SUPREME COURT-STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

-against-

WESTPORT INSURANCE CORP.,

Defendant-Respondent.

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App. Div. Nos.:
2021-02971, 2021-04034

Originating Court No.
450839/2021

BRIEF OF THE RESTAURANT LAW CENTER, NEW YORK STATE RESTAURANT ASSOCIATION, AND NEW YORK CITY HOSPITALITY ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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STATEMENT OF INTEREST

Amicus Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million establishments that represent a broad and diverse group of owners and operators—from large national outfits, to small, family-run neighborhood restaurants, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Through regular participation in *amicus* briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues that may have industry-wide implications.

Amicus New York State Restaurant Association is the leading business association for the restaurant and hospitality industry in New York State. It advocates for businesses and employees in the industry, which serves as the cornerstone of the state economy, and offers opportunities for career advancement and community involvement.

Amicus New York City Hospitality Alliance is a not for profit association representing and serving New York City's restaurant and nightlife industry. The Alliance is committed to advancing an agenda focused on opportunity, economic investment, and job creation, and to advocating on behalf of its members at all levels of government.

Amici and their members have a significant interest in the issues in this case. Many in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of COVID-19 or executive orders. According to the insurers, restaurants have not incurred physical loss or damage, even though their physical properties were visibly altered and impaired, in some instances completely inaccessible, and unable to function as they were insured to operate. To insurers, it does not matter that insured properties were insured as fully operational restaurants with physical spaces designed to generate corresponding revenues—not as shut down or physically impaired properties incapable of operating at the original revenue levels for which insurers priced and collected business interruption premiums. Nor does it matter to the insurers that because of the physical loss or damage wrought by COVID-19 or executive orders, the insured properties looked, functioned, and generated income worse than at the outset of the policy period.

The insurers are wrong. Whether Plaintiff-Appellant Consolidated Restaurant Operations, Inc. ("Consolidated") has stated a claim for coverage depends on the specific factual allegations in its pleadings. The key question is whether, accepting those allegations as true and drawing all reasonable inferences in Consolidated's favor, a reasonable jury *could* find Consolidated has alleged its insured properties

suffered "physical loss or damage," as an ordinary person would understand those key terms that the insurer chose to leave undefined in the policy.

Contrary to the Respondent's likely claims, what other courts (especially federal courts) have done in other cases does not control here. One judge recently explained why, rejecting insurers' reliance on trial-level decisions and "appeal to 'herding behavior'—a process by which group-think replaces individual decision-making." Reconsideration Order at 4, *JDS Constr. Grp., LLC v. Cont'l Cas. Co.*, No. 2020 CH 5678 (Ill. Cir. Ct. Oct. 25, 2021). The court explained that those decisions, which often follow others without meaningful explanation, "have no precedential value" and "are not helpful in determining whether the facts alleged in this complaint satisfy the legal standard." *Id.* at 2, 4. "Judges are not sheep, and [courts] do not decide a case by counting noses. Further, the 'herd' can be wrong." *Id.* at 4.

This Court can similarly disregard whatever insurers purport to be the *real* meaning of the undefined terms "physical loss or damage," whether they contend the policy requires "complete destruction," "permanent dispossession," or any number of other extrinsic formulations that are not included in the policies themselves. This Court only need concern itself with what ordinary reasonable consumers would understand "physical loss or damage" to mean. Those consumers would almost certainly believe that harmful physical alterations and forced deprivation of functional physical space qualifies, especially when business

interruption premiums were calculated on the assumption that insured properties would function and generate corresponding revenues as both the policyholder and insurer expected at the outset of the policy period.

Taking a fresh *de novo* look at Consolidated's allegations, and properly applying New York law—which requires this Court to give undefined policy terms the plain meaning ordinary consumers would ascribe to them, and to accept *any* reasonable interpretation of the policy supporting coverage—the judgment below should be reversed.

SUMMARY OF ARGUMENT

I. The restaurant industry is a significant sector of the New York economy and a major driver of economic activity. The industry creates many employment and entrepreneurship opportunities, including for women, minorities, and immigrants. It supports local businesses, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in New York and beyond.

For years, restaurants in New York and elsewhere have paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. And the policies cover not only physical loss or damage to the restaurant's space, but also resulting decreases in business income, i.e. the revenue stream that the space generates. Indeed, insurers,

price and charge premiums based on the policyholder's properties operating in a fully functional manner and based on the type of business, the available square footage at the outset of the policy period, and expected revenues.

Restaurant owners bought this insurance believing that it would cover income lost as a result of physical "loss or damage" to their property, which is what the policy said. Restaurant owners suffered what they believed to be physical "loss or damage" to property when COVID-19 and unprecedented executive orders detrimentally altered physical property, imposed physical changes for the worse, impaired physical spaces, and rendered property non-functional for its intended purposes. Yet insurers denied coverage anyway, without legitimate justification. Restaurants have turned to the courts for the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. While many of the decisions cited by the trial court favored insurers, those non-binding decisions have no bearing on this Court's review. Many of those decisions are tainted by foundational interpretive and analytical errors[1]—including failing to construe the policy's terms according to the

[1] This includes a misguided reliance on *Roundabout Theater Co. v. Continental Casualty Co*., 302 A.D. 2d 1 (1st Dep't 2002), and *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co*., 17 F. Supp. 3d 323 (S.D.N.Y. 2014). Consolidated addresses that point in detail in its brief to this Court and *amici* need not duplicate those arguments here.

natural meaning a reasonable policyholder would give to them, engrafting additional words or concepts onto the policy when the insurer did not do so, and placing undue weight on federal decisions rather than state decisions and the policies themselves.

Hewing to the standard of review is particularly important here, where many state trial courts have found in well-reasoned decisions that plaintiffs *have* stated claims for business interruption coverage. Roughly one third of state courts nationwide to decide these state-law questions have found policyholders stated claims or deserved summary judgment. Those decisions are not controlling here, yet they demonstrate that a jury could reasonably interpret the policy—understood as an ordinary consumer would—as supporting business interruption coverage based on Consolidated's allegations. Those decisions also support this Court reversing the trial court's premature dismissal and making clear that a restaurant may state a claim by alleging it suffered physical loss or damage when COVID-19 or executive orders dispossessed a restaurant of its tangible physical space, imposed real, detrimental physical alterations on the premises, and rendered the property's insured physical space unable to function as the policyholder and insurer expected.

III. Bedrock canons of insurance policy interpretation require that undefined terms be given their "plain and ordinary" meaning. *White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 267 (2007). A policy provision that purports to exclude or limit coverage will be read very narrowly, and it will be applied only where its terms are

"specific and clear" and exclude certain coverage "in clear and unmistakable language." *MDW Enters., Inc. v. CNA Ins. Co*., 4 A.D.3d 338, 340 (2d Dep't 2004). "[W]here the plain language of a policy permits more than one reasonable reading, a court must adopt the reading upholding coverage." *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 77 (2d Cir. 2013). In other words, the policyholder prevails so long as its interpretation is reasonable, even if its interpretation is not the *best* reading of the policy. *See id.*

A court should not inject extrinsic terms or conditions into the policy. A phrase's "plain and ordinary meaning" is determined by "'common speech' and 'the reasonable expectation and purpose of the ordinary businessman.'" *MDW Enters.*, 4 A.D.3d at 340. The policy's terms require no judicial redefinition: they should be construed according to what a reasonable consumer would expect.

Consolidated's policy provides Respondent Westport Insurance Corp. ("Westport") will pay for "all risks of direct physical loss or damage to insured property."[2] Dkt. 1 ¶ 43. Consolidated has alleged that COVID-19 "compromises the physical integrity of the structures it permeates and poses an imminent risk of physical damage to all other structures[,]" *id.* ¶ 21; that the virus actually was present on Consolidated's insured properties, *id.* ¶ 36, and that the "threatened presence" of the virus "due to its ubiquity" constitutes a risk of direct physical loss or damage, *id.*

[2] Citations to "Dkt. __" refer to the Supreme Court record below, No. 450839/2021.

In addition, Consolidated's proposed Amended Complaint—such amendment was denied as futile by the trial court—provides even more detailed factual allegations. It alleges, for example, that the presence and threatened presence of the virus "resulted in a tangible alteration to the Restaurants," which were "rendered unusable and functionally uninhabitable for their intended function." Dkt. 173 ¶¶ 41-42, 47.

Many other courts have found similar allegations qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent holding that a property may suffer physical loss or damage when its appearance or form is altered, or when the physical space is rendered non-functional for its intended purpose. That is precisely what happened to many restaurants when COVID-19 and executive orders effectively blocked off or nullified large swaths of previously functional square footage, impaired physical property, and imposed visible detrimental physical alterations to the space. As a result, the trial court erred by reading the policy to preclude coverage and by dismissing Consolidated's claims.

ARGUMENT

I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Hardship And Continue Their Critical Contributions To New York's Economy And Culture.

A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.

The restaurant and foodservice industry is the lifeblood of New York's economy. In 2019, the industry accounted for an estimated $54.5 billion in sales across 49,032 locations throughout the state. The industry employed 881,400 people in 2020 and is expected to employ 5.3% more over the next decade.[3]

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most threatened by COVID-19 and state and local shutdown orders—returns roughly two dollars to the state's economy and boosts the state's tax revenue.[4] A restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[5] That is the case in New York, where ample and diverse dining opportunities drive tourism.

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[3] Nat'l Restaurant Ass'n, *Factbook: 2020 State of the Restaurant Industry* 7 (2020) ("*Factbook*").
[4] Nat'l Restaurant Ass'n, *New York Restaurant Industry at a Glance* (2019).
[5] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020).

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants bring stability and interest in seeing their neighborhoods grow and thrive. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry and are a vibrant part of the communities where they operate.

The restaurant industry remains a shining example of upward mobility. Eight in ten owners say their first industry job was an entry-level position. Even more managers say the same. Restaurants also provide opportunities for historically disadvantaged communities. More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and own their own businesses.[6]

The past successes of the industry are not guaranteed in the future. Since March 2020, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry employment has decreased in every state and the District of Columbia.[7] As of late 2020, more than 110,000 establishments—which were in business for over sixteen years, on average—were "closed permanently or

[6] *Factbook*, *supra* note 3; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).
[7] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021) ("*Forty states*").

long-term."[8]

New York restaurants have not been spared. Restaurant employment is down more than 30%, representing over 240,000 jobs.[9] The numbers for independent restaurants are even starker.[10] These closures can devastate neighborhoods as the harm from closures reverberates, impacting other local businesses and industries. "Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[11]

B. Insurers Have Wrongfully Denied Restaurants' Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses caused by COVID-19 and executive orders forcing restaurants to severely alter and restrict their physical premises, restaurants turned to their insurers for coverage under "all risk" property insurance policies that included protection for business interruptions.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for risks of any kind or description, unless specifically excluded. "Business interruption" insurance provides

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[8] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).
[9] Nat'l Restaurant Ass'n, *Forty states*, *supra* note 7.
[10] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic,* Rest. Bus. (June 11, 2020).
[11] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by many restaurants, business interruption coverage is triggered when a policyholder suffers direct physical "loss or damage" to its premises. These policies provide businesses with comfort in knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" policies with business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed their policies would cover business income losses from any and all non-excluded risks. Those risks, to a reasonable policyholder, include COVID-19 and executive orders causing direct physical "loss or damage," as policyholders understood those words to mean.

For *amici's* members, the insured property is a restaurant and the physical space is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create the kind

of warm, inviting space that draws guests in. Restaurant dining is an experience, not just a financial transaction. The physical elements play a crucial role in that experience.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner and based on the type of business, the available square footage at the outset of the policy period, and revenue data. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a fully operational business. Business interruption coverage thus insures not only the restaurant's physical space, but also reductions in business income that result from physical loss or damage to that space.

That kind of interruption is precisely what happened when COVID-19 and executive orders required restaurants to make physical, detrimental alterations that materially impaired their physical space and prevented them from functioning as the restaurants that were insured. Millions of square feet of vital physical space were lost when on-premises dining was limited or barred entirely. Restaurants were dispossessed of their tangible spaces and their premises experienced very real, material, and detrimental physical changes and alterations. Dining rooms closed or limited. Areas blocked off. Seating areas eliminated. Barriers erected and dividers installed. Layouts altered. Fixtures and furniture removed. Self-service stations

gone. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss or damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause, often featuring boilerplate language asserting that coverage is unavailable due to the industry-standard "loss or damage" requirement. Those denials followed telegraphed statements by insurers and trade groups,[12] and were frequently issued without meaningful (if any) investigation.

Many restaurants have challenged these wrongful denials. Without judicial relief, many restaurants will be out of business entirely, many industry employees will remain out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

[12] For example, Society Insurance all but denied coverage "preemptively and *en masse*" through a memo to "agency partners" on March 16, 2020—before most businesses had even submitted claims but after many states limited operations of certain businesses—"observing that 'a quarantine of any size,'" or a "widespread governmental imposed shutdown" would "likely not trigger the additional coverage." *In re Society Ins. Co.*, 521 F. Supp. 3d 729, 735 (N.D. Ill. 2021). In early April, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, *APCIA Releases New Business Interruption Analysis* (Apr. 6, 2020).

II. This Is An Important Case Of First Impression Where The Court Applies *De Novo* Review.

This Court should closely scrutinize the policy language, apply well-established principles of policy interpretation, and resolve this case based on the unprecedented circumstances under which it arises. That is particularly so in light of other pending cases involving claims by restaurants for three reasons.

First, New York precedent dictates that "the interpretation of an insurance policy is a question of law." *Broad St., LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 130 (1st Dep't 2006). For that reason, "a de novo standard of review applies." *Gulf Ins. Co. v. Transatlantic Reinsurance Co.,* 13 A.D.3d 278, 279 (1st Dep't 2004). "On appeal, the standard of review is for this Court to examine the contract's language de novo." *Dreisinger v. Teglasi*, 130 A.D.3d 524, 527 (1st Dep't 2015). As such, the Court must construe the complaint "in the light most favorable to the plaintiff and all allegations must be accepted as true." *24 Franklin Ave. R.E. Corp. v. Cannella*, 139 A.D.3d 717, 717 (2d Dep't 2016). "In this context, 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.'" *Id.*

Second, this Court's review comes at a time when there is a disquieting divergence in outcomes between federal and state courts on an issue governed by state law. Among the trial-level decisions to date in state courts—where the judiciary

is well-versed in applying the state law that governs insurance policies—roughly one third have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[13] Many federal district courts, applying state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion.[14]

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[13] *See, e.g.*, *Snoqualmie Ent. Auth. v. Affiliated FM Ins. Co.*, 2021 WL 4098938 (Wash. Super. Ct. Sept. 3, 2021); Minute Order, *Nev. Prop. 1 LLC v. Factory Mut. Ins. Co.*, No. A-21-831049-B (Nev. Dist. Ct. Aug. 16, 2021); *JDS Constr. Grp., LLC v. Cont'l Cas. Co.*, 2021 WL 4027824 (Ill. Cir. Ct. Aug. 12, 2021); *Santino, LLC v. Society Ins. Co.*, 2021 WL 2288231 (Wis. Cir. Ct. Mar. 1, 2021); Tr., *Colectivo Coffee Roasters, Inc. v. Society Ins. Co.*, No. 2020-CV-002597 (Wis. Cir. Ct. Jan. 29, 2021), ECF No. 71 ("*Colectivo* Tr."); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); *MacMiles, LLC v. Erie Ins. Exch.*, 2021 WL 3079941 (Pa. Ct. C.P. May 25, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Ross Stores, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 3700659 (Cal. Super. Ct. July 13, 2021); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, 2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020); *Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020).

[14] *See, e.g.*, *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2021 WL 4302834 (W.D. Mo. Sept. 21, 2021); *Seifert v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479 (E.D. Pa. May 7, 2021); *Serendipitous, LLC v. The Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021); *In re Society*, 521 F. Supp. 3d 729; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D.

While other decisions have favored insurers, many turn on the specific facts or business circumstances alleged. Others fail to apply the reasonable-interpretation rule and other basic policy interpretation principles—including by rewriting the policy language based on extrinsic case law or arcane legal publications that ordinary people would never consult. Others improperly inject new terms or concepts into the policy, without regard to how a reasonable consumer would understand physical loss or damage. But policyholders should not have to hire lawyers to understand what the word "loss" means. They should not have to guess whether a judge will require a loss to involve something beyond what the policy describes. Plain and ordinary policy terms require no judicial redefinition or clarification.

More troubling, many decisions may be the result of a self-fulfilling feedback loop premised on what appears to be the application of federal common law on business interruption insurance. But no such law exists—state law controls these questions. For example, early yet unremarkable decisions favoring insurers have been cited dozens of times by other federal courts, even though the decisions are not particularly detailed or persuasive and have not been tested by appellate review. *See,*

Va. Dec. 9, 2020); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,* 489 F. Supp. 3d 1297 (M.D. Fla. 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020).

e.g., *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168 (S.D.N.Y. 2020), *appeal dismissed,* No. 21-57 (2d. Cir. Mar. 23, 2021).

Many courts also improperly rely on a treatise that erroneously describes requiring "*physical alteration*" as the "widely held" majority rule, when only one case had adopted this position. *See* Richard P. Lewis et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 Tort, Trial & Ins. Practice L.J. 621, 622 (Fall 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916391. And another well-respected treatise, consistent with the actual majority view, states the reverse: "when an insurance policy refers to *physical loss of or damage* to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present *without there having been a physical alteration of the object*," consistent with the dictionary definition described below. 3 Allan D. Windt, *Insurance Claims and Disputes* § 11:41, Westlaw (6th ed. database updated Mar. 2021) (emphasis added).

Other courts violate the basic rule that facts are not adjudicated on a motion to dismiss. Some of these decisions "merely note that claimants haven't even alleged physical damage using the words 'physical.' Others go further. The virus damages lungs not property, they say. But can this merely be asserted to become true? … Pointing to scientifically unsupported conclusions from other courts isn't enough." Mem. of Dec. on Mot. at 5, 6, *New Castle Hotels, LLC v. Zurich Am. Ins. Co.*, No.

CV-21-6142969-S (Conn. Super. Ct. Sept. 7, 2021), Entry No. 116.00; Reconsideration Order at 3, *JDS Constr. Grp.*, No. 2020 CH 5678 (rejecting argument that the allegations in the complaint were immaterial because "a virus like SARS-CoV-2 can *never* trigger coverage since it can just be wiped off," and explaining that it is "[h]ard to imagine that emerging 'facts' about a *novel* coronavirus would satisfy [the standard for judicial notice]" where "[t]here is far from universal agreement" about the science of the virus).

"Judges are not sheep," one judge recently explained in rejecting insurers' reliance on cases decided by other courts based on other allegations, and they "do not decide a case by counting noses." Reconsideration Order at 4, *JDS Constr. Grp.*, No. 2020 CH 5678. Rather than tally decisions by other courts or follow their faulty reasoning, this Court must focus on a complaint's allegations, liberally construed in Consolidated's favor, and determine whether those specific allegations satisfy the applicable standard. *See id.* at 3-4; *Seifert v. IMT Ins. Co.*, 2021 WL 2228158, at *3-4 (D. Minn. June 2, 2021) (denying motion to dismiss amended complaint alleging executive orders caused physical loss, after granting motion to dismiss initial complaint).[15]

[15] The federal appellate decisions to date are not to the contrary, as they focus on the specific allegations at issue and are necessarily limited to those allegations. *See, e.g*, *Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 2 F.4th 1141, 1145 & n.2 (8th Cir. 2021); *Gilreath Fam. & Cosm. Dentistry, Inc. v. The Cincinnati Ins. Co.*, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021); *Santo's Italian Café LLC v. Acuity Ins.*

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts weigh in. That has been true in insurance coverage cases involving the interpretation of industry-standard policy language. For example, "the meaning of the standard pollution exclusion clause's exception for discharges that are 'sudden and accidental' … precipitated 'a legal war ... in state and federal courts from Maine to California.'" *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as "at least suggesting that the term 'sudden' is susceptible of more than one reasonable definition." *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196 (3d Cir. 1991). Many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations.

This Court faces a similar task in interpreting the meaning of the policy here. Based on the undisputed policy-interpretation principles that govern—including that undefined terms are construed as an ordinary consumer would understand them, and that the policyholder need only offer a reasonable interpretation supporting coverage—this Court is on solid ground in joining other courts that have concluded that Consolidated's allegations meet the industry-standard physical loss or damage

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Co., 2021 WL 4304607, *3-4 (6th Cir. Sept. 22, 2021). *See also K.C. Hopps*, 2021 WL 4302834, at *6-8 (distinguishing *Oral Surgeons* and finding "'physical loss' or 'physical damage' under the Policy not only includes actual, tangible physical alteration of the property, but also includes physical contamination which renders the property unsafe").

requirement, that no policy exclusions apply, and that the judgment below should be reversed.[16]

III. Policy Language, Interpretation Principles, And Precedent Support Finding COVID-19 And Executive Orders Caused Physical Loss Or Damage.

Consolidated alleges that it suffered "direct physical loss or damage to property stemming from the COVID-19 pandemic," including the forced closure of its restaurants due to a series of executive orders issued starting in March 2020. *See* Dkt. 1 ¶¶1-3, 29-38. Westport, like other insurers, has insisted that the virus and orders that impaired policyholders' property have not caused physical "loss or damage." But that position is inconsistent with the policy's language, foundational policy-interpretation principles, and both recent and historical precedent.

A. Policy Language And Policy-Interpretation Principles Support Reversal.

Under New York law, insurance policies are "construed liberally in favor of the insured and strictly against the insurer." *Matter of Liberty Mut. Fire Ins. Co. (Malatino)*, 75 A.D.3d 967, 968 (3d Dep't 2010). "New York follows the maxim of *contra proferentem* in insurance cases: where the plain language of a policy permits more than one reasonable reading, a court must adopt the reading upholding

[16] *See Colectivo* Tr. at 38-39 ("I think the fact that there are so many different cases that each party has been able to find simply demonstrates that … the issues around the nature of the policy language here and the particular facts present here are such that the case is not amenable to decision on a motion to dismiss.").

coverage." *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 732 (2d Cir. 2012). "[W]hen an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." *MDW*, 4 A.D.3d at 340. "Such exclusions or exceptions … must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Id.*

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." *White*, 9 N.Y.3d at 267. A phrase's "plain and ordinary meaning" is determined by "'common speech' and 'the reasonable expectation and purpose of the ordinary businessman.'" *MDW*, 4 A.D.3d at 340. It is "common practice" for New York courts "to refer to the dictionary to determine the plain and ordinary meaning of words to a contract." *Mazzola v. Cnty. of Suffolk*, 143 A.D.2d 734, 735 (2d Dep't 1988).

Here, the plain language of the policy supports finding coverage for the loss or damage caused by the virus and executive orders that physically impaired Consolidated's insured properties. Westport agreed to pay for "all risks of direct physical loss or damage to insured property." Dkt. 1 ¶ 43. The disjunctive "or" in that phrase means that "loss" must cover something different from "damage." *See Certain Underwriters at Lloyd's London v. Advance Transit Co.*, 188 A.D.3d 523, 523-24 (1st Dep't 2020). As many courts have recently held, to read the policy

otherwise would improperly collapse the meaning of "loss" into the meaning of "damage."[17]

Had Westport wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do so explicitly, "in clear and unmistakable language." *MDW*, 4 A.D.3d at 340. But Westport chose not to despite knowing these terms can reasonably be construed (and indeed have been construed by many courts) more broadly than the narrow reading Westport favors. Each of those terms must therefore be given its plain and ordinary meaning consistent with the expectations of a reasonable consumer and construed in favor of coverage.

Merriam-Webster defines physical as "of or relating to material things" and "perceptible especially through the senses."[18] Loss is defined as "the act of losing possession," "deprivation," and the "failure to … utilize."[19] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world.

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[17] *See, e.g.*, *Cherokee Nation*, 2021 WL 506271, at *6-7; *North State Deli*, 2020 WL 6281507, at *3; *Seifert*, 2021 WL 2228158, at *3; *In re Society*, 521 F. Supp. 3d at 741-43; *Urogynecology Specialist,* 489 F. Supp. 3d at 1301-03; *Serendipitous, LLC*, 2021 WL 1816960, at *4-6; *Susan Spath Hegedus, Inc.*, 2021 WL 1837479, at *8-9.

[18] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed Nov. 11, 2021).

[19] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed Nov. 11, 2021).

For many restaurants, that was exactly what happened when the virus caused the imposition of real, detrimental, physical alterations to their spaces and executive orders barred access to the properties—banning or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The virus and executive orders "deprived" Consolidated and other restaurants of property in a way that is perceptible through the senses because they no longer possessed the same rights to their property and large swaths of their property were rendered non-functional.

Ordinary policyholders would understand that interposing physical barriers within a restaurant, blocking off physical space, and detrimentally changing property in other physical ways constitutes physical alterations and impairs how a restaurant's physical space functions. Likewise, ordinary policyholders would understand that property suffers loss or damage when its physical space becomes non-functional because a dangerous substance is present. Therefore restaurants have suffered physical "loss or damage" as a result of COVID-19 and executive orders.

The plain language of Consolidated's policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder's expectations—dictates that Consolidated has sufficiently alleged as a matter of fact that the COVID-19 and executive orders have caused "physical loss" by dispossessing it of its properties and rendering those properties non-functional.

Consolidated should be able to test whether it can offer sufficient evidentiary support to obtain a jury verdict in its favor.

B. Recent And Longstanding Precedent Supports Reversal.

In reversing the judgment below, this Court will be squarely within the mainstream of recent coverage decisions that have found restaurants and other businesses adequately alleged that they suffered physical "loss of or damage" to property as a result of state and local executive orders or COVID-19.

For instance, in *North State Deli LLC v. The Cincinnati Insurance Company*, the court granted summary judgment in favor of the policyholders, where government shutdown orders deprived the restaurant owners of their ability to continue to operate their property as intended. 2020 WL 6281507, at *4 (N.C. Oct. 9, 2020). The state court based its holding on the meaning of "physical loss," explaining that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *Id.* at *3. In *Colectivo Coffee Roasters, Inc. v. Society Insurance Company*, the court denied a motion to dismiss, finding allegations of losing a dining room due to executive orders constituted direct physical loss and were sufficient to state a claim for coverage. No. 2020-CV-002597 (Wis. Cir. Ct. Jan. 29, 2021), ECF No. 71 at 35-36, 43-45.

Similarly, in *In re Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, 521 F. Supp. 3d 729, 741-42, 746 (N.D. Ill. 2021), the court denied the insurer's motion to dismiss the insureds' business interruption claims because a reasonable jury could find that "on-site service restrictions" imposed by the shutdown orders "impose a physical limit: the restaurants are limited from using much of their physical space." *Id*. The fact that restaurants could physically alter their property to mitigate losses and restore lost function evidences that they have suffered *physical* loss or damage as a result of the virus and executive orders. *Id.*; *see also, e.g*., *Cherokee Nation v. Lexington Ins. Co*., 2021 WL 506271, at *2, *4 (Okl. Dist. Ct. Jan. 28, 2021) (granting summary judgment for policyholder and finding direct physical loss or damage where insured "repaired its covered property by implementing various mitigation protocols and modifications, such as installing acrylic barriers and sanitation stations, staggering seating and gaming machines, replacing air filters").[20]

[20] *See also Derek Scott Williams PLLC*, 2021 WL 767617, at *1, *3-4 (finding "physical loss" may include "a deprivation of the use of … business premises"); *Elegant Massage*, 506 F. Supp. 3d at 375 (holding that if the insurer "wanted to limit liability of 'direct physical loss' to strictly require structural damage to property, then Defendants, as the drafters of the policy, were required to do so explicitly"); *Seifert*, 2021 WL 2228158, at *4-5 (concluding "a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it").

Numerous other courts have ruled against insurers for the same reasons. *See, e.g.*, *supra* notes 13, 14.

Those decisions are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left "standing on the edge of and partially overhanging a newly formed 30-foot cliff" resulting from a landslide. *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 243 (Cal. Ct. App. 1962). The insurer argued the policy only insured the house itself, which had not been damaged. *Id.* at 245-49. The court rejected that argument, reasoning that it would "render the policy illusory" because the insurer's position was that "so long as its paint remains intact and its walls still adhere to one another," even if the property "might be rendered completely useless to its owners," no "loss or damage had occurred unless some tangible injury to the physical structure itself could be detected."

Similarly, in *Murray v. State Farm Fire & Casualty Company*, large boulders had fallen onto two homes, leaving two other plaintiffs' homes at risk of further rockfalls. 203 W.Va. 477, 481, 493-93 (1998). The West Virginia Supreme Court found coverage owed, reasoning that the insured properties "were homes, buildings normally thought of as a safe place in which to dwell or live" and until the risk of rockfalls abates, "plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.* The court thus held

that "direct physical loss[es]" 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.*[21]

Consolidated has alleged its insured properties suffered "direct physical loss" and have been rendered materially non-functional as a result of the actual and threatened presence of the virus and executive orders. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it cannot operate the physical space of its insured property, in whole or in part, and can no longer serve customers on premises as intended.

This Court should reverse and emphasize how courts must evaluate the sufficiency of such allegations of physical loss or damage caused by COVID-19 and executive orders that imposed material, detrimental, physical alterations to a plaintiff's property. The proper approach requires courts to: (1) liberally construe plaintiff's allegations and make all inferences in plaintiff's favor, and

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[21] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage where properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property became "uninhabitable and unusable for its intended purpose"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss" when "a building's function may be seriously impaired or destroyed").

(2) properly apply New York policy-interpretation principles—including by giving undefined terms the plain meaning an ordinary consumer would give the terms, and accepting any reasonable interpretation favoring coverage. Applying those well-established standards here, where the insured properties are fully functional restaurants with physical spaces purposefully designed to operate as expected at the outset of the policy period, this Court should conclude that Consolidated has stated a claim by alleging COVID-19 caused physical loss or damage to property.

CONCLUSION

The judgment below should be reversed.

November 12, 2021

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Gabriel K. Gillett

CERTIFICATE OF SERVICE

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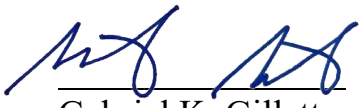

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