UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 21-1186

SANDY POINT DENTAL, P.C.,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

BRIEF OF APPELLEE THE CINCINNATI INSURANCE COMPANY

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Appellate Court No: 21-1186

Short Caption: Sandy Point Dental, P.C. v. The Cincinnati Ins. Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Cincinnati Ins. Co.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Litchfield Cavo LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Cincinnati Financial Corp.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Cincinnati Financial Corp.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Daniel G. Litchfield Date: 02/22/2021

Attorney's Printed Name: Daniel G. Litchfield

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Alan I. Becker Date: 3/11/2021

Attorney's Printed Name: Alan I. Becker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Brian M. Reid Date: Feb. 22, 2021

Attorney's Printed Name: Brian M. Reid

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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CORPORATE DISCLOSURE STATEMENT

CINCINNATI FINANCIAL CORPORATION is the parent corporation of THE CINCINNATI INSURANCE COMPANY and is the only publicly held company owning ten percent (10%) of more of the stock of THE CINCINNATI INSURANCE COMPANY.

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STATEMENT OF JURISDICTION

Appellee The Cincinnati Insurance Company ("Cincinnati") agrees that this Court has jurisdiction to hear this appeal for the reasons stated by Appellant Sandy Point Dental, PC ("Sandy Point").

STATEMENT OF ISSUES

1. Did the District Court correctly hold that Sandy Point's Amended Complaint did not state a claim upon which relief could be granted because it did not allege facts (as distinguished from conclusions) that would plausibly show that Sandy Point incurred direct physical loss or damage to its Covered Property as a result of the Coronavirus or government orders?
2. Has Sandy Point waived any claims regarding the District Court's decisions to deny its motion to reconsider its decision to dismiss the Amended Complaint and to deny its motion for leave to file a second amended complaint?

STATEMENT OF THE CASE

Sandy Point operates a dental practice in Lake Zurich, Illinois. It purchased a commercial property insurance policy from Cincinnati. The Policy provides for Business Income coverage as follows:

> 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" to property at "premises" caused by or resulting from any Covered Cause of Loss. (Appellee022).[1]
>
> 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" to property at "premises" which is described in the Declarations and for which a "Business

[1] References to Appellee### are to the Appellee's Short Appendix.

> Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. (Appellee078).

Relatedly, the Policy provides for "Extra Expense" Coverage as follows in pertinent part:

> We will pay "Extra Expense" you incur during the "period of restoration":
>
> (a) To avoid or minimize the "suspension" of business and to continue "operations"…
>
> (b) To minimize the "suspension" of business if you cannot continue "operations". (Appellee023).
>
> * * *
>
> We will pay the actual and necessary Extra Expense you incur due to direct physical "loss" to property at a "premises" which is described in the Declarations and for which an Extra Expense Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss….
>
> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical "loss" to property caused by or resulting from a Covered Cause of Loss. . . . (Appellee078).

"Loss" is defined to mean "accidental loss or damage." (Appellee040). The Policy defines "period of restoration" to mean "the period of time that begins at the time of loss and ends the earlier of:

> **(1)** The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality;
>
> **(2)** The date when business is resumed at a new permanent location; or
>
> **(3)** 12 consecutive months after the date of direct physical "loss".

(Appellee040; -51). Thus, by incorporation of the stated definitions into the insuring agreement, the Business Income and Extra Expense coverages indemnify Sandy Point for direct accidental physical loss or damage to property during the period reasonably required to replace, rebuild or repair the property that was physically lost or physically damaged.

Beginning in March 2020, in light of the Coronavirus pandemic, Illinois Governor Pritzker issued executive orders seeking to limit or slow the spread of the disease by reducing the

congregation of people. The Governor's March 20, 2020 order (Executive Order 2020-10) on which Sandy Point relies did not, in fact, require Sandy Point to close its dental practice. Section 1, paragraph 9 of the Order identified dental offices as "Healthcare Operations" and Section 1, paragraph 12 identified Healthcare Operations as "Essential Businesses and Operations."[2] Section 1, paragraph 1 of the Order provided that the Order's "Stay at Home" requirements did not apply to operating Essential Businesses and Operations" and Section 1, paragraph 2 expressly encouraged Essential Businesses and Operations [such as dental offices] to remain open. Section 1, paragraph 5, reiterated that the Order allowed people to visit health care professionals for health care.

On April 1, 2020 Governor Pritzker issued Executive Order 2020-19 that directed heath care professionals, including dentists, to postpone elective and routine procedures (but not emergency procedures).[3] This direction was terminated on May 11, 2020 when the Illinois Department of Public Health revised its guidance and recommended that oral health providers resume the provision of routine oral and dental care.[4]

In the District Court, Cincinnati moved to dismiss Sandy Point's Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6). The motion was granted on the grounds that the

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[2] A copy of Governor Pritzker's March 20, 2020 Executive Order 2020-10 is publicly available at. https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx. For ease of reference, a copy begins at Appellee087. The District Court properly took judicial notice of the government orders alleged, which are central to the Appellant's claim, and other matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion. *Laborers' Pension Fund v. Murphy Paving and Sealcoating, Inc.*, 450 F. Supp. 3d 815, 823 (N.D. Ill. 2020) *citing Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012); Fed. R. Evid. 201(b).

[3] Governor Pritzker's April 1, 2020 Executive Order 2020-19 is available at https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-19.aspx.

[4] *See Routine Oral and Dental Care, Revised Interim Guidance: Provision of Routine Oral and Dental Care*, Ill. Dept. of Pub. Health, http://www.dph.illinois.gov/covid19/community-guidance/routine-oral-and-dental-care (accessed May 11, 2021).

Amended Complaint did not allege facts plausibly showing any direct physical loss or physical damage to Sandy Point's property at its premises.

SUMMARY OF ARGUMENT

Sandy Point seeks coverage under the Cincinnati insurance policy solely because of government orders restricting the congregation of people to slow the spread of COVID-19 and because of orders that temporarily limited the type of services Sandy Point could provide. It alleges that in light of the orders and recommendations of dental associations, it suspended its dental practice. It characterizes this as "loss of use" of its property. The Policy, however, provides coverage only for income loss resulting from direct physical loss or damage to the insured's property. In other words, the Policy does not provide stand-alone business income loss coverage that is untethered to direct physical loss to property. Because Sandy Point's complaint did not allege facts that plausibly showed direct physical loss or damage to its property, neither the Business Income coverage nor the related Extra Expense coverage applied.

The District Court correctly held that the Policy provision requiring direct physical loss or damage requires some physical alteration of the Covered Property, which comprises the building and its contents, and that loss of use of that property, without any such alteration, was insufficient to trigger coverage. This application of the Policy terms is supported by numerous judicial decisions prior to the Coronavirus pandemic as well as the overwhelming majority of decisions applying the same or similar policy language to Coronavirus claims, including in Illinois. Moreover, the minority of Coronavirus decisions that have denied insurers' motions to dismiss do not properly apply the established principles of insurance policy interpretation. Among other deficiencies, these cases deconstruct the policy language by focusing on one of the definitions of the word "loss" apart from the phrase in which the word "loss" is used. In this way,

those cases ignore that the word "loss" is modified by the words "direct" and "physical" in the Policy. Additionally, these minority decisions improperly focus on whether the agent that causes loss is physical, rather than on whether the effect to the Covered Property is physical. The Policy requires the latter. Also, some of these cases improperly assume that the preposition "or" in the phrase direct physical loss or damage means that the word *loss* must mean something entirely different from *damage* so that if something is damaged it cannot be a loss. From here, these minority decisions conclude that direct physical loss can be the temporary loss of use of a business's property or operations. The minority decisions also fail to apply the principle that policy provisions should be read in context and in harmony with each other. Those decisions disregard the provision that Business Income coverage only applies during a period of restoration, which is the reasonable time to repair, rebuild or replace damaged or lost property. This provision harmonizes with the requirement that the Business Income coverage only applies where the insured has sustained a physical loss or damage to property, not a mere loss of use.

Sandy Point cites a number of cases involving contamination of property that could not readily be de-contaminated, or where remediation itself required alteration of the property, or where physical conditions rendered the property totally and permanently unsafe for occupancy. None of these decisions support the claim that temporary limitations on the manner in which property can be used constitutes direct physical loss or damage to Covered Property.

With respect to the Civil Authority coverage, the District Court correctly held that Sandy Point's Amended Complaint did not allege facts constituting direct physical damage to anyone else's property. Moreover, no Illinois government order prohibited access to Sandy Point's premises, which is required for civil authority coverage. Rather, access was not only permitted but was affirmatively encouraged for healthcare operations, including dental offices.

Finally, Sandy Point argues that the Policy does not contain an express exclusion of claims based on a pandemic. However, where is no affirmative grant of coverage in the Policy, the absence of an exclusion is irrelevant. An absent exclusion cannot constitute a grant of coverage as a matter of law.

ARGUMENT

I. BUSINESS INCOME COVERAGE UNDER THE POLICY REQUIRES DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY.

The insurance policy that Sandy Point purchased from Cincinnati is a commercial property policy. It protects Sandy Point from physical loss or damage to its property, as in the event of a fire or a storm. It does not insure against pure economic loss in the absence of physical loss or damage. The parts of the policy under which Sandy Point seeks coverage (the Business Income coverage in the Property Coverage form and the related Extra Expense Coverage) require direct accidental physical loss or direct accidental physical damage to property. Sandy Point's claim is based on government orders that temporarily restricted the type of services it could provide, not on any physical loss or damage to its property. Sandy Point does not even allege that the virus was actually present at its office.

The substantive issues in this case are governed by Illinois law, which says the interpretation of the meaning of the terms of an insurance policy is a matter of law for the court to decide. *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 860 N.E.2d 280, 285 (Ill. 2006). This Court summarized some Illinois insurance law principles in *Windridge of Naperville Condominium Association v. Philadelphia Indemnity Insurance Co.*:

> An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. Accordingly, our primary objective is to ascertain and give effect to the intention of the parties, as expressed in the policy language. If the policy language is unambiguous, the policy will be applied as written, unless it

> contravenes public policy. Further, to ascertain the meaning of the policy's language and the parties' intent, the court must construe the policy as a whole and 'take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract.

932 F.3d 1035, 1039 (7th Cir. 2019) (internal citations and quotations omitted). Moreover, where the terms of an insurance policy are clear and unambiguous, they "must be given their plain, ordinary and popular meaning." *Central Illinois Light Co. v. Home Ins. Co.*, 821 N.E.2d 206, 213 (Ill. 2004).

Applying these principles, the District Court correctly dismissed the Amended Complaint because it did not allege facts that plausibly constituted a claim that either the Coronavirus or the orders issued by Governor Pritzker constituted direct physical loss or damage to Sandy Point's Covered Property or to any other property.

A. Illinois Law, Including Other Illinois Coronavirus Coverage Decisions, Supports the Trial Court's Dismissal Decision.

Since the onset of the Coronavirus pandemic, numerous courts nationally have considered the meaning of the phrase direct physical loss or damage, or similar phrases, in insurance cases involving the presence of the virus in society and virus-related government orders that adversely affected businesses. This includes five Illinois state court decisions and fourteen Illinois federal court decisions, including this case. *See L&J Mattson's Co. v. The Cincinnati Ins. Co., Inc.*, 2021 WL 1688153 (N.D. Ill.); *Firenze Ventures LLC v. Twin City Fire Ins. Co.*, 2021 WL 1208991 (N.D. Ill.); *Chief of Staff LLC v. Hiscox Ins. Co. Inc.*, 2021 WL 1208969 (N.D. Ill.); *Zajas, Inc. v. Badger Mut. Ins. Co.*, 2021 WL 1102403 (S.D. Ill.); *Smeez, Inc. v. Badger Mut. Ins. Co.*, No. 3:20-cv-01132 (S.D. Ill.) (Appellee198)[5]; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill.); *In re Society Ins. Co.*

[5] Orders not yet available through a public electronic database are collected in the Appendix.

COVID-19 Bus. Interruption Prot. Ins. Litig., 2021 WL 679109 (N.D. Ill.); *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, 2021 WL 633356 (N.D. Ill.); *The Bend Hotel Dev. Co., LLC v. The Cincinnati Ins. Co.*, 2021 WL 271294 (N.D. Ill.); *TJBC, Inc. v. Cincinnati Ins. Co., Inc.*, 2021 WL 243583 (S.D. Ill.); *Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.*, 2021 WL 346423 (N.D. Ill.); *Bradley Hotel Corp. v. Aspen Spec. Ins. Co.*, 2020 WL 7889047 (N.D. Ill.); *T&E Chicago LLC v. Cincinnati Ins. Co.*, 2020 WL 6801845 (N.D. Ill.); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690 (N.D. Ill.), *reconsideration denied*, 2021 WL 83758 (N.D. Ill.); *Fran Napleton Lincoln, Inc. v. Motorists Comm. Mut. Ins. Co.*, No. 20 L 6767 (Ill. Cir. Ct. May 10, 2021) (Appellee208); *Source One Restaurant Corp. v. Western World Ins. Co., Inc.*, No. 20 L 7421 (Ill. Cir. Ct. May 10, 2021) (Appellee223); *Steve Foley Cadillac, Inc. v. N.Y. Marine & Gen. Ins. Co.*, No. 20-L-6774 (Ill. Cir. Ct. Feb. 19, 2021) (Appellee236); *Lee v. State Farm Fire & Cas. Co.*, No. 20 CH 4589 (Ill. Cir. Ct. Jan. 13, 2021) (Appellee247); *It's Nice, Inc. v. State Farm Fire & Cas. Co.*, No. 20 L 547 (Ill. Cir. Ct. Sept. 29, 2020) (Appellee225). *See also Paradigm Care & Enrichment Center, LLC v. W. Bend Mut. Ins. Co.*, 2021 WL 1169565 (E.D. Wis.) (applying Illinois law).

All but two of these cases hold that when the insured only incurs adverse economic effect without distinct, demonstrable, physical alteration of its property, there is no coverage. The trend is overwhelmingly the same throughout the country.[6]

1. All of the Illinois State Court Decisions Have Dismissed Claims for Coverage Under Property Insurance Policies.

Five Illinois state court cases have addressed the issue of coverage for business income loss in the pandemic and held that the Governor's orders restricting their business operations do

[6] Table 1 lists over 120 decisions that have dismissed property insurance claims based on the Coronavirus.

not constitute direct physical loss to property. This, even though some insureds were not "Essential Business Operations" and actually were ordered to suspend operations, unlike Sandy Point which was only required to limit the scope of its services briefly.

Steve Foley held that Illinois law has established that "physical loss" means "alteration in appearance, shape, color or other material dimension" of property, quoting the Supreme Court in *Travelers Ins. Co. v. Eljer Manufacturing, Inc.*, 757 N.E.2d 481, 496 (Ill. 2001). (Appellee240). The court also pointed out that the Supreme Court in *Board of Education v. A, C & S, Inc.*, 546 N.E.2d 580, 588 (Ill. 1989), cautioned against claims seeking insurance coverage "*through the use of some fictional property damage.*'"(Emphasis supplied.) (Appellee242).

Lee similarly held that Illinois law requires "alteration in appearance, shape, color or other material dimension" in order to satisfy the requirements of an insurance policy where coverage is premised on physical property loss or physical property damage. (Appellee249, 251–52).

It's Nice dismissed the insured's claim for "business interruption loss resulting from the COVID-19 pandemic and the [Illinois] executive orders," and held:

> [D]irect physical loss unambiguously requires some form of actual physical damage to the insured premises to trigger coverage. The words *direct* and *physical*, which modify the word *loss*, ordinarily connote actual demonstrable harm of some form to the premises itself rather than the force the closure of the premises for reasons extraneous to the premises itself or adverse business consequences that flow from such closure.

(Appellee282:13–21. The *It's Nice* court cites approvingly of the District Court's decision in the present case. (Appellee283:10–Appellee284:11).

In the two most recent cases, *Fran Napleton* and *Source One*, the court held that "The temporary state of any contagion on surfaces of a business does not amount to an alteration of the property as contemplated [by the policies]." *Fran Napleton*, Appellee214; *Source One*,

Appellee229. As in *Steve Foley*, the court also rejected the attempt to analogize asbestos cases because asbestos, unlike Coronavirus, is embedded in the property and difficult to remediate. *Fran Napleton*, Appellee214; *Source One*, Appellee229–30.

2. A Substantial Majority of Federal Court Decisions in Illinois Likewise Reject COVID-19 Claims in the Absence of Adequate Factual Allegations to Support Claims of Direct Physical Loss or Damage to Property.

Twelve District Court decisions in Illinois have dismissed Coronavirus coverage claims for lack of adequate allegations of direct physical loss or damage to property. Like the decision underlying this appeal, these decisions recognize that the plaintiffs' claims were based on the effects (or alleged effects) of government orders, not harm to premises or contents. As the Court in *Chief of Staff*, recently explained, "[the] Business Income provision does not apply where, as here, a government closure order prohibits access to a business's premises for reasons unconnected to any change in the physical condition of those premises, or in the physical condition or location of property at those premises. In so holding, this court joins the many other courts to have interpreted materially identical provisions in the same manner." 2021 WL 1208969, at *4.

The two minority decisions (which Sandy Point does not cite but its amicus cites) are flawed and do not reflect the correct application of Illinois law to the interpretation of insurance policies. These decisions are discussed in turn below.

a. *Derek Scott Williams*

Derek Scott Williams purported to apply Texas law and improperly based its decision on the conclusion that a factfinder (e.g., a jury) could find that the term "physical loss" could mean mere loss of use. 2021 WL 767617, at *3, *4. Under Illinois law, this conclusion would be error because the interpretation of the meaning of an insurance policy is a matter of law for the court,

not a matter of fact that a jury can determine. *Nicor*, 860 N.E.2d at 285.

Second, the court focused on a dictionary definition of the word "loss", without regard to the fact that the word is part of a phrase that includes the terms "direct" and "physical". 2021 WL 767617, at *4. As *Chief of Staff* pointed out, while the dictionary definition of "loss" standing alone, can refer to a deprivation of possession, in the Business Income policy "loss" is modified by the adjective "physical" "which in context means "tangible, concrete. . . . So 'physical loss' refers to a deprivation caused by a tangible or concrete change in or to the thing that is lost." 2021 WL 1208969, at *2 (internal citations and quotations omitted). It was error for *Derek Scott Williams* to rely on the definition of "loss" standing alone and out of context. *See Nicor*, 860 N.E.2d at 286 ("the court must construe the policy as a whole").

Third, in an effort to make its conclusion that physical loss without physical harm to property can harmonize with the "period of restoration" provision that limits the duration of business income loss to the reasonable time needed to rebuild, replace or repair the affected property, the court in *Derek Scott Williams* decreed that "repair" can mean the revocation of the governor's order. 2021 WL 767617, at *4. This was a totally arbitrary and artificial definition of a word that otherwise has a plain and ordinary meaning.

Tria WS LLC v. American Automobile Insurance Co., 2021 WL 1193370, at *7 n.5 (E.D. Pa.), directly rejected this extraordinary interpretation of "repair", observing that, "As ordinarily understood, however, a property is 'repaired' only when it is restore(d) to its sound and healthy state." *Hillcrest Optical, Inc. v. Continental Casualty Co.*, 2020 WL 6163142 *8 (S.D. Ala.), similarly held that a reasonable insured would not understand "repair" to mean a government order that revokes a prior order regulating business activity, citing, *inter alia*, *Wildin v. American Family Mut. Ins. Co.*, 638 N.W.2d 87, 90 (Wis. App. 2001) ("The common and ordinary

meaning of 'repair' is 'restore by replacing a part or putting together what is torn or broken.'"). *See also Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405, at *6 (S.D. Miss.).

Finally, although the court in *Derek Scott Williams* noted that the claim before it was governed by Texas law, the decision did not even acknowledge the numerous Texas law decisions holding that "physical loss" to property means "a distinct, identifiable, physical alteration of the property" and which therefore reject the claim that loss of use of property because of the COVID-19 pandemic or government orders restricting operations trigger coverage under commercial property insurance. *See, e.g., ILIOS Prod. Design, LLC v. Cincinnati Ins. Co., Inc.*, 2021 WL 1381148 (W.D. Tex.); *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, 2021 WL 462105, at *1 (N.D. Tex.); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2021 WL 972878, at *6 (W.D. Tex.); *Hajer v. Ohio Sec. Ins. Co.*, 2020 WL 7211636, at *2 (E.D. Tex.); *Diesel Barbershop LLC v. State Farm Lloyd's*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020).

The *Derek Scott Williams* court also ignored a pre-Coronavirus Texas state law decision underlying these decisions, *North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833-34 (Tex.App. 1996), which held that physical loss means "an initial satisfactory state that was changed by some external event into an unsatisfactory state."

b. *In Re Society*

In *In Re Society*, the court adopted the faulty notion that the use of the word "or" to separate "physical loss" from "physical damage" meant that the plaintiff did not need to show any change to the property's physical characteristics. 2021 WL 679109, at *8. As discussed *infra* at I.C.6, this reliance on "or" is legally, grammatically and analytically unsound. In its decision,

which the court said focused on Illinois law, the Court made no mention of the Illinois state law decisions involving Coronavirus claims or the underlying Illinois Supreme Court cases on which they relied. And, like *Derek Scott Williams*, the *In Re Society* court erroneously held that a jury could assume the task of interpreting the meaning of "physical loss" and could find that it included restrictions placed on operations by government order. *Id.* at *10.

B. Under the Applicable Illinois Law, Sandy Point's Complaints Did Not State a Claim for Business Income Coverage.

Sandy Point's Amended Complaint was not sufficient to "raise a right to relief" or "state a plausible claim for relief" as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Amended Complaint is devoid of any factually supported, non-conclusory allegations of direct physical loss or damage to property. Sandy Point makes conclusory allegations like "[t]he continuous presence of the coronavirus on or around its Plaintiff' [*sic*] has rendered the premises unsafe and unfit for its intended use and therefore caused physical property damage or loss under the Policies." (Appellee101, ¶ 33). But, this is not based on any stated facts about the Coronavirus specific to Sandy Point's premises. There is not even a specific allegation that Coronavirus was found at Sandy Point's property.

Even if Sandy Point had alleged that the virus was actually present on its premises, such an allegation would not adequately allege physical loss or damage to property because, as explained in publications of the CDC, the virus naturally disappears and can be removed by cleaning. "The virus that causes COVID-19 can be killed if you use the right products. EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes." *See* Centers for Disease Control and Prevention ("CDC") *Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses,*

Schools, and Homes (Appellee108)[7]. The Illinois government orders that allegedly forced Sandy Point to close similarly acknowledge that cleaning and disinfecting eliminated the risk of Coronavirus. *See* Appellee094, ¶ 15.[8] Thus, even where the Coronavirus is present, there is no direct physical loss to property because the virus either dies naturally in days, or it can be wiped away.[9]

The Eleventh Circuit Court of Appeals recently held that there must be an actual change in property in order for there to be a direct physical loss and that the presence of a substance that can be readily cleaned away does not constitute such change. *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020), *cert denied*, 2021 WL 1163753 (U.S. Mar. 29, 2021). There, the insured alleged that dust and debris from a nearby road construction project entered the insured's premises and caused its customers to avoid the insured's restaurant, resulting in a loss of income. *Id.* at 871. But, the insured identified no actual physical change to the premises. The district court held that the presence of material that could be washed away did not constitute actual, direct physical loss and the insurer was granted summary judgment, which the Court of

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[7] *See also* EPA online publication, *How does EPA know that the products on List N work on SARS- CoV-2?*, identifying hundreds of products that kill and remove Coronavirus, attached at Appelle117–85. The Complaint cites to CDC publications. This Court may take judicial notice of EPA and CDC reports and other matters of public record. *Laborers' Pension Fund*, 450 F. Supp. 3d at 823.

[8] The CDC has stated that surfaces are not "thought to be the main way the virus spreads." *CDC updates COVID-19 transmission webpage to clarify information about types of spread*, https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html (accessed Oct. 4, 2020). Recently, the CDC reiterated, "Current evidence strongly suggests transmission from contaminated surfaces does not contribute substantially to new infections. . . . Transmission through soiled hands and surfaces can be prevented by practicing good hand hygiene and by environmental cleaning." *Scientific Brief: SARS-CoV-2 Transmission, Prevention of COVID-19 transmission*, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html (accessed May 12, 2021).

[9] Amicus' hyperbolic and wholly unsupported and untrue assertion that this very courthouse is unsafe because of the presence of virus should be disregarded. The functions of the court are essential functions and the Court can take notice that many judges and court personnel continue to work at the courthouse. Virtual court proceedings have been adopted to prevent person-to-person infection, not because the courthouse has become unsafe, much less uninhabitable.

Appeals affirmed. *Id.* at 879.

C. Restrictions on the Use of a Property, in the Absence of Existing or Imminent Harm to the Property, Does Not Constitute Direct Physical Loss.

Sandy Point argues that the range of services it customarily provided was truncated by Governor Pritzker's Order and that this lessened range of services is "physical loss." This "loss of use" theory has been widely rejected both before the pandemic and in numerous pandemic-related coverage cases.

1. Well-Reasoned Cases Preceding the Pandemic Support the Trial Court's Decision.

Prior to the pandemic, numerous courts held that actual, identifiable physical alteration to property is required to have coverage under property policies. These decisions include *Windridge*, 932 F.3d at 1040 ("'physical' generally refers to tangible as opposed to intangible damage"); *Source Food Technology, Inc. v. U.S. Fidelity & Guaranty Co.*, 465 F.3d 834, 838 (8th Cir. 2006); *Pentair, Inc. v. American Guarantee & Liability Insurance Co*., 400 F.3d 613, 616 (8th Cir. 2005); *City of Burlington v. Indemnity Insurance Co. of North America*, 332 F.3d 38, 44 (2d Cir. 2003) (direct physical loss "strongly implies that there was an initial satisfactory state that was changed . . . into an unsatisfactory state"); *Trinity Industries, Inc. v. Insurance Co. of North America*, 916 F.2d 267, 270–71 (5th Cir. 1990); Additionally, the leading treatise on insurance law has long concluded: "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." 10A *Couch on Ins.*, § 148:46. A temporary limitation on the scope of dental services provided is, at most, an intangible loss, causing a delay in providing some services and a corresponding delay in collecting payment for such services.

Two decisions from the Eighth Circuit are particularly instructive. *Source Food* expressly rejected the loss of use theory. 465 F.3d at 838. There, the insured claimed loss of use of its beef product that was not permitted to be transported into the United States from Canada due to an embargo. The embargo was based on a general concern about incidents of mad cow disease in Canada. *Id*. at 835. There was no evidence that the insured's product was tainted. *Id*. at 838. The insured's insurance policy provided coverage for "direct physical loss to property". *Id*. *Source Food* rejected the loss of use claim because it would render the term "physical" meaningless. *Id*.

Similarly, *Pentair* considered a claim for business income arising from the shutdown of a factory caused by a loss of electrical power to the factory from the local electric utility. 400 F.3d at 614. *Pentair* affirmed the district court's conclusion that the factory's inability to operate without power did not constitute direct physical loss or damage to it. As here, this was required for business income coverage: "Accordingly, for some time now, the phrase direct physical loss or damage to property, or substantially similar language, has unambiguously not applied to economic loss claims." *Id*. at 616–17.

Sandy Point has not alleged facts showing that the virus was present on surfaces within its premises, much less facts alleging change in the physical characteristics of any of its Covered Property. Sandy Point's conclusory allegation that the Coronavirus damaged property without supporting factual allegations does not satisfy the requirements of *Iqbal.*

2. A Rapidly Growing Number of Decisions Nationally Support the Trial Court's Holding Here.

As shown above, the vast majority of Illinois Coronavirus coverage cases hold that loss of use without actual physical injury to property is insufficient to establish coverage under a property insurance policy. This same principle has already been widely applied in over 120 virus-related coverage decisions from state and federal courts nationwide. *See* Table 1.

3. The "Illinois Case Law" Cited by Sandy Point Does Not Support Its Theory That Loss of Use Without Physical Harm to Property Can Constitute Direct Physical Loss to Property.

Sandy Point argues that "Illinois Case Law" supports an expansive meaning of the term "physical" as used in the Policy term "direct physical loss or direct physical damage to property." Sandy Point cites *Board of Education v. International Insurance Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999), noting it relied on *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991). Those are asbestos cases in which the courts found that asbestos installed in the building and which had become friable, releasing toxic asbestos fibers, was contaminating the building "to the point where corrective action, under [the Illinois Asbestos Abatement Act] had to be removed", which involved alteration of the building. *Bd. of Educ.*, 720 N.E.2d at 625 (citing *Wilkin*, 578 N.E.2d at 931). Neither decision held that the presence of asbestos that had not become friable constituted property damage and neither decision adopted a general interpretation of the word "physical" that would embrace the loss of use of a property where physical alteration of the property was not even contemplated. *See also Lansdale 329 Prop, LLC v. Hartford Underwriters Ins. Co.*, 2021 WL 1667424, at *5 (E.D. Pa.) (rejecting analogy to asbestos cases in Coronavirus coverage cases); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 2021 WL 1400891, at *11 (D. Md.); *Tria*, 2021 WL 1193370, at *6–*7.

Sandy Point next cites *Posing v. Merit Insurance Co.*, 629 N.E.2d 1179 (Ill. App. Ct. 1994). That case involved claims that a termite inspector/exterminator had performed inadequate inspections or performed inadequate extermination. Sandy Point argues that the decision holds that termite infestation constitutes property damage to a building "despite not physically damaging the building." It does not. The issue in *Posing* was whether the insurer had a duty to defend, which is much broader than the duty to indemnify. *Title Indem. Assur. Co. v. First Am. Title Ins. Co.*, 853 F.3d 876, 883 (7th Cir. 2017). "Factually, each of the underlying complaints

[against Posing] alleges that the subject real estate was partially destroyed by pest infestation allegedly caused by Posing's faulty inspection or treatment. . . . this damage is a tangible, physical injury to property within the policy's definition of 'property damage'." 629 N.E.2d at 340. The duty to defend was therefore supported by factual allegations that physical damage to property had occurred. Moreover, *Posing* involves liability coverage, not property coverage. The purpose of each type of coverage is different, thus policy terms used in liability coverage do not explain the meaning of terms used in property coverage. *Chief of Staff*, 2021 WL 1208969, at *4 (rejecting the insured's "effort to create ambiguity" by conflating the liability coverage section with the property section of the policy).

Finally, Sandy Point discusses at length *Eljer Manufacturing, Inc. v. Liberty Mutual Insurance Co.*, 972 F.2d 805 (7th Cir. 1992), which it argues supports the proposition that the term "physical loss" should be given an expansive meaning so that it would cover loss of use of a building where use of the building was suspended to avoid the entry of the Coronavirus into the building. This is another case involving liability coverage rather than property coverage, with language and purpose dissimilar to the Sandy Point property insurance policy. Moreover, the decision does not correctly state Illinois law and should not be considered.

In *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, the Illinois Supreme Court held that "under its plain and ordinary meaning, the term 'physical injury' unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension." 757 N.E.2d at 502. The Court added that any interpretation of the policy language that effectively eliminated the "physical" aspect of the harm would "fundamentally alter the terms of the insurance contract entered into between the parties. Construing 'physical injury' in

this manner would violate the paramount rule in interpreting policy provisions, which is to ascertain and give effect to the intent of the parties." *Id.*

4. Sandy Point's Cases Involving Contamination or Uninhabitability Are Either Distinguishable or Inapplicable.

Sandy Point and its amicus cite a number of cases where contamination was found to cause physical loss to properties or where physical conditions involving the property rendered the property so unsafe as to be uninhabitable or rendered goods unsaleable. (App. Br. 11; Amicus Br. 11–12 nn.13–15).

In each case, the properties were actually contaminated by deleterious substances, such as ammonia, carbon monoxide, chemical odor, and gasoline odors. The contamination involved a chemical reaction or a chemical in or on the property that was so pervasive and persistent that it rendered the premises completely uninhabitable or, as in the case of *Essex Insurance Co. v. BloomSouth Flooring Corp.*, required destructive remediation. 562 F.3d 399, 401–02 (1st Cir. 2009). In a few cases, courts found that external physical conditions, such as landslide, caused destruction of a house to be imminent and unpreventable. *See Hughes v. Potomac Ins. Co.*, 199 Cal.App.2d 239 (Cal. Ct. App. 1962); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998). In those circumstances, the courts found that there was actual physical injury to the premises.

The common thread in these cases is that the physical conditions result in permanent dispossession or destructive remediation. Sandy Point does not allege such conditions, nor could it. "[E]ven assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated. Much like the dust and debris at issue in *Mama Jo's*, routine cleaning and disinfecting can eliminate the virus on surfaces." *Promotional Headwear Int'l v. The Cincinnati*

Ins. Co., 2020 WL 7078735, at *8 (D. Kan.); *appeal dismissed*, No. 21-3000 (10th Cir. Mar. 9, 2021). Similarly, *Universal Image Products, Inc. v. Chubb Corp*., 703 F. Supp. 2d 705, 710 (E.D. Mich. 2010), *aff'd*, 475 F. App'x. 569 (6th Cir. 2012), held that the cost of cleaning a ventilation system did not address a direct physical loss.

Sandy Point alleged no facts that would support a claim that the Coronavirus rendered its offices uninhabitable. To the contrary, Sandy Point admits that at most the government orders and the recommendations of the CDC and dental associations indicated that Sandy Point should limit its services temporarily at its offices, not that it should abandon its premises permanently because of the virus. (Appellee097, ¶¶ 7–9; Appellee088–89, ¶¶ 5, 7; Appellee092, ¶ 12; Appellee093, ¶ 13). Furthermore, courts throughout the country hold there is no coverage under policies like Plaintiff's because the virus, *even if present*, does not render premises unusable or uninhabitable. *See, e.g.*, *Promotional Headwear*, 2020 WL 7078735, at *9; *Uncork & Create, LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *5 (S.D.W. Va.); *Hillcrest*, 2020 WL 6163142, at *5–*7.

5. The *Studio 417* Suite of Cases Are Poorly Reasoned and Have Been Broadly Rejected By Courts Nationally.

Sandy Point cites a trio of orders by one judge in the Western District of Missouri. These decisions deny motions to dismiss claims for property damage coverage related to the coronavirus. *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *K.C. Hopps, Ltd v. The Cincinnati Ins. Co., Inc.*, 2020 WL 6483108 (W.D. Mo.); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020) (collectively, "*Studio 417*"). Those decisions are poorly reasoned, contrary to an overwhelming body of directly on-point authority nationally, and have been firmly cemented as outliers.

Zwillo V, Corp. v. Lexington Insurance Co., 2020 WL 7137110 (W.D. Mo.), and *Promotional Headwear, supra,*, are among the cases rejecting *Studio 417*. After a detailed examination of the relevant law and unambiguous policy language, both courts reject the "loss of use" theory because it did not satisfy their policies' direct physical loss or damage requirement. And, both cases expressly reject *Studio 417*'s errant holding.

Promotional Headwear rejects a claim of loss of use of premises resulting from emergency orders issued by the Governor of Kansas and Johnson County, Kansas. 2020 WL 7078735, at *1. It holds that the same Cincinnati policy language involved in the present case did not provide coverage because there was no allegation that the property had been physically altered. *Id*. at *2.

> The Court finds that coverage for "direct loss to Covered Property" under the Policy unambiguously requires more than mere diminution in value or impairment of use of the property. . . . The presence of the words "direct" and "physical" limit the words "loss" and "damage" and unambiguously require that the loss be directly tied to a material alteration to the property itself, or an intrusion onto the insured property. . . . Like the restaurant in *Mama Jo's*, Plaintiff alleges no loss or damage to the property that required repair or replacement based on an actual or tangible problem with the premises. And like the plaintiffs in *Pentair* and *Source Food*, Plaintiff suffers purely economic damages due to temporary loss of use, not a direct, physical change or intrusion onto the property.

Id. at *7 (internal footnotes omitted). *Promotional Headwear* further rejects *Studio 417*'s determination that a mere allegation that the virus was present on the premises is sufficient to survive a motion to dismiss. *Id*. at *8.

Promotional Headwear applies the same basic insurance law principles that apply in Illinois: the policy must be read as a whole and terms in the policy must be read in context. *Id*. at *4-*5; *Nicor*, 860 N.E.2d at 285. Thus, to find coverage based solely on dictionary definitions of the word loss, in isolation from the phrase containing that word, would read the modifying elements "direct" and "physical" out of the policy. *Promotional Headwear*, 2020 WL 7078735,

at *7. As discussed above, doing so would also violate the paramount principles of Illinois insurance law. *Travelers Ins. Co. v. Eljer*, *supra*. *Promotional Headwear* also rejects the argument that direct physical loss or damage could be satisfied absent facts that would show that the virus or the government orders caused permanent dispossession of the property. 2020 WL 7078735, at *7.

Zwillo similarly analyzed and rejected Coronavirus coverage claims. It also decisively "consider[s]" *and rejects* the argument that it should deny the motion to dismiss "to be in harmony with other rulings in [the Western District of Missouri]." 2020 WL 7137110, at *8. And, it dispenses with any pretextual effort to distinguish those cases: "To the extent this Court's ruling – finding the language in the policy plainly and unambiguously does not cover the claims – conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care*, *this Court respectfully disagrees with those cases.*" *Id.* (emphasis added). *Zwillo's* treatment of those cases was recently approved and adopted by the court in *Seoul Taco Holdings, LLC v. The Cincinnati Insurance Co.*, 2021 WL 1889866, at *5 (E.D. Mo.).

There are numerous other well-reasoned decisions that reject *Studio 417*, including from Illinois. *See, e.g.*, *Chief of Staff*, 2021 WL 1208969, at *6; *Crescent Plaza* , 2021 WL 633356, at *3; *Bend Hotel* 2020 WL 7889047, at *4; *see also Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 1131640, at *4 n.7 (D. Mass.) (collecting cases); *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co.*, 2021 WL 1069038, at *4 (W.D. Ky); *Food for Thought Caters Corp. v. Sentinel Ins. Co.*, 2021 WL 860345, at *5 (S.D.N.Y.); *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 2021 WL 858378, at *4 (D. Mass.) ("Multiple courts have considered those decisions of United States District Judge Stephen Bough [including *Studio 417* and have found them to be outliers."); *Gilreath Family & Cosmetic Dentistry, Inc. v. The*

Cincinnati Ins. Co., 2021 WL 778728, at *6 (N.D. Ga.); *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, 2021 WL 598818, at *10 (E.D. Mo.); *Terry Black's*, 2021 WL 972878, at *7 n.9 (describing *Studio 417* and *K.C. Hopps* as "outlier rulings"); *Kirsch v. Aspen Am. Ins. Co.*, 2020 WL 7338570, at *5 n.2 (E.D. Mich.); *Real Hospitality*, 2020 WL 6503405, at *7 n.12; *Uncork*, 2020 WL 6436948, at *4; *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581, at *6–*7 (S.D. Fla. Aug. 26, 2020).

Studio 417 is not just broadly rejected. It is also poorly reasoned. *Studio 417* violates controlling principles of federal law by repeatedly and erroneously accepting the plaintiffs' conclusory allegations and legal conclusions in addressing a F.R.C.P. 12(b)(6) motion. In particular, it treats the allegation that the virus was "likely" on the premises of each of the numerous plaintiffs as an allegation that the virus was actually present and actually caused physical loss or damage to those properties. 478 F. Supp. 3d at 798, 802. Those legal conclusions and other unsupported conclusions should not have been considered in determining the motion to dismiss. *See, e.g.*, *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. In contrast, the District Court here properly assessed Sandy Point's allegations (as distinguished from conclusions) and found none that would plausibly show that Sandy Point incurred direct physical loss or damage to its Covered Property as a result of the Coronavirus or government orders.

Moreover, *Studio 417* erroneously concluded that the plaintiffs there had alleged direct physical loss because there was a "causal relationship" between plaintiffs' financial losses and the virus, which is "a physical substance". 478 F. Supp. 3d at 800. But, under the plain language of the policies, it is the alleged loss or damage to property, *not* the damage-causing *agent*, that must be physical. *See Bridal Expressions LLC v. Owners Ins. Co.*, 2021 WL 1232399, at *7 (N.D. Ohio) (reading "impairment of functionality" into the policy "would result in the Policy

being triggered any time the rain renders the outdoor furniture unusable", an absurd result from equating loss of use with direct physical loss).

Sandy Point also points to the Missouri cases cited in *Studio 417*. However, those cases do not support the *Studio 417* decision. In *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 787 F.2d 349, 352 (8th Cir. 1986), the building Hampton occupied was in the process of collapsing and Hampton's equipment was physically destroyed when the building was demolished—actual physical loss and physical damage occurred. In *Mehl v. Travelers Home & Marine Insurance Co.*, 2018 WL 11301983 (E.D. Mo.), the policy there, unlike the Sandy Point policy here, defined "property damage" as "physical injury to, damage of, *or loss of use* of tangible property.*" Id.* at *1 (emphasis in the original). Also, the spiders in *Mehl* were actually present in the home, not and could not be eradicated, despite repeated efforts. *Id*. Sandy Point's allegations about the Coronavirus do not resemble *Mehl*.

The district court in *Uncork* acknowledged the existence of outlier decisions like *Studio 417*, but found "those decisions concluding that COVID-19 does not cause a direct physical damage or loss to property to be more persuasive." *Uncork*, 2020 WL 6436948, at *5. It explained:

> Although some courts have drawn a distinction based on whether a complaint alleged presence of the virus on the premises, the Court does not find such an allegation determinative. . . . Firstly, while factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, ***even when present***, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and ***its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property***. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be

> nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.

Id. (emphasis added). Another recent decision involving dental offices held:

> By all accounts, the structural integrity of the dental offices' "walls, doors, windows, and other external and internal physical barriers" remain entirely unscathed despite the proliferation and persistence of COVID-19. Any "actual change" is instead premised on the omnipresent specter of COVID-19, a generalized "alteration" experienced by every home, office, or business that welcomes individuals into an indoor setting across the globe

Johnson v. Hartford Fin. Servs. Grp., Inc., 2021 WL 37573, at *5 (N.D. Ga.).

6. The Use of the Word "Or" in the Definition of "Loss" Does Not Mean that Physical Loss Must Mean Something Entirely Different from Physical Damage.

Sandy Point also points to the statement in *Studio 417* that "physical loss is not synonymous with physical damage." 478 F. Supp. 3d at 801. In the *Studio 417* opinion, the court emphasized that the terms loss and damage in the Policy's definition of "loss" were separated by the word "or" and suggested that "physical loss" could mean something that did not require any direct physical effect on the property. *Id*. This conclusion, which is parroted by Sandy Point's amicus, is incorrect legally, grammatically and analytically.

The use of the word "or" does not mean that the surrounding terms must be totally different, much less that direct physical loss must mean loss of use without any physical harm to the property. In *Crescent Plaza*, 2021 WL 633356, at *3, Judge Gettleman explained:

> Finally, plaintiff argues that the use of the disjunctive in "direct physical loss or damage" requires that "loss" and "damage" be interpreted differently. According to plaintiff, the term "loss" provides coverage when there was no structural alteration to the property, such as when there is a mere loss of use. Any other interpretation would, plaintiff argues, render "loss" and "damage" redundant. Once again, the court disagrees. The plain wording of the phrase requires either a permanent disposition of the property due to a physical change ("loss"), or physical injury to the property requiring repair ("damage"). *See* [*Real Hospitality*, 2020 WL 6503405, at *5]. Plaintiff has not and cannot allege either. Consequently, plaintiff has failed to allege "direct physical loss or damage," a prerequisite for coverage. Defendant's motion to dismiss is granted.

Bethel Village Condominium Association v. Republic-Franklin Insurance Co., 2007 WL 416693 (Ohio Ct. App.), involved the same insurance policy language as is at issue here. Bethel urged that the word "or" separated two distinct and mutually exclusive, non-synonymous terms, physical loss and physical damage. *Bethel*, 2007 WL 416693, at *4. In essence, Bethel argued that any non-physical effect necessarily fell into the direct physical loss category. The court rejected this argument. It explained that "the conjunction 'or' may introduce any number of alternatives or may introduce a synonym or explanation of a previous word." *Id.* at *4. *Bethel* added, "Insurance contracts regularly insure against both total loss and damage to a portion of property." *Id*.

The focus on "or" to support a claim that "physical loss" means loss of use in the absence of some adverse physical change to the property has been soundly rejected by courts throughout the country. In *Henry's Louisiana Grill v. Allied Ins. Co. of Am.*, 2020 WL 5938755, at *5 (N.D. Ga.), the court explained that, when read in the context of a phrase like "direct physical loss of or damage to property", "or" is a coordinating conjunction used to link complementary terms. Loss connotes complete destruction and damage connotes lesser harm. Thus, physical damage to property means an alteration to property that can be repaired, while physical loss to property means an alteration to property that is beyond practical or economical repair. *Id*. As the court in *Henry's* put it, "loss is . . . 'the act of losing possession' by complete destruction, while damage is any other injury requiring repair." *Id.* at *6. In either case, however, a physical alteration of the property is necessary to have coverage. *Id.* at *5–*6. *See also Tria*, 2021 WL 1193370, at *6 (the terms "loss" and "damage" "indicate the degree to which the insured property has suffered a negative physical change."); *Bluegrass Oral Health*, 2021 WL 1069038, at *4 ("Thus, the policy

would extend to the continuum of harm from total (loss) to partial (damage) resulting in alteration to an insured property.") (collecting cases).

In *Chief of Staff*, Judge Feinerman provided a graphic explanation in rejecting the "or" argument:

> Chief of Staff is correct that the phrase "direct physical loss" and "direct physical damage" are best read so as not to completely overlap and thereby render one or the other superfluous. But it does not follow that mere loss of *use*—without any tangible alteration to the physical condition or location of property at the insured's premises—falls within the meaning of either phrase. Read naturally, the two phrases can be read to exclude loss of use without rendering either superfluous. To illustrate, consider a thief who attempts to steal a desktop computer. If the thief succeeds, the computer is "physical[ly] los[t]" but not necessarily 'physical[ly]…damage[d]." If the thief cannot lift the computer, so instead of stealing it takes a hammer to its monitor in frustration, the computer would be "physical[ly] …damage[d]" but not "physical[ly] los[t]." Yet if the thief were only to change the password on the system so that employees could not log in, there would be neither "physical…damage" nor "physical loss," though the computer would be unusable for some while. The Business Income provision might cover the first two cases, but it does not cover the third.

2021 WL 1208969, at *3.

Malaube, supra at *7-*8, is to the same effect. It explained that the word "or" did not require an interpretation of loss to be wholly distinct from damage because both required an actual, direct and physical effect upon property. *See also Georgetown Dental, LLC v. Cincinnati Ins. Co.*, No. 1:21-cv-00383-TWP-MJD (S.D. Ind. May 17, 2021) (Appellee309–10); *Kirsch*, 2020 WL 7338570 at *6 & fn. 3; *Zwillo, supra*, at *4; *Promotional Headwear, supra*, at *7; *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937 (S.D. Cal.).

As all of these cases show, the use of "or" cannot be read to eliminate the physical element for loss or damage to property. There simply is no basis in law or grammar for concluding that the presence of the word "or" in the phrase "accidental physical loss or accidental physical damage" requires that the term "physical loss" be construed to mean loss of

use of property that has not suffered some physical alteration. Nor is there any basis to conclude that the presence of the word "or" means it is reasonable to ignore the modifier "physical" in the phrase direct physical loss. As *Malaube* stated, "the terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties—not a strained, forced or unrealistic construction." *Malaube*, *supra*, at *3. Although *Malaube* was referring to Florida law, Illinois insurance law is the same. *See, e.g.*, *Nicor*, 860 N.E.2d at 286 ("The court must construe the policy as a whole, taking into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. . . . The words of a policy should be accorded their plain and ordinary meaning.); *Hobbs v. Hartford Ins. Co. of the Midw.*, 823 N.E.2d 561, 564 (Ill. 2005) ("Although 'creative possibilities' may be suggested, only reasonable interpretations will be considered.").

No amount of clever word play can escape the Illinois law imperative that the operative language here be read in context. Accordingly, the use of the word "or" in the phrase direct physical loss or damage to property does eliminate the requirement that Sandy Point must plead a detrimental physical effect upon property. Sandy Point's complaint is insufficient. No physical alteration to property is alleged.

D. Other Cases Denying Insurer's Motions to Dismiss Are the Minority View.

Sandy Point cites two other cases that denied motions to dismiss claims for coverage based on temporary restrictions placed on the provision of medical services. In *Optical Services USA/JCI v. Franklin Mutual Ins. Co.*, 2020 WL 5806576 (N.J. Super.) (entering order), the trial court acknowledged that the plaintiff claimed that "loss of physical functionality", by which the plaintiff meant loss of use, constituted physical loss, but the court did not adopt that proposition.

Rather, the court stated that because there was no controlling precedent in New Jersey, it was reluctant to render an interpretation and application of the policy terms without a fuller record and so denied the motion to dismiss. A New Jersey judge's reluctance to make a substantive ruling as to the interpretation of the policy provides no support for Sandy Point in the present case.

In *Urogynecology Specialist of Florida, LLC v. Sentinel Insurance Co.*, 489 F. Supp. 3d 1297 (M.D. Fla.), the insurer's motion to dismiss was based on an exclusion for loss or damage caused by the presence of virus. However, the exclusion referred to other provisions of the policy that had not been provided to the court. Because the court had not been provided with all of the material needed to interpret and apply the exclusion, the motion to dismiss was denied. *Id.* at 1302. Other federal courts in Florida expressly distinguish and decline to follow *Urogynecology* on this basis. *See, e.g., Royal Palm Optical, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2021 WL 1220750, at *2 (S.D. Fla.); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, 2021 WL 86777, at *9 n.4 (S.D. Fla.). *Urogynecology* has no relevance to the present case.

II. INTERPRETING BOTH PHYSICAL LOSS AND PHYSICAL DAMAGE TO REQUIRE ACTUAL PHYSICAL INJURY TO PROPERTY HARMONIZES WITH OTHER PROVISIONS IN THE BUSINESS INCOME COVERAGE

Sandy Point does not claim any damages based on physical injury to its premises or contents. Rather, it only claims loss of business income under the Business Income and Extra Expense coverage. In particular, it does not allege that any of its property needs to be repaired, rebuilt or replaced. The Business Income coverage applies to "the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (Appellee022, -78). The Policy defines "period of restoration" in terms of the reasonable time to

repair, replace or rebuild property that has been physically lost or physically damaged (with a cap of 12 months "Repair" is what one does to a building or contents that are damaged, but can be fixed. If the building is beyond repair—a total loss—it can be rebuilt. The provision of the Policy that ties Business Income coverage to a period of restoration ending with repair, rebuilding or replacement squarely harmonizes with the necessity for ***physical*** loss or ***physical*** damage to property. *See, e.g.*, *Bridal Expressions*, *supra*, at *6; *Crescent Plaza*, *supra*, at *3.

In contrast, interpreting physical loss to mean "loss of use" without physical harm to the property does not harmonize with the period of restoration provision. There is nothing to repair, rebuild or replace if there is no physical loss or physical damage to property. Indeed, "One does not replace, rebuild or repair a countertop (or a doorknob or a floor) because SARS-CoV-2 (or salmonella, MRSA or the flu virus) is present on the surface. One simply cleans the surface." *L&J Mattson's*, *supra*, at *5. Nor can the lifting of the restrictions on Sandy Point's services substitute as an end-point to the period of restoration because there is no reasonable sense in which the terms "repair, rebuild or replace" can be understood to mean the abatement or termination of governmental regulation of the business's operations. *Tria*, *supra*, at *5.

Toppers Salon and Health Spa, Inc. v. Travelers Property Casualty Co. of America, 2020 WL 7024287, at *4 (E.D. Pa.), exemplifies this point. *Toppers* addressed the period of restoration provision and held:

> [T]hese provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding or replacement.

Toppers concluded that the plaintiff's loss of use claim could not be harmonized with the period of restoration that governs the business income coverage. *See also The Woolworth LLC v. The Cincinnati Ins. Co.*, 2021 WL 1424356, at *4–*5 (N.D. Ala.); *Bel Air Auto Auction*, 2021 WL 1400891, at *11; *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *10 (N.D.

Ohio); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *6–*7 (S.D.N.Y.); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 7251643, at *4–*5 (S.D. Fla.) (collecting cases); *Hillcrest*, *supra*, at *8; *Henry's*, *supra*, at *5–*6.

Here as in *Toppers* and the other cases cited above, there must be some physical alteration to property in order to have direct physical loss or damage to property. The definition of the period of restoration resonates with this core requirement. If there is nothing to repair, rebuild or replace then there must not have been any direct physical loss or damage to property in the first place. Sandy Point fails to grasp this important point, and alleges financial loss without physical loss to property.

III. DECONSTRUCTING THE OPERATIVE PHRASE TO FIND COVERAGE FOR LOSS OF USE IN THE ABSENCE OF PHYSICAL INJURY IS CONTRARY TO ILLINOIS INSURANCE LAW.

Sandy Point's amicus argues that the dictionary definition of "loss" supports a claim for coverage based on loss of use. (Amicus Br. 6) Its dictionary argument is an attempt to deconstruct the Policy. Amicus' dictionary sources provide a variety of definitions, from which it selects secondary definitions (ignoring the first definition: "destruction, ruin")[10] and ignores the fact that the Policy defines "loss" more narrowly to mean only physical loss or physical damage to property.

Amicus also relies on a secondary definition of "property" and disregards the basic purpose of commercial property coverage. Its argument that "property" includes intangible rights ignores the fact that a commercial property policy need not cover every aspect of property rights. Intangible rights, such as title or intellectual property rights, are commonly protected by specialized insurance, not commercial property insurance.

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[10] "Loss." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (accessed May 11, 2021).

"Deconstruction" of written language is a critical method which asserts that the meaning of a word or phrase never means exactly what the author intended. *See* "Deconstruction." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/deconstruction (accessed April 25, 2021). The deconstruction method involves extracting words from the context in which they were written and reconstructing the writing to suit the narrative of the deconstructor without regard to the original intention of the writing. The point is to knowingly ignore the intended meaning and impose a reader's alternative meaning. Deconstruction may have its devotees in academic circles, but the Illinois law of insurance policy interpretation requires that words in insurance policies be read in context and rejects the notion that individual words can be read out of context to create an ambiguity or alternate meaning. *Nicor*, 860 N.E.2d at 286; *Hobbs*, 823 N.E.2d at 564; *Gen. Ins. Co. of Am. v. Robert B. McManus, Inc.*, 650 N.E.2d 1080, 1083 (Ill. App. Ct. 1995) ("All provisions of the insurance contract, not just an isolated part, should be read together to interpret it.").

Zwillo made an extensive analysis of this technique and correctly rejected the deconstruction approach:

> An Insured cannot create an ambiguity by reading only a part of the policy and claiming that, read in isolation, that portion of the policy suggests a level of coverage greater than the policy actually provides when read as a whole.

2020 WL 7137110, at *2 (citation omitted). *Zwillo* further held that the word "loss" could not be read in isolation from the words "direct" and "physical," which modify the words loss and damage, and convey actual, demonstrable loss or harm to some portion of the premises itself. *Id.* at *4–*5. Fundamentally, physical alteration of property is required by the modifying word "physical". Thus, there must be a tangible impact that physically alters property. *Id.* at *4.

Indeed, it is *Studio 417*'s use of a deconstruction analysis that led the district court in *Zwillo* to ***expressly reject*** *Studio 417*, an earlier decision in the same district. *Id*. at *8.

Similarly, in *Mama Jo's*, the Eleventh Circuit Court of Appeals rejected arguments based solely on definitions of the word loss applied out of the context of the whole phrase. It held that "'direct' and 'physical' modify loss and impose the requirement that the damage be actual." *Mama Jo's*, 823 F. App'x. at 879.

The Third Circuit Court of Appeals has likewise rejected the deconstruction of insurance policy language. *Royal Insurance Co. of America v. KSI Trading Co.*, 563 F.3d 68, 73-74 (3d Cir. 2009), stated, quoting from *A&S Fuel Co., Inc. v. Royal Indemnity Co., Inc.*, 652 A.2d 1236 (N.J. App. 1995):

> Our case law, however, does not require us to credit every conceivable deconstruction of contractual language. As Justice Clifford stated in *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 23, 405 A.2d 788 (1979), the "doctrine of ambiguity" should be invoked only to resolve "genuine ambiguities", not "artificial" ambiguities created by "semantical ingenuity."

See also Selery Fulfillment, Inc. v. Colony Ins. Co., 2021 WL 963742, at *3 (E.D. Tex.) ("While reviewing the policy, [n]o one phrase, sentence, or section of [it] should be isolated from its setting and considered apart from the other provisions.") (internal quotations omitted); *Gilreath, supra*, at *4 ("Courts also analyze the contract as whole (not merely isolated clauses and provisions) and interpret it both to give the greatest effect possible to all provisions and to avoid rendering any of the provisions meaningless."); *Equity Planning Corp. v. Westfield Ins. Co.*, 2021 WL 766802, at *6 (N.D. Ohio) ("Further, in construing a contract, a court must read and consider the provisions as a whole and not in isolation."); *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, 2020 WL 7181057, at *2 (E.D. Pa.) ("A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the

parties."); *Henderson v. State Farm Ins. Co.*, 596 N.W.2d 190, 195 (Mich. 1999) ("The proper approach is to read the phrase as a whole, giving the phrase its common meaning" rather than attempting to define each word in the phrase separately.).

Contrary to the deconstruction approach, under insurance law the meaning of loss cannot be construed independently from the words that surround it in the operative phrase: direct, accidental, ***physical*** loss or damage to property. Amicus seeks to impose a definition of loss as merely any deprivation of use. But, this ignores the context in which loss is used in the Policy. Coverage based on restrictions on the use of property, without more, reads the word "physical" out of the phrase, broadening the scope of coverage beyond the ordinary meaning of the language. *See Chief of Staff*, *supra*, at *4; *Bridal Expressions*, *supra*, at *5 (holding that the dictionary definitions of the words "physical", "loss" and "damage" must be considered in the context of the complete phrase in which they appear ("direct physical loss of or damage to" property) and also in the context of the purpose of the insurance policy as a whole); *Woolworth*, *supra*, at *4; *Paradigm Care*, *supra*, at *5 (applying Illinois law); *Bluegrass Oral Health*, *supra*, at *4; *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 2021 WL 858489, at *6 (S.D. Ohio).

IV. THE ABSENCE OF A VIRUS EXCLUSION AND PRESENCE OF OTHER EXCLUSIONS IS IRRELEVANT.

Sandy Point argues that because the Policy contains some exclusions for particular types of losses, most of which it erroneously describes as non-physical[11], and does not contain a virus exclusion it must cover any claim arising from or involving a virus as a physical loss. (App. Br. 7–8 and 17–18). That argument is contrary to how insurance coverage is applied in Illinois, and nationally. An exclusion can become relevant only if it is first determined that there is a loss

[11] For example, Sandy Point refers to the exclusion of "accounts, deeds, money" which excludes claims for the physical loss or damage to documents and currency, as in a fire.

within the scope of the insuring agreement apart from any exclusions. This insurance law principle, recited in 17A Couch on Insurance §254:12, is recognized by courts across the nation, both before and since the onset of the pandemic. For example, in *Sigler v. GEICO Casualty Co.*, 967 F.3d 658, 660 (7th Cir. 2020), the court held that "an insurance policy does not need to exclude coverage for something it does not cover to begin with." *See also L&J Mattson's*, *supra* at *7; *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014) (holding that the loss of power to a law firm was not a direct physical loss to property, so it was unnecessary to decide whether a flood exclusion applied); *Ward Gen. Ins. Servs. Inc. v. Emp'rs Fire Ins. Co.*, 114 Cal. App. 4th 548, 555 (2003), *as modified on denial of reh'g* (Jan. 7, 2004) (finding it "unnecessary to analyze the various exclusions and their application to this case" because a crashed computer database was not direct physical loss).

Thus, since Sandy Point's Amended Complaint did not allege facts to show that its claim fell within the affirmative grant of coverage for direct physical loss or damage to property, there is no need to explore whether Sandy Point's alleged losses resulted from an excluded cause.

Moreover, the scope of the insuring agreement cannot be expanded by the absence of an exclusion.

> It is undisputed that there is no virus exclusion. However, Plaintiffs have failed to provide any support for the notion that the absence of an exclusion means that whatever could have been excluded but wasn't is necessarily covered. Even more fundamentally, the issue of exclusions is irrelevant as Plaintiffs' claims do not fall within the scope of the Policies' coverage.

4431, Inc. v. Cincinnati Ins. Cos., 2020 WL 7075318, at *3 (E.D. Pa.). *See also Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868, 876 (8th Cir. 2013) ("[T]he absence of an exclusion, standing alone, does not imply coverage; coverage must be provided in the remaining policy terms."); *Advance Watch Co. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996) ("the

absence of an exclusion cannot create coverage"); *Paradigm Care*, *supra*, at *4 n.7; *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, at *3 (E.D. Pa.). Accordingly, the absence of a specific virus exclusion does not bear on the interpretation of the insuring agreement or the meaning of direct physical loss or damage to property.

Lastly, Sandy Point erroneously claims that an association of insurers recognized that the standard language used in property insurance policies covered claims based on the presence of virus in a pandemic. Sandy Point selectively quotes from a 2006 publication by the Insurance Services Office (ISO) (the "ISO Circular"). (Appellee186). Because the Cincinnati Policy's direct physical loss language is clear and unambiguous, that ISO Circular is inappropriate extrinsic evidence, irrelevant and should not be considered when interpreting the Policy. The Policy language controls the coverage determination, not the ISO Circular. *See, e.g.*, *Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 1000 (7th Cir. 2018); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1027 (2d Cir. 1991); *CNA Cas. of Cali. v. E.C. Fackler, Inc.*, 836 N.E.2d 732, 736 (Ill. Ct. App. 2005).

Nonetheless, the ISO Circular strongly supports Cincinnati here. In it, ISO specifically mentioned SARS and the risk of the spread of disease by the presence of disease-causing agents on interior building surfaces. *See* Appellee190–91 ("Introduction" & "Current Concerns"). ISO stated that there was no coverage even in the absence of a virus exclusion: "While ***property policies have not been a source of recovery for losses involving contamination by disease-causing agents*** . . . ." Appellee191 ("Current Concerns") (emphasis added). ISO foresaw that policyholders might try to do exactly what Sandy Point is attempting here – to assert coverage where there is none: "the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there

are ***efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent***. *Id.* (emphasis added). So, on filing the virus exclusion, ISO recognized that a virus was not covered to begin with and presented the virus exclusion as a "belt and suspenders" option. This stated intent is the exact opposite of Sandy Point's characterization of the position taken by ISO. In sum, there is no coverage here because there is no direct physical loss to property. For that reason, it is not necessary (or appropriate) to analyze whether an exclusion exists or applies.

V. SANDY POINT HAS WAIVED ANY CLAIM FOR COVERAGE UNDER THE CIVIL AUTHORITY PROVISION OF THE POLICY.

Although Sandy Point refers in passing to the Civil Authority coverage provision as constituting a "Covered Cause of Loss," (App. Br. 2) it has not argued that that provision itself affords coverage for its losses and any such claim must now be deemed waived. *Weinstein v. Schwartz*, 422 F.3d 476, 477 n.1 (7th Cir. 2005); *U.S. v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived").

In any event, the Civil Authority coverage requires both direct physical harm to property which, as shown above, Sandy Point has not alleged, and a prohibition of access to Sandy Point's premises which Governor Pritzker's order did not do, as the premises were at all times available for some dental services. No court has issued a decision under Illinois law finding coverage for an insured's Coronavirus-related economic loss under a property policy's Civil Authority coverage. *See, e.g.*, *L&J Mattson's*, *supra*, at *7; *Firenze*, *supra*, at *6; *Chief of Staff*, *supra*, at *6; *Bradley Hotel*, *supra*, at *4; *Fran Napleton*, Appellee216; *Source One*, Appellee230–31.

VI. SANDY POINT HAS WAIVED ANY CLAIMS BASED ON THE DENIAL OF ITS MOTION TO RECONSIDER AND DENIAL OF ITS MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT.

In its Statement of the Case, Sandy Point recites the procedural history of the case, including its presentation of a motion to reconsider the court's ruling granting the motion to dismiss and a motion for leave to file a Second Amended Complaint. (App. Br. 3). In its statement of the standard of review, it refers to the standard for review of the denial of its motion for reconsideration and its motion for leave to file a Second Amended Complaint. (App. Br. 4). However, Sandy Point makes no argument directed to the denial of those motions. In particular, Sandy Point does not state the standard for a motion to reconsider and does not argue how that standard applies. Regarding its motion for leave to file a Second Amended Complaint, Sandy Point does not identify any new or different allegations of fact from the Amended Complaint that would change the court's analysis as to the sufficiency of the pleading. Accordingly, Sandy Point has waived any claims regarding the denial of these two motions. *Weinstein, supra*; *Berkowitz, supra*.

CONCLUSION

For the reasons stated above, the decision of the District Court dismissing Sandy Point's Amended Complaint with prejudice should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because, according to the word count function of Microsoft Word 2016, this brief contains 13,980 words, excluding the parts of the brief exempted by Fed. R. App. P.32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P.(32)(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 12 point Times New Roman Font for the main text and 11 point Times New Roman Font for the footnotes.

/s/ *Daniel G. Litchfield*
Daniel G. Litchfield

TABLE 1: CASES REJECTING CLAIMS FOR PROPERTY INSURANCE COVERAGE BASED ON CORONAVIRUS ORDERS[12]

Case (Federal 2021)	2021 WL Cite	Court
Lisette Enters., Ltd. v. Regent Ins. Co.	1804618	S.D.Iowa
Ascent Hospitality Mgmt. Co., LLC v. Emp'rs Ins. Co. of Wausau	1791490	N.D.Ala.
Dukes Clothing, LLC v. The Cincinnati Ins. Co.	1791488	N.D.Ala.
Café Int'l Holding Co., LLC v. Westchester Surplus Lines Ins. Co.	1803805	S.D.Fla.
Muriel's New Orleans LLC v. State Farm Fire & Cas. Co.	1614812	E.D.La.
Q Clothier New Orleans LLC v. Twin City Fire Ins. Co.	1600247	E.D.La.
Rye Ridge Corp. v. The Cincinnati Ins. Co.	1600475	S.D.N.Y.
Aggie Investments LLC v. Cont'l Cas. Co.	1550479	E.D.Tex.
Graspa Consulting Inc. v. United Nat'l Ins. Co.	1540907	S.D.Fla.
Mohawk Gaming Enters. LLC v. Affiliated FM Ins. Co.	1419782	N.D.N.Y.
PF Sunset View, LLC v. Atl. Specialty Ins. Co.	1341602	S.D.Fla.
SSN Hotel Mgmt., LLC v. The Hartford Mut. Ins. Co.	1339993	E.D.Pa.
Select Hospitality LLC v. Strathmore Ins. Co.	1293407	D.Mass.
Islands Restaurants, LP v. Affiliated FM Ins. Co.	1238872	S.D.Cal.
Mayssami Diamond Inc. v. Travelers Cas. Ins. Co. of Am.	1226447	S.D.Cal.
Chester Cnty. Sports Arena v. The Cincinnati Specialty Underwriters Ins. Co.	1200444	E.D.Pa.
7th Inning Stretch LLC v. Arch Ins. Co.	1153147	D.N.J.
Out West Restaurant Grp. Inc. v. Affiliated FM Ins. Co.	1056627	N.D.Cal.
Westside Head & Neck v. The Hartford Fin. Servs. Grp. Inc.	1060230	C.D.Cal.
Windber Hospital v. Travelers Prop. Cas. Co. of Am.	1061849	W.D.Pa.
Daneli Shoe Co. v. Valley Forge Ins. Co.	1112710	S.D.Cal.
Manhattan Partners LLC v. Am. Guar. & Liab. Ins. Co.	1016113	D.N.J.
Bachman's Inc. v. Florists' Mut. Ins. Co.	981246	D.Minn.

[12] This Table does not include authorities that dismissed plaintiff's complaint based solely on the existence of a virus exclusion. Nor does it include cases cited in the Appellee's Brief or dismissals that are not available on Westlaw.

DZ Jewelry LLC v. Certain Underwriter at Lloyds London	1232778	S.D.Tex.
Arash Emami M.D. P.C. Inc. v. CNA	1137997	D.N.J.
Skillets LLC v. Colony Ins. Co.	926211	E.D.Va.
Kamakura LLC v. Greater N.Y. Mut. Ins. Co.	1171630	D.Mass.
B Street Grill & Bar LLC v. Cincinnati Ins. Co.	857361	D.Ariz.
deMoura v. Cont'l Cas. Co.	848840	E.D.N.Y.
AE Mgmt. LLC v. Ill. Union Ins. Co.	827192	S.D.Fla,
Town Kitchen LLC v. Certain Underwriters at Lloyd's London	768273	S.D.Fla.
Circus Circus LV LP v. AIG Specialty Ins. Co.	769660	D.Nev.
15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London	896216	S.D.Fla.
SAS Int'l Ltd. v. Gen. Star Indem. Co.	664043	D. Mass.
Brunswick Panini's LLC v. Zurich Am. Ins. Co.	663675	N.D.Ohio
Ceres Enters. LLC v. Travelers Ins. Co.	634982	N.D.Ohio
Torgerson Props. Inc. v. Continental Cas. Co.	615416	D.Minn.
Family Tacos LLC v. Auto Owners Ins. Co.	615307	N.D.Ohio
Café La Trova LLC v. Aspen Specialty Ins. Co.	602585	S.D.Fla.
Levy Ad Grp. Inc. v. The Chubb Corp.	777210	D.Nev.
Café Plaza de Mesilla Inc. v. Continental Cas. Co.	601880	D.N.M.
Whiskey Flats Inc. v. Axis Ins. Co.	534471	E.D.Pa.
Selane Prods. Inc. v. Cont'l Cas. Co.	609257	C.D.Cal.
Protege Rest. Partners LLC v. Sentinel Ins. Co. Ltd.	428653	N.D.Cal.
Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.	422607	M.D.Pa.
First Watch Rests. Inc. v. Zurich Am. Ins. Co.	390945	M.D.Fla.
Gym Mgmt. Servs. Inc. v. Vantapro Specialty Ins. Co.	647528	C.D.Cal.
Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.	775397	N.D.Cal.
Frank Van's Auto Tag LLC v. Selective Ins. Co. of the Se.	289547	E.D.Pa.
Rococo Steak LLC v. Aspen Specialty Ins. Co.	268478	M.D.Fla.
Colgan v. Sentinel Ins. Co. Ltd.	472964	N.D.Cal.
Karmel Davis & Assocs. Attorneys-at-Law LLC v. The Hartford	420372	N.D.Ga.

Fin. Servs. Grp. Inc.		
Fink v. The Hanover Ins. Grp. Inc.	647374	N.D.Cal.
Unmasked Mgmt. Inc. v. Century-Nat'l Ins. Co.	242979	S.D.Cal.
R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.	686864	M.D.Fla.
Graspa Consulting Inc. v. United Nat'l Ins. Co.	199980	S.D.Fla.
7th Inning Stretch LLC v. Arch Ins. Co.	800595	D.N.J.
Webb Dental Assocs. DMD PA v. The Cincinnati Indem. Co.	800113	N.D.Fla.
1 S.A.N.T. Inc. v. Berkshire Hathaway Inc. & Nat'l Fire & Marine Ins. Co.	147139	W.D.Pa.
Roundin3rd Sports Bar LLC v. The Hartford	647379	C.D.Cal.
Moody v. The Hartford Fin. Grp. Inc.	135897	E.D.Pa.
ATCM Optical Inc. v. Twin City Fire Ins. Co.	131282	E.D.Pa.
Clear Hearing Solutions LLC v. Cont'l Cas. Co.	131283	E.D.Pa.
Independent Rest. Grp. v. Certain Underwriters at Lloyd's London	131339	E.D.Pa.
TAQ Willow Grove LLC v. Twin City Ins.	131555	E.D.Pa.
Ultimate Hearing Sols. II LLC v. Twin City Fire Ins. Co.	131556	E.D.Pa.
Zagefen Bala LLC v. Twin City Fire Ins. Co.	131657	E.D.Pa.
Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co. Ltd.	141180	N.D.Cal.
BA Lax LLC v. Hartford Fire Ins. Co.	144248	C.D.Cal.
Carrot Love LLC v. Aspen Specialty Ins. Co.	124416	S.D.Fla.
O'Brien Sales & Mktg. Inc. v. Transp. Ins. Co.	105772	N.D.Cal.
Berkseth-Rojas DDS v. Aspen Am. Ins. Co.	101479	N.D.Tex.
Island Hotel Properties, Inc. v. Fireman's Fund Ins. Co.	117898	S.D.Fla.
Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.	80535	S.D.Fla.
Rialto Pockets, Inc. v. Certain Underwriters at Lloyd's	267850	C.D.Cal.
KD Unlimited v. Owners Ins.	81660	N.D.Ga
Bluegrass v. State Auto. Mut. Ins.	42050	S.D.W.Va.
Ballas Nails & Spa v. Travelers Cas. Ins.	37984	E.D.Mo.
Edison Kennedy v. Scottsdale Ins.	22314	M.D.Fla.

Roy H. Johnson, DDS v. The Hartford Fin. Servs.	37573	N.D.Ga
Baker v. Oregon Mut. Ins.	24841; 1145882	N.D.Cal.
Palmdale Estates. v. Blackboard Ins.	25048	N.D.Cal.

Case (Federal 2020)	**2020 WL Cite**	**Court**
Atma Beauty v. HDI Global Spec.	7770398	S.D.Fla.
Drama Camp Productions. v. Mt. Hawley Ins.	8018579	S.D.Ala.
Jonathan Oheb MD. v. Travelers Cas. Ins.	7769880	C.D.Cal.
Sun Cuisine v. Certain Underwriters at Lloyd's	7699672	S.D.Fla.
Karen Trinh, DDS v. State Farm Gen. Ins.	7696080	N.D.Cal.
1210 McGavock St. Hosp. Part. v. Admiral Indem.	7641184	M.D.Tenn.
Mortar & Pestle v. Atain Spec. Ins.	7495180	N.D.Cal.
Emerald Coast Restaurants v. Aspen Spec. Ins.	7889061	N.D.Fla.
Prime Time Sports Grill v. DTW 1991 Underwriting	7398646	M.D.Fla.
10012 Holdings v. Sentinel Ins.	7360252	S.D.NY
Boulevard Carroll Entm't v. Fireman's Fund Ins.	7338081	D.N.J.
Gerleman Mgmt. v. Atlantic States Ins.	8093577	S.D.Iowa
Palmer Holdings & Investments v. Integrity Ins.	7258857	S.D.Iowa
El Novillo Rest. v. Certain Underwriters at Lloyd's	7251362	S.D.Fla.
Geragos & Geragos Eng. Co. No. 28 v. Hartford Ins.	7350413	C.D.Cal.
Whiskey River on Vintage. v. Ill. Cas.	7258575	S.D.Iowa
BBMS v. Cont'l Cas.	7260035	W.D.Mo.
Selane Prods. v. Continental Cas.	7253378	C.D.Cal.
Chattanooga Prof'l Baseball v. Nat'l Cas.	6699480	D.Ariz.
Long Affair Carpet & Rugv. Liberty Mut. Ins.	6865774	C.D.Cal.
Goodwill Ind. of Centr. Okla. v. Phila. Indem. Ins.	8004271	W.D.Okla.
Water Sports Kauai v. Fireman's Fund Ins.	6562332	N.D.Cal.
Brian Handel D.M.D. v. Allstate Ins.	6545893	E.D.Pa.
Raymond H Nahmad DDS v. Hartford Cas. Ins..	6392841	S.D.Fla.

W. Coast Hotel Mgmt. v. Berkshire Hathaway	6440037	C.D.Cal.
Travelers Cas. Ins. v. Geragos & Geragos	6156584	C.D.Cal.
Seifert v. IMT Ins.	6120002	D.Minn.
Mark's Engine Co. No. 28 Rest. v. Travelers Indem.	5938689	C.D.Cal.
Oral Surgeons. v. Cincinnati Ins.	5820552	S.D.Iowa
Infinity Exhibits v. Certain Underwriters At Lloyd's	5791583	M.D.Fla.
Mudpie, Inc. v. Travelers Cas. Ins.	5525171	N.D.Cal.
Turek Enters. v. State Farm Mut. Auto. Ins.	5258484	E.D.Mich.
10E, LLC v. Travelers Indem.	5359653; 6749361	C.D.Cal.
Social Life Magazine v. Sentinel Ins.	2904834	S.D.N.Y.

Case (State 2021)	**2021 WL Cite**	**Court**
Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.	609851	N.Y.Sup.Ct.
Soundview Cinemas, Inc. v. Great Am. Ins. Grp.	561854	N.Y.Sup.Ct.
The Scranton Club v. Tuscarora Wayne Mut. Grp., Inc.	454498	Pa.Com.Pl.
Case (State 2020)	**2020 WL Cite**	**Court**
Musso & Frank Grill. v. Mitsui Sumitomo Ins.	7346569	Cal.Super.
The Inns By the Sea v. California Mut. Ins.	5868738	Cal.Super.
Rose's 1 v. Erie Ins.	4589206	DC Super.
Catlin Dental, P.A. v. The Cincinnati Indem. Co.	8173333	Fla.Cir.Ct.
Dime Fitness v. Markel Ins.	6691467	Fla.Cir.Ct.
DAB Dental v. Main Street Am. Protection Ins.	7137138	Fla.Cir.Ct.
Gavrilides Mgmt. v. Mich. Ins.	4561979	Mich.Cir.Ct.
MAC Property Grp. v. Selective Fire & Cas. Ins.	7422374	N.J.Super.

CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I, Daniel G. Litchfield, an attorney, hereby certify that on May 17, 2021, I caused the Brief of Appellee The Cincinnati Insurance Company to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be automatically accomplished by the CM/ECF system.

/s/ *Daniel G. Litchfield*
Daniel G. Litchfield