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Appellate Division–First Department Case Nos. 2021-02971 and 2021-04034

Court of Appeals

of the

State of New York

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS OF THE STATE OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC., Plaintiff-Appellant, v. WESTPORT INSURANCE CORPORATION Defendant-Respondent.	**NOTICE OF MOTION** Index No. 450839/2021 Appellate Division – First Department Nos.: 2021-02971 & 2021-04034

PLEASE TAKE NOTICE, that upon the affirmation of Robin L. Cohen, Esq., dated July 11, 2022, the exhibits annexed thereto, and the accompanying memorandum of law, Consolidated Restaurant Operations, Inc. ("CRO") will move this Court, at a term to be held at the Courthouse, located at 20 Eagle Street, Albany, New York 12207, on July 25, 2022, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to CPLR 5602(a)(1), granting CRO leave to appeal from the Decision and Order of the Appellate Division, First Department, dated April 7, 2022, which affirmed the Decision and Order of the Supreme Court, New York County, dated August 4, 2021, dismissing CRO's Complaint against Respondent, Westport Insurance Corporation in its entirety and the Decision and Order of the Supreme Court, New York County, dated September 23, 2021 denying CRO's Motion for Reargument and, in the Alternative, to Amend Its Complaint.

Dated: New York, New York
July 12, 2022

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COURT OF APPEALS OF THE STATE OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC., Plaintiff-Appellant, v. WESTPORT INSURANCE CORPORATION Defendant-Respondent.	Index No.: 450839/2021 **CORPORATE DISCLOSURE STATEMENT** Appellate Division – First Department Nos.: 2021-02971 & 2021-04034

Plaintiff-Appellant Consolidated Restaurant Operations, Inc. ("CRO") has the following parents, affiliates and/or subsidiaries: Consolidated Restaurant Companies, Inc.; CRO International Franchising, LLC; ECRI, Inc.; El Chico Restaurants of America, Inc.; El Chico License, Inc.; Pronto Restaurant Design & Equipment, Inc.; ECRHC, Inc.; Cantina Laredo Restaurants, LLC; Good Eats Restaurants, Inc.; Good Eats Restaurants of Texas, LP; Good Eats Restaurants of Texas LP, Inc.; Good Eats Restaurants of America, Inc.; Good Eats Franchising, Inc.; Good Eats License, Inc.; Silver Fox Restaurants LP, LLC; SF Acquisition, LLC; Silver Fox Restaurants, LP; CRO Development LP, LLC; CRO Development I, LP; Cantina Laredo Branson, LP; CRO-SSRH Development, LP; Cantina Laredo Jacksonville, LLC; Silver Fox Frisco, LP; CRO-San Luis Development, LLC; Branson Café, LP; Cantina Laredo MOA, LP; and Cantina Laredo Clayton, LLC.

Dated: New York, New York
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COURT OF APPEALS OF THE STATE OF NEW YORK

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PLAINTIFF CONSOLIDATED RESTAURANT OPERATIONS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

QUESTION OF LAW PRESENTED FOR REVIEW 1

PRELIMINARY STATEMENT 1

BACKGROUND, PROCEDURAL HISTORY, AND TIMELINESS 3

JURISDICTION 7

ARGUMENT 7

I. This Appeal Raises Novel Issues Of Statewide Importance Impacting Thousands Of Policyholders 7

II. The First Department's Restrictive New Test Is Contrary To Decades Of Caselaw From Across The Country Interpreting The Words "Physical Loss Or Damage," Including Prior Decisions From New York Courts 9

III. The First Department's Decision Restricts Coverage In Contravention Of This Court's Rules Governing Insurance Policy Interpretation 13

IV. The First Department's Decision That CRO's Allegations Were Conclusory Is Contrary To This Court's Holdings Regarding New York's Pleadings Standards 16

V. Other Considerations Warranting Review 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Alliance Ins. Co. v. Keleket X-Ray Corp.,
248 F.2d 920 (6th Cir. 1957) 9

Arbeiter v. Cambridge Mut. Fire Ins. Co.,
1996 WL 1250616 (Mass. Super. Mar. 15, 1996) 10

Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.,
939 F. Supp. 2d 1059 (D. Haw. 2013) 10

Azalea, Ltd. v. Am. States Ins. Co.,
656 So.2d 600 (Fla. Dist. Ct. App. 1995) 10

Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.,
720 N.E.2d 622 (Ill. App. Ct. 1999), *as modified on denial of reh'g* (Dec. 3, 1999) 10

Cajun Conti LLC v. Certain Underwriters at Lloyd's, London,
2021-CA-0343, 2022 WL 2154863 (La. Ct. App. June 15, 2022) 12

Cherokee Nation v. Lexington Ins. Co.,
No. CV-20-150, 2021 WL 506271 (D. Okla. Jan. 28, 2021) 15

Columbiaknit, Inc. v. Affiliated FM Ins. Co.,
1999 WL 619100 (D. Or. Aug. 4, 1999) 10

Consol. Rest. Operations, Inc. v. Westport Ins. Corp.,
205 A.D.3d 76 (1st Dep't 2022) ..... *passim*

Cooper v. Travelers Indem. Co. of Ill.,
2002 WL 32775680 (N.D. Cal. Nov. 4, 2002) 10

County of Columbia v. Continental Insurance Co.,
83 N.Y.2d 618 (1994) 13

de Laurentis v. United Servs. Auto. Ass'n,
162 S.W.3d 714 (Tex. App. 2005) 10

Essex Ins. Co. v. BloomSouth Flooring Corp.,
562 F.3d 399 (1st Cir. 2009) 10

Farmers Ins. Co. of Oregon v. Trutanich,
858 P.2d 1332 (Or. Ct. App. 1993) 10

Gen. Mills, Inc. v. Gold Medal Ins. Co.,
622 N.W.2d 147 (Minn. Ct. App. 2001) 10

Godfrey v. Spano,
13 N.Y.3d 358 (2009) 16

Graff v. Allstate Ins. Co.,
54 P.3d 1266 (Wash. Ct. App. 2002) 10

Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,
No. 2:12-CV-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) 10

Hetrick v. Valley Mut. Ins. Co.,
15 Pa. D. & C.4th 271 (Pa. Ct. Com. Pl. 1992) 9

Howard Stores Corp. v. Foremost Ins. Co.,
82 A.D.2d 398 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 991 (1982) 12

Inns-by-the-Sea v. California Mut. Ins. Co.,
286 Cal. Rptr. 3d 576 (Cal. Ct. App. 2021), *review denied* (Mar. 9, 2022) 9, 13

Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.,
No. B316501 (Cal. Ct. App. July 13, 2022) 12

Matzner v. Seaco Ins. Co.,
1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998) 10

Mellin v. N. Sec. Ins. Co.,
115 A.3d 799 (N.H. 2015) 10

Motorists Mut. Ins. Co. v. Hardinger,
131 F. App'x 823 (3d Cir. 2005) 10

Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,
487 F. Supp. 3d 834 (N.D. Cal. 2020), *aff'd* 15 F.4th 885 (9th Cir. 2021) 13

Netherlands Ins. Co. v. Main Street Ingredients,
LLC, 745 F.3d 909 (8th Cir. 2014) 10

Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,
17 F. Supp. 3d 323 (S.D.N.Y. 2014) 11

Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.,
No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016), *vacated by joint stipulated request of parties*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) 10

Pillsbury Co. v. Underwriters at Lloyd's, London,
705 F. Supp. 1396 (D. Minn. 1989) 9

Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts,
2002 WL 31495830 (D. Or. June 18, 2002) 10

Robert Levy, D.M.D., LLC, et al., v. Hartford Cas. Ins. Company, et al.,
No. 21-1446, 2022 WL 2520570 (8th Cir. July 7, 2022) 12

Roundabout Theatre Co. v. Continental Casualty Co.,
302 A.D.2d 1 (1st Dep't 2002) ..... *passim*

Schlamm Stone & Dolan LLP v. Seneca Ins. Co.,
800 N.Y.S.2d 356 (Sup. Ct. 2005) (unpublished table decision) 10

Sentinel Mgmt. Co. v. N.H. Ins. Co.,
563 N.W.2d 296 (Minn. Ct. App. 1997) 10

Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.,
2007 WL 464715 (D. Or. Feb. 7, 2007) 10

TRAVCO Ins. Co. v. Ward,
715 F. Supp. 2d 699 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) 10

In re Viking Pump, Inc.,
27 N.Y.3d 244 (N.Y. 2016) 13, 14, 15

W. Fire Ins. Co. v. First Presbyterian Church,
437 P.2d 52 (Colo. 1968) (en banc) 9, 10

Wakonda Club v. Selective Ins. Co. of Am.,
973 N.W.2d 545 (Iowa 2022) 13

Widder v. La. Citizens Prop. Ins. Corp.,
82 So.3d 294 (La. App. 4th Cir. 2011), cert. denied, 76 So.3d 1179 (La. 2011) 10

Yale Univ. v. Cigna Ins. Co.,
224 F. Supp. 2d 402 (D. Conn. 2002) 10

OTHER AUTHORITIES

CPLR 5602(a)(1) 7

Appellant Consolidated Restaurant Operations, Inc. ("CRO"), respectfully submits this memorandum of law in support of its motion for leave to appeal from the New York Supreme Court, Appellate Division, First Department's Decision and Order dated April 7, 2022, affirming the New York State Supreme Court, New York County's Decision and Order dated August 4, 2021, granting the Motion to Dismiss of Defendant Westport Insurance Corporation ("Westport"), and the Decision and Order dated September 23, 2021, denying CRO's Motion for Reargument and, in the Alternative, to Amend Its Complaint.

QUESTION OF LAW PRESENTED FOR REVIEW

Whether allegations that SARS-CoV-2, the virus that causes COVID-19, infiltrated insured property, attached to and transformed insured property into vectors for disease, persisted for extended periods of time, and impaired the use of such property for its intended purpose, are sufficient under New York law to plead a claim for "direct physical loss or damage" under an all-risk property and business interruption insurance policy?

PRELIMINARY STATEMENT

This dispute presents the threshold question of whether a policyholder's allegations that the actual presence and/or imminent threat of COVID-19 on insured property rendered that property unusable for its intended and insured purpose are sufficient to plead "direct physical loss or damage" under an all-risks property and business interruption insurance policy and New York's liberal pleading standard. This is an issue of first impression for this Court and is indisputably of statewide, public importance, representing one of the most consequential insurance law questions to arise under New York law in decades. Indeed, at least thirteen other state high courts have recognized the significance of this issue, having heard or agreed to hear appeals involving this important question.

Review by this Court is particularly necessary here to rectify an error that will impact thousands of policyholders in the COVID-19 context, and countless policyholders for years to come in a broad array of cases. Specifically, in concluding that CRO was not entitled to insurance coverage for its COVID-19 losses, the First Department established a new "tangible alteration" requirement under New York law. But this new test has no support in any decision from this Court. Rather, it was based primarily on the First Department's own prior authority involving insurance policies with far narrower coverage grants and distinguishable facts. And, critically, this new test contradicts sixty years of pre-COVID-19 insurance law nationwide (as well as prior New York authority) holding that invisible substances such as ammonia, dust, and E. coli, which impair the use of insured property, *can* cause "physical loss or damage." It also contradicts bedrock principles of insurance policy interpretation announced by this Court, the reasonable expectations of the ordinary insured, and the plain terms of the policy which, when read as a whole, contemplate that an invisible substance such as a virus can cause physical loss or damage. Indeed, the First Department effectively read the words "physical loss" out of the policy. Thus, unless corrected, the First Department's decision will drastically reduce coverage for thousands of policyholders under New York law in a wide range of circumstances. It will also mean that for years to come, New York policyholders may be entitled to far narrower coverage than policyholders in other states under the very same policy language.

Moreover, having established an improperly restrictive interpretation of the relevant insurance policy, the First Department then refused to accept CRO's extensive pleadings, which alleged that SARS-CoV-2 did just what the First Department held was required: caused a detrimental "tangible alteration" to CRO's property. Indeed, rather than credit CRO's robust allegations as true, the First Department simply dismissed them as "conclusory." In doing so, the

First Department (and the trial court) appears to have accepted Westport's unsubstantiated argument that SARS-CoV-2 cannot impact property and can be easily cleaned—even as CRO provided the court with publication after publication establishing the opposite. In essence, the First Department improperly converted New York's pleading standard into a federal plausibility standard, and then substituted its own view of the impact and nature of COVID-19 in place of a developed record on these issues. Therefore, the First Department effectively abrogated New York's well-established notice pleading standard. If left uncorrected, this new, heightened standard will prematurely close the courthouse doors to thousands of policyholders.

For these reasons, this Court, like at least thirteen other state high courts, should address this issue of statewide importance.

BACKGROUND, PROCEDURAL HISTORY, AND TIMELINESS

CRO, like thousands of policyholders in New York and across the country, suffered significant losses when it was forced to close its restaurants to in-person dining as a result of the actual and imminent threat of COVID-19 in and on its restaurants. R52 ¶ 4; R54 ¶ 13; R1932 ¶ 14; R1942-44 ¶¶ 46-47, 51; *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 78 (1st Dep't 2022) ("It is unrefuted that plaintiff suffered tens of millions of dollars in revenue loss because of sharply curtailed operations.").[1] Indeed, as CRO alleged in exacting detail, SARS-CoV-2, the virus that causes COVID-19, is a dangerous, physical substance, that permeated the air within its restaurants, attached to surfaces within its restaurants, is resilient and resistant to cleaning, has numerous modes of transmission, rendered CRO's restaurants unusable for their intended and insured function—in-person dining—and continuously threatened its restaurants.

[1]All citations to "R__" refer to the Record on Appeal filed herewith.

R54-56 ¶¶ 12-21; R60 ¶ 36; R68 ¶ 61; R1932-38 ¶¶ 13-30; R1941-42 ¶¶ 41-42, 46. Therefore, CRO sought coverage from Westport, its property and business interruption insurer, on the ground that COVID-19 had caused "direct physical loss or damage" to CRO's restaurants. CRO reasonably expected that its policy would cover this claim for numerous reasons, including that the policy itself recognized that invisible, dangerous substances can cause physical loss or damage, the policy was an "all-risks" policy, and caselaw across the country and in New York had for decades interpreted the words "physical loss or damage" to encompass losses caused by noxious substances that can be invisible to the naked eye. R52 ¶ 5; R62 ¶ 43; R1930 ¶ 6; R1945 ¶ 60. Indeed, CRO purchased a policy that did not include a standard virus exclusion that is widely available in the insurance marketplace, appears in many other commercial property and business interruption insurance policies, and is designed to bar coverage for physical loss or damage caused by viruses. R69-70 ¶ 66; R1952-53 ¶ 86.

Westport, however, denied coverage for CRO's losses. R68 ¶ 60; R1951 ¶ 79. This position echoed an industry-wide approach by insurers to categorically deny coverage for COVID-19-related claims.

Therefore, on August 5, 2020, CRO filed suit in the Supreme Court of the State of New York, Westchester County, for declaratory relief and damages for breach of contract to secure the insurance coverage to which it was entitled. R49-165. On December 11, 2020, the Westchester County court granted Westport's motion to transfer venue to New York County.

On August 4, 2021, the New York County court heard oral argument on Westport's motion to dismiss CRO's Complaint. During the argument, the trial court made various observations and asked numerous questions based on its own factual theories and unsubstantiated scientific

conclusions, despite there being no record yet in the case, let alone expert evidence and testimony. For example:

- The court questioned the particular property that the coronavirus attached to, despite CRO's allegations that the virus was actually present in the restaurants (and therefore attached to property within the restaurants, such as tables, chairs and other high-touch surfaces). R11-13 at 5:10-14; 6:20-7:2; 7:6-9.

- The court suggested that CRO "could wipe down the tables every two minutes" and that the property can "be cleaned and replaced right back," despite CRO's allegations regarding the resilience of the virus, its effect of requiring enhanced and continual cleaning that was not used or necessary before COVID-19, the impairment of the property's physical function created by the dangers to human health that SARS-CoV-2 poses, and the lack of any scientific basis for this suggestion in the record. R15 at 9:8-12.

- The court suggested that CRO could "in theory, test each and every person before they come in and only allow people who don't have the virus in the restaurants, and then they could be in the restaurant," without having considered the impractical burden this would impose, especially at times when testing was scarce, or the possibility that a person with a false negative test result could nonetheless bring the virus into the restaurants. R21-22 at 15:16-18; 15:20-21; 16:11-16.

- The court suggested that there would have been no impact from the virus so long as "the property was unexposed to people," despite the fact that it is irrelevant how the virus entered the property, only that it did. R16 at 10:7-10.

Thereafter, the court found that *Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1 (1st Dep't 2002), a First Department decision, was "binding preceden[t]" warranting dismissal. R40-41 at 34:22-35:2. This is despite the fact that *Roundabout* had nothing to do with whether the presence of a dangerous substance *on insured property* can cause physical loss or damage, and that the standard applied in *Roundabout* was drawn from an earlier First Department case involving a policy with a much more restrictive coverage grant. Nevertheless, based on *Roundabout*, the trial court found that CRO had failed to allege physical loss or damage under the policy. R40-41 at 34:22-35:2; R4-6. The court then denied CRO's motion for leave to file an amended complaint that directly addressed many of the court's factual concerns and questions regarding CRO's claim based on futility. R23; R47-48.

On August 9, 2021, CRO filed a notice of appeal of the August 4, 2021 Decision and Order, which granted Westport's Motion to Dismiss CRO's complaint. On September 30, 2021, CRO filed a notice of appeal of the September 23, 2021 Decision and Order, which denied Plaintiff's Motion for Reargument and, in the Alternative, to Amend its Complaint. On November 8, 2021, CRO filed its Note of Issue, addressing both appeals, and its brief in support. Westport opposed the appeal on December 8, 2021, and CRO submitted a reply on December 23, 2021. Oral argument was held on February 8, 2022.

On April 7, 2022, the First Department affirmed the trial court's decision, announcing that, under New York law, the words "direct physical loss or damage" require that the property in question "must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred." *Consol. Rest. Operations*, 205 A.D.3d at 82. On April 25, 2022, Westport filed notice of entry of this Order.

In announcing this "tangible alteration" standard—which appears nowhere in the text of the relevant insurance policy—the First Department did not cite to any authority from this Court; rather, it cited to its own prior *Roundabout* decision, and state and federal trial court decisions which, in turn, primarily relied on *Roundabout*. *Id.* at 82-86. Indeed, no prior New York court has ever applied this standard in the case of noxious substances. Instead, the First Department distinguished numerous cases pre-dating COVID-19, which found that a noxious, invisible substance can cause physical loss or damage on the ground that these cases did not apply New York law. *Id.* at 85. Further, after announcing this newfound standard for "physical loss or damage" as "New York law," the Court concluded that CRO's allegations regarding the virus failed to meet that standard because they were "conclusory." *Id.* at 83. Specifically, the court held that CRO had failed to "identify any physical change, transformation, or difference in any of its

property." *Id.* at 86. This was despite CRO's extensive allegations concerning the virus's presence on its properties and the effects thereof.

CRO timely served Westport with its notice of motion seeking leave to appeal from the First Department's decision on April 28, 2022, by filing its motion on the First Department's electronic docket. CRO was served with the Order of the First Department, denying CRO's motion for leave to appeal to this Court on June 23, 2022, and Westport filed notice of entry of that Order on July 6, 2022.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to CPLR 5602(a)(1) because it is an appeal from "an order of the appellate division which finally determines the action and which is not appealable as of right."

ARGUMENT

This Court should grant CRO's leave application because this dispute, and the First Department's decision in particular, raise critical issues of statewide importance that will impact thousands of policyholders. Indeed, if left uncorrected, the First Department's decision will drastically reduce coverage for New York businesses based on a standard and reasoning that are contrary to this Court's rules governing the interpretation of insurance policies.

I. THIS APPEAL RAISES NOVEL ISSUES OF STATEWIDE IMPORTANCE IMPACTING THOUSANDS OF POLICYHOLDERS

The availability of insurance coverage under property and business interruption insurance policies for COVID-19-related losses is an issue of first impression in this Court. Indeed, this Court has never addressed the meaning, scope and application of the words "direct physical loss or damage" in a property and business interruption insurance policy. And, it certainly has never

addressed the applicability of these words to circumstances where a dangerous, invisible substance has impaired a policyholder's ability to use insured property for its intended purpose.

Moreover, the interpretation, scope and applicability of these words to COVID-19-related losses will impact many policyholders across New York State who suffered significant losses during the pandemic. Indeed, more than two dozen appeals are pending in New York's federal and state appellate courts regarding this issue. And, notably, at least thirteen state high courts have already addressed or agreed to address this issue,[2] with others likely to follow. Thus, it is indisputable that the availability of insurance coverage for COVID-19-related losses under New York law is an important issue that will impact many New York businesses statewide that suffered losses as a result of COVID-19.

Further, the First Department's decision in this case will have wide-ranging impacts outside of the COVID-19 context, such as in cases involving myriad substances that render property dangerous to use by their mere presence and transform property on a microscopic level. Indeed, as discussed in more detail below, courts across the country have historically held that substances such as ammonia, noxious fumes, and E. coli that pose a threat to human health *can* cause physical loss or damage if they even temporarily impair the use of insured property, despite none of these substances otherwise tangibly altering property. The First Department, however, rejected this analogous authority on the ground that "[t]hese cases and others like them are distinguishable because under New York law 'a negative alteration in the tangible condition of [the] property [insured]' is necessary in order for there to be 'physical' damage to the property." 205 A.D.3d at 85-86 (citation omitted). Notably, whereas other courts have at least attempted to factually

[2] This includes Massachusetts, Iowa, Wisconsin, Washington, D.C., Delaware, Maryland, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, and Washington.

distinguish circumstances involving ammonia and similar substances from COVID-19,[3] the First Department has seemingly held that coverage would never be available for any of these substances under New York law.

This Court, however, has never adopted or announced the First Department's highly restrictive tangible alteration standard, and has certainly never held that New York policyholders are entitled to narrower coverage than policyholders in other states under the very same policy language. Thus, if left uncorrected, the First Department's decision will not only impact the many policyholders that suffered COVID-19-related losses, but it will also drastically restrict coverage in numerous other contexts where coverage has historically been available (including in New York) and continues to be available in other jurisdictions. Therefore, this Court's review of this issue is of great importance, as it will impact countless New York businesses both in the COVID-19 context and in many other contexts going forward.

II. THE FIRST DEPARTMENT'S RESTRICTIVE NEW TEST IS CONTRARY TO DECADES OF CASELAW FROM ACROSS THE COUNTRY INTERPRETING THE WORDS "PHYSICAL LOSS OR DAMAGE," INCLUDING PRIOR DECISIONS FROM NEW YORK COURTS

Although the interpretation of the words "physical loss or damage" is an issue of first impression for this Court, courts across the country have held for more than sixty years that these words encompass losses caused by dangerous, invisible substances such as E. coli and ammonia, which do not tangibly alter property.[4] These are not hypothetical scenarios; they are real-world

[3] *See, e.g.*, *Inns-by-the-Sea v. California Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576, 589 (Cal. Ct. App. 2021), *review denied* (Mar. 9, 2022) (distinguishing substances such as ammonia and odors from COVID-19 for purposes of constituting physical loss or damage).

[4] *See, e.g., Am. Alliance Ins. Co. v. Keleket X-Ray Corp*., 248 F.2d 920 (6th Cir. 1957) (radioactive dust and radon gas); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (en banc) (gasoline vapors); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396 (D. Minn. 1989) (health-threatening organisms); *Hetrick v. Valley Mut. Ins. Co.*,

situations in which policyholders secured coverage under similar policy language, but would not be entitled to coverage under the First Department's newly announced standard. *See e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418, 2014 WL 6675934, *5-6 (D.N.J. Nov. 25, 2014); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016), *vacated by joint stipulated request of parties*, 2017 WL 1034203 (D. Or. Mar. 6, 2017); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968).

Moreover, before COVID-19, courts in New York had held that "noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage," *Schlamm*

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15 Pa. D. & C.4th 271 (Pa. Ct. Com. Pl. 1992) (oil); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (methamphetamine fumes); *Azalea, Ltd. v. Am. States Ins. Co*., 656 So.2d 600 (Fla. Dist. Ct. App. 1995) (unknown pollutant); *Arbeiter v. Cambridge Mut. Fire Ins. Co*., 1996 WL 1250616 (Mass. Super. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co*., 563 N.W.2d 296 (Minn. Ct. App. 1997) (asbestos); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co*., 720 N.E.2d 622 (Ill. App. Ct. 1999), *as modified on denial of reh'g* (Dec. 3, 1999) (asbestos); *Columbiaknit, Inc. v. Affiliated FM Ins. Co*., 1999 WL 619100 (D. Or. Aug. 4, 1999) (mold or mildew); *Gen. Mills, Inc. v. Gold Medal Ins. Co*., 622 N.W.2d 147 (Minn. Ct. App. 2001) (food treated with unapproved pesticide); *Yale Univ. v. Cigna Ins. Co*., 224 F. Supp. 2d 402 (D. Conn. 2002) (asbestos and lead); *Graff v. Allstate Ins. Co*., 54 P.3d 1266 (Wash. Ct. App. 2002) (methamphetamine vapors); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830 (D. Or. June 18, 2002) (mold); *Cooper v. Travelers Indem. Co. of Ill*., 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005) (E.coli); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App. 2005) (mold); *Schlamm Stone & Dolan LLP v. Seneca Ins. Co*., 800 N.Y.S.2d 356 (Sup. Ct. 2005) (unpublished table decision) (dust and noxious particles); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn*., 2007 WL 464715 (D. Or. Feb. 7, 2007) (lead); *Essex Ins. Co. v. BloomSouth Flooring Corp*., 562 F.3d 399 (1st Cir. 2009) (odors); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (toxic gas); *Widder v. La. Citizens Prop. Ins. Corp*., 82 So.3d 294 (La. App. 4th Cir. 2011), cert. denied, 76 So.3d 1179 (La. 2011) (lead contamination); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co*., 939 F. Supp. 2d 1059 (D. Haw. 2013) (arsenic); *Netherlands Ins. Co. v. Main Street Ingredients*, LLC, 745 F.3d 909 (8th Cir. 2014) (salmonella in food); *Mellin v. N. Sec. Ins. Co*., 115 A.3d 799 (N.H. 2015) (odor of cat urine).

Stone & Dolan, LLP. v. Seneca Ins. Co., 800 N.Y.S.2d 356 (Sup. Ct., N.Y. Cnty. 2005), and "the critical policy term . . . 'physical loss or damage[]' does not require that the physical loss or damage be tangible, structural or even visible," *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co*., 17 F. Supp. 3d 323, 330 (S.D.N.Y. 2014). Indeed, in *Pepsico, Inc. v. Winterthur International American Insurance Co.*, the Second Department rejected the notion that "to prove 'physical damages' the [insured] must prove that 'there has been a distinct demonstrable alteration of [the] physical structure [of the insured's products] by an external force.'" 806 N.Y.S.2d 709, 711 (2d Dep't 2005). Instead, the Second Department found that it was sufficient that the introduction of a substance into the insured product "seriously impaired" the "function and value" of the product. *Id*. Thus, the First Department's newfound test for "physical loss or damage" is contrary to decades of caselaw across the country interpreting those words and has been rejected by the Second Department.

Indeed, in support of its tangible alteration standard, the First Department relied heavily on its own prior decision in *Roundabout*. *Roundabout*, however, did not involve any physical impact to insured property, tangible or otherwise. Rather, it involved the question of whether damage *to someone else's* property—there, collapsed scaffolding that created dangerous conditions in a public street—was covered under an insurance policy that limited its coverage to loss or damage "to the insured's property."

Roundabout also did not cite a single decision from this Court interpreting the relevant policy language, "physical loss or damage." Instead, relying on an even earlier First Department decision, *Roundabout* held that "business interruption coverage is limited to losses involving physical damage to the insured's property." 302 A.D.2d at 7 (citing *Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 991 (1982)). The policy in

Howard, however, was expressly limited to "damage to or destruction of real or personal property." *Howard Stores*, 82 A.D.2d at 399. Here, in stark contrast, the policy covers direct "physical loss" *or* "physical damage" to property. Thus, the First Department's "tangible alteration" requirement, which now applies to nearly every property and business interruption insurance policy interpreted under New York law, was drawn from the First Department's own prior case involving non-analogous circumstances which, in turn, was based on a prior decision interpreting a narrower grant of coverage. Put differently, the First Department's pronouncement of New York law on this issue deprives New York policyholders of historically-available insurance coverage based on inapposite authority, and without any guidance from this Court.

Furthermore, the First Department's decision is contrary to numerous courts interpreting these same words in the COVID-19 context. For example, in a comprehensive, 28-page decision, California's Second Appellate District Court recently held that an insured had "unquestionably" pled "physical loss or damage" based on the actual presence and impact of COVID-19 on insured property. *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, No. B316501 (Cal. Ct. App. July 13, 2022); *see Addendum*. Similarly, a recent Louisiana appellate court held that "coverage exists for loss or damage caused by 'direct physical loss of or damage to' the appellants' insured premises as a result of contamination by COVID-19." *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2021-CA-0343, 2022 WL 2154863 (La. Ct. App. June 15, 2022). And, even certain courts that have dismissed policyholders' coverage claims for COVID-19-related losses have suggested that the result would be different if the policyholder, like CRO here, had alleged that its losses were caused by the physical presence of the virus on insured property. *See, e.g.*, *Robert Levy, D.M.D., LLC, et al., v. Hartford Cas. Ins. Company, et al.*, No. 21-1446, 2022 WL 2520570, at *1 (8th Cir. July 7, 2022) (finding no coverage because the policyholders in

that case "limited their services as a precautionary measure, not because the virus was present on their premises"); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 553-54 (Iowa 2022) (making clear that allegations that COVID-19 virus was present at a covered property could satisfy the physical element of loss of use, even though the plaintiff in the case before Iowa's Supreme Court pled otherwise due to the presence of a virus exclusion in the policy at issue); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 841 n.7 (N.D. Cal. 2020) ("Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening force would be different."), *aff'd* 15 F.4th 885 (9th Cir. 2021); *Inns-by-the-Sea*, 286 Cal. Rptr. 3d at 590 (recognizing that "it could be possible, in a hypothetical scenario, that an invisible airborne agent would cause a policyholder to suspend operations because of direct physical damage to property"). Thus, the First Department's decision is contrary to persuasive authority from other appellate courts interpretating the very same language.

III. THE FIRST DEPARTMENT'S DECISION RESTRICTS COVERAGE IN CONTRAVENTION OF THIS COURT'S RULES GOVERNING INSURANCE POLICY INTERPRETATION

This Court has held that "all of the language" in an insurance policy must be "afford[ed] a fair meaning" and that "surplusage [is] a result to be avoided." *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257 (N.Y. 2016), *opinion after certified question answered*, 148 A.3d 633 (Del. 2016). Indeed, the First Department, citing this Court's decision in *County of Columbia v. Continental Insurance Co.*, 83 N.Y.2d 618, 628 (1994), recognized that insurance policies cannot be read so as to render certain terms "meaningless." *Consol. Rest. Operations*, 205 A.D.3d at 82. The First Department further recognized this Court's requirement that "contracts should be interpreted 'consistent with the reasonable expectation of the average insured.'" *Id.* at 81 (quoting *Viking Pumps*, 27 N.Y.3d at 257). Moreover, policy language is ambiguous and must be construed in

favor of coverage if it is subject to a "reasonable basis for a difference of opinion." *In re Viking Pump, Inc.*, 27 N.Y.3d at 258. The First Department's decision, however, turns these bedrock principles on their head.

The First Department concluded that CRO's interpretation of the words "physical loss or damage" would render the word "physical" meaningless. *Consol. Rest. Operations*, 205 A.D.3d at 82. But this is not accurate. Unlike in *Roundabout*, in which the policyholder's inability to use its property was unrelated to any physical impact *to insured property*, CRO alleged that its inability to use its restaurants was caused by the *physical* impact and presence of a *physical* substance on insured property that rendered that property *physically* dangerous for use. R59-60 ¶¶ 29-33; R1941-43 ¶¶ 41-47. Put differently, CRO suffered a "physical loss" of its insured properties because of something that physically impacted those very properties.[5] Indeed, whereas CRO's interpretation of the words "physical loss or damage" gives full force and meaning to each of these undefined words, the First Department's newfound "tangible alteration" or "damage" requirement would render the words "physical loss" meaningless by collapsing the words "physical loss" into the words "physical damage."

Moreover, the average insured would consider its inability to use insured property as a result of the presence and imminent threat of a dangerous, physical substance to fall squarely within the words "direct physical loss or damage." This reasonable interpretation is based on the plain meaning of those words and decades of caselaw from across the country interpreting them in the context of coverage for noxious substances. It is also based on other terms and conditions of

[5] Insurers routinely argue in these cases that policyholders have not suffered "physical loss" under these circumstances because COVID-19 dissipates or can be cleaned quickly. Although this argument is contrary to CRO's allegations regarding the resilience of the virus (which must be accepted as true at this stage), it also erroneously conflates the trigger for coverage – which is a liability question – with the duration of coverage – which is a damages question.

the relevant policy, which would be rendered superfluous by the First Department's standard. Indeed, unlike many other policyholders who purchased policies with broad virus exclusions, CRO's policy has no such exclusion. Instead, CRO purchased a policy that expressly recognizes that a wide range of contaminants, including "fumes," "pathogens," and "illness-causing agents," can cause physical loss or damage. R143. Thus, when read as a whole, as required under this Court's precedent, a reasonable policyholder would expect coverage under the circumstances CRO has alleged here.

Notably, as one court pointedly observed, insurance "[c]arriers have utilized the phrase *direct physical loss* for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise [interpretive] issue" presently before this Court. *Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271, at *3 (D. Okla. Jan. 28, 2021) (emphasis in original). Nevertheless, "[d]espite these pleas and the known confusion surrounding the phrase 'direct physical loss,' [insurers] made no attempt to clarify or define that phrase within the [insurance] policy to avoid the [policyholder's belief or contention] that losses such as the closure of a business in response to the Pandemic would be covered – at least, not until it was too late." *Id.*

Thus, even if the First Department's interpretation of the words "physical loss or damage" is *a* reasonable interpretation, CRO has proffered a competing reasonable interpretation of those same words that results in coverage and, thus, controls. *In re Viking Pump, Inc.*, 27 N.Y.3d at 258 (policy language is ambiguous if there is a "reasonable basis for a difference of opinion"). Accordingly, this Court should grant CRO's motion for leave to appeal to rectify the First Department's stark departure from this Court's well-established rules governing insurance policy interpretation.

IV. THE FIRST DEPARTMENT'S DECISION THAT CRO'S ALLEGATIONS WERE CONCLUSORY IS CONTRARY TO THIS COURT'S HOLDINGS REGARDING NEW YORK'S PLEADINGS STANDARDS

This Court should also grant CRO's application for leave to appeal on the independent ground that the First Department's decision is contrary to this Court's longstanding rules regarding New York's pleading standards. Specifically, after concluding (erroneously) that New York law requires a tangible alteration of or damage to property to constitute physical loss or damage, the First Department held that CRO could not satisfy this standard because its allegations were "conclusory." *Consol. Rest. Operations*, 205 A.D.3d at 83. But this Court has made clear that "conclusory" allegations, for purposes of New York's procedural law, are "claims consisting of bare legal conclusions with no factual specificity." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Here, CRO's allegations regarding the nature, impact, and presence of the virus on insured property were factually robust, detailed, and highly plausible.

Specifically, CRO alleged in dozens of paragraphs supported by citation to scientific evidence that, among other things:

- The coronavirus is a deadly and highly contagious respiratory virus that has resulted in a global pandemic, infected hundreds of millions of people around the world, and killed hundreds of thousands of people (now more than one million people) in the United States. R54-55 ¶¶ 12-17; R1932-33 ¶¶ 13-16; R1936-37 ¶ 26.
- The coronavirus is a physical substance carried and spread through physical droplets and airborne respiratory particles, pervades and attaches to property, survives on property for weeks, is resilient, and is challenging to contain. R54-56 ¶¶ 12-21; R1932-38 ¶¶ 13-30.
- The coronavirus has multiple modes of transmission, including airborne transmission through physical droplets, and transmission through human contact with the virus on physical objects. R54-55 ¶¶ 14-15; R1933-34 ¶¶ 16-21.
- The coronavirus can spread through asymptomatic and pre-symptomatic individuals (thus making it effectively impossible to identify and segregate infectious persons from non-infectious persons), cannot be entirely removed through cleaning, physically alters the air, and attaches to and alters physical surfaces by turning them into fomites – vectors for infection. R54-56, ¶¶ 14-21; R1932-38 ¶¶ 13-31.

- Beginning in February/March of 2020, the virus was present in the air within the CRO's restaurants and on the surfaces of restaurant property, and thereby physically altered numerous items of insured property by combining dangerous viral RNA with air that previously was normal to breathe and surfaces that previously were safe to touch. R60 ¶ 36; R68 ¶ 61; R1941 ¶¶ 41-42. Thereafter, the virus was continually reintroduced into the CRO's restaurants. R1941 ¶ 41.
- CRO was forced to suspend indoor operations due to the presence of the virus, the continuing threat of the virus, and resulting stay-at-home orders that went into effect at every location that CRO maintained a restaurant. R51-52 ¶¶ 3-4; R59-60 ¶¶ 29-33, 36; R1929-30 ¶¶ 3-4; R1940 ¶¶ 37-39; R1944 ¶ 52.
- As a result, CRO suffered massive losses, and spent considerable sums on remedial measures, such as adding physical partitions at the restaurants, physically reconfiguring layouts, commencing construction to add ventilators and purifiers, and implementing stringent and continuous cleaning procedures, including adding extra cleaning stations and hand sanitizer mounts, which were not previously used or necessary. R1941-42 ¶¶ 42-45.

There is nothing conclusory about these allegations. Rather, taken together, and certainly when all reasonable inferences are drawn in CRO's favor, as required at this stage of the proceeding, CRO exhaustively alleged that its properties, including the air and surfaces therein, were impacted and altered by the presence of the coronavirus, thereby resulting in significant losses.

Although insurers, and even the First Department, may disagree with these allegations as a factual matter, resolution of these allegations requires discovery and expert analysis regarding the nature and impact of COVID-19 on property. It was therefore error for the First Department to simply disregard these allegations by deeming them "conclusory." Indeed, if CRO's allegations are deemed "conclusory," it would represent a wholesale reconceptualization of what that word means in the context of New York's liberal pleading standard. It would also convert New York's notice pleading standard into a federal plausibility standard, and thereby set a far higher threshold for policyholders to plead a legally sufficient complaint in New York. Thus, this Court should grant CRO's motion for leave to appeal to reaffirm New York's pleading standard.

V. OTHER CONSIDERATIONS WARRANTING REVIEW

Westport, in opposing CRO's application for leave to appeal to this Court, likely will argue that the First Department's decision is consistent with the weight of authority from courts across the country concerning coverage for COVID-19-related losses. What Westport likely will fail to mention is that in the majority of these cases: (1) the policyholder failed to allege the actual presence of the virus on insured property and, thus, failed to allege a physical impact to insured property; (2) the policy contained a standard virus exclusion Westport failed to include in CRO's policy; (3) the policyholder's allegations regarding the presence and impact of COVID-19 on insured property were far weaker than CRO's allegations here; and/or (4) the courts erroneously resolved hotly contested fact issues at the motion to dismiss stage, such as finding that COVID-19 can be easily cleaned. Moreover, even a cursory review of the New York caselaw regarding this issue reveals that many courts have fallen into a proverbial echo chamber, in which a handful of decisions involving poorly-pled complaints in the early days of the pandemic created a self-reinforcing snowball effect on New York's lower courts and, indeed, courts nationally. Thus, these circumstances present the quintessential case where review by this Court is necessary to rectify a systemic error.

Westport may also argue, as other insurers have, that a ruling in favor of policyholders on these issues will be financially devastating to the insurance industry and will require insurers to cover losses under policies that were not underwritten for the risk of pandemics. But, to the extent Westport raises these arguments, it likely will omit that many commercial property insurance policies include a standard virus exclusion, and either a one or two-year statute of limitations. Thus, this appeal concerns policyholders who purchased policies without any such exclusion, and who timely filed suit, as well as future policyholders seeking coverage for non-COVID-19-related losses. And, notably, the fact that some policies, but not others, include a widely available virus

exclusion, makes clear that the insurance industry was well aware of this risk, but that Westport made a conscious decision to issue policies that omitted the virus exclusion and therefore accepted the risk of owing coverage in the event of a pandemic.

Indeed, far from threatening the solvency of the insurance industry (which has enjoyed record profits in recent years), if the First Department's decision is left uncorrected, it would result in a substantial windfall to the insurance industry. Specifically, commercial property insurers collected massive premiums during the pandemic despite the fact that the properties they insured were not being used and, thus, were generating fewer claims. Now, those same insurers have not only kept the premiums they collected, but, under the First Department's decision, are permitted to continue charging those premiums (some insurers have even increased premiums), despite a drastic narrowing of coverage under those same policies. And they have done so without any of the regulatory oversight ordinarily required when an insurer restricts coverage. Thus, this appeal presents significant public policy concerns warranting review by this Court.

CONCLUSION

CRO respectfully requests that this Court grant its motion for leave to appeal.

Dated: New York, New York
July 12, 2022

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ADDENDUM

Filed: 7/13/22

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARINA PACIFIC HOTEL & SUITES, LLC et al., Plaintiffs and Appellants, v. FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.	B316501 (Los Angeles County Super. Ct. No. 20SMCV00952)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Reversed and remanded with directions.

Barnes & Thornburg, David P. Schack, Matthew B. O'Hanlon and Jonathan J. Boustani for Plaintiffs and Appellants Marina Pacific Hotel & Suites, LLC, Venice Windward, LLC, Larry's Venice, L.P. and Erwin H. Sokol.

DLA PIPER, John P. Phillips, Joseph Davison and Brett Solberg for Defendant and Respondent.

For more than two years our understanding of COVID-19, the infectious disease caused by the SARS-CoV-2 virus and its many variants, has evolved.[1] Today we think we know how it spreads, how to protect against it and how best to treat those who have it. Perhaps we do. But even so, when a pleading alleges facts sufficient to constitute a cause of action, what we think we know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true and, on that ground, sustaining a demurrer without leave to amend. Yet that is precisely what occurred here.

The owners of Hotel Erwin and Larry's (a restaurant adjacent to the hotel) in Venice Beach—Marina Pacific Hotel & Suites, LLC; Venice Windward, LLC; Larry's Venice, L.P.; and Erwin H. Sokol, as trustee of the Frances Sokol Trust (collectively insureds)—sued Fireman's Fund Insurance Company alleging the COVID-19 virus was present on, and had physically transformed, portions of the insured properties—"direct physical loss or damage" within the meaning of Fireman's Fund's first-party commercial property insurance policy—but Fireman's Fund refused to pay policy benefits for covered losses incurred as a result. The trial court sustained Fireman's Fund's demurrer to the insureds' first amended complaint without leave to amend and dismissed the lawsuit, ruling the COVID-19 virus cannot cause direct physical loss or damage to property for purposes of

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[1] For ease of reference we refer, as do the parties, to the "COVID-19 virus."

insurance coverage. That might be the correct outcome following a trial or even a motion for summary judgment. It was error at this nascent phase of the case. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Fireman's Fund (Allianz) Policy*[2]

As alleged in the operative first amended complaint, Fireman's Fund issued its commercial property insurance policy no. USC007058190 for the period July 1, 2019 to July 1, 2020 to provide coverage for Hotel Erwin and Larry's. Marina Pacific Hotel & Suites, LLC; Venice Windward, LLC; Larry's Venice, L.P.; and Erwin H. Sokol, as trustee of the Frances Sokol Trust—plaintiffs in this litigation—were named insureds. A copy of the policy was attached as Exhibit A to the pleading.

The policy's general property coverage provision states, "[W]e will pay for direct physical loss or damage to [the insured property] caused by or resulting from a **covered cause of loss** during the Policy Period." The policy provided business interruption coverage (with a $22 million limit) for "the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of your operation during the **period of restoration** arising from direct physical loss or damage to [covered] property." The terms printed in boldface type were separately defined. As pertinent here, "covered cause of loss" was defined as "risk of direct physical loss or damage not excluded or limited in the Coverage Form"; "business income" was defined as the net profit or loss before

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[2] The policy attached to the first amended complaint and cited by both the insureds and Fireman's Fund is identified as "Allianz Global Corporate & Specialty® Allianz Insurance Policy." Fireman's Fund is a member of the Allianz Group.

income taxes from the business's operations; "suspension" as "the slowdown or cessation" of operations and also meant that part or all of the premises had been rendered untenable. "Period of restoration" meant "the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a **covered cause of loss** to the property" and ends when the property "should be repaired, rebuilt, or replaced with reasonable speed and like kind or quality."

The policy also included "communicable disease coverage" (with a policy limit of $1 million), providing the insurer would pay "for direct physical loss or damage" to insured property "caused by or resulting from a covered **communicable disease event**," including costs necessary to repair or rebuild insured property damaged or destroyed by the **communicable disease** and to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor and assess the effects [of] the **communicable disease**." In addition, business interruption coverage was provided for suspension of operations during a period of restoration, provided the suspension was "due to direct physical loss or damage to property at a location caused by or resulting from a covered **communicable disease event**." "Communicable disease" was defined as "any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human." "Communicable disease event" was defined as "an event in which a **public health authority** has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a **communicable disease** at such location."

As one of the exclusions applicable to all coverages (property coverage, business income and extra expense coverage

or any extensions of coverage), the policy, under the heading "Mortality and Disease," provided the insurer would not pay for any loss, damage or expense caused directly or indirectly by, or resulting from, "[m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus."

2. *The First Amended Complaint*

The insureds filed their complaint against Fireman's Fund on July 21, 2020—four months after the COVID-19 pandemic first gripped the United States and three weeks after the end of the policy period—and the operative first amended complaint on August 31, 2021, alleging causes of action for breach of contract, tortious breach of contract, elder abuse and unfair competition. All four causes of action were based on Fireman's Fund's denial of coverage and refusal to pay (or to advance) policy benefits for losses claimed by the insureds as a result of the pandemic.

The first amended complaint alleged, in part, the insureds, beginning in March 2020, had suffered loss arising from direct physical loss or damage to covered property based on the existence of COVID-19. They asserted that "COVID-19 is a covered cause of loss under the Policy because it is not excluded or limited thereunder" and, on information and belief, that "the presence of COVID-19 on property, including on and within Insured Properties (i.e., an external force), caused and continues to cause physical loss and/or damage to property by causing, among other things, a distinct, demonstrable or physical alteration to property" and "by transforming the physical condition of property at Insured Properties and within the covered radius," causing the properties to remain in an unsafe and hazardous condition.

Also on information and belief the insureds alleged COVID-19 spreads through three primary modes of transmission: airborne transmission (droplets of saliva or nasal discharge of an infected individual, which are released by a cough, sneeze, speech or similar modes and inhaled by others); aerosols (smaller droplets that can linger in the air for hours and reach others further away); and fomite transmission—indirect contact with surfaces or objects where the virus has been disseminated by a person with COVID-19. The first amended complaint continued, "Both porous and nonporous surfaces or objects can harbor COVID-19 and serve as vehicles of transmission. Once this occurs, the transfer of COVID-19 may and does readily occur between inanimate and animate objects, or vice versa. A study by the Virology Journal showed that COVID-19 can survive on surfaces up to 28 days, serving as a vehicle for transmission during that time span." Citing several journal articles, the insureds alleged the COVID-19 virus does not simply live on the surface of objects. Rather, "it also actually bonds and/or adheres to such objects through physico-chemical reactions involving, *inter alia*, cells and surface proteins" and "caus[es], among other things, a distinct, demonstrable or physical alteration to property."

The insureds alleged COVID-19 had been present in and before March 2020 on a variety of physical objects in the insured properties, including furniture, countertops, walls, bedding, appliances and food and other packaged items, as well as in the air. The presence of the virus was not due to a single episode. Rather, "because COVID-19 is a pandemic and is statistically certain to be carried by a number of individuals who visit the Insured Properties and other properties within the covered

radius daily, COVID-19 is continually reintroduced to the air and surfaces of those locations." Further, they alleged, in response to multiple employees of Hotel Erwin testing positive, "various public health authorities have ordered that Hotel Erwin be evacuated, decontaminated, or disinfected," and specifically alleged one employee had been ordered by the Los Angeles County Department of Health–Environmental Health Division to "evacuate the hotel and quarantine."

The physical loss or damage to property, the insureds alleged, required the closure or suspension of operations at Hotel Erwin and Larry's or portions of those properties at various times and caused them to incur extra expense, adopt remedial and precautionary measures "to attempt to restore and remediate the air and surfaces at the Insured Properties, dispose of property damaged by COVID-19 and limit operations at the Insured Properties." In addition, access to the insured properties, the insureds alleged, had at times been prevented or limited by governmental orders issued "in response to the direct physical loss and/or damage caused by COVID-19 to other property within the covered radius [as defined by the policy]."

Finally, the insured alleged they gave timely notice of the loss under the policy and had performed all conditions on their part under the policy except as excused by Fireman's Fund's conduct and breaches of contract. Fireman's Fund, despite notice, breached the policy by denying coverage and refusing to pay any policy benefits.[3]

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[3] The insureds' second cause of action alleged Fireman's Fund breached the implied covenant of good faith and fair dealing contained in the policy by, among other grounds, "[w]rongfully, intentionally, unreasonably and in bad faith

3. *Fireman's Fund's Demurrer and the Insureds' Response*

Fireman's Fund demurred to the first amended complaint on August 19, 2021. It argued the insureds had failed to allege facts showing direct physical loss or damage to covered property, a contractual prerequisite for a valid claim to benefits under the policy. In support Fireman's Fund explained that courts across the country had ruled the pandemic does not equate to physical loss or damage and argued loss of use alone does not constitute direct physical loss or damage. Because various public agency orders (from Governor Newsom and the County and City of Los Angeles) permitted the insureds' properties to remain open, Fireman's Fund contended the policy's civil authority coverage

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refus[ing] to honor its obligations under the Policy," and by "[f]raudulently misrepresent[ing] and falsely promis[ing] that it would indemnify and pay the losses incurred by Plaintiffs under the Policy for covered losses when it had no intention of doing so."

The third cause of action for financial elder abuse alleged Sokol is an "elder" as defined by Welfare and Institutions Code section 15610.27 and a "senior citizen" as defined by Civil Code section 1761, subdivision (f), and Fireman's Fund perpetrated "financial abuse" within the meaning of Welfare and Institutions Code section 15610.30 by "taking, appropriating, obtaining and/or retaining personal property in the form of benefits owing to Sokol under the Policy for a wrongful use and/or with intent to defraud."

The fourth cause of action alleged Fireman's Fund's conduct constituted unlawful business practices in violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.).

was inapplicable.[4] Finally, it argued coverage (and, thus, the insureds' claims for damages) was expressly precluded by the policy's mortality and disease exclusion.

In their opposition filed September 2, 2021 the insureds, pointing to specific allegations, argued their first amended complaint had alleged direct physical loss or damage to covered property; disputed Fireman's Fund's interpretation of the policy's civil authority coverage provision and the mortality and disease exclusion; and argued cases from California (e.g., *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1 [involving asbestos fibers]) and across the country have refused to dismiss similar lawsuits at the pleading stage.

4. *The Court's Order Sustaining the Demurrer Without Leave To Amend*

After taking the matter under submission following a hearing on September 13, 2021, the trial court issued its final ruling on October 5, 2021, sustaining without leave to amend Fireman's Fund's demurrer to each of the four causes of action in the first amended complaint.[5] The court, relying on *MRI*

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[4] The policy's "civil authority coverage," which is not at issue on appeal, provided that under certain circumstances the insurer would pay for "actual loss of **business** income and necessary **extra expense**" sustained due to the "necessary **suspension**" of operations caused by actions of a civil authority.

[5] The court denied as irrelevant Fireman's Fund's request to take judicial notice of four orders from governmental entities relating to the COVID-19 pandemic and 10 orders and filings from various state and federal trial court cases. The court similarly denied as irrelevant the insureds' request to take judicial notice of three orders issued in cases pending in the

Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co. (2010) 187 Cal.App.4th 766 (*MRI Healthcare*), held "direct physical loss or damage," necessary for there to be a "loss" triggering coverage within the meaning of policies of the type at issue here, requires some external force acting upon the insured property that causes a physical change in the condition of the property—that is, "it must have been 'damaged' within the common understanding of that term." The insureds' allegations do not satisfy that definition, the court ruled: "[W]here the property has simply been rendered unusable based on a virus, rather than an external force, the loss of use of the property in a typical manner is not a 'direct physical loss' contemplated by the insurance policy. To the contrary, the fact that the virus 'can survive on surfaces up to 28 days, serving as a vehicle for transmission during that time span' [citing to paragraph 16 of the first amended complaint], shows that any harm is temporary such that there is no need for any repairs or remediation. Instead, risk mitigation policies responsive to the existence of COVID-19, such as those in place at the Los Angeles Superior Court, i.e., regular cleaning and mandatory masks, serve to remove the virus from surfaces and minimize transmission." That the virus actually bonds or adheres to surfaces and objects,

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Los Angeles and Orange County Superior Courts. However, on its own motion the court took judicial notice of the three studies cited by the insureds in their pleading and observed, "[N]one of the three cited studies stands for the proposition that the presence of COVID-19 causes physical property damage, i.e., that it is 'damaged' within the common understanding of that term." Neither side challenges these rulings on appeal.

as alleged, "does not mean it causes physical damage to property."

The court additionally found, quoting the mortality and disease exclusion, that the Fireman's Fund policy "contains an express virus exclusion provision." "This provision expressly excludes coverage of any direct physical loss or damage resulting from a virus; it is beyond dispute that COVID-19 is a virus."

Because the insureds could not successfully allege direct physical loss or damage to property, the court concluded, it followed that they had failed to set forth a cause of action for breach of contract. In the absence of such a breach, there could be no tortious breach of contract, financial elder abuse or unfair competition. And the insureds failed to demonstrate they could cure those deficiencies if given leave to amend.

Judgment was entered October 26, 2021. The insureds filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768; *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; accord, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010;

Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081.) Indeed, "we accept as true even improbable alleged facts, and we do not concern ourselves with the plaintiff's ability to prove [the] factual allegations." (*Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 576; accord, *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 280 ["[i]n considering the merits of a demurrer, however, 'the facts alleged in the pleading are deemed to be true, however improbable they may be'"]; *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958 [same]; see *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711 ["[w]e do not concern ourselves with whether the plaintiff will be able to prove the facts that he or she may allege in the complaint"].) However, we are not required to accept the truth of the factual or legal conclusions pleaded in the complaint. (*Mathews*, at p. 768; *Centinela Freeman*, at p. 1010; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967; *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848), but liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726; see *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; accord, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.*, *supra*, 1 Cal.5th at p. 1010.)

2. *Governing Law: Interpretation of Insurance Policies*

"In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation." (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194.) The principles governing such an interpretation are well-established: "Our goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions. If contractual language is clear and explicit, it governs. If the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], we interpret them to protect the objectively reasonable expectations of the insured. If these rules do not resolve an ambiguity, we may then resort to the rule that ambiguities are to be resolved against the insurer." (*Montrose Chemical Corp. of California v. Superior Court* (2020) 9 Cal.5th 215, 230 [cleaned up].)

"The 'tie-breaker' rule of construction against the insurer stems from the recognition that the insurer generally drafted the policy and received premiums to provide the agreed protection." (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 321.) As a corollary rule of interpretation, intended "[t]o further ensure that coverage conforms fully to the objectively reasonable expectations of the insured," "in cases of ambiguity, basic coverage provisions are construed broadly in favor of affording protection, but clauses setting forth specific exclusions from coverage are interpreted narrowly against the insurer." (*Id.* at p. 322.)

The insureds' appeal requires analysis of the allegations in their first amended complaint primarily in terms of one insuring provision —coverage for business interruption due to "direct

physical loss or damage to" covered property[6]—and one exclusion—for "mortality and disease." We consider each provision in turn.

3. *The Insuring Provision: Direct Physical Loss or Damage*

Although "direct physical loss or damage" is a crucial term in a first party commercial property insurance policy, it is left undefined in commercial property policies, which define a plethora of other words and phrases. Left to other interpretive tools, Division Eight of this court in *MRI Healthcare*, *supra*, 187 Cal.App.4th 766 construed a similar, but not identical, coverage term, "accidental direct physical loss" to insured property as requiring "'an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become

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[6] In addition to alleging Fireman's Fund breached the policy's business income and extra expense coverage, the first amended complaint alleged Fireman's Fund breached the policy's communicable disease coverage by failing to pay for direct physical loss or damage to insured properties caused by public health authority orders that insured properties be evacuated, decontaminated or disinfected due to the COVID-19 outbreak and the policy's civil authority coverage by failing to pay for losses caused by orders prohibiting access to the insured properties as a result of direct physical loss or damage to property other than at the insured's location.

The parties do not separately address these alleged breaches in their briefs in this court, focusing instead on whether we can hold, as a matter of law, the COVID-19 virus does not cause damage to property, a ruling that would preclude all forms of coverage under the policy. Similarly, the trial court in its order sustaining Fireman's Fund's demurrer did not discuss these alternative grounds for finding a policy breach.

unsatisfactory for future use or requiring that repairs be made to make it so.'" (*Id.* at p. 779.) The *MRI Healthcare* court continued, "The word 'direct' used in conjunction with the word 'physical' indicates the change in the insured property must occur by the action of the fortuitous event triggering coverage. In this sense, 'direct' means '"[w]ithout intervening persons, conditions, or agencies; immediate." [Citation.]' [Citation.] For loss to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property." (*Ibid.*)[7]

The insureds argue *MRI Healthcare*'s definition of "direct physical loss" misstated California law and was based, they contend, solely on the erroneous assertion in a treatise of a

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[7] The insured in *MRI Healthcare* operated an imaging center in a building leased from a third party. As a result of storms the landlord was required to repair the roof over the room housing the MRI machine. These repairs could not be undertaken unless the machine was "ramped down" (demagnetized). Once the machine was ramped down, it failed to ramp back up. The insured alleged this failure constituted damage to the MRI machine within the meaning of its commercial property insurance. Because the damage was proximately caused by the storms, which were a covered event, the insured claimed it was entitled to recover both the amount it expended to repair the MRI machine and the income loss sustained while the machine was inoperable. (*MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 770.) Affirming the judgment entered after the trial court granted State Farm's motion for summary judgment—not an order sustaining a demurrer—the court of appeal held, "The failure of the MRI machine to satisfactorily 'ramp up' emanated from the inherent nature of the machine itself rather than actual physical 'damage.'" (*Id.* at p. 780.)

"widely held" rule that was, in fact, not at all widely held.[8] In support of this position the insureds cite *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, disapproved on another ground in *Sabella v. Wisler* (1963) 59 Cal.2d 21, 34, in which the court of appeal held a home had suffered physical loss or damage when the land underlying the home slid away, leaving the home standing on the edge of a newly formed cliff (*Hughes*, at p. 243),[9] as well as a third-party commercial general liability (CGL) case in which the court held the existence of asbestos fibers on surfaces in a building constituted property damage. (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, *supra*, 45 Cal.App.4th at p. 90.)

Notwithstanding those authorities, the requirement an insured allege an external force acted on the insured property causing a physical change in the condition of the property to come within the coverage provision for "direct physical loss or damage" has been adopted by a number of other courts of appeal, including

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[8] In holding physical alteration was a necessary element of "accidental direct physical loss," the court in *MRI Healthcare* quoted extensively from the third edition of Couch on Insurance (1995). (See, e.g., *MRI Healthcare*, *supra*, 187 Cal.App.4th at pp. 778-779.)

[9] In rejecting the insurer's argument coverage did not exist, the *Hughes* court explained, "Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." (*Hughes v. Potomac Ins. Co.*, *supra*, 199 Cal.App.2d at pp. 248-249.)

our colleagues in Division Four of this court and Division One of the Fourth Appellate District when deciding cases involving COVID-19. (See *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821, 830 (*United Talent*); *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 706 (*Inns-by-the-Sea*); see also *Doyle v. Fireman's Fund Ins. Co.* (2018) 21 Cal.App.5th 33, 38 [""[t]he 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 where the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property""].) Because we conclude the insureds' first amended complaint adequately alleged direct physical loss or damage to their covered property within the *MRI Healthcare* definition, we need not address their additional argument that *MRI Healthcare* should not be followed and direct physical loss or damage may be shown without evidence of a physical alteration in the insured property.

4. *The Insureds Adequately Alleged Direct Physical Loss or Damage Caused by the COVID-19 Virus and a Cause of Action for Breach of Contract by Fireman's Fund*

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Fireman's Fund's demurrer did not challenge elements (1), (2) or (4), contending only it did not breach its obligation to pay benefits under the policy because the insureds, having failed to allege any direct

physical loss or damage to property, failed to allege a covered loss.[10]

To reiterate, with respect to covered loss, the insureds alleged in their first amended complaint COVID-19 (that is, the SARS-CoV-2 virus that causes the disease) not only lives on surfaces but also bonds to surfaces through physicochemical reactions involving cells and surface proteins, which transform the physical condition of the property. The virus was present on surfaces throughout the insured properties, including the hotel lobby, kitchens at both the hotel and restaurant, employee breakroom, service elevator and parking garage, as well as on the properties' food, bedding, fixtures, tables, chairs and countertops. Because of the nature of the pandemic, the virus was continually reintroduced to surfaces at those locations. As a direct result, the insureds were required to close or suspend operations in whole or in part at various times and incurred extra expense as they adopted measures to restore and remediate the air and surfaces at the insured properties. The insureds specifically alleged they were required to "dispose of property damaged by COVID-19 and limit operations at the Insured Properties."

Assuming, as we must, the truth of those allegations, even if improbable, absent judicially noticed facts irrefutably contradicting them, the insureds have unquestionably pleaded direct physical loss or damage to covered property within the definition articulated in *MRI Healthcare*—a distinct, demonstrable, physical alteration of the property (*MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 779). They also

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[10] The parties agree, as did the trial court, for purposes of Fireman's Fund's demurrer the insureds' other three causes of action stand or fall with their ability to allege a covered loss.

adequately alleged that physical loss or damage caused a slowdown in, or cessation of, the operation of the insureds' business while the covered property was restored or remediated, thereby triggering their business interruption ("business income and extra expense") coverage.

We recognize this conclusion is at odds with almost all (but not all) decisions considering whether business losses from the pandemic are covered by the business owners' first person commercial property insurance. Of course, federal cases, whether considering insurance coverage under California law or that of other states; state court decisions from other jurisdictions; and decisions from other California courts of appeal are not binding on us. (See, e.g., *T.H. v. Novartis Pharmaceuticals Corp.*, *supra*, 4 Cal.5th at p. 175 ["[a]lthough the decisions of our sister states and the lower federal courts may be instructive to the extent we find their analysis persuasive, they are neither binding nor controlling on matters of state law"]; *Rubin v. Ross* (2021) 65 Cal.App.5th 153, 163 ["decisions of lower federal courts are not binding on us, even on questions of federal law"]; *Sarti v. Salt Creek Ltd*. (2008) 167 Cal.App.4th 1187, 1193 ["there is no horizontal stare decisis in the California Court[s] of Appeal"].) Moreover, virtually all those decisions dismissing lawsuits claiming coverage for business losses attributable to COVID-19 are readily distinguishable from the issue presented by the case at bar.

First, the pleading rules in federal court are significantly different from those we apply when evaluating a trial court order sustaining a demurrer. In *Ashcroft v. Iqbal* (2009) 556 U.S. 662 the Supreme Court held, to survive a motion to dismiss under the Federal Rules of Civil Procedure, "a complaint must contain

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (*Id.* at p. 678; see *id.* at p. 679 ["[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. [Citation.] Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"].) Unlike in federal court, the plausibility of the insureds' allegations has no role in deciding a demurrer under governing state law standards, which, as discussed, require us to deem as true, "however improbable," facts alleged in a pleading—specifically here, that the COVID-19 virus alters ordinary physical surfaces transforming them into fomites through physicochemical processes, making them dangerous and unusable for their intended purposes unless decontaminated.[11]

Second, a number of the cases rejecting COVID-19 claims, including *Inns-by-the-Sea*, *supra*, 71 Cal.App.5th 688, the first published California court of appeal decision involving a COVID-19 insurance claim, and *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753 (*Musso & Frank*), the first such decision in the Second District, involved

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[11] Being the careful lawyers they are, two weeks after filing their demurrer counsel for Fireman's Fund moved for summary judgment, arguing, based on discovery conducted to date, the undisputed facts established the absence of any covered losses. (We augment the record on our own motion pursuant to California Rules of Court, rule 8.155(a)(1)(A) to include Fireman's Fund's September 3, 2021 motion for summary judgment and separate statement in support of the motion.) As part of its ruling sustaining the demurrer, the trial court vacated the hearing date scheduled for that motion.

allegations of loss of use of insured property as a result of government-ordered closures to limit the spread of COVID-19, rather than, as expressly alleged here, a claim the presence of the virus on the insured premises caused physical damage to covered property, which in turn led to business losses. (See, e.g., *Inns-by-the-Sea*, at pp. 703 ["Inns alleges that it ceased operations 'as a direct and proximate result of the Closure Orders.' It does not make the proximate cause allegation based on the particular presence of the virus on its premises"];[12] *Musso & Frank*, at pp. 758-759 [citing *Inns-by-the Sea* and holding a policy requiring physical loss or damage to property did not cover losses incurred as a result of the Los Angeles Mayor's pandemic-related order mandating that restaurants close by midnight]; see also *Mudpie, Inc. v. Travelers Cas. Ins. Co.* (9th Cir. 2021) 15 F.4th 885, 892 (*Mudpie*) ["Mudpie's complaint does not identify a 'distinct, demonstrable, physical alteration of the property'. . . . Mudpie alleges the Stay at Home Orders temporarily prevented Mudpie from operating its store as it intended, and urges us to interpret

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[12] The court of appeal in *Inns-by-the-Sea* acknowledged, "in a hypothetical scenario," "an invisible airborne agent [c]ould cause a policyholder to suspend operations because of direct physical damage to property. . . . 'For example, a restaurant might need to close for a week if someone in its kitchen tested positive for COVID-19, requiring the entire facility to be thoroughly sanitized and remain empty for a period.'" (*Inns-by-the-Sea, supra*, 71 Cal.App.5th at pp. 704-705.) The court emphasized, however, that was not the scenario it was considering: "[T]he complaint here simply does not describe such a circumstance because it bases its allegations on the situation created by the Orders, which were not directed at a particular business establishment due to the presence of COVID-19 on that specific business's premises." (*Id.* at p. 704.)

'direct physical loss of or damage to' to be synonymous with 'loss of use'"].)

Not distinguishable on this ground, however, is *United Talent*, *supra*, 77 Cal.App.5th 821, Division Four's recent decision affirming a dismissal following an order sustaining a demurrer without leave to amend, which, like the trial court in the case at bench, found, as a matter of law, the insured's allegations that the physical presence of the virus on insured property constituted direct physical loss or damage were insufficient to trigger coverage. (*Id.* at p. 838.)[13] Rejecting the analogy to the infiltration of asbestos considered in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, *supra*, 45 Cal.App.4th 1 and the presence of environmental contaminants found sufficient for coverage in *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, like *Armstrong* a case involving a CGL policy, the court reasoned, "[T]he virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks. Thus, the presence of the virus does not render a property useless or uninhabitable, even though it may affect how

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[13] *United Talent*, agreeing with the analysis in *Inns-by-the-Sea*, also held temporary loss of use of a property due to pandemic-related closure orders, without more, did not constitute direct physical loss or damage and was insufficient for a claim of coverage under commercial property insurance policies. (*United Talent*, *supra*, 77 Cal.App.5th at pp. 830-832.) The insureds in this case made no such claim.

people interact with and within a particular space." (*United Talent*, at p. 838.)[14]

Thus, the *United Talent* court, based on its de novo review, affirmed a trial court ruling that, like the decision we review, found—without evidence—the COVID-19 virus does not damage property. But the insureds here expressly alleged that it can and that it did, including the specific allegation they were required to dispose of property damaged by COVID-19. We are not authorized to disregard those allegations when evaluating a demurrer, as the court did in *United Talent*, based on a general belief that surface cleaning may be the only remediation necessary to restore contaminated property to its original, safe-for-use condition. That was not always the understanding of the appropriate precautions to take with items potentially exposed to the virus (many people, in the early months of the pandemic, left groceries and other items outside their homes for several days after first sanitizing them); the insureds expressly alleged disinfecting affected objects does not repair or remediate the actual physical alteration to property caused by the virus; and the trial court did not take judicial notice of the effectiveness of cleaning as a proposition "not reasonably subject to dispute" pursuant to Evidence Code section 452, subdivisions (g) or (h).

Even if there had been evidence subject to proper judicial notice to establish that disinfecting repaired any alleged property damage, it would not resolve whether contaminated property had been damaged in the interim, nor would it alleviate any loss of business income or extra expenses. As the insureds argue on

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[14] The court added, "UTA has not alleged that its properties required unique abatement efforts to eradicate the virus." (*United Talent*, *supra*, 77 Cal.App.5th at p. 839.)

appeal, the duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage.

Finally, Fireman's Fund's argument and the trial court's conclusion that the COVID-19 virus cannot cause direct physical loss or damage to property are directly undermined by the policy's plain language establishing communicable disease coverage. Fireman's Fund asserts the insureds must allege an obvious physical alteration, for example, "broken chairs, dented walls, or smashed windows," to adequately allege direct physical loss or damage. Because it is undisputed the COVID-19 virus (or presumably any communicable disease) does not cause such damage, Fireman's Fund argues, it cannot cause property damage as defined in the policy. However, as discussed, the communicable disease coverage states Fireman's Fund will pay for "direct physical loss or damage" to insured property "caused by or resulting from a covered **communicable disease event**," including necessary costs to "[r]epair or rebuild [insured property] which has been damaged or destroyed by the communicable disease." This language explicitly contemplates that a communicable disease, such as a virus, can cause damage or destruction to property and that such damage constitutes direct physical loss or damage as defined in the policy. Construing the policy provisions together, as we must, this language precludes the interpretation that direct physical loss or damage categorically cannot be caused by a virus. (See Civ. Code, § 1641 ["[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].)

5. *The Mortality and Disease Exclusion*

If, as the trial court ruled and Fireman's Fund argues on appeal, the policy's mortality and disease exclusion bars all loss or damage caused by a virus, then it would be immaterial whether the first amended complaint alleged facts showing direct physical loss or damage to property from the COVID-19 virus. The most reasonable interpretation of that policy language, however, does not exclude the insureds' claim of loss.

Significantly, in the wake of the SARS outbreak (caused by the SARS-CoV virus) in the early 2000's, the Insurance Services Office (ISO) in 2006 introduced a new industry-standard endorsement for commercial property policies, "CP-01-40-07-06—Exclusion Of Loss Due To Virus Or Bacteria," which stated there is no coverage for losses 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. (ISO Circular, New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria (July 6, 2006) <https://www.propertyinsurancecoveragelaw.com/wp-includes/ms-files.php?file=2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> [as of July 13, 2022], archived at https://perma.cc/NXM6-36HM.) That exclusion was included, for example, in the policy at issue in *Musso & Frank*, *supra*, 77 Cal.App.5th 753. Accordingly, Division One of this district held, in rejecting the insured's claim for losses incurred as a result of its pandemic-related business closure, "even assuming Musso & Frank could bring itself within the insuring clause, the virus exclusion would bar coverage." (*Id.* at p. 761; accord, *Mudpie*, *supra*, 15 F.4th at p. 893 [the policy's virus exclusion, which provided, "[Travelers] 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," bars coverage for Mudpie's claimed COVID-19-related losses].)

The policy issued to the insureds did not contain this virus or bacteria exclusion. Instead, as discussed, the exclusion provided only that the insurer would not pay for loss, damage or expense caused by, or resulting from, "[m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus." Particularly when compared to the all-encompassing language of the ISO virus exclusion, the most reasonable interpretation of this language is that it precludes coverage for losses related to death from any of the listed causes—that is, it excludes losses resulting from a death caused by a virus or other disease, and not more broadly any otherwise covered losses resulting from a virus or a disease. At the very least, the language is ambiguous. Absent extrinsic evidence of the parties' expectations—hardly surprising given the preliminary stage of the proceedings—the exclusion must be interpreted narrowly, at least for now. (See *Montrose Chemical Corp. of California v. Superior Court*, *supra*, 9 Cal.5th at p. 230; see also *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648 ["'[a]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear'"].)

This understanding of the exclusion's more limited reach is reinforced by the policy's communicable disease coverage, which applies if there is a direct physical loss or damage to insured property caused by a public health authority order that a location be evacuated, decontaminated or disinfected due to the outbreak of a transmissible virus. If all losses caused by a virus were

excluded, even those indirectly resulting from the virus, as Fireman's Fund contends, the communicable disease coverage would be meaningless. It is our obligation to interpret the policy in a manner that does not leave one of its provisions without effect. (See Civ. Code, § 1641 ["[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"]; *AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at pp. 827-828 [insurance policy should not be read in such a way as to render some of its terms meaningless]*; Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 818 [same].) We do so by holding the mortality and disease exclusion does not bar the insured's claims in this lawsuit.

6. *Conclusion*

Quoting from one of the many out-of-state federal court decisions cited in its respondent's brief, Fireman's Fund argues, "'Common sense' confirms that 'the pandemic impacts human health and human behavior, not physical structures,'" and asserts "common experience from all of us being in homes, courtrooms, or other structures during the pandemic shows that COVID-19 does not physically alter the structure of property." We acknowledge it might be more efficient if trial courts could dismiss lawsuits at the pleading stage based on the judges' common sense and understanding of common experience rather than waiting to actually receive evidence to determine whether the plaintiff's factual allegations can be proved. But that is not how the civil justice system works in this state.

Because the insureds adequately alleged losses covered by Fireman's Fund's policy, they are entitled to an opportunity to present their case, at trial or in opposition to a motion for

summary judgment. The judgment of dismissal based on the trial court's disbelief of those allegations, whether ultimately reasonable or not, must be reversed.

DISPOSITION

The judgment is reversed, and the cause remanded with directions to the trial court to vacate its order sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. The insureds are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

COURT OF APPEALS OF THE STATE OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC., Plaintiff-Appellant, v. WESTPORT INSURANCE CORPORATION Defendant-Respondent.	**AFFIRMATION OF ROBIN COHEN IN SUPPORT OF MOTION FOR LEAVE TO APPEAL** Index No. 450839/2021 Appellate Division – First Department Nos.: 2021-02971 & 2021-04034

ROBIN L. COHEN, an attorney duly authorized to practice before the Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am a partner at Cohen Ziffer Frenchman & McKenna LLP, attorneys of record for the Appellant, Consolidated Restaurant Operations, Inc. ("CRO"). I submit this affirmation in support of CRO's motion, pursuant to CPLR 5602(a) and 22 NYCRR § 500.22(b), for an Order granting leave to CRO to appeal to the Court of Appeals from the Order of the Appellate Division, First Department (the "First Department"), dated April 7, 2022, which affirmed the Decision and Order of the Supreme Court, New York County, dated August 4, 2021, dismissing CRO's Complaint against Respondent, Westport Insurance Corporation ("Westport") in its entirety, and the Decision and Order of the Supreme Court, New York County, dated September 23, 2021, denying CRO's Motion for Reargument and, in the Alternative, to Amend its Complaint.

2. Pursuant to 22 NYCRR § 500.22(b), attached hereto are the following exhibits:

Exhibit Letter	Description of Document
A	Decision and Order, dated April 7, 2022, and entered with the Clerk of the Court of the Appellate Division, First Department, on April 7, 2022, with Notice of Entry thereof on April 25, 2022.

B	Decision and Order, dated August 4, 2021, and entered with the Clerk of the Court of New York County on August 4, 2021, with Notice of Entry thereof dated August 4, 2021.
C	Decision and Order, dated September 23, 2021, and entered with the Clerk of the Court of New York County on September 23, 2021, with Notice of Entry thereof dated September 23, 2021.
D	Notice of Appeal filed by CRO with the Clerk of the Court of New York County on August 9, 2021.
E	Notice of Appeal filed by CRO with the Clerk of the Court of New York County on September 30, 2021.
F	Order, Dated June 23, 2022, with Notice of Entry thereof on July 6, 2022.

3. Pursuant to 22 NYCRR § 500.22(c), filed herewith is one of copy of the record below, and one copy of the parties' appellate briefing below.

4. For the reasons stated in CRO's accompanying memorandum law, CRO's leave application is timely, this Court has jurisdiction over this appeal, and the Court should grant CRO's motion for leave to appeal. In short, this dispute presents a novel issue of statewide importance impacting thousands of policyholders, raises legal issues that have never been addressed by this Court, and raises a conflict between New York's intermediary appellate courts. Further, the First Department's decision is contrary to this Court's rulings regarding the basic standards of insurance policy interpretation and New York's pleadings standards.

Dated: New York, New York
July 12, 2022

Robin L. Cohen

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC.,	:	
Plaintiff,	:	Index No. 450839/2021
-against-	:	Commercial Division
WESTPORT INSURANCE CORPORATION,	:	Hon. Jennifer Schecter, J.S.C.
Defendant.	:	
	:	**NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in the Office of the Clerk of the Appellate Division, First Judicial Department, and signed by Susanna Molina Rojas, Clerk of the Court, on April 7, 2022.

Dated: New York, New York
April 25, 2022

By: _____

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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Judith J. Gische, J.P.
Jeffrey K. Oing
Tanya R. Kennedy
Manuel J. Mendez
Martin Shulman, JJ.

Appeal No. 15410-
15410A
Index No. 450839/21
Case No. 2021-02971
2021-04034

CONSOLIDATED RESTAURANT OPERATIONS, INC.,
Plaintiff-Appellant,

-against-

WESTPORT INSURANCE CORPORATION,
Defendant-Respondent.

THE RESTAURANT LAW CENTER,
NEW YORK STATE RESTAURANT ASSOCIATION,
NEW YORK CITY HOSPITAL ALLIANCE, THE CHEF'S WAREHOUSE INC.,
UNITED POLICYHOLDERS, NEW YORK STATE TRIAL LAWYERS ASSOCIATION and
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,
Amici Curiae.

Plaintiff appeals from the order of Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about August 4, 2021, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and declared that the losses plaintiff alleges in the complaint are not covered by the subject insurance policy. Plaintiff also appeals from the order, same court and Justice, entered September 23, 2021, which denied plaintiff's motion for reargument or leave to amend the complaint.

Cohen Ziffer Frenchman & McKenna LLP, New York (Robin L. Cohen, Alexander M. Sugzda and Orrie A. Levy of counsel), for appellant.

DLA Piper LLP (US), New York (Aidan M. McCormack and Robert C. Santoro of counsel), for respondent.

Jenner & Block LLP, New York (Jeremy M. Creelan, Michael W. Ross, David M. Kroeger, Gabriel K. Gillett and David J. Clark of counsel), for The Restaurant Law Center, New York State Restaurant Association and New York City Hospitality Alliance, amici curiae.

Reed Smith LLP, New York (John N. Ellison and Richard P. Lewis of counsel), for The Chefs' Warehouse Inc., amicus curiae.

Covington & Burling LLP, New York (Andrew Hahn, Andrew Henley, and Rukesh Korde, of the bar of the District of Columbia, admitted pro hac vice, of counsel), for United Policyholders, amicus curiae.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas, Joseph D. Jean, Maria T. Galeno and Scott D. Greenspan of counsel), and Brian J. Isaac, New York, for New York State Trial Lawyers Association, amicus curiae.

Robinson & Cole LLP, New York (Wystan M. Ackerman of counsel), for American Property Casualty Insurance Association, amicus curiae.

GISCHE J.,

This appeal concerns the issue of whether the actual or possible presence of COVID-19 in plaintiff's restaurants caused "direct physical loss or damage" to its property, within the meaning of the insurance policy that plaintiff purchased from defendant. The issue of whether business interruptions due to COVID-19 is caused by direct "physical" damage to property presents an issue of first impression for an appellate court in New York. This Court has, however, previously construed the phrase "direct physical loss or damage" in other contexts involving similar insurance contracts. As more fully explained below, we hold that where a policy specifically states that coverage is triggered only where there is "direct physical loss or damage" to the insured property, the policy holder's inability to fully use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting "physical" difference to the property from what it was before exposure to the virus, fails to state a cause of action for a covered loss.

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic and countries began sealing their borders. Beginning in early February into March 2020, plaintiff, the owner and operator of numerous restaurants both in the United States and abroad, took initial steps to protect its customers by implementing enhanced cleaning procedures, and by installing hand sanitizer stations and physical partitions. By mid-March, however, plaintiff was forced to suspend its indoor dining operations as a result of various executive closure orders in New York and elsewhere. In some states plaintiff was allowed to continue providing its customers with takeout, drive through and/or delivery services. It is unrefuted that plaintiff suffered tens of millions of dollars in revenue loss because of sharply curtailed operations.

Before the pandemic, plaintiff purchased a commercial "all-risk" form of general property insurance from defendant, which included business interruption coverage. This policy had a $50 million per occurrence limit and was in effect from July 1, 2019 - July 1, 2020. The insurance agreement provides that "this POLICY . . . insures all risks of direct physical loss or damage to INSURED PROPERTY while on INSURED LOCATION(S) provided such physical loss or damages occurs during the term of this POLICY." Beyond covering physical loss or damage itself, the policy also provided coverage for associated time element losses, also known as business interruption loss, during the period of direct physical loss or damage to the property:

> "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 POLICY at INSURED LOCATIONS(S) . . . "

In April 2020, plaintiff filed a claim with defendant stating it had suffered direct physical loss or damage to its property because the actual or threatened presence of the virus in and on its property (i.e. the ambient air and internal surfaces) eliminated the functionality of the restaurants for their intended purpose. In July 2020, defendant denied coverage stating that "[t]he actual or suspected presence of [SARS CoV-2] responsible for [COVID-19] does not constitute physical loss or damage to the property," within the meaning of the policy, and that even if there was any coverage under a communicable disease clause, it was limited to a $250,000 combined sublimit, far less than plaintiff's claimed losses. Defendant also invoked a contaminant exclusion to coverage that contained the term "virus."

In August 2020, plaintiff commenced this action for breach of contract, and a judgment in its favor against defendant declaring that its losses are covered under the

policy and that it is entitled to payment for its claim. Defendant brought a preanswer motion to dismiss the complaint based upon documentary evidence (CPLR 3211[a][1]) and failure to state a cause of action (CPLR 3211[a][7]), stating that the clear weight of authority in New York is that "physical loss or damage" requires some form of actual, physical damage to the insured property in order for there to be a loss that would trigger coverage. Supreme Court granted the motion. It dismissed the complaint on the basis that plaintiff had not sustained any "physical" loss or damage within the meaning of its policy and prevailing New York law. The court also stated that the result was constrained by this Court's prior decision in *Roundabout Theatre Co. v Continental Cas' Co.* (302 AD2d 1 [1st Dept 2002]). Plaintiff later moved to reargue or, in the alternative, to amend its complaint. That second motion was denied in its entirety. This appeal of both orders ensued.

Plaintiff argues that Supreme Court erred in dismissing the complaint because it applied the wrong legal standard by considering what it thought could be proved rather than whether the complaint stated a cause of action (CPLR 3211[a][7]). Plaintiff contends that it set forth facts that adequately supported the causes of action pleaded, and therefore, the case should be allowed to proceed beyond the pleading stage. With respect to dismissal of the complaint based upon documentary evidence (CPLR 3211[a][1]), plaintiff separately argues that this Court's precedent in *Roundabout Theatre* does not dictate the resolution of the issues in this case because of its markedly different facts. Citing decisions by other non-New York courts, plaintiff claims that COVID-19 inflicts physical damage on property, even if such damage is invisible or intangible. Plaintiff draws analogies between the coronavirus and the presence of noxious substances, such as e. coli, asbestos, ammonia and salmonella, arguing that

other courts have held such airborne substances, etc., inflict "physical" damage to property because they are difficult to remediate, just like COVID-19. Plaintiff contends that unlike other cases where the insured claimed physical loss or damage because of government closures, its claim is that the virus was physically present in and physically altered its premises, evidenced by the fact that the restaurants were unusable. Plaintiff contends that the physical droplets and respiratory particles that transmit the virus are so resilient that they cannot be entirely eradicated from property. Plaintiff argues that the absence of a standard-form virus exclusion is further evidence that coverage in the COVID-19 context is available under its policy and that other exclusions to coverage in its policy do not apply.

Defendant argues that plaintiff's property has not undergone any physical change, let alone damage, due to the virus. Assuming the virus was present, defendant contends that plaintiff has not identified any aspect of its property, any item, or even a single knob or table that was physically altered by the presence of COVID-19. Defendant argues that our decision in *Roundabout* is directly on point and decisive of the issue before us. Defendant also argues that COVID-19 is a virus that infects cells in people but cannot possibly alter or change "things." According to defendant, plaintiff may have suffered a loss of use of its property, but a loss of use is different than physical damage to it and without physical damage, no coverage is available.

Where, as here, "[a]n insured seek[s] to recover for a loss under an insurance policy [it] has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy" (*United States Dredging Corp. v Lexington Ins. Co.*, 99 AD3d 695, 696 [2d Dept 2012], citing *Roundabout Theatre Co. v Continental Cas. Co.,* 302 AD2d at 6). "In determining a dispute over insurance

coverage, we first look to the language of the policy" (*Keyspan Gas E. Corp. v Munich Reins. Am., Inc.*, 31 NY3d 51, 60 [2018][internal quotation marks and citations omitted]). Moreover, like any other contract, 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" (*Universal Am. Corp v National Union Fire Ins. Co. of Pittsburgh, Pa.,* 25 NY3d 675, 680 [2015][internal quotation marks and citations omitted]). Since this is a pre-answer motion to dismiss under CPLR 3211(a)(1) and (7), our review is de novo, but different standards apply. With respect to defendant's motion to dismiss for failure to state a cause of action, we are required to accept as true the facts in the complaint and consider whether plaintiff can succeed upon any reasonable view of the facts stated (*see Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). With respect to defendant's motion to dismiss based upon documentary evidence, "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). As an initial matter, the insurance policy qualifies as "documentary evidence" under CPLR 3211(a)(1) (*Ralex Servs., Inc. v Southwest Mar. & Gen. Ins. Co.*, 155 AD3d 800, 802 [2d Dept 2017]). Therefore, we first consider what losses are covered under the terms of this policy.

Plaintiff claims that the term "physical loss or damage to property," as used in its commercial property insurance policy, covering "all-risk," is ambiguous because the word "physical" is undefined. Plaintiff argues that its claim that the virus particles physically impacted its property is entirely plausible. "An ambiguity [however] does not arise from an undefined term in a policy merely because the parties dispute the

meaning of that term" (*Hansard v Federal Ins. Co.*, 147 AD3d 734, 737 [2d Dept 2017], *lv denied* 29 NY3d 906 [2017]). Moreover, it is blackletter law that insurance contracts should be interpreted "consistent with the reasonable expectation of the average insured" (*Matter of Viking Pump, Inc.* 27 NY3d 244, 257 [2016]). Terms that are clear cannot be disregarded and "must be given their plain and ordinary meaning" (*Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009][internal quotation marks and citations omitted]). We reject plaintiff's argument that the policy is ambiguous.

The pandemic engendered a great deal of litigation in New York and throughout the country concerning what a direct "physical" damage or loss entails, for purposes of commercial property insurance policies, similar to the one at bar. This Court has interpreted "direct physical damage or loss to property" to mean something that directly happens to the property resulting in physical damage to it. In *Roundabout Theatre Co.*, for instance, we clarified that although the plaintiff sustained some minor damage to the roof of its property, its claim was for loss of business income resulting from damage that had occurred elsewhere. We held that the Roundabout Theatre's claim was for "loss of use," which was not covered under its policy covering "all risks of direct physical loss or damage to the property described in Paragraph I [i.e., the theatre building or facilities]," not an incidental loss of use (302 AD2d at 7).

Roundabout, while factually distinguishable, provides a useful starting point for our analysis, supporting a conclusion that any claim for coverage must arise from something that occurred within the property. Additional authority supports a further conclusion that in order for there to be "direct" "physical" damage or loss to property, there be "some physical problem with the covered property," not just the mere loss of

use (*Rye Ridge Corp. v Cincinnati Ins. Co.*, 535 F Supp 3d 250, 255 [SD NY 2021], *affd* 21-1323-CV, 2022 WL 120782 [2d Cir Jan. 13, 2022]). The property must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred. If the proffered facts do not identify any physical (tangible) difference in the property, then the complaint fails to state a cause of action. Were we to accept that an economic loss, for purposes of the all-risk policy plaintiff purchased from defendant, without any attendant physical, tangible damage to the property is sufficient, it would render the term "physical" in the policy meaningless (*see County of Columbia v Continental Ins. Co.,* 83 NY2d 618, 628 [1994]). Phrased differently, under the terms of plaintiff's policy, the impaired function or use of its property for its intended purpose, is not enough. "Rather to survive dismissal [the] complaint must plausibly allege that the virus itself inflicted actual physical loss of or damage to [the] property" (*Kim-Chee LLC v Philadelphia Indem. Ins. Co.*, 21-1082-CV, 2022 WL 258569, at *1 [2d Cir Jan. 28, 2022]).

Although plaintiff argues that its complaint and certainly its proposed amended complaint allege that its property was physically altered by the coronavirus, we find that the pleadings are conclusory. While plaintiff cites several out-of-state decisions that it believes supports its position, the overwhelming number of authorities, with which we agree, support an opposite view.

Federal courts applying substantive New York law have uniformly held that conclusory assertions that COVID-19 causes physical damage to property because it is contagious and hard to clean fail to state a basis for coverage where the policy requires direct physical loss or damage to the property. In *Kim-Chee,* for instance, the Second Circuit Court of Appeals rejected the plaintiff's arguments that property was physically

damaged due to COVID-19 exposure. In affirming dismissal of the complaint at an initial stage, the Court held that the complaint "[did] not allege that any part of its building or anything within it was damaged - let alone to the point of repair, replacement, or total loss" (*Kim-Chee LLC*, 2022 WL 258569, at *2).

Likewise, in *10012 Holdings, Inc. v Sentinel Ins. Co* 21 F4th 216, 222 [2d Cir 2021]), another case applying New York law, the Second Circuit also rejected the plaintiff's claim that it had suffered a "physical event" within the meaning of its policy; the court affirmed dismissal of the complaint because the facts did not show "direct physical loss" or "physical damage" to the plaintiff's property and the policy "d[id] not extend to mere loss of use of a premises," but rather required "actual physical loss of or damage to the insured's property."[1] While these decisions are not binding on this court, their analysis of New York law is persuasive and we adopt their reasoning (*see In re Brooklyn Navy Yard Asbestos Litig*., 971 F2d 831, 850 [2d Cir 1992]).

Other federal courts throughout the country, not applying New York law, but rather standard principles of insurance contract interpretation, have reached the same conclusion, that the terms "direct" and "physical" as it relates to "damage or loss to property" requires a direct physical loss of property, not simply the inability to use it (*Santo's Italian Cafe LLC v Acuity Ins. Co*., 15 F4th 398, 402 [6th Cir 2021]["A loss of use simply is not the same as a physical loss"]; *Oral Surgeons, P.C. v Cincinnati Ins.*

[1] To date, these New York district courts have reached the same result, applying essentially the same analysis: *Mohawk Gaming Enters., LLC v Affiliated FM Ins. Co.*, 534 F Supp 3d 216, 222 [ND NY 2021]; *St. George Hotel Assoc., LLC v Affiliated FM Ins. Co*., 20-CV-05097 (DG)(RLM), 2021 WL 5999679, at *6 [ED NY Dec. 20, 2021][physical damage as that term is ordinarily understood is "a negative alteration in the tangible condition of property"]; *Jeffrey M. Dressel, D.D.S., P.C. v Hartford Ins. Co. of the Midwest, Inc.*, 20 Civ. 2777 (KAM)(VMS), 2021 WL 1091711, at *3-5 [ED NY Mar. 22, 2021]; *Sharde Harvey DDS, PLLC v Sentinel Ins. Co*., No. 20 Civ 3350 (PGG) (RWL), 2021 WL 1034259 at *6-7 [SD NY Mar. 18, 2021].

Co., 2 F4th 1141, 1144 [8th Cir 2021]["there must be some physicality to the loss or damage of property—e.g., a physical alteration, physical contamination, or physical destruction"]; *Gilreath Family & Cosmetic Dentistry, Inc. v Cincinnati Ins. Co.,* 2021 WL 3870697, at *2 [11th Cir Aug. 31, 2021]["Gilreath has alleged nothing that could qualify, to a layman or anyone else, as physical loss or damage;" no damage or change to the property]). The Fifth Circuit has specifically adopted the reasoning set forth in the decisions of the Second Circuit, finding that "direct physical loss" to property, as required to recover lost business income and extra expense under an all-risk commercial property policy, necessarily entails a "tangible alteration or deprivation of property" (*Terry Black's Barbecue, L.L.C. v State Auto. Mut. Ins. Co.*, 22 F4th 450, 456 [5th Cir 2022]).

Several trial level New York courts have also granted preanswer dismissals of complaints with alleged facts similar to those in the complaint at bar. Plaintiff argues that those decisions are distinguishable because the policyholders in those cases claimed financial loss attributable to the executive orders shutting down their businesses, but its claim is that COVID-19 actually damaged its property by altering the surfaces of its restaurants and the air within them, resulting in direct physical loss. This is a distinction without any meaningful difference. These trial level courts have concluded that the plain meaning of "physical" as commonly understood, requires some tangible alteration of the property that changes it from what it previously was to what it is now (*Abruzzo DOCG Inc. et al. v Acceptance Indemnity Ins. Co. et al.,* index No. 514089/2020 [Sup Ct, Kings County]["mere loss of use is insufficient to trigger any coverage for physical loss or physical damage]; *Federal Ins. Co. v BD Hotels LLC*, index No. 650856/2021 [Sup Ct, NY County]["while BDH cites to dictionary definitions and

case law from other jurisdictions, it cites to no New York decisions supporting its interpretation of the coverage provision at issue here"]; *Benny's Famous Pizza Plus Inc. v Security Natl. Ins. Co.,* 72 Misc 3d 1209(A), *4 [Sup Ct, Kings County July 1, 2021]["proof . . . of alteration of the insured premises is necessary"]; *6593 Weighlock Dr., LLC v Springhill SMC Corp.*, 71 Misc 3d 1086, 1095-1096 [Sup Ct, Onondaga County 2021][no tangible physical loss or damage to plaintiff's hotels]; *Visconti Bus Serv., LLC v Utica Natl. Ins. Group*, 71 Misc 3d 516, 531-532 [Sup Ct, Orange County 2021]["the words "direct" and "physical," which modify the phrase "loss or damage," require a showing of actual, demonstrable physical harm of some form to the insured premises—the forced closure of the premises for reasons exogenous to the premises themselves is insufficient to trigger coverage"]). Neither the government orders, nor the presence of the coronavirus inflicted "direct physical loss or damage" to any of these properties for purposes of property insurance coverage (*see Newman Myers Kreines Gross Harris, P.C. v Great N. Ins. Co.,* 17 F Supp 3d 323, 331 [SD NY 2014]*; see also Food for Thought Caterers Corp. v Sentinel Ins. Co.,* 524 F Supp 3d 242, 246-247 [SD NY 2021]). As stated in *Newman Myers*, "physical loss or damage" in an insurance policy requires "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure" (17 F Supp 3d at 331).

Although the words "direct" and "physical," modify or qualify the phrase "loss or damage," to require a showing of actual, demonstrable physical harm of some form to the insured premises, plaintiff nonetheless urges us to embrace a more expansive definition of "physical" because some courts have held that conditions rendering

property "unusable" afford coverage for business interruption losses (*Port Authority of New York & New Jersey v Affiliated FM Ins. Co.*, 311 F3d 226, 230 [3d Cir 2002][presence of asbestos in several buildings constituted a "physical loss or damage"]; *Gregory Packaging, Inc. v Travelers Prop. Cas. Co. of Am.*, 2:12-CV-04418 WHW, 2014 WL 6675934 [D NJ, Nov. 25, 2014][ammonia infiltration requiring extensive remediation measures]; *TRAVCO Ins. Co. v Ward*, 715 F Supp 2d 699 [ED Va 2010][toxic gas from dry walls]). None of these cases involve COVID-19, the courts did not apply New York law and these cases are not binding on this court. These cases and others like them are distinguishable because under New York law "a negative alteration in the tangible condition of the property [insured]" is necessary in order for there to be "physical" damage to the property (*Michael Cetta, Inc. v Admiral Indem. Co.*, 506 F Supp 3d 168, 178-179 [SD NY 2020], 2021 WL 1408305 [2d Cir 2021]). *Pepsico, Inc. v Winterthur Intl. Amer. Ins. Co.,* 24 AD3d 743 (2d Dept 2005), also relied on by plaintiff, is unhelpful because the product (soda) was, in fact, physically altered so as to render it unsellable to consumers.

Plaintiff claims that given the opportunity, it can better develop its claim and it urges us to grant its motion to amend its complaint. A complaint "cannot be vague and conclusory" (*Phillips v Trommel Constr.*, 101 AD3d 1097, 1098 [2d Dept 2012]), and "[b]are legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2d Dept 2007]). As we have seen, plaintiff fails to identify any physical change, transformation, or difference in any of its property. While it vaguely refers to "fomites" in the surfaces of its restaurants, and states the virus infiltrated the premises, it fails to identify in either its pleading or the proposed amended complaint a single

item that it had to replace, anything that changed, or that was actually damaged at any of its properties. Nothing stopped working. In fact throughout the pandemic, plaintiff was able to provide its customers with takeout, drive through and delivery services, indicating that the kitchens still operated, and the property was usable, and not physically damaged, despite the presence of the virus. Its statement that COVID-19 particles and droplets damage property is merely a conclusion that will not save the complaint from dismissal. Plaintiff's insurance policy does not provide coverage for financial loss, without direct physical damage or loss, and its inability to operate the property as intended is not discernable, direct physical damage or loss to its property, but rather an external force limiting plaintiff's use of the property (*see Newman Myers Kreines Gross Harris, P.C. v Great Northern Ins. Co.,* 17 F Supp 3d 323, 331 [SD NY 2014][no coverage for loss of business while power shut-off during Hurricane Sandy; no physical damage sustained]; *see also Roundabout Theatre Co. v Continental Casualty Co.,* 302 AD2d 1]).

Since the complaint seeks coverage for economic loss due to "direct physical loss or damage to insured property," but plaintiff fails to allege any tangible, ascertainable damage, change or alteration to the property so as to plausibly state a claim the damage was "physical," the complaint was properly dismissed by Supreme Court because it fails to state a cause of action. The additional facts that plaintiff seeks to add by way of its proposed amended complaint do not remedy this defect. As the proposed amended complaint is patently devoid of merit, leave to amend the complaint was properly denied (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

Plaintiff's argument that a property insurance policy without a virus exclusion provides coverage for loss or damage caused by viruses is contrary to well-settled law

that "exclusion clauses subtract from coverage rather than grant it" (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.,* 5 NY3d 157, 163 [2005][internal quotation marks and citation omitted]). Furthermore, having determined there is no coverage, we need not address whether any of the exclusions to coverage apply to bar coverage for plaintiff's claims.

No appeal lies from the denial of a motion for reargument (*Street Snacks, LLC v Bridge Assoc. of Soho, Inc.*, 156 AD3d 556, 557 [1st Dept 2017]).

Accordingly, the order of Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about August 4, 2021, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and declared that the losses plaintiff alleges in the complaint are not covered by the subject insurance policy, should be affirmed, without costs. The order, same court and Justice, entered September 23, 2021, which denied plaintiff's motion for reargument or leave to amend the complaint, should be affirmed, insofar as it denied leave to amend the complaint, and the appeal

otherwise dismissed, without costs, as taken from a nonappealable order.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about August 4, 2021, affirmed, without costs. Order, same court and Justice, entered September 23, 2021, affirmed insofar as it denied leave to amend the complaint, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Opinion by Gische, J. All concur.

Gische, J.P., Oing, Kennedy, Mendez, Shulman, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 7, 2022

Susanna Molina Rojas
Clerk of the Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Consolidated Restaurant Operations, Inc.	:	Index Number 450839/2021
Plaintiff,	:	Commercial Division
v.	:	Hon. Jennifer G. Schecter, J.S.C.
Westport Insurance Corporation,	:	**NOTICE OF ENTRY**
Defendant.	:	

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, New York County, signed by the Honorable Jennifer G. Schecter, J.S.C., on August 4, 2021, and entered in the Office of the Clerk of the Supreme Court, New York County, on August 4, 2021.

Dated: August 4, 2021

By: 

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EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC.,	:	
Plaintiff,	:	Index No. 450839/2021
-against-	:	Commercial Division
WESTPORT INSURANCE CORPORATION,	:	Hon. Jennifer Schecter, J.S.C.
Defendant.	:	Mot. Seq. #002
	:	**NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, New York County, signed by the Honorable Jennifer G. Schecter, J.S.C., on September 23, 2021, and entered in the Office of the Clerk of the Supreme Court, New York County, on September 23, 2021.

Dated: New York, New York
September 23, 2021

By: _____

Aidan M. McCormack
Robert C. Santoro
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Attorneys for Defendant
Westport Insurance Corporation

EXHIBIT D

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Consolidated Restaurant Operations, Inc.	:	Index Number 450839/2021
Plaintiff,	:	Commercial Division
v.	:	Hon. Jennifer G. Schecter, J.S.C.
Westport Insurance Corporation,	:	**NOTICE OF ENTRY**
Defendant.	:	

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, New York County, signed by the Honorable Jennifer G. Schecter, J.S.C., on August 4, 2021, and entered in the Office of the Clerk of the Supreme Court, New York County, on August 4, 2021.

Dated: August 4, 2021

By: 

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Attorneys for Defendant Westport Insurance Corporation

TO: Robin Cohen
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rcohen@cohenziffer.com
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Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 08/04/2021	Entered:08/04/2021
Judge (name in full):Jennifer G. Schecter	Index No.:450839/2021
Stage: ☐ Interlocutory ■ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Consolidated Restaurant Operations, Inc.	Plaintiff	Appellant
2	Westport Insurance Corporation	Defendant	Respondent
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New York	New York	10019	212-584-1890	
asugzda@cohenziffer.com				
☒	☐	☐	☐	☐
1				
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robert.santoro@dlapiper.com				
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☒	☐	☐	☐	☐
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EXHIBIT E

1 of 8

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC.,	:	
Plaintiff,	:	Index No. 450839/2021
-against-	:	Commercial Division
WESTPORT INSURANCE CORPORATION,	:	Hon. Jennifer Schecter, J.S.C.
Defendant.	:	Mot. Seq. #002
	:	**NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, New York County, signed by the Honorable Jennifer G. Schecter, J.S.C., on September 23, 2021, and entered in the Office of the Clerk of the Supreme Court, New York County, on September 23, 2021.

Dated: New York, New York
September 23, 2021

By: _____
Aidan M. McCormack
Robert C. Santoro
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New York, New York 10020
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Attorneys for Defendant
Westport Insurance Corporation

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

Consolidated Restaurant Operations, Inc.

- against -

Westport Insurance Corporation

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☒ Commercial	☒ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☐ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated:	Entered:
Judge (name in full): Jennifer G. Schecter	Index No.: 450839/2021
Stage: ☐ Interlocutory ■ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ■ Yes ☐ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

2021-02971

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

By Decision and Order dated September 23, 2021, the Supreme Court of the State of New York, New York County denied Plaintiff Consolidated Restaurant Operations, Inc.'s motion for reargument and, in the alternative, to amend its complaint.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Plaintiff seeks reversal of the Supreme Court's Decision and Order denying Plaintiff's motion for reargument and, in the alternative to amend its complaint. Plaintiff respectfully submits that the court misapplied or overlooked New York law to Plaintiff's complaint in denying its motion for argument. The court also erred in not allowing Plaintiff leave to amend its complaint in the alternative.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Consolidated Restaurant Operations, Inc.	Plaintiff	Appellant
2	Westport Insurance Corporation	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Robin L. Cohen; Cohen Ziffer Frenchman & McKenna LLP			
Address: 1350 Avenue of the Americas, 25th Floor			
City: New York	State: New York	Zip: 10019	Telephone No: 212-584-1890
E-mail Address: rcohen@cohenziffer.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: Alexander Sugzda; Cohen Ziffer Frenchman & McKenna LLP			
Address: 1350 Avenue of the Americas, 25th Floor			
City: New York	State: New York	Zip: 10019	Telephone No: 212-584-1890
E-mail Address: asugzda@cohenziffer.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: Robert Santoro; DLA Piper LLP			
Address: 1251 Avenue of the Americas			
City: New York	State: New York	Zip: 10020	Telephone No: 212-335-4557
E-mail Address: robert.santoro@dlapiper.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name: Aidan McCormack; DLA Piper LLP			
Address: 1251 Avenue of the Americas			
City: New York	State: New York	Zip: 10020	Telephone No: 212-335-4557
E-mail Address: aidan.mccormack@dlapiper.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

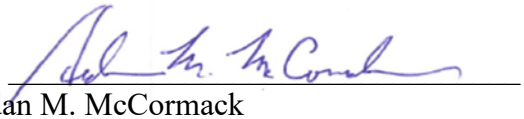
EXHIBIT F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CONSOLIDATED RESTAURANT OPERATIONS, INC.,	:	
Plaintiff,	:	Index No. 450839/2021
-against-	:	Commercial Division
WESTPORT INSURANCE CORPORATION,	:	Hon. Jennifer Schecter, J.S.C.
Defendant.	:	
	:	**NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in that Court and signed by Susanna Molina Rojas, Clerk of the Court, on June 23, 2022.

Dated: New York, New York
July 6, 2022

By: 

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(T): 212-335-4500

Attorneys for Defendant
Westport Insurance Corporation

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Judith J. Gische, Justice Presiding,
Jeffrey K. Oing
Tanya R. Kennedy
Manuel J. Mendez
Martin Shulman, Justices.

Consolidated Restaurant Operations, Inc., Plaintiff-Appellant,	Motion No.	**2022-01772**
	Index No.	450839/21
	Case Nos.	2021-02971
-against-		2021-04034
Westport Insurance Corporation, Defendant-Respondent.		
- - - - - - - - - - - -		
The Restaurant Law Center, New York State Restaurant Association, New York City Hospital Alliance, The Chef's Warehouse Inc., United Policy Holders, New York State Trial Lawyers Association and American Property Casualty Insurance Association, Amici Curiae.		

Plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on April 07, 2022 (Appeal Nos. 15410-15410A),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED: June 23, 2022

Susanna Molina Rojas
Clerk of the Court

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On July 14, 2022

deponent served the within: **MOTION FOR LEAVE TO APPEAL**

upon:

Robert Santoro, Esq.
DLA PIPER LLP
Attorneys for Defendant-Respondent
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on 14th day of July, 2022

MARIANNA BUFFOLINO
Notary Public State of New York
No. 01BU6285846
Qualified in Nassau County
Commission Expires July 15, 2025

Job# 314219