To be Argued by:
ROBIN L. COHEN
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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 FOR APPELLANT

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DISCLOSURE STATEMENT PURSUANT TO 22 N.Y.C.R.R. 500.1(f)

Consolidated Restaurant Operations, Inc. has the following parents, subsidiaries, and/or affiliates: 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.

STATEMENT OF RELATED LITIGATION

There are no actions or proceedings pending in any court of this State related to this appeal at the time of filing this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Statutes

Other Authorities

Plaintiff-Appellant Consolidated Restaurant Operations, Inc. ("CRO") submits this brief in support of its appeal from the Decision and Order of the Appellate Division, First Department, dated April 7, 2022 (the "Decision," R2061-77), which affirmed the Decision and Order of the Supreme Court, New York County (Schecter, J.), entered on August 4, 2021 (the "August 4 Decision and Order," R4-6), dismissing CRO's complaint against Defendant-Respondent Westport Insurance Corporation ("Westport") in its entirety.

PRELIMINARY STATEMENT

CRO alleged in detail that it suffered "direct physical loss or damage" under its property and business interruption insurance policy (the "Policy") when SARS-CoV-2, the virus that causes COVID-19 – a lethal, physical substance that was the third highest cause of death in the Unites States in 2020[1] – permeated and attached to its insured restaurants, thereby tangibly altering the air and surfaces therein, and severely impairing their functionality. These allegations provided adequate notice to Westport of CRO's claim and are legally sufficient to survive a motion to dismiss under this Court's longstanding rules of insurance policy interpretation and New York's liberal pleading standard. In dismissing CRO's complaint, the First Department violated these core principles. It ignored the Policy's plain language,

[1] *See* Farida B. Ahmad et al., *Provisional Mortality Data – United States, 2020*, 70 Ctrs. for Disease Control and Prevention Morbidity and Mortality Wkly. Rep. 505, 519-22 (April 9, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7014-H.pdf.

failed to interpret the Policy as a whole, rendered numerous of the Policy's terms meaningless, disregarded the policyholder's reasonable expectations, failed to accept CRO's allegations as true, and resolved hotly contested issues of scientific fact in favor of Westport at the pleading stage. Therefore, this Court should reverse.

CRO, an owner and operator of dozens of restaurants across the United States, suffered significant losses beginning in early 2020, when the dining areas of its restaurants were rendered functionally useless by the presence and impact of SARS-CoV-2 in and on its insured properties and by resulting governmental orders. In fact, because of the presence and impact of the virus, CRO's dining areas became functionally useless for their insured and intended purpose, just as if CRO had experienced a fire or flood.

CRO reasonably expected that its losses would be covered by its property and business interruption insurance Policy issued by Westport, which covers *all risks* of "direct physical loss or damage to property," including the partial cessation of business activities. Indeed, unlike many policyholders, CRO purchased a policy without a standard exclusion for losses caused by a virus. Instead, CRO's Policy is replete with terms and conditions that *confirm* that the Policy covers losses caused by the presence of invisible, noxious substances that render property unusable for its intended purpose, even if the property is not structurally damaged. Indeed, the

Policy describes a long list of such substances as capable of causing "physical loss or damage," including communicable diseases, radiation, and viral matter.

Nevertheless, when CRO turned to Westport to cover CRO's losses under the Policy, Westport summarily denied coverage for CRO's claim, arguing that SARS-CoV-2 cannot cause "direct physical loss or damage" as a matter of law. The First Department agreed, violating nearly every one of this Court's core principles of insurance policy interpretation in the process, and ignoring New York's basic pleading standards.

First, the First Department erroneously concluded that the words "direct physical loss or damage" *require* tangible, demonstrable "damage" and "alteration" to property. This interpretation improperly narrowed the scope of coverage by adding the words "tangible" and "demonstrable" to the Policy, rendering the words "physical loss" meaningless in contravention of this Court's admonition in *In re Viking Pump*, 27 N.Y.3d 244 (2016), that each word in an insurance policy must be afforded independent meaning and effect. At the same time, the First Department failed to meaningfully consider decades of caselaw finding coverage under the same policy language and similar circumstances, which informed CRO's reasonable expectation of coverage.

Second, the First Department rejected as "conclusory" CRO's allegations, supported by scientific literature and evidence, that SARS-CoV-2 is highly

resilient, attached to its insured properties, impaired their physical integrity, and physically altered them, both by changing previously normal air into a dangerous gas and converting normal surfaces into vectors for disease transmission. The First Department credited decisions by lower courts finding, without hearing any evidence, that COVID-19 does not cause "direct physical loss or damage" because viral particles can be cleaned easily. In so holding, the First Department failed to accept CRO's contrary allegations as true, as required. Instead, it resolved hotly disputed issues of scientific fact in Westport's favor.

This error is underscored by the fact that CRO's allegations are supported by a growing body of scientific evidence that CRO was never allowed to develop. For example, four well-respected medical associations have recently submitted amicus briefs in COVID-19-related cases confirming that COVID-19 is extraordinarily difficult to clean and the insurance industry's contrary position – implicitly adopted by the First Department – is "junk science."

At bottom, CRO adequately alleged its entitlement to coverage based on a reasonable interpretation of the Policy. That interpretation is supported by the plain language of the Policy as a whole, dictionary definitions, and decades of pre- and post-COVID-19 caselaw interpreting those words. CRO's allegations even satisfy the First Department's erroneous "tangible" damage standard. The First Department's contrary holding violated numerous bedrock principles of insurance

policy interpretation, turned New York's liberal pleading standard on its head, and improperly resolved contested issues of scientific fact at the pleading stage.

If left uncorrected, the First Department's decision will (1) severely restrict historically available insurance coverage for policyholders in New York for years to come with respect to a wide range of noxious substances; (2) result in a massive windfall for the insurance industry on the backs of premium-paying policyholders; and (3) upend decades of jurisprudence regarding the interpretation of insurance policies. It will also close the courthouse doors to plaintiffs in science-based cases whenever a judge personally disagrees with a plaintiff's factual allegations, violating the letter and spirit of the CPLR's liberal pleading standards. Therefore, this Court should reverse, and confirm the important principles of insurance policy interpretation and New York pleading standards that have guided litigants for decades.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this appeal pursuant to CPLR 5602(a)(1)(i). The Decision (R2061-77) finally determines the action because it resolved all claims against Westport. The Decision affirmed the August 4 Decision and Order (R4-6), granting Westport's motion to dismiss pursuant to CPLR 3211(a)(1) and (7) and declaring that the Policy does not cover the losses

CRO alleged in its complaint. Further, the Order "is not appealable as of right." CPLR 5602(a)(1)(i).

The First Department interpreted "the meaning of the insurance policy" and held as a matter of law that CRO "fail[ed] to state a cause of action for a covered loss." R2064. The issues herein are preserved for this Court's review. Westport prevailed on them before the First Department, and the parties addressed them throughout their briefing to the First Department.

QUESTIONS PRESENTED

This Appeal raises the following questions:

1. Whether the First Department erred in holding that the words "direct physical loss or damage" in CRO's all-risks property and business interruption insurance policy require that CRO suffer tangible, demonstrable damage and alteration to property?

2. Assuming that the First Department was correct to interpret "direct physical loss or damage" as requiring tangible, demonstrable damage and alteration to property, whether the First Department erred in dismissing CRO's complaint without any evidentiary record on the ground that CRO's allegations that COVID-19 tangibly and demonstrably altered its properties and the air therein were "conclusory"?

STATEMENT OF FACTS

CRO's complaint described the devastating nature and impact of COVID-19 in and on its insured properties, which resulted in "direct physical loss or damage" and significant losses. Contrary to the First Department's approach, these detailed factual allegations, as described below, *must* be accepted as true at this stage, with *all* reasonable inferences drawn in CRO's favor.

A. CRO Suffered Losses Due to the Physical Presence and Impact of SARS-CoV-2 Particles in and on Insured Property and the Resulting Government Orders

CRO operates dozens of restaurants across the United States and in the United Arab Emirates (the "Restaurants"). R51 ¶ 2. These Restaurants employ more than 3,200 people and annually welcome more than seven million guests to enjoy in-person dining – the Restaurants' central function and the cornerstone of CRO's business. R51-52 ¶¶ 2, 4; R59-60 ¶¶ 31, 34-35.

In early 2020, droplets containing the deadly, highly contagious, and resilient SARS-CoV-2 respiratory virus were present in the Restaurants, physically attached to the surfaces therein, and tangibly altered the Restaurants' air. R55-56 ¶¶ 17-20; R60 ¶ 36; R68 ¶ 61. Indeed, SARS-CoV-2 is a physical, tangible substance with multiple modes of transmission. R54-56 ¶¶ 14-15, 17-19.[2] For example, airborne transmission, which occurs through the distribution of viral

[2] Scientific studies have shown that restaurants are "particularly susceptible to circumstances favorable to the spread of the virus." R55-57 ¶¶ 16, 22.

droplets through normal breathing or during a cough or sneeze, can cause infections both in the near vicinity of an infected person as well as throughout a property when particles are pulled into air circulation systems. R55-57 ¶¶ 15, 18, 22. SARS-CoV-2 also has the propensity to attach to property. R56 ¶ 19. Unlike other viruses that are unable to survive for long periods of time outside the body, the coronavirus is resilient and can survive on surfaces for days and even weeks, thereby compromising the property's physical integrity by transforming the property from something that was safe to touch into a vector for disease transmission. R54-57 ¶¶ 14-15, 18-22. Thus, the physical presence of SARS-CoV-2 in and on the Restaurants "compromise[d] the physical integrity of" the Restaurants and "render[ed] [the Restaurants] unusable." R56 ¶ 21.

Moreover, as the pandemic swept the nation, state and local governments imposed restrictions on routine activities (the "Orders"). R51-52 ¶ 3; R58-59 ¶¶ 27, 29-31. Certain Orders, including those issued in New York by Mayor Bill de Blasio, explained that the restrictions they imposed were needed, in part, because of the virus's propensity to cause "property loss and damage." R51-52 ¶ 3; C-540. The Orders restricted or prohibited the operation of non-essential businesses or public gatherings and required individuals to stay at home except for essential purposes. R58-59 ¶¶ 27, 29-31. The Orders effectively prohibited in-person dining in the Restaurants and limited the Restaurants' operations to takeout

or delivery service, subject to additional restrictions. R59 ¶ 31. But even after the Orders were lifted or modified, CRO continued to suffer losses amounting to tens of millions of dollars due to the presence and impact of the coronavirus in and on its Restaurants. R52 ¶ 4; R60-61 ¶¶ 35-36, 38; R68 ¶ 61; R71 ¶ 74.

B. CRO Reasonably Expected Coverage Under Its All-Risks Policy

CRO sought coverage for its losses under its $50 million per-occurrence property and business interruption insurance Policy issued by Westport. R52 ¶ 5; R61 ¶ 39; R67 ¶ 58. The Policy broadly covers "all risks of direct physical loss or damage to insured property," meaning that the Policy covers all risks unless specifically excluded. R62 ¶ 43 (emphasis added). The Policy also includes numerous other coverages, including "Communicable Disease Losses" if "an insured location owned, leased or rented by [CRO] has the actual not suspected presence of communicable disease and access to such insured location is limited, restricted or prohibited by: (a) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or (b) a decision of an Officer of [CRO] as a result of the actual not suspected presence of communicable disease[.]" R64-65 ¶ 52.

Westport did not include in the Policy the broad virus exclusion drafted by the Insurance Services Office ("ISO")[3] (the "ISO Virus Exclusion") that was widely available at the time Westport sold CRO the Policy and that appears in many all-risks insurance policies issued since 2006. That exclusion provides that the insurer "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." R69-70 ¶ 66. Instead, the Policy only bars coverage for "physical loss or damage" caused by a virus under specific circumstances not applicable here. R128 § VI.C.5; R143 § X.D. Indeed, the Policy identifies a long list of invisible, noxious substances as causing loss or damage, including ammonia, radiation, microorganisms, and viral agents. R109 § IV.B.25; R128-29 §§ VI.B.6, VI.C.6.d; R158 at End. 2. The Policy nowhere excludes loss and damage caused by the intrusion and adherence of viral particles on insured property from natural causes, such as during a global pandemic. Therefore, CRO reasonably expected that the Policy would cover its losses from the presence and impact of SARS-CoV-2 in and on its Restaurants.

Moreover, the Policy expressly covers losses resulting from pre-emptive actions taken by CRO for the "protection or preservation" of insured property from

[3] ISO is an advisory and rating organization serving the property/casualty insurance industry. In addition to providing the industry statistical and actuarial services, ISO also drafts policy language. *See* https://www.verisk.com/insurance/brands/iso/.

"immediately impending direct physical loss or damage[.]" R123 § V.H.12. And it expressly covers CRO even when it is "wholly or partially prevented from . . . continuing business operations or services," meaning that CRO's inability to use its dining areas would trigger coverage even if it could use other portions of the Restaurants. R114 § V.B.3.a.

C. Westport Denied Coverage for CRO's Claim

CRO gave prompt notice of its claim to Westport. R67 ¶ 58. Westport, however, denied coverage months later on July 13, 2020, asserting that COVID-19 cannot cause "direct physical loss or damage to property." R52 ¶ 6; R67-68 ¶¶ 58-60; R71 ¶¶ 75-76. Therefore, CRO filed suit against Westport for declaratory relief and breach of contract to secure the coverage to which it was entitled.[4] R52-53 ¶¶ 6-7.

Because CRO filed its complaint in the early days of the pandemic, the precise nature and causes of its losses were still in flux. Therefore, out of an abundance of caution, CRO asserted that it suffered "direct physical loss or damage to insured property" based on alternative grounds, including the actual presence and impact of the virus on insured property and/or the resulting Orders. R60 ¶ 36.

[4] CRO filed its complaint in the Supreme Court, Westchester County. Westport moved to transfer venue to the Supreme Court, New York County (hereinafter the "Supreme Court") on October 16, 2020, which was granted on December 11, 2020. R1.

D. The Supreme Court Improperly Granted Westport's Motion to Dismiss CRO's Well-Pled Complaint Without Any Evidentiary Record

Westport moved to dismiss CRO's complaint on the ground that CRO failed to allege adequately "direct physical loss or damage" to property under New York law. R166-67.[5] On August 4, 2021, the Supreme Court heard oral argument on Westport's motion. After hearing from the parties, the Supreme Court granted Westport's motion, ruling that the First Department's decision in *Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1 (1st Dep't 2002), was "binding preceden[t]," R40:22-41:2, even though *Roundabout* did not involve losses resulting from *any* physical impact to insured property and, thus, *Roundabout* did not involve the key issue presented by CRO's insurance claim: whether the presence of a dangerous substance on insured property can cause "physical loss or damage."

The Supreme Court reached this conclusion by relying on a series of hypotheticals with no basis in fact, engaging in outright factfinding, and assessing the merits of CRO's allegations, despite the absence of any evidentiary record. For example, the court expressed skepticism that the virus was present in the Restaurants, despite CRO's clear allegations that it was present, and questioned

[5] Westport also moved to dismiss CRO's claim for Communicable Disease coverage on the ground that CRO did not allege the actual presence of the virus on insured property. R195. CRO's response made clear that the virus was actually present on insured property. R658-88. The trial court, however, did not address the Communicable Disease coverage.

CRO regarding the *particular* pieces of property to which the coronavirus attached. R11:10-14; R12:20-13:2; R13:6-9. The court then theorized that CRO "could wipe down the tables every two minutes" and that the property can "be cleaned and replaced right back," a view that lacks a scientific basis and disregarded CRO's contrary allegations. R15:8-12. The court also 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." R22:11-16; *see also* R21:16-18, 20-21. The court further posited that there would have been no impact from the virus so long as "the property was unexposed to people." R16:7-10; R20:14-18. Because of the trial court's departure from the standards applicable to assessing CRO's allegations, CRO requested leave to file an amended complaint to address the court's concerns, but the court did not rule on CRO's request at that time. R34:20-23.

E. The Supreme Court Denied CRO's Renewed Motion for Leave to Amend Its Complaint

It was clear from the oral argument that the trial court had not accepted CRO's allegations as true and had drawn inferences in Westport's favor, rather than CRO's. Further, given the constantly evolving science of COVID-19, as well as CRO's developing understanding of its own losses, CRO was in a position following the argument to provide the trial court with even more detail regarding the nature and impact of SARS-CoV-2 on the Restaurants. Therefore, CRO moved

for reargument and, in the alternative, renewed its request for leave to amend its complaint on August 19, 2021. R1922-2013.

CRO's proposed amended complaint was replete with detailed and robust allegations regarding, inter alia, (1) the actual presence of COVID-19 on CRO's properties; (2) how virus particles transform and tangibly alter high-touch surfaces into disease vectors, and alter the air, making it potentially lethal to breathe; (3) the virus's resilience and the difficulty of removing the virus, even through in-depth cleaning; (4) the significant efforts CRO undertook to repair, remediate, and replace property, including by making physical alterations to its Restaurants; and (5) how the presence of the virus impaired the physical function of the Restaurants and resulted in the permanent closure of dozens of Restaurants. *See generally* R1932-44 ¶¶ 13-54.

On September 23, 2021, the Court denied CRO's motion for reargument and, in the alternative, to amend its complaint (the "September 23 Decision and Order"), stating only that "[n]othing was overlooked or misapprehended and the proposed amendment would be futile." R47-48.

F. The First Department Affirmed the Supreme Court's Erroneous Dismissal

On August 5, 2021, CRO appealed to the First Department from the Supreme Court's August 4 and September 23 Decisions and Orders. R3. On April 7, 2022, the First Department affirmed the Supreme Court's decision, finding that

CRO had failed to sufficiently allege "direct physical loss or damage" under the Policy. R2061-77. The court offered several permutations of what it believed was required to show "direct physical loss or damage," ranging from "physical, tangible damage," R2070, to "actual, demonstrable physical harm," R2073, to a "negative alteration in the tangible condition of the property," R2074, to "tangible, ascertainable damage, change or alteration to the property," R2075. Taken together, the First Department effectively required that CRO establish that its Restaurants were tangibly and demonstrably damaged and altered by the virus.

In support of this standard, the First Department did not rely on any authority from this Court interpreting the Policy language, analyze the reasonable expectations of the average policyholder, or assess the Policy's terms and conditions as a whole. Nor did it meaningfully address the long history of pre-pandemic caselaw finding coverage to exist when a noxious substance pervades and impairs the functionality of insured property, dismissing these cases merely because they did not "involve COVID-19." R2074. Instead, the First Department ignored that the Policy covers direct physical loss and, separately, direct physical damage, and collapsed the words "physical loss" into "physical damage" based primarily on its own prior holding in *Roundabout* and other New York trial-court-level decisions that incorrectly applied *Roundabout* in the COVID-19 context. Further, the court made no mention of the numerous terms and conditions of this

Policy, which show that "direct physical loss or damage" *does not* require tangible, demonstrable damage to property.

The First Department then misapplied this standard by rejecting CRO's allegations that SARS-CoV-2 had tangibly and detrimentally altered and impacted its properties, holding that these allegations were "conclusory." R2070. This is despite CRO's robust allegations that its Restaurants were covered in dangerous, resilient, physical viral particles, and that these particles attached to, and impacted the physical integrity of, the Restaurants, severely impairing the Restaurants' functionality. R54-57 ¶¶ 14-15, 17-22; R60 ¶ 36; R68 ¶ 61.[6]

ARGUMENT

I. THE FIRST DEPARTMENT'S CONCLUSION THAT "DIRECT PHYSICAL LOSS OR DAMAGE" CAN ONLY BE SATISFIED BY TANGIBLE, DEMONSTRABLE DAMAGE TO PROPERTY CONTRAVENES BEDROCK PRINCIPLES OF INSURANCE POLICY INTERPRETATION AND MUST BE REVERSED

Consistent with the plain language of the Policy as a whole, basic dictionary definitions, and a long history of cases confirming coverage for noxious substances, the words "direct physical loss or damage" encompass a scenario in which a dangerous, lethal substance permeates insured property and impairs its functionality, which is exactly what CRO alleged here. R54-57 ¶¶ 14-15, 17-22;

[6] CRO also sought coverage under numerous other coverages in the Policy, including "Order of Civil or Military Authority" coverage. R62-66 ¶¶ 42-55. Although the First Department did not address these coverages, each is also triggered by "physical loss or damage." Thus, the First Department's holding necessarily and erroneously dismissed these coverages as well.

R60 ¶ 36; R68 ¶ 61. Indeed, the presence of SARS-CoV-2 in and on CRO's dining areas rendered them as unusable for their insured and intended purpose as if CRO had experienced a flood or fire, the main difference being that the virus, although a physical substance, is invisible to the naked eye.

The First Department did not dispute that CRO sufficiently alleged "direct physical loss or damage" under this standard. Nor could it, given CRO's robust allegations regarding the presence and impact of the virus. Instead, the First Department incorrectly held CRO to a far *stricter* standard, concluding that "direct physical loss or damage" only means "something that directly happens to the property resulting in physical *damage* to it." R2069 (emphasis added). The court repeated this erroneous standard (in various formulations) throughout its opinion, requiring that CRO show demonstrable, tangible damage and alteration to the Restaurants. R2070, 2073-75. This interpretation of "direct physical loss or damage" violated nearly every one of this Court's core principles of insurance policy interpretation and must be reversed.

A. This Court Has Repeatedly Reversed Lower Courts That Failed to Adhere to the Rubric for Interpreting Insurance Policies Under New York Law

Insurance policies in New York are subject to a specific interpretive rubric intended to maximize coverage. This Court has repeatedly reminded courts applying New York law that words in an insurance policy "must" be construed "in

a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect," such that "surplusage is . . . avoided." *Viking Pump*, 27 N.Y.3d at 257. Further, insurance policies "must be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Id.*; *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 561 (2021), *reargument denied*, 37 N.Y.3d 1228 (2022). And, if there is even a "reasonable basis for a difference of opinion" regarding the meaning of policy language, that language must be construed in favor of coverage. *Viking Pump*, 27 N.Y.3d at 257-58.

This Court has not hesitated to reverse lower courts' decisions that depart from these standards. For example, in *Viking Pump*, this Court addressed a national split of authority regarding the proper approach to allocation in the context of long-tail toxic tort claims. *Id.* at 256-57. At that time, courts in different jurisdictions were divided between a "pro rata" and an "all sums" approach. *Id.* New York state courts, as well as the Second Circuit Court of Appeals, had adopted the "pro rata" approach for all claims regardless of the policy language. *Id.* at 262-64. This Court rejected that consensus, reminding courts that under New York law, *it was the particular policy language that controlled*. *Id.* Similarly, in 2013, and more recently in 2021, this Court twice reversed the First Department for failing to adhere to these basic principles. *See J.P. Morgan Sec. Inc. v. Vigilant*

Ins. Co., 21 N.Y.3d 324, 334 (2013) (reiterating "insurance contracts, like other agreements, will ordinarily be enforced as written"); *J.P. Morgan*, 37 N.Y.3d at 567-69 (enforcing policy's plain language based on reasonable expectations of policyholder based on policy as a whole).

The First Department departed from these same bedrock principles here in numerous ways, and the result should be no different – reversal.

B. The First Department's Tangible, Demonstrable Damage Requirement Improperly Rewrote the Policy's Plain Terms

In holding that "direct physical loss *or* damage" requires tangible, demonstrable *damage* and *alteration* to property, the First Department excised the words "physical loss" from the Policy and collapsed "physical loss" into "physical damage," despite these terms being separated by the disjunctive "or." This violated the core tenet that each word in an insurance policy must be afforded independent meaning and effect, and that no word can be rendered meaningless. *See Viking Pump*, 27 N.Y.3d at 257. In other words, "physical loss" must mean something different than "physical damage." *Cataract Sports & Ent. Grp., LLC v. Essex Ins. Co.*, 59 A.D.3d 1083, 1084 (4th Dep't 2009) (explaining that where insurance coverage provisions are framed "in the disjunctive, each must be separately considered and either would support coverage"). Indeed, as a California federal court recently explained, under "New York law, physical alteration to property is not necessary to constitute a physical loss," in part, because the tangible

damage and alteration requirement "requires 'loss' to share a meaning with 'damage,' which violates the canon that every word be given meaning." *Kingray Inc. v. Farmers Grp. Inc.*, 523 F. Supp. 3d 1163, 1173 (C.D. Cal. 2021).

The Vermont Supreme Court recently reached this same conclusion, holding that "the policy covers 'direct physical loss' and 'direct physical damage,' and each must have a distinct meaning. If such were not the case, there would be no need for the policy to differentiate between physical loss and physical damage." *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 2022 WL 4396475, at *6 (Vt. Sept. 23, 2022). Indeed, if Westport had wanted to narrow the scope of coverage this drastically, it could have easily limited coverage to "physical damage" only or defined "physical loss" as requiring tangible damage and alteration to property. It chose not to.

To evade this conclusion, the First Department created a false construct, holding that if it accepted "that an economic loss, for purposes of the [Policy], without any attendant physical, tangible damage to the property is sufficient, it would render the term 'physical' in the policy meaningless." R2070. This false dichotomy presupposes that a policyholder *either* suffers economic loss untethered to anything "physical" *or* suffers tangible "damage." But the undefined words "physical loss" also reasonably encompass a third scenario, where a *physical* substance is present on insured property, rendering the property unusable for its

intended purpose. As a leading insurance treatise explains the distinction, "when an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present without there having been a physical alteration of the object." 3 Allan D. Windt, *Insurance Claims & Disputes* § 11:41 (6th ed. 2013).

Further, the First Department compounded its error by adding the words "tangible" and "demonstrable" to the Policy, thereby severely restricting coverage. R2070, 2073-75. This ignored that under basic dictionary definitions, the words "direct physical loss or damage" simply mean that a "material thing" has impaired the physical function or capability of the insured's property, or a "material thing" has injured the property sufficient to impair "value or usefulness."[7] *See J.P. Morgan*, 37 N.Y.3d at 563 (relying on dictionary definitions to interpret insurance policy). Even the Orders issued in the wake of the pandemic recognized this, confirming that COVID-19 was causing physical loss and damage to property. *See, e.g.*, C-540. That is exactly what CRO alleged here.

Indeed, CRO's reasonable interpretation of the Policy, which gives meaning to the words "physical loss," was recently confirmed by three decisions from state

[7] *See Direct*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/direct; *Physical*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/physical; *Damage*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/damage; and *Property*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/property.

high courts. In *Huntington*, the Vermont Supreme Court held that the term "direct physical loss" merely requires "persistent destruction *or deprivation, in whole or in part*, with a causal nexus to a physical event or condition." 2022 WL 4396475, at *8 (emphasis added). This interpretation was based on "the policy terms as a whole while relying on *compelling reasoning from decades of jurisprudence* on occurrences that rise to the level of a direct physical loss under similar insurance policies." *Id*. (emphasis added).

Similarly, in *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Co.*, the Washington Supreme Court rejected the tangible alteration standard, and agreed that "there are likely cases in which there is no physical *alteration* to the property but there is a *direct physical loss* under a theory of loss of functionality." 515 P.3d 525, 533 (Wash. 2022) (emphasis added). The court granted summary judgment to the insurer only because the policyholder in that case had failed to plead the presence of COVID-19 on insured property. The same is true of the Iowa Supreme Court's recent decision in *Jesse's Embers, LLC v. Western Agricultural Insurance Co.*, 973 N.W.2d 507 (Iowa 2022). There, the court confirmed that "a physical contamination of the policyholder's property may satisfy the direct physical requirement," and only ruled for the insurer because the policyholder "affirmatively assert[ed] there was no contamination to its property, either by the

existence of the COVID-19 virus on its property or by the presence of any infected employees or patrons." *Id.* at 510.

Here, CRO alleged that the presence and impact of COVID-19 impaired the Restaurants' functionality. These allegations fall squarely within the words "direct physical loss or damage" under these cases. In holding otherwise, the First Department simply rewrote the Policy in Westport's favor.

Although certain other appellate courts in other jurisdictions have adopted similar standards to the First Department's tangible, demonstrable alteration requirement, none of them applied New York law or interpreted the Policy at issue here. Additionally, many involved insurance policies with broad virus exclusions (unlike the Policy here) or involved circumstances where COVID-19 was not present at and on insured property. The better-reasoned and more persuasive decisions, such as the Vermont Supreme Court's decision in *Huntington*, have adopted CRO's reasonable interpretation of the Policy language.

In any case, this divergence simply establishes that, at most, there is a "reasonable basis for a difference of opinion" regarding the interpretation of the words "direct physical loss or damage," and that CRO's interpretation is reasonable and, thus, controls under New York law. *Viking Pump,* 27 N.Y.3d at 257-58. In fact, a recent jury in *Baylor College of Medicine v. XL Insurance America, Inc.*, No. 2020-53316-A (Tex. Dist. Ct. Harris Cnty.), found in favor of a

policyholder in a dispute over whether the policyholder had suffered "direct physical loss or damage" due to the presence of COVID-19 on insured property. C-547-52. That a jury and more than a dozen experienced jurists on numerous state Supreme Courts agree with CRO's interpretation of the Policy confirms its interpretation is at least reasonable.

Tellingly, the First Department did not even try to explain why CRO's interpretation was unreasonable; nor could it. Instead, the First Department simply misstated CRO's argument. Specifically, the First Department asserted that CRO "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." R2068. But it is not the fact that this one word is undefined that supports CRO's interpretation. Rather, CRO's reasonable interpretation is based on the totality of the words "direct physical loss or damage," *each* of which is undefined, and *each* of which must be given meaning.

C. The First Department Failed to Interpret the Policy as a Whole

The First Department's tangible, demonstrable damage requirement violated this Court's admonition in *Viking Pump* that an insurance policy must be interpreted based on its particular terms and as a whole, rather than based on a one-size-fits-all approach, or a herd mentality. 27 N.Y.3d at 257 ("We emphasized in *Consolidated Edison*, and have reiterated thereafter, that '[i]n determining a

dispute over insurance coverage, [courts] first look to the language of the policy.'" (citation omitted) (alterations in original)). Indeed, the Policy is replete with terms, conditions, and exclusions that confirm that the presence of a noxious substance that impairs the functionality of property constitutes "direct physical loss or damage." The First Department rendered these terms meaningless.

For example, the Policy expressly describes "Interruption By Communicable Disease," which indisputably encompasses a virus, as a "Type of Loss," and provides coverage for three consecutive calendar months from "the date of the physical loss or damage" caused by the disease. R93 § II.D; R95 § II.E. Similarly, the Policy's "Property Damage Coverage Extensions" section covers the "reasonable and necessary costs incurred by the Insured" in responding to the presence of a "communicable disease." R100; R102 § IV.B.3. That same section also covers "direct physical loss or damage insured by this Policy . . . caused by sudden and accidental radioactive contamination." R109 § IV.B.25. And the Policy expressly covers "[a]mmonia contamination" as a type of "Loss." R158 at End. 2. Therefore, reading the Policy as a whole, "a reasonable insured . . . would have understood the phrase" "direct physical loss or damage" to encompass a circumstance where an invisible, deadly, physical substance permeates insured property and impairs its functionality. *J.P. Morgan*, 37 N.Y.3d at 563. Otherwise, the Policy would make no sense. In fact, two California courts recently concluded

that the communicable disease coverage provisions in certain policies confirmed that "physical loss or damage" encompassed losses as a result of the physical presence of COVID-19 on insured property under those policies. *Sacramento Downtown Arena LLC v. Factory Mut. Ins. Co.*, 2022 WL 16529547, at *4 (E.D. Cal. Oct. 28, 2022); *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 296 Cal. Rptr. 3d 777, 790 (Ct. App. 2022).

That a viral substance can cause "physical loss or damage" under the Policy is further confirmed by the Policy's exclusions. Specifically, the Policy bars coverage for "loss or damage" due to a long list of noxious substances when released or discharged "unlawfully" or as traditional environmental pollution. R128 § VI.C.5; R143 § X.D; R129 § VI.C.6.d. This includes, specifically, "loss or damage" caused by viruses. *Id.* Thus, when read as whole, the Policy repeatedly *confirms* that it covers "physical loss or damage" caused by invisible substances, including viruses, except in certain specific circumstances absent here. *See Westview Assocs. v. Guar. Nat'l Ins. Co.*, 95 N.Y.2d 334, 339 (2000) (reversing the First Department, in part, on the ground that insurer's interpretation would render exclusionary language in policy "unnecessary" and "mere surplusage").[8]

[8] This Court's reliance on exclusionary language in *Westview* to inform the average policyholder's reasonable interpretation of a policy is consistent with cases throughout the country. *See, e.g.*, *Landmark Am. Ins. Co. v. NIP Grp., Inc.*, 962 N.E.2d 562, 576 (Ill. Ct. App. 2011); *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902-03 (Del. 2021).

This is particularly notable given that, unlike the majority of insurers, Westport chose not to include the widely available ISO Virus Exclusion in its policy, which bars coverage for "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185, 270-71 (2020) (citation omitted). Designed in the wake of the SARS (severe acute respiratory syndrome) outbreak, the ISO Virus Exclusion bars coverage for viral and pandemic-related losses. *Id.* at 196. There would be no need for this exclusion if insurers did not believe that a virus could cause "direct physical loss or damage."[9] Rather than use this broad exclusion, however, Westport only barred coverage for such substances under limited circumstances. This is significant because of the well-established principle that when "parties to a contract omit terms . . . that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission." *Quadrant Structured Prods. Co., v. Vertin*, 23 N.Y.3d 549, 560 (2014) (citations omitted).

[9] There is a growing body of evidence that before the COVID-19 pandemic, insurers understood that the words "physical loss or damage" would encompass the risk of viruses. *See* Greg Gotwald & Michael S. Levine, *The Insurance Industry's COVID Sin*, Insurance Coverage Law Center (Dec. 14, 2022), C-543-46.

In the face of this common-sense conclusion, the First Department cursorily noted that exclusions "subtract from coverage rather than grant it." R2076. But CRO is not relying on the absence of this exclusion to *grant* coverage. Rather, the exclusion's absence is probative of how a reasonable policyholder, and the insurance industry, understood the undefined words "all risks of direct physical loss or damage." *See, e.g.*, *Barnes v. Am. Int'l Life Assurance Co. of N.Y.*, 681 F. Supp. 2d 513, 524 (S.D.N.Y. 2010) ("If AIG had wanted to exclude losses resulting from medical or surgical treatment, it could have included such an exclusion. It did not. Indeed . . . such an exclusion existed in [other policies]."); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 952 (S.D.N.Y. 1996) (same); *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1001 (2d Cir. 1974).

In fact, the only case the First Department relied on to ignore the import of the Policy's exclusions, *Raymond Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 163 (2005), simply noted that a court cannot "discover coverage" based on "negative inferences from the policy's exclusions." Here, however, CRO is not asking the Court to "discover coverage." Rather, CRO is relying on the well-settled principle that terms in an insurance policy must be interpreted in the context of the policy as a whole, including its exclusions.

The First Department also bolstered its demonstrable, tangible damage standard by misinterpreting or ignoring other terms and the conditions of the Policy. For example, the First Department observed that, "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." R2075. In addition to relying on the erroneous "damage" standard, this assertion ignored that the Policy's business interruption coverage applies when an insured is even "partially prevented from . . . continuing business operations or services." R114 § V.B.3.a. The Policy even covers losses "incurred by [CRO] for a period of time after [CRO] has first taken reasonable action for the temporary protection and preservation of property . . . provided such action is necessary to prevent immediately impending direct physical loss or damage[.]" R123 § V.H.12. Thus, the fact that CRO was still able to use its kitchens to serve takeout customers and did not have to replace particular property does not mean that it did not suffer a physical loss of its dining areas. This is no different than if CRO had experienced a flood in its dining areas, but could still offer takeout, which would certainly be covered. Indeed, the First Department effectively penalized CRO for attempting to mitigate its losses, even though the Policy expressly covers CRO under those circumstances and encourages mitigation. *See, e.g.*, R104 § IV.B.24.a.

Similarly, the First Department faulted CRO for failing 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." R2074-75. To the extent the First Department was referencing the Policy's "Period of Liability," which ends when property can be "repaired or replaced" with "current materials of like size, kind and quality," its reliance on that provision was misplaced. R115 § V.D. To repair something simply means "to restore to a sound or healthy state,"[10] which is precisely what CRO endeavored to do with its Restaurants. CRO's efforts to sanitize the Restaurants and to clean the air with filtration systems constituted efforts to "repair" its properties, as that word is ordinarily understood. R1941-42 ¶¶ 42-45. Indeed, the Vermont Supreme Court recently confirmed that a similar "period of liability" was consistent with "physical loss" caused by the persistent presence of COVID-19 on insured property. *Huntington*, 2022 WL 4396475, at *10.

Further, the "Period of Liability" simply demarcates the period during which Westport must pay a business interruption loss *if* the affected property can be repaired or replaced. That does not mean that the Policy excludes coverage if the property cannot be repaired or replaced. Rather, in such a circumstance, there

[10] *Repair*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/repair.

would still be "direct physical loss or damage," and Westport would be obligated to pay business interruption losses up to its limits of liability.

D. The First Department Ignored Decades of Authority Supporting CRO's Reasonable Interpretation of the Policy

CRO's reasonable interpretation of the Policy is further confirmed by decades of caselaw from across the country finding coverage when a noxious substance is present on, and impairs the functionality of, property, irrespective of any tangible, demonstrable damage to property. This includes coverage for substances that are far less dangerous and resilient than COVID-19, such as fumes, odors, ammonia, and E. coli.[11] Despite being aware of these cases, Westport made no effort to define the words "physical loss" or "physical damage" in its Policy, or to exclude coverage for "direct physical loss or damage" caused by these substances.

[11]*See, e.g.*, *Cooper v. Travelers Indem. Co. of Ill.*, 2002 WL 32775680, at *5 (N.D. Cal. 2002), *aff'd*, 113 F. App'x 198 (9th Cir. 2004) (bacteria); *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.*, 15 Pa. D. & C.4th 271 (Com. Pl. 1992) (oil); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (methamphetamine fumes); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616 (Mass. Super. Ct. 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); *Netherlands Ins. Co. v. Main St. 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).

The First Department, however, rejected these cases because they did not involve COVID-19 or "New York law," which, according to the First Department, requires that there be a "negative alteration" and "'physical' damage to the property." R2074. Yet the First Department did not explain – nor could it – how COVID-19 differs from these other substances for purposes of triggering coverage. It did not explain why a reasonable policyholder's understanding of these same words would change from jurisdiction to jurisdiction. And its finding that these cases are irrelevant because they do not apply New York law is a quintessential logical fallacy, given that it is these very cases that support CRO's reasonable expectation of coverage, and it is that reasonable expectation that drives the interpretation of the Policy under New York law.

Further, the First Department's purported reliance on "New York law" was fundamentally flawed in that it relied heavily on its prior decision in *Roundabout*, which involved starkly different facts and relied on cases interpreting narrower policy language. *Roundabout*, 302 A.D.2d 1. Indeed, in the absence of guidance from this Court, nearly all of the New York decisions on both the state and federal level that have ruled in favor of insurers regarding coverage for COVID-19-related losses have relied heavily on *Roundabout*. The trial court here was no different, finding that *Roundabout* was "binding authority." R40:22-41:2. *Roundabout*, however, is inapposite, and its erroneous extension to the COVID-19 context by

certain New York courts in the early days of the pandemic has led to a self-reinforcing snowball effect that only this Court can cure.

The *Roundabout* policyholder sought coverage for losses because of "off-site property damage," which caused the closure of a public street. 302 A.D.2d at 3-4. It did not allege that its losses were caused by any physical impact to insured property. *Id.* at 4. Despite there being *no physical impact* to insured property causing the policyholder's losses, the policyholder argued that it had suffered "physical loss or damage" in the form of "loss of use" of property. *Id.* at 5. The *Roundabout* court rejected that argument, holding that "losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* at 7. In other words, the court found that there is no coverage where a policyholder alleges *pure loss of use untethered to any physical impact to insured property*. It did not address the fundamental question of whether "physical loss or damage" can be caused by the actual presence and impact of a dangerous, physical substance on insured property.

Moreover, in holding that the "policy clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage" – the standard adopted by the First Department here – *Roundabout* relied primarily on *Howard Stores Corp. v. Foremost Insurance Co.*, 82 A.D.2d 398, 399 (1st Dep't 1981), in which the policy only covered "damage to or destruction of real or

personal property," and made no mention of physical loss.[12]

The First Department also ignored or misstated contrary authority from New York that confirms the reasonableness of CRO's interpretation. For example, in *Pepsico, Inc. v. Winterthur International America Insurance Co.*, 24 A.D.3d 743 (2d Dep't 2005), the insured sought coverage when its beverages were rendered unsellable by the introduction of a faulty ingredient. 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.'" *Id.* at 744. Instead, the court found that it was sufficient that the introduction of this substance "seriously impaired" the "function and value" of the product. *Id.*

The First Department, however, turned *Pepsico* on its head, noting that the soda in *Pepsico* was "physically altered." R2074. But this observation overlooked that *Pepsico* expressly disclaimed the tangible alteration standard. Moreover, the so-called "alteration" to the soda was invisible, and the only impact of this "alteration" was to impair the soda's "value." Indeed, the soda was still drinkable, it was just "off-tasting." This is analogous to CRO's Restaurants, which were

[12] The same is true of the First Department's passing reference to this Court's decision in *County of Columbia v. Continental Insurance Co.*, 83 N.Y.2d 618, 628 (1994), which analyzed a policy that covered "bodily injury and property damage," and made no mention of "physical loss."

rendered unusable for their intended purpose by the infiltration and adherence of viral particles into and onto insured property, even though the virus was invisible.

Similarly, the First Department simply ignored *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co.*, in which the court held that "the presence of noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage," reasoning that "[t]he carpets and other surfaces are property of plaintiff, and the presence [of] noxious particles thereon clearly impairs plaintiff's ability to make use of them." 6 Misc. 3d 1037(A), 2005 WL 600021, *4 (Sup. Ct., N.Y. Cnty. Mar. 4, 2005).

The same is true of *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323, 330 (S.D.N.Y. 2014), in which the court, applying New York law, recognized that the term "physical loss or damage . . . does not require that the physical loss or damage be tangible, structural or even visible." Indeed, although the First Department construed *Newman Myers* as requiring "actual, demonstrable harm of some form to the premises," it omitted *Newman Myers*' express finding that substances such as "toxic gases," "invisible fumes," and "contamination" can cause "physical loss or damage" as well. *Id.* The *Newman Myers* court *only* ruled for the insurer because the policyholder had alleged that its losses were caused by a pre-emptive decision by Con Edison to shut down its power rather than *any* direct physical impact to insured property. *Id.* at

331-33. Under those circumstances, the court properly relied on *Roundabout*, which involved losses that were not caused by any direct impact to insured property. Thus, a long history of New York jurisprudence supports CRO's reasonable interpretation of the words "direct physical loss or damage."

The First Department also construed *Newman Myers* as requiring "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." R2073. Yet the First Department ignored that COVID-19 was not an "exogenous" cause of loss – it was in and on CRO's property (i.e., endogenous), establishing the very circumstance that would trigger coverage under *Newman Myers*.

In ignoring the import of these cases, the First Department effectively turned the Policy's insuring agreement into an exclusion by construing it strictly and narrowly against the policyholder. It thus drastically reduced historically available coverage for New York policyholders for a wide range of invisible yet dangerous substances. If left uncorrected, thousands of New York policyholders who paid significant premiums for "all risks" business interruption coverage will now find themselves abandoned by their insurers when their properties are inundated with ammonia, E. coli, dangerous fumes, smoke, or similar substances that have long triggered coverage under these policies.

E. Rather Than Conduct an Independent Policy Analysis, the First Department Relied on an Echo Chamber of Inapposite Authority

Instead of meaningfully analyzing the Policy, the First Department resorted to confirmation bias, noting that certain other courts had agreed with its view. But these and similar cases are readily distinguishable in that (1) the policies at issue included the broad ISO Virus Exclusion;[13] (2) the policyholder did not allege the physical presence of the virus on insured property;[14] (3) the cases were decided on

[13] *See, e.g.*, *100 Orchard St., LLC v. Travelers Indem. Ins. Co. of Am*., 542 F. Supp. 3d 227, 229 (S.D.N.Y. 2021) ("[T]he Policy contains a Virus Exclusion Clause that independently and unambiguously bars coverage of Orchard Street's business losses at issue.").

[14] *See, e.g.*, *10012 Holdings Inc. v. Sentinel Ins. Co*., 507 F. Supp. 3d 482 (S.D.N.Y. 2020) (no allegation of virus on insured property), *aff'd*, 21 F.4th 216 (2d Cir. 2021); *6593 Weighlock Drive, LLC v. Springhill SMC Corp*., 71 Misc. 3d 1086 (Sup. Ct., Onondaga Cnty. 2021); *Benny's Famous Pizza Plus Inc. v. Sec. Nat'l Ins. Co*., 72 Misc.3d 1209(A), 2021 WL 3121495 (Sup. Ct., Kings Cnty. July 1, 2021); *BR Rest. Corp. v. Nationwide Mut. Ins. Co.*, 2021 WL 3878991 (E.D.N.Y. Aug. 24, 2021); *Broadway 104, LLC v. XL Ins. Am., Inc.*, 545 F. Supp. 3d 93 (S.D.N.Y. 2021); *Chefs' Warehouse, Inc. v. Emps. Ins. Co. of Wassau*, 2021 WL 4198147 (S.D.N.Y. Sept. 15, 2021); *Deer Mountain Inn LLC v. Union Ins. Co*., 541 F. Supp. 3d 235 (N.D.N.Y. 2021); *DeMoura v. Cont'l Cas. Co.*, 523 F. Supp. 3d 314 (E.D.N.Y. 2021); *Elite Union Installations, LLC v. Nat'l Fire Ins. Co. of Hartford*, 559 F. Supp. 3d 211 (S.D.N.Y. 2021); *Gammon & Assocs. Inc. v. Nat'l Fire Ins. Co. of Hartford*, 2021 WL 3887718 (S.D.N.Y. Aug. 31, 2021); *Island Gastroenterology Consultants PC v. Gen. Cas. Co. of Wis.*, 150 N.Y.S.3d 898 (Sup. Ct., Suffolk Cnty. Aug. 25, 2021); *JD Cinemas, Inc. v. Northfield Ins. Co*., 2021 WL 2626973 (Sup. Ct., Suffolk Cnty. Mar. 5, 2021); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168 (S.D.N.Y. 2020); *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, 515 F. Supp. 3d 95 (S.D.N.Y. 2021); *Office Sol. Grp., LLC v. Nat'l Fire Ins. Co. of Hartford*, 544 F. Supp. 3d 405 (S.D.N.Y. 2021); *Rye Ridge Corp. v. Cincinnati Ins. Co*., 535 F. Supp. 3d 250 (S.D.N.Y. 2021), *aff'd*, 2022 WL 120782 (2d Cir. Jan. 13, 2022); *Salvatore's Italian Gardens, Inc. v. Hartford Fire Ins. Co.*, 547 F. Supp. 3d 299 (W.D.N.Y. 2021); *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, 2020 WL 2904834 (S.D.N.Y. May 14, 2020); *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, 71 Misc. 3d 493 (Sup. Ct., Nassau Cnty. 2021); *Sportime Clubs, LLC vs. Am. Home Assurance*, 2021 WL 4027887 (Sup. Ct., Suffolk Cnty. June 30, 2021); *Thill 13014, LLC v. Finger Lakes Fire & Cas. Co.*, 2021 WL 4027888 (Sup. Ct., Erie Cnty. June 17, 2021); *WM Bang LLC v. Travelers Cas. Ins. Co. of Am*., 559 F. Supp. 3d 225 (S.D.N.Y. 2021); *Abbey Hotel Acquisition, LLC v. Nat'l Sur. Corp.*, 2021 WL 4522950 (S.D.N.Y. Oct. 1, 2021).

a summary judgment standard rather than a motion to dismiss standard;[15] (4) the cases held that COVID-19 cannot cause "physical loss or damage" because it could simply be wiped away like dust – which is contrary to CRO's allegations, the current science of COVID-19, and the lived experience of billions of people;[16] (5) the policies did not include terms and conditions confirming that viruses can cause "physical loss or damage"; and/or (6) the courts incorrectly found that *Roundabout* barred coverage.

This is best exemplified by the First Department's reliance on two cases from the Second Circuit. In *10012 Holdings*, the policyholder did not even allege the presence of the virus on insured property, and the Second Circuit simply "follow[ed] [*Roundabout*'s] holding." 21 F.4th at 220-21. Rather than express confidence in this conclusion, the court noted the split of authority on this issue and made clear that the New York Court of Appeals "will have every opportunity

[15] *See, e.g., Mangia Rest. Corp. v. Utica First Ins. Co.*, 72 Misc. 3d 408 (Sup. Ct., Queens Cnty. 2021).

[16] *See, e.g., Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co.*, 2021 WL 1034259, at *10 (S.D.N.Y. Mar. 18, 2021) ("[C]ontamination by a virus does not constitute 'direct physical loss' where . . . routine cleaning and disinfecting can eliminate its presence."), R. & R. *adopted*, 2022 WL 558145 (S.D.N.Y. Feb. 24, 2022); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020) ("'[A]n item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 535 F. Supp. 3d 152, 161 (W.D.N.Y. 2021) (comparing the coronavirus to the "easily remedied intrusion of road dust"), *aff'd*, 2022 WL 258569 (2d Cir. Jan. 28, 2022).

to address this question and either endorse or correct our interpretation of New York law[.]" *Id.* at 225.

Similarly, in *Kim-Chee,* the Second Circuit merely relied on its prior decision in *10012 Holdings* and the First Department's decision in *Roundabout*. 2022 WL 258569, at *1. The same is true of *Michael Cetta,* which found that *Roundabout* was "on point," despite that *Roundabout* did not involve *any* physical impact to insured property. 506 F. Supp. 3d at 178.

The First Department's reliance on *Kim-Chee* was particularly puzzling given that the district court in *Kim-Chee* found that *Roundabout* was *inapplicable*, cited numerous cases holding that a noxious substance can cause "physical loss or damage," and merely held that the policyholder had failed to adequately plead physical loss or damage under the federal plausibility standard – a higher standard that is not applicable here. *Kim-Chee*, 535 F. Supp. at 159-61. Indeed, in ruling for the policyholder, the Vermont Supreme Court found "persuasive Judge Crawford's explanation in [*Kim-Chee*] that courts have generally found coverage in situations where there is a persistent issue, such as a contamination, creating a loss but have declined to find coverage when the contamination is ephemeral or transient." *Huntington*, 2022 WL 4396475, at *10. Thus, *Kim-Chee* strongly confirms that CRO's interpretation of the Policy is reasonable, and merely ruled for the insurer based on the particular allegations in that case and the federal

"plausibility" standard for pleadings.[17]

The New York state court decisions the First Department cited are similarly inapposite. For example, in the first case the First Department cited, the only question before the court was whether governmental orders, rather than the actual presence of the virus on insured property, constituted "direct physical loss or damage." *Abruzzo DOCG Inc. v. Acceptance Indem. Ins. Co.*, 2022 WL 1024719, at *2 (Sup. Ct., Kings Cnty. Mar. 15, 2022). In answering that question in the negative, the court heavily relied on *10012 Holdings* and *Roundabout*.

Similarly, in *Visconti Bus Service, LLC v. Utica National Insurance Group*, the court relied on *Roundabout*, *10012 Holdings* and *Tappo*. 71 Misc. 3d 516, 522-24, 530-32 (Sup. Ct., Orange Cnty. 2021). As noted, *Roundabout* and *10012 Holdings* have no bearing on the factual scenario CRO alleged here. And *Tappo* primarily relied on an Eleventh Circuit decision, *Mama Jo's Inc. v. Sparta Insurance Co.*, 823 F. App'x 868, 879 (11th Cir. 2020), which the court erroneously identified as a case "involving businesses seeking coverage for

[17] The First Department's reliance on non-binding federal appellate authority from other jurisdictions was similarly misplaced. Those cases applied the federal plausibility standard rather than New York's notice pleading standard. And a number of those cases did not involve allegations that the virus was present on insured property. Even then, certain of these courts recognized that a viral contaminant could cause "physical loss or damage" if a policyholder plausibly alleged that the virus was present on insured property. *See, e.g.*, *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021) (holding that "there must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, *physical contamination*, or physical destruction" (emphasis added)).

business interruption resulting from COVID-19 and government closure orders." 2020 WL 7867553, at *4. But *Mama Jo's* was *not* a COVID-19 coverage case; rather, it was a coverage dispute about whether road dust that could be cleaned from the property constituted "physical loss or damage" under Florida law. As CRO has made clear, and prevailing science has confirmed, COVID-19 is far more lethal and resilient than dust.[18]

These cases do not buttress the First Department's interpretation of the Policy or undercut the reasonableness of CRO's interpretation under New York law. Instead, they reveal that New York courts have been trapped in a cascading, self-reinforcing echo chamber based on early pandemic coverage decisions in which (1) policyholders generally failed to allege the presence of the virus on insured property (in many cases specifically to avoid application of the ISO Virus Exclusion not present in CRO's Policy), and (2) courts misapplied a single First Department decision that involved different facts to devise an erroneous requirement that the distinct terms "physical loss" and "physical damage" are both only satisfied by an allegation of physical damage.

[18] The other cases cited by the First Department are distinguishable for these same reasons. *See Fed. Ins. Co. v. BD Hotels LLC*, 2022 WL 783949, at *1 (Sup. Ct., N.Y. Cnty. Mar. 15, 2022) (relying on other New York trial-level decisions, all of which relied on *Roundabout*'s "physical damage" requirement); *6593 Weighlock Drive*, 71 Misc. 3d at 1094 (finding for insurer based on *Roundabout's* "physical damage" requirement); *Benny's Famous Pizza*, 72 Misc. 3d 1209(A) (relying on *Kim-Chee* which, in turn, relied on *Roundabout*); *Food for Thought Caterers Corp. v. Sentinel Ins. Co.*, 524 F. Supp. 3d 242, 247 (S.D.N.Y. 2021) (same).

Rather than serve as persuasive authority, the thin reasoning of these cases reflects an unfortunate reality – that early in the pandemic, certain courts were seemingly swayed by the insurance industry's erroneous, doomsday argument that finding in favor of policyholders would bankrupt the industry. Indeed, in its First Department amicus filing, the American Property Casualty Association raised the specter of "substantial solvency risks for the [insurance] sector" if "pandemic" losses were covered, arguing that such a finding would "dangerously undermine[]" the "ability of insurers to honor their promises" to other policyholders. C-250-51. But this position eludes common sense given the prevalence of the ISO Virus Exclusion in most property and business interruption policies. R69-70 ¶ 66. And even if true, it is not a proper basis to interpret a contract – it is simply a bailout of the insurance industry on the backs of premium-paying policyholders, including "mom and pop" businesses that suffered immensely during the pandemic, only to then be abandoned by their insurers. If Westport and similarly situated insurers need such relief (they do not), they can certainly lobby the legislature rather than ask this Court to rewrite the contracts they drafted and sold.

Finally, even if these decisions were probative of the words "direct physical loss or damage" in a vacuum, they have no bearing on how a reasonable policyholder would understand those words in *this* Policy. None of these cases involved the unique terms of the Policy here, including specific coverage grants

and exclusions that confirm CRO's reasonable interpretation of the words "direct physical loss or damage." *Sacramento Downtown Arena*, 2022 WL 16529547, at *4 (ruling for policyholder under particular terms of policy at issue, noting "it is unnecessary to decide whether the presence of a virus might be 'physical loss or damage' in the abstract or under a different policy with different terms").

II. THE FIRST DEPARTMENT ERRONEOUSLY DEPARTED FROM NEW YORK'S LIBERAL PLEADING STANDARD IN HOLDING THAT CRO'S ALLEGATIONS REGARDING COVID-19 WERE "CONCLUSORY"

Even if the First Department's tangible damage/alteration requirement were correct, its conclusion that CRO failed to satisfy that standard because its allegations were "conclusory" violated New York's liberal notice pleading standard, as well as the standards governing a motion to dismiss based on legal sufficiency. Indeed, rather than accept CRO's factual allegations regarding COVID-19 as true, the First Department resolved disputed issues of scientific fact in Westport's favor by dismissing CRO's allegations despite the lack of an evidentiary record. R2061-77. This violated the letter and spirit of New York's liberal pleading standard, which does not permit judges to deny plaintiffs their day in court by usurping the role of the jury and dismissing scientific, factual allegations with which they personally disagree. Therefore, the First Department erred in depriving CRO of the opportunity to proceed with discovery and prove the truth of its allegations.

A. The First Department Ignored New York's Liberal Notice Pleading Standard

Under longstanding New York law, "the primary function of pleadings" is to "adequately advis[e] the adverse party of the pleader's claim or defense." *Foley v. D'Agostino*, 21 A.D.2d 60, 62-63 (1st Dep't 1964). The basic requirement of a pleading is that it be "sufficiently particular" in its statement of facts to give "notice" of (1) the "transactions or occurrences" intended to be litigated, and (2) the "material elements" of plaintiff's cause of action. CPLR 3013.

This is in contrast to the heightened pleading standards applicable to certain causes of action under New York law, such as fraud. CPLR 3016(b) (causes of action rooted in fraud or mistake require the 'circumstances constituting the wrong' to be stated in detail); *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). It is also distinguishable from the heightened "plausibility" standard utilized by federal courts. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gutierrez v. Bactolac Pharm., Inc.*, 210 A.D.3d 746, 747 (2d Dep't 2022) ("[T]he federal pleading requirement of plausibility . . . is not an element of the analysis under CPLR 3211(a)(7).").

Consistent with New York's liberal pleading standard, a motion to dismiss on the ground that a pleading is legally insufficient must be denied if "from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v.*

Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted); *see also Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562 (1968). In making that assessment, a reviewing court must afford the pleading a liberal construction, *see* CPLR 3026, and the Court must "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" and "accord plaintiffs the benefit of every possible favorable inference." *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152 (citations omitted).

"Unlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings." *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014) (internal quotation marks and citation omitted). Accordingly, this Court has cautioned that "whether or not plaintiff will be able to establish [its] allegations by competent evidence is not a pertinent consideration." *Cohn*, 21 N.Y.2d at 562; *see also EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 228 (1st Dep't 2002) ("In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions . . . .").

As this Court has long recognized, "[p]laintiffs have the right 'to seek redress, and not have the courthouse doors closed at the very inception of an

action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint.'" *Aristy-Farer v. State*, 29 N.Y.3d 501, 521 (2017) (concurrence in part) (quoting *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 379 (1995)). This is of particular consequence in disputes involving contested and evolving scientific facts, such as the nature and impact of a virus. In rejecting CRO's allegations regarding COVID-19 as "conclusory," the First Department violated these critical standards and deprived CRO of its day in court.

B. The First Department Improperly Rejected CRO's Well-Pled Allegations as Conclusory, Eviscerating New York's Liberal Pleading Standard

The First Department improperly rejected CRO's allegations that COVID-19 tangibly altered its properties and the air therein as "conclusory," despite having no evidentiary record to assess CRO's allegations, no expert reports, and no specialized expertise regarding COVID-19. This conclusion threw the CPLR and New York's pleading standard out the window.

CRO provided Westport with abundant notice of both (1) the events forming the basis for CRO's claim, and (2) the facts supporting the essential elements of that claim. CRO alleged that it had a valid contract with Westport, that CRO satisfied its obligations under that contract, and that Westport breached the contract

by failing to cover CRO's claim as required. R71-72 ¶¶ 72-79.[19] As relevant here, CRO did not simply allege that COVID-19 causes "direct physical loss or damage." Rather, it alleged that COVID-19 caused "direct physical loss or damage" to the Restaurants *because* (1) physical droplets containing the deadly, highly contagious, and resilient SARS-CoV-2 respiratory virus were present in the Restaurants and physically attached to the property therein, R55-56 ¶¶ 17-20; R60 ¶ 36; R68 ¶ 61; (2) the physical presence of the virus in and on the Restaurants "*compromise[d] the physical integrity of*" the Restaurants and "render[ed] [the Restaurants] unusable," R56 ¶ 21 (emphasis added); and (3) CRO's losses resulted from "direct physical loss or damage to property, including . . . the actual presence of the virus in the Restaurants," R60 ¶ 36. These allegations are not bare legal conclusions; they are factual allegations that easily satisfy the First Department's tangible alteration requirement. *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) (noting that "conclusory" allegations are restricted to "claims consisting of bare legal conclusions with no factual specificity").

Even the First Department recognized that CRO's "complaint and certainly its proposed amended complaint allege that its property was physically altered by

[19] N.Y. Pattern Jury Instr.--Civil 4:1 (to adequately plead a cause of action for breach of contract under New York law a plaintiff must allege: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage).

the coronavirus." R2070. Yet, rather than accept these allegations as true, the First Department simply dismissed them as "conclusory" in violation of New York's well-established pleading standard.

This fundamental error began with the trial court, which assessed and dismissed CRO's allegations as a *factual* matter based on a series of irrational hypotheticals, despite the absence of any evidentiary record or expert evidence. For example, the trial court suggested that CRO did not suffer "physical loss or damage" because it could have kept all patrons out of its restaurants, easily cleaned away any trace of the virus, or tested every patron prior to their entry at a time when tests for COVID-19 were not widely available, COVID-19 vaccines did not yet exist, and false negative test results were common. R15-16; R20-22. Put differently, rather than credit CRO's allegations as true and permit CRO to adduce scientific and factual evidence to support its allegations, the trial court invented its own factual record on the fly, and then rejected CRO's allegations based on that contrived record. But courts should not be acting as amateur, armchair epidemiologists. As one court bluntly stated in reversing a trial court's dismissal of a COVID-19-related coverage complaint on similar grounds, "that is not how the civil justice system works." *Marina Pac.*, 296 Cal. Rptr. 3d at 792.

The First Department mimicked the trial court's error by not engaging in *any* independent analysis to support its conclusion that CRO's allegations were

"conclusory." Instead, the First Department largely cited to federal cases applying the heightened "plausibility" pleading standard for the proposition that "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." R2070. *See Kim-Chee*, 2022 WL 258569, at *1 ("[T]o survive dismissal, Kim-Chee's complaint *must plausibly allege* that the virus itself inflicted 'actual physical loss of or damage to' property." (emphasis added)); *see also 10012 Holdings*, 21 F.4th at 223. In fact, in *Kim-Chee*, the Second Circuit held that under this heightened standard "the virus's inability to physically alter or persistently contaminate property differentiates it from radiation, chemical dust, gas, asbestos, and other contaminants whose presence could trigger coverage under Kim-Chee's policy," without providing any basis or explanation for this factual conclusion. 2022 WL 258569, at *2. This heightened pleading standard, however, does not govern CRO's allegations here. *Rizvi v. N. Shore Hematology-Oncology Assocs., P.C.*, 69 Misc. 3d 1212(A) (Sup. Ct., Suffolk Cnty. 2020) (analyzing "dichotomy" between New York and federal pleading standards and noting New York courts "have reiterated that New York's 'relaxed notice pleading standard' remains undisturbed post *Ashcroft v. Iqbal*" (citation omitted)).

The First Department's error is highlighted by its reliance on New York state trial court decisions that all relied on federal decisions issued under the plausibility standard. For example, in *Visconti Bus Service*, the court effectively adopted that standard, using the words "plausibly" and "plausible" *seven* times, without even referencing the CPLR and its pleading standard. 71 Misc. 3d 516.

In addition to failing to apply New York's pleading standards, the First Department's factual conclusion that COVID-19 cannot tangibly alter property, including its reliance on cases holding that COVID-19 can be easily cleaned, was contrary to this Court's repeated admonitions that New York courts are only permitted to "take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *Hamilton v. Miller,* 23 N.Y.3d 592, 603 (2014). Courts may not, however, take judicial notice of disputed matters of scientific fact. *Id.* (noting that courts cannot take judicial notice that "lead-based paint can cause the injuries of which [the plaintiff] complains"; rather, "scientific evidence" is required). The reason for this is simple – judges and lawyers are not scientific experts. This bedrock principle dates back nearly a century. *People v. Forte*, 279 N.Y. 204, 206 (1938) (holding that the court "cannot take judicial notice" of the efficacy of a "lie detector" because "[t]he record is devoid of evidence tending to show a general scientific recognition that the [lie detector] possesses efficacy").

This dispute exemplifies why this principle is so important. Specifically, the First Department's conclusions regarding COVID-19 are demonstrably false and contrary to prevailing science. A growing body of scientific data confirms that COVID-19 cannot be easily cleaned, is highly resilient, and impacts property. For example, at least four medical associations representing tens of thousands of doctors have filed amicus briefs in COVID-19-related coverage cases confirming that COVID-19 is resilient and resistant to disinfectants. *See* C-417-538. These well-regarded medical associations have referred to insurers' contrary arguments and, implicitly, the factual assumptions underpinning the First Department's decision here, as "junk science." *See, e.g.*, C-424.

And lest there be any doubt on this point, several courts, including the Vermont Supreme Court, have cogently crystallized the First Department's error in departing from these basic standards. In *Huntington*, the court recognized the importance of "allow[ing] experts and evidence to come in to evaluate the validity of [an] insured's novel legal argument before dismissing [a] case based on a layperson's understanding of the physical and scientific properties of a novel virus." 2022 WL 4396475, at *12. And in *Marina Pacific*, a California appellate court reaffirmed the common-sense proposition, long echoed by New York courts, that "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." 296 Cal. Rptr. 3d at 779. Thus, both courts held that it was error for the trial court to dismiss a policyholder's allegations that COVID-19 tangibly altered its properties at the pleading stage. The result should be the same here.

Taken together, the First Department's departure from the CPLR and basic pleading standards will close the courthouse doors to plaintiffs in a wide range of cases involving disputed issues of scientific fact. If judges were permitted to reject a plaintiff's scientific allegations based on their own perceived scientific knowledge, it would negatively impact cases ranging from product liability to manufacturing, pharmaceutical, and environmental issues. Indeed, as codified in the CPLR and enshrined in decades of New York jurisprudence, the civil justice system rests, in part, on judicial humility and the recognition that it is not the role of the court to make factual determinations at the pleading stage, particularly regarding issues of disputed scientific fact. The First Department ignored these principles, and its decision should be reversed.

III. NO EXCLUSION IN THE POLICY BARS COVERAGE

Despite failing to include the ISO Virus Exclusion in its Policy, Westport also moved to dismiss CRO's complaint based on four inapplicable exclusions. Although the First Department did not reach these exclusions, CRO anticipates that Westport will raise these exclusions as an independent basis to affirm dismissal of

CRO's complaint. To the extent the Court reaches these exclusions, they do not bar coverage, let alone at the pleading stage. Indeed, "exclusions are given a strict and narrow construction," and for any exclusion to apply, Westport must "establish that the exclusion [1] is stated in clear and unmistakable language, [2] is subject to no other reasonable interpretation, and [3] applies in the particular case." *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003). Westport cannot satisfy this burden.

A. The Contamination Exclusion Does Not Apply

Westport's reliance on the contamination exclusion in the Policy is contrary to this Court's holding in *Belt Painting* that this type of exclusion applies only to traditional environmental pollution and hazardous waste. Specifically, in *Belt Painting*, this Court considered an exclusion for bodily injury or property damage caused by the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." 100 N.Y.2d at 382. The policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste." *Id.* In finding that this exclusion did not apply to paint fumes, this Court reasoned that "the terms used in the exclusion to describe the method of pollution – such as 'discharge' and 'dispersal' – are 'terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous

waste.'" *Id.* at 387 (quoting *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 654 (1993)).

This Court further stated that it cannot be said that the "'discharge, dispersal, seepage, migration, release or escape' . . . language unambiguously applies to ordinary paint or solvent fumes that drifted a short distance from the area of the insured's intended use and allegedly caused inhalation injuries to a bystander." *Id.* at 387-88. And this Court reasoned that "'it strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to the injured party's lungs, had somehow been 'discharged, dispersed, released, or escaped.'" *Id.* at 388 (citation omitted).[20] Following *Belt Painting*, New York courts have repeatedly found that exclusions with this prefatory language are limited to losses that are environmental or industrial in nature. *See, e.g.*, *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 13 A.D.3d 599, 600-01 (2d Dep't 2004); *Colonial Oil Indus. Inc. v. Indian Harbor Ins. Co.*, 528 F. App'x 71, 75 (2d Cir. 2013).

The contamination exclusion here falls squarely into this well-established line of authority. It provides: "This POLICY does not insure against . . . Loss or

[20] Other State high courts are in accord. *See MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003) ("'The drafters' utilization of environmental law terms of art ('discharge,' 'dispersal,' . . . 'release,' or 'escape' of pollutants) reflects the exclusion's historical objective—avoidance of liability for environmental catastrophes related to intentional industrial pollution.'"); *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 617 (Nev. 2014) (same).

damage due to the *discharge, dispersal, seepage, migration, release or escape* of CONTAMINANTS[.]" R128 § VI.C.5 (emphasis added). "CONTAMINANTS" are defined as "[m]aterials that may be harmful to human health," and include a long list of substances, including a virus, which does not override the import of the exclusion's prefatory language, which limits the exclusion's scope to traditional environmental pollution. R143 § X.D. This is particularly true given that the definition of "contaminants" references the "Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act, Toxic Substances Control Act," and the "United States Environmental Protection Agency[.]" *Id.*

Thus, for example, a virus released from a medical facility in the form of hazardous waste might trigger this exclusion. But particularly in light of *Belt Painting*, a decision Westport has certainly been aware of for twenty years, a reasonable policyholder would not view this exclusion as applying to a naturally occurring virus. Indeed, numerous courts have rejected insurers' attempts to apply pollution and contamination exclusions to COVID-19-related losses, even though they contain the word "virus." *See, e.g., Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 489 F. Supp. 3d 1297, 1302 (M.D. Fla. 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020).

B. The Microorganism Exclusion Does Not Apply

The microorganism exclusion does not apply because COVID-19 is not unambiguously a microorganism. This exclusion only bars coverage for loss or damage caused by "mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health[.]" R128 § VI.B.6. Westport's argument that a virus is a microorganism and thus is excluded ignores that a microorganism is defined as a living object. *Organism*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/organism ("a living being"). A virus, in contrast, is not alive and is not an organism. *Virus*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/virus ("nonliving extremely complex molecules"). Thus, SARS-CoV-2 is not encompassed by the term "microorganism." *See Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 2021 WL 4029204, at *11 (N.H. Super. Ct. June 15, 2021) ("The Microorganism Exclusion is not applicable to SARS-CoV-2, because a virus is not unambiguously understood to be a 'microorganism.'").

This conclusion is supported by the canon of construction known as *noscitur a sociis*, which dictates that words or phrases grouped in a list should be given related meaning. *See Nat'l Football League v. Vigilant Ins. Co.*, 36 A.D.3d 207, 213-14 (1st Dep't 2006) (interpreting exclusion narrowly based on related words in

list). Under this principle, the exclusion applies only to a "microorganism" of the same kind as "mold," "mildew," "fungus," and "spores." A virus does not fall into this category, which only encompasses living organisms (in particular, the kingdom of fungi). And to the extent there is any debate or confusion on whether a virus constitutes a microorganism, the exclusion must be construed in favor of coverage. *See Sincoff v. Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 390 (1962) (holding where experts "disagree as to the meaning of [a] word, and the dictionaries contain varying connotations," the term "is capable of more than one meaning" and therefore, its meaning "must be resolved in favor of the insured").

C. The Loss of Market Exclusion Does Not Apply

Westport's reliance on the loss of market exclusion (R127 § VI.B.1.b) ignores that this exclusion bars coverage for "losses resulting from economic changes occasioned by, e.g., competition, shifts in demand, or the like; it does not bar recovery for loss of ordinary business caused by a physical destruction or other covered peril." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003), *aff'd as modified*, 411 F.3d 384 (2d Cir. 2005). Here, CRO squarely alleged that its losses were caused by "physical loss or damage" to its Restaurants caused by COVID-19 rather than a "loss of market" or shifts in competition or demand. Thus, this exclusion does not apply.

D. The "Reasons Not Covered" Exclusion Does Not Apply

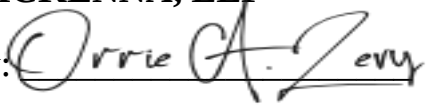
Both Westport and CRO agree on the interpretation of the "reasons not covered" exclusion: it only serves to reinforce the Policy's requirement that business interruption coverage must be the result of "physical loss or damage" to property. R129 § VI.D.1. Westport has argued that the "reasons not covered" exclusion applies because CRO has not alleged "physical loss or damage" to its properties, but for the reasons explained at length above, CRO *has* alleged "physical loss or damage" under New York law. Therefore, the "reasons not covered" exclusion does not apply.

CONCLUSION

For these reasons, the First Department's decision should be reversed.

Dated: New York, New York
January 17, 2023

COHEN ZIFFER FRENCHMAN & MCKENNA, LLP

By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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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.

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Sworn to before me on January 17, 2023

Mariana Braylovskiy

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Commission Expires March 30, 2026

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