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,)
)
v.)
)
THE CINCINNATI CASUALTY COMPANY)
and McGOWAN INSURANCE GROUP, LLC,)
)
Defendants.)

FILED
December 13, 2021
CLERK OF THE COURT
MARION COUNTY
JL

ORDER GRANTING ALL MOTIONS FOR LEAVE/TO SUPPLEMENT THE RECORD AND ORDER GRANTING DEFENDANT'S, THE CINCINNATI CASUALTY COMPANY, CROSS-MOTION FOR SUMMARY JUDGMENT

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 came before the Court on Plaintiff's Motion for Partial Summary Judgement against Cincinnati.[1] Also, before the Court was Cincinnati's Cross-Motion for Summary Judgment. On March 12, 2021 (amended on May 20, 2021), the Court issued

[1] The Court thanks all counsel on this case for well-written briefs on this complex coverage case and the outstanding oral arguments presented to the Court. Counsels' work greatly assisted the Court in issuing this order.

an 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). More specifically, the Court articulated the trigger for coverage for business income loss under the IRT's insurance policy. The Court held that IRT must show that the "insured property underwent some type of direct and physical loss or damage." Specifically, the Court's order stated: "[t]he Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage." (Amended Order, p.25.)

The Court made clear 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'" and was "[b]ased on the evidence currently before the Court." (Amended Order, pp.27-28.) The Court noted that IRT had alleged in its complaint that the coronavirus could attach to surfaces and later infect people. (Amended Order, p.27.) The Court cited the previously filed affidavits of the parties' experts Dr. Richard Feldman and Dr. Wayne Thomann and stated: "[b]ased on this information, the Court can only conclude that IRT should have the opportunity to demonstrate the presence of the virus at the theater and that the virus caused physical alteration or was at least capable of doing so. Accordingly, the Court granted additional time to IRT to obtain that evidence." (Amended Order, p.27.)

On June 15, 2021, IRT submitted the declarations of three expert witnesses: (1) Dr. Brian E. Dixon, (2) Mark Wood, and (3) Dr. Sergey Grinshpun. Along with this, IRT filed its Motion to Supplement the Summary Judgment Record Pursuant to the Court's Order; Motion for Leave to File Supplemental Brief in Opposition to Cincinnati's Motion

for Summary Judgment; and Amended Designation of Evidence in Support of Motion for Partial Summary Judgment Against the Cincinnati Casualty Company and in Opposition to the Cincinnati Casualty Company's Cross-Motion for Summary Judgment.

In response to the declarations of the three expert witnesses, Defendant Cincinnati did not file any opposing expert witness affidavits. Instead, Cincinnati filed, without leave of the Court, an amended designation of evidence that included the transcript of the first day of a two-day deposition of Suzanne Sweeney, the IRT's managing director. In response, IRT filed a motion for leave to file a sur-reply and also moved for leave to supplement its designation of evidence to include the transcript of the second day of Ms. Sweeney's deposition as well as the deposition of the IRT's artistic director, Janet Allen, conducted on August 12, 2021. Cincinnati objected to IRT's motions.

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

I. IRT'S SUPPLEMENTAL EVIDENCE

A. IRT's Expert Testimony

In response to the Court's order granting it leave to obtain evidence regarding the SARS-CoV-2 virus inside the theatre in March 2020 and whether the virus caused, or was capable of causing, physical alteration to property, IRT submitted three declarations by individuals IRT designates as experts:

1. Declaration of Dr. Brian E. Dixon, Ph.D. ("Dixon Decl."), dated June 14, 2021;
2. Declaration of Mark Wood ("Wood Decl."), dated June 14, 2021; and

3. Declaration of Dr. Sergey A. Grinshpun (“Grinshpun Decl.”), dated June 14, 2021.

The Court summarizes each declaration below.

1. Dixon Declaration

Dr. Brian E. Dixon is the Director of Public Health Informatics at the Regenstrief Institute in Indianapolis. [Dixon Decl. at ¶ 1]. His work applies health information systems tools and technology (informatics) to address population health problems. [*Id.*]. Dr. Dixon has a bachelor’s degree in computer science, master’s of public administration and obtained his Ph.D. from the School of Informatics and Computing at Indiana University in Bloomington. [*Id.* at ¶ 4].

Dr. Dixon provides general background about the SARS-CoV-2 virus and about the nature of viruses generally. [*Id.* at ¶¶ 6–13]. He states that coronaviruses, like SARS-CoV-2, are common and that cases of COVID-19, the disease that SAR-CoV-2 causes, were identified in Indiana as early as mid-February 2020. [*Id.* at ¶ 7]. Dr. Dixon also states that around 75 percent of COVID-19 cases are mild and do not require medical care, but that some people who test positive seek emergency care, while others hospitalized due to the illness. [*Id.* at ¶ 8]. Of those hospitalized, approximately 16% die from COVID-19. [*Id.*]. Dr. Dixon has compiled statistics about COVID-19 as part of his work for the Regenstrief Institute. [*Id.*]. Dr. Dixon also states that SARS-CoV-2 is highly transmissible through respiratory droplets that either become aerosolized or land on surfaces. [*Id.* at ¶¶ 12–13]. “Viruses can adsorb onto surfaces through electrostatic interactions between the outer layer of the virus and the surface of a solid object.” [*Id.* at ¶ 13]. Dr. Dixon notes that the U.S. Centers for Disease Control and Prevention advises

people to wash their hands frequently and to disinfect high-touch surfaces often. [*Id.* at ¶ 13].

Dr. Dixon presents two opinions in his declaration. First, that SARS-CoV-2 was present inside IRT's theatre by March 1, 2020 and, second, that SARS-CoV-2 physically alters IRT's theatre when the virus is present. [*Id.* at pp. 8 & 16]. For his first opinion, Dr. Dixon explains that he and his colleagues developed a "statistical model to estimate the cumulative prevalence of SARS-CoV-2 in Indiana at any point in time." [*Id.* at ¶ 19]. Dr. Dixon's model relies on data from random testing, documented cases of COVID-19 at Indiana State Department of Health and recorded deaths attributed to COVID-19 by ISDH. [*Id.*]. Dr. Dixon states that his model can provide an "accurate estimation" of past and current infections among Hoosiers at any given date. [*Id.*].

Dr. Dixon's model allows him to extrapolate data to identify the "probable incidence of COVID-19 infections in Indianapolis as of early March 2020, at the beginning of the pandemic and prior to the shutdown of the IRT on March 16, 2020." [*Id.* at ¶ 20]. Based on assumptions about the growth rate of the SARS-CoV-2 virus, Dr. Dixon determined the incidence of COVID-19 for the State of Indiana to have been 0.27% as of March 1, 2021 and the incidence for Indianapolis to have been around 0.5%. [*Id.* at ¶ 20]. Dr. Dixon also determined that, because more than zero percent of the adult population in Indiana was infected with COVID-19 as of March 1, 2020, the virus was actively circulating in the state. [*Id.* at ¶ 21]. Therefore, according to Dr. Dixon's model, as of March 15, 2020, if there were "an average audience of 400 IRT theatre attendees there would have been on average 2.2 individuals who were infected with and transmitting SARS-CoV-2." [*Id.*]. Dr. Dixon's report does not identify these

individuals. Dr. Dixon goes on to state that if the IRT had remained opened or reopened during the pandemic, then "persons infected with SARS-CoV-2 almost certainly would have entered theater" and spread the virus. [*Id.* at ¶ 22].

Dr. Dixon's second opinion is that the SARS-CoV-2 physically alters and negatively affects buildings and property. [*Id.* at ¶ 25]. Dr. Dixon explains that human respiratory droplets from individuals infected with SARS-CoV-2 contain virus. Those droplets may land on surfaces or remain in the air and travel through a building. [*Id.* at ¶ 25]. Dr. Dixon states that an infected individual could contaminate the indoor air at IRT's theatre with aerosolized SARS-CoV-2 and expose uninfected persons to the virus and increasing their risk of infection when they inhale the airborne virus. [*Id.*]. Dr. Dixon states that risk of viral spread among people could be reduced through the use of air purifiers, but that the risk cannot be eliminated completely. [*Id.*]. Based on this information, Dr. Dixon concludes "the indoor air inside the IRT is significantly and adversely physically changed by the presence of SARS-CoV-2." [*Id.* at ¶ 26].

Dr. Dixon also states that SARS-CoV-2 physically alters solid surfaces through electrical attractions between molecules the virus and molecules of whatever the virus lands on. [*Id.* at ¶ 27]. Dr. Dixon states that anything can "potentially become infectious" and that humans may spread the virus to themselves by touching surfaces with virus on them. [*Id.*]. Dr. Dixon concludes that since at least one infected person likely entered IRT's theatre for performances, the concentration of the virus also likely increased, which likely resulted in exposure to infection. Based on this, Dr. Dixon concludes items of property within the IRT's theatre are physically and negatively altered by the presence of SARS-CoV-2 inside the theatre. [*Id.* at ¶ 28].

Dr. Dixon also opines the adverse impact and physical alteration by SARS-CoV-2 to the indoor air and surfaces of the theatre continued after IRT shut down in March 2020. [*Id.* at ¶¶ 29–30]. Dr. Dixon notes that IRT personnel continued to report to work at IRT throughout the pandemic, and that IRT produced virtual performances without an audience present, but which required actors and crew to be in IRT's theatre. From this, Dr. Dixon deduces it is "almost certain" that some personnel brought SARS-CoV-2 into the building. [*Id.* at ¶ 30]. He notes that one employee, Suzanne Sweeney, tested positive for COVID-19 in March 2021 and was present at the theatre at that time. [*Id.* at ¶ 31 (emphasis added)]. Dr. Dixon does not identify any individuals who tested positive for COVID-19 in March 2020, prior to IRT filing this lawsuit in April 2020.

2. Wood Declaration

Mr. Mark Wood worked for nearly 30 years in the fields of industrial hygiene and environmental, health and safety regulatory compliance for Eli Lily and Company, from which he retired in 2018. [Wood Decl. at ¶ 1]. He is currently a member of the faculty at IUPUI Richard M. Fairbanks Schools of Public Health, where he teaches courses in industrial hygiene, environmental health and leadership. [*Id.*]. Mr. Wood has a bachelor's degree in environmental health and a master's degree in public health.

Mr. Wood presents two opinions in his declaration. First, Mr. Wood opines that indoor air is a part of a building; that SARS-CoV-2 physically alters the indoor air; and that building safety standards are changing to reflect new measures needed to protect indoor air quality. [*Id.* at page 2]. Second, SARS-CoV-2 binds to objects with which it comes into contact, which creates a potential secondary route of SARS-CoV-2

exposure that can only be disrupted through constant cleaning and disinfecting of indoor surfaces and that can be affected by ventilation. [*Id.* at page 7].

In support of his first opinion, Mr. Wood states that indoor air is an integral component of a building and that the building acts to separate indoor, conditioned air from outdoor, unconditioned air. [*Id.* at ¶ 4]. He notes that government agencies regulate indoor air quality in schools and state agency buildings and that the Actors' Equity Association, a labor union representing actors in the United States, has expressed concern about the quality of air as it relates to SARS-CoV-2. [*Id.*]. Mr. Woods states also that building materials can affect indoor air quality and that managing indoor air through ductwork and air handling units is an important part of operating a building. [*Id.* at ¶¶ 4–5].

Mr. Wood states that the national consensus standards for ventilation and air filtration are established by the American Society of Heating, Refrigeration and Air Conditioning Engineers ("ASHRAE") and that Indiana incorporates those standards into state and local buildings codes. [*Id.* at ¶ 7]. Mr. Wood explains that, because of SARS-CoV-2, ASHRAE and other authorities have recommended making changes to HVAC systems, because SARS-CoV-2 can be transmitted through the air. [*Id.* at ¶ 8]. Mr. Wood asserts that human respiratory droplets containing the virus can become aerosolized, which contaminates the air and can cause people to inhale the virus and develop COVID-19. [*Id.* at ¶ 9]. Mr. Wood asserts that current ventilation standards for indoor spaces, like at IRT, "are not designed for virus infection control." [*Id.* at ¶ 10]. Mr. Wood states it is important to upgrade filters in mechanical systems that recirculate air within the same room or ventilation zone, like IRT's systems. [*Id.*].

Mr. Woods also cites to a computer modeling system that is used to estimate how long a number of people can occupy a space safely based on different variables. [*Id.* at ¶ 11]. Mr. Wood states that it is "highly likely" an infected person would have entered the theatre if it had been open and that, when the theatre is at capacity, an audience of 600 people "could only safely remain present for about thirty minutes if a single individual infected with SARS-CoV-2 is present in the theatre." [*Id.* at ¶ 11]. Mr. Wood declares that SARS-CoV-2 foiled the purpose of the theatre's ventilation system, which was to maintain safety and comfort of the audience and workers. [*Id.*]. Based on this, Mr. Wood states that this ineffectiveness is "the functional equivalent of complete physical loss of the system" at the beginning of the pandemic. [*Id.*].

Mr. Woods states that IRT physically altered its ventilation system by installing new filters and an ionization device. [*Id.* at ¶ 12]. Mr. Wood predicts these measures will be insufficient to ensure the safety of large audiences and that additional ventilation and masking will be needed. [*Id.*]. Depending on variables like mask usage and audience immunity, as well as current ventilation capability, Mr. Wood predicts the IRT may need to increase the rate at which the building exchanges indoor and outdoor air. [*Id.* at ¶ 13]. Mr. Wood believes doing so will enable a large audience to occupy the space for several hours. [*Id.*].

Mr. Wood notes that infectious disease researchers and virologists believed the SARS-CoV-2 and its variants will become endemic, continuing to circulate in the global population for years, without being eradicated. [*Id.* at ¶ 14]. He also notes the low vaccination rate for Hoosiers. [*Id.*]. Accordingly, Mr. Wood predicts building owners will need to enhance their ventilation and air filtration systems to mitigate against the virus.

For his second opinion, that SARC-CoV-2 binds to objects and can be cleaned, Mr. Wood states that SARS-CoV-2 can live on surfaces for varying periods of time, hours to days, and that humans can transmit the virus by touching it on a surface and then touching their mouth, nose or eyes. [*Id.* at ¶ 15]. Whether the virus binds to a surface depends on the nature of the virus, the nature of the surface and the humidity and temperature in the room. [*Id.* at ¶ 16]. Mr. Wood states that SARS-CoV-2 binds to surfaces through molecular or atomic bonding forces. Mr. Wood concludes, "[t]hese chemical forces cause the virus to physically adsorb on to surfaces, not merely 'rest' on surfaces." [*Id.* (emphasis added)].

Applying these principles to IRT, Mr. Wood opines that "SARS-CoV-2 creates contagion risks" in IRT's theatre and that eliminating the risk of transmission is "challenging". [*Id.* at ¶ 17]. This is because the virus cannot be seen and the degree and magnitude of the virus cannot be known. [*Id.*]. In turn, the level of cleaning required cannot be readily determined, complicating the cleaning. [*Id.*]. Mr. Wood states that even with cleaning, the virus will be reintroduced in the theatre as infected persons enter and circulate in the building, requiring more cleaning. [*Id.*]. Because of this threat of recontamination, Mr. Wood believes IRT will need to make changes to the facility, including touchless restroom fixtures, light switches and elevator buttons. [*Id.*].

3. Grinshpun Declaration

Dr. Sergey A. Grinshpun is a Professor of Environmental and Public Health Services of the University of Cincinnati and founding Director of the Center for Health-Related Aerosol Studies there. [Grinshpun Decl. at ¶ 1]. Dr. Grinshpun has a Ph.D. in physics with a specialization in Thermophysics Aerosol Science. [*Id.*]. Dr. Grinshpun

studies airborne particles, including viruses, bacteria and fungi types, and how they move, deposit, are inhaled, become inactive, as well as respiratory protection and the purification of indoor air that has been contaminated with hazardous biological particles. [*Id.* at ¶ 2]. Since February 2020, he has been concerned with mitigating the pandemic and consulted government agencies on the transmission of the SARS-CoV-2 virus, human exposure to it and respiratory protection issues. [*Id.* at ¶ 3].

Dr. Grinshpun asserts that any hazardous airborne component introduced in an indoor environment negatively affects or alters air quality in the environment. [*Id.* at ¶ 11]. He equates infectious diseases present in an indoor environment with "asbestos fibers, lead paint particles, anthrax sport and other known hazards." [*Id.*]. Dr. Grinshpun opines that the presence of SARS-CoV-2 inside the IRT theatre presented a clear danger to IRT patrons, actors and other people working at IRT. [*Id.*]. He believes that it would have been irresponsible for the IRT to have continued full operations, such as full performances, because of the human health danger posed by SARS-CoV-2. [*Id.*]. Dr. Grinshpun also opines that the presence of SARS-CoV-2 on a solid surface alters the surface through the process of adsorption, which he explains as a complex process involving surface chemistry "that may impact the properties of the surface." [*Id.* at ¶ 12]. He opines that surfaces contaminated with SARS-CoV-2 may make the surface a source of infection to humans, which Dr. Grinshpun equates to a loss of functionality of the surface. [*Id.* at ¶ 12].

Dr. Grinshpun's declaration also addresses opinions set forth in the affidavit of Dr. Wayne Thomann, submitted previously by Cincinnati in support of summary judgment. [*Id.* at ¶¶ 9, 14]. Dr. Grinshpun disputes Dr. Thomann's opinion that "after

cleaning, the presence of SARS-CoV2- is not a concern." [*Id.* at ¶ 14]. Dr. Grinshpun's dispute is that cleaning appears to only "reduce" the risk of SARS-CoV-2 transmission from surfaces and not "eliminate" the virus 100%. [*Id.*]. He also notes that some surfaces cannot be easily reached for cleaning, including surfaces in the theatre. [*Id.*]. Dr. Grinshpun opines that even after surface cleaning, the presence of SARS-CoV-2 could still be a concern. [*Id.*].

Dr. Grinshpun assumes people carrying the SARS-CoV-2 virus entered IRT's building and caused the virus to be spread in the air and on to surfaces. [*Id.* at ¶ 15]. Dr. Grinshpun states that the virus can survive at room temperature for up to nine days. [*Id.*]. Based on his assumption and the survival duration of the virus, Dr. Grinshpun predicts that, had the IRT remained open and held three performances per week, then surface contamination in the theatre would have likely increased by outpacing the natural death of the virus. [*Id.*]. Thus, Dr. Grinshpun states, there was a "clear potential" for surface contamination to increase over time and pose a higher health risk to humans who came into contact with surfaces. [*Id.*]. Dr. Grinshpun states that his statements in his affidavit are his personal opinions are given with a reasonable extent of scientific certainty. [*Id.* at ¶ 16].

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. MOTIONS FOR LEAVE/TO SUPPLEMENT THE RECORD

A. Transcripts of Suzanne Sweeney's Deposition and IRT's Motion to Supplement Designation of Evidence in Opposition to Cincinnati's Motion for Summary Judgment

Both parties supplemented their designations of evidence filed as part of the original summary judgment briefing. As part of its reply brief, filed August 6, 2021, Cincinnati attached the deposition transcript of IRT's co-CEO Suzanne Sweeney and some exhibits from that deposition.

On August 23, 2021, IRT filed a Motion for Leave to File Surreply in Opposition to Cincinnati's Motion for Summary Judgment, attaching to the motion a copy of IRT's proposed surreply. Part of IRT's justification for seeking leave to file a surreply was that Sweeney's deposition held on June 18, 2021 had only paused by agreement of the parties. IRT objected to Cincinnati filing the transcript of Sweeney's then-incomplete deposition.

On September 29, 2021, before the Court could rule on IRT's motion for leave to file its surreply, IRT filed its Motion to Supplement Designation of Evidence in Opposition to Cincinnati's Motion for Summary Judgment. IRT attached twelve pages from Sweeney's first deposition (held on June 18 and already filed in its entirety by Cincinnati), 164 pages from Sweeney's second deposition (held September 1, 2021) and the complete deposition of IRT's other co-CEO Janet Allen (held August 12, 2021).

In the interest of having a complete record, the Court GRANTS IRT's Motion to Supplement Designation of Evidence in Opposition to Cincinnati's Motion for Summary Judgment. Additionally, with the completion of Sweeney's deposition, and IRT having filed parts of the first and second deposition transcripts, IRT's objection to Cincinnati submitting Sweeney's first deposition transcript is Moot.

B. IRT's Motion for Leave to File Surreply in Opposition to Cincinnati's Motion for Summary Judgment

As noted above, on August 23, 2021, IRT sought to file a surreply and did file as an exhibit to the motion. On August 27, 2021, Cincinnati filed its objection to IRT's motion for leave to file a surreply. Cincinnati asked, if IRT was permitted to file a surreply, then Cincinnati should be able to file a sur-surreply. **In the interest of having a complete record, IRT's Motion for Leave to File Surreply in Opposition to Cincinnati's Motion for Summary Judgment is GRANTED as well as Cincinnati's request to file a sur-surreply.**

C. IRT's Motion for Leave to Submit Supplemental Authority

On September 29, 2021, IRT filed its Motion for Leave to Submit Supplemental Authority, attaching a copy of the ruling denying summary judgment to Cincinnati in *K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.,* 2021 WL 4302834 (W.D. Mo. Sept. 21, 2021). IRT's motion acknowledged that the Court had ordered the parties on March 5, 2021 "to not submit supplemental authority and further orders that the Parties are not to submit any additional authority unless requested by the Court or there is a new decision applying Indiana law." [Order Granting Cincinnati Sixth Motion to Supplement Case Law and to Bar Further Submissions of Authority, Mar. 5, 2021].

On October 1, 2021, Cincinnati objected to IRT's motion, citing the March 5 order. Cincinnati further argued that permitting IRT to submit supplemental authority now prejudiced Cincinnati, since Cincinnati had followed the March 5 order and refrained from submitting to the Court the many decisions supporting its arguments from across the nation. Cincinnati supplied to the Court citations to some of those cases.

The Court notes that its interest is having a complete record. Although IRT's submission of supplemental authority violated the Court's March 5 order on

the issue, the Court nevertheless GRANTS IRT's Motion for Leave to Submit Supplemental Authority and modifies its March 5, 2021 Order to permit the parties to submit supplemental authority. To this end, the Court also accepts notice of the authorities cited by Cincinnati in its opposition to IRT's motion.

With the above outstanding motions and issues resolved, the Court now turns to the merits of the parties' arguments at summary judgment.

IV. DISCUSSION

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, even if IRT could satisfy 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 as exclusions that apply here. Cincinnati requests that this Court grant its Cross-Motion for Summary Judgment and declare that there is no coverage under the Policy for IRT's claims.

Citing to its experts' declarations, IRT responds that it has secured evidence showing that the SARS-CoV-2 virus was present at its theatre in March 2020, that it altered IRT's property and that it prompted IRT to shut down its theatre. Citing to Dr. Dixon's statistical modeling, IRT argues that, as of Sunday, March 15, 2020, in an average audience size of 400 IRT theatre attendees, there would have been an average

of 2.2 individuals infected with and transmitting SARS-CoV-2. Next, IRT asserts that because the virus is a harmful substance that contaminates the air, which IRT argues is insured property, the air inside IRT's theatre was physically altered or damaged, which the Cincinnati Policy requires to trigger coverage. IRT also asserts that the virus adhered to and altered the surfaces of IRT's property, similarly contaminating the property, which IRT argues constitutes physical damage to the property. IRT also argues that its theatre need not have been uninhabitable or completely unusable for it to trigger coverage under the Cincinnati Policy. IRT believes that it has put forth evidence of the virus' presence and that the virus is capable of causing physical alteration or damage to property sufficient to raise a question of material fact in order to defeat Cincinnati's motion for summary judgment.

In its reply to IRT's evidence and arguments, Cincinnati asserts that IRT's evidence that the virus was present in the theatre in March 2020 is speculative and, in any event, does not establish that the virus physically alters or damages property. Cincinnati also disputes whether "air" inside a building is insurable property under Indiana law.

IRT's surreply contends that Cincinnati's arguments go to the weight and sufficiency of IRT's experts' declarations and that such arguments cannot defeat summary judgment. IRT also argues that its experts create a genuine issue of material fact as to whether the virus physically alters the air and surfaces in the theatre, which must be tried to a jury.

A. Indiana Law Governing Interpretation of Insurance Policies and the Cincinnati Policy

As stated in the Court’s prior summary judgment ruling in this case, 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).

To prevail on its claim for business interruption coverage, IRT must prove the elements of coverage set forth in the Policy: (1) an actual loss of "Business Income" (2) sustained due to the necessary "suspension" of your "operations" during the "period of restoration" (3) where the "suspension" must be caused by direct "loss" to property at "premises" (4) and the "loss" must be caused or result from a "Covered Cause of Loss."[2]

[2] These elements of coverage appear in the Policy at IRT_00106. Words in quotations are defined terms in the Policy. As pertinent here, the Policy defines "loss" as "accidental physical loss or accidental physical damage." [Policy at IRT_000114]. For the meaning of "Covered Cause of Loss," the Policy refers to the Building and Personal Property Coverage Form. [Policy at IRT_000107]. The

The Court notes that it is undisputed by the parties that the Business Income Form, in Cincinnati's Policy, provided insurance for lost business income, but first required direct physical loss or damage to property as a prerequisite. Consistent with the principles that were recently discussed, the Court previously held that in order to properly construe the Policy, it 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. This Court noted that if loss of use alone qualified as direct physical loss to property, then the term 'physical' would have no meaning, and the Court cannot interpret the Policy in a way that nullifies one of its terms. This Court found that the Policy required physical alteration to the premises to trigger the business income coverage that IRT seeks. [Am. Order at 25].

In order to give IRT the opportunity to meet its burden, the Court granted IRT's request for time to develop evidence to demonstrate the presence of the virus at the theatre in March 2020 and that the virus was capable of causing direct physical alteration or damage to the premises. [Am. Order at 27–28]. The Court will now determine whether IRT has met its burden.

B. Statistical Modeling can Create a Genuine Issue of Material Fact

Cincinnati argues in its August 6 brief that IRT's evidence that SARS-CoV-2 was inside the IRT theater is speculation and "guesswork" based on statistical probabilities rather than actual testing of the indoor air or surfaces and cannot create a genuine disputed issue of fact. (Reply, pp.1, 3-6.) The Court notes, however, that under Indiana

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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].

law, Cincinnati must affirmatively negate IRT's claims. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The Court further points out that the Indiana Supreme Court has stated that summary judgment may be precluded by as little as a non-movant's "mere designation of a self-serving affidavit." *Id.*

Cincinnati cites four cases to argue that IRT's *method* of proof is inappropriate under Indiana law. Those cases are inapposite. Three of the cases, *City of Gary v. Auto-Owners Ins. Co.*, 116 N.E.3d 1116 (Ind. Ct. App. 2018), *Beatty v. LaFountaine*, 896 N.E.2d 16 (Ind. Ct. App. 2008), and *Sullivan v. Allstate Ins. Co.*, 841 N.E.2d 1220 (Ind. Ct. App. 2006), did not involve expert-witness testimony. Two of those cases, *City of Gary,* 116 N.E.2d at 1124, and *Beatty*, 896 N.E.2d at 20, also just recited the truism that "mere speculation cannot create questions of fact." They neither held nor suggested there is anything "speculative" about an expert's use of statistics or reliance upon statistical modeling. *Sullivan* similarly noted that an inference of a disputed fact "is not reasonable when it rests upon on no more than speculation or conjecture," 841 N.E. 2d at 1225, but that case also had nothing to do with statistics and instead involved an inference that was contradicted by the undisputed evidence. *Id.*

Cincinnati's fourth case, *City of Evansville v. United States Fidelity and Guaranty Company*, 965 N.E.2d 92 (Ind. Ct. App. 2012), concerned speculation by an expert that sewer repairs "may" involve remediation in the future that might qualify for coverage. The Court of Appeals held that the expert's testimony was "pure speculation" and that "[o]pinions expressing a mere possibility with regard to a hypothetical situation are insufficient to establish a genuine issue of material fact." 965 N.E.2d at 102. However, IRT's expert is not offering unmeasured and uncertain predictions about the future—he

is simply using statistics and statistical modeling to measure the probability of present or past infection (or a trait or other attribute) in a random grouping of people. (Dixon Decl. ¶¶14-24.)

As IRT points out, Indiana courts regularly permit expert witnesses to use statistics and probabilities to resolve a host of legal issues. *See, e.g.*, *Cahoon v. Cummings*, 734 N.E.2d 535, 539-41 (Ind. 2000) (statistics used to calculate damages in wrongful death case); *Smith v. State*, 702 N.E.2d 668, 672-73 (Ind. 1998) (statistics used to estimate the frequency of a DNA profile within the overall population); *Green v. Robertson*, 56 N.E.3d 682, 695 (Ind. Ct. App. 2016) (statistics used to determine damages in medical malpractice case); *Think Tank Software Dev. Corp. v. Chester, Inc.*, 988 N.E.2d 1169, 1177-79 (Ind. Ct. App. 2013) (reversing exclusion of economics/business valuation/statistics expert as an abuse of discretion).

IRT's expert Dr. Dixon states that "SARS-CoV-2 was present inside the IRT's theater by March 1, 2020." (Dixon Decl., p.8.) He states that as of March 15, 2020, the date of IRT's last performance prior to shutting down, there would have been on average 2.2 infected individuals transmitting the virus in the audience and that by November 2020, had the IRT remained open, there would have been 20 such individuals in the audience. (Dixon Decl. ¶22.)

The Court further notes the uncontroverted fact that the modeling used by IRT's expert is accepted and reliable. This modeling is being used by Indiana's Governor and state health officials in making policy decisions about what facilities must shut down or limit capacity due to the presence of SARS-CoV-2.

The Court notes that Cincinnati's citation to deposition testimony by Suzanne Sweeney, the IRT managing director, does not diminish IRT's expert evidence regarding the presence of the virus. Ms. Sweeney testified that IRT did not test the indoor air and surfaces for the virus because the IRT's public safety consultant, Keramida, advised against doing so because the theater is such a large facility. (Sweeney Dep. Day 2, at 131:7-14.) The Court points out that direct testing is not the only kind of evidence; circumstantial evidence and expert opinion testimony are sufficient to preclude summary judgment. *See Hughley*, 15 N.E.3d at 1004-05.

The Court lastly notes that under Rule 702 of the Indiana Rules of Evidence, the admissibility of an expert's opinion depends on whether the opinion will assist the fact-finder and whether the underlying scientific principles are reliable. *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 460 (Ind. 2001); *see also Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 553-54 (Ind. Ct. App. 1999); *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 593-94 (1993). "Once the admissibility of the expert's opinion is established under Rule 702, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact." *Sears*, 742 N.E.2d at 461.

While Cincinnati argues that IRT's evidence that SARS-CoV-2 was inside the IRT theater is speculation and "guesswork" based on statistical probabilities, the Court disagrees. As IRT points out, this statistical modeling is being used by Indiana's Governor and state health officials in making policy decisions about what facilities must shut down or limit capacity due to the presence of SARS-CoV-2. The Court notes, as IRT points out, that Indiana courts regularly permit expert witnesses to use statistics and

probabilities to resolve a host of legal issues. The admissibility of these expert opinions are governed by Indiana Trial Rule 702. In accordance with this rule, the Court finds that the expert testimony rests upon reliable scientific principles, and thus is admissible expert testimony which may be disputed on cross-examination. *See* Ind. R. Evid. 702(b) (Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles). The Court notes that, while one would argue that these statistics are considered as a self-serving affidavit, the Court points out that this statistical modeling exceeds a “self-serving affidavit” because the expert’s conclusions are based on scientific and objective principles rather than just making a stray statement based on a subjective belief, like in the *City of Evansville v. United States Fidelity and Guaranty Company*, 965 N.E.2d 92. The Court finds that because under the *Hughley* standard, something as little as a non-movant's "mere designation of a self-serving affidavit" is sufficient to create a genuine issue of material fact, the Court must find that the statistical modeling is sufficient to create a genuine issue of material fact and thus preclude summary judgment. *See Hughley*, 15 N.E.3d at 1003. The Court points out that, while *Hughley* is instructive in this case, *Hughley* has been used numerous times to get a case past summary judgment even when the evidence is not sufficient for the party to succeed at trial. *See, e.g., Scheffer v. Centier Bank*, 101 N.E.3d 815, 821 (Ind. Ct. App. 2018) (affirming a directed verdict at trial when a party recanted his prior statement that was used to defeat a summary judgment motion by creating a genuine issue of material fact). This Court is not sure that this is what the Indiana Supreme Court intended when issuing *Hughley*; but given the substantial number of judges and attorneys relying on that decision in the seven years

since its issuance, this may be a good time for the Indiana Supreme Court to provide further guidance on this summary judgment standard. **Based on the *Hughley* standard and the expert statistical modeling, the Court finds that there is at least a genuine dispute of material fact about whether the SARS-CoV-2 virus was present at the theatre starting in March 2020.**

C. Whether the SARS-CoV-2 Virus is Capable of Causing Structural Alteration or Damage to the Covered Property

The Court also granted IRT time to develop evidence showing that, if the virus had been present in the theatre in March 2020, then it was also capable of causing physical alteration to property. [Am. Order at 28]. IRT contends that the SARS-CoV-2 virus is capable of causing structural alteration or damage because it physically alters the air and the surfaces of the theatre when it is aerosolized or "adsorbs" to surfaces. The parties dispute whether the air inside of IRT's theatre is property as that term is used in the Policy. The Court notes that it does not need to resolve this issue due to the fact that the Court finds that, even if air is property, IRT's proffered evidence does not create a genuine question of fact about whether the SARS-CoV-2 virus is capable of physically altering or damaging IRT's premises.

a. It is undisputed that the virus can be removed by cleaning or dies in time and so does not cause physical alteration as a matter of law

The undisputed facts here establish that the SARS-CoV-2 virus can be cleaned or dies on its own naturally. [Cincinnati Designation of Evidence, Aff. Dr. Wayne Thomann at ¶ 22]. IRT's experts admit this is true. [Wood Decl. at 7 & ¶ 15 (opining that

SARS-CoV-2 exposure "can only be disrupted through constant cleaning and disinfecting of indoor surfaces"; "Viable SARS-CoV-2 can be found on those surfaces for periods ranging from hours to days."); Grinshpun Decl. at ¶¶ 14–15 (citing to CDC guidance that the cleaning can reduce the risk of SARS-CoV-2 transmission; "The characteristic time of survival of coronavirus on surfaces at room temperature can be as long as 9 days")].

Courts across the country including in Indiana have relied on these indisputable facts to hold that the virus does not cause physical alteration to property as a matter of law. *See Circle Block Partners, LLC v. Fireman's Fund Insurance Co.*, 2021 WL 3187521 (S.D. Ind. July 27, 2021). The plaintiff in *Circle Block* was the owner of the Conrad Hotel, located just down the block from IRT. The owner sought business interruption and other coverages after Indiana and Indianapolis restricted non-essential travel, causing the hotel's occupancy rates to plummet and the hotel to suspend operations entirely in April 2020. *Id.* at *1. The hotel alleged that remaining open was "untenable" without guests, but the court dismissed the complaint with prejudice for failing to allege direct physical loss or damage to property: "Even when accepted as true, these allegations attribute the lost revenue to changes in human behavior, not a harmful physical change to the Conrad or the property located within it." *Id.* at *4. Additionally, the hotel, like IRT, argued that it had alleged sufficient facts for the court to infer the Coronavirus had been present in the hotel. *Id.* at *6. The court was not persuaded that would matter:

> But the Policy requires "direct physical loss or damage *to* property," not merely a physical substance *on* property. . . . Although the virus may have been present on surfaces at the Conrad Hotel as alleged, Circle Block has not plausibly alleged that the virus caused the type of harm to the building

> itself or items within it that is necessary to show "direct physical loss or damage to property."

Id. at *7 (internal citations omitted).

Circle Block also cites to this Court's first summary judgment ruling for support and is consistent with other Indiana cases like *MHG Hotels, LLC v. Emcasco Ins. Co.*, No. 1:20-cv-01620-RLY-TAB, Slip Op. at 9 (S.D. Ind. Mar. 8, 2021) and *Georgetown Dental, LLC v. Cincinnati Insurance Co.*, 2021 WL 1967180 (S.D. Ind. May 17, 2021), as well as rulings elsewhere. *See, e.g.*, *Troy Stacy Enters. Inc. v. Cincinnati Ins. Co.*, 2021 WL 4346688, at *5 (S.D. Ohio Sept. 24, 2021) ("As an initial point, the claim that the virus causes 'structural alterations' and 'property damage' strains the plausibility requirement to its breaking point. A court need not set aside common sense when reading complaints. And here, it defies common sense to hold that a microscopic virus structurally alters or tangibly damages physical property — especially in light of Plaintiffs' own acknowledgments that the virus can be eliminated with disinfectant and goes away naturally after a few days.") (internal citation omitted); *Goodwood Brewing, LLC v. United Fire Grp.*, 2021 WL 2955913, at *5–*7 (W.D. Ky. July 14, 2021) (granting insurer summary judgment where insured asserted "one of its employees was diagnosed with COVID-19" because that failed as a matter of law to establish that the insured property underwent direct physical loss or damage, as required by the policy); *Christie Jo Berkseth-Rojas DDS v. Aspen Am. Ins. Co.*, 2021 WL 2936033, at *5 (N.D. Tex. July 13, 2021) (dismissing "second amended complaint [that] does not allege any physical damage other than the mere presence of COVID-19."); *Green Beginnings, LLC v. W. Bend Ins. Co.*, 2021 WL 2210116, at *5 (E.D. Wis. May 28, 2021) ("As for Green Beginnings' contention that the virus is on its property and has damaged it, the

presence of the virus on property does not cause a 'loss' of the use of the property. . . . COVID-19 particles only very temporarily impact the use of the objects they touch without altering them in appearance, shape, color, or other material dimension. . . . COVID-19 particles do not damage or cause a loss to Green Beginnings' premises."); and *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 532 F. Supp. 3d 147, 152 (D. Mass. 2021) ("The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute 'direct physical loss of or damage to' property. A virus is incapable of damaging physical structures because 'the virus harms human beings, not property.'") (citation omitted).

The Court agrees with *Circle Block* and these other authorities that reject equating the presence of a virus in the air or on surfaces with the harm or physical alteration to a building. While IRT is correct that the SARS-CoV-2 virus can be deadly, other common diseases are too, yet no one could actually contend that property suffers physical alteration or damage annually when flu season arrives. Courts in other jurisdictions agree that to treat SARS-CoV-2 and its presence at a premises differently from other diseases would be arbitrary and unreasonable. *See Dino Drop, Inc. v. Cincinnati Ins. Co.*, 2021 WL 2529817, at *7 (E.D. Mich. June 21, 2021) ("The Court agrees with Cincinnati's assessment that the presence of COVID-19 at the premises is analogous to the presence of virus particles causing influenza or the common cold. . . . Though each virus can be harmful and potentially deadly, no reasonable person would assert that their presence renders property uninhabitable or substantially unusable."). **For the aforementioned reasons and the fact that the virus can be removed by**

cleaning or dies in time, the Court finds that the virus does not cause physical alteration as a matter of law.

b. The mere presence of the virus and structural alteration to property

IRT and its experts conflate the potential presence of SARS-CoV-2 inside the theatre with physical alteration to property. IRT asserts that the presence of the virus causes physical alteration in two ways: (1) by being suspended in the air and making the air dangerous to breathe; or (2) adhering to surfaces making them dangerous to touch.

i. IRT does not provide any evidence that the air is structurally altered

IRT's experts claim that the virus was in the theatre and so would have been suspended in the air. They then conclude the air was altered by the mere presence of the virus. This does not establish structural alteration, which the Court held is required. [Am. Order at 25, 27–28]. The "structure" of the air has not been changed in a way recognized by the Policy. Cincinnati argues that what IRT and the experts mean by "air" and its structure is insufficiently specific, since air is partly comprised of different gases, which are in turn comprised of molecules. (Cincinnati Reply at 23). Cincinnati argues that IRT's experts fail to offer any opinions that the SARS-CoV-2 virus alters the molecules of the air, from which the Court could reasonably infer that the structure of the air is altered in any way. IRT tries to brush aside this argument, arguing this is an issue for a jury. But, as a matter of law, IRT's claim cannot proceed unless it has

created a genuine issue of material fact about whether the SARS-CoV-2 virus is capable of causing physical or structural alteration to the air. The Court finds it has not.

IRT's experts only opine the SARS-CoV-2 virus is present in the air, along with the existing air molecules, and that, if inhaled, it is dangerous to humans. [Dixon Decl. at ¶ 25 ("[W]ith a few or even just one infected individual inside the IRT theatre for one or two hours at a time, the indoor air in the theatre would become contaminated with aerosolized SARS-CoV-2, exposing uninfected persons and increasing their risk of infection when they inhale sufficient concentrations of this airborne virus."); Wood Decl. at ¶ 9 ("People breathing this contaminated air can inhale the virus and develop COVID-19."); Grinshpun Decl. at ¶ 11 ("The presence of SARS-CoV-2 inside the IRT presented a clear danger to IRT patrons, actors and others working in the IRT facility.")]. The virus' potential to harm humans is undisputed, but it is also irrelevant because the Policy insures property, not people. Under IRT's theory, any time an undesirable substance or thing were to enter a room, no matter how fleetingly, property insurance could be implicated. That is an unreasonable and boundless extension of property insurance.

Indeed, courts in other jurisdictions have held that a chemical reaction alone without any physical manifestation is not direct loss to property. *See Protégé Restaurant Partners LLC v. Sentinel Ins. Co.*, 2021 WL 428653, at *4 (N.D. Cal. Feb. 8, 2021) ("Plaintiff's claim that there was a high risk that COVID-19 particles were present on its property does not constitute physical damage."). This is especially so where Sweeney confirmed that, after the theatre shut down in March 2020, IRT's custodian continued to go to the theatre "daily just to walk around and make sure there were no leaks or anything that would do significant damage to the building . . . ." [IRT Am. Designation of

Evidence, Ex. E, Sweeney Dep. Sept. 1, 2021 at 118:18–21]. Eventually, more employees came back and plays were resumed, despite the continuing pandemic. [*Id.* 118:23–119:13]. IRT cannot ask the Court to reasonably infer that the air in its theatre was dangerous to humans while it allowed employees and others to continue working there. **The evidence creates no genuine issue of material fact that the presence of SARS-CoV-2 physically alters the structure of the air around it.**

ii. IRT Fails to Create a Question of Material Fact as to Whether the Virus is Capable of Causing Physical or Structural Alteration to Surfaces

IRT and its experts acknowledge that SARS-CoV-2 can be cleaned from surfaces. [Wood Decl. at ¶ 17; Grinshpun Decl. at ¶ 14 (citing to CDC guidance that the cleaning can reduce the risk of SARS-CoV-2 transmission). While Dr. Grinshpun purports to dispute the opinion of Cincinnati's expert, Dr. Wayne Thomann, there is no genuine dispute between the experts. Dr. Grinshpun agrees that the SARS-CoV-2 virus can be cleaned, but maintains that cleaning cannot provide a "true 100% inactivation efficiency" and instead only reduces the risk of surface transmission, but does not eliminate it. [Grinshpun Decl. at ¶ 14]. Dr. Thomann also testified that, "After 7 days, or after cleaning, the presence of SARS-CoV-2 is not a concern." [Thomann Aff. ¶ 17]. Again, IRT's experts agree that the virus is only viable for a short period of time. [Dixon Decl. at ¶¶ 13, 27; Wood Decl. at ¶ 15; Grinshpun Decl. at ¶ 15]. The fact that the experts agree that the SARS-CoV-2 virus can be cleaned or dies is all that matters, and disagreements about the outer limits of cleaning or viability do not save IRT's claim.

Furthermore, the contentions that the virus cannot be eradicated by cleaning because some surfaces are "unreachable" or missed is irrelevant, especially when the "unreachable" or missed virus will die on its own. By definition, an unreachable surface cannot be touched by a person, so there is no risk of surface transmission. The contention that the virus will repopulate is likewise irrelevant. The fact that the virus can be removed by cleaning or over time dies on its own establishes that it does not cause physical, structural alteration as this Court held is required for coverage. **Accordingly, the Court finds there is no disputed material facts as to whether the virus is capable of causing physical or structural alteration to surfaces.**

c. IRT's argument regarding Whether the Virus Contaminated Its Theatre or that It was Uninhabitable is Moot

IRT argues that SARS-CoV-2 contamination alone is sufficient to establish physical alteration. The Court, again, not only points out that Sweeney confirmed that, after the theatre shut down in March 2020, IRT's custodian continued to go to the theatre daily just to walk around and check for damage. [IRT Am. Designation of Evidence, Ex. E, Sweeney Dep. Sept. 1, 2021 at 118:18–21]. Also, eventually more employees came back and plays were resumed, despite the continuing pandemic. [*Id.* 118:23–119:13]. IRT cannot ask the Court to reasonably infer that the virus contaminated its theatre or that it was uninhabitable. Regardless of these facts, the Court finds this argument to be moot because it is contrary to the Court's ruling that physical alteration to the premises is required. *See* Am. Order at 25 (The Court noted that if loss of use alone qualified as direct physical loss to property, then the term 'physical' would have no meaning, and the Court cannot interpret the Policy in a way

that nullifies one of its terms. This Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage that IRT seeks.). **Accordingly, the Court finds IRT's argument on this point to be moot.**

D. Policy Exclusions

In its Motion for Summary Judgment, Cincinnati argued that three exclusions applied to bar coverage for IRT's claims: the loss of use exclusion, the ordinance exclusion, and the acts or decisions exclusion. The parties briefed the law and application of the exclusions, but the Court finds that it does not need to address the exclusions because the Court has found that the undisputed facts demonstrate there was no physical damage or loss to the IRT to satisfy the Policy's insuring agreement. [Am. Order at 26]. The Court finds that, while the Court found there to be a genuine dispute of material fact about whether the SARS-CoV-2 virus was present at the theatre starting in March 2020, the ruling must remain because the undisputed evidence has failed to demonstrate that the SARS-CoV-2 virus has caused or is capable of causing structural/physical alteration or damage to the covered premises. For the foregoing reasons, the Court finds that there is no genuine dispute of material fact as to the SARS-CoV-2 virus not having caused or being capable of causing structural alteration or damage to the covered premises, and that Cincinnati is entitled to summary judgment on its cross-motion because there has been no direct physical loss to property as a matter of law. **Accordingly, the Court must Grant Cincinnati's Cross-Motion for Summary Judgment.**

V. ORDER

The Court hereby **GRANTS** all Motions for Leave/to Supplement the Record and **GRANTS** Defendant's, The Cincinnati Casualty Company, Cross-Motion for Summary Judgment.

SO, ORDERED, ADJUDGED, AND DECREED this 13th day of December 2021.

Heather A. Welch

Hon. Heather A. Welch
Judge, Marion Superior Court, Civil 1
Indiana Commercial Court

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