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To be Argued by:
AIDAN M. MCCORMACK
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New York Supreme Court

Appellate Division—First Department

Appellate Case Nos.: 2021-02971 2021-04034

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

Defendant-Respondent Westport Insurance Corporation ("Westport") respectfully requests that this Court affirm the Supreme Court's The Honorable Justice Jennifer G. Schecter's Decision and Order dated August 4, 2021, which granted Westport's motion to dismiss Plaintiff-Appellant Consolidated Restaurant Operations, Inc.'s ("CRO") complaint pursuant to CPLR 3211(a).

While COVID-19 has affected all of us, these challenging times do not require re-writing the insurance contract entered into by the parties. Like 50 other New York Courts have done, the Supreme Court correctly granted Westport's motion to dismiss because economic losses due to business restrictions designed to stop the spread of a virus that makes humans sick do not constitute "direct physical loss or damage" to insured property within the meaning of a property insurance contract. Those cases are in perfect and uniform alignment with New York precedent, this Court's often-cited decision in *Roundabout Theatre*, and 12 appellate rulings across the country, holding there is no property insurance coverage for COVID-19 losses.

CRO does not cite a single New York decision holding that COVID-19 causes direct, physical loss or damage to property. Rather, it cites to just two non-COVID-New York cases and argues that this Court should follow a razor-thin minority view by a few foreign, trial courts. Fifty New York courts and 12 appellate courts already have unanimously rejected that argument. While CRO portrays the Insurance

Contract as an "all loss" insurance contract, it is not. Its plain language requires CRO to demonstrate that CRO's loss was caused by "direct physical loss or damage to insured property." R-84. CRO cannot do so.

Moreover, while the Court need not even reach the issue, four exclusions apply to bar coverage in any event: C.5 for any loss due to "pathogen or pathogenic organism, disease-causing or illness-causing agent, … virus" applies; B.6 for "mold, mildew, fungus, spores or nature, or description, including but not limited to any substances whose presence poses an actual or potential threat to human health" applies; B.1 for "indirect or remote loss or damage" applies; and D.1 loss "for any reason other than physical loss or damage" applies.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court correctly held that CRO failed to plausibly allege "direct physical loss or damage to insured property."

Westport answers the question in the affirmative.

2. Whether the Supreme Court correctly denied CRO's motion for leave to reargue.

Westport answers the question in the affirmative.

3. Whether the Supreme Court correctly denied CRO's motion for leave to amend its Complaint.

Westport answers the question in the affirmative.

4. Whether in any event four exclusions apply to bar coverage.

Westport answers the question in the affirmative.

COUNTER-STATEMENT OF FACTS

CRO's Factual Background and Procedural History contains inaccuracies.

CRO incorrectly states that the Insurance Contract covers "all risks unless specifically excluded." Pls. Br. at 11. The Insurance Contract in fact requires that CRO show its loss is due to "direct physical loss or damage to insured property." R-84. CRO asserts that "CRO paid for a policy from Westport that does not include this exclusion," referring a certain type of virus exclusion. Pls. Br. at 12. CRO offers no record cite for this claim and it should be ignored.

CRO fills its "Procedural History" section with unsupported claims and argument. CRO claims that the Supreme Court did not accept CRO's "allegations as true" and did not "construe[] all reasonable inferences in CRO's favor." Pls. Br. at 15. CRO offers no record cite for this claim. In fact, the transcript shows that Justice Schecter studied the papers and carefully considered all arguments. R-40 at 34:15-21. CRO asserts that the trial court's view of CRO's allegations "are inconsistent with prevailing science." *Id.* CRO does not set forth the "prevailing science" it refers to and offers no record cite for this allegation. Thus, these claims should not be considered.

ARGUMENT

I. The Trial Court Correctly Granted The Motion To Dismiss The Complaint Because CRO Has Not Plausibly Alleged Coverage For The Claimed Losses Under The Insurance Contract

A. Interpretation Of An Insurance Contract Under New York Law

It is undisputed that New York law applies since the Insurance Contract contains a New York choice of law provision. R-139. Under New York law, interpretation of an insurance contract is subject to the general principles of contract interpretation. *Univ. Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 25 N.Y.3d 675, 680, 16 N.Y.S.3d 21 (2015). The "provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." *Id.* Further, of course, it is the insured – here CRO – that bears the burden to prove that the insurance contract covers the loss. *See Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 6 (1st Dep't 2002). "Labeling the policy as 'all risk' does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy." *Id.*

"Where the provisions of a policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. Courts may not make or vary the contract of insurance to accomplish their notions of abstract justice or moral obligation." *Id.* (citations omitted). "An insurance policy should not be read so that some provisions are rendered meaningless." *Id.* at 8.

Where the “intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract.” *Dreisinger v. Teglasi*, 130 A.D.3d 524, 527 (1st Dep’t 2015) (citing *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 460, 161 N.Y.S.2d 90 (1957)). Even where the parties have a dispute over the meaning of the words in a contract, that does not create an ambiguity. It is for the court to decide as a matter of law what is the reasonable interpretation. *Id.* (citing *Ashwood Capital, Inc. v. OTG Mgt., Inc.*, 99 A.D.3d 1, 7-8, 948 N.Y.S.2d 292 (1st Dept. 2012)).

Moreover, where, as here, the insured is a sophisticated business enterprise represented by a world-class broker, Lockton, traditional rules of policy interpretation do not apply. Instead, New York courts interpret the contract from “‘the understanding of a person engaged in the insured’s course of business.’” *See Moshiko, Inc. v. Seiger & Smith, Inc.*, 137 A.D.2d 170 (1st Dep’t 1988), *aff’d*, 72 N.Y.2d 945 (1988).

B. The Actual Presence Of A Virus At A Location Does Not Constitute “Direct Physical Loss Or Damage To Property” Under New York Law.

Under New York law, the presence of a hazardous substance alone is not “direct physical loss or damage to property.” New York authority is clear that the phrase “direct physical loss or damage” in a first-party property insurance contract

means there must be actual, tangible physical loss or damage to insured property for coverage to be triggered.

Even before the current pandemic, courts in New York held that a first-party property insurance contract using language such as “direct physical loss or damage” (like that at issue here) requires actual, tangible physical loss or damage to property to trigger coverage. The oft-cited decision from this Court in *Roundabout Theatre* is instructive and directly on point.

CRO’s position that there is coverage for loss of use is contrary to a long history of New York law. At the Supreme Court, CRO repeatedly claimed that the “appellate courts in New York have said” that there is insurance coverage for “loss of use” as a “result of the presence of a hazardous substance on your property that causes you not to be able to use the property for its intended use.” R-19-20 at 13:25-14:4. CRO never cites to any such New York appellate authority. That is because none exists. On appeal CRO again relies entirely on decisions outside of New York, ignoring binding New York law on point.

In fact, no New York appellate court has ever held that the presence of a hazardous substance alone causing a loss of use is “direct physical loss or damage” to insured property. Rather, New York courts have held the opposite: that there is no coverage when there is a loss of use of property untethered to any “direct physical loss or damage” to such property. The Supreme Court properly examined the issue

under existing New York law and concluded that CRO's Complaint did not plausibly allege that the SARS-CoV-2 virus causes "direct physical loss or damage" to property. As a result, the Decision & Order should be affirmed.

CRO also argues instead that this Court should look to decisions outside of New York and adopt a new rule of law. But CRO concedes that New York substantive law applies here and there is more than ample New York law on point as discussed in Section B.1 and B.2 below.

What is more, as discussed in Section B.7 below, those foreign decisions addressed circumstances where a foreign substance physically impaired or damaged property and required extensive remediation. In each of those non-New York decisions, courts held that there was potential for coverage due to the presence of a foreign substance only when a physical structure was rendered "useless or uninhabitable," or its function was "nearly eliminated or destroyed." CRO cannot even meet this hurdle, as it does not allege its restaurants were "uninhabitable" or their function totally "destroyed." Indeed, CRO alleges that its restaurants were still used for takeout, drive thru, and delivery. R-59, ¶ 31.

In addition, CRO wrongly complains that the Supreme Court erred because it did not receive or consider any scientific evidence. This is contrary to the standard in New York. The interpretation of an insurance contract is a question of law. Undefined terms are given their plain and common speech meaning and must be

interpreted with the reasonable expectation of the (here sophisticated) insured in mind. Pls. Br. at 18. CRO's argument that we need complex scientific evidence to understand whether SARS-CoV-2 causes "direct physical loss or damage" goes against those bedrock principles of New York law.

1. Under New York Law, The Presence Of A Hazardous Substance Alone Does Not Constitute "Direct Physical Loss or Damage" To Property.

The Insurance Contract's insuring agreement provides as follows:

> **A. Insuring Agreement**
>
> 1. … this POLICY … insures all risks of direct physical loss or damage to INSURED PROPERTY while on INSURED LOCATION(S) ….

R-84.

The Time Element section of the Insurance Contract provides coverage as follows:

> **A. Loss Insured**
>
> 1. This POLICY insures TIME ELEMENT loss, during the **Period of Liability** directly resulting from direct physical loss or damage insured by this POLICY to INSURED PROPERTY at INSURED LOCATION(S) ….

R-113 (emphasis in original).

Thus, from the plain, ordinary words, CRO must show direct physical loss or damage to insured property. New York authority is clear that the phrase "direct physical loss or damage" in a first-party property insurance contract means there

must be actual, tangible physical loss or damage to insured property for coverage to be triggered.

Even before the current pandemic, courts in New York held that a first-party property insurance contract using language such as "direct physical loss or damage" (like that at issue here) requires actual, tangible physical loss or damage to property to trigger coverage. This Court's decision in *Roundabout Theatre* confirms that interpretation.

There, an elevator collapsed near the insured's premises. New York City's Office of Emergency Management issued a directive that closed 43rd Street between Broadway and 6th Avenue for 37 days. *Roundabout Theatre*, 302 A.D.2d at 3. As a result of the government order, the theater was inaccessible to the public, causing the cancellation of 35 performances. The collapsed elevator did not fall on or otherwise physically damage the theatre. Some minor roof damage was quickly repaired. The policy required "direct physical loss or damage" to the insured's property. *Id.*

This Court held that the financial losses to the theater were not covered: "[T]he only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property." *Id.* at 7.

Critically, the Court rejected the argument that "loss of" must include "loss of use." *Id.* First, the Court reasoned that "loss of" could refer to theft or misplacement

of property that is neither damaged nor destroyed. *Id.* "More importantly," however, this Court concluded that the requirement for "direct physical loss or damage" to property "narrows the scope of coverage and mandates the conclusion that losses resulting from off-site property damage do not constitute covered perils under the Policy." *Id.*

As a result, *Roundabout* is plainly applicable here. This Court concluded that "loss of" did not include "loss of use" and that the provision "direct physical loss or damage" results in only one conclusion: "the business interruption coverage is limited to losses involving physical damage to the insured's property." *Id.*

CRO asserts that 50 New York State and Federal jurists have gotten *Roundabout* wrong, and that it is inapplicable here. Not so. CRO ignores the decision's central holding that the phrase "direct physical loss or damage" requires some form of "physical damage to the insured's property." *Id.* at 7. This Court also held that "loss of use" untethered from "physical damage" to the insured's property – or physical loss of property like theft or misplacement – is not covered. *Id.*

CRO's claim that its property was rendered unusable for its intended function is simply another way of saying "loss of use." It is a distinction without a difference. It does not change the fact that CRO seeks coverage for the temporary and partial loss of use of its property not connected to any "direct" and "physical" loss or damage to its property. CRO's loss is not because of any internal, physical impact

to its property. Instead, it flows from external sources. Even CRO admits this when it alleges in its Complaint that the government "Orders have devastated CRO's business," and "these Orders … effectively limited the Restaurants' on-premises dining and operations, resulting in an interruption of necessary operations and an immediate time element loss." R-52, 59 ¶¶ 4, 31. CRO's loss was not from the SARS-CoV-2 virus causing "direct physical loss or damage" to, for example, its tables and chairs requiring them to be repaired or replaced.

This result is further supported by this Court's decision in *Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.*, 6 A.D.3d 300 (1st Dep't 2004). There, a laboratory was ordered to shut down after a discharge of noxious fumes caused tenants in the building to become ill. *Id.* at 301. The Court held that there was no coverage because there was no "direct physical loss to property," such as a break in a pipe. *Id.*

The Court held that the real losses were due to a refusal by the authorities to permit resumption of operations until proper permits were obtained, and a more acceptable ventilation system was installed. *Id.* The Court determined that the "purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against." *Id.* The Court concluded that the presence of noxious fumes in the building and the later government orders

restricting occupancy of the building until after the ventilation system was upgraded were not "covered loss … within the meaning of the policy." *Id.*

The same result is required here. There has been no "direct physical loss or damage" to property. CRO's real loss – as it has alleged in its Complaint – is from the government orders directing people to stay home and limiting in-person dining to keep humans safe. There has been no "direct physical loss or damage" to any of CRO's property; e.g., the walls, the tables, the chairs, the floor, etc. CRO's property has not required any repair or replacement.

CRO is wrong that *Cytopath* does not apply. It is telling that CRO relegates the decision to a footnote. Just like in this case, the property at issue in *Cytopath* was not rendered unusable by the fumes. Rather, the real loss was from a government order refusing to allow operations until an acceptable ventilation system was installed. Pls. Br. at 31 n. 11. The release of the noxious fumes, however, caused tenants to become ill and triggered the government order.

Moreover, even if CRO's proposed interpretation of *Cytopath* is credited, CRO's claim still fails. CRO's focus on the amount of time the property was restricted misses the mark. It is not about how long a property is closed, but *why* the property is closed. In addition, CRO admits that its properties were not rendered unusable and alleges that they were available for drive-thru, takeout, or delivery. R-59, ¶ 31. CRO's loss is directly analogous to the loss denied in *Cytopath*. There was

the presence of a foreign substance, and a resulting loss due to a government order restricting access to the property. As this Court held, "there was no covered loss here," which required "direct physical loss to property." *Cytopath*, 6 A.D.3d at 301. Same too here with CRO.

CRO's claims that "direct physical loss or damage to property" as defined can be reasonably interpreted to include the loss of use of property is contrary to New York law. CRO's efforts to redefine the terms "direct physical loss or damage to property" from the definition clearly established by New York law are unavailing. *See Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003) ("the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.").

The Supreme Court held that such allegations did not plausibly allege "direct physical loss or damage:"

> THE COURT: So isn't that the problem, though, that it's patrons who were bringing in the virus which is communicable through the air, as opposed to property that remains on the location?
>
> If the property was unexposed to people, would it be a loss or damage that would cause losses here? If just the objects were in the restaurant without people, how would that work?

R-16 at 10:3-25.

Under CRO's implausible assertions, coverage under the Insurance Contract would be triggered when, for example, (1) a city changes its maximum occupancy codes for restaurants, meaning that CRO could no longer seat as many customers as it used to, (2) a city amends an ordinance requiring restaurants to cease operations by 4:00 a.m. to now end at 2:00 a.m., or (3) if a party comes to the restaurant and physically moves two tables together for a larger party. These scenarios do not constitute "direct physical loss or damage" to property under New York law, yet that is the result CRO seeks. It is an unreasonable interpretation of the Insurance Contract.

Further, pre-pandemic New York federal courts applying New York law have reached the same conclusions. For example, in *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), the insured sought coverage for loss of business income as a result of its inability to access its office during a power outage caused by a storm. Like the struggles facing businesses in this pandemic, the insured was not able to access its office space when the power utility cut power to the building. The policy there required "direct physical loss or damage." *Id.* at 328-29.

The insured conceded that its office "did not sustain any structural damage as a result of" the storm. *Id.* at 329. Also, the insured argued that all that was required was "an initial satisfactory state" at the insured property "that was changed by some

external event into an unsatisfactory state." *Id.* The court rejected that argument, concluding that the phrase "direct physical loss or damage" in the insurance contract "require[d] some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage." *Id.* at 331.

These New York decisions are also consistent with a prominent insurance treatise's observation that "the requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." 10A Couch on Insurance §148:46 (3d ed. June 2020).

The same result is required here. Not only because judicial precedent calls for it, but also because consistent interpretation of the same contractual requirement is a cornerstone of commercial relationships under New York law such as that at issue here. In order to prevent the spread of SARS-CoV-2 that is responsible for COVID-19 and injury to *humans*, governments issued orders suspending or at least curtailing operations at businesses and interaction of individuals generally, and in addition individuals were, understandably, concerned about being in contact with others. That caused CRO's financial losses. Not "direct physical loss or damage" to insured property.

The law in New York is clear. Courts have repeatedly required demonstrable, physical loss or damage *to the insured property* in order to trigger coverage. Government orders limiting or restricting use *to prevent bodily injury to humans* are plainly insufficient as a matter of New York law. S*ee, e.g.*, *Satispie, LLC v. Travelers Prop. & Cas. Co. of Am.*, No. 17-cv-06234, 2020 WL 1445874 (W.D.N.Y. Mar. 25, 2020) ("Under New York law, the phrase 'risks of direct physical loss' has been interpreted to mean 'some form of actual, physical damage' to the insured property.") (citation omitted); *United Airlines Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier "'physical' before 'damages'… supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Ins. Co.*, 385 F. Supp 2d 280, 287-288 (S.D.N.Y. 2005) (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property … which must be caused by a 'covered cause of loss.'").

Government Orders prevented individuals from coming in contact with each other and if CRO chose to move tables apart or offer takeout (as so many restaurants did) it was a business operations decision to operate in that manner, not "direct physical loss or damage" to insured property. Indeed, CRO does not allege that its restaurants were uninhabitable. In fact, CRO was allowed to continue operating its

business. The restaurants were still useable for employees to cook, prepare, and deliver meals. Many businesses during the pandemic, deemed "essential businesses," could stay open and operate. Hospitals, restaurants, grocery stores, doctors' offices, gas stations, pharmacies, convenience stores, and funeral homes are just some of the businesses that continued to operate, as allowed by the various state and federal COVID-19 restrictions. Limitations were put in place, not because of direct physical loss or damage to property caused by SARS-CoV-2, but simply to enforce social distancing requirements in order to slow the spread of COVID-19 and thereby prevent harm to humans.

This precise issue was addressed in *Social Life Magazine Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-cv-3311, 2020 WL 2904834 (S.D.N.Y. May 14, 2020). The court, applying New York law, rejected the argument that the SARS-CoV-2 virus causes direct physical loss or damage. There, like CRO here, the insured sought coverage for lost business income when it was forced to shut down due to the COVID-19 pandemic. The insured argued that the virus itself physically damaged its property. The policy at issue insured "direct physical loss of or physical damage to Covered Property at the premises." The insured moved for a Temporary Restraining Order. The insurer in response relied on the New York cases supporting the conclusion that the presence or suspected presence of a virus does not qualify as physical loss or damage. *Id.* at *5-6.

At a hearing, the Court rejected the insured's arguments, explaining that "what has caused the damage is that the governor has said you need to stay home. It is not that there is any particular damage to your specific property." *Id.* at 4. When the Court questioned counsel for the insured to identify the alleged damage, counsel responded that "the virus exists everywhere." *Id.* at 5. The Court rebuffed that argument, stating: "[i]t damages lungs. It doesn't damage printing presses." *Id.* Counsel for the insured further argued that if the virus "lands on something and you touch it, you could die from it." *Id.* at 6. Again, the Court rejected that argument: "[t]hat damages you. It doesn't damage the property." *Id.* The court held that "New York law is clear that this kind of business interruption needs some damage to the property" in order for there to be coverage and denied the insured's motion. *Id.* at 7.

CRO argues on appeal that the presence of the SARS-CoV-2 virus on insured property altered the property and impaired the restaurants' functionality and rendered them unusable for their intended purpose. Pls. Br. at 1. But that is not what CRO alleges in its Complaint. R-59, 68-69, ¶¶ 31 ("These Orders … effectively limited the Restaurants' on-premises dining and operations"), 63 ("no Restaurants had access limited or prohibited due to an order by a governmental agency … due to the actual not suspected presence of the virus."). CRO's claim in its brief is not plausible. Scientific or expert evidence is not required to come to this conclusion. CRO itself confirms that the impairment of functionality – indoor dinning – was

caused by government order, not by the virus. How can the presence of the virus impair the functionality of the dining room but not impair the functionality of the kitchen? It is because the cause of CRO's loss is the government orders, not the alleged presence of the SARS-CoV-2 virus.

2. Consistent With That New York Authority, 50 New York Courts Have Unanimously Held COVID-19 Losses Are Not Due To Direct Physical Loss Or Damage To Insured Property.

As Justice Barry R. Ostrager recently explained:

> It is now well settled that COVID-related business interruption claims do not trigger coverage under policies like the Zurich Policy at issue in this case unless the loss was caused by "direct physical loss of or damage to property." The cases so holding are so numerous it is unnecessary to cite them. The imposition of COVID-19 restrictions on a business simply does not constitute direct physical loss or damage to the property covered under the terms of the Business Income Coverage Form of the Policy, ….

VMSB, LLC v. Zurich American Ins. Co, No. 650590/2021, 2021 WL 5359032, at *1 (Sup. Ct. N.Y. Cty. Nov. 10, 2021). CRO does not allege that any building component, furniture or other piece of property required repair or replacement when the SARS-CoV-2 virus was present on a surface. They are simply cleaned. Many businesses continued to operate despite the potential or known presence of the SARS-CoV-2 virus in their premises.

New York courts are unanimous on this issue. The "business interruption insurance coverage exists only for damage caused by "direct physical loss, damage

or destruction. Here there wasn't any. Covid-19 … simply does not constitute anything covered by the policies." *Raymours Furniture Co., Inc. v. Lexington Ins. Co.*, No. 655167/2020, 2021 WL 4789148, at *1 (N.Y. Sup. Ct. Oct. 14, 2021) (citing *Roundabout Theatre*; *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575 (1st Dep't 2021), *rev'g* No. 652732/2020, 2020 WL 6435136 (Sup. Ct. N.Y. Cty. Oct. 30, 2020) (plaintiff not entitled to rent abatement under lease because pandemic and resulting government lockdowns are not "incidents causing physical damage to the premises.")).

Justice Borrok confirmed that the economic loss "wasn't from Covid-19, rather it was caused by governmental shutdown orders which temporarily restricted non-essential business operations. For the avoidance of doubt, [the insured] opened its stores as soon as governmental restrictions lifted and there was no change, at the time, in the effects of any Covid-19 particles." *Id.* at *2.

Justice Hudson further explained that New York law limits "direct physical loss or damage" to "physical property damage, and New York law requires some form of actual, physical damage to the insured premises if the claimant seeks to recover loss of business income and extra expenses." *Sportime Clubs, LLC v. American Home Assurance*, No. 614493/2020, 2021 N.Y. Slip Op. 32019(U), *7 (Sup. Ct., Suffolk Cty. June 30, 2021). The Court held that it "concurs with our colleagues persuasive authority and concludes that '… tangible, physical damage is

needed to trigger coverage and COVID-19 related government restrictions on business activity do not amount to such damage.'" *Id.* at *9 (citing *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, 71 Misc.3d 493, 142 N.Y.S.3d 724 (Sup. Ct. Nassau Cty. Feb. 8, 2021)). The Court concluded that "viral particles on building structures do not constitute property damage within the meaning of Insurance policies similar to the contract under review herein." *Id.*

Judge Matsumoto, Eastern District of New York, persuasively explained that, although the "virus has the potential to cause significant harm to people, the court is not aware of any scenario in which its presence can cause 'physical damage' to property such as a building, or other inanimate objects." *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest*, No. 20-cv-2777, 2021 WL 1091711, at *4 (E.D.N.Y. Mar. 22, 2021).

Judge Rakoff, Southern District of New York, came to the same conclusion. In *Northwell Health, Inc. v. Lexington Ins. Co.*, No. 21-cv-1104, 2021 WL 3139991 (S.D.N.Y. July 26, 2021), the insured argued that respiratory droplets carrying the coronavirus "'compromise the physical integrity of the structures it permeates' and renders those structures 'unusable.'" *Id.* at *5. The insured also argued that those respiratory droplets were like invisible fumes or noxious gas that non-New York courts have held can constitute a form of physical damage. *Id.* Judge Rakoff rejected that argument.

The Court first held that the insured's interpretation "risks impermissibly collapsing coverage for direct physical loss or damage into 'loss of use' coverage." *Id.* at *6 (citing *Roundabout*). Second, the coronavirus, unlike invisible fumes and chemicals, does not "persist" and "irreversibly alter the physical condition of a property." *Id.* And third, the insured did not plausibly allege that "the presence of COVID-19 made its properties unusable." The Court determined that the insured's properties "continued to operate with 'extra precautions'; their functions were not destroyed, nor were they declared unsafe to enter." *Id.*

Every single New York State and Federal court that has addressed this issue has held that the presence of the SARS-CoV-2 virus does not cause or constitute "direct physical loss or damage to property." This includes at least 14 New York Supreme Court decisions[1] and at least 36 New York federal court decisions.[2]

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[1] The additional state decisions are *JD Cinemas Inc. v. Northfield Ins. Co.*, No. 609919/2020, 2021 WL 2626973 (Suffolk); *Visconti Bus Service, LLC v. Utica National Insurance Group*, No. EF005750-2020, 71 Misc.3d 516 (Orange); *Mangia Restaurant Corp. v. Utica First Insurance Company*, No. 713847/2020, 72 Misc.3d 408 (Queens); *Thill 13014, LLC v. Fingers Lakes Fire & Cas. Co.*, No. 800744/2021, 2021 WL 4027888 (Erie); *Benny's Famous Pizza Plus Inc. v. Sec. Nat'l Ins. Co.*, No. 512131/2020, 72 Misc.3d 1209(A) (Kings); *Harry E. Bassett III v. Wesco Ins. Co.*, No. 512144/2020 (Kings); *Island Gastroenterology Consultants PC v. General Casualty Company of Wisconsin*, No. 604318/2021, 72 Misc.3d 1221(A), 2021 WL 3852967, (Suffolk); *Wellpath Holdings, Inc. v. XL Insurance America, Inc.*, No. 54589/2021, 2021 WL 5165653 (Westchester).

[2] The additional federal decisions are *Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co.*, No. 20-cv-701, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021); *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, No. 20-cv-3418, 2021 WL 860345 (S.D.N.Y. Mar. 6, 2021); *DeMoura v. Cont'l Cas. Co.*, No. 20-cv-2912, 2021 WL 848840 (E.D.N.Y. Mar. 5, 2021); *Tappo of Buffalo, LLC v. Eerie Ins. Co.*, No. 20-cv-754V, 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020); *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, No. 20-cv-4471, 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020); *Michael J. Redenburg, Esq. PC v. Midvale Indemnity Company*, No. 20-cv-5818, 2021 WL

3. The Two New York State Decisions Cited By CRO Are Distinguishable And Do Not Even Involve COVID-19.

Despite citing to 147 decisions in its brief, CRO only points to two decisions from New York in support of its conclusion. Neither is applicable here. The first is the Second Department decision in *Pepsico, Inc. v. Winterthur International American Insurance Co.*, 24 A.D.3d 743 (2d Dep't 2005).

Pepsico is not relevant here because there the soda was permanently destroyed by adding a raw ingredient to the soda that turned out to be faulty. *Id.* at 743. The

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276655 (S.D.N.Y. Jan. 27, 2021); *Sullivan County Fabrication Inc. v. Selective Ins. Co. of Am.*, No. 20-cv-5750 (S.D.N.Y. May 19, 2021); *Deer Mountain Inn LLC v. Union Ins. Co.*, No. 20-cv-0984 (N.D.N.Y. May 24, 2021); *100 Orchard Street LLC v. Travelers Indem. Co. of Am.*, No. 20-cv-08452 (S.D.N.Y. Jun. 8, 2021); *Red Apple Dental, P.C. v. Sentinel Ins. Co. Ltd.*, No. 20-cv-03549 (S.D.N.Y. Jun. 9, 2021); *Office Solution Group, LLC v. National Fire Ins. Co. of Hartford*, No. 20-cv-04736 (S.D.N.Y. Jun. 11, 2021); *Broadway 104, LLC v. XL Ins. Am.*, No. 20-cv-03813 (S.D.N.Y. Jun. 23, 2021); *Salvatore's Italian Gardens, Inc. v. Hartford Fire Ins. Co.*, No. 20-cv-00659, 2021 WL 3162800 (W.D.N.Y. Jul. 7, 2021); *BR Restaurant Corp. v. Nationwide Mutual Ins. Co.*, No. 20-cv-02756, 2021 WL 3878991 (E.D.N.Y. Aug. 24, 2021); *J&S Kid's Wear Inc. v. The Ohio Casualty Ins. Co.*, No. 20-cv-03121 (E.D.N.Y. Aug. 24, 2021); *Slate Hill Daycare Ctr. Inc. v. Republic-Franklin Ins. Co.*, No. 20-cv-03565 (S.D.N.Y. Aug. 30, 2021); *Gammon and Associates Inc. v. National Fire Ins. Co. of Hartford*, No. 20-cv-03882, 2021 WL 3887718 (S.D.N.Y. Aug. 31, 2021); *WM Bang LLC, et al. v. Travelers Cas. Ins. Co.*, Civil Action No. 20-cv-4540, 2021 WL 4150844 (S.D.N.Y. Sept. 13, 2021); *Elite Union Installations, LLC v. Nat'l Fire Ins. Co. of Hartford*, No. 20-cv-3882, 2021 WL 4155016 (S.D.N.Y. Sept. 13, 2021); *Chef's Warehouse Inc. v. Liberty Mutual Insurance Company*, No. 20-cv-4825 (S.D.N.Y. Sept. 15, 2021); *Hudson Valley Bone & Joint Surgeons, LLP v. CNA Financial Corp.*, No. 20-cv-6073 (S.D.N.Y. Sept. 23, 2021); *Poughkeepsie Waterfront Development, LLC v. The Travelers Indemnity Company of America*, No. 20-cv-4890, 2021 WL 4392304 (S.D.N.Y. Sept. 24, 2021); *Abbey Hotel Acquisition, LLC v. National Surety Corp.*, No. 21-cv-03506, 2021 WL 4522950 (S.D.N.Y. Oct. 1, 2021); *Metropolitan Dental Arts P.C. v. Hartford Financial Services Group, Inc.*, No. 20-cv-02443 (E.D.N.Y. Oct. 12, 2021); *Spirit Realty Capital, Inc. v. Westport Insurance Corporation*, No. 21-cv-02261, 2021 WL 4926016 (S.D.N.Y. Oct. 21, 2021); *Torches on the Hudson, LLC v. Sentinel Insurance Company, Ltd.*, No. 20-cv-07855, 2021 WL 5403168 (S.D.N.Y. Nov. 18, 2021); *Abrams Fensterman v. Valley Forge Insurance Co.*, No. 20-cv-2941, 2021 WL 5759703 (E.D.N.Y. Dec. 3, 2021); *Servedio v. Travelers Casualty Insurance Company of America*, No. 20-cv-3907 (S.D.N.Y. Dec. 6, 2021).

Second Department concluded that the soda was "seriously impaired" to the level that it could not be sold. *Id.* at 744. In other words, a complete loss. The mixture of the faulty raw ingredient into the soda was a "physical event … [in] which injury or damage resulted." *Id.*

CRO does not attempt to explain how a total loss of the soft drink, where presumably the faulty raw ingredient could not simply be removed from the soda once mixed in, is analogous to the situation here. CRO did not suffer a total loss of its property. The restaurants were not made completely useless or uninhabitable. The "function and value" of CRO's restaurants were not totally eliminated or destroyed, nor does CRO allege they were. Instead, CRO could continue to use its restaurants for takeout, delivery, or outdoor dining.

The second is the unpublished table decision in *Schlamm Stone & Dolan, LLP. v. Seneca Ins. Co.*, 6 Misc. 3d 1037(A) (Sup. Ct., New York Cty. 2005). *Schlamm* does not help CRO either. As an initial matter, the insurance policy in that case had materially different wording. That was a "Special Business Owners" insurance policy that specifically defined "property damage" to include "physical injury to or destruction of tangible property … including the loss of use thereof at any time" or the "loss of use of tangible property which has not been physically injured or destroyed." *Id.* at *4.

In *Schlamm*, the insured suffered dust and debris in its downtown offices after the terrorist attacks of September 11. *Id.* at *1. Despite cleaning the carpets, airshafts, furniture, and surfaces, the dust and debris problem persisted. *Id.* The insured was also not allowed to return to its office for the first five days after the attacks by order of New York City.

Analyzing coverage for losses incurred in those first five days, Supreme Court concluded there was no coverage because the insured did not show that losses were caused by "damage to its premises," nor was the City's order not a "superseding, intervening cause of its injury." *Id.* at *3. The Supreme Court determined that the insurer made a *prima facie* showing that it was the City's order, and not damage to property, that was the direct cause of the insured's business losses. *Id.* at *2. The Court held that the insured did not "allege facts sufficient to demonstrate that, despite the order, damage to its property was the proximate cause of its loss." *Id.* at *4.

With respect to the claims for loss following the first five days after the attacks, the Court concluded the insurer failed to show the absence of a material issue of fact with respect to whether the insured's property was damaged. The Court determined that there was a potential for coverage under that policy because the presence of "noxious particles" in the carpets and other surfaces "clearly impairs plaintiff's ability to make use of them." *Id.*

Here, in contrast, the Insurance Contract does not provide coverage for "loss of use." Moreover, in *Schlamm*, the persistence of the debris after cleaning rendered it a "permanent, physical alteration of property," in contrast to the transient, ephemeral presence of the SARS-CoV-2 virus. *See Buffalo Xerographix, Inc. v. Sentinel Ins. Co., Ltd.*, No. 20-cv-520, 2021 WL 2471315, at *4 (W.D.N.Y. June 16, 2021) (distinguishing *Schlamm*); *see also Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-3350, 2021 WL 1034259, at *10 (S.D.N.Y. Mar. 18, 2021) (distinguishing *Schlamm* based on persistence of debris, in contrast to SARS-CoV-2 virus, which is eliminated by "routine cleaning and disinfecting"); *Northwell Health, Inc. v. Lexington Ins. Co.*, No. 21-cv-1104, 2021 WL 3139991 at *16-17 (S.D.N.Y. July 26, 2021) (same).

CRO does not cite to any other New York authority in support of its argument that coverage is triggered simply if there is a loss of use of property for its intended function. As a result, the Supreme Court's decision should be affirmed.

4. The Period Of Liability Provision Supports Westport's Interpretation That There Has Been No "Direct Physical Loss Or Damage To Insured Property."

The fact that the Insurance Contract's Time Element coverage only covers loss during the period that insured property is being repaired or replaced further demonstrates that "direct physical loss or damage to" property requires a physical

loss or physical alteration of the property, *i.e.*, something broken or torn is in need of repair or replacement. The "Period of Liability" is:

> a. For building and equipment, the period of time:
>
> I. starting on the date of physical loss or damage insured by this POLICY to INSURED PROPERTY; and
>
> II. ending when with due diligence and dispatch the building and equipment could be repaired or replaced with current materials of like size, kind and quality and made ready for operations; …

R-115.

CRO argues that this Court should interpret "physical loss or damage to property" more broadly. But that would improperly render the "repaired or replaced" requirement mere surplusage, which is impermissible under New York law. *Consol. Edison Co. of New York v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221-22 (2002) ("We construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'") (citation omitted). It would make the effective period of the Time Element illusory because, of course, no repair or replacement is ever going to happen because none is needed or even alleged in the Complaint. The only conduct needed is to wipe or spray property with disinfectant, but that is done to protect humans. Finally, CRO does not even allege that its restaurants were closed in order to be "repaired or replaced" following physical loss or damage.

CRO asserts that the presence of the SARS-CoV-2 virus on property causes a "physical alteration to that property" that necessitates repair or replacement. Pls. Br. at 25-26. CRO claims that it has "repaired" or "replaced" its property by making "alterations" to its restaurants. *Id.* at 26. CRO asserts that "installing barriers and filtration systems, and implement strict cleaning procedures," constitutes repair or replacement of property. Not so.

The claimed alterations do not fall under the plain and ordinary meaning of the words "repair" and "replaced." CRO does not explain, for example, if its tables and chairs were "physically altered" by the presence of the SARS-CoV-2 virus, how the installation of a filtration system has "repaired" or "replaced" those tables or chairs. Moreover, installing a barrier does not "repair" or "replace" the allegedly physically altered countertop.

Indeed, after the installation of a barrier or a filtration system, CRO's restaurants were still subject to the same government orders as before. Nothing changed. The Insurance Contract does not provide coverage for CRO to "transform" its property. Pls. Br. at 27. The Insurance Contract requires that damaged property be repaired or replaced with "current materials of like size, kind and quality." R-115. Thus, the argument that the installation of barriers or filtration systems constitutes "repair" or "replacement" is not reasonable.

CRO only cites to non-New York cases in support of its strained interpretation of the Insurance Contract. New York courts, however, have held the opposite. In *Sharde Harvey*, the Court noted that courts have "consistently found that the words rebuild, repair, and replace 'contemplate physical damage to the insured premises as opposed to lose of use of it.'" 2021 WL 1034259 at *7. *See also Roundabout Theatre*, 302 A.D.2d at 8 (absent a physical damage requirement, a provision limiting coverage to the time necessary to "rebuild, repair, or replace such part of the property" would be "meaningless"); *Newman Myers*, 17 F. Supp. 3d at 332 ("The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it."); *United Airlines*, 385 F.Supp.2d at 349 (policy language limiting coverage "for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports the notion that "physical damage is required before business interruption coverage is paid"); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168, 177 (S.D.N.Y. 2020), *appeal withdrawn*, No. 21-57, 2021 WL 1408305 (2d Cir. Mar. 23, 2021) ("The idea that the premises will be 'repaired, rebuilt or replaced' suggests the occurrence of material harm that then requires a physical fix").

5. The Absence Or Presence Of Insurance Contract Exclusions Does Not Create Coverage And CRO's Argument Otherwise Is Contrary To Well-Established New York Law.

CRO argues that the lack of a virus exclusion in the Insurance Contract supports their position. Pls. Br. at 12, 23, 34-35. CRO again cites to only non-New York decisions. Under well-settled New York law, an insured must first establish that its claim falls within the policy's grant of coverage. Only "[o]nce coverage is established, the insurer bears the burden of proving that an exclusion applies." *Consol. Edison*, 98 N.Y.2d at 220. The Court of Appeals has held that coverage cannot be found based on "negative inferences from the policy's exclusions" because "it is a 'basic principle that exclusion clauses subtract from coverage rather than grant it.'" *Raymond Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 163 (2005) (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979)) (emphasis in original).

In applying New York law, "[t]he absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention to provide coverage." *Com. Union Ins. Co. v. Flagship Marine Servs., Inc.*, 190 F.3d 26, 33 (2d Cir. 1999) (quoting *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996)). For the same reason, CRO's reference to the lack of a specific virus exclusion or the use of a title "Types of Loss or Damage" in the Exclusions section of the Insurance Contract cannot be used to create coverage

where it does not otherwise exist. *Raymond Corp.*, 5 N.Y.3d at 163; *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co.*, 2021 WL 1069038, at *4 (W.D. Ky. Mar. 18, 2021) (rejecting same argument regarding nuclear radiation exclusion because "it is elementary that 'an exclusion cannot grant coverage'").

In recent COVID-19 cases, New York federal and state courts have unanimously concluded that the absence of a virus exclusion cannot create coverage. *Rye Ridge Corp. v. Cincinnati Ins. Co.*, 2021 WL 1600475, at *3 (S.D.N.Y. Apr. 23, 2021) ("Plaintiffs' argument that there is no virus exclusion in the Policies is irrelevant because the Complaint does not meet its initial burden of pleading that the Policies apply."); *6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, 71 Misc. 3d 1086, 1096 (Sup. Ct. Onondaga Cty. Apr. 13, 2021) (finding it unnecessary to reach exclusions because plaintiff's claim did not allege "physical loss or damage").

Contrary to CRO's arguments, New York law has long held that "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide." *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 31 N.Y.3d 131, 137 (2018) (quoting *Greenfield v. Phillies Records, Inc.*, 98 N.Y.2d 562, 569 (2002)).

CRO's non-New York cases do not support its position that the absence of a virus exclusion is relevant here. *See Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) (finding contract provision "clear and unambiguous"); *Last*

Time Beverage Corp. v. F & V Distrib. Co., 98 A.D.3d 947, 951 (2d Dep't 2012) ("matters extrinsic to the agreement may not be considered when the parties' intent can be gleaned from the face of the instrument").

6. Scientific Or Expert Evidence Is Not Needed To Resolve The Motion To Dismiss, And, By CRO's Own Admission, Should Not Be Considered.

CRO wrongly complains that the Supreme Court erred because it did not receive or consider any scientific evidence. This is contrary to the standard in New York and even CRO agrees. Pls. Br. at 18 ("insurance contracts must be interpreted consistently with the reasonable expectation of the average insured.").

Under New York law, the starting point in any dispute over insurance coverage is the language of the policy itself. *See Gilbane Bldg. Co./TDX Constr. Corp.*, 31 N.Y.3d at 137. An insurance contract is subject to standard principles of contract interpretation. *See Universal Am. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 N.Y.3d 675, 680, 16 N.Y.S.3d 21 (2015). Unambiguous provisions of an insurance contract must be given their plain and ordinary meaning. *See White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 267, 848 N.Y.S.2d 603 (2007).

An insurance contract is unambiguous if the language it uses has a "definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565

(2002). The test to determine whether an insurance contract is ambiguous "focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech." *Universal Am. Corp.*, 25 N.Y.3d at 680 (the "provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court."). CRO's claim that Supreme Court needs complex scientific or expert evidence to determine whether SARS-CoV-2 causes "direct physical loss or damage" to property as a matter of law goes against this bedrock principle of New York law.

CRO argues that all allegations in the Complaint must be accepted as true, regardless of their implausibility. Not so. CRO's conclusory claims that the threat of the virus or the loss of function, purpose, and use of the Restaurants equates to "direct physical loss or damage" is too vague, too unsubstantiated, and too implausible to establish, by itself, the necessary conditions for coverage. Indeed, CRO in its Complaint alleges both "the actual presence of virus in their Restaurants," (R-60, ¶ 36), while simultaneously pleading that "the virus might not be actually present at the Restaurants." R-68-69, ¶ 63.

Under the insurance it procured and New York law, it is unreasonable for CRO to claim that there was "direct physical loss or damage to property" caused by the *virus*. This Court should reject the Plaintiff's efforts to characterize non-physical damage as a physical loss and conclude that CRO cannot recover "by attempting to

artfully plead temporary impairment to economically valuable use of property as physical loss or damage." *10E v. Travelers*, at *7. The express requirement of "direct physical loss or damage to property" is not met. Therefore, Plaintiff's claim for coverage must be dismissed with prejudice.

7. Non-New York Cases Cited By CRO Are Inapplicable Here, And In Any Event, Only Support Westport's Position.

CRO cannot point to a single New York decision in its favor and, as a result, relies on a host of inapplicable non-New York decisions. These are mostly trial court decisions, none of which applies New York law. Each and every case involved problems with the insured *property*, requiring some type of repair or replacement of *property*, in contrast to the SARS-CoV-2 virus, which harms *people*, not property.

What is more, CRO merely cites to a string of non-New York decisions without any analysis as to why this Court should depart from long-held New York law. Instead, CRO claims that its position is supported by "decades of case law," but only from non-New York cases. CRO can only say that "other courts" – i.e., outside New York – have denied insurers' motions to dismiss, but again fails to address why this Court should throw away decades of New York law and follow suit. That is because there is no reasonable argument to do so.

In any event, the non-New York cases cited by CRO do not help its cause. The cited cases all involve a tangible and physical alteration to property requiring repair or replacement of the insured property itself, unlike the case with SARS-CoV-

2. CRO's lead citation, the unreported decision in *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,* 2014 WL 6675934 (D.N.J. Nov. 25, 2014), provides no guidance because it applies New Jersey law and involved an ammonia leak requiring evacuation of a building and surrounding area and extensive remediation. The ammonia remained present in the building for some amount of time, and the release rendered the facility "physically unfit for normal human occupancy." *Id.* at *3.

The building and the surrounding areas for one mile were evacuated. *Id.* The fire department did not allow anyone in the building. *Id.* A remediation crew had to enter the property dressed in a hazardous safety suit. *Id.* The property had to be remediated by environmental specialists. *Id.* The facility was shut down for one week. *Id.* The court concluded that, under New Jersey law, coverage was triggered by the fact that the building was physically transformed by the ammonia so that it was rendered "unfit for occupancy" by any humans.

While this standard has not been accepted by any appellate court in New York, the facts of *Gregory Packaging* are nothing like the current pandemic. None of CRO's restaurants were evacuated and forced to close with entry by any humans restricted by the local government. Hazmat suits were not required for entry into CRO's restaurants. The restaurants continued to operate to allow take-out and delivery. Thus, *Gregory Packaging* is not applicable.

The Third Circuit's unpublished decision in *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005), does not help CRO either. In that case, a homeowner's water well was contaminated with e. coli bacteria. The Third Circuit acknowledged that it had to address "whether loss of use may constitute a physical loss." *Id.* at 826. The Third Circuit found there was a genuine issue of fact under Pennsylvania law as to whether the functionality of the property was "nearly eliminated or destroyed, or whether their property was made useless or uninhabitable." *Id.* at 826-27. Importantly, the Third Circuit concluded that the mere presence of the e. coli bacteria in the water well was not sufficient to conclude that a "direct physical loss" had occurred.

This standard of total destruction or complete uninhabitability due to the presence of a foreign substance has not been adopted by any appellate court in New York. But even if it had, that would not change the result in this case. CRO has not alleged that the functionality of its restaurants was "nearly eliminated or destroyed." Nor has CRO alleged that the restaurants were rendered completely useless or uninhabitable. In fact, just the opposite. CRO alleges that its employees were allowed in the restaurants in order to serve customers for drive-through, takeout, and delivery. R-59, ¶ 31. Even if the standard existed in New York, CRO fails to meet it.

The decision in *Motorists Mutual* followed the Third Circuit's decision in *Port Auth. Of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), also cited by CRO. Pls. Br. at 29, fn. 10. The *Port Authority* decision was issued 12 days before this Court issued its decision in *Roundabout Theatre*.

The Third Circuit addressed some of the cases from other states cited by CRO in its brief. The Third Circuit first held that "physical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." *Id.*

The Court determined that when the "presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss." *Id.*

Importantly, the Third Circuit concluded that the "structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage." *Id.* The Third Circuit affirmed the judgment of the District Court, concluding that the presence of asbestos or even the general threat of future damage from that presence, "lacks the distinct and demonstrable character necessary for first-party insurance coverage." *Id.* CRO relegates *Port Authority* to a footnote without analysis or discussion.

SARS-CoV-2 simply does not destroy the functionality of a structure. Indeed, many locations stayed fully open throughout the pandemic. Hospitals, police stations, grocery stores, and gas stations, as a few examples. None of these physical structures were deemed so dangerous as to be "uninhabitable" or had their "function nearly eliminated or destroyed."

CRO has also not alleged that its property was "nearly eliminated or destroyed." CRO's property was still available to it, and its employees could use the property. CRO was not permanently dispossessed of its property. CRO could offer outdoor dining, takeout, delivery, or drive thru. R-59, ¶ 31. CRO's restaurants were not rendered useless and uninhabitable and government restrictions were eased based on external factors, not any physical condition of the structure itself. There was no repair or replacement of CRO's property required.

CRO's other citations similarly involved harm to property requiring substantial remediation of property. *See, e.g.*, *TRAVCO Ins. Co. v. Ward,* 715 F. Supp. 2d 699, 703, 708 (E.D. Va. 2010) (sulfuric gases from Chinese-made drywall caused corrosion of various metallic components of home, which was "rendered unusable by physical forces"); *Mellin v. N. Sec. Ins. Co.,* 115 A.3d 799, 801, 805 (N.H. 2015) (pervasive odor of cat urine in condominium could not be successfully remediated; court determined that "physical loss" required a "distinct and demonstrable alteration of the insured property"); *Gen. Mills, Inc. v. Gold Medal*

Ins. Co., 622 N.W.2d 147, 150 (Minn. Ct. App. 2001) (food manufacturer sustained direct physical loss or damage to its cereal product as a result of a contractor's treating oats with an unapproved pesticide that rendered them unsalable).

None of these decisions applied New York law. They are distinguishable as addressed above. Numerous courts have similarly distinguished these decisions in recent COVID-19 cases. As one court recently explained, "the presence of COVID-19 on Plaintiff's property did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property. Instead, all that is required for Plaintiff to return to full working order is for the Governor to lift the decrees and restrictions." *First & Stewart Hotel Owner, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3109724, at *4 (W.D. Wash. July 22, 2021). *See also, e.g.*, *Sharde Harvey*, 2021 WL 1034259, at *9 (distinguishing *Motorists Mutual*, *Gregory Packaging*, and other decisions as involving "damage" that "would require non-routine, extensive remediation").

Courts in New York have addressed these same arguments made by insureds and roundly rejected them. In *Northwell Health*, for example, Judge Rakoff distinguished *Port Authority*, noting that it "harms rather than helps [the insured's] position. *Northwell Health*, 2021 WL 3139991 at *6 ("Intangible or particulate

matter must 'contaminat[e] of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable.'").

In *Kim-Chee LLC v. Philadelphia Indemnity Ins. Co.*, No. 20-cv-1136, 2021 WL 1600831 (W.D.N.Y. Apr. 22, 2021), the Court studied the same case law cited by CRO here. That Court noted that, while "contamination of a structure that seriously impairs or destroys its function may qualify as direct physical loss," "contamination which is short-lived or does not prevent the use of the structure does not qualify as direct physical loss." *Id.* at *5.

The Court identified two complementary principles. First, contamination by a persistent chemical or biological agent may cause a direct physical loss if it renders the insured property unusable. *Id.* at *6. Second, contamination that is temporary or that imposes remediation costs without preventing use of the building is unlikely to qualify as direct physical loss. *Id.*

The Court acknowledged that its conclusion "does not mean that the contamination is not expensive to remove or serious in its health risks. Rather, courts have recognized that first-party coverage responds to physical damage to the insured property and not to all forms of loss or expense experienced by the property owner." *Id.*

At bottom, these non-New York decisions provide CRO no help. CRO also wrongly contends that these non-New York decisions all uniformly conclude that

the "actual presence of an invisible, yet dangerous substance … that renders the property uninhabitable for its intended function constitutes physical loss or damage." Pls. Br. at 29. The non-New York decisions say nothing about "intended function," "impairment of functionality," or "unusable for intended purpose." As the Third Circuit held, a "higher threshold" is required. *Port Authority*, 311 F.3d at 235. The non-New York decisions almost uniformly hold that a structure must be rendered "useless or uninhabitable," or its function "nearly eliminated or destroyed." *Id.* at 236. Thus, a "less demanding standard" would not "comport with the intent of a first-party 'all-risks' insurance policy." *Id.*

8. Every Appellate Court In The United States To Address This Issue To Date Has Agreed With Westport's Position.

The Sixth, Eighth, Ninth, and Eleventh Federal Circuits have all issued decisions in favor of insurers on this issue. In addition, the California Court of Appeal, Fourth Appellate District and the Court of Appeals of Ohio, Eighth District, Cuyahoga County and Fifth District, Delaware County recently ruled similarly.

The Sixth Circuit issued four decisions, *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), *In re Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021), *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021), and *Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, (6th Cir. Nov. 30, 2021).

In *Santo's Italian Cafe*, the Sixth Circuit addressed the same arguments made by CRO here. The court noted that there was nothing unexpected when consulting the dictionary definitions of the words "direct," "physical," "loss, and "property." *Santo's Italian Café*, 15 F.4th at 401. The court held that: "The restaurant has not been tangibly destroyed, whether in part or in full. And the owner has not been tangibly or concretely deprived of any of it. It still owns the restaurant and everything inside the space. And it can still put every square foot of the premises to use, even if not for in-person dining use." *Id.*

The Eighth Circuit, in *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021), held that the COVID-19 pandemic nor the related government-imposed restrictions constituted a "direct physical loss." *Id.* at 1145. The court "rejected the argument that loss of use or function necessarily constitutes 'direct physical loss or damage,' explaining that such an interpretation would allow coverage to be 'established whenever property cannot be used for its intended purpose.'" *Id.* at 1144 (citing *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005)).

The Ninth Circuit similarly rejected the same arguments CRO makes (that the property merely is no longer suitable for its intended purpose) in three simultaneous decisions: *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021), *Chattanooga Pro. Baseball LLC v. Nat'l Cas. Co.*, No. 20-17422, 2021 WL

4493920 (9th Cir. Oct. 1, 2021), and *Selane Prod., Inc. v. Cont'l Cas. Co.*, No. 21-55123, 2021 WL 4496471 (9th Cir. Oct. 1, 2021).

In *Mudpie*, the Ninth Circuit affirmed the dismissal of the policyholder's complaint, holding that the phrase "direct physical loss of or damage to" property requires "a distinct, demonstrable, physical alteration of property," or a "permanent[] dispos[ition] of property." *Id.* at 892. The allegation that the insured was prevented from operating its store as intended did not qualify as "direct physical loss of or damage to" property. *Id.* The Ninth Circuit concluded there was no coverage because "California courts have carefully distinguished 'intangible,' 'incorporeal,' and 'economic' losses from 'physical' ones." *Id.* (citing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 115 Cal. Rptr. 3d 27, 37 (2010).

The Eleventh Circuit also affirmed dismissal of a complaint by an insured seeking business interruption coverage as a result of COVID-19. In *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021), the court determined that there was no coverage because the "common meaning" of "direct physical loss or damage" requires an "'actual change in insured property' that either makes the property 'unsatisfactory for future use' or requires 'that repairs be made.'" *Id.* at *2 (citing *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 208, 581 S.E.2d 317 (2003)). The court concluded that

the insured could still use its property for emergency procedures and that the presence of SARS-CoV-2 did not "cause physical damage or loss to the property." *Id.*

Further, the California Court of Appeal in *Inns by Sea v. California Mut. Ins. Co.*, No. D079036, 2021 WL 5298480 (Cal. Ct. App. Nov. 15, 2021), rejected the same argument that CRO makes here, that the presence of the SARS-CoV-2 virus constitutes actual damage to property. *Id.* at *6. In *Inns by Sea*, the insured argued that SARS-CoV-2 actually damages property because "its physical presence transforms property, specifically indoor air and surfaces, from a safe condition to a dangerous and potentially deadly condition unsafe and unfit for its intended purpose." *Id.* The Court rejected this argument and distinguished the host of cases cited by the insured related to other noxious substances and odors (the same cases CRO cites here).

Finally, the Court of Appeals of Ohio, Eighth Appellate District in *The Nail Nook, Inc. v. Hiscox Insurance Co. Inc.*, No. 110341, 2021-Ohio-4211, 2021 WL 5709971 (Ohio Ct. App. Dec. 2, 2021) and the Court of Appeals of Ohio, Fifth Appellate District in *Sanzo Enterprises, LLC v. Erie Insurance Exchange*, No. 21-CAE-06-0026 (Ohio Ct. App. Dec. 7, 2021) both came to the same conclusion. In *Nail Nook*, the Court held that the insured "could not prove 'direct physical loss or damage to Covered Property' required for 'Business Income or Extra Expense'

coverage under the policy." *Id.* ¶ 30. The Court also concluded that the insurance contract's virus exclusion barred overage for the loss. In *Sanzo*, the Court found the Sixth Circuit decision in *Santo's Italian Café* "well-reasoned and persuasive." *Id.* ¶ 45.

None of these state and federal appellate court decisions were decided under New York law. They offer, however, the most compelling perspective of the issues in this appeal.

C. The Pandemic And Government Orders And Directives Do Not Constitute "Direct Physical Loss Or Damage To Property."

CRO concedes that a government order or directive does not constitute "direct physical loss or damage" to property under the terms and conditions of the Insurance Contract. In its appellate brief, CRO alleges only that the actual presence of COVID-19 alters the surfaces of its property and impaired its physical function and that it rendered its restaurants unusable for their intended function. Pls. Br. at 20-36. Nowhere does CRO assert that government orders or directives constitute "direct physical loss or damage" to property.

CRO tries to distinguish *Roundabout* on the ground that there was no "physical impact to insured property" at issue in that case. Pls. Br. at 37. CRO admits that *Roundabout* plainly applies to cases where an insured alleges "that it suffered purely economic loss untethered to any physical impact to property." Yet, that is exactly what CRO alleges in its Complaint in this action. CRO alleges that its losses

result from “direct physical loss or damage to property, including, but not necessarily limited to … the loss of function, purpose, and use of the Restaurants – all caused by … the pandemic, governmental negligence, or the Orders. R-60, ¶ 36.

CRO also alleges that its losses “resulted from a number of causes other than the virus or the disease, including but not necessarily limited to, the pandemic, governmental negligence, or the Orders, all of which are other covered causes of loss under the All-Risk Policy.” R-70, ¶ 67.

At the trial court and now on appeal, CRO abandoned its claim that the pandemic, governmental negligence, or government orders or directives constitutes “direct physical loss or damage” to property. This is not surprising because the fundamental premise of property insurance is the insurance of *property*. Any business income coverage is entirely dependent on establishing the prerequisite of “direct physical loss or damage” to property. An insured’s operations are not what is insured, the building and personal property are.

D. Four Separate Exclusions Apply To Bar Coverage For CRO’s Claims

1. Exclusion C.5 Applies To Bar Coverage

Exclusion C.5 in the Insurance Contract applies to bar coverage here since it expressly excludes loss resulting from any pathogen or pathogenic organism, disease-causing, illness-causing agent or virus. Exclusion C.5 states as follows:

> The POLICY does not insure against loss or damage caused by any of the following: …
>
> 5. Loss or damage due to the discharge, dispersal, seepage, migration, release or escape of CONTAMINANTS ….

* * *

R-128. "Contaminants" is defined in the Insurance Contract, in part as:

> C. CONTAMINANT(S)
>
> a. Materials that may be harmful to human health, wildlife or the environment. CONTAMINANTS include any impurity, solid, liquid, gaseous or thermal irritant or pollutant, poison, toxin, pathogen or pathogenic organism, disease-causing or illness-causing agent, asbestos, dioxin, polychlorinated biphenyls, agricultural smoke, agricultural soot, vapor, fumes, acids, alkalis, chemicals, bacteria, virus, ….

* * *

R-143.

The plain language of Exclusion C.5 applies to bar coverage here. There is no coverage for any "loss or damage due to the discharge, dispersal, seepage, migration, release or escape of … materials that may be harmful to human health … [including] pathogen or pathogenic organism, disease-causing or illness-causing agent, [or] virus." SARS-CoV-2 is "harmful to human health." It is also a "pathogen or pathogenic organism." It is also a "disease-causing or illness-causing agent." It is also a "virus." R-143.

Courts analyzing similar exclusions have determined that similar wording bars coverage for losses related to the coronavirus. *See*, *e.g.*, *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-00597, 2021 WL 2184878, at *15 (W.D. Wash. May 28, 2021) (policy exclusion barring coverage for "'loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease,' or something similar" applied to bar coverage for alleged COVID-19 loss); *Rhonda Hill Wilson, et al., v. Hartford Casualty Co., et al.*, No.20-3384, at *18 (E.D. Pa. Sept. 30, 20) (granting dismissal, in part, based on exclusion which stated the insurer "will not pay for loss or damage caused directly or indirectly by … presence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus.").

CRO asserts that exclusion C.5 does not apply because it can only be interpreted as a standard environmental pollution exclusion. CRO admits that the words "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease" in an exclusion would apply to bar coverage here. Even though the exclusions are very similar, CRO claims that the inclusion of the words "discharge, dispersal, seepage, migration, release or escape," at the beginning of Exclusion C.5 makes it applicable to only "traditional environmental pollutants."

Pls. Br. at 43. CRO claims that this is so under *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003). CRO is wrong.

First, the *contamination* exclusion, which bars losses caused by a "virus" is nothing like a traditional *pollution* exclusion. Thus, CRO cannot rely on *Belt Painting* which only addressed a traditional environmental pollution exclusion that did not mention "virus." The Third Department rejected an insured's attempt to rely on *Belt Painting* to defeat application of an exclusion in a property insurance policy that also included terms materially different from those in *Belt Painting*.

In *Broome Cty. v. Travelers Indem. Co.*, 125 A.D.3d 1241 (3d Dep't 2015), the Court held that "if the words '[d]ischarge, dispersal, seepage, migration, release or escape' are read as not intended to describe short migratory events where the relevant contaminant remains on the plaintiff's property and does damage to it, then the exclusion has no significance at all in this first-party policy, especially to the portion of the definition of pollutants" not found in the definition at issue in *Belt Painting*. *Id.* at 1243. The same reasoning applies with equal force here. Exclusion C.5 unambiguously applies to any loss caused by the "discharge, dispersal, seepage, migration, release or escape" of a "pathogen or pathogenic organism, disease-causing or illness-causing agent, … bacteria, [or] virus." It thus applies to bar CRO's claim which results from the COVID-19 pandemic brought on by the SARS-CoV-2 virus.

Second, the Court in *Northwell Health* considered and rejected this exact argument. In *Northwell Health*, the Honorable Jed Rakoff noted "what is a sneeze or cough if not a discharge or dispersal?" *Northwell Health*, 2021 WL 3139991 at *9. The Court rejected the plaintiff's argument that this exclusion was an "environmental exclusion" because it used the words "release" and "discharge" and therefore the court should treat the word "virus" in the clause as if it were not there. *Id.* The Court held that the similar exclusion "unambiguously excludes coverage." The Court distinguished the exclusion in *Belt Painting* because the exclusion at issue in *Northwell* contained a definition that included viruses and must be considered so as not to render that part of the insurance contract "meaningless." *Id.*

Contamination is defined to include "virus." The government orders were entered for one reason: the coronavirus. Without the coronavirus there would be no government orders. Contracts of insurance are to be interpreted "so as to give effect to the intention of the parties as expressed in the unequivocal language employed." *Broad Street, LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 130 (1st Dep't 2006). There is no dispute that the loss barred by exclusion C.5 includes loss due to the SARS-CoV-2 virus.

2. Exclusion B.6 Applies To Bar Coverage.

The Insurance Contract's Exclusion B.6 states as follows:

> This POLICY does not insure against the following types of loss or damage: …

6. mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substances whose presence poses an actual or potential threat to human health, wet rot or dry rot ….

* * *

R-128.

The plain wording of exclusion B.6 bars coverage here. There is no coverage for any "other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health, …." *Id.* The opinions discussed in detail in Point III above all support the conclusion that exclusion B.6 bars coverage here. The exclusion is not ambiguous. Therefore, SARS-CoV-2 falls within the wording in exclusion B.6 as it is a "microorganism of any type, nature, or description," and its "presence poses an actual or potential threat to human health." *Id.*

The CDC itself describes SARS-CoV-2 as a microorganism. R-218, 222. The word "microorganism" also appears in numerous federal and state regulations, and in each such instance, it is defined broadly to include viruses. R-240, 242, 249, 253, 265, 269, 275, 276, 277, 278, 282. The language is neither vague nor ambiguous and therefore, the coverage barred includes the SARS-CoV-2 virus.

3. Exclusion B.1 Applies To Bar Coverage.

The Insurance Contract's Exclusion B.1 states as follows:

This POLICY does not insure against the following types of loss or damage:

1. a. indirect or remote loss or damage;

a. delay or loss of market; or

b. interruption of business unless otherwise provided hereon;

* * *

R-127.

The plain meaning of Exclusion B.1 applies to exclude CRO's alleged losses here. CRO alleges that the government orders "devastated" CRO's business and turned its restaurants into "virtual ghost-towns." R-52, ¶ 4. CRO's alleged losses are due to the government orders that closed or limited its restaurants, which resulted in a loss of market for CRO. The stay-at-home orders also limited customers from venturing out to dine. The alleged losses that resulted from the decrease in the customer base or customer demand is excluded from coverage as a loss of market.

CRO claims that the application of Exclusion B.1 here would render the Insurance Contract illusory but does not provide any analysis as to how that would be. The Insurance Contract plainly provides coverage, for example, if a fire burned down a restaurant and CRO took eight months to rebuild it.

In *U.S. Airways v. Commonwealth Insurance*, 64 Va. Cir. 408 (Cir. Ct. 2004), the court held that the loss of market exclusion applied to certain "market share" losses claimed by the policyholder under its business interruption policy. The Court agreed with the insurer that the loss of market exclusion barred coverage "for loss of market share as a result of business interruption" because it was clear and

unambiguous. *Id.* at *6. CRO's losses are explicitly alleged to be from the loss of people due to government orders, leaving their restaurants "virtual ghost-towns," and thus exclusion B.1 applies.

4. Exclusion D.1 Applies To Bar Coverage.

Finally, exclusion D.1 applies to bar coverage. Exclusion D.1 states:

> This POLICY does not insure against TIME ELEMENT loss for any period during which business would not or could not have been conducted for any reason other than physical loss or damage insured by this POLICY to INSURED PROPERTY.
>
> * * *

R-129.

Here, all time element losses sought by CRO are barred because the period that its business "would not or could not have been conducted" is not due to physical loss or damage insured by the Insurance Contract, as outlined above. All purported loss allegedly directly results from government orders implemented in order to slow the spread of COVID-19, and not any physical loss or damage insured by the Insurance Contract to insured property. Thus, exclusion D.1 applies to bar coverage.

II. The Trial Court Correctly Denied Leave For CRO To Amend The Complaint Because Amendment Would Be Futile

Supreme Court correctly denied leave to amend the Complaint. CRO's proposed amendment is palpably insufficient and patently devoid of merit. Thus, this Court should affirm the Supreme Court's Decision and Order denying leave to amend the Complaint.

While leave to amend is generally freely granted, CRO's present effort to amend presents an exception. The futility of CRO's palpably meritless amended complaint warrants denial of leave. *See* 84 N.Y. Jur. 2d Pleading § 239 (Nov. 2016) ("[L]eave to amend should be denied where the claim is palpably insufficient as a matter of law") (citations omitted); *Board of Mgrs. of SoHo N. 267 W. 124th St. Condo. v. NW 124 LLC*, 116 A.D.3d 506, 507 (1st Dep't 2014) (denying motion for leave to amend as futile where proposed claims failed as a matter of law).

Here, the Supreme Court's Decision & Order should be affirmed because CRO's proposed additional factual allegations do not change the result on the motion to dismiss. Indeed, even though CRO's Complaint is far from "robust" and CRO improperly commingled factual allegations from the valid pleading with a proposed pleading in its "Facts" section, Westport's arguments apply equally to the allegations in both the Complaint and the proposed amended complaint.

It should be noted that CRO seeks to delete a key factual allegation it previously made that demonstrates the futility of its proposed amendments. CRO seeks to delete the factual allegation that no restaurants had access limited due to a government order due to the presence of the SARS-CoV-2 virus. R-68-69, ¶ 63 compared to R-1952, ¶ 82.

CRO included this factual allegation in its Complaint and should not now be able to remove it, essentially alleging the exact opposite fact. A plaintiff cannot plead

alternative facts. *Drexel Burnham Lambert Grp., Inc. v. Vigilant Ins. Co.*, 157 Misc. 2d 198, 207–08 (Sup. Ct., N.Y. Cty. 1993) ("Theories as to the basis for legal recovery may be inconsistent, but not facts. It cannot be alleged that maybe a fact occurred or maybe it didn't.").

Moreover, at the August 4, 2021 hearing on Westport's motion to dismiss, the Court addressed all of the factual allegations CRO seeks to add. Westport addresses all of these proposed additional facts on appeal. The majority of CRO's argument focuses on the alleged presence of the SARS-CoV-2 virus at CRO's restaurants and the alleged items of property the coronavirus allegedly damaged. Virtually no effort was spent addressing CRO's early claims (now abandoned) that government stay-at-home orders caused "direct physical loss or damage" to property. In its proposed amended complaint, CRO does not seek to add any new legal theories or causes of action. Thus, the proposed amended complaint is patently devoid of merit because the Supreme Court has already addressed the exact allegations CRO seeks to add and Westport has demonstrated in its brief on appeal that the allegations still fail to state a cause of action.

At the August 4, 2021 hearing, the Supreme Court asked, "how was the virus in all 40 restaurants?" R-11 at 5:11. The Supreme Court asked what "property, in particular, was it on?" R-12 at 6:20-21. The Supreme Court asked, "what steps were

taken to remove it, if any?" *Id.* at 6:21. The Supreme Court asked if it was "on the table," or "on a doorknob?" R-13 at 7:6-7.

The Supreme Court also asked significant questions regarding the virus "being in the air," *id.* at 7:13, what happens if nobody that has the virus is in the restaurant and the restaurant is clean, sanitized?" R-14 at 8:4-5, and "what if the locations are sanitized?" *id.* at 8:12. The Supreme Court allowed CRO's counsel significant opportunity to answer the question: "What is the property here, the insured property that suffered some type of physical loss or damage?" R-17 at 11:10-12. CRO's counsel was provided wide latitude to argue the factual allegations which it now seeks to add in the proposed amended complaint. The Supreme Court rejected all of these claims.

Thus, all of the amendments that CRO seeks to make were already addressed, considered, and dismissed by the Supreme Court. A party should not be granted leave to amend a pleading with allegations that a court has already rejected. *Brook v. Peconic Bay Med. Ctr.*, 172 A.D.3d 468, 469 (1st Dep't 2019).

Even though CRO improperly commingled factual allegations from the operative pleading with claims in a proposed amended complaint in its brief on appeal, Westport's arguments address both groups of allegations. Both the Complaint and CRO's proposed amended complaint fail to state a cause of action

under New York law. Thus, the Supreme Court's Decision & Order should be affirmed.

CONCLUSION

For the foregoing reasons, the Supreme Court's Decision & Order granting Westport's motion to dismiss should be affirmed and the Decision & Order denying CRO's motion for leave to reargue and to file an amended complaint should be affirmed.

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