To be Argued by:
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New York Supreme Court

Appellate Division—First Department

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

Appellate Case Nos.: 2021-02971 2021-04034

BRIEF OF *AMICUS CURIAE* NEW YORK STATE TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

This appeal presents the question whether a court may disregard well-pled factual allegations—including allegations regarding the presence of a hazardous substance on business premises and the resulting effects on habitability and functional use—on a motion to dismiss for failure to state a cause of action. The CPLR and decades of case law interpreting its provisions say no. Supreme Court erroneously said yes.

Amicus curiae New York State Trial Lawyers Association ("NYSTLA") has a strong interest in this Court reversing Supreme Court's decisions and preserving the ability of injured people to have the merits of their claims determined on the basis of an evidentiary record, including expert testimony, and not peremptorily dismissed at the pleading stage based on judicial factfinding.

NYSTLA is a statewide organization of more than 3,500 attorneys, most of whom practice in the personal injury field. Its certificate of incorporation expresses the purpose of the organization as follows: to "promote reforms in the law, facilitate the administration of justice, elevate the standard of integrity, honor and courtesy in the legal profession, and cherish the spirit of brotherhood among members thereof."

There are many interest groups that actively seek to limit the rights of persons who are tortiously injured, including consumers and workers injured by

hazardous and toxic substances; NYSTLA exists to advance and protect those rights. NYSTLA's business is to assure that the wrongfully injured will have full access to the civil justice system. The organization is thus dedicated to the preservation of the federal and state constitution rights to trial by jury. NYSTLA fights to ensure that injured people are not barred from the civil justice system; wrongdoers are not immunized from liability; juries are free to determine the proper amount of compensation without arbitrary legislative interference; and obstacles are not placed in the way of litigating all meritorious actions. New York appellate courts have previously accepted amicus submissions from NYSTLA in cases raising issues of significance for the development of personal injury law, or as to the fairness of proceedings. This is such a case.

SUMMARY OF ARGUMENT

If Defendant-Respondent Westport Insurance Corporation ("Westport") and other insurance carriers want to contest the scientific allegations in policyholder complaints about the dangers that Coronavirus can cause when present in the indoor air and on the surfaces of a property and the damage it can cause to that property, New York law permits them to summon scientific experts to do so. What New York law forbids is for the court to disbelieve, on a motion for failure to state a cause of action, the factual and scientific allegations in a complaint—be they allegations concerning the dangers of and harm caused by asbestos, ammonia

fumes, lead paint or Coronavirus and COVID-19. To rule otherwise would disregard and reject long standing case law precedent and the CPLR and close New York State courthouse doors to future toxic tort claims in emerging areas of science—just like lead paint and asbestos claims arose from new scientific understandings. That should not be allowed to happen.

Rather than assuming the truth of the factual and scientific allegations in the complaint of Plaintiff-Appellant Consolidated Restaurant Operations, Inc. ("CRO")—and leaving proof of their veracity to fact discovery and expert testimony—Supreme Court indulged its own views of how the SARS-CoV-2 virus ("Coronavirus") that causes the often deadly disease Coronavirus Disease 2019 ("COVID-19") is transmitted within and adheres to property. That was error.

Supreme Court failed to abide by the directives of the CPLR and the decisions of the New York Court of Appeals and this Court that have interpreted them. When the CPLR was enacted, it revolutionized the pleading stage of civil cases. Plaintiffs are no longer caught in a maze of technical pleading requirements. They merely have to provide a short statement sufficient to give the defendant notice of the claims. Coupled with a limited motion to dismiss for failure to state a cause of action under CPLR 3211—addressing only the facial sufficiency of a complaint while assuming the truth of factual allegations therein—the CPLR's pleading rules provide that challenges to the merits of a plaintiff's claim would

predominantly be addressed through discovery and summary judgment, not motions attacking the pleadings. And by retaining the liberal standard to amend a complaint, the CPLR sought to ensure that meritorious claims would be heard.

Supreme Court disregarded these critical provisions of the CPLR when it granted Westport's motion to dismiss and subsequently denied CRO leave to amend based on Supreme Court's own scientific conclusions about Coronavirus that contradicted CRO's extensive and detailed allegations.

These erroneous rulings are especially concerning to NYSTLA because personal injury plaintiffs' allegations of injury and causation are frequently dependent upon claims about the nature of hazardous products and toxic substances. Such claims cannot be adjudicated on the merits at the motion to dismiss stage because they require discovery and expert analysis from scientists. The CPLR recognizes this, even if Supreme Court's decisions failed to.

Indeed, this case illustrates the importance of fact discovery and expert testimony for evaluating scientific evidence. The science of Coronavirus and COVID-19 is complex and has evolved significantly. For example, while many people—including, evidently, Supreme Court—believed that Coronavirus could be easily removed from surfaces by simply wiping them down, researchers have actually determined that Coronavirus "adsorbs" onto the surface of objects, and is much more resilient to cleaning than other respiratory viruses. Researchers have

found that Coronavirus cannot be removed from surfaces by routine cleaning, that surface cleaning does not remove the virus at all from its number one transmission vector—the air, and that no amount of cleaning prevents the virus's constant reintroduction into property. Thus, Supreme Court's precipitous conclusion that Coronavirus does not constitute physical loss or damage based on a belief that it can be readily cleaned improperly preempted the development of relevant scientific information.

An affirmance here would fundamentally alter the liberal notice pleading standards enshrined in both the CPLR and decades of well-settled caselaw and empower defense attorneys to invite judges to disregard the well-pled factual and scientific allegations in complaints and substitute their own judgment of the facts at the pleadings stage. In so doing, plaintiffs would be denied the factual and expert disclosure that is at the bedrock of New York's court system and its administration of justice. That cannot be, and is not, the law in New York, and there is no exception for COVID-19 business interruption litigation in the notice pleading standards.

Accordingly, NYSTLA respectfully requests that this Court reaffirm that well-pled factual allegations must be accepted as true when a motion to dismiss challenges their facial sufficiency, and reverse Supreme Court's decisions granting Westport's motion to dismiss and denying CRO's motion for leave to amend.

ARGUMENT

POINT I: THE CPLR DIRECTS CHALLENGES TO THE MERITS OF PLAINTIFF'S ALLEGATIONS TO THE SUMMARY JUDGMENT STAGE, NOT THE PLEADING STAGE

While the meaning of a policy provision could be a matter of law for the court to decide, the application of policy language to events on the ground presents issues of fact. Here, Supreme Court concluded—on a motion to dismiss, with no evidence before it and with factual/scientific allegations in CRO's Complaint to the contrary—that Coronavirus does not cause direct physical loss or damage to property. In doing so, Supreme Court failed to adhere to the requirements of the CPLR.

A. Pleadings Need Only Give Notice and Must Be Liberally Construed

The liberalization of pleading was a major achievement of the CPLR. The Advisory Committee on Practice and Procedure that proposed the CPLR (the "Advisory Committee") sought to eliminate the overly technical pleading requirements under the common law and former Civil Practice Act, as well as the frequently endless exchanges of pleadings ("complaint, answer, replication, rejoinder, surrejoinder, rebutter, surrebutter, and perhaps more") and motions attacking them. Connors, Practice Commentaries C3013:1.

Moreover, "at common law, it was the pleadings which by themselves manifested the issues . . . because there were no other sources to do the job, such as

the omnipresent and omnipotent disclosure devices used today." *Id*. at 3013:1. But, as a result of the reforms embodied in the CPLR, "[p]leadings under Article 30 were to have a diminished role; disclosure under Article 31 was to have an expanded role." *Id*. at 3013:8.

The purpose of the CPLR's pleading provisions "is to elicit pleadings that are sufficiently particularized to enable the parties to prepare their cases and to enable the court to control pretrial disclosure and the trial." 1 Weinstein, Korn & Miller CPLR Manual 19.06. To that end, CPLR 3013 sets forth only two requirements for the substance of pleadings: "Statements in a pleading shall be sufficiently particular to give the court and parties [1] notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and [2] the material elements of each cause of action or defense."

As to the first requirement, a court's inquiry is "whether the total verbiage of the pleading at issue may be said to give 'notice' to the other side of what the pleader's grievance is. If it is sufficient to put the adversary on 'notice,' it satisfies this first mandate." Connors, Practice Commentaries C3013:2.

As to the second requirement, "the practitioner need only see to it that the material elements that are substantive constituents of the claim are somewhere verbalized within the four corners of the complaint." Connors, Practice Commentaries C3013:3 (citing *Gershon v. Goldberg*, 30 A.D.3d 372, 373 (2d

Dep't 2006)). *See also Aronoff v. Albanese*, 85 A.D.2d 3, 6 (2d Dep't 1982) ("[A]lthough plaintiffs never alleged 'gift' or 'waste' in their complaint, the omission does not bar a consideration of the gift or waste claims. Under liberal rules of pleading, plaintiffs' assertions of unreasonable transactions — which benefited the individual defendants personally — should be sufficient to put them on notice of plaintiffs' theory.").

As this Court recognized in the leading case of *Foley v. D'Agostino*, 21 A.D.2d 60 (1st Dep't 1964), "[b]y virtue of the provisions, the emphasis with respect to pleading is placed, where it should be, upon the primary function of pleadings, namely, that of adequately advising the adverse party of the pleader's claim or defense." *Id*. at 62-63 (citation omitted). Thus, "generally speaking, 'Pleadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy.'" *Id*. at 63 (citation omitted).

As long as a plaintiff alleges enough to put the defendant on notice of its claims, "[t]he vagueness or conclusory nature of certain of its allegations are not such as to render" a complaint inadequate. *Pernet v. Peabody Eng'g Corp.*, 20 A.D. 2d 781, 782 (1st Dep't 1964) (noting that "further particularity as to plaintiff's alleged cause of action may be obtained by a demand for a bill of particulars or by means of disclosure proceedings"). *Accord Holzer v. Feinstein*,

23 A.D.2d 771, 772 (2d Dep't 1965) ("In view of the mandate of the CPLR for liberal construction of pleadings . . . , we find that this complaint, considered as a whole, states a cause of action under section 853 of the Real Property Actions and Proceedings Law. The preponderance of conclusory allegations in this regard . . . is no longer fatal." (citations omitted)).

Moreover, CPLR 3013 must be read in light of CPLR 3026's requirement that "pleadings shall be liberally construed" and "[d]efects shall be ignored if a substantial right of a party is not prejudiced." As this Court noted in *Foley*,

> The proper promotion of the general Civil Practice Law and Rules objective requires more than mere token observance of or lip service to its mandate for liberal construction of pleadings. To achieve such objective, we must literally apply the mandate as directed and thus make the test of prejudice one of primary importance. Thereby, we would invariably disregard pleading irregularities, defects or omissions which are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause or defense.

Foley, 21 A.D.2d at 66. *Accord Lane v. Mercury Record Corp.*, 21 A.D.2d 602, 604 (1st Dep't 1964) *aff'd* 18 N.Y.2d 889 (1966) (alteration in original) ("[P]articular stress must be given to CPLR 3026 which provides that pleadings 'shall be liberally construed' and that '[d]efects shall be ignored if a substantial right of a party is not prejudiced.'"). *See also* Connors, Practice Commentaries C3013:11 ("Superimposing CPLR 3026 on CPLR 3013 would permit the

conclusion that even if one of the material elements is omitted from the complaint, its omission shall be ignored if no substantial right is prejudiced.").

B. Motions to Dismiss for Failure to State a Claim Must Accept Factual Allegations as True

The former Civil Practice Act permitted a motion to dismiss, like the common law demurrer, which assumed the truth of plaintiff's allegations and challenged their legal sufficiency. John R. Higgitt, CPLR 32111(a)(7): Demurrer or Merits-Testing Device?, 73 Alb. L. Rev. 99, 101 (2009). Because such motions "rarely led to the disposition of cases," *id*. at 102, and instead merely prolonged the pleading stage by, at most, resulting in the filing of amended pleadings, the Advisory Committee originally recommended omitting a motion to dismiss for failure to state a cause of action from the CPLR in favor of a summary judgment motion after issue had been joined. *Id*. at 102-03.

In response to bar association criticism, however, the Advisory Committee subsequently amended its recommendation to permit a motion to dismiss for failure to state a cause of action, while seeking to shorten the frequently interminable pleading stage by adding a requirement that a motion for leave to replead be accompanied by evidence demonstrating the merits of the amended claim. *Id*. at 103-04. In the end, the New York State Legislature included a motion to dismiss for failure to state a cause of action in the CPLR, but it did not

include the requirement of an evidentiary showing for a motion for leave to replead. *Id*. 104-05.

Importantly, nothing in the legislative history indicates "that the failure to state a cause of action motion that was inserted into the CPLR was anything other than the motion that existed under the Civil Practice Act—the common law demurrer. . . . 'Speaking motions,' i.e., motions to dismiss for failure to state a cause of action supported by evidence, were not discussed in the [Committee's] Fifth Report." *Id*. at 106.

True to this legislative history, courts have narrowly construed CPLR 3211(a)(7)'s provision for a motion to dismiss "on the ground that . . . the pleading fails to state a cause of action." As the Court of Appeals explained, where the "sole question presented for our review is whether the plaintiff's complaint states a cause of action . . . [,] we accept, as we must, each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts." *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509 (1979) (stating that, "[i]f we find that the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, our judicial inquiry is complete and we must declare the plaintiff's complaint to be legally sufficient").

In *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005), the Court of Appeals further noted that, "[i]n the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference . . . . Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss."

This Court has similarly stated that, "[i]n deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims." *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 228 (1st Dep't 2002) ("The court's role is simply to determine whether the facts, as alleged, fit into any valid legal theory.").

The Court of Appeals has repeatedly held that challenges to the merits of factual allegations should be raised in a summary judgment motion where plaintiff has an opportunity to present its evidence. Thus, in *Nonnon v. City of New York*, 9 N.Y.3d 825, 826 (2007), plaintiffs alleged they were harmed by toxic substances emanating from landfills negligently maintained by the City. The City moved to dismiss under CPLR 3211(a)(7) on the ground that plaintiffs failed to allege a causal connection between their injuries and the City's alleged negligence. *Id*. Notwithstanding that both sides had submitted expert affidavits on the issue of

causation, the Court of Appeals held that a motion to dismiss was not the proper means to challenge the truth of plaintiffs' allegations:

> On a CPLR 3211 motion to dismiss, the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' . . . .
>
> As the City's motion was never converted to one for summary judgment, plaintiffs were not put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered . . . . Accordingly, the City is not now entitled to dismissal of plaintiffs' complaints for failure to state a cause of action.

Id. at 827.

Likewise, in *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 351 (2013), the Court of Appeals rejected defendant's attempt to have a negligence claim dismissed under CPLR 3211(a)(7) based on affidavits that contradicted plaintiff's allegations: "this matter comes to us on a motion to dismiss, not a motion for summary judgment. As a result, the case is not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and Miglino has at least pleaded a viable cause of action at common law." [1]

[1] In *Rovello v. Orofino Realty Co.*, 40 N.Y. 2d 633, 635 (1976), the Court of Appeals left an opening—albeit small—for consideration of evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211(a)(7): "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action." *Id*. at 636. However, the Court of Appeals has reiterated that such affidavits submitted by a defendant "will almost never warrant dismissal." *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 595 (2008).

Moreover, because a plaintiff must be given an opportunity to present evidence in support of its allegations on a summary judgment motion, the Court of Appeals has cautioned that courts may not convert a motion to dismiss to one for summary judgment under CPLR 3211(c) without providing adequate notice. *E.g., Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508 (1988) ("[T]he court's *sua sponte* treatment of the [CPLR 3211(a)(7)] motion as one for summary judgment deprived plaintiff of the 'opportunity to make an appropriate record' and thus thwarted the very purpose of CPLR 3211 (c)." (citation omitted)). *See also* 1 Weinstein, Korn & Miller CPLR Manual § 21.03 ("[A] challenge to the claim's factual underpinnings should be made either via a motion for summary judgment, or if, for tactical reasons, counsel chooses to move for dismissal under CPLR 3211(a)(7), the latter should be coupled with a request that it be treated as a motion for summary judgment.").

C. Leave to Amend Should Be Freely Granted

The standard for leave to amend is exceedingly permissive in New York. Under the CPLR, no evidence whatsoever is required to support a motion for leave to amend. As noted above, the Legislature rejected the Advisory Committee's recommendation that a party be required to make an evidentiary showing in support of the amended allegations. As a result, CPLR 3025(b) broadly provides that a party may amend its pleading by leave of the court and that "leave shall be

freely given upon such terms as may be just." The Court of Appeals has explained that leave should be granted "in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit." *Davis v. . Nassau Cmtys. Hosp.*, 26 N.Y.3d 563, 580 (2015).

While some older Appellate Division decisions required a movant to provide an affidavit of merit in support of a motion to amend, more recent decisions have abandoned any such requirement. Thus, Plaintiffs are "not required to submit an affidavit of merit or make any other evidentiary showing in support of their motion" to amend. *Boliak v. Reilly*, 161 A.D.3d 625, 625 (1st Dep't 2018)*; accord Favia v. Harley-Davidson Motor Co.*, 119 A.D.3d 836, 836-37 (2d Dep't 2014) ("No evidentiary showing of merit is required under CPLR 3025(b) . . . . If the opposing party wishes to test the merits of the proposed added cause of action . . . , that party may later move for summary judgment upon a proper showing") (citations and internal quotation marks omitted).

In determining whether the proffered amendment is "palpably insufficient or clearly devoid of merit," *Fairpoint Cos., LLC v Vella*, 134 A.D.3d 645, 645 (1st Dept 2015), courts apply the same test as for a motion to dismiss under CPLR 3211. In *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 185 (1st Dep't 2001), *aff'd as mod sub nom. Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314 (2002), this

Court held that "[a] proposed amendment that cannot survive a motion to dismiss should not be permitted."

As with a motion to dismiss for failure to state a claim, in deciding a facial challenge to the sufficiency of the amended pleading, the court should assume the truth of the proposed amended allegations. *See Hosp. for Joint Diseases Orthopaedic Inst. v. James Katsikis Envtl. Contractors.*, 173 A.D.2d 210, 210 (1st Dep't 1991) ("Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment."); *see also Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dep't 2008) ("If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing."); *NYAHSA Services, Inc. v. People Care Inc.*, 156 A.D.3d 99 (3d Dep't 2017) (same).

POINT II: SCIENTIFIC ALLEGATIONS CANNOT BE EVALUATED AT THE PLEADING STAGE

These CPLR provisions and the case law interpreting them reflect the Legislature's desire for plaintiffs to have meaningful access to the courts and for their claims to be decided on the merits, after an opportunity to obtain and present evidence, to the maximum extent possible. These policy concerns are especially important to personal injury plaintiffs harmed by dangerous products or toxic/hazardous/noxious substances, where claims of injury and causation typically

require fact discovery and testimony from scientific experts from the fields of medicine, biology, virology, chemistry, engineering or epidemiology in order to be adjudicated.

While the present case involves a dispute over all-risk property insurance, CRO's claims about the hazardous nature of Coronavirus or COVID-19 and their effect on property implicate the same policy concerns.

Many court decisions and scholarly articles have focused on the challenges that scientific evidence presents for courts and juries, including how to ensure that such evidence is appropriately evaluated by the factfinder. As the Court of Appeals explained in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006):

> As with any other type of expert evidence, we recognize the danger in allowing unreliable or speculative information (or "junk science") to go before the jury with the weight of an impressively credentialed expert behind it. But, it is similarly inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court. It is necessary to find a balance between these two extremes.

While courts and commentators have disagreed about the appropriate standard such scientific evidence must meet in order to be submitted to the factfinder, they have rightly placed the court's gate-keeping function at the pre-trial or summary judgment stage—where the parties may proffer expert evidence for the court's evaluation—and not at the pleading stage.

As U.S. Supreme Court Justice Breyer has remarked, "science should expect to find a warm welcome, perhaps a permanent home, in our courtrooms. The legal disputes before us increasingly involve the principles and tools of science. . . . Our decisions should reflect a proper scientific and technical understanding so that the law can respond to the needs of the public." Stephen G. Breyer, Science in the Courtroom, 16 Issues in Science & Tech., ¶1 (Summer 2000). Moreover, "[t]he importance of scientific accuracy . . . reaches well beyond the case itself." *Id*., ¶8. "A decision wrongly denying compensation in a toxic substance case, for example, can not only deprive the plaintiff of warranted compensation, but also . . . can encourage the continued use of a dangerous substance." *Id*. "The upshot is that we must search for law that reflects an understanding of the relevant underlying science." *Id*.

Achieving such an understanding is no easy feat, both because "a courtroom is not a scientific laboratory" and most judges "lack the scientific training that might facilitate the evaluation of scientific claims," but also because "science itself may be highly uncertain and controversial with respect to many of the matters that come before the courts." *Id*. at ¶¶9-11.

As Judge Learned Hand remarked when faced with deciding a patent infringement case, "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of

even the rudiments of chemistry to pass upon such questions as these. . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows . . . ." *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (S.D.N.Y. 1911) *aff'd in part and reversed in part* 196 F.486 (2d Cir 1912). Critically, however, as Justice Breyer noted, "[a]ny effort to bring better science into the courtroom must respect the jury's constitutionally specified role." Breyer at ¶12.

POINT III: THE COMPLEX AND EVOLVING SCIENCE OF CORONAVIRUS REQUIRES FACT AND EXPERT DISCOVERY

Cases like this one demonstrate why the merits of factual and scientific allegations cannot and should not be adjudicated at the pleading stage. As a prominent treatise on insurance law (known for more often coming down on the side of the insurers' viewpoints) co-authored by New York County Supreme Court Commercial Division Justice, insurance law expert and former top-tier counsel for insurance carriers Barry R. Ostrager recently observed, the determination whether Coronavirus causes physical loss or damage to property and triggers all-risk property coverage "will ultimately depend on several factors, including scientific and medical information that develops as to the virus, its transmission, and its ability to remain viable on surfaces and in the air." Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes, at 18 (20th ed. 2020)

All of those factors implicate complex factual issues that are utterly unresolvable on a CPLR 3211 motion to dismiss. Indeed, the scientific understanding of the virus has continued to evolve, causing many consensus views to "change at a breakneck pace."[2]

A. Coronavirus Alters Surfaces

Researchers have confirmed that Coronavirus is capable of adhering to surfaces.[3] As a matter of surface chemistry, the virus does not just "rest" on a surface. It actually "adsorbs" onto the surface through intermolecular electric interactions between the outer surface layer of the virus and the surface of a solid object. The virus does not disappear when this occurs, and the surface to which it attaches is materially altered as a result of this adsorption.[4] As a result, it is no longer safe.

Moreover, the virus has been shown to be extraordinarily persistent. It can remain infectious on surfaces for "significantly longer time periods than generally considered possible."[5] Originally, researchers concluded that the virus could

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[2] *The Stress of Bayesian Medicine—Uncomfortable Uncertainty in the Face of Covid-19*, 384 NEW ENG. J. OF MED. 1, 7 (Jan. 7, 2021).

[3] A. Meiksin, *Dynamics of COVID-19 Transmission Including Indirect Transmission Mechanisms: A Mathematical Analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 23, 2020).

[4] *See generally* Joonaki, et al., *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, 6 CHEMISTRY 9, 2135-46 (Sept. 10, 2020); Kempf, et al., *Persistence of Coronaviruses on Inanimate Surfaces and their Inactivation with Biocidal Agents*, 104 J. HOSP. INFECTION 246, 251 (2020).

[5] Shane Riddell, *The Effect of Temperature on Persistence of SARS-CoV-2 on Common Surfaces*, 17 VIROLOGY J. 145 (Oct. 7, 2020).

survive on surfaces for periods ranging from hours to days, depending on the ambient environment and the type of surface.[6] More recent research, however, has shown that the virus can survive for nearly a month at room temperature on a variety of surfaces, including glass, vinyl, plastic and paper.[7]

Although in the early days of the pandemic cleaning was believed to be highly effective (*i.e.*, "wipe down the tables," as Supreme Court suggested during oral argument), more accurate studies have led the CDC to conclude that "surface disinfection once- or twice-per-day had little impact on reducing estimated risks" of virus transmission.[8] Additional studies based on experience with the pandemic similarly indicate that the virus "is much more resilient to cleaning than other respiratory viruses."[9] A 2021 study by Northwell Health, the largest hospital

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[6] N. van Doremalen, et al. *Aerosol and Surface Stability of HCoV-19 (SARS-CoV-2) Compared to SARS-CoV-1*, 382 NEW ENGL. J. MED. 1564-67 (Apr. 16, 2020); Boris Pastorino et al., *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020); G. Kampf et al., *Persistence of Coronaviruses on Inanimate Surfaces and Their Inactivation with Biocidal Agents*, 104 J. HOSP. INFECTION 3, 246-51 (Mar. 1, 2020).

[7] Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3, 374-78 (Feb. 1, 2021).

[8] *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021) (citing A. K. Pitol & T. R. Julian, *Community Transmission of SARS-CoV-2 by Fomites: Risks and Risk Reduction Strategies*, ENV'T SCI. & TECH. LETTERS (2020)), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html (last visited Sept. 3, 2021).

[9] Nevio Cimolai, *Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020).

network in New York, demonstrated that even after hospital staff disinfected treatment areas, much of the virus survived.[10]

These studies generally involve hard, nonporous surfaces. Few reported studies have investigated the efficacy of cleaning on soft, porous surfaces (such as textiles and seating often found in restaurants), but available data is not particularly encouraging. One study found that the virus traveled far beyond Covid-19 hospital treatment rooms, apparently carried on clothing worn by hospital employees.[11] The other major cleaning difficulty is that the virus is invisible. Unlike with dirt and dust, an ordinary person cannot tell (a) where cleaning is required and (b) whether the cleaning was effective. Moreover, depending on the surface, efforts at cleaning are actually capable of "re-aerosolizing" the virus and causing it to circulate within the air again.

B. Coronavirus Alters Indoor Air

Coronavirus also significantly impacts indoor air—its number one vector for transmission.

Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath,

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[10] Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 5, 2479 (Mar. 3, 2021).

[11] V.A. Vicente, et al., *Environmental Detection of SARS-CoV-2 Virus RNA in Health Facilities in Brazil and a Systematic Review on Contamination Sources*. 18 INT'L J. ENV'TL RES. PUBLIC HEALTH 7, 3824 (Apr. 6, 2021).

that remain infectious when suspended in the air over long distances and time.[12] These tiny particles can remain suspended "for indefinite periods unless removed by air currents or dilution ventilation."[13] As a result, the risk of disease transmission increases substantially in enclosed environments compared to outdoor settings.[14]

These phenomena were not well understood at the start of the pandemic. However, as "essential workers" returned to work in the spring of 2020 and some businesses were allowed to reopen, patterns emerged. For example, the CDC published a research letter concluding that a restaurant's air conditioning system triggered the transmission of the Coronavirus, spreading it to people who sat at

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[12] Eric A. Meyerowitz et al., *Transmission of SARS-CoV-2: A Review of Viral, Host, and Environmental Factors*, Annals Internal Med. (Jan. 2021), https://www.acpjournals.org/doi/10.7326/M20-5008 (last visited Apr. 10, 2021); *see also* Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols*. *We Have Enough Evidence, Now It Is Time to Act*, TIME (Aug. 25, 2020), https://time.com/5883081/covid-19-transmitted-aerosols/ (last visited Apr. 9, 2021); Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, USA TODAY NEWS (last updated Sept. 21, 2020), www.usatoday.com/indepth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spreadthroughcoughs/5086553002/ (last visited Apr. 9, 2021); Wenzhao Chen et al., *Short-range airborne route dominates exposure of respiratory infection during close contact*, 176 BLDG. & ENV'T 106859 (June 2020), https://www.sciencedirect.com/science/article/pii/S0360132320302183 (last visited Apr. 10, 2021).

[13] Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (Sept. 1, 2020), https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext (last visited Apr. 9, 2021).

[14] Muge Cevik et al., *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, CLINICAL INFECTIOUS DISEASES (Sept. 23, 2020), https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315 (last visited Apr. 9, 2021).

separate tables downstream of the restaurant's airflow.[15] As another example, grocery-store workers tested positive at five times the rate as the general population, despite masking requirements.[16] Moreover, one study detected Coronavirus inside the HVAC system connected to hospital rooms of COVID-19 patients. That study found Coronavirus in ceiling vent openings, vent exhaust filters and ducts located as much as 180 feet from the COVID-19 patients' rooms.[17]

These discoveries prompted the CDC to warn against the risks of indoor activities and to recommend "ventilation interventions" to help reduce exposures to the airborne Coronavirus, including increasing airflow and air filtration (such as installing high-efficiency particulate air (HEPA) fan/filtration systems).[18] While standard HEPA systems can be helpful, they capture only 15% of small viral particles and 50% of larger particles. More effective "MERV-13" filters and

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[15] Jianyun Lu et al., *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China*, 2020, 26 EMERGING INFECTIOUS DISEASES 7 (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited Apr. 9, 2021); *see also* Keun-Sang Kwon et al., *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. KOREAN MED. SCI. 46, e415 (Nov. 23, 2020), https://jkms.org/DOIx.php?id=10.3346/jkms.2020.35.e415 (last visited Apr. 9, 2021).

[16] Joanna Gaitens et al, *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT'L J. ENV'T RSCH. PUB. HEALTH 4, 1446 (Feb. 4, 2021); Fan-Yun Lan et al., *Association Between SARS-CoV-2 Infection, Exposure Risk and Mental Health Among a Cohort of Essential Retail Workers in the USA*, 78 OCCUPATIONAL ENV'T MED. 237-43 (Oct. 30, 2020).

[17] Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, SCI. REPS. 10, 19589 (Nov. 11, 2020), https://www.nature.com/articles/s41598-020-76442-2(last visited Apr. 9, 2021).

[18] *Ventilation in Buildings*, CDC (updated Mar. 23, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2 (last visited Apr. 9, 2021).

ionization devices can eliminate 66% of small particles and 92% of larger particles. However, these and other measures come at significant cost and disruption, and are not 100% effective in eliminating the virus

Given this, the rapidly evolving science of COVID-19 transmission is not capable of resolution on a motion to dismiss. Rather, proper development of a full record of fact and expert discovery is required, and then resolution by the trier of fact. New York law affords plaintiffs those basic rights and no trial judge can substitute their "gut" instinct on the science for the factual/scientific allegations of the complaint at the CPLR 3211 motion to dismiss stage.

POINT IV: SUPREME COURT ERRED IN GRANTING THE MOTION TO DISMISS AND DENYING LEAVE TO AMEND

"Law lags science; it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). Supreme Court did not heed that caution.

While Supreme Court's decision granting Westport's motion to dismiss under CPLR 3211(a)(7) turned in part on its interpretation of the policy's language (which is outside the scope of this amicus brief),[19] Supreme Court also found that Coronavirus did not physically damage CRO's restaurants. In making that

[19] Westport also moved to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1). However, the documentary evidence consisted of the policy attached to the complaint, which is not relevant to the factual determination regarding the presence and effect of COVID-19 and Coronavirus on CRO's property.

determination, Supreme Court disregarded CRO's well-pled allegations in favor of its own conceptions of scientific fact, contrary to the CPLR and controlling precedent.

In its original Complaint, CRO alleged that (i) Coronavirus was actually present in its restaurants, (ii) is resilient and can survive on surfaces for weeks, (iii) compromises the physical integrity of the structures it permeates and renders such structures unusable, and (iv) restaurants are particularly susceptible to circumstances favorable to the spread of Coronavirus. R56-57, 60, ¶¶19-22, 36. The proposed Amended Complaint contained additional, detailed factual allegations that buttressed CRO's claims regarding the presence of Coronavirus, how it is transmitted, and how it physically alters property, replete with citations to scientific studies. R1933-44.

At the hearing on Westport's motion to dismiss, Supreme Court challenged CRO's allegations regarding the nature of Coronavirus and its presence and effect on property. For example, Supreme Court posited that CRO "could wipe down the tables every two minutes" and that the property can "be cleaned and replaced right back." R15. But judges are not scientists and, as Justice Breyer wisely cautioned, judges generally lack scientific training and most are generalists. And yet, relying on its own scientific understanding of Coronavirus, casting aside the allegations of CRO's complaint and "based on the reasoning" of *Northwell Health Inc. v.*

Lexington Ins. Co., No. 21-cv-1104 (JSR), 2021 WL 3139991 (S.D.N.Y. July 26, 2021), Supreme Court summarily concluded that "there just are no allegations here that fall within the coverage provision." R40.

In doing so, Supreme Court failed to liberally construe CRO's complaint, assume the truth of its allegations, and draw all reasonable inferences in CRO's favor. Moreover, *Northwell Health* involved materially different allegations ("the Complaint itself suggests, a property may be kept 'safe and sanitized,' and therefore usable, despite the presence of SARS-CoV-2," *id*. at *6)[20]; *Northwell Health* is not binding on CRO or New York state courts; and one court's improper factfinding on a motion to dismiss is not a license for subsequent courts to do the same.

Supreme Court thus failed to heed this Court's admonishment in *PT Bank Central Asia, New York Branch v. ABN AMRO Bank NV*, 301 A.D.2d 373, 375-76 (1st Dep't 2003), that "[t]he scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed. . . . In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *See also*

[20] Because Appellant CRO explains in its brief why *Northwell* improperly relied on the *Roundabout Theatre* case, that issue will not be addressed in this brief.

Fischbach & Moore, Inc., v. E. W. Howell Co., 240 A.D.2d 157, 157 (1st Dep't 1997) ("[T]he court should . . . make no effort to evaluate the ultimate merits of the case."); *Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 321 (1st Dep't 1997) (holding that the court erred when it "erroneously decided factual issues in deciding the motion to dismiss").

In determining whether to grant leave to amend under CPLR 3025(b), Supreme Court likewise should have applied the same motion to dismiss standard and accepted the truth of these allegations. *See, e.g., Hospital for Joint Diseases,* 173 A.D.2d at 210. Based on its all too brief decision, it is clearly evident that Supreme Court failed to do so.

By failing to adhere to the proper standards, Supreme Court short-circuited the development of relevant scientific information. As Justice Breyer warned, such a decision not only disserves the parties to this case, but also the public. Premature factual findings prevent further scientific inquiry and discussion, including those that might show that the judge's initial impression was misguided. *See* Breyer, ¶¶8-9.

History affords many examples in the personal injury context of plaintiffs injured by products and substances that scientists had confidently declared to be safe. Such plaintiffs were only able to recover for their injuries because courts adhered to their prescribed role and did not enforce conventional "wisdom" at the

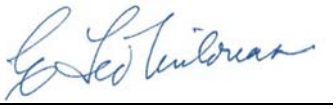
pleading stage. The standard applied by Supreme Court in this case, however, would effectively shut the courthouse doors to such plaintiffs in the future whose personal injury claims involve emerging areas of science—just like lead paint and asbestos claims did at the beginning. That should not be allowed to happen.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Supreme Court's decisions granting Westport's motion to dismiss and denying CRO's motion for leave to amend be reversed.

Dated: November 24, 2021

Respectfully submitted,



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