necessary suspension of its operations during the period of restoration;
- 20 e. The suspension of operations was caused by a direct physical loss to
21 property of the Covered Property;
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- 1 f. Plaintiff incurred extra expense to avoid or minimize the suspension of
2 business and continue operations; and
3 g. Any further and additional relief as the Court may deem to be appropriate.
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5 **COUNT II**
6 **BREACH OF CONTRACT**

7 54.Plaintiff repeats and re alleges paragraphs one (1) through forty-four (44) of
8 Plaintiff's Complaint as the allegations in Count II of Plaintiff's Complaint.

9 55.During the Policy period of March 15, 2020 to March 15, 2021 Plaintiff
10 sustained direct physical loss to the Covered Property from a covered cause
11 of loss. Plaintiff also sustained a covered cause of loss resulting from an act
12 or decision of a person, group, organization, or a governmental body, and
13 Plaintiff's loss is therefore a covered resulting loss. Plaintiff also sustained a
14 covered cause of loss resulting from an act or prohibition of a civil authority,
15 and Plaintiff's loss is therefore a covered resulting loss. Plaintiff also suffered
16 loss of business income and extra expense, in addition to other losses and
17 damages.
18

19
20 56.Plaintiff notified Defendant of its losses.

21
22 57.Plaintiff complied with all conditions precedent o entitle Plaintiff to recover
23 under the Policy, or Defendant waived compliance with such conditions.
24
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1 58. Defendant has failed to provide coverages for Plaintiff's losses and has failed
2 to pay for all of Plaintiff's losses. Defendant has denied all coverage for
3 Plaintiff's claim. A copy of Defendant's denial letter of May 18, 2020 is
4 attached as Exhibit B.

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6 59. Defendant's failure to pay for Plaintiff's covered losses is a material breach
7 of contract.

8 60. Defendant further breached its contract with Plaintiff by:

- 9
- 10 a. Failing to fully investigate the loss;
 - 11 b. Conducting a biased and outcome-oriented investigation of the loss;
 - 12 c. Not promptly paying Plaintiff all benefits owed as a result of the
13 covered loss;
 - 14 d. Failing to pay for all resulting damage; and
 - 15 e. Not putting Plaintiff in the position it would have been in had
16 Defendant timely performed all of its contractual duties.
- 17

18 61. As direct and proximate result of Defendant's breach of contract, Plaintiff:

- 19
- 20 a. Suffered and will continue to suffer loss of business income and extra
21 expenses;
 - 22 b. Incurred and will incur in the future loss of business income and extra
23 expenses;
 - 24 c. Suffered and will continue to suffer consequential damages;
- 25

- 1 d. Is entitled to an award of prejudgment interest, taxable costs, and
2 investigatory fees; and
3 e. Incurred other expenses as a result of Defendant's breach of contract.

4 WHEREFORE, Plaintiff, JKR ENTERPRISES, LLC, d/b/a MENCHIE'S
5 FROZEN YOGURT, prays for judgment against Defendant, THE HANOVER
6 INSURANCE COMPANY, for:
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- 8 a. Actual damages;
9 b. Attorney's fees and costs;
10 c. Prejudgment and post judgment interest; and
11 d. Any further and additional relief as the Court may deem to be
12 appropriate.
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17 Respectfully submitted,

18 DATED: July 22, 2020

AGRUSS LAW FIRM, LLC

19
20 By /s/Michael S. Agruss
21 Michael S. Agruss
22 Attorney for Plaintiff
JKR ENTERPRISES, LLC
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