INDIANA COMMERCIAL COURT

STATE OF INDIANA
IN THE MARION COUNTY SUPERIOR COURT

INDIANA REPERTORY THEATRE, INC., Plaintiff, v. THE CINCINNATI CASUALTY COMPANY and McGOWAN INSURANCE GROUP, LLC, Defendants.	CAUSE NO. 49D01-2004-PL-013137

Indiana Repertory Theatre, Inc.'s Brief in Support of its Motion for Partial Summary Judgment against The Cincinnati Casualty Company

I. INTRODUCTION

This case is about insurance coverage for losses resulting from the COVID-19 pandemic. In the midst of showing Agatha Christie's *Murder on the Orient Express* and with months remaining of its 2019–2020 season, Plaintiff Indiana Repertory Theatre, Inc. ("IRT") had to close its doors and suspend operations to protect its artists, staff, patrons, and the community from the rapidly spreading SARS-CoV-2 virus. IRT eventually cancelled the remainder of its season and laid-off most of its employees. As a result, IRT expects to lose more than a million dollars in revenue.

IRT asked its insurer, The Cincinnati Casualty Company ("Cincinnati"), to cover these losses under its "all risks" commercial property insurance policy. This

policy, which includes Business Income and Extra Expense coverage, requires Cincinnati to pay for the actual loss of "Business Income" sustained by IRT due to the necessary "suspension" of "operations" caused by direct "loss" to property and caused by or resulting from any "Covered Cause of Loss." Cincinnati defined "loss" as "accidental physical loss or accidental physical damage."

Cincinnati has refused to cover this loss. It claims there has been no "direct physical loss or direct physical damage," which it argues requires something like "a deformation, permanent change in physical appearance, or other manifestation of a physical effect" to trigger coverage. Yet such phrases or requirements appear nowhere in Cincinnati's policy.

The COVID-19 pandemic has caused a direct physical loss to IRT's property. SARS-CoV-2 is highly contagious. In a matter of months, it has infected over two million Americans and tens of thousands of Hoosiers. It spreads through respiratory droplets and contaminated surfaces, where it can linger for hours. It incubates in the body for 2–12 days, during which time it can multiply and spread even before symptoms develop. Carriers may be asymptomatic, making it even harder to detect and contain. When the virus attacks, its effects can be deadly. There is no known treatment and no available vaccine. This disastrous combination has resulted in the most destructive public health crisis in more than a century.

This public health crisis and the rampant spread of the virus have caused a direct physical loss to IRT's property. It rendered IRT's property unsafe and unusable. The mere presence of a few patrons—let alone the hundreds that normally

gather for shows—could result in an explosion of infections. As such, it is impossible to safely operate and inhabit IRT's premises at this time. This is a "direct physical loss" to IRT's property that triggers business income coverage under Cincinnati's policy.

There are several provisions in Cincinnati's policies that provide coverage for IRT's losses. Some will require fact discovery about the drafting history of Cincinnati's policies and scientific and expert analysis about the spread of the SARS-CoV-2 virus. But on this narrow and important issue—whether the IRT's inability to operate and occupy its theatre as a result of the pandemic is a covered "loss"—there are no disputed issues of fact and summary judgment is appropriate. IRT asks the Court to grant partial summary judgment in IRT's favor and declare that IRT has suffered a "direct physical loss" that triggers coverage under Cincinnati's policy, and that the cause of that loss is not excluded under the policy.

II.
UNDISPUTED MATERIAL FACTS

The COVID-19 pandemic is the worst public health crisis in more than a century. Within six months, the novel SARS-CoV-2 virus spread around the world and infected millions of people. It is so dangerous that, for the first time in modern history, elected leaders and government agencies have declared emergencies and restricted the use of certain properties and businesses nationwide to slow the spread of the virus. The losses suffered by some businesses, like IRT, have been catastrophic. It is a natural disaster.

A. The virus spreads.

In January 2020, the first known case of a U.S. resident infected by the novel SARS-CoV-2 virus was reported in the state of Washington. [Declaration of Dr. Richard Feldman ("Feldman Decl.") ¶ 13, Attachment 11, Aarons et al., *Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility*, NEW ENGLAND J. MED. 382:22, at 2082 (May 28, 2020).] The virus quickly spread across the United States. [*Id.*] The first case in Indiana was confirmed on March 6, 2020, and the first death occurred on March 16, 2020. [*Id.*; Affidavit of Ryan Leagre ¶ 4, Exhibit 1, Indiana Executive Order ("E.O.") 20-31, at 1.] In brief, the disease 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.]

Within twelve weeks, it infected tens of thousands of Hoosiers [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 the date of this filing, it has killed over 2,000 Hoosiers and 100,000 Americans, and it is likely to kill many more. [Ex. 1, Ind. E.O. 20-31, at 1; Feldman Decl. ¶ 13.] The SARS-CoV-2 virus is extremely dangerous for several reasons:

- It is highly contagious,[1] spreading through respiratory droplets[2] (including during human speech)[3] and contaminated surface where it can survive for days;[4]

- It can be spread by asymptomatic[5] and presymptomatic[6] carriers, who appear to represent 86% of all actual infections;[7]

- It has an incubation period of at least 2–12 days,[8] allowing people to spread the virus long before they know they have been infected;[9]

- 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,

---

[1] [Feldman Decl. ¶ 15, Attach. 11, Aarons, et al., *Presymptomatic Infections*, at 2087 ("Twenty three days after identifying the first resident with SARS-CoV-2 infection, [the facility] had a 64% prevalence of Covid-19 among residents.").]

[2] [*Id.*, Attachment 7, Gandhi, Lynch & Del Rio, *Mild or Moderate Covid-19*, NEW ENGLAND J. MED. *Clinical Practice*, at 1-2, 6 & tbl. 2 (Apr. 24, 2020); Attachment 9, Klompas, Morris, Sinclair, Pearson & Shenoy, *Perspective: Universal Masking in Hospitals in the Covid-19 Era*, NEW ENGLAND J. OF MED. 382:21, at e63(1) (May 21, 2020) (explaining that infected respiratory droplets can enter the body through may avenues, and not just the nose and mouth); Attachment 2, Leung, et al., *Respiratory Virus Shedding in Exhaled Breath and Efficacy of Face Masks*, 26 NATURE 676 (May 2020).]

[3] [*Id.* ¶ 16, Attachment 6, Anfinrud et al., *Visualizing Speech-Generated Oral Fluid Droplets with Laser Light Scattering*, NEW ENGLAND J. MED., 382:21, at 2061-64 (May 21, 2020) and Matthew Meselson, *Droplets & Aerosols in the Transmission of SARS-CoV-2*, NEW ENGLAND J. MED 832:21, 2063 (May 21, 2020).]

[4] [*Id.* ¶ 16, Attachment 5, Correspondence, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, NEW ENGLAND J. OF MED. 382:16 (Apr. 16, 2020) (finding that a "viable virus was detected up to 72 hours after application" to plastic and stainless steel).]

[5] [*Id.* ¶ 17, Attach. 9, *Universal Masking*, at e63(2) (May 21, 2020) ("Transmission from people with asymptomatic infection has been well documented . . . ."); Attachment 3, Li, et al., *Substantial Undocumented Infection Facilitates the Rapid Dissemination of Novel Coronavirus*, SCIENCE 368:489-93, at 1, 4 (May 1, 2020) ("This high proportion of undocumented infections, many of which were likely not severely symptomatic, appears to have facilitated the rapid spread of the virus throughout China.").]

[6] [*Id.*, Attach. 11, Aarons et al., *Presymptomatic Infections*, at 2081-83; Attach. 7, Gandhi, Lynch & Del Rio, *Mild or Moderate Covid-19*, at 6 & tbl. 2.]

[7] [Attach. 3, Li, et al., *Undocumented Infection*, at 1.]

[8] [*Id.* ¶ 18, Attach. 11, Aarons et al., *Presymptomatic Infections*, at 1085-86, tbl. 1, & fig. 3; Attach. 7, Gandhi, Lynch & Del Rio, *Mild or Moderate Covid-19*, at 2 (median incubation period is 4-5 days, with 97.5% of symptomatic patients showing symptoms after 11.5 days).]

[9] [*Id*, Attachment 4, Rothe, et al., *Transmission of 2019-nCoV Infection from an Asymptomatic Contact in Germany*, NEW ENGLAND J. MED 382:10, at 1-2 (Mar. 5, 2020).]

dyspnea, hypoxemia and silent hypoxia, lung edema, and organ failure[10]; and

- "[H]ealthy persons of any age can be come critically ill with Covid-19,"[11] and the mortality rate appears to be fairly high (1-5% of the infected population and over 10% of patients needing hospitalization);[12] and

- There is no known treatment or vaccine.[13]

[Feldman Decl. ¶¶ 14–27.] By early March, federal, state, and local governments were scrambling to contain the virus, slow its spread, and mitigate the emerging public health crisis.

B. Elected officials and government agencies respond by implementing measures to slow the virus's spread.

In March 2020, world, federal, state, and local leaders declared emergencies and began issuing restrictions on travel and certain industries to slow the spread of the virus. [*See, e.g.*, Leagre Aff. ¶ 6, Exhibit 3, Ind. E.O. 20-26, at 1-3.] For many officials, including those in Indiana, it became apparent that the single most effective means to "treat, prevent, or reduce the spread of this dangerous virus" was to require people to remain in their homes "in order to reduce their likelihood of

---

[10] [*Id.* ¶ 21, Attach. 11, Aarons et al., *Preysymptomatic Infections*, at 2085-86, tbl. 1 & fig. 2; Attachment 8, Berlin, Gulick & Martinez, *Severe Covid-19*, NEW ENGLAND J. MED., *Clinical Practice*, at 1 (May 15, 2020).]

[11] [*Id.*, Attach. 8, Berlin, Gulick & Martinez, *Severe Covid-19*, at 2.]

[12] [*Id.*, Berlin, Gulick & Martinez, *Severe Covid-19*, at 2 (observing that 5% of Covid-19 patients become critically ill and about 49% of those patients die, and noting variance depends on preexisting risk factors); Attachment 12, Beigel, et al., *Remdevisir for the Treatment of Covid-19—Preliminary Report*, NEW ENGLAND J. MED. at 1 (May 22, 2020) (of hospitalized Covid-19 patients, the mortality rate was 11.9% without treatment); Attachment 10, Cao, et al., *A Trial of Lopinavir-Ritonavir in Adults Hospitalized with Severe Covid-19*, NEW ENGLAND J. MED., 382:19, at 1794 (April 14, 2020) (noting overall mortality in the study was 22.1%, compared with 11% to 14.5% mortality reported elsewhere).]

[13] [Leagre Aff., Ex. 2, Ind. E.O. 20-02, at 1; Feldman Decl., Attach. 7, Gandhi, Lynch & Del Rio, *Mild or Moderate Covid-19*, at 4 ("There are no approved treatments for Covid-19.").]

contracting this virus and/or transmitting it to others." [Leagre Aff. ¶ 7, Exhibit 4, Ind. E.O. 20-06, at 1.) This "social distancing" was vital, and sometimes "medically necessary," in order "to contain, slow, and reduce the spread of COVID-19." [*Id.*; *see also, e.g.*, Leagre Aff. ¶ 8, Exhibit 5, Ind. E.O. 20-04, at 1 ("[L]imitations on large gatherings and using social distancing can prevent initial exposure and secondary transmission."); *Id.* ¶ 9, Exhibit 6, Marion Cnty. E.O. No. 1, 2020, at 1, 3.]

This conclusion led to a series of executive orders and other actions. 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. [Ex. 2, Ind. E.O. 20-02, at 1-2).] On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic. [Leagre Aff. ¶ 10, Exhibit 7, Ind. E.O. 20-08, at 1.] On March 12, 2020, Mayor Joe Hogsett and the Marion County Health Department ordered a 30-day suspension of all non-essential gatherings of more than 250 individuals. [Leagre Aff. ¶ 11, Exhibit 8. March 12, 2020 Press Release, at 1.] On March 13, 2020, the President of the United States declared a national emergency. [*Id.* ¶ 12, Exhibit 9, Presidential Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).] 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. [Ex. 6. Marion Cnty. E.O. No. 1, 2020, at 4-5; Leagre Aff. ¶ 13, Exhibit 10, Marion Cnty. Health Dep't Order No. 1, at 1.]

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. [Ex. 7, Ind. E.O. 20-08, at 2-3.] Governor Holcomb extended the stay-at-home order until May 23, 2020. [Leagre Aff. ¶ 14, Exhibit 11, Ind. E.O. 20-18, at 3 (extension to April 20, 2020); ¶ 15, Exhibit 12, Ind. E.O. 20-22, at 2 (extension to May 1, 2020); Ex. 3, Ind. E.O. 20-26, at 1-3 (extension to May 23, 2020, as to Marion County).]

C. IRT suspends its operations and cancels all remaining performances.

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.] But on March 16, when Mayor Hogsett prohibited gatherings of more than 50 individuals and ordered entertainment venue's like IRT closed, IRT announced its decision to close its doors for the rest of the 2019–2020 season. [*Id.* ¶ 5.] The IRT made this difficult 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.]

D. IRT seeks coverage from Cincinnati for its losses.

IRT submitted a claim to Cincinnati for lost business income and extra expense coverage on March 20, 2020. Cincinnati insured IRT under commercial property policy EPP 050 25 09 (the "Policy"), which included coverage for lost busi-

ness income. Relevant excerpts of the Policy are attached to the Leagre Affidavit as Exhibit 13. The Policy includes several forms that apply to IRT's claim.

The first form is the Business Income (And Extra Expense) Coverage Form. This form includes the 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.

[Ex. 13, Policy at IRT_000106.] This form defines "loss" as "accidental physical loss or accidental physical damage." [*Id.* at IRT_000114 (emphasis added).] For the meaning of "Covered Causes of Loss," the policy refers to a second form:

> **3. Covered Causes of Loss**
>
> See **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss.**

[*Id.* at IRT_000107.] In the Building and Personal Property Coverage Form, Cincinnati defines "Covered Causes of Loss" broadly:

> **3. Covered Causes of Loss**
>
> **a. Covered Causes of Loss**
>
> Covered Causes of Loss means direct "loss" unless the "loss" is excluded or limited in this Coverage Part.

[*Id.* at IRT_000027.]

Cincinnati's policy is known as an "all risk" policy. It covers all risks not specifically excluded. *E.g., Copper Mt., Inc. v. Indus. Sys.*, 208 P.3d 692, 693 n.7 (Colo.

2009). The Policy identifies some causes of loss that are excluded. These range from losses caused by earth movement or "fungi, wet rot, dry rot, and bacteria," to losses caused by electrical current, weather conditions, and "defects, errors, and omissions," among others. [Ex. 13, at IRT_000027–33.] This list is what distinguishes an "all risk" policy like Cincinnati's Policy from more limited commercial property policies. Those policies only provide coverage for a short list of "specified" causes of losses. *See Vision One, LLC v. Phila. Indem. Ins. Co.*, 276 P.3d 300, 306 (Wash. 2013) ("'Named perils' or 'specific perils' policies provide coverage only for the specific risks enumerated in the policy and excluded all other risks."). Cincinnati's "all risk" policy, however, covers every imaginable cause of "loss" unless specifically excluded. *Id.* ("All-risk policies, on the other hand, 'provide coverage for all risks unless the specific risk is excluded.'" (citation omitted)).

Cincinnati could have tried to exclude coverage for loss or damage caused by viruses. Beginning in the mid-2000s, many insurers began incorporating exclusions in their policies to limit their exposure to losses associated with viruses. Cincinnati elected not to.

There are at least three fairly common virus exclusions used by insurers across the country. The most common is the Insurance Services Organization's 2006 "Exclusion of Loss Due to Virus or Bacteria." [Leagre Aff. ¶ 17, Exhibit 14.] It reads, in relevant part: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." [*Id.*]

Another common form exclusion was published by the American Association of Insurance Services in 2006. This exclusion is more specific about the losses excluded:

> "We" do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.
>
> This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:
>
> a. any contamination by any virus, bacterium, or other microorganism; or
>
> b. any denial of access to property because of any virus, bacterium, or other microorganism.

[*Id.* at ¶ 18, Exhibit 15.]

Finally, some insurers have incorporated exclusions that exclude coverage for loss caused by or resulting from the actual or suspected presence or threat of any virus capable of causing a pandemic:

> [We do not pay for loss arising from] [t]he actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS or Avian Flu.

See Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co., 218 F. Supp. 3d 1034, 1037–38 (D. Neb. 2016).

Thus, while some insurers included exclusions containing the word "virus," Cincinnati did not include any such exclusion.

E. Cincinnati refuses to cover IRT's losses.

Cincinnati responded within three days of receiving IRT's claim. [Leagre Aff. ¶ 19, Exhibit 16.] It informed IRT that it was "investigating" the claim under a full reservation of rights. [*Id.*] But Cincinnati also claimed 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.

[*Id.*]

Cincinnati did not identify a single exclusion that applied to IRT's claim. [*Id.*] The meaning Cincinnati assigned to the phrase "direct physical loss or damage"—"a physical effect on Covered Property, such as a deformation, permanent change in physical appearance or other manifestation of a physical effect"—appears nowhere in Cincinnati's policy.

IRT filed suit against Cincinnati on April 3, 2020, seeking a declaration that Cincinnati's policy provides coverage for IRT's losses.

III.
LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial

Rule 56(C). Insurance policy interpretation is a question of law for which summary judgment is particularly appropriate. *Piers v. American United Life Ins. Co.*, 714 N.E.2d 1289, 1290 (Ind. Ct. App. 1999).

B. Rules For Interpreting Insurance Policies

The "disparity in bargaining power, which is characteristic of 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). Several such rules apply here:

First, "[a]n insurance policy should be so construed as to effectuate indemnification . . . rather than defeat it." *Masonic Acc. Co. v. Jackson*, 164 N.E. 628, 631 (Ind. 1929); *Cincinnati Ins. Co. v. BACT Holdings, Inc.*, 723 N.E.2d 436, 440 (Ind. Ct. App. 2000) ("[W]e 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."). This is to honor the basic purpose for which we buy insurance, which is to indemnify against unexpected loss. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985).

This is especially true for "all risks" commercial property policies, which cover all losses not explicitly excluded. *Associated Aviation Underwriters v. George Koch Sons, Inc.*, 712 N.E.2d 1071, 1073 (Ind. Ct. App. 1999). "Such policies generally permit recovery for all fortuitous losses in the absence of fraud or misconduct of the insured, unless the policy contains a specific provision expressly excluding the

loss from coverage." *Id.* (emphasis added); *see also Schultz v. Erie Ins. Group*, 754 N.E.2d 971, 974 (Ind. Ct. App. 2001).

Second, policy terms not defined in the policy are interpreted from the perspective of an ordinary policyholder of average intelligence. *Travelers Indem. Co. v Summit Corp. of Am.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999); *Asbury v. Ind. Union Mut. Ins. Co.*, 441 N.E.2d 232, 237 (Ind. Ct. App. 1981). A rigidly technical or legalistic construction of a policy term may not be used to defeat coverage. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996).

Third, any ambiguity in an insurance policy must be construed in favor of coverage. *Lilly*, 482 N.E.2d at 470-71. An insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language. *Jackson*, 164 N.E. at 631. If there is more than one reasonable construction of a policy term, then the term is ambiguous and must be construed in favor of the policyholder. *Lilly*, 482 N.E.2d at 470; *Kiger*, 662 N.E.2d at 948. This is particularly true where a policy excludes coverage." *Id.* at 947 (citation omitted); *Lilly*, 482 N.E.2d at 470; *Rose Acre*, 107 F.3d at 458. An exclusion must "clearly and unmistakably" bring the excluded condition within its scope to be effective. *Asbury*, 441 N.E.2d at 237; *Jackson*, 164 N.E. at 631 (coverage "will not be destroyed by language of exception, unless such exception shall be clear and free from reasonable doubt"). Fourth, the fact that different courts interpret the same policy terms differently is itself important evidence of ambiguity. *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 295, 298 (Ind. Ct. App. 1997); *see also Summit*, 715 N.E.2d at 938; *Hun-*

tington Mut. Ins. Co. v. Walker, 392 N.E.2d 1182, 1185 (Ind. Ct. App. 1979); *Indiana Ins. Co. v. O.K. Transport, Inc.*, 587 N.E.2d 129, 132 (Ind. Ct. App. 1992).

Fifth, the effect of the above is that a policyholder need not prove that it has the only reasonable interpretation of the policy, or even that it has the "best" interpretation of the disputed term. *Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2014). Instead, it must only provide a reasonable interpretation—even if the insurer's is also reasonable—because "[a] reasonable construction that supports the policyholder's position must be enforced as a matter of law." *Id.*; *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981; *Lilly*, 482 N.E.2d at 471. Conversely, to defeat coverage, an insurer must prove that its construction of the insurance agreement is the "only reasonable interpretation." *Carter v. State Farm Fire & Cas. Co.*, 407 F. Supp. 3d 780, 783 (S.D. Ind. 2019). "This strict construal against the insurer is driven by the fact that the insurer drafts the policy and foists its terms upon the customer." *Kiger*, 662 N.E.2d at 947 (quoting *Liggett*, 426 N.E.2d at 142).

Sixth, the terms in an insurance contract may not be construed in a manner "repugnant to the purposes of the policy as a whole." *Property Owners Ins. Co. v. Hack*, 559 N.E.2d 396, 402 (Ind. Ct. App. 1990) (citing *J.B. Kramer Grocery Co., Inc. v. Glens Falls Inc. Co.*, 497 F.2d 709, 712 (8th Cir. 1974)). The "reasonable expectations and purpose of the ordinary businessman when making an ordinary business contract" must be honored. *Hack*, 559 N.E.2d at 402. If provisions in an insurance policy would otherwise provide only illusory coverage they must be enforced in a

manner that protects the policyholders' reasonable expectations of coverage. *City of Lawrence v. Western World Ins. Co.*, 626 N.E.2d 477, 480 (Ind. Ct. App. 1993).

Seventh, in order to honor the policy's basic purpose to indemnify against loss, when a term is found in a coverage clause, it is interpreted broadly, to expand coverage to its reasonable limits. For the same reasons, when the word is found in an exclusion, it is construed strictly and narrowly to preserve coverage whenever possible. *Allstate Ins. Co. v. Neuman*, 435 N.E.2d 591, 593 (Ind. Ct. App. 1982) (a term is "given its broad meaning in the so-called 'extension' cases, and is construed narrowly in 'exclusion' cases"); *see also Ind. Farmers Mut. Ins. Co. v. Imel*, 817 N.E.2d 299, 305 (Ind. Ct. App. 2004); *Kiger*, 662 N.E.2d at 949. This is not just the rule in Indiana. It is a foundational principle of insurance-policy interpretation across the country. *Hampton Med. Grp., P.A. v. Princeton Ins. Co.*, 840 A.2d 915, 920 (N.J. App. Div. 2004).[14] In short, "principles of insurance contract interpretation 'mandate [a] broad reading of coverage provisions, [a] narrow reading of exclusionary provisions, [the] resolution of ambiguities in the insured's favor, and [a] construction consistent with the insured's reasonable expectations.'" *Id.* (quoting *Search EDP, Inc. v. Am. Home Assurance Co.*, 632 A.2d 286, 289 (N.J. App. Div. 1993).

---

[14] *E.g.*, *Tower Ins. Co. v. Capurro Enters.*, No. C 11-03806 SI, 2012 U.S. Dist. LEXIS 46443, *27 (N.D. Cal. Apr. 2, 2012); *L.A. Lakers, Ins. v. Fed. Ins. Co.*, 869 F.3d 795, 801-02 (9th Cir. 2017); *Petrosky v. Allstate Fire & Cas. Ins. Co.*, 141 F. Supp. 3d 376, 384 (E.D. Pa. 2015); *D.D. v. Ins. Co. of N. Am.*, 905 P.2d 1365, 1368 (Ala. 1995); *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1090 (Fla. 2005); *W. Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 372 N.E.2d 438, 441 (Minn. Ct. App. 1985); *Salem Grp. v. Oliver*, 590 A.2d 1194, 1197 (N.J. Super. Ct. App. Div. 1991); *Acuity, A Mut. Ins. Co. v. Chartis Specialty Ins. Co.*, 861 N.W.2d 533, 541-42 (Wis. 2015).

The common thread in all of these rules is to effectuate coverage wherever reasonably possible. The underlying purpose of insurance is to indemnify against unexpected loss. *Lilly*, 482 N.E.2d at 470. That is reasonable because insurers write the policies, and can write them to be as restrictive or detailed as they wish. For these reasons, *any* ambiguity or doubt is resolved *as a matter of law* in favor of the policyholder and coverage.

IV.
ARGUMENT

Cincinnati promised to pay IRT's lost income and extra expenses if IRT suspended operations due to a "loss" to its property caused by or resulting from a covered cause of loss. Thus, to trigger coverage, IRT need only show that (1) the suspension of its operations was caused by direct "loss" to its property and (2) that this "loss" was caused by or resulted from a Covered Cause of Loss. IRT has established both. Cincinnati has identified no exclusions that it claims applies. Cincinnati did not include any of the several available virus exclusions in this Policy. The Court should declare that the IRT's inability to operate and occupy its theatre is a "physical loss" covered by the policy.

A. IRT suspended its operations because of its inability to safely operate and occupy its theatre, which constitutes a "loss" under the Policy.

IRT's inability to operate and occupy its theatre due to conditions caused by the COVID-19 pandemic satisfies the definition of "loss" in the Policy. This definition merely requires a *loss*—which is something different than "damage"—and for that loss to be *physical*. IRT's claim satisfies both conditions.

1. IRT's inability to use or occupy its theatre is a "loss" regardless of whether there also has been "physical damage."

Cincinnati defined "loss" as either "accidental physical loss or accidental physical damage." [Ex. 13, Policy, § G.8, at IRT_000060 (emphasis added).] Its use of the disjunctive "or" shows that it understood "physical loss" to be different than "physical damage."[15] Any other interpretation would improperly render the phrase "physical loss" meaningless or superfluous. *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 850 (Ind. 2012); *Mich. Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001, 1104 (Ind. Ct. App. 1983) (construing policy in favor of coverage and holding that the disjunctive reading of the word "or" is "but a restatement of the general rule that courts may not construe words in a [policy] in such a way as to render them meaningless").

Thus, there need not be "physical damage" to the IRT's property to constitute a "loss" under the policy. *Manpower Inc. v. Ins. Co. of Pa.*, 2009 U.S. Dist. LEXIS 108626, *18–19 (E.D. Wis., Nov. 3, 2009) (Wisconsin law) ("[T]he policy cover[s] physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language."). "Loss" is something different from "damage."

Cincinnati's argument ignores this distinction. It claims that a "physical loss" requires some form of "deformation," "permanent change in physical appearance,"

[15] *Ind. Ins. Co. v. N. Vermillion Comm. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) ("The use of the disjunctive 'or' before 'disparaging' suggests that something different though similar and additional to 'defamatory' is intended."); *Bolin v. State Farm Fire & Cas. Co.*, 557 N.E.2d 1084, 1085 n.1 (Ind. Ct. App. 1990) ("It is the word 'or' in the phrase 'expected or intended' which renders it disjunctive.").

or "manifestation of a physical effect." [Ex. 16.] But those injuries would be covered under the policy's grant of coverage for "physical damage." Had that been Cincinnati's intent, it would have insured only against "physical damage." But having promised to insure against both "physical loss" and "physical damage," it has foreclosed the argument that the latter is the exclusive means of proving coverage. *Cf. Welton Enters., Inc. v. Cincinnati Ins. Co.*, 131 F. Supp. 3d 827, 835 (W.D. Wis. 2015) (holding that if Cincinnati wanted to exclude cosmetic injuries from the meaning of "loss," then "it should have written the policy that way."). It understood that "loss" means something different from "damage."

Cincinnati did not actually explain what the word *loss* means in the phrase "physical loss." Cincinnati defined "loss," in part, as "an accidental physical *loss*." [Ex. 13 at IRT_000060.] This circular definition is unhelpful. Aside from providing adjectives, it gives no further guidance on what the word "loss" means. Thus, "loss" must be "interpreted from the perspective of an ordinary policyholder of average intelligence." *Summit*, 715 N.E.2d at 936. If that interpretation is reasonable, it "must be enforced as a matter of law." *Taylor*, 926 N.E.2d at 1014.

The term *loss* reasonably encompasses the loss of the IRT's ability to safely operate and occupy its theatre. "Loss" is an expansive word that can carry multiple meanings. It can mean: "2.a: the act of losing possession: deprivation; b: the harm or privation resulting from loss or separation, c. an instance of losing." *Loss*, MERRIAM-WEBSTER ONLINE DICTIONARY.[16] It can also mean: "1. detriment, disadvantage, or

[16] https://www.merriam-webster.com/dictionary/loss

deprivation from failure to keep, have, or get; 2. something that is lost; . . . [and] 4. the state of being deprived of or being without something that one has had. *Loss*, DICTIONARY.COM;[17] *see Schambs v. Fid. & Cas. Co.*, 259 F. 55, 58 (6th Cir. 1919) ("Loss" is not a word of limited, hard and fast meaning. There are many kinds of loss…."); *Second Injury Fund v. Conrad*, 947 S.W.2d 278, 284 (Tex. App. 1997).

IRT's inability to safely operate and occupy its theatre, its loss of use, fits comfortably within the broad dictionary definition of "loss." This interpretation is reasonable. Therefore, it governs as a matter of law, even if Cincinnati's proffered definition is also reasonable. *Taylor*, 926 N.E.2d at 1014.

2. IRT's inability to physically operate and physically occupy its theatre is a *physical* loss.

Given the "all risk" nature of the Policy it sold and the breadth of the word "loss," Cincinnati was obliged to put clear limits on what kind of loss it would not cover. *Flexdar*, 964 N.E.2d at 848; *Customized Distrib. Servs. v. Zurich Ins. Co.*, 862 A.2d 560, 566-67 (N.J. App. Div. 2004) (stating that "it was incumbent on the insurer to clearly and specifically rule out coverage" for "loss" it did not want to cover). All it said was that the loss must be "physical." [Ex. 13, Policy at IRT_000060.] That is not sufficient to "clearly expres[s]" the limitation sought by Cincinnati here. *Flexdar*, 964 N.E.2d at 848. The term "physical loss," without further qualification, includes a policyholder's inability to safely occupy its property. This physical deprivation constitutes a *physical* loss.

[17] https://www.dictionary.com/browse/loss?s=t

In 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), the court held that an open-air theater that had to curtail performances due to smoke from a nearby forest fire had sustained a "physical" loss even though only the air had been affected and the theater itself was structurally undamaged. The theater was forced to suspend performances while waiting for the smoke to dissipate. The court explained that lost use of the theater was "not mental or emotional, nor is it theoretical," as a loss based on reputation or valuation might be, and therefore it was a "physical loss." *Id.* at *15.

Similarly, the IRT's loss of use of its theatre is neither mental or emotional, nor theoretical. Dictionaries define "physical" as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1706); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803 (N.H. 2015) (quoting 2 OXFORD ENGLISH DICTIONARY 2194 (6th ed. 2007), containing a similar definition); *Physical*, MERRIAM-WEBSTER ONLINE DICTIONARY[18] ("2.b: "of or relating to material things"); *Physical*, DICTIONARY.COM[19] ("2. Of or relating to that which is material."). Thus, "physical" is used to distinguish between the material or tangible aspects of an object and those that are purely intangible, such as value or sentiment. *E.g.*, *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260 (D. Mass. 2004) (holding that changes to the . . . "character" of a hole on a golf course were intangible and did not constitute "physical"

[18] https://www.merriam-webster.com/dictionary/physical

[19] https://www.dictionary.com/browse/physical

loss or damage). Here, IRT lost the ability to operate and occupy its most important *physical* asset—its theatre. That is a *physical* loss.

Courts around the country have held that where the policyholder loses the physical use of the insured property, for any reason, there is a "loss" of the physical property. Courts have reached this conclusion in cases involving asbestos fibers;[20] harmful fumes,[21] odors,[22] or smoke;[23] nearby erosion or falling rocks;[24] nearby flood-

---

[20] **Asbestos fibers.** *Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (finding that property sustained a direct physical loss because it was rendered uninhabitable by the presence of asbestos fibers); *Bd. of Educ. of Township High School Dist. No. 211 v. Int'l Ins. Co.*, 720 N.E.2d 622, 601–02 (Ill. Ct. App. 1999) (finding that property sustained a direct physical loss because it was rendered uninhabitable by the presence of asbestos fibers and "had been contaminated to the point where corrective action . . . [had] to be taken."); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296, 298–00 (Minn. Ct. App. 1997) (finding a direct physical loss, and thus coverage, for apartment buildings that had been rendered uninhabitable by asbestos fibers within the buildings); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002) (asbestos and lead contamination constituted direct physical loss).

[21] **Fumes and vapors.** *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (finding that property sustained a direct physical loss because it could not be safely used because of fumes from gasoline in the ground); *Stevens v. Bankers Ins. Co.*, 970 F. Supp. 769 (N.D. Cal. 1997) (when floodwaters entered the store and barred access, moisture evaporated, and rendered rolls of wallpaper unsalable, there was a "direct loss" from flood covered by flood insurance even though the floodwaters never touched the paper); *Gregory Packaging v. Travelers Property Casualty Co. of America*, 2014 U.S. Dist. LEXIS 165232 (D. N.J., Nov. 26, 2014) (ammonia discharge rendering the property uninhabitable inflicted direct physical loss or damage "because the ammonia physically rendered the facility unusable for a period of time"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 Mass. Super. LEXIS 661 (Mass. Super. Ct., Mar. 15, 1996) (presence of oil fumes in a building constituted a "physical loss" to the building).

[22] **Odors.** *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (extreme odor caused by cat urine in downstairs apartment's plumbing system could constitute physical loss if it rendered the unit "uninhabitable."); *Farmers Ins. Co. of Ore. v. Trutanich*, 858 P.2d 1332, 1335–36 (Or. Ct. App. 1993) (finding that rental property sustained a direct physical loss because it was rendered uninhabitable by the odors from an illegal drug laboratory); *Columbiaknit v. Affiliated FM Ins. Co.*, 1999 U.S. Dist. LEXIS 11873, *16-19 (D. Or. 1999) ("direct physical loss" included home rendered uninhabitable by strong, pervasive, noxious odor caused by mold); *see also Essex Ins. Co. v. BloomSouth Flooring Co.*, 562 F.3d 399, 406 (1st Cir. 2009) (suit against insured alleging that odors permeated the building triggered duty to defend because it was "physical injury" under a liability policy).

[23] **Smoke.** *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, *supra*; *Matzner v. Seacoast Ins. Co.*, 1998 WL 566658 (Mass. Super. Ct. August 12, 1998) (finding that a building with unsafe levels of carbon monoxide from a chimney blockage by an old galvanized pipe sustained a direct physical loss).

[24] **Erosion and falling rocks/objects.** *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (finding that home sustained a direct physical loss because it could not be safely occupied

ing;[25] chemical contamination;[26] contamination from mold or other biological substances;[27] electrical outages;[28] noxious, defective drywall;[29] and theft.[30]

---

because of a potential for falling rocks); *Hampton Foods, Inc. v. Aetna Cas. & Surety Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (finding that danger of imminent collapse requiring evacuation and rendering goods unusable resulted in direct physical loss); *Adams-Arapahoe Joint Sch. Dist. v. Cont'l Cas. Co.*, 891 F.2d 772, 778 (10th Cir. 1989) (where partial collapse of roof rendered entire school uninhabitable, the "loss" was the entire school); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), *abrogated on other grounds* (finding a direct physical loss to a building which became uninhabitable because of erosion even though there was no physical damage to the building's structure); *Manpower Inc. v. Ins. Co. of Pa.*, 2009 U.S. Dist. LEXIS 108626, *18-19 (E.D. Wis., Nov. 3, 2009) (direct physical loss present, even although there was no damage to policyholder's office space, but instead because the occupancy was impossible due to nearby collapse of other property).

[25] **Nearby Flooding.** *Gatti v. Hanover Ins. Co.*, 601 F. Supp. 210 (E.D. Pa. 1985) (broken pipe near apartment complex, requiring action by complex policyholder to fix it, was "physical loss."); *Gibson v. Sec. U.S. Dep't Housing & Urban Dev.*, 479 F. Supp. 3, 6 (M.D. Pa. 1978) (finding that there was a direct physical loss when floodwaters made it unsafe to use the home as a residence, even though floodwaters never actually touched the house).

[26] **Chemical Contamination.** *Gen. Mills, Inc. v. Gold Medal Ins. Co.,* 622 N.W.2d 147, 150–52 (Minn. Ct. App. 2001) (oats spoiled by treatment with an unapproved pesticide were a "direct physical loss"); *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294, (La. Ct. App. 2011) (lead contamination making a house uninhabitable was "direct physical loss"); *Stack Metallurgical Serv. v. Travelers Indem. Co.*, 2007 U.S. Dist. LEXIS 9267, *25 (D. Or. 2007) (same, except lead contamination of medical instrument); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Dist. Ct. App. 1995) (dumping of unknown chemical into sewage treatment plant, which killed essential bacteria, caused a "direct physical loss"); *Hetrick v. Valley Mut. Ins. Co*, Cause No. 2245 Civil 1988, 1992 WL 524309, *2 (Pa. Com. Pl. 1992) (finding groundwater contamination rendering a building uninhabitable caused a direct loss despite the fact there was no visible or structural damage).

[27] **Mold or Biological Substances.** *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826 (3d Cir. 2005) (e-coli contamination rendering house uninhabitable constituted direct physical loss); *Prudential Prop. & Cas. Co. v. Lillard-Roberts*, 2002 U.S. Dist. LEXIS 20387, *26-27 (D. Or. 2002) (house rendered uninhabitable by mold fell suffered "direct physical loss").

[28] **Electrical Outages**. *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.1*, 968 A.2d 724 (N.J. Ct. App. 2009) (massive power outage causing injury to the policyholder supermarket constituted "physical damage").

[29] **Defective Drywall.** *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822 (E.D. La. 2010) (undefined "physical loss" term was reasonably understood as including total loss of use caused by presence of defective drywall); *TRAVCO v. Ward*, 715 F. Supp. 2d 699, 701 (E.D. Va. 2010) (same); *Depuy v. USAA Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 31890, *5-8 (M.D. La. 2012) (same).

[30] **Theft.** *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (theft of equipment under a claim of right was "direct physical loss" because it deprived the policyholder of the property); *AGCS Marine Ins. Co. v. World Fuel Servs.*, 187 F. Supp. 3d 428 (S.D.N.Y. 2016) ("The absence of possession and control falls within the plain meaning of 'loss'"); *see also Total Intermodal Services, Inc. v. Travelers Prop. & Cas. Co.*, 2018 WL 3829767 (C.D. Cal. 2018) (finding direct physical loss to property where goods were sent to China, rather than California, and while unharmed, were rendered useless to the customer); *cf. Morrisville Pharm., Inc. v. Hartford Cas. Ins. Co.*, 2010

Although no Indiana appellate court has decided this issue, at least one Indiana trial court applied this reasoning and case law in the context of a spider infestation. In *Cook v. Allstate Insurance Company*, Cause No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32 (Madison Super. Ct., Nov. 30, 2007), the court held that a brown recluse infestation constituted a "direct physical loss" even though the building retained its structural integrity and had no visible damage. *Id.* It reached this conclusion because the presence of the spiders "ma[d]e it unsafe for Cook and his very young children to live in the home," rendering the house "unsuitable for its intended use." *Id.*

The thrust of all these cases is that anytime the insured property has suffered a substantial loss of use, the "physical loss" requirement is satisfied. *E.g.*, *Hughes*, 18 Cal. Rptr. at 655; *First Presbyterian*, 437 P.2d at 55–56. Again and again, courts have explained why the insurance industry's interpretation of this language is not the only reasonable one:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that [property] might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

First Presbyterian, 437 P.2d at 56 (quoting *Hughes*, 18 Cal. Rptr. at 655).

U.S. Dist. LEXIS 116607 (E.D. Pa. 2010) (suggesting that, had the policyholder not known her landlord was going to change the locks, her inability to access inventory before it became unsalable would be direct physical loss).

The Colorado Supreme Court applied the same logic in *First Presbyterian*. There, gasoline in the soil beneath a church infiltrated the building, rendering it uninhabitable and prompting the fire department to order the building closed. *Id.* at 54. The insurer contended there was no "direct physical loss" because the church merely suffered a "loss of use" rather than a physical injury. *Id.* The court rejected that argument. *Id.* It reasoned instead that "because of the accumulation of gasoline around and under the church building[,] the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* In other words, although the parishioners could use the church, doing so would put them and others at serious risk of injury, illness, or death. *See id.* Indeed, the risk was so serious that use was forbidden by the government. *Id.* at 54.

The Supreme Court of Appeals of West Virginia reached the same outcome in *Murray v. State Farm Fire & Cas. Co.* 509 S.E.2d 1 (W. Va. 1998). In that case, three neighbors lived near the edge of a man-made cliff standing about fifty feet high. *Id.* at 4. Several boulders fell from the cliff and crushed two of the three homes. *Id.* at 5. The third home was left unscathed, but "firemen compelled all three families to leave their homes because of the possibility that further rocks could fall, and turned off all electricity and water." *Id.* The insurer claimed there was no "direct physical loss." *Id.* The court, like the Colorado Supreme Court, disagreed. *Id.* at 16. Citing *Hughes*, the court held that "[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property." *Id.* at 17.

The rationale in *Murray* is particularly compelling. The court observed that the insured properties "were homes, buildings normally thought of as a safe place to live. . . . [and that] all three of the plaintiffs' homes became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time." *Id.* (emphasis added). The court concluded that until the boulder issue was fixed, "the plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.*

Much like the house on the eroding cliff, or the house below the crumbling mountain, or the home crawling with brown recluse spiders, or any of the dozens of other cases described above, the IRT's theatre has been rendered completely useless. The IRT exists for people to be physically present on the premises and to enjoy the physical performances of the actors. The transmissibility of the virus has resulted in a total loss of that central feature of the IRT's property. People can no longer physically gather in the audience, on the stage, or in the lobby without exposing themselves and others to a deadly disease. Like the house in *Murray*, the IRT's theatre could "scarcely be called [a theatre] in the sense that rational persons would be content to [gather] there." *Murray*, 509 S.E.2d at 17. The loss of that use is a "physical loss" triggering Cincinnati's coverage obligations.

3. At least one court has described these losses as a natural disaster indistinguishable from other casualty events covered by property insurance.

The loss and damage caused by the virus is not meaningfully distinguishable from other events that are routinely covered by property and casualty insurance. This is confirmed by at least one court addressing the emergency orders states have imposed to fight the crisis.

The COVID-19 pandemic is a natural disaster involving "substantial damage to property, hardship, suffering or potential loss of life." *Friends of Devito v. Wolf*, — A.3d —, 2020 Pa. LEXIS 1987, *31-32 (Pa., Apr. 13, 2020). In *Wolf*, the Pennsylvania Supreme Court rejected challenges to an executive order closing all non-life-sustaining businesses, reasoning as follows:

> We agree with the Respondents that the COVID-19 pandemic qualifies as a "natural disaster" under the Emergency Code for at least two reasons. First, the specific disasters in the definition of "natural disaster" themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve "substantial damage to property, hardship, suffering or possible loss of life." In this respect, the COVID-19 pandemic is of the "same general nature or class as those specifically enumerated," and thus is included, rather than excluded, as a type of "natural disaster."

Id. The *Wolf* court also held that each Pennsylvania county that had a reported COVID-19 case was properly classified as a disaster area. *Id.* at *33–35. It follows that the COVID-19 pandemic is a natural disaster, indistinguishable from other casualty events for which insurance coverage has always been intended to provide coverage. Based on the *Wolf* court's reasoning, it is not the actual presence of the

virus that has caused property damage; rather, it is the damage associated with the threat of transmission of the virus at any location where two or more persons are present. That is a physical loss to property, no less than a hurricane, fire, storm, or other event rendering property unusable or inaccessible.

B. The dangerous conditions caused by the rapidly spreading SARS-CoV-2 virus is a Covered Cause of Loss.

If there is a "loss" under the analysis above, Cincinnati's policy provides coverage if the "loss" is "caused by or result[s] from a Covered Cause of Loss." [Ex. 13, Policy at IRT_000106.] The policy in turn defines "Covered Cause of Loss" as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." [*Id.* at IRT_000027.] In other words, the Policy covers all "loss" unless the "loss" is excluded. No exclusion in Cincinnati's policy comes close to describing the cause of IRT's losses here. The dangerous conditions created by the COVID-19 pandemic thus fit comfortably within the exceptionally broad coverage grant of Cincinnati's "all risk" policy.

"All risk" policies like the Policy are exceptionally broad.[31] They "permit recovery for all fortuitous losses in the absence of fraud or misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." *George Koch Sons, Inc.*, 712 N.E.2d at 1073; *Advance Cable*, 2014 U.S. Dist.

[31] The "all risk" name comes from prior versions of this form, which defined "covered cause of loss" as "all risks of direct loss." The Insurance Services Offices ("ISO") eventually deleted "all risks of" to clarify that these policies did not cover excluded losses. [Leagre Aff. ¶ 20, Exhibit 17, 2011 Multistate Revision to Commercial Property Coverage Forms and Endorsements, p. 43.] The scope of coverage, however, remains the same. [*Id.* p. 44 ("There is no change in coverage.").] These policies cover all causes of loss unless they are specifically excluded.

LEXIS 32949, at *35 (holding that under a similar Cincinnati "Covered Cause of Loss" definition, "[t]he Policy, therefore, covers *all* risks, unless specifically excluded") (emphasis in original); *Hartford Cas. Ins. Co. v. Evansville Vanderbergh Pub. Library*, 860 N.E.2d 636, 640–41, 645 (Ind. Ct. App. 2007) (construing a coverage grant meaningfully identical to Cincinnati's).[32]

The only causes of loss not covered are those that are specifically and clearly excluded. Under Indiana law, all limitations on coverage are subject to strict scrutiny, and they "must be clearly expressed to be enforceable." *Flexdar*, 964 N.E.2d at 848; *Kiger*, 662 N.E.2d at 947. So if a cause of loss is not "clearly and unmistakably" excluded, it is covered. *Asbury*, 441 N.E.2d at 236-37; *Kiger*, 662 N.E.2d at 947 ("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.'").

No such exclusion applies here. None of Cincinnati's exclusions even purports to address the circumstances that caused IRT's "loss," namely, the dangerous conditions arising from the rapidly spreading and deadly SARS-CoV-2 virus. There is no

[32] This is the rule around the country. *Persian Galleries v. Transcont'l Ins. Co.*, 38 F.3d 253, 256 & n.1 (6th Cir. 1994) (holding that similar language creates "all risk" coverage); *Machecha Transp. Co. v. Phila. Indem. Ins. Co.*, 463 F.3d 827, 828 (8th Cir. 2006) (same); *DENC, LLC v. Phila. Indem. Ins. Co.*, 421 F. Supp. 3d 224, 227 (M.D.N.C. 2019) (same); *T.H.E. Ins. Co. v. Charles Boyer Children's Tr.*, 455 F. Supp. 2d 284, 290-91 & n.3 (M.D. Pa. 2006) (same); *St. Paul Fire & Marine Ins. Co. v. Luke Ready Air*, 800 F. Supp. 2d 1299, 1307 (S.D. Fla. 2012) (same); *U.S. Fire Ins. Co. v. Kelman Bottles*, 538 F. App'x 175, 177 (3d Cir. 2013) (same); *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 31 A.D.3d 100, 105 (N.Y. App. Div. 2006) ("When parties enter into an 'all risk' policy, such as is involved here, covering 'direct physical loss of or damage to Covered Property at the premises . . . caused by or resulting from any Covered Cause of Loss,' they obviously intend to cover all losses except those specifically excluded."); *Sunbreaker Condominium Ass'n v. Travelers Ins. Co.*, 901 P.2d 1079, 1080, 1086 (Wash. Ct. App. 1995) (describing similar language as creating "all risk" coverage); *Pace Props. v. Am. Mfrs. Mu.t Ins. Co.*, 918 S.W.2d 883, 885-86 (Mo. Ct. App. 1996); *Bishops, Inc. v. Penn Nat'l Ins. Co.*, 984 A.2d 982, 986, 996 (Pa. Super. Ct. 2009) ("Accordingly, all property damage to the insured premises is a 'Covered Cause of Loss' unless it is specifically excluded").

virus exclusion. There is no exclusion for pandemic-related losses or losses arising from a public health crisis. Cincinnati did not include any such exclusion in the IRT's policy, even though they are widely available and could have been used. That fact alone defeats any prospect that Cincinnati can rely on an exclusion. *Flexdar*, 964 N.E.2d at 851–52 (finding a vague exclusion unenforceable when the insurer, at the time it wrote the policy, had access to a specific exclusion that would have excluded the loss). Since there is no "specific provision expressly excluding the loss from coverage," Cincinnati cannot shoehorn the pandemic into general, nonspecific language by implication when it failed to do so in express terms. *George Koch Sons, Inc.*, 712 N.E.2d at 1073; *Summit*, 715 N.E.2d at 936.

Added to this is the principle that coverage grants are construed broadly, while exclusions are construed narrowly. *Neuman*, 435 N.E.2d at 593 (a term is "given its broad meaning in the so-called 'extension' cases, and is construed narrowly in 'exclusion' cases"); *see also Imel*, 817 N.E.2d at 305; *Kiger*, 662 N.E.2d at 949. This is a foundational principle of insurance contract interpretation and is necessary to protect the policyholder's reasonable expectations. *Hampton Med. Grp.*, 840 A.2d at 920. Upon reading an insuring agreement that covers all risks and all "physical loss[es]," and seeing no specific exclusions for viruses, pandemics, or public health emergencies, an ordinary policyholder of average intelligence would expect coverage. *Summit*, 715 N.E.2d at 936. That expectation "must be enforced as a matter of law." *Taylor*, 926 N.E.2d at 1014.

Cincinnati knows this. In its denial letter, it did not identify a single exclusion that would bar coverage. [Ex. 16.] In fact, its questions to IRT—such as whether the virus was physically present in the theatre and whether any employees or patrons had been infected by the virus—indicate that Cincinnati understands that the COVID-19 pandemic meets the definition of a covered cause of loss.

Any attempt by Cincinnati to argue that the covered cause of loss has not been "direct" should likewise be rejected. There can be no dispute that the loss directly impacted the IRT. It is the IRT's theatre where plays are produced and performed that has been rendered useless, not a collateral facility whose loss might indirectly impact the IRT. IRT need not prove that the virus was actually present in its theatre. The first virus case was confirmed in Marion County on March 6, and the first death on March 16, 2020. [Ex. 1, Ind. E.O. 20-31, at 1.] By the end of April—and in spite of strict stay-at-home orders—Marion County had experienced "well over 5,000 confirmed cases of COVID-19 and well over 300 reported deaths." [Leagre Aff. ¶ 21, Exhibit 18, Marion Cnty. E.O. 4, 2020, at 1.] The fast spread of the virus shows that, had no countermeasures been taken, the toll clearly would have been far higher.

Thus, whether the virus reached inside IRT's doors or not—its arrival was inevitable, if not already present. Its transmission within the theatre (where people are seated in close quarters and where actors are speaking into the audience) could easily sicken hundreds or thousands of additional people before patrons realized they were sick. *See supra*, pp. 4-7 & nn.1-16. When the risk of a loss is imminent,

and its effects catastrophic, it is senseless and contrary to sound public policy to demand that policyholders continue operating their businesses until catastrophe strikes. The court in *Murray* did not wait for boulders to crush all the homes before finding a "direct physical loss" to the property. *Murray*, 509 S.E.2d at 17. The court in *Hughes* did not wait for a landslide to wash away the policyholders' home before finding that "loss or damage" had occurred. *Hughes*, 18 Cal. Rptr. at 655 The court in *Cook* did not wait for brown recluse spiders to actually bite the homeowners before finding a "direct physical loss." *Cook*, 2007 Ind. Super. LEXIS 32 at *10. As soon as it was unsafe to occupy the IRT's theatre—where hundreds of patrons gather indoors for hours at a time—the IRT had suffered a "direct" physical loss.

The Court can therefore declare that Cincinnati's policy covers the IRT's losses, no matter how hard Cincinnati may now try to squeeze this cause into one of the inapplicable exclusions in its policy.

V.
CONCLUSION

The IRT has suffered a "physical loss" as that term is used in Cincinnati's policy. None of Cincinnati's exclusions bar coverage for the cause of that loss. The Court should, therefore, declare that the losses are covered by the Policy.

Respectfully submitted,

/s/ Ryan T. Leagre
George M. Plews, #6274-49
Peter M. Racher, #11293-53
Gregory M. Gotwald, #24911-49
Ryan T. Leagre, #32050-49
Christopher E. Kozak, #35554-49

PLEWS SHADLEY RACHER & BRAUN
1346 N. Delaware St.
Indianapolis, IN 46202
Tel: 317.637.0700
Fax: 317.637.0710
gplews@psrb.com
pracher@psrb.com
ggotwald@psrb.com
rleagre@psrb.com
ckozak@psrb.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on the following counsel of record by electronic service via the Indiana E-Filing System (IEFS) on June 25, 2020.

Dennis M. Dolan Litchfield Cavo LLP dolan@litchfieldcavo.com Richard R. Skiles Skiles DeTrude rskiles@skilesdetrude.com *Counsel for The Cincinnati Casualty Company*	Michael E. Brown Kightlinger & Gray, LLP mbrown@k-glaw.com *Counsel for McGowan Insurance Group LLC*

/s/ Ryan T. Leagre