New York County Clerk's Index No. 450839/21
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.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS OF THE STATE OF NEW YORK

	:	Appellate Division –
CONSOLIDATED RESTAURANT OPERATIONS, INC.,	:	First Department
	:	Docket No. 2021-02971
	:	Docket No. 2021-04034
Plaintiff-Appellant,	:	
	:	Motion No. 2022-551
-against-	:	
	:	**CORPORATE**
	:	**DISCLOSURE**
WESTPORT INSURANCE CORPORATION,	:	**STATEMENT**
	:	
Defendant-Respondent.	:	New York County Index
	:	No. 450839/2021

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, Defendant-Respondent Westport Insurance Corporation states that it is a wholly owned subsidiary of SR Corporate Solutions America Holding Corporation, which is a wholly owned subsidiary of Swiss Re Corporate Solutions Holding Company Ltd., which is a wholly owned subsidiary of Swiss Reinsurance Company Ltd., which is a wholly owned subsidiary of Swiss Re Ltd. ("Swiss Re"). Swiss Re is a publicly traded company listed on the SIX Swiss Exchange. Swiss Re has the following affiliates: iptiQ Group Holding Ltd., iptiQ Americas Inc., Swiss Re Corporate Solutions Holding Company Ltd., SR Corporate Solutions America Holding Corporation, Swiss Reinsurance Company Ltd., Swiss Re Reinsurance Holding Company Ltd., Swiss Re America Holding Corporation, Swiss Re Management Ltd., Swiss Re Management (US) Corporation, Swiss Re Insurance-Linked Investment Advisors Corporation, Swiss Re Financial Products Corporation, Swiss Reinsurance America Corporation, Swiss Re Property & Casualty America Inc., Swiss Re Capital Markets Corporation, Swiss Re Life & Health America Holding Company, Swiss Re Treasury (US) Corporation, Swiss Re Financial Markets Corporation, Swiss Re Atrium Corporation, Swiss Re Ltd., Wing Re Inc., Swiss Re Life & Health America Inc., Pecan Re Inc., Wing Re II Inc., Swiss Reinsurance America Corporation – Escritório de Representação no Brasil Ltda., Pillar RE Holdings LLC, Swiss Reinsurance America Corporation, Oficina de Representación en México, Granular Insurance Company, Swiss Re Corporate Solutions America Insurance Corporation, Swiss Re Corporate Solutions Global

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Dated: New York, New York
July 25, 2022

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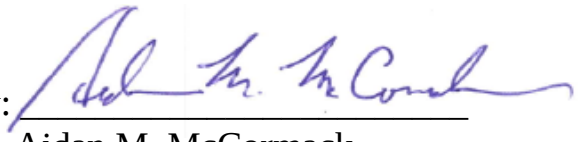
By: 

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Defendant-Respondent Westport Insurance Corporation ("Westport") respectfully submits this memorandum of law in opposition to Plaintiff-Appellant Consolidated Restaurant Operations, Inc.'s ("CRO") 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 Westport's Motion to Dismiss, and the Decision and Order dated September 23, 2021, denying CRO's Motion for Reargument.

ARGUMENT

CRO's motion for leave to appeal should be denied. CRO has identified no error of fact or law, nor any leave-worthy issue, in the First Department's unanimous Decision.

The plain meaning of "direct physical loss or damage to property" under the insurance contract is clear and unambiguous—it requires that loss or damage to insured property be both direct and physical in nature. That means a distinct, demonstrable physical damage or destruction of property. The economic harm from the temporary, partial loss of use due to business slowdown during the pandemic that CRO alleges here is insufficient. The First Department and trial court were right to dismiss. Indeed, virtually every appellate court across our Nation agrees with them.

CRO alleges that it sustained economic losses when its restaurants were required to close their dining rooms to comply with government social-distancing orders issued to prevent the spread of COVID-19. This is intangible economic harm to CRO's business, no matter how severe or unfortunate. It is not the result of direct physical loss or damage to property. Even if the virus were present, there would be no coverage because COVID-19 particles harm people, not property. They are temporary, can be cleaned with a disinfectant or soap and water, and do not damage or destroy the property. CRO alleges nothing to the contrary. There is no coverage because there has been no physical tangible, ascertainable damage that caused CRO's financial losses.

CRO alleges that "the First Department established a new 'tangible alteration' requirement under New York Law," that has "no support in any decision from this Court." Motion at 2. CRO's position has no merit. There is no conflict between the First Department's Decision and long-established New York law. Indeed, the First Department correctly applied well-settled principles of insurance contract interpretation law to the facts alleged by CRO.

CRO has not justified appeal to this Court. CRO establishes no split of authority, no important question of law that needs resolution, nor any matter of strong public import at stake. CRO claims that the denial of leave would impact "countless policyholders for years to come in a broad array of cases." Motion at 2.

Not so. While Covid-19 is novel, the application of an unambiguous insurance contract and New York law to the claim facts is not. Indeed, New York courts have a well-earned respect for applying contracts as written as the Appellate Division and trial court did here.

CRO's disagreement with the First Department's applications of well-established legal principles of insurance contract interpretation in New York is not a basis for granting leave to appeal. Thus, CRO's motion should be denied.

I. The Issues Here Are Not Novel Issues, Nor Issues Of Great Public Importance

This Court should deny CRO's leave application because this dispute, among other things, does not raise novel issues of law. While the pandemic is a "once-in-a-lifetime" event of great public interest, the legal issues here are not new. CRO's motion creates a straw man in the coronavirus pandemic itself. But the issues in this case are basic matters of insurance contract interpretation that New York courts have addressed for decades. The First Department's Decision follows long-standing insurance contract interpretation principles in New York, and nothing has changed. CRO's contention that the Decision has turned these principles "on their head" has no merit.

The First Department acknowledged that in interpreting an insurance contract a court will "first look to the language of the policy." Decision at 7 (citing *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.,* 31 N.Y.3d 51, 60 (2018)). The First

Department held that the word "physical" was not ambiguous and that under "blackletter law" the insurance contract should be interpreted "'consistent with the reasonable expectation of the average insured.'" *Id.* at 8 (citing *Matter of Viking Pump, Inc.*, 27 N.Y.3d 244, 257 (2016)). The First Department concluded, like nearly all courts in the country, that the words "direct" and "physical" require "something that directly happens to the property resulting in physical damage to it." *Id.* at 8.

The First Department also correctly determined that the plain language of the insurance contract foreclosed any argument that an "economic loss … without any attendant physical, tangible damage to the property," was covered. *Id.* at 9. The First Department found it telling that CRO failed to identify a "single item that it had to replace, anything that changed, or that was actually damaged at any of its properties." *Id.* at 13-14.

CRO's complaint that the Decision will have wide-ranging impacts outside of the COVID-19 context rings hollow. CRO, for example, posits that the Decision will foreclose any future type of insurance coverage for any "substance." Motion at 8-9. CRO's argument is nothing more than unfounded fear mongering. CRO asserts that the First Department did not fully consider its argument on this point. Notwithstanding that this quibble is no reason to grant leave to appeal to this Court, CRO's argument has no merit. The First Department carefully considered CRO's

argument and rejected it. Decision at 10-11. CRO also cites to an out-of-state decision in *Inns-by-the-Sea v. California Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576 (Cal. Ct. App. 2021) *review denied* (Mar. 9, 2022), as its preferred analysis where a court properly "attempted to factually distinguish circumstances involving ammonia and similar substances from COVID-19." Motion at 9.

The court in *Inns-by-the-Sea*, however, came to the same conclusion as the First Department. This decision only supports Westport's position that leave to appeal is not appropriate here. The court in *Inns-by-the-Sea* acknowledged that there were certainly "some comparable elements" between COVID-19 and other substances like smoke, ammonia, odor, or asbestos. *Inns-by-the-Sea v. California Mut. Ins. Co.*, 286 Cal. Rptr. 3d at 589. The court concluded, however, that the "similarities end there because Inns cannot reasonably allege that the presence of the COVID-19 virus on its premises is what *caused* the premises to be uninhabitable or unsuitable for their intended purpose." *Id.*

Further, the *Inns-by-the-Seas* court distinguished the other "substance" cases from COVID-19 because "the presence of COVID-19 on Plaintiff's property did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property. Instead, all that is required for Plaintiff to return to full working order is for the government orders and restrictions to be lifted." *Id.*

The court there also cited to a decision from Florida involving a restaurant like CRO here:

> Indeed, the lack of causal connection between the alleged physical presence of the virus on Inns' premises and the suspension of Inns' operations can be best understood by considering what would have taken place if Inns had thoroughly sterilized its premises to remove any trace of the virus after the Orders were issued. In that case, Inns would still have continued to incur a suspension of operations because the Orders would still have been in effect and the normal functioning of society still would have been curtailed. As explained in the context of a lawsuit brought by a restaurant to recover for business losses during the pandemic: "[T]he property did not change. The world around it did. And for the property to be useable again, no repair or change can be made to the property—the world must change. Even if a cleaning crew Lysol-ed every inch of the restaurant, it could still not host indoor dining at full capacity. Put simply, Plaintiff seeks to recover from economic losses caused by something physical—not physical losses."

Id. at 590 (2021). On March 9, 2022, the California Supreme Court declined review of *Inns-by-the-Sea*.

CRO misconstrues these other "contamination" cases and the First Department properly rejected CRO's argument. It is not merely a substance which poses a threat to human health which triggers coverage. Instead, the substance must physically damage the property itself. *See, e.g., Farmers Ins. Co. v. Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (methamphetamine cooking at home caused physical smoke damage to the walls necessitating a chemical company to scrape the damage from the walls); *Widder v. Louisiana Citizens Property Ins. Co.*, 82 So.3d 294 (La. App. 4th Cir. 2011) (due to lead paint, home was unusable and

uninhabitable and required to be gutted with extensive remediation); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968) (gasoline vapors infiltrated the soil and contaminated the foundation, halls, and rooms of the church building, rendering the church uninhabitable by order of the fire department and continued use of church was dangerous due to an explosion risk); *Azalea, Ltd. v. American States Ins. Co.*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995) (unknown contaminant adhered to interior walls of sewage plant and caused destruction of bacteria colony in sewage treatment system where the insured was required to hand chisel away contaminant's chemical residue); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010), aff'd 504 Fed. App'x 251 (4th Cir. 2013) (chinese drywall released sulfuric gas into home and residents were forced to leave the home and had to remove and replace the drywall and repair or replace the property damaged by the sulfuric gas).

The First Department's Decision is in line with this reasoning. The First Department was correct to distinguish these cases from COVID-19. The First Department did not hold that there is never coverage for any substance. The First Department reiterated long-standing New York law. A contaminant must physically harm the property. COVID-19 does not physically harm property, it harms humans.

CRO also says that the First Department's Decision will hurt New York policyholders because it narrows coverage compared to other states under the very

same policy language. Yet, what CRO fails to acknowledge is that virtually all the other states' appellate courts have *agreed* with New York law and the First Department's Decision. Of the three high courts to issue decisions on this issue, Massachusetts, Iowa, and Wisconsin, all have agreed with New York law and the First Department's Decision.[1]

In *Verveine*, for example, the Massachusetts Supreme Judicial Court agreed that "physical loss or damage" could not "fairly be construed to mean physical loss in the absence of physical damage." *Id.* at 541. The Court stated that the "question is not whether the virus is physical, but rather if it has direct physical effect on property that can be fairly characterized as 'loss or damage.'" *Id.* at 542 (cleaned up). The Court held that "'direct physical loss or damage to' property requires some 'distinct, demonstrable, physical alteration of the property." *Id.*

In *Inns-by-the-Sea*, the court, like the First Department, conducted a careful and thorough analysis of the insurance contract interpretation issues. The *Inns-by-the-Sea* appellate court concluded that the policyholder's allegations were

[1] *Verveine Corp. v. Strathmore Ins. Co.*, 489 Mass. 534, 184 N.E.3d 1266 (2022); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 2022 WI 36, ¶ 13, 401 Wis. 2d 660, 672, 974 N.W.2d 442, 447 ("the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property.") (internal citations omitted); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 554 (Iowa 2022) ("The closures are unlike the physical threat cases because there was no imminent physical threat to the insured's property.").

insufficient to state a cause of action. The California Supreme Court denied leave to appeal.

II. The First Department's Decision that "Physical Loss Or Damage" Requires a Tangible Alteration To Property Is In Line With Prior Decisions From New York Courts And Is Not A New Test.

CRO's assertion that the First Department's Decision is contrary to "decades" of caselaw from around the country is both wrong and irrelevant. Appeal to this Court is not appropriate based on the argument that a First Department decision potentially conflicts with another state's law. More importantly, however, as described above, the Decision does not conflict with the historical case law cited by CRO.

CRO claims that New York policyholders are now not entitled to insurance coverage for any other substance or contaminant, like in cases in other states under other state's laws. But that is a gross misreading of the First Department's Decision. The First Department correctly concluded that, under New York law, a policyholder needs to allege physical damage to property. The "alteration" must be in the "tangible condition of the property." This requirement gives meaning to the word "physical" in the policy wording.

Merriam-Webster dictionary defines "Physical" to mean: "having material existence, perceptible especially through the senses and subject to the laws of nature; of or relating to material things." Merriam-Webster dictionary also identifies

"material" as a synonym for "tangible." This Court's role is to decide actual controversies, not to hypothesize about potential future fact patterns and any coverage or lack thereof.

CRO also argues that the Second Department has rejected the analysis employed by the First Department in the Decision. This claim has no merit.

In *Pepsico, Inc. v. Winterthur International American Insurance Co.*, 806 N.Y.S.2d 709 (2d Dep't 2005), the Second Department held that insurance coverage was triggered because the insured demonstrated "physical damage." There, a faulty ingredient was introduced in the soda. The insured could not easily remove the ingredient, as it had been mixed into the soda. The insured could not sell the soda and had to throw away the product. In finding coverage was triggered, the Second Department did not hold that a tangible alteration in the condition of the property was not required. Instead, the Second Department found it sufficient that the "product's function and value have been seriously impaired, such that the product cannot be sold." *Id.* at 711. The Court still concluded that the mixing of the faulty ingredient was a "physical event" which resulted in "injury or damage" to the soda. *Id.* This is perfectly in line with the First Department's Decision. The policyholder in *Pepsico* demonstrated physical damage to the soda where it had to be discarded. CRO has alleged no such physical damage to property here.

CRO also argues that "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.'" Motion at 14. Not so. New York courts have routinely held that the plain meaning of the interpretation of the term "physical loss or damage" constitutes both "physical loss" and "physical damage." *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F.Supp.3d 323 (S.D.N.Y.2014) ("The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote 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."); *Mangia Rest. Corp. v. Utica First Ins. Co.,* 72 Misc. 3d 408, 414, 148 N.Y.S.3d 606, 611 (N.Y. Sup. Ct. 2021) ("Such policy terms ordinarily connote actual, demonstrable, physical harm of some form to the premises itself, rather than damages merely consequential to a forced closure or business interruption, as claimed herein."). The Decision by the First Department does nothing to change this view.

CRO claims that before the pandemic there was "decades of case law from across the country" that established that "direct physical loss or damage" "encompasses losses caused by dangerous, invisible substances such as E.coli and

ammonia, which do not tangibly alter property." Motion at 9. CRO is wrong. But even if CRO were correct, that would not make leave to appeal appropriate here.

New York contract interpretation principles are well-established. CRO does not argue that any law was wrongly applied or that there is a split of authority within the Appellate Division. Instead, CRO is unhappy with the application of the law to the alleged facts of its case.

Moreover, CRO cannot cite a single New York case that contrasts with the First Department's Decision. Therefore, it must continuously cite to cases from other jurisdictions. This Court's role is not to conform New York law to other jurisdictions. The Decision adheres to long-standing New York precedent. Hence, CRO's claims that the Decision will hurt other policyholders seeking coverage for losses from other invisible substances has no merit.

III. The First Department's Decision that CRO's Allegations Were Conclusory Is Not Contrary New York's Pleading Standards.

CRO contends that its allegations cannot be considered "conclusory." Motion at 16. CRO improperly cites to the allegations in its proposed amended complaint. CRO's proposed amended complaint is a nullity in this action and should be given no consideration.

CRO quotes New York law stating that "conclusory" allegations are "claims consisting of bare legal conclusions with no factual specificity." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). This is the extent of CRO's allegations here. In the only

operative pleading in this action, CRO asserts that the "direct physical loss or damage" its property suffered resulted from "the actual presence of the virus in the Restaurants; the threated [sic] threatened presence of the virus in the Restaurants due to its ubiquity; and the loss of function, purpose, and use of the Restaurants – all caused by the virus, the resulting disease, the pandemic, governmental negligence, or the Orders." R. 60 ¶ 36.

This is the extent of CRO's allegations concerning the purported presence of the virus in its restaurants. CRO's allegations are wholly conclusory and lacking. As such, the First Department was correct in finding CRO's allegations to be conclusory and this Court should deny CRO's motion for leave to appeal.

IV. CRO's Other Purported Considerations Warranting Review Do Not Require Leave To Appeal

CRO is correct 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. CRO's claims of a narrowing of coverage for New York policyholders compared to policyholders in other states is unfounded. CRO's asserts, however, that that weight of authority is not persuasive because the policyholder in the majority of those cases failed to allege the actual presence of the virus on property. Notwithstanding CRO's bare and conclusory allegation with respect to the virus on its premises in the operative pleading here, CRO fails to acknowledge that many appellate courts have addressed whether the presence of the COVID-19 virus

on property can constitute "direct physical loss or damage" – even if not explicitly alleged in the complaint. Thus, this is just a red herring.

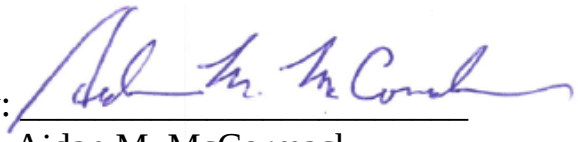
CRO also argues that a majority of those cases had a standard virus exclusion. That is irrelevant. It is well settled law that exclusion clauses "subtract from coverage rather than grant it." *Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 163 (2005). Even if those policies do contain a virus exclusion, that does not change the court's analysis of the insuring agreement – which is analyzed first.

CONCLUSION

For the foregoing reasons, Westport respectfully requests that this Court deny CRO's motion for leave to appeal.

Dated: New York, New York
July 25, 2022

DLA PIPER LLP (US)

By: 

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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

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deponent served the within: **Opposition to Motion For Leave To Appeal**

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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 25th day of July, 2022

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

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