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AFTAB PUREVAL
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Hamilton County, Ohio
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**THE ENSEMBLE THEATRE
CINCINNATI**

A 2002536

vs.

**THE CINCINNATI
INSURANCE COMPANY**

**FILING TYPE: INITIAL FILING (IN COUNTY) WITH NO JURY
DEMAND**

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VERIFY RECORD

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

THE ENSEMBLE THEATRE
CINCINNATI,
1127 Vine Street
Cincinnati, OH 45202

Plaintiff,

v.

THE CINCINNATI INSURANCE
COMPANY,
6200 South Gilmore Road
Fairfield, OH 45014

Serve:
Statutory Agent
Steve Corbly
P. O. Box 145496
Cincinnati, OH 45205

and

THE CINCINNATI CASUALTY
COMPANY,
6200 South Gilmore Road
Fairfield, OH 45014

Serve:
Statutory Agent
Steve Corbly
P. O. Box 145496
Cincinnati, OH 45205

and

THE CINCINNATI INDEMNITY
COMPANY,
6200 South Gilmore Road
Fairfield, OH 45014

Case No.: _____

Judge _____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Serve: :
Statutory Agent :
Steve Corbly :
P. O. Box 145496 :
Cincinnati, OH 45205 :
:
Defendants. :

Plaintiff Ensemble Theatre Cincinnati (“ETC” or “Plaintiff”), brings this action against Defendants The Cincinnati Insurance Company, The Cincinnati Casualty Company and The Cincinnati Indemnity Company (collectively “Defendants” or “Cincinnati Insurance”), and alleges as follows:

INTRODUCTION

1. ETC owns and operates a performance theatre in the Cincinnati downtown region of Over-The-Rhine. Ensemble Theatre has entertained and served the Over-The-Rhine area for more than 35 years. To protect its business in the event that it had to suspend operations for reasons outside of its control, Plaintiff purchased an insurance policy from Cincinnati Insurance, which contained property coverage, including “business income” insurance, (also referred to as "business interruption" insurance) which insures against the loss of business income from a number of causes including actions of a “Civil Authority”.

2. ETC was forced to suspend its business due to COVID-19 (a.k.a. the “coronavirus” or “SARS-CoV-s”) as well as take necessary steps to prevent further damage and minimize the suspension of its business.

3. As described in more detail hereafter ETC made a claim for the loss of its business income due to its compliance with the Orders of the Ohio Department of Health and Defendants denied the claim. The claim denial is attached as Exhibit 1.

4. This is a lawsuit for declaratory judgment filed pursuant to Section 2721.02, *et seq.*, of the Ohio Revised Code (“ORC”). It arises out of the loss of business income which was sustained by ETC, as a result of a “shutdown order” from the Ohio Department of Health, based upon the airborne and deposited presence of the COVID-19 virus throughout the State of Ohio and the City of Cincinnati.

II. PARTIES

5. ETC is an Ohio corporation that operates a theatre in Cincinnati, Hamilton County, Ohio, and has its principal business office in Cincinnati, Hamilton County, Ohio.

6. Defendants The Cincinnati Insurance Company, The Cincinnati Casualty Company and The Cincinnati Indemnity Company are Ohio corporations, with their principal place of business in Fairfield, Ohio. Defendants are authorized to write, sell, and issue business insurance policies throughout the State of Ohio, through appointed agents who regularly sell policies in Hamilton County, Ohio. The agency that sold Ensemble Theatre its policy is Arthur J. Gallagher & Company.

III. THE INSURANCE POLICY

7. The insurance policy purchased by ETC and at issue in this declaratory judgment action (the “Policy”) is attached hereto as Exhibit 2. But for a limited amount of information that is placed on declaration pages in the policy it is otherwise substantially a preprinted form document. Most importantly the sections of the Policy that are at issue in this declaratory judgment action are preprinted form language and apply to all similarly situated Ohio insureds of Defendants.

8. The Policy provides certain coverages, additional coverages, and coverage extensions. Listed among the additional coverages and coverage extensions is “business income”

insurance which insures against the loss of business income from a number of causes including action of civil authority.

9. Listed under the category of “business income” insurance is “Civil Authority” coverage. When there is damage to property other than the insured's property, then the insurance company is required to pay the loss of business income sustained as caused by action of civil authority that prohibits access to the insured's premises. In other words, the property damage need not be to the insured's property, but damage to another property which leads the government to shut down the insured's business.

10. There are certain other qualifications relating to (a) the area where the damaged property must be located; and (b) the presence of a dangerous physical condition that causes the action by the civil authority.¹

11. In summary, the Policy provides that:

- There is insurance for loss of “business income” which may occur for several different reasons;
- There is insurance for loss of “business income” if that loss results from the action of a “civil authority” (a government agency);
- The action of the civil authority need not be based upon damage to the insured property, but may be based upon “damage to property other than property” at the insured's premises; and
- The damage to the other property must be in relatively close proximity to the insured property and the action of the civil authority must be based upon a dangerous physical condition.²

¹ These qualifications are easily satisfied in that the virus is airborne throughout the State of Ohio. When the airborne virus settles on a surface then that property becomes damaged and dangerous. The widespread existence of the virus throughout the State of Ohio is precisely why the orders of the Department of Health are exceedingly broad.

² ETC's policy does not have a “virus exclusion”. Interestingly, Cincinnati Insurance has issued other policies which have a specific “virus exclusion” in them, but it was not inserted in ETC's policy.

**IV. COVID-19 VIRUS IN OHIO AND
THE RESPONSE OF THE OHIO CIVIL AUTHORITY**

12. The presence of COVID-19 has caused civil authorities to issue orders requiring the suspension of business. On March 14, the State of Ohio, through the states' Department of Health, issued the "Director's Order" which required the closure of mass gatherings in Ohio of more than 100 people. Attached hereto as Exhibit 3. On March 17, the State of Ohio, through the states' Department of Health, issued the "Director's Order" which required the closure of mass gatherings in Ohio of more than 50 people and all performance theatres in Ohio. Attached hereto as Exhibit 4.

13. On of April 2, 2020, the State of Ohio, recognizing that there is "a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population", issued an order requiring the closure of non-essential businesses (the "Stay at Home Order"), which took effect on April 6, 2020. Attached hereto as Exhibit 5.

14. The Stay at Home Order applied, without exception, to "all individuals currently living within the State of Ohio." It required them to stay home, with certain limited exceptions, and to engage in "social distancing requirements" which included such things as maintaining a six-foot distance from other individuals, frequently washing hands and using hand sanitizer. These requirements applied throughout the State of Ohio and were necessary because of the widespread prevalence of the virus in the air and on surfaces of property throughout the State.

15. As of July 16, 2020, there were approximately 70,000 confirmed cases of the COVID-19 virus in the State of Ohio resulting in over 3,000 deaths. These numbers are continuing to increase. The airborne virus was so prevalent, throughout the State of Ohio, that on March 9, 2020, the Governor of the State of Ohio, the Honorable Mike DeWine, declared a state

of emergency throughout the entire State. As of July 16, 2020, there were over 7,000 confirmed cases of COVID-19 virus in Hamilton County, Ohio, the location of Plaintiff's insured premises and over 200 deaths.

16. As a result of the widespread prevalence of the COVID-19 virus in the air and on surfaces throughout the State of Ohio, the proximity requirements of ETC policy with Defendants are met.

V. DECLARATORY JUDGMENT — THE ISSUES

17. Section 2721.02 of the ORC provides that a court of record in Ohio may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action may be objected to on the basis that declaratory judgment is requested and the declaration may be either affirmative or negative in form or effect. Once rendered, the declaration has the effect of a final judgment or decree.

18. Plaintiff respectfully submits that there are several issues raised by Plaintiff's claim and Defendant's denial that are appropriate for a declaratory judgment at this time. Those issues are as follows:

- Whether the order signed by Dr. Acton is a valid and enforceable order of a civil authority requiring that Plaintiff cease doing business at the insured premises;
- Whether the airborne presence of the virus and/or the presence of the virus on numerous surfaces and on numerous properties throughout the State of Ohio can, as a matter of law, be considered property damage under the applicable case law and legal authorities; and
- Whether the preponderance of the evidence supports the conclusion that it is more likely than not that the virus was present on other property in and around and within one mile of the insured's premises.

19. Plaintiff submits that the facts and the case law support a finding by the Court in favor of Plaintiff on each of the above issues. Thus, the Court should enter a declaratory

judgment that Plaintiff has coverage for the loss of business income that Plaintiff suffered as a result of the civil orders signed by Dr. Action under the civil authority insurance section of Plaintiff's policy.

VI. DAMAGES

20. The Court should enter a declaratory judgment on the coverage issue, in favor of Plaintiff. Plaintiff does not seek the Court's determination of damages at this time.

21. The policy issued by Cincinnati Insurance contains a form "appraisal" clause. That clause permits each party to select an appraiser and then the two appraisers select an umpire. The persons who act as appraisers are normally an adjuster, acting on behalf of the company, and a public adjuster employed by the insured.

22. The Court should grant declaratory judgment in Plaintiff's favor on the coverage issue. After the judgment on the liability issue is entered, Plaintiff will attempt to negotiate, in good faith, with Defendants in an effort to arrive at a mutually acceptable figure for the loss of business income suffered by ETC. If such good faith negotiation does not result in a resolution of the claim then Plaintiff will invoke the appraisal process to obtain a damage determination.

WHEREFORE, in consideration of the foregoing, ETC requests that the Court grant declaratory judgment in favor of ETC, and enter an order holding that ETC has insurance coverage that was purchased by ETC from Defendants, for ETC's loss of business income arising from the civil authority orders issued by the Ohio Department of Health. ETC also requests all other proper and appropriate relief including costs and attorneys' fees.

Respectfully submitted,

/s/ Mark T. Hayden

Mark T. Hayden (0066162)

TAFT STETTINIUS & HOLLISTER LLP

425 Walnut Street, Suite 1800

Cincinnati, OH 45202

Phone: (513) 381-2838

Fax: (513) 381-0205

mhayden@taftlaw.com

Counsel for Plaintiff