IN THE SUPREME COURT OF OHIO

EMOI SERVICES, LLC, Plaintiff/Appellee, v. OWNERS INSURANCE COMPANY, Defendant/Appellant.	CASE NO. 2021-1529 On Appeal from the Second Appellate District, Montgomery County Court of Appeals, Case No. 29128

MERIT BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

IN SUPPORT OF APPELLEE EMOI SERVICES, LLC

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I. INTRODUCTION

United Policyholders submits this amicus brief in support of the merit brief of Appellee EMOI Services, LLC ("EMOI"), because the issues on appeal under Appellant's "Proposition of Law No. 1" present legal issues that can adversely affect policyholders throughout the State of Ohio.

The key issue presented by this appeal – whether a business property insurance policy provides insurance coverage for a ransomware attack that encrypts files on a policyholder's servers and its software – is one of first impression for this Court. It is not by any means, however, a novel issue. To the contrary, as the Second District Court of Appeals recognized in reversing the trial court's grant of summary judgment to Appellant, numerous courts around the country have held that property insurance policies, including business package policies like the one Appellant sold to EMOI, cover physical loss or damage to computer systems, including damage affecting information residing on computer systems, inflicted by ransomware. Numerous courts similarly have concluded that malware attacks and other incidents of damage constitute "direct physical loss or damage" to property.

Appellant's insurance coverage defenses in this appeal suffer from three key flaws:

1. Contrary to Appellant's unsupported representations, ransomware causes "physical loss or damage"—it is no accident that ransomware is deliberately designed to alter computer files and computer systems through electronic instructions making the property inoperable;

2. Contrary to Appellant's argument, property insurance does cover physical loss or damage to computer systems and data - in this vein, the existing body of case law is nearly unanimous in reaching this conclusion;

3. Contrary to Appellant's arguments, no sleight-of-hand can obscure the fact that the property insuring agreements Appellant sold to EMOI do not require covered property to be "tangible property". That term is nowhere to be found in the relevant portions of Appellant's business package policy sold to EMOI.

As set forth below, United Policyholders respectfully submits that Appellant's denial of insurance coverage runs afoul of Ohio insurance law and well-settled case law throughout the country, violates the insurance doctrines designed to protect policyholders from vague or uncertain policy language, and also runs counter to a policyholder's reasonable expectations. United Policyholders, therefore, asserts that the Second District Court of Appeal's reversal of the trial court, holding both that EMOI's evidence supports a conclusion that its software was damaged and that Appellant's Policy contemplated that EMOI's software was capable of being physically damaged, such that genuine issues of material fact exist as to whether EMOI's claim was covered under the Policy, should be affirmed by this Court.

II. STATEMENT OF THE FACTS

United Policyholders adopts the Statement of the Facts contained in the brief of Plaintiff-Appellee EMOI.

III. STATEMENT OF INTEREST OF AMICUS CURIAE

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Ohio businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), to Preparedness (preparedness through insurance

education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org. UP communicates with the Director of the Ohio Department of Insurance, Judith L. French, during meetings of the National Association of Insurance Commissioners where UP's Executive Director, Amy Bach, Esq., serves as an official consumer representative.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for insureds' rights in the courts for decades. For instance, UP's amicus brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). UP recently submitted an amicus curiae brief to this Court in *Motorists Mutual Insurance Co. v. Ironics, Inc., et al*., No. 2020-0306, 2022 WL 852346 (Ohio Mar. 23, 2022).

UP seeks to fulfill the classic role of amicus curiae by supplementing the efforts of counsel and drawing the Court's attention to law or circumstances that may have escaped consideration. As commentators have stressed, an amicus is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

IV. ARGUMENT IN SUPPORT OF EMOI ON APPELLANT'S PROPOSITION OF LAW NO. 1

Appellant's main arguments rest on the baseless premise that there was no "physical loss or damage" suffered by EMOI due to the ransomware attack on its computer system. Appellant's repeated arguments are belied not only by the evidentiary record established in this case (*see*

Court of Appeals' Opinion at pp. 16-19), but by virtually every single property insurance case considering physical loss or damage to a computer system, including damage to data, software, and processing. For the following reasons, Appellant's arguments should be rejected as they are incorrect as a matter of law and as a matter of fact.

A. Relevant Case Law Expressly Rejects Appellant's Contentions That "Physical Loss or Damage" Is Not Present When Computer Systems Are Attacked or Damaged

The Appellant repeatedly argues that its insurance policy (and property insurance in general) does not cover loss or damage to computer systems, including damage to software and data on those systems (*see*, *e.g.,* Appellant Brief at pp. 1, 2, 23, and 24). This is an inaccurate statement of both law and fact. Almost every decision to consider the issue demonstrates that property insurance policies (including property insuring agreements contained in business package policies) do cover physical loss or damage to computer systems, whether by ransomware, damage caused by broken temperature controls, sabotage by malware, electrical surges, and other related harms. *See, e.g., Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679 (D. Md. 2020) (hereinafter "*National Ink*") (finding property insurance coverage under business package policy for property damage suffered for lost data due to ransomware attack); *Ashland Hosp. Corp. v. Affiliated FM Ins. Co*., No. 11-16-DLB-EBA, 2013 WL 4400516, at *1 (E.D. Ky. Aug. 14, 2013) (discussed in detail below); *Landmark Am. Ins. Co. v. Gulf Coast Analytical Labs., Inc*., No. 10-809, 2012 WL 1094761 (M.D. La. Mar. 30, 2012) (hereinafter "*Landmark*" and discussed in detail below); *Se. Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831, 838 (W.D. Tenn. 2006) (finding "that the corruption of the pharmacy computer constitutes 'direct physical loss of or damage to property' under the business interruption policy."); *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc*., No. 99-185 TUC ACM, 2000 WL 726789 (D. Ariz., Apr. 18, 2000) (finding property insurance coverage for

programming information that had been stored in random access memory of mainframes during power outage).

B. Appellant's Arguments Are Remarkably Similar to Those Rejected in the *Landmark* Case and Its Progeny

Appellant's defense to covering EMOI's loss hinges on the arguments that data, media and software are incapable of suffering "physical loss or damage". This very argument has been repeatedly rejected. In the 2012 *Landmark* case, the policyholder operated a computer system that computed chemical data analysis for the petro-chemical industry. The hard disk storage system failed and led to the corruption of its business data, causing over $100,000 in recovery costs and over $1 million in losses of business income.

While the policyholder and insurance company both agreed that the property policy at issue covered the policyholder's electronic data, the insurance company disputed that electronic data could be "physically" damaged or lost. The federal court, applying Louisiana law, held to the contrary. Recognizing that although Louisiana has not "specifically addressed the issue of whether stored data is physical, it has determined electronic software data is physical." *Landmark*, 2012 WL 1094761, at *3. The court, in analyzing property insurance coverage terms, was persuaded by a tax law decision rendered by the Louisiana Supreme Court that had found "'tangible, physical property' is analogous to corporeal movable property in Louisiana law, and held that the electronic data is considered corporeal movable property." *Id.* at *3.

Importantly here, the *Landmark* court relied upon the fact that data "stored on magnetic tape, disc, or computer chip, this software, or set of instructions, is physically manifested in machine readable form by arranging electrons, by use of an electric current, to create either a magnetized or unmagnetized space . . . this machine readable language or code is the physical manifestation of the information in binary form" and that "tangibility is not a defining quality of

physicality." *Landmark*, 2012 WL 1094761, at *4. Applying this concept from Louisiana law, the *Landmark* court reasoned that electronic data may not be tangible, but "it is still physical because it can be observed and altered through human action." *Id*. at *4. The court, therefore, found that the policyholder's electronic data "has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses." *Id*. at *4. The court determined that for insurance coverage purposes, electronic data is susceptible to "'direct, physical loss or damage.'" *Id*. at *4.

In *Ingram Micro,* the insurance company refused to provide property insurance coverage to the policyholder under the argument that the harm to the computer system did not fit within the insuring agreement of the policy. Specifically, after a power outage damaged the policyholder's computer system and the matrix switch, the insurance company denied coverage for the policyholder's insurance claim arguing that the computer components were not "physically damaged" because "their capability to perform their intended functions remained intact. The power outage did not adversely affect the equipment's inherent ability to accept and process data and configuration settings when they were subsequently reentered into the computer system." *Ingram Micro, Inc*., 2000 WL 726789, at *2.

In turn, the policyholder contended that the "fact that the mainframe computers and the matrix switch retained the ability to accept the restored information and eventually operate as before, does not mean that they did not undergo 'physical damage.'" *Id.* at *2. The policyholder stressed that under property insurance, "physical damage" also "includes loss of use and functionality" which the policyholder had suffered after its systems went down. *Id.* at *2.

The federal trial court in that case ultimately determined that the damage suffered constituted physical loss or damage. The court concluded that:

> Ingram's mainframes were "physically damaged" for one and one half hours. It wasn't until Ingram employees manually reloaded the lost programming information that the mainframes were "repaired." Impulse was "physically damaged" for eight hours. Ingram employees "repaired" Impulse by physically bypassing a malfunctioning matrix switch. Until this restorative work was conducted, Ingram's mainframes and Impulse were inoperable.

Id. at *3. The court stated that: "Lawmakers around the country have determined that when a computer's data is unavailable, there is damage; when a computer's services are interrupted, there is damage; and when a computer's software or network is altered, there is damage. Restricting the Policy's language to that proposed by American would be archaic." *Id*. at *3.

In the 2020 decision in *National Ink*, applying Maryland law, the policyholder's computer system was damaged after ransomware was used by a hacker to attack the policyholder's computers. After computer systems and security consultants assessed the damage to the system, the policyholder elected to replace its system due to dormant strains of the malware remaining on the system and the slowed functionality of the system due to the computer security patches needed to maintain the integrity of the computer system in the wake of the attack. The policyholder sought coverage under its property insurance coverage of its business package policy for the costs of replacing its "entire computer system - all hardware and software needed for a fully functional computer system akin to the system it had before being attacked with the malware. *National Ink,* 435 F. Supp. 3d at 683.

As in this case, the insurance company argued that the claim did not come within the insuring promises of the subject property policy. The federal court noted that the insurance company's claims position equated the insuring agreement's "physical loss or damage" language to "require an utter inability to function." *Id.* at 686. The court rejected the insurance company's construction of the insuring agreement, finding that "no such prerequisite" exists for total loss of functionality before coverage obtains. *Id.* at 686. The court reasoned that the "more persuasive

cases are those suggesting that loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the 'physical loss or damage to' language in the Policy." *Id.* at 686. In so ruling, the court noted that computers often suffer "damage" without being rendered fully inoperable. *Id*. at 686.

The ruling focused on the loss suffered by the policyholder from the damage to the computer system, rather than whether the computer system was structurally altered or rendered entirely inoperable. The slow-down in computing and lack of access to software applications and data qualified for covered loss, even if the system remained theoretically functional. The court ruled that because "the plain language of the Policy provides coverage for such losses and damage," the policyholder was entitled to summary judgment concerning interpretation of the property policy's terms. *Id.*

Similarly, the *Ashland Hospital* court found that the policyholder's property insurance policy covered a malfunctioning computer system due to the overheating of various component parts of the policyholder's network. This system failure prevented data access for several hours. Diagnostic logs demonstrated that: hundreds of components "failed from thermal over-temperature conditions"; "drives reported 'media errors'"; and computer drives "reported hardware errors, including 'catastrophic disk drive'" faults. *Ashland Hospital*, 2013 WL 4400516, at *1. Based upon the damage suffered by the policyholder's systems, a computer consultant concluded that the system was severely "compromised" and needed replacement, given that its long-term reliability could not be assured. *Id.* at *2.

The policyholder thereafter sought property insurance coverage for the replacement costs for the damaged computer system. The insurance company offered two main reasons to justify its denial of coverage for the computer system. First, it argued that its denial was justified

because "direct physical loss or damage" does not cover situations in which there is a loss of reliability of the insured property. *Id.* at *5. That argument continued with the assertion that the hospital could not obtain coverage for the loss of reliability of its property because that aspect of the property is allegedly "intangible." *Id.* at *5. Instead, the insurance company argued that "physical" damage means a "distinct, demonstrable, physical alteration" of the covered property that is "perceptible to the senses." *Id.* at *5.

Second, the insurance company argued that property must be physically damaged so as to render it completely inoperable. The court rejected the insurance company's argument concerning the proper interpretation of the insuring phrase "direct physical loss or damage." Instead, the court agreed with the policyholder that once the property was adversely affected when it overheated, the resulting loss of reliability was a covered event. *Id.* at *5. Applying both an immediacy test and a proximate cause test, the court found the damage to the system to be "direct." *Id.* at *5.

The court also concluded that the damage to the hospital's computer system was "physical" because the harm indeed resulted "from physical alteration to the components themselves. It is undisputed, for instance, that disk drive damage occurs on a microscopic level through a process called 'ionic migration,' in which 'lubricants are thinned or . . . move around because they're more fluid [as a result of heat exposure].'" *Id.* at *5. The court also ruled that it is "undisputed that heat exposure can degrade the disk drives." *Id.* at *5. Specifically, the *Ashland Hospital* court found that "degradation" of a disk drive "due to heat exposure is a physical process." *Id.* at *5.

The insurance company also argued that there could be no covered loss or damage where the loss of functionality was not permanent in nature. *Id.* at *6. The court rejected the insurance

company's contention that "direct physical loss or damage" must be construed to require proof that the insured property had "permanently lost its ability to function." *Id.* at *6. The court explained that adopting the insurance company's argument would be to "ignore both the core function and value" of the computer system along with the very "purpose of insuring it." *Id.* at *6. The court refused to fashion a rule of construction that would require the policyholder to await complete failure of the system before its covered insurance claim would mature, since this "would defeat the objective of insurance." *Id.* at *6. Accordingly, the court concluded that the inaccessibility of data and unreliability of the computer system was covered "direct physical loss or damage" under the property policy. Of course, here, the Second District Court of Appeals cited evidence indicating not only that EMOI's systems were rendered inaccessible and unreliable following the ransomware attack, but also that EMOI's software was damaged. *See* Court of Appeals' Opinion at ¶ 42, p. 17; APPENDIX - 0017.

C. Ransomware Attacks on Computer Systems Are "Physical" Events

Appellant's anti-insurance coverage arguments are not only contrary to established and relevant case law, but also to our collective knowledge about the physical forces recognized in computer science. Appellant completely misstates the physical affect ransomware imposes upon computers systems and computer files.

At its most basic level, ransomware is a software program.[1] Like all software, it performs computer functions through electronic instructions. *See* Crystal Andrews, *Software Presentation, emerge with computers*, 2022, https://slideplayer.com/slide/5722216/. The electronic nature of these computer system instructions makes them a "physical" force - even if the naked eye cannot

[1] Kaspersky, *What is Ransomware*, https://www.kaspersky.com/resource-center/threats/ransomware.

see these electrons.[2] These electronic instructions enable the computing services desired. Unlike most software, however, ransomware is designed to harm the targeted computer system by encrypting data and computer files. File management refers to "the physical and logical storage system and practices provided for managing data on a computer." *see id*. Ransomware deliberately and physically alters the computer systems by changing the file extensions of the policyholder's data set.[3] *See* Court of Appeals' Opinion at ¶ 40, p. 16; APPENDIX - 0016 (testimony of Glaser-Garbick "that when he accessed the [Appellee's computer] system on September 12, he saw that 'all the files had weird extensions'"). The backup server of the appellee was also encrypted by the hackers. *Id*.

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[2] "*Computers are becoming faster and faster, but their speed is still limited by the physical restrictions of an electron moving through matter. What technologies are emerging to break through this speed barrier*?", Scientific American, Technology, (Oct. 21, 1999), https://www.scientificamerican.com/article/computers-are-becoming-fa/#:~:text=An%20electronic%20computer%20computes%20by,faster%20than%20the%20electrons%20themselves. Noting in relevant part that according to Seth Lloyd, "an assistant professor in the mechanical engineering department at the Massachusetts Institute of Technology":

> The wires in an electronic computer are like full hoses: they are already packed with electrons. Signals pass down the wires at the speed of light in metal, approximately half the speed of light in vacuum. The transistorized switches that perform the information processing in a conventional computer are like empty hoses: when they switch, electrons have to move from one side of the transistor to the other. The 'clock rate' of a computer is then limited by the maximum length that signals have to travel divided by the speed of light in the wires and by the size of transistors divided by the speed of electrons in silicon. In current computers, these numbers are on the order of trillionths of a second, considerably shorter than the actual clock times of billionths of a second. The computer can be made faster by the simple expedient of decreasing its size. Better techniques for miniaturization have been for many years, and still are, the most important approach to speeding up computers.

Id.

[3] *See* FBI Statement on Ransomware, https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/ransomware#:~:text=The%20FBI%20does%20not%20support,this%20type%20of%20illegal%20activity.

Accordingly, the malware injected into the computer system of Appellee by the hackers physically altered the computer files. This is not equivalent to forgetting a password as Appellant professes. Any scientific analysis of the damage occasioned by ransomware on a computer network or on computer files (as was the case with EMOI's cyber-attack) plainly demonstrates a "physical alteration" of the Appellee's computer files. This physical alteration of computer files was achieved when the cyber-attack on Appellee used the electronic instructions of the malware program to lock its computer files by changing file extensions. These electronic instructions embedded in the malware used against EMOI or any other organization are "physical" forces, even if not visible to the naked eye. [4] *See NMS Servs., Inc. v. Hartford*, 62 F. App'x 511, 515 (4th Cir. 2003) (covered claim under policy insuring physical loss and damage after former employee's hacking and malware attack erased and destroyed computer files, wherein concurring judge noted "a computer stores information by the rearrangement of the atoms or molecules of a disc or tape to effect the formation of a particular order of magnetic impulses, and a 'meaningful sequence of magnetic impulses cannot float in space.'").

D. Appellant Improperly Conflates Physical Loss or Damage with "Tangible Property"

Hoping to avoid its clear insurance coverage obligations to Appellee, Appellant imposes a supposed tangibility "requirement" into the type of property that must be physically lost or damaged. The plain language of Appellant's own insurance policy, however, does not support

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[4] Perhaps one of the clearest statements on the issue was made as early as 1994:

> When stored on magnetic tape, disc, or computer chip, this software, or set of instructions, is physically manifested in machine readable form by arranging electrons, by use of an electric current, to create either a magnetized or unmagnetized space . . . this machine readable language or code is the physical manifestation of the information in binary form.

S. Cent. Bell Tel. Co. v. Barthelemy, 643 So. 2d 1240, 1244 (La. 1994).

such a “limitation” on insurance protection. Indeed, Appellant grafts the term “tangible” onto property insurance where no such term is normally used - instead, the term tangible is used in the context of third party liability insurance coverage found under CGL policies (*See, e.g., Eyeblaster, Inc. v. Fed. Ins. Co.*, 613 F.3d 797 (8th Cir. 2010); *Target Corp. v. ACE Am. Ins. Co.*, No. 19-CV-2916, 2022 WL 848095 (D. Minn. Mar. 22, 2022), *vacating* 517 F. Supp. 3d 798 (D. Minn. 2021)).

Property insurance policies are virtually devoid of requirements that “covered property” be limited to “tangible” property. As such, Appellant’s arguments attempting to conflate “physical loss or damage” with damage only to tangible property should be rejected in their entirety.

Indeed, one need only review Appellant’s business package policy in this case to see that the term “tangible” is nowhere to be found in the property insuring agreements and corresponding policy terms. Tellingly, however, Appellant does use the word “tangible” when addressing third-party liability coverage for property damage. *See* Appellant’s APPENDIX - 00171, 00180, and 00183. By its express terms, Appellant never sought to define covered “property” as only “tangible property”. *National Ink,* 435 F. Supp. 3d at 683 (finding property coverage for ransomware damage and indicating that the “instant Policy does not limit coverage to ‘tangible property.’ To the contrary, as noted above, the Policy expressly includes ‘data’ and ‘software’ as categories of ‘covered property.’ ECF 35-2 at p. 61. The facts presented, then, are more similar to a line of cases holding, in plaintiffs' favor, that the type of damage suffered by Plaintiff constitutes "direct physical loss or damage."). As insurance policies are to be read as a whole and avoid surplus terms, it is clear that Appellant intended to distinguish “tangible

property" (as it used that term in the liability coverage party) from covered property (under the property insurance protection of the business package policy).

To the extent there is any doubt or uncertainty concerning Appellant's underwriting intentions when it comes to what constitutes covered property, such uncertainty must be resolved against Appellant. Under well-established cannons of Ohio law, insurance policies are viewed as "contracts of adhesion, [and] are strictly construed against the insurer and liberally construed in favor of the insured and the public." *State Auto. Mut. Ins. Co. v. Hawk*, No. CA-6751, 1986 WL 3922, at *1 (5th Dist. Stark Mar. 17, 1986) (citations omitted).

Indeed, analysis of the policy at issue begins with its plain language. *Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 46 Ohio St. 3d 51, 53, 544 N.E.2d 920, 923 (1989) (The primary objective in contract interpretation is to give effect to the intent of the parties as expressed in the language they chose to employ in their agreement.). Common words should be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument. *Foster Wheeler Enviresponse v. Franklin Cnty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 361, 678 N.E.2d 519, 526 (1997).

"Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties." *Rhoades v. The Equitable Life Assurance Soc'y of the U.S.*, 54 Ohio St. 2d 45, 47, 374 N.E.2d 643, 644 (1978) (citation omitted). *See also Ambrose v. State Farm Fire & Cas.,* 70 Ohio App. 3d 797, 800, 592 N.E.2d 868, 870 (9th Dist. 1990) ("When words used in a policy have a plain and ordinary meaning, it is neither necessary nor permissible to construe a different meaning."). If an insurance provision is reasonably susceptible to more than one interpretation,

however, it must be construed strictly against the insurance company, and liberally in favor of coverage. *Hartman v. Erie Ins. Co.*, 2017-Ohio-668, 85 N.E.3d 454, ¶ 49 (6th Dist.).

Under Ohio law, an insurance company such as Appellant seeking to avoid its coverage obligations "must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question." *Andersen v Highland House Co*., 93 Ohio St. 3d 547, 549, 757 N.E.2d 329, 332 (2001) (citation omitted). "[C]ontract of insurance prepared by insurer and in language selected by the insurer must be construed liberally in favor of the insured and strictly against the insurer if the language used is doubtful, uncertain or unambiguous. This is especially true where an exception or exclusion from liability is contained in the policy." *Am. Fin. Corp. v. Fireman's Fund Ins. Co.*, 15 Ohio St. 2d 171, 173, 239 N.E.2d 33, 35 (1968) (internal citations omitted). Exclusions must be strictly construed and be interpreted as applying only to that which is clearly intended to be excluded. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.,* 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102 (1992).

Furthermore, the fact that the Policy at issue is a Business Owners Policy, and not a "cyber policy", is of no moment. The law is clear that it is the language of the policy itself, and not the label affixed by the insurance company, that counts. *See Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115, 1117 (1996); *Hillyer v. State Farm Fire & Cas. Co.*, 97 Ohio St. 3d 411, 414, 780 N.E.2d 262, 265 (2002) (holding that "it is the type of coverage provided, not the label affixed by the insurer, that determines the type of policy"); *see also G&G Oil Co. of Indiana, Inc. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 87–88 (Ind. 2021) (rejecting business package insurer's argument that policyholder could not have crime coverage for ransomware loss because it declined express "cyber" hacking and virus coverage options under

another part of package policy where the court noted that each part of policy should be read individually unless otherwise specified, and considered whether coverage was provided under the Commercial Crime Coverage provisions of the policy).

A full analysis of the policy at issue here demonstrates that it was intended to cover "direct physical loss or damage" to software and data on "media" as a result of a ransomware attack. The Second District Court of Appeals properly applied the law to the facts of this case in reaching a result that matches the expectation of the insurance industry and policyholders throughout the State of Ohio.

E. Appellant Cites Case Law Which Does Nothing to Support Its Denial of Coverage

As demonstrated by a review of the cases relied upon in the Appellant's Brief, none support a denial of coverage. The cases cited by Appellant do not involve the policy language at issue here. Thus, none is on point, and none is controlling.

On top of that, none involves facts analogous to the facts at issue here. In many of the cited cases, the policyholders did not contend there was "physical loss or damage" to covered property. The disputes were about wholly different issues. In the remainder of the cases, the facts are plainly distinguishable because the opinion explains in simple terms why there was not any damage, such as because the alleged harm was aesthetic.

Appellant claims that the "seminal" Ohio case on "direct physical loss or damage" to property supports a finding of no coverage. Appellant cites *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.). *Mastellone* involved mold and residual mildew stains that were characterized as merely "aesthetic" because the stained wood in *Mastellone* functioned exactly and completely as intended, despite the stains. *Id.* at 42, 884 N.E.2d at 1144. The opposite is true with a ransomware attack. The entire design

of malware is to adversely harm the system and physically alter and damage its operations through the malware's electronic instructions attacking the target computer system. EMOI suffered an attack that had rendered its computer system incapable of functioning as intended and as it had functioned before the ransomware was used to infect its files. *See* Court of Appeals' Opinion at ¶ 9, p. 4; APPENDIX – 0004. The recurring encryption destroys the functionality of the software. Some of the software, such as the automated phone call system, was not decrypted. *See* Court of Appeals' Opinion at ¶ 9, p. 4; APPENDIX - 0004. EMOI's website lost certain communication capabilities. *Id*. These losses are not "aesthetic". For the reasons discussed in Section IV.C. above, the computer files and accompanying data did not function because they suffered physical loss or damage given the hacker's harmful alteration of EMOI's computer files. *See* Mark Loman, *Dir. Eng'g, How Ransomware Attacks*, Sophos Labs White Paper, Nov. 2019[5] at 8 - 9 (explaining certain characteristics of ransomware attacks that rename files: ransomware alteration "as the document file type icon changes in Explorer and applications"; "ransomware typically encrypts documents with a certain file name extension only"; "Breaks the filetype relationship to the file's parent application, and also prevents the user from recovering their files from earlier versions in the Windows Volume Shadow Copy Service"; "Complicates the salvage of deleted documents using special recovery software" and "recovery results may be limited"; "Some ransomware changes the file name extension to an email address of the hacker" and "there is no guarantee all encrypted documents can be correctly decrypted to their original state. Many ransomware attackers make poor software developers").

Appellant also cites the Ohio Court of Appeals decision in *Bethel Village Condominium Association v. Republic-Franklin Insurance Co.*, 10th Dist. Franklin No. 06AP-691, 2007 WL

[5] https://www.sophos.com/en-us/medialibrary/pdfs/technical-papers/sophoslabs-ransomware-behavior-report.pdf

416693 (Feb. 8, 2007). Appellant argues that *Bethel* supports its construction of the terms "physical loss of or damage to" that Appellant relied upon to deny coverage. The case does not support Appellant's construction because it did not address the issue. Bethel claimed that the insurance company's denial of coverage constituted the "physical loss of or damage to" property. The Court of Appeals held that the denial itself is not covered as a loss or damage because the policy did not provide property coverage "and also against appellee's own decision to deny coverage for casualty loss." *Id*. EMOI is claiming that it did suffer "physical loss of and damage to" its covered property.

Appellant also cites a case applying Michigan law, *Universal Image Productions, Inc. v. Federal Insurance Co.*, 475 F. App'x 569 (6th Cir. 2012). That case involved mold, as well, and the court concluded that the policyholder had not suffered "physical loss or damage" because the building remained entirely capable of performing as a work space, even during remediation. Putting aside whether the reasoning of the case is correct, the facts are not analogous. EMOI's computer system did not perform at all and was a complete loss for the entire time it was encrypted due to file alteration from the ransomware. It then was only partially capable of operating after being decrypted, including because parts remained encrypted, parts were re-encrypted and other parts have to be cordoned off with less ability to operate.

Another case relied upon by Appellant turned on the wording in a coverage provision for an extension of business interruption coverage for civil authority orders that cut off access to a property. *See Penton Media, Inc. v. Affiliated FM Ins. Co*., 245 F. App'x 495 (6th Cir. 2007). The coverage provision in *Penton* for contingent business interruption bore no resemblance to the relevant coverage provisions at issue in this case. Perhaps more importantly, there was no allegation, let alone dispute, over whether the facts constituted physical loss or damage to

property, when a trade show was postponed because the property - the Javits Center in Manhattan - was occupied by emergency responders following the 9/11 attacks. The coverage analysis in this case is not about whether "physical loss of damage to" the Javits center took place, particularly when EMOI alleges, and the District Court of Appeals found, evidence supporting a conclusion that there was damage to EMOI's property.

Similarly, the fact dispute in *Source Food Technology, Inc. v. United States Fidelity & Guaranty Co*., 465 F.3d 834 (8th Cir. 2006), is markedly different because a government ban precluding importation of the product sold by the policyholder was found not to involve any damage to any property of the policyholder. Conversely, EMOI suffered a loss of its own computer system and property at the hands of a hacker who installed malware onto EMOI's computer system and deliberately altered the computer files of EMOI.

The holding in *Pentair, Inc. v. American Guarantee & Liability Insurance Co*., 400 F.3d 613, 616 (8th Cir. 2005), sheds no light on this dispute because there the policyholder's overseas supplier - again another party and not the policyholder - suffered damage from an earthquake. There was no allegation there of any harm or even an event happening to the policyholder's property. That case has no bearing on what happened to EMOI's electronic property that was damaged.

Appellant also relies upon *Mama Jo's Inc. v. Sparta Insurance Co*., 823 F. App'x 868 (11th Cir. 2020). Appellant describes this case as holding that a property that can be restored by merely cleaning has not suffered direct loss or damage. Assuming the case did stand for that proposition, the case would shed no light on whether there is insurance coverage for EMOI's loss. EMOI did attempt to remove the computer virus and it did not work. EMOI's system became re-infected after it paid the ransom and supposedly had its files decrypted. Because the

remediation did not work for EMOI, the analogy to cleaning is inapposite. The same is true in even a cursory analysis of *Promotional Headwear International v. Cincinnati Insurance Co.*, 504 F. Supp. 3d 1191 (D. Kan. 2020). Whether or not the Covid-19 virus can be "wiped away," a case holding that a virus can be wiped away does not resolve the question of whether a computer encryption program that could not be "wiped away" is covered.

Similarly, in *Equity Planning Corp. v. Westfield Insurance Co*., 522 F. Supp. 3d 308 (N.D. Ohio 2021), the policyholder alleged that "it suffered a loss of use of its properties, resulting in a substantial loss of business income when its tenants were forced to shut down their non-essential businesses during Ohio's Stay At Home Order, …." *Id*. at 310. The policyholder did not contend that there had been any damage to its property. The court stated that "intangible losses cannot be repaired, rebuilt, or replaced." *Id.* at 321. Among other things, the statement demonstrates that the EMOI loss is not "intangible" since the software and data can be repaired, rebuilt and replaced. Indeed, that is what many policyholders are inevitably forced to do after suffering a ransomware attack.

The same is true for the other Covid cases Appellant cited. For example, *Image Dental, LLC v. Citizens Insurance Co. of America*, 543 F. Supp. 3d 582, 592 (N.D. Ill. 2021), held that the terms "physical loss or damage" do not mean "loss of use." Appellant cites *Real Hospitality LLC, v. Travelers Casualty Insurance Co. of America*, 499 F. Supp. 3d 288, 296 (S.D. Miss. 2020), for the proposition that operations are not insured. That case involved allegations that based solely on Covid-related civil orders the plaintiff lost use of its property. These allegations and holdings do not support the conclusion that EMOI suffered no "physical loss of or damage to" its property.

The decision in *TJBC, Inc. v. Cincinnati Insurance Co.,* No. 20-CV-815-DWD, 2021 WL 243583, at *5 (S.D. Ill. Jan. 25, 2021), *aff'd sub nom*. *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327 (7th Cir. 2021), also has no bearing on this case. That decision turned on whether the "physical dimension" of the property had been altered. Here, the whole purpose of ransomware is to physically alter computer systems and files so that the policyholder cannot operate its computer system—and thus is coerced into paying a ransom. As demonstrated in the testimony from the policyholder noted above, the cyber-attack altered EMOI's computer files with "weird extensions". Thus, the files were changed and otherwise harmfully altered by the ransomware attack, and it was the malware's electronic instructions that were used in altering the physical characteristics of the computer files with the intent and result of damaging them.

Thus, none of the cases proffered by Appellant support its denial of insurance coverage to EMOI. As such, the Court should affirm the ruling of the Appellate District below.

F. Appellant's Case Law Does Not Support Its Argument that Media Must Be Tangible

There is no dispute that the definition of Media in the Policy broadly covers software and data. "Media" is defined by the Electronic Equipment endorsement at 9. Definitions, d.:

> "Media" means materials on which information is recorded such as film, magnetic tape, paper tape, disks, drums and cards. **"Media" includes computer software and reproduction of data contained on covered media**.

(Weaner Aff., Appx. D, p. 86, emphasis added.)

The definition by its terms clearly includes software and data. Accordingly, cases about coverage for money do not bear on the coverage dispute in this case. Yet, Appellant's first two cited cases as to why it contends EMOI has not established that its losses were physical are cases about money. *See* Appellant Brief at p. 25, citing *Schmidt v. Travelers Indemnity Co. of America*, 101 F. Supp. 3d 768, 781 (S.D. Ohio 2015) (finding no coverage for funds withdrawn from an

account) and *Florists' Mutual Insurance Co. v. Ludy Greenhouse Manufacturing Corp.*, 521 F. Supp. 2d 661, 680 (S.D. Ohio 2007) (same).

Appellant also cites to *Ward General Insurance Services, Inc. v. Employers Fire Insurance Co.*, 7 Cal. Rptr. 3d 844 (Cal. Ct. App. 2003). The *Ward* case actually supports a finding of insurance coverage for EMOI. In *Ward*, the California appellate court ruled that: "coverage for plaintiff's claim under the BPP [insurance policy] form depends on whether the loss of electronically stored data, without loss or damage of the storage media, constitutes a 'direct physical loss.'" *Id*. at 849. Here, EMOI did have physical loss and damage to its "storage media", since the computer files storing EMOI's data were physically altered by the computer hacker.[6] Furthermore, to the extent that the California court's decision in *Ward* is argued to support Appellant, it appears that the main rationale for the California court's refusal to find coverage there was due to the notion that "tangible property" should be read into property insurance clauses to create unified interpretation rules for liability and property insurance policies. *See id*. at 852. That rationale runs afoul of Ohio insurance law for the reasons set forth in section IV.D above. The term "tangible property" is not used in the relevant provisions of EMOI's property coverage—it is only used in the liability coverage section that Appellant sold to EMOI and those deliberate policy language distinctions should be given effect.

Like the cases interpreting "physical loss of or damage," *J.O. Emmerich & Associates v. State Auto Ins. Cos.*, No. 3:06cv00722-DPJ-JCS, 2007 WL 9775576, at *7 (S.D. Miss. Nov. 19,

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[6] A computer file stores information (whether data, images, recordings or other records). "A file may be designed to store an Image, a written message, a video, a computer program, or any wide variety of other kinds of data. Certain files can store multiple data types at once. By using computer programs, a person can open, read, change, save, and close a computer file. Computer files may be reopened, modified, and copied an arbitrary number of times. Files are typically organized in a file system, which tracks file locations on the disk and enables user access."

See https://en.wikipedia.org/wiki/Computer_file.

2007), is a case that did not involve a claim of loss or damage at all. A power outage cut off access to a computer system, and was alleged to have done so without harming the software or data. The facts in that case are therefore the opposite of EMOI's facts. Thus, that case simply does not support Appellant's denial of coverage.

Similarly, Appellant cites a case that denied a duty to defend under a general liability policy, not a property policy. *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F. Supp. 2d 459, 468 (E.D. Va. 2002). That case did not involve the definition of "Media" in EMOI's policy. It involved language in general liability policies.

The laundry list of cases cited in Appellant's Brief continues for pages. However, the remainder of the cases it lists are equally unhelpful. Appellant suggests relying on cases involving Y2K patches, a planned ramp-down of an MRI machine, and cases focusing on whether data is "tangible," instead of focusing on cases that address actual physical loss of or damage to property or the applicable definition of "Media." Appellant Brief 25-30. As set forth above, such cases do not support a denial of coverage for EMOI's losses under the Policy language at issue.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the Decision of the Second District Court of Appeals and find that Appellant's insurance policy provides coverage for the damage to EMOI's business property resulting from the cyber-attack.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was electronically filed this 6th day of June, 2022, with the Clerk of Courts via its cm/ecf system, which by its operation will serve all parties who have entered an appearance and registered electronically. Parties may access this filing through the Court's system.

Additionally, this same date a copy of the foregoing was served via email upon the following:

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