APL-2022-00160
New York County Clerk's Index No. 450839/2021
Appellate Division–First Department Appellate
Case Nos. 2021-02971 and 2021-04034

Court of Appeals

of the

State of New York

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Respondent.

BRIEF ON BEHALF OF *AMICI CURIAE* AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF RESPONDENT

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Date Completed: April 28, 2023

CORPORATE DISCLOSURE STATEMENT

American Property Casualty Insurance Association is a trade association that has no parents, subsidiaries or affiliates.

National Association of Mutual Insurance Companies is a trade association that has no parents, subsidiaries or affiliates.

STATEMENT OF AMICI CURIAE

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, American Property Casualty Insurance Association and National Association of Mutual Insurance Companies state that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

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INTEREST OF *AMICI CURIAE*

American Property Casualty Insurance Association (APCIA) and National Association of Mutual Insurance Companies (NAMIC) (collectively, "Amici") are the national trade associations for home, auto, and business insurers. Amici represent the vast majority of the U.S. property-casualty insurance market, including the commercial property insurance market, and promote and protect the viability of private competition to benefit consumers and insurers.

The issues in this and similar cases pending in courts throughout the country arising from coronavirus-related business income insurance claims have a significant impact on Amici's members, their policyholders, and the property insurance marketplace. Amici believe their perspective will aid the Court in its analysis of the important issues before it.

SUMMARY OF ARGUMENT

Amici seek to fulfill the classic role of *amici curiae* by providing additional background, context, and perspective on the issues, and by citing additional authorities that might otherwise escape the Court's attention. Amici explain below that: (1) the history and purpose of commercial property insurance policies further support the Appellate Division's decision; (2) as a practical matter, the insurance mechanism cannot insure broadly against pandemic losses, and to find such coverage contrary to the plain language of the policy could substantially harm New York's insurance marketplace; (3) recent appellate decisions and additional authorities dispel Plaintiff-Appellant Consolidated Restaurant Operations, Inc.'s (CRO) arguments and provide further support for the Appellate Division's decision; and (4) to the extent CRO alleges that it made modifications or alterations to its property for social distancing purposes during the pandemic, that does not constitute "direct physical loss or damage to" property.[1]

This Court should affirm the Appellate Division's decision.

[1] Amici agree with the other arguments made by Defendant-Respondent, including regarding the applicability of the exclusions. Amici do not address those issues herein in the interests of brevity and avoiding duplicative briefing.

ARGUMENT

I. THE HISTORY AND PURPOSE OF COMMERCIAL PROPERTY INSURANCE POLICIES SUPPORT THE APPELLATE DIVISION'S DECISION

Historically, property insurance insured against the risk of fire for ships, buildings, and some commercial property at a time when most of the structures in use were made of wood. 10A *Couch on Insurance*, § 148:1 (3d ed. 2020); *see also* Philip L. Bruner and Patrick J. O'Connor, Jr., *Bruner and O'Connor on Construction Law* § 11:418 (explaining how property insurance developed in London after the Great Fire of 1666). Over time, commercial property coverage expanded to include loss arising from other perils that physically harm property.

As the U.S. Court of Appeals for the Sixth Circuit has explained, "[e]ven when called 'all-risk' policies, as these policies sometimes are, they still cover only risks that lead to tangible 'physical' loss or damages, say by fire, water, wind, freezing and overheating, or vandalism." *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 403 (6th Cir. 2021) (affirming dismissal of COVID-19 business interruption insurance case). Open peril policies, sometimes called "all risk" policies, first developed out of marine insurance that covered "all losses occasioned by perils of the sea." In property policies, such coverage has long been "limited to fortuitous physical loss from external

causes." John Henry Magee & Oscar N. Serbein, PROPERTY AND LIABILITY INSURANCE 61-62 (1967). This type of insurance covers property, such as an insured's building or its business personal property (e.g., equipment, furniture), against risks of direct physical loss or damage, such as a fire, windstorm, or theft. *See Uncork and Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 931 n.6 (4th Cir. Mar. 7, 2022) (rejecting argument that an "all-risk" policy "necessarily covers any type of loss for any reason unless included as a stated exclusion," explaining that only covered causes of loss are covered, which are typically defined as risks of direct physical loss). Property insurance is fundamentally different from, for example, "[t]itle insurance, which relates to intangible rights rather than to the property itself." *Couch on Insurance*, § 148:1.[2] "The imperative of a 'direct physical loss' or 'direct physical damage'

[2] The *Couch* treatise has described what typically constitutes "direct physical loss or damage to property" as a "distinct, demonstrable, physical alteration of the property." *Couch on Insurance* § 148:46. In attempting to overcome the overwhelming authority against their clients' position, a group of attorneys representing policyholders published an article critical of the *Couch* treatise for utilizing this phrase in 1995. *Couch* simply did what treatises often do—examine how some courts had decided individual cases and suggest a legal standard that courts might find helpful. According to a Westlaw search, more than 300 courts have cited, and many of them adopted, the "distinct, demonstrable, physical alteration of the property" phrase from *Couch* as a shorthand reference for what "direct physical loss of or damage to property" typically involves. There is no reason to debate the *Couch* phrase decades later

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. . . is the North Star of [a] property insurance policy from start to finish." *Santo's Italian Café*, 15 F.4th at 402.

When purchasing property insurance, a business can choose to add Business Income and Extra Expense coverage. This provides additional coverage when, for example, insured property is damaged by a fire, requiring the business to suspend operations. In that event, certain losses of business income and extra expenses (such as renting a temporary office) occurring during the "period of restoration" (while the lost or damaged property is being repaired or replaced) would be covered, subject to the policy's terms and only if those losses were caused by direct physical loss or damage to property at the insured premises.

These additional coverages, such as Business Income and Extra Expense, are secondary to and dependent on direct physical loss or damage to property at the insured premises that requires repair or replacement. In other words, the insured's "*operations* are not what is insured—the building and the personal

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after so many courts have adopted it. *See Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 198 n.14 (Conn. 2022) (rejecting policyholder's reliance on article criticizing *Couch* treatise); *Apple Annie, LLC v. Oregon Mut. Ins. Co.*, 82 Cal. App. 5th 919, 935 (2022), *review denied* (Dec. 14, 2022) ("At this point in time, any analytical flaws in the Couch formulation have become largely academic in light of the now-existing wall of precedent confronting [the plaintiff].").

property in or on the building are." *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 296 (S.D. Miss. 2020). "Policyholders are not insuring against 'all risks' to their income—they are insuring against 'all risks' to their property—that is, the building and its contents." *Id.* at 294 n.9.

Neither loss of use of property due to a government order nor the ephemeral presence of a virus within a building constitutes physical loss of or damage to *property* that property insurance covers. "A loss of use simply is not the same as a physical loss." *Santo's*, 15 F.4th at 402. As the South Carolina Supreme Court explained, "[t]he contention that a government shut-down order caused direct physical loss or damage is meritless" because "[a]lthough the government orders affected business operations, these restrictions did not cause any direct physical loss or damage" to *property*. *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742, 744-45 (S.C. 2022).

Allegations of the "presence of virus particles" in insured property are likewise insufficient, as an "overwhelming majority" of courts have held, because such allegations could not establish that the virus "alter[s] the appearance, shape, color, structure, or other material dimension of the property." *Id.* at 745; *see also Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022) ("Although caused, in some sense, by the physical properties of the virus, the suspension of business at the restaurants

was not in any way attributable to a direct physical effect on the plaintiffs' property that can be described as loss or damage. As demonstrated by the restaurants' continuing ability to provide takeout and other services, there were not physical effects on the property itself.").

Allegations of the presence of viral particles also cannot satisfy the "period of restoration" (here, "Period of Liability") requirement in property insurance policies because the presence of the coronavirus does not require repairing or replacing any property. While CRO asserts that "efforts to sanitize the Restaurants and to clean the air with filtration systems constituted efforts to 'repair' its properties" (Appellant's Br. at 30), such activities are plainly not "restoring damaged or lost property." *Sullivan Mgmt.*, 879 S.E.2d at 745-46. As the Louisiana Supreme Court recently explained, "[a] layperson would not say that cleaning or sterilizing tables, plates or silverware is a 'repair.'" *Cajun Conti v. Certain Underwriters at Lloyd's, London*, – So. 3d –, 2023 WL 2549132, at *3 (La. Mar. 17, 2023).

Like courts across the country, this Court applies common sense when interpreting an insurance policy. *See, e.g., L. Smirlock Realty Corp. v. Title Guarantee Co.*, 52 N.Y.2d 179, 189 (1981) (agreeing that an insurance policy "must be given a common sense application"); *U.S. Fid. & Guar. Co. v. Am. Re-Ins. Co.*, 20 N.Y.3d 407, 422 (2013) (interpreting re-insurance policy "with

a common-sense appreciation of the risks that reinsurers could reasonably be expected to take"). Common sense dictates that "[o]ne does not replace, rebuild or repair a countertop (or a doorknob or a floor) because SARS-CoV-2 (or salmonella, MRSA or the flu virus) is present on the surface." *L&J Mattson's Co. v. Cincinnati Ins. Co.*, 536 F. Supp. 3d 307, 314-15 (N.D. Ill. 2021). As CRO's reply brief implicitly concedes, "property impacted by [COVID-19] can be restored to sound health through the passage of time or merely opening a window." (Reply Br. at 8.)

If the outlandish theory of coverage proposed by CRO were adopted, every hospital, doctor's office, and supermarket has been physically damaged virtually every day by viruses, both before and after the advent of COVID-19. That makes no sense. *See, e.g., Conn. Children's Med. Ctr. v. Cont'l Cas. Co.*, 581 F. Supp. 3d 385, 392 (D. Conn. 2022), *aff'd*, 2023 WL 2961738, at *2 (2d Cir. Apr. 17, 2023) ("To the extent that [plaintiffs] allege that COVID-19 virus particles affix themselves temporarily to interior portions of their physical property, they do not explain how it is plausible to conclude that this amounts to 'damage' to the property. Indeed, the plaintiffs are medical providers whose role is to treat sick people (including patients with COVID-19), not to file property 'damage' claims every time a sick person coughs, sneezes, or otherwise respirates or expectorates at their premises."); *Northwell Health,*

Inc. v. Lexington Ins. Co., 550 F. Supp. 3d 108, 118 (S.D.N.Y. 2021) ("A hospital does not cease to function as a hospital because a viral outbreak requires more staff or an increase in the hospital's use of hygiene practices, personal protective equipment, or janitorial services.").

As numerous courts nationally have held during the pandemic, complaints essentially identical to CRO's complaint fail to state a claim. *See Conn. Dermatology*, 288 A.3d at 195-97 nn. 11, 12 (collecting cases).

II. INSURANCE CANNOT BROADLY COVER PANDEMIC LOSSES, AND TO FIND SUCH COVERAGE CONTRARY TO THE PLAIN LANGUAGE OF THE POLICY COULD SUBSTANTIALLY HARM NEW YORK'S INSURANCE MARKETPLACE

The fundamental concept of insurance is risk spreading. Insurers calculate risks of covered losses (e.g., tornadoes, theft, and fires) and pool them together, enabling insurers to collect premiums at "a slight fraction of the possible liability" for covered claims when risks unpredictably affect individual policyholders in separate incidents at different times. 1 *Couch on Ins.* § 1:9 (3d ed. 2020). As the National Association of Insurance Commissioners (NAIC) has explained, insurance cannot insure broadly against "a global pandemic where virtually every policyholder suffers significant

losses at the same time for an extended period."[3] The insurance mechanism—pooling premiums from all policyholders at risk to create a fund to pay the limited group of policyholders that actually suffer covered loss—does not function when widespread losses can hit all or a substantial majority of insureds at once. Further complicating this is that pandemics can occur as rarely as once per century. Insurers cannot, as a practical matter, project loss experience and maintain reserves vast enough to spread such a massive but rarely occurring potential exposure over such a long period of time for every business. To the extent pandemic insurance was available in the insurance marketplace before COVID-19 for an appropriate premium, it was limited, expensive, and rarely purchased, although the operator of the Wimbledon tennis tournament, for example, did so.[4]

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[3] *NAIC Statement on Congressional Action Relating to COVID-19*, NAT'L ASS'N OF INS. COMMISSIONERS (Mar. 25, 2020), https://www.campbell-bissell.com/wp-content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-COVID-19.pdf.

[4] *See* Pandemics, 3 CASUALTY INSURANCE CLAIMS § 53:12 (4th ed.) (noting the availability of "pandemic insurance coverage . . . under which coverage is triggered by a World Health Organization alert level of three or higher," which was available since at least 2008-09); "Wimbledon's pandemic insurance coverage results in $141M payout," *Property Casualty 360* (April 10, 2020) ("tennis tournament is set to receive around $141 million after paying for pandemic insurance coverage for nearly 20 years").

To convert Respondent Westport Insurance Corporation's (Westport) policy retroactively into pandemic insurance that CRO chose not to purchase would not only violate the plain language of the policies, it would fundamentally distort the insurance mechanism. As the Sixth Circuit explained in affirming a decision granting an insurer's motion to dismiss in a COVID-19 case:

> Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for.

Santo's, 15 F.4th at 407. This applies to both construing grants of coverage beyond their plain meaning and intent and failing to apply the plain meaning of exclusions.

If New York law were to require payment of benefits for which no corresponding premiums were paid, and contrary to controlling appellate decisions in numerous other jurisdictions, New York would likely stand alone. This could have a substantial detrimental impact on New York policyholders and the state's insurance marketplace. The NAIC concluded that requiring insurers to cover businesses' uninsured economic losses from the pandemic "would create substantial solvency risks for the [insurance] sector." NAIC,

supra note 4. Rating agencies agree with the NAIC on the threat to insurer solvency if courts and governments were to impose coverage for the COVID-19 pandemic under commercial property policies, contrary to the plain language of their terms.[5] APCIA has estimated that New York COVID-19-related business interruption losses—should coverage be mandated—would range from $5.8 billion to $21.5 billion *per month* for businesses with less than 250 employees. By comparison, total monthly premiums for commercial property policies written in New York amount to approximately $300 million, of which business interruption premiums constitute a small fraction.

Property insurance reserves are set aside to pay insured losses caused by windstorms, fires, and other daily events occurring in New York and throughout the country. The ability of insurers to honor their promises in policies covering such devastating and commonplace property perils would be

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[5] *See, e.g.*, *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, BUSINESS WIRE (May 5, 2020, 11:07 AM), https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital; *Credit FAQ: How COVID-19 Risks Factor Into U.S. Property/Casualty Ratings*, S&P GLOB. RATINGS (Apr 27, 2020, 2:50 PM), https://www.spglobal.com/ratings/en/research/articles/200427-credit-faq-how-covid-19-risks-factor-into-u-s-property-casualty-ratings-11454312.

dangerously undermined by a finding of coverage for purely economic losses attributable to the COVID-19 pandemic.[6]

Governmental relief efforts have provided trillions of dollars to businesses suffering setbacks from the pandemic through laws providing forgivable loans and other relief to American businesses.[7] Solutions for the economic toll the coronavirus had on businesses should come from programs like these, not trying to shoehorn claims into insurance policies that do not cover them.

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[6] Any suggestion that the insurance industry has unfairly profited from the pandemic is flatly untrue. Rather, industry data reflects that insurers' net income *declined* by approximately 27% in the first nine months of 2020 as compared with the prior year, and "[i]nsurers' overall profitability as measured by their annualized rate of return on average policyholders' surplus fell to 5.5% from 8.3% a year earlier." Spector and Gordon, Property/Casualty Insurance Results: Nine-Months 2020, available at: https://www.verisk.com/siteassets/media/downloads/insuranceresultsreport2020q3.pdf. Overall, the industry's underwriting gain declined by 94%. *Id.*

[7] *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281; Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 177 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

III. RECENT APPELLATE DECISIONS AND ADDITIONAL AUTHORITY DISPEL CRO'S ARGUMENTS AND PROVIDE FURTHER SUPPORT FOR THE APPELLATE DIVISION'S DECISION

Westport has briefed the issues at length and cited the overwhelming authority across the country supporting its position. Without repeating those arguments, Amici will point the Court to additional authority it may wish to consider, and to how recent appellate decisions dispel CRO's arguments that (a) the Appellate Division purportedly adjudicated "factual disputes" about the coronavirus and (b) the Appellate Division incorrectly interpreted the "Period of Liability" provision. Amici also provide additional authority supporting Westport's position that CRO cannot satisfy the causation requirement for coverage.

A. Persuasive Recent Appellate Decisions Reject CRO's Arguments that the Appellate Division Adjudicated Factual Disputes on a Motion to Dismiss and Incorrectly Interpreted the "Period of Liability" Provision

CRO challenges the Appellate Division's decision on the basis that it purportedly "resolved disputed issues of scientific fact" regarding the coronavirus. (Appellant's Br. at 43, 48-49.) In addition to the arguments made by Westport, recent appellate decisions in other jurisdictions directly and persuasively reject CRO's argument:

In *Tapestry v. Factory Mut. Ins. Co.*, 286 A.3d 1044 (Md. 2022), the policyholder made extensive allegations regarding the coronavirus and its alleged presence on the policyholder's property—much more extensive than what CRO alleged here. *Id.* at 1051-52. The policyholder and its supporting amicus argued that "it is improper for courts to make rulings that essentially amount to factual findings that Coronavirus is not capable of causing 'physical loss or damage.'" *Id.* at 1060. Rejecting that argument, the Maryland Supreme Court explained that "our decision is that, assuming the truth of all the non-conclusory factual allegations in the Complaint about how Coronavirus operates and how it impacted Tapestry's properties and operations, the presence of Coronavirus in the air and on surfaces at Tapestry's properties did not cause 'physical loss or damage' as that phrase is used in the Policies." *Id.* at 1061. In other words, the court assumed the truth of all well-pled factual allegations (but not conclusions of law), and interpreted the policy as applied to those facts. That is the same analysis this Court is required to perform under New York law. *Sokoloff v. Harriman Ests. Dev. Corp.*, 96 N.Y.2d 409, 414 (2001) (on motion to dismiss, court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether

the facts as alleged fit within any cognizable legal theory"). This Court can readily reach the same result here.

In *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014 (7th Cir. 2022), the policyholder and an amicus attempted to create factual issues by asserting that "virus particles physically attached to surfaces," that "the virus 'adsorbs' onto surfaces and materially alters them," and that "cleaning efforts may be less effective in eradicating the virus than was previously understood." *Id.* at 1020 & n.2, 1022. The Seventh Circuit found these facts insufficient to plead a covered claim as a matter of law. It explained that the policy's "period of restoration" provision made clear that "repair or replacement" was required, and that was not alleged. *Id.* at 1020. Moreover, there was no physical dispossession of the property that would constitute a "direct physical loss," and "[i]n ordinary parlance, the term 'damage' connotes some kind of harm." *Id.* at 1021-22.

The Seventh Circuit further reasoned that "[t]he fact that 'material matter' has been added to hotel surfaces does not mean [the policyholder's] property has been harmed." *Id.* at 1023. If the policyholder's "surfaces" theory had merit, "[a] sneeze that spreads cold virus particles, for example, would be deemed to have inflicted 'direct physical damage,'" and a "reasonably intelligent policyholder" would not "share such an expansive understanding of

that phrase," nor would "restoration or relocation" be required under the "period of restoration" provision. *Id.* As to the policyholder's allegations about cleaning being potentially "less effective," that did not demonstrate that "repair or replacement" of property would be required. *Id.* at 1020 n.2. And the ultimate question of how "a reasonable policyholder would understand the policy's restoration language" was a "legal question" properly decided on a motion to dismiss. *Id.*; *see also Neuro-Commc'n Servs., Inc. v. Cincinnati Ins. Co.*, – N.E.3d –, 2022 WL 17573883, at *4 (Ohio Dec. 12, 2022) ("Resuming normal business operations did not require any Covered Property to be 'repaired, rebuilt or replaced.' It required only that the Shutdown Orders be lifted.").

In several recent COVID-19 cases, evidence regarding the coronavirus was presented on a summary judgment motion or at trial, but the issues were ultimately resolved as a matter of law based on interpretation of the policy. The Louisiana Supreme Court, in reviewing a judgment after a trial and an intermediate appellate court decision, held that "the plain, ordinary and generally prevailing meaning of 'direct physical loss of or damage to property' requires the insured's property sustain a physical, meaning tangible or corporeal, loss or damage" that "must also be direct, not indirect." *Cajun Conti*, 2023 WL 2549132, at *3 (La. Mar. 17, 2023). Applying that legal

standard, the court concluded that "loss of use alone is not 'physical loss,'" and contamination of property with the coronavirus did not trigger coverage because giving the policy's words "their ordinary and generally prevailing meaning, [the policyholder] never had to repair, rebuild, or replace anything." *Id.* "A layperson would not say that cleaning or sterilizing tables, plates or silverware is a 'repair.'" *Id.* The insurance policy was "clear and must be enforced as written." *Id.* at *5; *see also Hartford Fire Ins. Co. v. Moda,* LLC, 288 A.3d 206, 212 (Conn. 2023) (affirming summary judgment ruling for insurer, explaining that "[c]ontamination with the SARS-CoV-2 virus, even if it could be proved, is not sufficient to establish that the [insured property was] physically lost or damaged"); *Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 203 N.E.3d 555, 557-59 (Ind. Ct. App. 2023) (affirming summary judgment ruling for insurer because, assuming plaintiff's expert opinions were correct, there was no coverage "because the COVID virus did not physically alter the theatre or otherwise render it physically useless or uninhabitable").

These recent appellate decisions provide substantial further support for the Appellate Division's holding that, as a matter of policy interpretation, CRO "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." *Consol. Rest. Operations, Inc. v. Westport*

Ins. Corp., 205 A.D.3d 76, 86 (2022). As the Appellate Division emphasized, "[n]othing stopped working," and CRO's "statement that COVID-19 particles and droplets damage property is merely a conclusion that will not save the complaint from dismissal." *Id.* "[W]here a policy specifically states that coverage is triggered only where there is "direct physical loss or damage" to the insured property, the policyholder'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." *Id.* at 78.

CRO argues that a few outlier decisions support its position, mainly a repeatedly criticized 3-2 decision by the Vermont Supreme Court in *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515 (Vt. 2022). A narrow majority of that court, applying what it described as "our extremely liberal pleading standards" requiring only a "bare bones statement" of a claim, *id.* at 533, 536, credited baseless, conclusory allegations that the COVID-19 virus could physically "alter" surfaces "in a tangible way." *Id.* at 534. The dissenting opinion is in line with overwhelming, near unanimous authority across the country, concluding that "[a]s a matter of law, human-generated droplets containing SARS-CoV-2 cannot cause 'direct physical loss or damage

to property' under this insurance policy" and "[n]o future litigation can change that reality." *Id.* at 537 (Carroll, J., dissenting, joined by Bent, J.). The dissent appropriately focused on the policy's "period of recovery" provision, similar to the "Period of Liability" provision here, concluding that the plaintiff "has pled no allegations describing measures it took to rebuild, repair, or replace any covered property." *Id.* at 542. The dissent persuasively explained how sanitization and other measures taken by the insured were not repairs or replacement of damaged property within the plain meaning of those words. *Id.* at 543-45. "[I]f resolving insurance-policy disputes such as this one always required expert evidence, even where no fact if proven would provide the nonmovant with its requested relief, policy contracts would become ever more complex and unwieldy," and "[t]his would no doubt result in increased costs for the industry and policyholders alike." *Id.* at 546.

Two outlier California appellate decisions cited by CRO, decided by the same panel, are distinguishable, contrary to New York law, and incorrectly decided.[8] In *Marina Pacific Hotel & Suites, LLC v. Firemans' Fund Ins. Co.*,

[8] The California Supreme Court recently accepted a certified question from the Ninth Circuit to resolve conflicting authority in the California Court of Appeal. *See Another Planet Entertainment, LLC v. Vigilant Ins. Co.*, 56 F.4th 730, 734 (9th Cir. 2022) (certifying question regarding whether "the actual or potential presence of

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81 Cal. App. 5th 96 (Cal. Ct. App. 2022), the court acknowledged that its decision was "at odds with almost all" other similar COVID-19 cases, *id.* at 109, and based its decision on unusual factual allegations not present here. The court emphasized that the plaintiff "specifically alleged they were required to 'dispose of property damaged by COVID-19." *Id.* The plaintiff further alleged that "in response to multiple employees of [plaintiff's hotel] testing positive, 'various public health authorities have ordered that [the hotel] 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.'" *Id.* at 101-02. CRO made no such allegations here. *Marina Pacific* also effectively read the period of restoration requirement out of the policy, failing to analyze or address it. Similarly, in *Shusha, Inc. v. Century-National Ins. Co.*, 303 Cal. Rptr. 3d 100, 104, 111 (Cal. Ct. App. 2022), the plaintiff alleged that it closed its restaurant for two weeks due to patrons having reported that they had tested positive for COVID-19 and employees believing that they contracted COVID-19 on the premises. This closure was during a period when government orders

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the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?"), *certified question accepted*, No. S277893 (Cal. Mar. 1, 2023).

expressly *allowed* the plaintiff to continue operations (limited to takeout and delivery service). *Id.* at 111-13. While *Marina Pacific* and *Shusha* was wrongly decided because human infections are not "direct physical loss or damage to property" as a matter of law, there are no comparable allegations in this case.[9]

Numerous courts have persuasively declined to follow and/or distinguished *Huntington Ingalls* and/or *Marina Pacific*. *E.g.*, *Tapestry*, 286 A.3d at 1065; *Conn. Dermatology*, 288 A.3d at 204 n.24; *Neuro-Communication Services*, 2022 WL 17573883, at *7; *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 143 n.6 (3d Cir. 2023); *Apple Annie*, 82 Cal. App. 5th at

[9] CRO incorrectly suggests that *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Company*, 515 P.3d 525 (Wash. 2022), *Wakonda Club v. Selective Insurance Company of America*, 973 N.W.2d 545 (Iowa 2022) and *Jesse's Embers, LLC v. Western Agricultural Insurance Company*, 973 N.W.2d 507 (Iowa 2022) support its position. (Appellant's Br. at 22; Appellant's Reply Br. at 15.) In *Hill & Stout*, while the court was not presented with the "virus on premises" theory of coverage, the court agreed with "the national consensus … that COVID-19 and related governmental orders do not cause physical loss of or damage to a property," reasoning that "[t]he property was in [the plaintiff's] possession, the property was still functional and able to be used, and [the plaintiff] was not prevented from entering the property." 515 P.3d at 533-34. In *Wakonda Club*, the court explained that "[t]he possibility of the COVID-19 virus being present in [the plaintiff's] facilities is insufficient to trigger coverage … because there was no imminent physical threat to the insured's property." 973 N.W.2d at 554; *see also Jesse's Embers*, 973 N.W.2d at 510 (applying *Wakonda Club*).

933-34, 937; *Tao Group Holdings, LLC v. Employers Ins. Co. of Wausau*, 2022 WL 17102363, at *2 (9th Cir. Nov. 22, 2022) (unpublished).

B. Additional Authorities Support Westport's Argument That CRO's Failure to Allege Causation Is An Independently Dispositive Ground for Affirmance

Westport argues that this Court can also affirm the Appellate Division's decision on the alternative, independently dispositive ground that the policy's causation requirement is not satisfied. (Respondent's Br. at 25-26.) In its reply brief, CRO asserts that causation is a question of fact, but fails to identify any non-conclusory factual allegation that could establish that it closed its restaurants because of the presence of the coronavirus within the restaurants at a time when no government order required such closure. (Reply Br. at 24-25.)

In addition to the authority cited by Westport, the Third Circuit, applying both New Jersey and Pennsylvania law, held that "whether the coronavirus was present in [the insured] properties *would have made no difference*" because "the closure orders applied to nonessential businesses across the board, regardless of the presence of the virus on the businesses' properties." *Wilson*, 57 F.4th at 146 (emphasis added). The same is true here. The Third Circuit also noted the undisputable fact that "[e]ven at its peak, buildings in which the coronavirus inevitably amassed—such as hospitals and grocery stores—remained open and inhabitable." *Id.*; *see also AC Ocean Walk,*

LLC v. Am. Guar. & Liab. Ins. Co., 2022 WL 2254864, at *13 (N.J. Super. Ct. App. Div. June 23, 2022), *cert. granted*, 288 A.3d 447 (N.J. 2023) ("[The plaintiff] was forced to close its casino gaming floor [and certain other operations] to the public in accordance with Governor Murphy's [executive orders]," and "[s]aliently, [the plaintiff] would have been able to continue operating its casino and performance venue without interruption had the [executive orders] not been issued," given that after reopening the plaintiff continued to operate while the COVID-19 virus has continued to circulate.).

Similarly, the Eighth Circuit chose to sidestep the question of whether a plaintiff had adequately alleged "direct physical loss of or damage to" property by pleading that one employee tested positive for COVID-19, instead deciding the case on causation grounds. *Torgerson Props., Inc. v. Cont'l Cas. Co.*, 38 F.4th 4, 6 (8th Cir. 2022). Explaining that "[t]he policy requires that the direct physical loss *cause* the lost income," the Eighth Circuit found that requirement was not satisfied. *Id.* "The contamination did not cause [the policyholder's] business interruption; the shutdown orders did" because the policyholder "would have been subject to the exact same restrictions even if its premises weren't contaminated." *Id.* The same is true here.

IV. DELIBERATE MODIFICATIONS TO PROPERTY FOR SOCIAL DISTANCING PURPOSES DO NOT CONSTIUTE "DIRECT PHYSICAL LOSS OR DAMAGE" TO PROPERTY

CRO asserts briefly that it took "significant efforts … to repair, remediate, and replace property, including by making physical alterations to its Restaurants." (Appellant's Br. at 14.) The First Department's opinion noted that CRO alleged that it had to make modifications to its property in response to government orders, such as installing hand sanitizers and physical partitions, which it argued were a basis for coverage. 205 A.D.3d at 78. While the First Department found that argument unworthy of discussion in depth, it plainly rejected those allegations as a basis for coverage. This "modifications" argument has been pursued by other plaintiffs in New York cases and unanimously rejected. *E.g.*, *Meritage Hospitality Grp., Inc. v. N. Am. Elite Ins. Co.*, 2022 WL 1104005, at *1 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 8, 2022); *John Gore Org., Inc. v. Fed. Ins. Co.*, 2022 WL 873422, at *12 (S.D.N.Y. Mar. 23, 2022); *Abruzzo Docg Inc. v. Acceptance Indem. Ins. Co.*, 2022 WL 1025719, *14-15 (N.Y. Sup. Ct. Kings Cty. Mar. 15, 2022), *appeal pending*, No. 2022-02854 (2d Dep't).

While CRO has not briefed its "modifications" argument in any detail in this Court, likely because it recognizes that the argument is meritless, Amici respectfully urge the Court to address this issue briefly in its opinion and dispel the argument, to avoid further unnecessary litigation, given that this argument is

sometimes presented by policyholder attorneys as a separate, distinct "theory" of coverage, and was alleged in this case.

As Justice Schecter of the Commercial Division in New York County explained, "[t]aking safeguards against the spread of COVID-19, such as installing plexiglass or moving furniture, *does not mean there was property damage*" under a policy requiring "direct physical loss or damage" to property. *Meritage Hospitality Grp.*, 2022 WL 1104005, at *1 (emphasis added). Similarly, a Southern District of New York decision rejected the claim that "installing hand sanitizing stations, plexiglass shields, COVID-related signage, and enhanced HVAC systems" constitutes direct physical property loss or damage because "these remediation efforts are not there to replace or repair damage to the property; they are there to protect humans." *John Gore Org.*, 2022 WL 873422, at *12.

Appellate courts in other jurisdictions have unanimously rejected this "modifications" argument. For example, in *Cherokee Nation v. Lexington Ins. Co.*, 521 P.3d 1261 (Okla. 2022), the Oklahoma Supreme Court reversed a trial court's conclusion that the insured "'repaired' its properties by implementing various COVID-19 mitigation protocols and modifications [in its casino], such as installing acrylic barriers and sanitization stations, staggering seating and gaming machines, and replacing air filters." 521 P.3d at 1270. The Oklahoma Supreme Court agreed with other courts that taking "preventative measures to decrease the spread of

COVID-19 does not constitute direct physical damage or loss to property." *Id.* (citing decisions in other cases where the insured installed plexiglass, improved HVAC systems, rearranged furniture and/or installed partitions). The court reasoned that such modifications "constitute measures to stop the spread of the virus from one person to another, *not repairs to or replacement of damaged or lost property*." *Id.* (emphasis added).

The Supreme Court of Maryland also rejected the "modifications" argument in a footnote explaining that reconfiguring retail stores and installing barriers to "increase social distancing" simply were "not the repair or remediation of damaged or lost property." *Tapestry*, 286 A.3d at 1057 n.16. Similarly, the South Carolina Supreme Court explained that, while the insured restaurant operator "took steps to mitigate the spread [of COVID-19], such as . . . installing plexiglass, these acts are different than restoring damaged or lost property." *Sullivan Mgmt.*, 879 S.E.2d at 746. "In other words, [the restaurant] had nothing to 'repair, replace or rebuild'" within the meaning of the policy's "period of restoration." *Id.*

The Sixth and Seventh Circuits and California and Illinois appellate courts reached the same result, rejecting insureds' "modifications" claims in short order. *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303, 307 (7th Cir. 2021) (rejecting argument that insured hotel suffered direct physical loss or damage because "it was required to incur expenses to install Plexiglas partitions

and hand sanitizer stations, to display signs throughout the hotel, and to move furniture to permit social distancing"); *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 404 (6th Cir. 2022) ("remediation measures, such as cleaning and reconfiguring spaces, to reduce the threat of COVID-19 . . . are precisely the sorts of losses we have previously determined are 'not tangible, physical losses, but economic losses'") (citation omitted); *United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65, 80 (Cal. Ct. App. 2022) (agreeing with other courts that "cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss"); *GPIF Crescent Ct. Hotel LLC v. Zurich Am. Ins. Co.*, , 2022 WL 1606999, at *4 (Ill. App. Ct. May 20, 2022) (allegations that insured hotels moved furniture and "had to install various items to help contain the spread of the virus (plexiglass barriers, hand sanitizer stations, instructional stickers, etc.)" were insufficient to state a claim for direct physical loss or damage).

In the interests of completeness and achieving finality in this three-year-old litigation that has been the subject of dozens if not hundreds of lawsuits in New York, this Court should briefly address and reject the "modifications" argument presented by CRO's allegations.

CONCLUSION

Amici respectfully urge the Court to affirm the Appellate Division's decision.

Dated: April 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 6, 231 words.

This brief was prepared with Microsoft Word 365 using Times New Roman proportionally spaced typeface in 14-point font.

Dated: April 28, 2023

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