INDIANA COMMERCIAL COURT

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-2004-PL-013137

INDIANA REPERTORY THEATRE, INC.,	)	
	)	
Plaintiff,	)	
	)	F I L E D
v.	)	March 12, 2021
	)	CLERK OF THE COURT
THE CINCINNATI CASUALTY COMPANY	)	MARION COUNTY
and McGOWAN INSURANCE GROUP, LLC,	)	SW
	)	
Defendants.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND GRANTING PLAINTIFF'S REQUEST FOR ADDITIONAL TIME TO DEVELOP EVIDENCE PURSUANT TO INDIANA TRIAL RULE 56(F)

On April 3, 2020, the Plaintiff, Indiana Repertory Theatre, Inc. ("IRT"), filed its Complaint for Declaratory Judgment against the Defendant, The Cincinnati Casualty Company ("Cincinnati"). On April 10, 2020, IRT filed an Amended Complaint for Declaratory Judgment and Damages, adding Defendant McGowan Insurance Group, LLC ("McGowan") to the suit. The Plaintiff's Amended Complaint asserts: *Count 1*: Declaratory Relief against Cincinnati only and *Count 2*: Negligence against McGowan only.

This matter now comes before the Court on Plaintiff's Motion for Partial Summary Judgement against Cincinnati. Also, before the Court is Cincinnati's Cross-Motion for Summary Judgment. The Plaintiff filed a Brief in Support of its Motion for Partial Summary Judgment against Cincinnati on June 25, 2020. In response, Cincinnati filed a

Cross-Motion for Summary Judgment and Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment on August 28, 2020. On November 2, 2020, the Plaintiff filed a Combined Response and Reply in Support of its Motion for Partial Summary Judgment. On November 27, 2020, Cincinnati filed a Reply in Support of its Cross-Motion for Summary Judgment. A remote hearing, due to COVID-19, was held on Plaintiff's Motion for Partial Summary Judgment and Cincinnati's Cross-Motion for Summary Judgment on December 3, 2020. At the conclusion of the hearing, the Court took the matter under advisement. Following the hearing, both the Plaintiff and Cincinnati submitted a number of Supplemental Authorities for the Court to review. The most recent Supplemental Authority from Cincinnati was submitted on March 9, 2021 (Seventh Motion to Supplement Authority) and from IRT on March 2, 2021.[1]

Having been fully briefed on the issues set forth in this matter, the Court finds now as follows:

I. UNDISPUTED RELEVANT FACTS

A. The Insurance Policy

1. This is an insurance-coverage matter arising out of a commercial property insurance policy (the "Policy"), issued by Cincinnati to IRT and effective for the period of August 30, 2018 through August 30, 2021. [IRT Ex. 13 ("Policy"), at IRT_000001.] The 379-page Policy includes several coverages (called "forms" in the Policy).

[1] The Court recognizes and appreciates the excellent advocacy and arguments by both counsel for Plaintiff and counsel for Defendant at the hearing on these matters as well as in their briefs and supplemental authority.

2. The Policy contains a Building and Personal Property Coverage Form (the "Building Form"), which states that Cincinnati "will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." [Policy at IRT_000025.]
3. The Building Form defines "premises" as the Location and Buildings described in the Declarations. [Policy at IRT_000051.] The Declarations lists the property located at 140 W. Washington St., Indianapolis, Indiana, which is IRT'S theatre. [Policy at IRT_000001.]
4. The Building Form defines "loss" to mean "accidental physical loss or accidental physical damage." [Policy at IRT_000060.]
5. The Building Form defines Covered Cause of Loss to mean "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." [Policy at IRT_000027.]
6. The Building Form contains exclusions:

> **(1)** We will not pay for "loss" caused directly or indirectly by any of the following, unless otherwise provided. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".
>
> **(a) Ordinance or Law**
>
> Except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law,** the enforcement of or compliance with any ordinance or law:
>
> **1)** Regulating the construction, use or repair of any building or structure; . . .
>
> This exclusion applies whether "loss" results from:
>
> **1)** An ordinance or law that is enforced even if the building or structure has not been damaged; or
>
> **2)** The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of any building or structure, or removal of its debris, following a direct "loss" to that building or structure.
>
> * * *

> **(2)** We will not pay for "loss" caused by or resulting from any of the following
>
> **(b) Delay or Loss of Use**
>
> Delay, loss of use or loss of market.
>
> * * *
>
> **(3)** We will not pay for "loss" caused by or resulting from any of the following . . . .
>
> * * *
>
> **(b) Acts or Decisions**
>
> Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

[Policy at IRT_000027, -30, -32.]

7. The Policy also contains a Business Income (And Extra Expense) Coverage Form. This form includes the following coverage grant for a business income loss:

> **1. Business Income**
>
> a. We [Cincinnati] 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.... The "loss" must be caused by or result from a Covered Cause of Loss.

[Policy at IRT_000106.]

8. The Business Income Form references and incorporates the Building Form's Covered Cause of Loss section, which contains the Building Form's definition of Covered Cause of and exclusions. [Policy at IRT_000107.]
9. The Policy defines "loss" as "accidental physical loss or accidental physical damage." [Policy at IRT_000114.]
10. The Policy defines "period of restoration" as the period of time that:

a. Begins at the time of direct "loss".

b. Ends on the earlier of:

i. The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

ii. The date when business is resumed at a new permanent location.

[Policy at IRT_000114.]

11. The Policy defines "suspension" as:

a. The slowdown or cessation of your business activities; and

b. That a part or all of the "premises" is rendered untenantable if coverage for "Business Income" including "Rental Value" or "Rental Value" applies.

[Policy at IRT_000114.]

12. The Policy defines "premises" as "the Locations and Buildings described in the Declarations." [Policy at IRT_000051.] The Declarations lists the property located at 140 W. Washington St., Indianapolis, Indiana, which is IRT'S theatre. [Policy at IRT_000001.]

13. For the meaning of "Covered Causes of Loss," the Policy refers to the Building and Personal Property Coverage Form. [Policy at IRT_000107.]

14. The Building and Personal Property Coverage Form defines "Covered Cause of Loss" as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." [Policy at IRT_000027.]

15. Cincinnati's Policy does not contain any "virus" exclusion. [*See* Policy.]

B. COVID-19

16. In January 2020, the first known case of a U.S. resident infected by the novel SARS-COV-2 Virus (the "Coronavirus" or "COVID-19") was reported in the State of Washington. [Declaration of Dr. Richard Feldman ("Feldman Decl.") ¶ 13, Attachment 11.] The Virus quickly spread across the United States. [*Id.*]

17. The first case in Indiana was confirmed on March 6, 2020, and the first death occurred on March 16, 2020. [*Id.*; Leagre Aff., Ex. 1, Indiana Executive Order ("E.O.") 20-31, at 1.]

18. COVID-19, the disease caused by SARS-CoV-2, is a "severe respiratory illness" caused by "a rapidly spreading virus that is transmitted from human-to-human" and which "results in symptoms ranging from fever, cough, acute respiratory distress, pneumonia, and even death." [Leagre Aff. ¶ 5, Exhibit 2, Ind. E.O. 20-02, at 1.]

19. Within twelve weeks, SARS-CoV-2 infected tens of thousands of Indiana residents [Ex. 1, Ind. E.O. 20-31, at 1] and nearly two million people in the United States. [*See United States Covid-19 Cases and Deaths by State*, U.S. Ctr. for Disease Control & Prevention (https://www.cdc.gov/covid-data tracker/index.html).] As of December 3, 2020, more than 5,000 persons in Indiana and more than a quarter million Americans had died from the disease.

20. The SARS-CoV-2 Virus is extremely dangerous for several reasons:

    a. It is highly contagious, spreading through respiratory droplets (including during human speech) and contaminated surface where it can survive for days;

b. It can be spread by asymptomatic and pre-symptomatic carriers, who appear to represent 86% of all actual infections;

c. It has an incubation period of at least 2-12 days, allowing people to spread the virus long before they know they are infected;

d. Symptoms are wide-ranging and include fever, cough, shortness of breath, chills, malaise, sore throat, confusion, congestion, myalgia, dizziness, headache, nausea, pneumonia, cardiac arrhythmias, coagulopathy, shock, dyspnea, hypoxemia and silent hypoxia, lung edema, and organ failure; and

e. "[H]ealthy persons of any age can become critically ill with Covid-19," and the mortality rate appears to be fairly high (1-5% of the infected population and over 10% of patients needing hospitalization).

[Feldman Decl. ¶¶ 14-27.]

21. The first vaccine for the disease was approved for emergency use while this motion was under advisement. Deaths and hospitalizations, including those in Indiana, have continued to rise.

C. Closure Orders Due to COVID-19 and IRT's Response

22. In March 2020, world, federal, state, and local leaders declared emergencies and began issuing restrictions to slow the spread of the virus. [Leagre Aff., Ex. 3, Ind. E.O. 20-26, at 1-3.] The purpose of the restrictions was to "treat, prevent, or reduce the spread of this dangerous virus" by requiring people to remain in their homes "in order to reduce their likelihood of contracting this virus and/or transmitting it to others." [Leagre Aff., Ex. 4, Ind. E.O. 20-06, at 1.]

23. This led to a series of executive orders and other actions:

a. On March 6, 2020, Governor Eric Holcomb issued Executive Order 20-02, which declared that a public health emergency existed throughout the State of Indiana. [IRT Ex. 2, Ind. E.O. 20-02, at 1-2).]

b. On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic. [IRT Ex. 7, Ind. E.O. 20-08, at 1.]

c. On March 12, 2020, Indianapolis Mayor Joe Hogsett and the Marion County Health Department ordered a 30-day suspension of all non-essential gatherings of more than 250 individuals. [IRT Ex. 8, March 12, 2020 Press Release, at 1.]

d. On March 13, 2020, the President of the United States declared a national emergency. [IRT Ex. 9, Presidential Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).]

e. On March 16, 2020, Mayor Hogsett and the Marion County Health Department issued a series of orders for Marion County prohibiting all public gatherings of 50 or more people and closing bars, nightclubs, movie theatres, entertainment venues, gyms, and fitness facilities. [IRT Ex. 6, Marion Cnty. E.O. No. 1, 2020, at 4-5; IRT Ex. 10, Marion Cnty. Health Dep't Order No. 1, at 1.]

f. On March 23, 2020, Governor Holcomb issued Executive Order 20-08, which ordered all individuals living in the State of Indiana to stay at home through at least April 6, 2020, and ordered all non-essential businesses to close, with limited exceptions. [IRT Ex. 7, Ind. E.O. 20-08, at 2-3.]

Governor Holcomb extended the stay-at-home order until May 23, 2020. [IRT Ex. 11, Ind. E.O. 20-18, at 3 (extension to April 20, 2020); IRT Ex. 12, Ind. E.O. 20-22, at 2 (extension to May 1, 2020); IRT EX. 3, Ind. E.O. 20-26, at 1-3 (extension to May 23, 2020, as to Marion County).]

24. After Mayor Hogsett's March 12 Order prohibiting gatherings of more than 250 individuals, IRT announced that its current performances of *Murder on the Orient Express* would continue, but that capacity would be limited to 250 people. [Affidavit of Suzanne Sweeney ¶ 4.]

25. In his role as a volunteer member of the board of directors of IRT, Dr. Richard Feldman advised IRT leadership just prior to March 16, 2020, that in his professional opinion, "live performances should be suspended." [Feldman Decl. ¶ 29.] Dr. Feldman is an Indiana-licensed physician who served as the Indiana State Commissioner of Health from 1997 to 2001 and in other public health roles, including as a member of the Marion County Health Department Scientific Advisory Committee for Pandemic Flu. [Feldman Decl. ¶¶ 2-3.] He testified in his affidavit that this suspension "was the only responsible course of action available to the IRT." [Feldman Decl. ¶ 29.]

26. Dr. Feldman' s opinion was based on several factors about the virus, including its: (1) ability to spread through respiratory droplets and aerosolization [*Id*. ¶¶ 15-16]; (2) the rate of asymptomatic and pre-symptomatic spread [*Id*. ¶¶ 17-19]; and (3) the potentially severe consequences for an infected person [*Id*. ¶¶ 21-28.]

27. Dr. Feldman stated that a theater establishment like IRT'S presents the most dangerous situation for person-to-person transmission:

> The most dangerous situation is a large gathering in an enclosed place, such as a basketball game, a movie theatre, or a live production theatre. In such environments, the droplets exhaled by infected persons recirculate in the air with little ability to dissipate. The longer the same people are in the confined area, the higher the concentration of infected particles in the air, and thus the greater the risk that persons will inhale the virus and become infected.
>
> [Feldman Decl. ¶ 20.]

28. On March 16, IRT announced its decision to close its doors for the rest of the 2019-2020 season. [*Id*. ¶ 5.] IRT made this decision after considering state, city, and county orders and guidelines and to protect the health and well-being of IRT'S patrons, staff, and artists. [*Id*. ¶ 6.] IRT made this decision before Mayor Hogsett and the Marion County Health Department ordered all entertainment venues closed. [Second Sweeney Aff. ¶ 4.]
29. On March 18, 2020, the IRT and WFYI Indianapolis taped a live performance of *Murder on the Orient Express* "in front of a small house of IRT staff, designers, Board members, and actors' families." [Cincinnati Br., Ex. D at 2.] The performance was made available online for the public to purchase. [Cincinnati Br., Ex. D; Second Sweeney Aff. ¶ 7.]
30. On March 23, 2020, IRT announced, "Effective 3.23.20, the IRT is closed due to the State of Indiana's COVID-19 orders." [Cincinnati, Ex. C at 1.]
31. While the theatre was closed to the public, IRT employees made improvements to the theatre's physical plant and equipment.
32. The State of Indiana began to ease its business restrictions in June 2020. Effective June 19, 2020, Marion County's "Cultural, entertainment, and tourism

sites may reopen at 50% capacity indoors and 50% capacity outdoors." [Cincinnati Ex. G, Marion Cnty. Health Dep't Order No. 16, at 4.]

33. IRT has remained closed to in-person performances, even after state and local authorities lifted some restrictions on venues like IRT'S theatre. [*Id.* ¶¶ 5-6.] For its 2020-2021 season, IRT intends to produce a virtual season in order to safely accommodate staff, actors and patrons. [Second Sweeney Aff. ¶¶ 5-6.]

D. IRT's Claim to Cincinnati

34. On March 20, 2020, IRT submitted a claim to Cincinnati for lost business income and extra expense coverage as a result of the COVID-19 pandemic under its commercial property insurance policy. [IRT Br. 8-9; Cincinnati Br. 7.]

35. On March 23, 2020, Cincinnati sent IRT a letter seeking information about IRT's claim and reserving Cincinnati's rights under the Policy as its investigation continued. [IRT Ex. 16.] The information requested included a description of loss or damage at the premises by the Coronavirus, inspection and test reports referring to or relating to actual or suspected presence of Coronavirus at the premises and any other documentation referring or relating to the presence of Coronavirus among employees or visitors to the premises. [IRT Ex. 16 at 9.]

36. IRT did not respond to Cincinnati's letter or provide any of the information requested. [Cincinnati Br. 7 (citing Affidavit of Chad Dowdy, Aug. 28, 2020, (Dowdy Aff.), ¶ 4).]

37. A few days later, Cincinnati stated that its initial conclusion was that there was no coverage because there had been no "physical loss":

At the threshold, there must be direct physical loss or damage to Covered

> Property caused by a covered cause of loss in order for the claim to be covered. . . . Direct physical loss or damage generally means a physical effect on Covered Property, such as deformation, permanent change in physical appearance or other manifestation of a physical effect. Your notice of claim indicates that your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.
>
> [IRT Ex. 16.]

38. On April 3, 2020, IRT filed this lawsuit against Cincinnati, seeking declaratory relief.

II. STANDARD ON MOTION FOR SUMMARY JUDGMENT

Under Indiana Trial Rule 56, "summary judgment is precluded by any "genuine" issue of material fact – that is, any issue requiring the trier of fact to resolve the parties' differing accounts of the truth." *Hughley v. State*, 15 N.E.3d 1000, 1002 (Ind. 2014). "Summary judgment should not be granted when it is necessary to weigh the evidence." *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n*, 571 N.E.2d 282, 285 (Ind.1991). "Even though Ind. R. Trial P. 56 is nearly identical to Fed. R. Civ. P. 56, the Supreme Court of Indiana has long recognized that Indiana's summary judgment procedure diverges from federal summary judgment practice." *Id.* at 1003 (citing *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). In particular, while federal practice permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, the court imposes a more onerous burden: to affirmatively negate an opponent's claim. *Id.*

Summary judgment "shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). "A fact is material

if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth . . . , or if the undisputed facts support conflicting reasonable inferences." *Hoosier Mt. Bike Ass'n v. Kaler*, 73 N.E.3d 712, 716 (Ind. Ct. App. 2017) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)). "'The initial burden is on the summary-judgment movant to demonstrate the absence of any genuine issue of fact as to a determinative issue, at which point the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact.'" *Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 51 N.E.3d 1163, 1165 (Ind. 2016) (quoting *Hughley*, 15 N.E.3d at 1003).

III. DISCUSSION

In its Motion for Partial Summary Judgment, IRT asserts that it is entitled to recover for losses resulting from the Coronavirus pandemic. IRT claims it lost the use of its theatre due to the Coronavirus pandemic and that this loss of use satisfies the Policy's direct physical loss or damage requirement. IRT affirmatively states that it need not prove the virus was actually at its theatre. But, if the Court determines that evidence of the virus' presence at IRT's premises is required to demonstrate direct physical loss or damage, IRT seeks additional time to produce such evidence. (IRT Br. 23 n.15 (citing T.R. 56(f) Affidavit of Peter Racher). IRT also argues that no exclusion in the Policy precludes coverage for its claim. IRT is requesting that this Court grant IRT partial Summary Judgment and declare that IRT has suffered a "direct physical loss" under the Policy, no Policy exclusions bar coverage for the cause of loss, and that IRT's economic losses are covered by the Policy.

In its Cross-Motion for Summary Judgment, Cincinnati asserts that IRT has failed to demonstrate direct physical loss or damage to Covered Property at the premises,

caused by or resulting from any Covered Cause of Loss, which is required by the Policy's insuring agreements, including the Business Income Form. Cincinnati argues that this requirement is only satisfied if there is some physical alteration to property, not the mere loss of use of property. In the alternative, if loss of use alone satisfies the Policy's insuring agreements, then exclusions apply to preclude coverage for IRT's loss of use. Cincinnati identifies the Policy's Ordinance or Law, Delay or Loss of Use, and Acts or Decisions exclusions apply here. Cincinnati opposes granting IRT additional time to produce evidence that the virus was present at its theatre. Cincinnati requests that this Court grant its Cross-Motion for Summary Judgment, declare there is no coverage under the Policy for IRT's claims, and deny IRT's Motion for Partial Summary Judgement.

A. Indiana Law on Insurance-Policy Contractual Interpretation

In accordance with Indiana law, "[a] contract for insurance is subject to the same rules of interpretation as other contracts." *Cent. Mut. Ins. Co. v. Motorists Mut. Ins. Co.*, 23 N.E.3d 18, 21 (Ind. Ct. App. 2014). The "disparity in bargaining power, which is characteristic of the parties to insurance contracts, has led courts to develop distinct rules of construction for those contracts." *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1283 (Ind. 2006) (citing *Beam v. Wausau Ins. Co.*, 765 N.E.2d 528, 528 (Ind. 2002)). "When construing the meaning of a contract, a court's primary task is to determine and effectuate the intent of the parties." *Ind. Ins. Guar. Ass'n v. Smith*, 82 N.E.3d 383, 386 (Ind. Ct. App. 2017). The meaning of an insurance contract can only be gleaned from a consideration of all its provisions, not from an analysis of individual words or phrases. *Adkins v. Vigilant Ins. Co.*, 927 N.E.2d 385, 389 (Ind. Ct. App. 2010).

Courts must accept an interpretation of the contract that harmonizes its provisions. *Smith*, 82 N.E.3d at 386. An insurance policy should be construed to further the policy's basic purpose of indemnity. *Tate v. Secura Ins.*, 587 N.E.2d 665, 668 (Ind. 1992).

The standard for interpreting contract provisions is well established: "unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning." *State Farm Fire & Cas. Co. v. Riddell Nat. Bank*, 984 N.E.2d 655, 657 (Ind. Ct. App. 2013). Stated another way, if a contract is clear and unambiguous, its language is given its plain meaning. *Auto-Owners Ins.*, 842 N.E.2d at 1283. If a provision is ambiguous, however, its meaning is to be determined by extrinsic evidence. *State Farm Fire & Cas. Co.*, 984 N.E.2d at 657. Also, if there is ambiguity, the contract is construed strictly against the insurer, and the language of the policy is viewed from the insured's perspective. *Auto-Owners Ins.*, 842 N.E.2d at 1283 (citing *Bosecker v. Westfield Ins. Co.,* 724 N.E.2d 241, 244 (Ind.2000)).

"An ambiguity exists where a provision is susceptible to more than one interpretation and reasonable persons would differ as to its meaning." *Auto-Owners Ins.,* 842 N.E.2d at 1283. When reasonable minds can interpret policy provisions differently, those provisions are ambiguous, and are strictly construed against the insurance company. *Id.* "This strict [construction] . . . is driven by the fact that the insurer drafts the policy and foists its terms upon the customer. 'The insurance companies write the policies; we buy their forms, or we do not buy insurance.'" *Id.* (quoting *American Economy Ins. Co. v. Liggett*, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981)). A division between courts as to the meaning of the language in an insurance contract is evidence of ambiguity. *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999).

However, this does not establish conclusively that a particular clause is ambiguous and [Indiana courts] are not obliged to agree that other courts have construed the policy correctly. *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005).

If any ambiguity exists in a policy term, and particularly in an exclusion, the term must be interpreted in favor of the policyholder and in favor of coverage. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996). A policyholder need not prove that its interpretation of a policy term is the *only* reasonable interpretation—only that it is *a* reasonable interpretation. *Liggett*, 426 N.E.2d at 144. Indiana law is clear that when the policyholder has offered a reasonable construction of the policy language, it must be applied as a matter of law. *See Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2010) ("A reasonable construction that supports the policyholder's position must be enforced as a matter of law").

In addition, there are special rules for interpreting insurance policies, as they are contracts of adhesion construed in favor of coverage with exclusions construed narrowly. Indiana law holds that insurance policy terms are to be interpreted in the way that the insured understands them in the ordinary course of business. *See*, e.g., *Tate*, 587 N.E.2d at 668 ("By failing to clearly express a contrary meaning, [the insurer] is bound by the plain and ordinary meaning of its words as viewed from the standpoint of the insured."); *Masonic Temple Ass'n of Crawfordsville v. Indiana Farmers Mut. Ins. Co.*, 779 N.E.2d 21, 27-28 (Ind. Ct. App. 2002) ("Because insurance contracts are contracts of adhesion construed against the drafter, the insurer is bound by the plain, ordinary meaning of the words as viewed from the perspective of the insured."). When the policy language can be given more than one reasonable interpretation, then the language is to be construed in

the policyholder's favor and in favor of coverage. *Cincinnati Ins. Co. v. BACT Holdings, Inc.*, 723 N.E.2d 436, 440 (Ind. Ct. App. 2000) ("The insurer is [] bound by the plain, ordinary meaning of the words as viewed from the perspective of the insured. . . . We conclude that an ambiguity does exist in the policy language. . . . Reasonable persons [] could disagree about whether the policy exclusion for a 'production machine' also applies to drum tires. Consequently, we must attempt to give effect to the reasonable expectations of the insured and construe the policy to further its basic purpose of indemnifying the insured for its loss.").

Any undefined terms must be interpreted from the perspective of an ordinary policyholder of average intelligence. *Summit Corp. of Am.*, 715 N.E.2d at 936. It also is appropriate to consider dictionary definitions of a policy term to understand it. *OmniSource Corp. v. NCM Americas, Inc.*, 313 F. Supp. 2d 880, 890 (N.D. Ind. 2004) ("[A] court must give the term [in an insurance policy] its plain and ordinary meaning [if it is undefined and unambiguous]. For this purpose, courts may properly consult English language dictionaries"); *Smith v. Allstate Ins. Co*, 681 N.E.2d 220, 223 (Ind. Ct. App. 1997) (using Webster's dictionary to define terms in insurance policy).

"The interpretation of an insurance policy is primarily a question of law for the court, and thus is particularly well-suited for disposition on summary judgment." *Adkins*, 927 N.E.2d at 389 (citing *Am. Family Life Assur. Co. v. Russell*, 700 N.E.2d 1174, 1177 (Ind. Ct. App. 1998), *trans. denied*.). If, however, [an insurance policy] is ambiguous, the parties may introduce extrinsic evidence of its meaning, and the interpretation becomes a question of fact. *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016), *trans. denied*. When extraneous facts and circumstances are necessary to

explain an ambiguous or uncertain contract, . . . the facts on which that construction rests must be determined by the jury. *Indiana Broadcasting Corp. v. Star Stations of Indiana*, 388 N.E.2d 568, 572 (Ind. Ct. App. 1979).

B. Whether IRT has Suffered a Direct Physical Loss or Damage to Covered Property

The Cincinnati Policy is a commercial property insurance policy. As a commercial property policy, the Cincinnati Policy's primary purpose is to protect against loss or damage to property. The Business Income Form does provide insurance for lost business income, but first requires direct physical loss or damage to property as a prerequisite. Therefore, the insured property must first sustain direct physical loss before any income coverage is available.

IRT does not dispute that it must establish that there has been a direct physical loss to its property to obtain the coverage it seeks. IRT contends that it has suffered a "direct" "physical loss" because of its inability to safely use and fully operate its theatre due to the COVID-19 pandemic and the rapidly spreading virus. IRT asserts that its loss of use of its theatre alone satisfies the direct physical loss or damage requirement. IRT supports its argument by applying the dictionary definitions of those key terms, which are either not defined in the Policy or are defined ("loss") in a circular fashion. IRT notes that, because these terms are in the insuring clause, they are to be given a broad, coverage-enhancing construction. IRT directs the court to dozens of pre-COVID-19 cases around the country stretching back over many years where courts have found a "physical loss" in the absence of damage or physical alteration to property. IRT points out that Cincinnati took no steps, despite all these cases, to add any clarifying or limiting

words to the Policy. IRT concludes that the ordinary policyholder of average intelligence—the standard in Indiana—would look at the actual Policy terms, including the absence of a virus exclusion when one was widely available, and reasonably conclude that a loss of the sort IRT sustained is covered.

Cincinnati counters by arguing that "physical loss" requires physical "alteration," and that the presence of the virus does not alter the property. Cincinnati accuses IRT of dissecting the Policy and failing to harmonize Policy provisions. Cincinnati contends that while Indiana courts do look to dictionaries to understand the plain meaning of undefined words in insurance policies, *Allgood*, 836 N.E.2d at 247, the terms must still be read together and in context to ascertain their meaning. *Mahan v. Am. Std. Ins. Co.*, 862 N.E.2d 669, 676 (Ind. Ct. App. 2007); *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). Cincinnati argues that IRT's use of separate definitions from multiple dictionaries demonstrates that this exercise can create confusion rather than clarify the Policy's terms. For example, IRT asserts that dictionaries define "loss" to include "dispossession" or "deprivation." (IRT Br. 19.) Cincinnati claims that those definitions have no application here. Cincinnati contends that IRT never lost possession of its theatre and was not deprived of it by the pandemic as it asserts. In fact, the evidence shows that it continued to use its theatre even after the pandemic was declared. Cincinnati also directs the Court to its own set of cases that support its interpretation, including recent COVID-19 insurance cases. Cincinnati also argues that IRT has failed to allege the presence of the virus in the theatre, and that, at a minimum, there is a question of fact as to whether IRT lost the use of its theatre.

IRT responds by noting that the division in authority, for both non-COVID-19 and COVID-19 cases, is wide and deep. IRT notes that under Indiana law this division of authority is strong evidence of ambiguity. *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 295-98. IRT claims that its interpretation is, at the very least, reasonable, and that any reasonable construction in favor of coverage must be adopted. *Liggett*, 426 N.E.2d at 142; *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985).

Both parties direct the Court to pre-COVID-19 cases from around the country that have endorsed their dueling proposed interpretations of "physical loss." IRT's pre-COVID-19 cases from other jurisdictions include: (1) a theatre forced to cancel performance due to smoke from nearby wildfires, *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450, at *13-15 (D. Or. June 7, 2016), *vacated as a condition of settlement*, 2017 U.S. Dist. LEXIS 33208 (D. Or. 2017), (2) a home that could not be safely occupied due to the risk of a rockfall, *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1,17 (W. Va. 1998), (3) a home rendered unsafe for occupation due to nearby erosion, *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), *abrogated on other grounds*, (4) a church rendered unsafe due to infiltration of gasoline fumes from the ground, *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968), and (5) a power grid that could not be safely used, *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (NJ. Ct. App. 2009), among many others. IRT pointed out that in each of these instances, there was no structural alteration or deformation to the property. While these cases are all from other jurisdictions, the Court notes that this issue has reached Indiana. In fact, both

parties have cited to *Cook v. Allstate Insurance Co.*, 48D02-0611-PL-01156 (Madison Cnty. Super. Ct., Nov. 30, 2007).

In *Cook*, Cook's home was infested with brown recluse spiders. Despite repeated attempts, the spiders could not be exterminated. *Cook*, 48D02-0611-PL-01156 at 1-2. The *Cook* court held that the permanent spider infestation rendered the home uninhabitable for its intended use, which constituted direct physical loss. *Cook*, 48D02-0611-PL-01156 at 7-8. Cincinnati argues that this case does not support IRT's assertion that the temporary loss of use alone is sufficient to establish direct physical loss to property. Cincinnati claims that the facts of *Cook* are materially different. Cincinnati points out that *Cook* involved (1) a physical impact (the actual presence of the spiders); (2) the physical impact could not be remedied (extermination attempted and failed); and (3) the property was completely uninhabitable or unusable. The Court agrees with Cincinnati that this case is distinguishable from our case.

The Court also notes that IRT and Cincinnati cite to a number of cases addressing insurance coverage for COVID-19. Although neither IRT nor Cincinnati cite to any Indiana cases addressing insurance coverage for COVID-19 related to business income losses (as this is an issue of first impression in Indiana), these claims have been addressed by courts across the country. The vast majority of these courts have held that there is no coverage because the direct physical loss requirement is not satisfied.

First looking to IRT's COVID-19 cases which it cites to in support of its loss of use argument. Of the cases IRT cites, all but a few were decided under a motion to dismiss standard. The courts denied the insurer's motions to dismiss based primarily on allegations that the virus was likely on the premises and caused direct physical loss.

See, *e.g.*, *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *6 (W.D. Mo. Aug. 12, 2020); *K.C. Hopps, Ltd v. The Cincinnati Ins. Co., Inc.*, No. 20-CV-00437-SRB, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020). The Court points out that IRT makes no such allegations that the virus was likely on the premises and has supplied no evidence that the virus was in the theatre or caused any damage.

The Court notes that there are not as many decisions which IRT relies on that were decided as a matter of summary judgment. One case in particular is *North State Deli v. The Cincinnati Insurance Co.*, Case No. 20-CVS-02569 (N.C. Durham Sup. Ct. Oct. 9, 2020). There, the insured sought partial summary judgment that it was entitled to coverage where the North Carolina government orders forced the insured to lose the physical use and access to their property and premises. *North State Deli*, Case No. 20-CVS-02569, at 4. The court found in favor of the insured. The court found that Cincinnati's argument focused too narrowly on damage to the property, which the Court found was not the only way to define "physical loss." The Court notes, as Cincinnati points out, that *North State Deli* ignored controlling North Carolina precedent holding that loss of use without physical alteration is not covered. *Harry's Cadillac–Pontiac–GMC Truck Co., Inc. v. Motors Ins.*, 486 S.E.2d 249, 251-252 (N.C. App. 1997). For this reason, the Court finds that *North State Deli* is not persuasive.

Some of the COVID-19 cases (just to discuss a few) which support Cincinnati's position include *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am*. In that case, the court granted the Defendant's Motion to Dismiss. The court held that "when all of the provisions are read together it makes logical sense that the property that is insured, i.e.,

the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in." No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405, at *6 (S.D. Miss. Nov. 4, 2020). Another case is *Uncork & Create LLC v. Cincinnati Ins. Co*. In that case, the court granted the Defendant's Motion to Dismiss. The court held that "property, including the physical location of Uncork and Create, is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to Uncork and Create's operation. The court noted that no repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. The Court found that, in short, the pandemic impacts human health and human behavior, not physical structures." No. 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020). One other case is *Sandy Point Dental, PC v. Cincinnati Ins. Co*. In that case, the court granted the Defendant's Motion to Dismiss. The court held that "the critical policy language here—'direct physical loss'—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure." No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020). One last case is *Nite, LLC v. Certain Underwriters at Lloyd's London*. In that case, the court granted summary judgment in favor of the Defendant. The court held that "the Governor's Order nor the virus itself constitutes damage to the property, thus there's no coverage under

the policy. The court noted that the record was simply void of any evidence to establish any physical damage or any physical loss that was caused to any property. The court pointed out that the plaintiff had not shown that the property was either useless or uninhabited. The court also noted that once the stay-at-home order was lifted, the property was still in the exact same condition. The court concluded that under those facts, the policy did not provide coverage." No. 698068, Section 23 (Feb. 9, 2021 East Baton Rouge Parish, La.).

The Court finds that, although none of these cases apply Indiana law and are not binding, the Court is persuaded by their reasoning and analysis. The Court points out that each of these cases contain the same policy language as that in our case and apply law which is similar to Indiana's law on insurance contract interpretation. The Court finds these cases to be persuasive in supporting the Court's interpretation of the Policy.

IRT argues that the existence of a split of authority indicates that the Policy is ambiguous and therefore must be construed in favor of coverage. (IRT Resp. at 11). The Court disagrees with IRT's view. First, there does not appear to be a "split of authority." The majority of courts have dismissed these claims. Those that have not have merely allowed the insured to try and prove them. The weight of authority establishes a majority view. In addition, the Indiana Supreme Court has recognized that a disagreement among courts may be evidence of ambiguity, but "[i]t does not establish conclusively that a particular clause is ambiguous and [Indiana courts] are not obliged to agree that other courts have construed the policy correctly. *Allgood*, 836 N.E.2d at 248.

The Court's independent review of the Policy leads the Court to find that the language at issue is not ambiguous.

The Court finds that when read together and in context, the Policy's requirement of direct physical loss or damage to property is not ambiguous. The Court points out that IRT must demonstrate that its insured property underwent some type of direct and physical loss or damage. Here, IRT has asserted that it lost the use of its theatre for its intended purpose. The inquiry is whether this loss of use is a direct physical loss to property. The Court finds that it is not. IRT's loss of use does not have any physical impact on its property. No evidence suggests that the theatre was physically different on March 23, 2020 when IRT announced "the IRT is closed due to the State of Indiana's COVID-19 orders." (Cincinnati, Ex. C at 1). To properly construe the Policy, the Court must give effect to the "physical" requirement, which is also consistent with the law of Indiana and other jurisdictions that have dealt with this issue. If loss of use alone qualified as direct physical loss to property, then the term "physical" would have no meaning. The Court cannot interpret the Policy in a way that nullifies one of its terms. *Briles*, 858 N.E.2d at 213. The Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage.

Other provisions of the Policy also support the conclusion that there is no business income coverage without structural alteration to property. The business income coverage applies to the "period of restoration." The "period of restoration" begins with the date of loss and ends on the date when "the property at the 'premises' should be repaired, rebuilt or replaced" or "business is resumed at a new permanent location." (Policy at IRT_0000114). The Court notes that there is nothing to "repair,"

"rebuild" or "replace" if the premises have not been damaged. The Court further notes that COVID-19 has not physically harmed or changed the theatre. IRT has produced no evidence that the virus was ever present at its theatre. In addition, the evidence shows that IRT undertook projects at the theatre during the pandemic, demonstrating that the theatre was not uninhabitable. This evidence defeats any conclusion that the loss of use IRT experienced had a physical impact on the theatre premises or that the theatre was completely unusable. Because there is nothing to repair, replace or rebuild; there has been no direct physical loss.

IRT asserts that its interpretation that loss of use alone, without physical impact or alteration to property, is reasonable and, therefore, the Court must construe the Policy in its favor and find coverage. The Court disagrees. The Court finds that IRT's interpretation is not reasonable. The Court points out, as discussed above, that IRT fails to give meaning to the Policy's requirement that the loss to the property must be "physical." The Court also points out that IRT's interpretation fails to construe the Policy as a whole and to give all its terms effect. The Court cannot accept that interpretation.

As for the arguments regarding the delay or loss of use exclusion, the ordinance exclusion, the acts or decisions exclusion, and the absence of a virus exclusion. The Court finds these arguments to be moot. The Court points out that, in interpreting an insurance policy, an insured must first demonstrate that it satisfies the policy's insuring agreement. Only after the insured satisfies this burden are exclusions relevant. Here, IRT has failed to satisfy the insuring agreement. Specifically, the theatre has not suffered a direct physical loss to property. The Court, therefore, finds the arguments regarding these exclusions to be moot.

Based on the evidence currently before the Court, the Court finds that there are no genuine issues of material fact that would preclude the granting of summary judgment in Cincinnati's favor as to the meaning of "direct physical loss or damage".

For the foregoing reasons, the Court DENIES Plaintiff's Motion for Partial Summary Judgment as to Count 1: Declaratory Relief against Cincinnati only and GRANTS Defendant's Cross-Motion for Summary Judgment.

C. <u>The Presence of the Coronavirus at IRT & Rule 56(F) Affidavit</u>

IRT attaches to its Reply brief an affidavit pursuant to Indiana Trial Rule 56(F) seeking additional time to develop evidence regarding the presence of the SARS-CoV-2 virus inside its theatre.

Pursuant to Indiana Trial Rule 56(F), should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. Ind. Trial Rule 56(F).

The Court points out that in its Amended Complaint, IRT alleged the Coronavirus could attach to surfaces and later infect people. (IRT Am. Compl. ¶ 48). IRT attached to its motion for partial summary judgment the declaration of Dr. Richard Feldman and various scientific publications, to support its allegations. Cincinnati filed the affidavit of Dr. Wayne Thomann on August 28, 2020, who opined that the virus could exist on surfaces, but for no more than seven days. (Thomann Aff. ¶ 9). Based on this information, the Court can only conclude that IRT should have the opportunity to demonstrate the presence of the virus at the theatre and that the virus caused physical

alteration or was at least capable of doing so. Accordingly, the Court will grant additional time to IRT to obtain that evidence.

For the foregoing reasons, the Court GRANTS Plaintiff's Request for additional time to develop evidence pursuant to Indiana Trial Rule 56(F).

The Court points out that this Order that it is issuing is merely the Court's interpretation of the Policy language as to the meaning of the language "direct physical loss or damage" to property. The Court notes that should IRT obtain evidence regarding the presence of the SARS-CoV-2 virus inside the theatre in March 2020 (when the shutdown occurred) and if IRT believes that this new evidence demonstrates that the virus caused physical alteration or at least was capable of doing so, IRT may file a motion with the Court.

IV. ORDER

The Court hereby **DENIES** Plaintiff's Motion for Partial Summary Judgment as to Count 1: Declaratory Relief against Cincinnati only and **GRANTS** Defendant's Cross-Motion for Summary Judgment. The Court also hereby **GRANTS** Plaintiff's Request for additional time to develop evidence pursuant to Indiana Trial Rule 56(F).

SO, ORDERED, ADJUDGED, AND DECREED this 12th day of March 2021.

Heather A. Welch

Hon. Heather A. Welch
Judge, Marion Superior Court
Marion County Commercial Court

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