

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-20-003537  
Victoria Benavides

CAUSE NO. D-1-GN-20-003537

<b>ILIOS PRODUCTION DESIGN, LLC</b>	§	<b>IN THE DISTRICT COURT</b>
<i>Plaintiff</i>	§	
	§	
v.	§	
	§	
	§	353RD
<b>THE CINCINNATI INSURANCE COMPANY, INC., THE CINCINNATI CASUALTY COMPANY, INC. and THE CINCINNATI INDEMNITY COMPANY, INC.</b>	§	<b>JUDICIAL DISTRICT</b>
	§	
<i>Defendants</i>	§	
	§	<b>OF TRAVIS COUNTY, TEXAS</b>

**PLAINTIFF’S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ILIOS PRODUCTION DESIGN, LLC (hereafter “ILIOS”), and files this it’s Plaintiff’s Original Petition against THE CINCINNATI INSURANCE COMPANY, INC., THE CINCINNATI CASUALTY COMPANY, INC. and THE CINCINNATI INDEMNITY COMPANY, INC. (collectively “Cincinnati Insurance”, “The Cincinnati Insurance Group” or “Defendants”), and in support thereof, would respectfully demonstrate to the Court as follows:

**SUMMARY OF THE CASE**

For years, ILIOS has paid “all-risk” insurance premiums to The Cincinnati Insurance Group to safeguard the livelihood of their business and their employees in the event of a civil authority shutdown. As a result of the dangerous physical conditions presented by the 2020 spread of the novel coronavirus (hereafter “COVID-19”), local (City of Austin/Travis County), State of Texas and federal authorities issued a series of civil authority orders closing Plaintiff’s business. Despite the absence of a clear virus exclusion in it’s policy, Cincinnati Insurance has failed to acknowledge the dangerous impact COVID-19 posed to the community, and refused coverage under its “all-risk” policy. According to Defendants’ 10-K filed with the Securities and Exchange Commission for the fiscal year ended on December 31, 2019, The Cincinnati Insurance Group had earned premiums of approximately \$5.6 Billion.

## I. DISCOVERY LEVEL

1. Plaintiff intends to conduct discovery under Level Three (3) pursuant to Rule 190 of the Texas Rules of Civil Procedure. This case involved complex issues and will require extensive discovery. Therefore, Plaintiff will ask the Court to order that discovery be conducted in accordance with a discovery control plan tailored to the particular circumstances of this suit. Plaintiff affirmatively pleads that this suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169.

## II. PARTIES AND SERVICE

2. Plaintiff ILIOS Production Design, LLC (formerly “ILIOS Lighting Design, LLC”) is a Texas limited liability company, operating a legal business out of it’s headquarters at 4009 Commercial Center Dr., Austin, Texas 78744-1088 located in Travis County, Texas. ILIOS may be served with process through the undersigned counsel.

3. Defendants Cincinnati Insurance Group consist of three separate Ohio corporations (The Cincinnati Insurance Company, Inc., The Cincinnati Casualty Company, Inc., and The Cincinnati Indemnity Company, Inc.), with their principal place of business in Fairfield, Ohio who each conduct business of insurance in the State of Texas. The insurance business done by the Cincinnati Insurance Group in Texas includes, but is not limited to, the following:

- The making and issuing of contracts of insurance with the Plaintiff;
- The taking or receiving of application for insurance, including the Plaintiff’s application for insurance;
- The receiving or collection of premiums, commissions, membership fees, assessments, dues or other consideration for any insurance or any part thereof, including any such consideration or payments from the Plaintiff; and
- The issuance or delivery of contracts of insurance to residents of this state or a person authorized to do business in this state, including the Plaintiff.

4. Defendants can be served through their registered agent National Registered Agents, Inc. at the following address: 1999 Bryan St., Suite 900, Dallas, Texas, 75201-3136. **Plaintiff requests the clerk issue service via certified mail/return receipt requested at this time.**

## III. JURISDICTION AND VENUE

5. The Court has jurisdiction over this action because Plaintiff seeks damages within the Court’s jurisdictional limits. Plaintiff seeks monetary relief of over \$1,000,000, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.

6. Venue is proper in Travis County under TEX. CIV. PRAC. & REM. CODE §15.002(a)(1) because it is the county where all of the events and omissions giving rise to Plaintiff's claims occurred.

#### **IV. FACTUAL BACKGROUND**

##### **Plaintiff Purchased an “All-Risk” Policy of Property Insurance That Broadly Provides Coverage for Loss of Business Income, Among Other Things**

7. On or about August 28, 2018, Plaintiff purchased a contract of insurance from Defendants, whereby Plaintiff agreed to make payments (in the form of premiums) to Defendants in exchange for Defendants' promise to indemnify Plaintiff for losses at the Covered Property, including, but not limited to, business income losses and business interruption losses.

8. Plaintiff's contract of insurance with Defendants bears Policy Number EPP0500963, is comprised of more than one policy (as stated herein shall be referred to as the “Policy”) and is effective for the period of August 20, 2018 through August 20, 2021 (the “Policy Term”).

9. Plaintiff has paid all premiums owed to Defendants under the Policy, and Defendants accepted all such premiums from Plaintiff.

10. The Policy is a form policy issued by Defendants.

11. The Policy is an “all-risk” policy, which provides the broadest property insurance coverage available.

12. The Policy provides coverage for “direct loss to Covered Property at the premises caused by or resulting from any Covered Cause of Loss.”

13. The Policy does not define the phrase “loss.”

14. “Loss” may be reasonably interpreted to occur when a covered cause of loss threatens or renders property unusable or unsuitable for its intended purposes or unsafe for normal human occupancy and/or continued use.

15. “Loss” may also be reasonably interpreted to occur when civil authority orders result in an actual loss of access, loss of use, or loss of functionality; thereby impairing the function and value of the insured property and/or premises.

16. The Policy provides Plaintiff with various business income and extra expenses coverage during the Policy Term.

17. Under the Policy, Defendants agrees to pay: **“the actual loss of ‘Business Income’ and ‘Rental Value’ you sustain due 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.”** The Policy describes the covered premises as “4009 Commercial Center Dr., Austin, Texas 78744-1088,” the Covered Property, and coverage is listed for “Business Income and Extra Expense” for twelve months actual loss sustained.

18. Additional coverage is provided under the Policy for business income losses resulting from an “action of civil authority” which prohibits access to the “premises” related to a “Covered Cause of Loss” at property other than the “Covered Property” at a “premises”: **we will pay for the actual loss of “Business Income” and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the ‘premises’.**”

19. The Policy contains no exclusionary language referencing the phrases “virus”<sup>1</sup> or “pandemic”; despite this Policy being issued in 2018; years after the Severe Acute Respiratory Syndrome (“SARS”) outbreak swept across the globe and caused millions of dollars of exposure to the insurance industry.

**In Response to Covid-19, Texas and Other Local Governments Issue Sweeping Orders Shutting Down “Non-Essential” Businesses**

20. Severe acute respiratory syndrome coronavirus-2 (“COVID-19”) has spread, and continues to spread, rapidly across the United States and has been declared a pandemic by the World Health Organization. See <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center> (last accessed July 6, 2020).

21. The global COVID-19 pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials for many days.

22. According to a study published in *The New England Journal of Medicine*, COVID-19 is widely accepted as a cause of real physical loss and damage. It remains stable and transmittable in aerosols for up to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last accessed June 15, 2020).

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<sup>1</sup> The Policy does contain references to computer “virus” which are not applicable in this dispute.

23. Another study, published in the *Journal of Hospital Infection*, found: “Human coronavirus can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30°C or more the duration of persistence is shorter.” See <https://www.inverse.com/science/coronavirus-4-studies-explain-how-covid-19-sticks-to-surfaces> (last accessed June 15, 2020).

24. On March 6, 2020, City of Austin Mayor Steve Adler and Travis County Judge Sarah Eckhardt declared a state of disaster for the City of Austin<sup>2</sup> and Travis County<sup>3</sup>, respectively.

25. On March 13, 2020, Greg Abbott, Governor of Texas, declared a state of disaster for all counties within Texas<sup>4</sup>.

26. On March 14, 2020, City of Austin Mayor Steve Adler and Travis County Judge Sarah Eckhardt banned mass gatherings of 250 persons or more anywhere in the City of Austin<sup>5</sup> or County of Travis<sup>6</sup>, respectively, beginning 2:00 a.m. on March 15, 2020 and continuing until May 1, 2020, unless terminated or modified by an earlier order.

27. On March 15, 2020, the Centers for Disease Control and Prevention (“CDC”) recommended that organizers (whether groups or individuals) cancel or postpone in-person events that consist of fifty (50) or more people throughout the United States<sup>7</sup>.

28. On March 16, 2020, President Trump acknowledged the gravity of the COVID-19 pandemic, releasing strict new guidelines to limit people’s interactions, including that Americans should avoid groups of more than ten (10) people<sup>8</sup>.

29. On March 19, 2020, Greg Abbott, Governor of Texas, issued Executive Order GA-08<sup>9</sup>, adopting the guidelines from the President and CDC, including temporarily closing all schools in Texas.

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<sup>2</sup> See [https://www.austintexas.gov/sites/default/files/files/COVID-19%20Declaration\(2\).pdf](https://www.austintexas.gov/sites/default/files/files/COVID-19%20Declaration(2).pdf)

<sup>3</sup> See <https://www.traviscountytexas.gov/images/docs/disaster-declaration-03-06-2020.pdf>

<sup>4</sup> See [https://gov.texas.gov/uploads/files/press/DISASTER\\_covid19\\_disaster\\_proclamation\\_IMAGE\\_03-13-2020.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf)

<sup>5</sup> See <http://www.austintexas.gov/edims/document.cfm?id=337524>

<sup>6</sup> See <https://www.traviscountytexas.gov/images/docs/covid-19-order-1.pdf>

<sup>7</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>

<sup>8</sup> See [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf)

<sup>9</sup> See [https://gov.texas.gov/uploads/files/press/EO-GA\\_08\\_COVID-19\\_preparedness\\_and\\_mitigation\\_FINAL\\_03-19-2020\\_1.pdf](https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf)

30. On March 20, 2020, City of Austin Mayor Steve Adler<sup>10</sup> and Travis County Judge Sarah Eckhardt<sup>11</sup> issued orders adopting the President's, Governor's, and CDC's recommendations.

31. With the pandemic continuing to spiral out of control, on March 24, 2020 City of Austin Mayor Steve Adler and Travis County Judge Sarah Eckhardt issued "Stay at Home or Place of Residence" which also ordered all non-essential businesses and operations to immediately cease operations within any facility in the City of Austin<sup>12</sup> or Travis County<sup>13</sup>. This same order also prohibited all public and private gatherings of any number of people occurring outside a single household or dwelling unit, which includes Plaintiff's operations, covered most of it's customers, and canceled nearly all scheduled events for the duration of the Order and subsequent extensions.

32. On March 31, 2020, Governor Abbott issued an Executive Order stating that "Every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household."<sup>14</sup> This order closed schools and required services to be provided through remote tele-work from home unless the services were deemed essential by the federal government.<sup>15</sup>

33. Under §418.173 of the TEX. GOV'T CODE, failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable by a fine not to exceed \$1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement<sup>16</sup>.

34. On April 13, City of Austin Mayor Steve Adler<sup>17</sup> and Travis County Judge Sarah Eckhardt<sup>18</sup> issued orders extending their respective local governments' "Stay Home – Work Safe" orders to May 8, 2020.

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<sup>10</sup> See <https://www.austintexas.gov/sites/default/files/files/COA%20Order%2020%20Mar%202020.pdf>

<sup>11</sup> See <https://www.traviscountytx.gov/images/docs/covid-19-order-3.pdf>

<sup>12</sup> See <https://www.austintexas.gov/sites/default/files/files/Order%2020200324-007%20-%20Stay%20Home%20-%20Work%20Safe.pdf>

<sup>13</sup> See <https://www.traviscountytx.gov/images/docs/covid-19-order-5.pdf>

<sup>14</sup> See [https://gov.texas.gov/uploads/files/press/EO-GA-14-Statewide\\_Essential\\_Service\\_and\\_Activity\\_COVID-19\\_IMAGE\\_03-31-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-14-Statewide_Essential_Service_and_Activity_COVID-19_IMAGE_03-31-2020.pdf)

<sup>15</sup> See <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

<sup>16</sup> See <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm#418.173>

<sup>17</sup> See [https://www.austintexas.gov/sites/default/files/files/document\\_96DEBEEC-E581-05E0-8A3D444404948A84.pdf](https://www.austintexas.gov/sites/default/files/files/document_96DEBEEC-E581-05E0-8A3D444404948A84.pdf)

<sup>18</sup> See <https://www.traviscountytx.gov/images/docs/covid-19-order-7.pdf>

35. On May 6, 2020, Governor Abbott permitted companies to resume in-office operations, so long as no more than five (5) persons or twenty-five percent (25%) of the workforce, whichever was greater, returned to the office<sup>19</sup>.

36. On May 8, 2020, City of Austin Mayor Steve Adler extended the City's "Stay Home – Work Safe" order to May 30, 2020<sup>20</sup>, and released the City's re-opening strategy; consisting of five levels<sup>21</sup>. As of the date of this filing, the City of Austin is in Stage Five – the most restrictive level (the City has yet issued an order closing non-essential businesses). On May 8, 2020 Travis County Judge Sarah Eckhardt extended the County's "Stay Home – Work Safe" order to June 15, 2020<sup>22</sup>.

37. Most other states have enacted similar shut-down orders for "non-essential" businesses, or businesses deemed not to be "life sustaining."

38. As a result of the orders governing Plaintiff, the Covered Property completely closed to all employees on March 24, 2020.

39. The closure of all "non-life-sustaining businesses" evidences an awareness on the part of both state and local governments that COVID-19 causes loss of or damage to property. This is particularly true in places of business open to the public, as the contract and interaction necessarily incident to such businesses causes heightened risk of the property becoming contaminated. ILIOS' operations are even more susceptible, given the extensive transportation of people and property between locations throughout Texas, back to the warehouse, and then back out to new locations.

40. For example, a New York City Executive Order<sup>23</sup> entered on March 16, 2020 specifically acknowledges that: "[COVID-19] physically is causing property loss and damage."

41. Similarly, in a March 16, 2020 Proclamation<sup>24</sup>, the City of New Orleans acknowledged COVID-19's "propensity to attach to surfaces for prolonged periods of time,

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<sup>19</sup> See <https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-to-expand-openings-of-certain-businesses-and-activities>

<sup>20</sup> See <https://www.austintexas.gov/sites/default/files/files/Order%2020200508-011.pdf>

<sup>21</sup> See <https://www.austintexas.gov/page/covid-19-risk-based-guidelines>

<sup>22</sup> See <https://www.traviscountytx.gov/images/docs/covid-19-order-8.pdf>

<sup>23</sup> See <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf>

<sup>24</sup> See <https://nola.gov/mayor/executive-orders/emergency-declarations/03162020-mayoral-proclamation-to-promulgate-emergency-orders-during-the-state-of-emergency-due-to-co/>

thereby spreading from surface to person and causing property loss and damage in certain circumstances.”

42. In upholding the Governor of Pennsylvania’s Proclamation of a state-wide disaster and the Executive Orders mandating the closure of businesses within Pennsylvania, the Pennsylvania Supreme Court noted the significant risk of the spread of the COVID-19 virus, even in locations where the disease has not been detected:

Covid-19 does not spread because the virus is “at” a particular location. Instead, it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic. Respondents’ Brief at 4 (citing Coronavirus Disease 2019, “Symptoms,” CDC, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last accessed 4/9/2020)). The virus can live on surfaces for up to four days and can remain in the air within confined areas and structures. *Id.* (citing National Institutes of Health, “Study suggests new coronavirus may remain on surfaces for days,” (Mar. 27, 2020) <https://www.nih.gov/news-events-nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (last accessed 4/9/2020) and Joshua Rabinowitz and Caroline Bartman, “These Coronavirus Exposures Might be the Most Dangerous,” *The New York Times* (April 1, 2020) <https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html>).

*Friends of DeVito v. Wolf*, \_\_\_ A. 3d \_\_\_, 2020 WL 1847100, \*15-16 (Pa. April 13, 2020).

43. Because the COVID-19 virus can survive on surfaces for up to fourteen (14) days, the Pennsylvania Supreme Court ultimately concluded that “any location . . . where two or more people can congregate is within the disaster area.”

44. On July 6, 2020, a group of 239 scientists from 32 countries delivered an open letter<sup>25</sup> to the World Health Organization arguing that multiple studies “have demonstrated beyond any reasonable doubt that viruses are released during exhalation, talking, and coughing in micro-droplets small enough to remain aloft in the air.” It says these micro-droplets “pose a risk of exposure at distances beyond the 1 to 2 m from an infected individual.”

**Plaintiff Submits a Claim Under Its “All-Risk” Policy, and Defendants Wrongfully Fails and Refuses to Honor Its Obligations Respecting Same**

45. As a result of the orders governing Plaintiff, the Covered Property was closed on March 24, 2020 and remained closed until a limited re-opening on June 26, 2020.

46. Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

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<sup>25</sup> See <https://tinyurl.com/WHOletter> (last accessed on July 8, 2020).

47. With ILIOS’ facility and all business operations ordered to cease, prohibiting access to the premises pursuant to civil authority orders, Plaintiff provided timely notice to Defendants on March 25, 2020 to “get a Business Interruption Claim started.”

48. Defendants denied Plaintiff’s claim by letter dated April 20, 2020, attached hereto as **Exhibit A**. In its letter, Defendants posited, *inter alia*, that coverage under the Policy may not be afforded because: (i) Plaintiff’s losses do not arise from “physical loss or damage” (seemingly ignoring that coverage can be triggered under the Policy by either “physical loss of” or “damage to” property); and Plaintiff’s claim is barred by the Policy’s so-called “Pollutants” exclusion, defining “pollutants” as:

any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste . . . “Pollutants” include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the “pollutants” . . .

*See* Policy (FM 101 05 16 at p. 39).

49. Notably, the Policy does not contain any exclusionary language containing the words “virus,” pandemic” or a combination of generally accepted terms used within the insurance industry since the 2002-2003 SARS epidemic led to significant industry losses.

50. The Policy’s Pollutants Exclusion does not preclude coverage for Plaintiff’s claim under the Policy. Defendants made material misrepresentations about Policy provisions, coverage and law in Texas applying thereto. Defendants and their agents have kept and have in their possession a claim file which details Plaintiff’s claim and it’s investigation, adjustment, and subsequent denial of the claim. Further, Defendants’ agents misrepresented the Policy provisions and coverage.

## **V. CAUSES OF ACTION**

### **A. BREACH OF CONTRACT**

51. Plaintiff incorporates by reference each and every allegation set forth above.

52. Plaintiff and Defendants entered into a contract of insurance; here, the Policy.

53. Under the Policy, Defendants agreed to indemnify Plaintiff for it’s business losses as a result of a covered loss.

54. Plaintiff suffered a covered loss under the Policy.

55. Plaintiff submitted a timely notice of claim and satisfied all conditions precedent to receiving coverage it purchased from Defendants.

56. Defendants breached their contract with Plaintiff by failing and refusing to provide the contracted-for coverage.

57. Defendants' breach of the contract has caused Plaintiff to suffer damages in the amount of its unreimbursed business losses or their limits of liability, whichever is lower.

## **B. NON-COMPLIANCE WITH TEXAS INSURANCE CODE**

### **(1) Unfair Settlement Practices**

58. Plaintiff incorporates by reference each and every allegation set forth above.

59. Texas law requires Defendants to conduct a reasonable, full and fair claim investigation. Defendants violated Chapter 541 of the Texas Insurance Code, in one or more of the following particulars:

#### **§ 541.061 (Texas Insurance Code) – Misrepresentation of Insurance Policy**

- Making an untrue statement of material fact;
- Failing to state a material fact necessary to make other statements not misleading;
- Making a misleading statement; and
- Failing to disclose a material matter of law.

60. Defendants' misrepresentations, including but not limited to the "pollutants exclusion," were made knowingly and therefore constitute actionable violations of the Texas Insurance Code.

### **(2) The Prompt Payment of Claims**

61. Plaintiff incorporates by reference each and every allegation as set forth above.

62. Plaintiff suffered a covered loss under the Policy, and made a timely notice of claim to Defendants for coverage under the Policy.

63. Defendants failed and will continue to fail to timely indemnify Plaintiff for losses suffered under the Policy due to Defendants' wrongful denial of the Policy benefits. Defendants' wrongful delay and failure to promptly pay Plaintiff's claims were made knowingly.

### **(3) Breach of the Duty of Good Faith and Fair Dealing**

64. Plaintiff incorporates by reference each and every allegation as set forth above.

65. Plaintiff alleges that Defendants' conduct constitutes a breach of the common law duty of good faith and fair dealing owed to Plaintiff pursuant to the Policy at issue.

66. From and after the time Plaintiff's loss was presented to Defendants, its liability to pay the reduced amount for business losses demanded under the Policy was reasonably clear. However, Defendants have refused to pay Plaintiff and wrongfully denied the claim, despite there being no basis upon which a reasonable insurance company would have relied upon to deny the demanded amount. Defendants' conduct constitutes a breach of the common law duty of good faith and fair dealing.

67. Defendants' failure, as described above, to adequately and reasonably investigate and evaluate Plaintiff's claim, which at the time it knew or should have known through the exercise of reasonable diligence that it's liability was reasonably clear. Such failure occurred knowingly and therefore constitutes a breach of the duty of good faith and fair dealing.

#### **VI. DAMAGES**

68. Plaintiff will show that Defendants wrongfully refused to pay the \$597,642.99 demanded as full and final settlement of all claims made pursuant to the Policy on May 6, 2020; therefore Plaintiff is entitled to treble damages in the amount of \$1,792,928.97 for Defendants' knowing violations of the Texas Insurance Code.

69. Plaintiff additionally requests the Court's judgment include the eighteen percent (18%) per annum on the amount of Plaintiff's claim, together with attorney's fees, pursuant to Texas Insurance Code §542.060.

#### **VII. REQUEST FOR ATTORNEY'S FEES**

70. Plaintiff seeks its reasonable and necessary attorney's fees for services rendered through the trial of this matter, together with a conditional award of attorneys' fees in the event of appeal, pursuant to TEX. CIV. PRAC. & REM. CODE 38.001.

#### **VIII. REQUEST FOR DISCLOSURE**

71. Defendants are requested, within fifty (50) days of the date of service of this Original Petition, to disclose the information requested under Rule 194.2 of the Texas Rules of Civil Procedure.

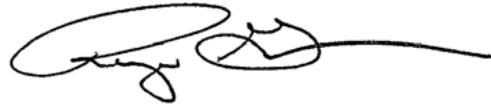
#### **VIII. PRAYER**

WHEREFORE, premises considered, Plaintiff ILIOS Production Design, LLC prays The Cincinnati Insurance Group Defendants answer the allegations contained herein, and that Plaintiff be awarded a judgment within the jurisdictional amounts of the Court; together with

attorney's fees and post-judgment interest at the legal rate; and such other and further relief to which Plaintiff may be justly entitled to at law or in equity.

Respectfully submitted,

**The Law Office of Roger Gordon**

A handwritten signature in black ink, appearing to read 'Roger E. Gordon', with a long horizontal flourish extending to the right.

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State Bar No. 24043697  
901 South Mopac Expressway  
Building One, Suite 300  
Austin, Texas 78746  
O: (512) 636-2540  
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[roger@rogergordonlaw.com](mailto:roger@rogergordonlaw.com)

**ATTORNEY FOR PLAINTIFF  
ILIOS PRODUCTION DESIGN, LLC**



*The Cincinnati Insurance Company ■ The Cincinnati Indemnity Company  
The Cincinnati Casualty Company ■ The Cincinnati Life Insurance Company  
The Cincinnati Specialty Underwriters Insurance Company*

Monday, April 20, 2020

**VIA EMAIL AND U.S. MAIL**

ILIOS Lighting Design, LLC  
Attn: Brian Azar  
4009 Commercial Center Dr #650  
Austin TX 78744

<b>Re:</b>	<b>Insured:</b>	ILIOS Lighting Design, LLC
	<b>Policy No.:</b>	EPP0500963
	<b>Claim No.:</b>	3527348
	<b>Date of Loss:</b>	03/25/2020

Dear Brian Azar,

This letter provides Cincinnati Insurance Company's ("Cincinnati") coverage decision for the above-referenced claim made by ILIOS Lighting Design, LLC ("you" or "ILIOS"). As submitted, the claim involves the Novel Coronavirus known as SARS-CoV-2, which causes the viral infection known as COVID-19 ("Coronavirus"). The claim asserts possible Business Interruption due to COVID-19 pandemic. Cincinnati has determined that coverage is unavailable for the claimed loss. Cincinnati regrets that this decision is necessary and wants to describe the basis for its decision. Should you have any disagreement with the basis for this decision, Cincinnati invites you to state the reasons for your disagreement in writing, including by submitting any additional information or documentation. Cincinnati will consider any further information or documents you may supply.

**I. SUMMARY**

The Cincinnati policy provides coverage for direct physical loss or damage to Covered Property at the premises. This direct physical loss or direct physical damage must be to property at the covered premises. Cincinnati's investigation has found no evidence of direct physical loss or damage at your premises. Similarly, there is no evidence of damage to property at other locations, precluding coverage for orders of civil authority.

Nothing in this letter is a waiver of any rights available to Cincinnati under the policy or applicable law. Cincinnati reserves the right to rely on additional rights and/or language in the policy whether or not discussed in this letter.

**II. THE CINCINNATI POLICY**

Cincinnati issued policy number EPP0500963 ILIOS Lighting Design, LLC (the "Policy"). The Policy's effective dates are from August 20, 2018 through August 20, 2021. The Commercial Property Coverage provides limits of insurance for Business Personal Property with a limit of \$100,000 and Business Income with Extra Expense with a limit of \$1,200,000.

**Mailing Address:** P.O. Box 126 • Bulverde, TX 78163  
**Email:** [Johnathan\\_Malish@cinfin.com](mailto:Johnathan_Malish@cinfin.com) • **Cell:** (210) 243-3025 • **Fax:** (833) 854-2412

**III. BACKGROUND**

On March 27, 2020, ILIOS reported that revenue was being lost to the Coronavirus quarantine. We sent a letter that outlined potential coverage issues and requested specific items from ILIOS. We received the information below from subsequent communication with Roger Gordon whom relayed/confirmed the following:

- On March 16, 2020 ILIOS shut down business operations and closed their facility because of orders/mandates from the City of Austin, Count of Travis, and the State of Texas as ILIOS was not identified as essential and furthermore did not meet the essential criteria to resume business.
- In early-March, ILIOS employee Dustin Lueders, interacted with two clients who later tested positive for COVID-19. Mr. Lueders, without knowledge of, further interacted with ILIOS staff and equipment/furniture, which later then lead to other employees calling in sick; to include a senior staff who became ill and suspected to have been contracted with COVID-19 which was then instructed to stay home.
- The limited availability of testing during the early weeks of March precluded any ILIOS employees from confirming a COVID-19 diagnosis. ILIOS anticipates testing all their staff upon the FDA-approval of a test that will confirm the presence of COVID-19 antibodies.
- Two Orders issued by the 201st Judicial District Court of Travis County on April 17, 2020 related to Covid-19 and the Elections Code.

**IV. NO COVERAGE UNDER THE POLICY FOR LOSS OF INCOME DUE TO CORONAVIRUS**

**A. No Direct Physical Loss**

The Policy's insuring agreement at Section A. Coverage provides the following coverage:

We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

(FM 101 05 16 at p. 3.) The Policy defines "loss" as "accidental physical loss or accidental physical damage." (FM 101 05 16 at p. 38.) The Policy defines "premises" as "the Locations and Buildings described in the Declarations." (FM 101 05 16 at p. 39.)

This claim does not satisfy the Policy's insuring agreement. The claim does not involve direct, physical loss to property at your premises caused by a Covered Cause of Loss. Although you have indicated that ILIOS employee Dustin Lueders, interacted with two clients who later tested positive for Coronavirus and returned to the premises, this does not establish direct physical loss to property. You have not shown direct physical loss to property, as required by the Policy.

Accordingly, the Policy's insuring agreement is not met, and coverage is unavailable under the Policy.

## **B. No Business Income and Extra Expense Coverage**

**EXHIBIT A**

The Policy's Coverage Extensions section contains provisions for Business Income and Extra Expense coverage, included in Form FM 101 05 16:

### **(1) Business Income**

We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due 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. With respect to "loss" to personal property in the open or personal property in a vehicle or portable storage unit, the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

With respect to the requirements of the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purpose of this Coverage Extension only, your "premises" is the portion of the building that you rent, lease or occupy, including:

- (a)** Any area within the building or on the site at which the "premises" are located if that area services or is used to gain access to the "premises"; and
- (b)** Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

### **(2) Extra Expense**

- (a)** We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)(b)**, **(c)** and **(d)**) during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.
- (b)** If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **(2)(c)**) to:
  - 1)** Avoid or minimize the "suspension" of business and to continue "operations" either:
    - a)** At the "premises"; or
    - b)** At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
  - 2)** Minimize the "suspension" of business if you cannot continue "operations".
- (c)** We will also pay expenses to:
  - 1)** Repair or replace property; or

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- 2) Research, replace or restore the lost information on damaged "valuable papers and records";

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage will be reduced by the salvage value of that property.

- (d) Extra Expense does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(Form FM 101 05 16 at pp. 18-19, 21.)

Additionally, the Policy at Form FA 213 05 16 provides separate Business Income and Extra Expense coverage provisions:

### **1. Business Income**

- a. 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 "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. With respect to "loss" to personal property in the open (or personal property in a vehicle or portable storage unit), the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater.
- b. With respect to the requirements set forth in the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purposes of this Coverage Part only, your "premises" is the portion of the building which you rent, lease or occupy, including:
- (1) Any area within the building or on the site at which the "premises" are located if that area services or is used to gain access to the described "premises".
  - (2) Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater.

### **2. Extra Expense**

- a. Extra Expense coverage is provided at the "premises" described in the Declarations only if the Declarations show that "Business Income" coverage applies at that "premises".
- b. Extra Expense means necessary expenses you sustain (as described in Paragraphs **2.c.**, **d.** and **e.**) during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

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- c. If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph 2.d.) to:
- (1) Avoid or minimize the "suspension" of business and to continue "operations" either:
    - (a) At the "premises"; or
    - (b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
  - (2) Minimize the "suspension" of business if you cannot continue "operations".
- d. We will also pay expenses to:
- (1) Repair or replace property; or
  - (2) Research, replace or restore the lost information on damaged "valuable papers and records"

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage Form will be reduced by the salvage value of that property.

- e. Extra Expense as described in Paragraphs 2.a. thru 2.d. does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(FA 213 05 16 at pp.1-2.)

Like the Policy's insuring agreement, the Business Income and Extra Expense coverages require that there be direct physical loss or damage to Covered Property at the premises or within 1,000 feet of those premises. There is no evidence of any such physical loss or damage. Accordingly, the Business Income and Extra Expense requirements are not satisfied and coverage is unavailable under the Policy.

### **C. Pollution Exclusion**

For the reasons stated above, there is no coverage here because there was no direct physical loss at the premises. But, even assuming that there was direct physical loss, there was no covered cause of loss. This is because the Policy's Exclusions section at FM 101 05 16 excludes from coverage any "loss" caused by or resulting from:

#### **(I) Pollutants**

Discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" unless the discharge, dispersal, seepage, migration, release, escape or emission is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" results in a "specified cause

of loss", we will pay for the "loss" caused by that "specified cause of loss".

(FM 101 05 16 at pp. 8, 10.)

The Policy defines "pollutants" as

any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. . . . 'Pollutants' include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the 'pollutants' . . . .

(FM 101 05 16 at p. 39.)

The Coronavirus is a solid irritant or contaminant. Moreover, the government generally recognizes the Coronavirus as harmful to people. Accordingly, to the extent the Policy's insuring agreement was otherwise satisfied, coverage would ultimately be excluded because under the Pollutants exclusion there was no covered cause of loss.

#### **D. No Civil Authority Coverage**

The Policy's Coverage Extensions section contains provisions for Civil Authority coverage, included in Form FM 101 05 16:

When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:

- (a)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (b)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1)** 30 consecutive days after the time of that action; or
  - 2)** When your "Business Income" coverage ends;
- whichever is later.

(Form FM 101 05 16 at pp. 19, 21.)

Additionally, the Policy at Form FA 213 05 16 provides separate Civil Authority coverage provisions:

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the "premises", we will pay for the actual loss of "Business Income" you sustain and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority coverage for "Business Income" will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will apply for a period of up to 30 consecutive days from the date on which such coverage began.

Civil Authority coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for "Business income" coverage ends, whichever is later.

(FA 213 05 16 at p. 2.)

Although you closed your business in response to a governmental order, there is no evidence that the order was entered because of direct damage to property at other locations or dangerous physical conditions at other locations. Moreover, the order does not restrict access to the area immediately surrounding your premises. Because these requisite elements of the Civil Authority coverage are not present here, coverage is unavailable under the Policy.

## **V. CONCLUSION**

For the reasons discussed above, Cincinnati has concluded that the Policy provides no coverage for your claim. Cincinnati therefore cannot indemnify ILIOS Lighting Design, LLC for any loss of business income from Coronavirus.

You should note that the U.S. Small Business Administration ("SBA") may be providing assistance for citizens in your circumstances. I understand that the SBA's contact information is:

Website: <https://www.sba.gov/funding-programs/disaster-assistance>  
Phone: 1-800-659-2955

This letter is not intended to be a limitation or waiver of any rights available to Cincinnati. Cincinnati's position is based on the information available to date. Cincinnati

reserves all of its rights under the Policy and the applicable law. Cincinnati reserves the right to rely on any and all provisions of the Policy whether or not addressed in this letter.

If you have any information that you believe may impact any of the issues raised in this letter, please forward it to us as soon as possible. If you believe that we have misunderstood the facts or are in error regarding any of the statements set forth above, please notify us as soon as possible.

Please feel free to contact me if you have any questions or would like to discuss this matter.

Very truly yours,



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