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.

REPLY BRIEF FOR APPELLANT

COHEN ZIFFER FRENCHMAN & MCKENNA LLP
Attorneys for Appellant
1325 Avenue of the Americas
New York, New York 10019
Tel.: (212) 584-1890
Fax: (212) 584-1891
rcohen@cohenziffer.com
aziffer@cohenziffer.com
olevy@cohenziffer.com

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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.

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I. CRO SUFFICIENTLY PLED "DIRECT PHYSICAL LOSS OR DAMAGE," WHICH DOES NOT REQUIRE A SHOWING OF "TANGIBLE DAMAGE" UNDER THIS POLICY

Westport asks this Court to take a one-size-fits-all approach and hold that CRO's "all risks" policy (the "Policy") does not cover losses resulting from the presence of dangerous, physical COVID-19 particles on insured property because COVID-19 cannot cause "physical loss" or "physical damage" as a matter of law. But this Court has long held that the terms of the particular insurance policy control, each term in an insurance policy must be given effect, the policy must be construed as a whole, and a policy should be interpreted to maximize coverage consistent with the reasonable expectations of the policyholder. *See In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257-58 (2016). Here, the Policy is replete with terms and conditions establishing that it was designed to cover the precise circumstances CRO has alleged here: that a dangerous, physical substance permeated its properties and caused deprivation and physical loss of the properties for their intended purpose.

Indeed, the Policy identifies a long list of contaminants, including specifically a "virus," as capable of causing "physical loss." R128 § VI.C.5; R143 § X.D. It also describes "Interruption by Communicable Disease" as a "Type of Loss" that is triggered from "the date of the physical loss or damage" caused by a disease. R93 § II.D; R95 § II.E. Similarly, the Policy expressly covers "ammonia contamination"

as a type of "Loss" even though ammonia is an invisible substance that does not tangibly "damage" property. R158 at End. 2. And, it identifies "communicable disease response" coverage and "radioactive contamination" coverage as "Property *Damage*" coverage extensions, even though radiation, ammonia, diseases, and similar substances do not *visibly* impact property. R100; R102 § IV.B.3; R109 § IV.B.25. Taken together, these provisions show that harmful agents, although invisible, can cause "physical loss or damage" under *this* Policy. Indeed, courts analyzing this unique policy language have ruled in *favor* of policyholders. *See, e.g.*, *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 296 Cal. Rptr. 3d 777, 790 (Ct. App. 2022).

Nevertheless, in nearly 60 pages of briefing, Westport fails to grapple with the terms of *this* Policy, let alone harmonize them. Instead, Westport (1) asks this Court to ignore applicable rules of insurance policy interpretation; (2) resorts to fearmongering by erroneously suggesting that a ruling in CRO's favor would open the floodgates of insurance claims; and (3) under the guise of New York law, effectively rewrites the Policy by deleting the words "physical loss," which is an independent trigger of coverage, and restricts coverage to "tangible damage." Westport's efforts to distract this Court from the controlling language of the Policy should be rejected.

A. Westport Ignores Applicable Rules of Construction

The best evidence that the First Department's interpretation of "physical loss or damage" violates this Court's long-held principles of insurance policy construction is that Westport opens its brief by asking this Court to ignore those standards. Indeed, Westport (part of SwissRe, one of the world's largest insurers) suggests that this Court should not apply "traditional rules of contract interpretation" to the Policy because CRO is a "sophisticated business enterprise." Westport's Opposition Brief ("Opp. Br.") at 7. Yet Westport fails to cite a single decision from this Court supporting that proposition – nor could it, given that this Court has *repeatedly* applied this standard even when the insured is a "sophisticated" entity. *See, e.g.*, *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 561 (2021).

In fact, Westport's own authority confirms that traditional rules of construction *may* not apply in very limited circumstances where the policyholder is "instrumental in crafting various parts of the agreement," had "equal bargaining power," and "acted like an insurance company by maintaining a self-insured retention," none of which applies to CRO based on the record here. *Cummins, Inc. v. Atl. Mut. Ins. Co.*, 56 A.D.3d 288, 290 (1st Dep't 2008). This Court has even confirmed the limited reach of this exception as recently as 2017, construing policy language against the insurer and in favor of the NYC Transit Authority – hardly an unsophisticated policyholder. *Burlington Ins. Co. v. NYC Transit Auth.*, 29 N.Y.3d

313, 337 n.9 (2017).[1] That is because *contra proferentem* does not depend upon the sophistication of the parties; rather, it places the duty to avoid ambiguities on the drafter. *See, e.g.*, *151 W. Assocs. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 734 (1984).

B. Westport's Suggestion That CRO's Interpretation of the Policy Would Open the Floodgates of Insurance Claims Is Demonstrably False and an Irrelevant Scare Tactic

After attempting in vain to unencumber itself from the applicable rules of construction that are fatal to its arguments, Westport resorts to fearmongering, suggesting that CRO's interpretation of the Policy would lead to potentially endless liability by turning every water spill and "every sneeze in New York into a potential property insurance claim." Opp. Br. at 19. This position is nonsensical and rests on a false equivalency. The common cold has not killed millions of people, brought society to a halt for years, and rendered property unusable like COVID-19 has. Put simply, the obvious difference between the common cold and COVID-19 is that, although they are both "physical," only one of them caused CRO to experience a "loss" of its property under the Policy based on its invasion into and physical presence on that property.

[1] Westport's reliance on *Westchester Fire Insurance Co. v. MCI Communications Corp.*, 74 A.D.3d 551 (1st Dep't 2010), is similarly misplaced, as it simply cited to *Cummins* for this same narrow exception. The same is true of *Schering Corp. v. Home Insurance Co.*, 712 F.2d 4, 10 n.2 (2d Cir. 1983), a federal decision from 1983 merely noting that the applicability of the *contra proferentem* doctrine to a sophisticated policyholder is "unresolved." To the extent that was ever true, the issue is no longer unresolved, as confirmed by this Court's jurisprudence.

Westport's scare tactics are also undermined by the Policy's numerous terms and conditions – monetary, temporal, and geographical – that restrict coverage, such that any liability arising from COVID-19 would be fixed and limited in both duration and amount. For example, the Policy includes a monetary cap on liability, including numerous sublimits on particular coverages. R92 § II.A; R93-95 § II.D. It also includes a one-year limit on the duration of coverage for business interruption losses, as well as even more restrictive temporal limits on specific coverages. R95 § II.E. And it includes "Waiting Periods" before certain coverages kick in. R99 § III.C.

Equally meritless is Westport's suggestion that CRO's interpretation would open the floodgates of insurance claims. CRO's Policy lacks a standard and broad virus exclusion that appears in more than 83% of policies.[2] As reflected in many of Westport's own cases, numerous policyholders have expressly alleged that COVID-19 *was not* present on their properties to try to plead around this exclusion, whereas CRO is among the very small number of policyholders who have alleged that COVID-19 *was present* on its properties.[3] Moreover, most policies have suit

[2] Charles M. Miller, Richard P. Lewis, Chris Kozak, *Covid-19 and Business-Income Insurance: The History of "Physical Loss" and What Insurers Intended It to Mean*, 57 Tort Trial & Ins. Prac. L.J. 675, 697 (2022).

[3] Westport's suggestion that its choice to omit a standard virus exclusion from the Policy carries no consequences because an exclusion cannot create coverage is a red herring. Opp. Br. at 37-38. CRO has never argued that the absence of this exclusion *creates* coverage. Rather, the Policy covers "all risks" of "physical loss or damage" *unless excluded*. That CRO purchased a policy that does not exclude the risk for which it seeks coverage is probative of *this* policy's scope of

limitation provisions requiring policyholder suits be brought within one to two years of the first date of physical loss or damage, such that any COVID-19-related insurance lawsuits have already been brought. And notably, CRO is among a minority of policyholders whose policy includes communicable disease coverage, as well as other terms and conditions confirming coverage for noxious substances.[4] Thus, Westport's suggestion that this Court should turn a blind eye to the terms of the Policy and jettison New York's notice pleading standards because CRO's interpretation would result in limitless liability for insurers is baseless.

C. CRO's Interpretation Harmonizes the Policy, Whereas Westport's Interpretation Does Not

Recognizing that scare-tactics will only get it so far, Westport attempts to ground its interpretation in the policy language by accusing CRO of reading the word "physical" out of the words "physical loss." Opp. Br. at 22-23. But it is Westport's interpretation that excises the words "physical loss" from the Policy altogether. A *non*-physical loss is the opposite of a physical loss, and would include a loss of income due to reputational harm, increased competition from competitors, or

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coverage. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139, 162 (2013) (Smith, J., concurring). In any case, CRO's interpretation of the Policy and expectation of coverage is also based on the Policy's *inclusion* of numerous terms that confirm that interpretation.

[4] Westport's contention that CRO has waived communicable disease coverage is meritless. Westport moved to dismiss regarding that coverage, CRO opposed, and the trial court did not address it. Thus, at the very least, the matter should be remanded so the trial court can assess whether CRO is entitled to that coverage.

changes in occupancy regulations. Thus, for example, if a restaurant loses business because a better restaurant opens across the street, that would be a non-physical loss. In contrast, where, as here, a policyholder suffers losses because a *physical* substance permeated its properties and *physically* impaired their functionality such that the policyholder is unable to use the property for its intended purpose, that is quintessentially a *physical* loss. That is particularly true given CRO's allegations that COVID-19 attached to its properties and impaired their physical integrity. R55-56 ¶¶ 17-20; R60 ¶ 36; R68 ¶ 61. That CRO's properties were not *visibly* altered does not change the physicality of its loss. Unlike CRO's interpretation, which affords meaning to each word in the Policy, including the word "physical," the First Department's "tangible damage" requirement collapsed physical loss into physical damage and, thus, erased the words "physical loss" from the Policy.

Westport's attempt to defend the First Department's interpretation by pointing to the Policy's Period of Liability fares no better. That provision, which is defined as the "length of time as would be required with exercise of due diligence and dispatch to rebuild, repair or replace," does not require "tangible damage." R115 § V.D. Nor is it a separate trigger of coverage, as Westport suggests. Rather, this provision simply measures the *duration* of losses *after* coverage is already triggered. Put differently, the Period of Liability serves as a limitation on the *amount* that an insured can recover when its property is capable of being rebuilt, repaired, or

replaced; it does not serve as an implied limitation on the scope of the insuring agreement. *See Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984).

Further, the word "repair," which is undefined in the Policy, means "to restore to a sound or healthy state," which is what CRO alleged it did here.[5] Given that the impact of ammonia and radiation to property is expressly covered by the Policy, and that property impacted by these substances can be restored to sound health through the passage of time or merely opening a window, CRO's efforts to remediate its properties are certainly consistent with the Period of Liability. Thus, CRO's interpretation does not render the Period of Liability mere surplusage and "undefinable," as Westport suggests. Opp. Br. at 11. Rather, it harmonizes the Period of Liability with the other terms of the Policy that confirm coverage for the presence of a physical, dangerous substance on insured property.

Indeed, Westport's assertion that "every state supreme court or court of appeals and Federal Court of Appeals [] have pointed to the presence of the period of limitation as a reason that COVID-19 is not covered" is false. *Id.* at 10 n.2. For example, in *Huntington Ingalls Industries, Inc. v. Ace American Insurance Co.*, the Vermont Supreme Court expressly rejected the notion that the "Period of Liability" "impose[s] additional requirements upon the policy language describing coverage-triggering events." 287 A.3d 515, 528 n.11 (Vt. 2022).

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

Finally, Westport's assertion that "physical loss" could mean complete destruction or theft and, thus, could have a different meaning than "physical damage" is misplaced. Complete destruction is a form of "physical damage" and, therefore, does not afford independent meaning to the words "physical loss," as required under this Court's precedent. Further, Westport provides no explanation for why a reasonable policyholder would limit its understanding of the words "physical loss" to complete destruction or theft as opposed to all other forms of physical deprivation. Indeed, restaurants are not susceptible to theft, and theft is not included among the seven dictionary definitions of loss. Rather, "loss" is defined as "the partial or complete deterioration or absence of a physical capability or function," i.e., exactly what CRO alleged happened here.[6]

D. Westport Mischaracterizes New York Law To Support its False Construct

Westport, seemingly recognizing that its interpretation of "physical loss or damage" is contrary to the plain language of the Policy, suggests that New York courts have "unanimously" and historically applied the "tangible damage" requirement to both "physical damage" *and* "physical loss." This is demonstrably false. Westport's primary support for this proposition is *Roundabout Theatre Co. v. Continental Casualty Co.*, a non-binding First Department case interpreting different

[6] *Loss*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/loss.

policy language and holding that a policyholder's pure "loss of use," untethered to *any* physical impact to property, did not constitute "physical loss or damage." 302 A.D.2d 1 (1st Dep't 2002). *Roundabout* bears no resemblance to CRO's allegations here. Indeed, although Westport argues that "CRO misses the point" of *Roundabout* which, according to Westport, is that the inability to use property in and of itself does not constitute "physical loss," Opp. Br. at 11, CRO has never alleged that it lost use of its property for reasons untethered to the property insured by the Policy; rather, it alleged that it was unable to use its insured properties because they were covered in dangerous, physical, viral particles.[7]

Equally misplaced is Westport's suggestion that *Cytopath Biopsy Laboratory, Inc. v. U.S. Fidelity & Guaranty Co.*, 6 A.D.3d 300 (1st Dep't 2004), extended *Roundabout* to the circumstances here. In *Cytopath*, the court held *on summary judgment* that the release of noxious fumes did not trigger coverage because the fumes dissipated within a few hours and, as a factual matter, the losses were indisputably caused by governmental restrictions *unrelated to the presence of the fumes*. This stands in stark contrast to both the procedural posture here – a motion

[7] Even the First Department recognized that *Roundabout* was not on point here, R2069, a sentiment shared by other courts which have taken a more nuanced approach to "physical loss or damage." This includes *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co.*, 535 F. Supp. 3d 152, 161 (W.D.N.Y. 2021), which recognized that *Roundabout* was inapplicable, cited numerous cases holding that a noxious substance can cause "physical loss or damage," and merely held that the policyholder failed to adequately plead physical loss or damage under the federal plausibility standard – a higher standard that is not applicable here.

to dismiss – and CRO's allegations that (1) "the novel coronavirus is resilient and can survive on surfaces for days and even weeks"; and (2) the presence of the virus caused CRO's losses. R56 ¶ 20; R60 ¶ 36.[8]

Westport's misplaced reliance on *Roundabout* is born of necessity. Namely, to justify the First Department's "tangible damage" requirement, Westport is forced to draw a false dichotomy between a situation where property is "torn, dented, or destroyed," Opp. Br. at 1, on the one hand, and pure "loss of use," on the other, with nothing in between. But Westport's binary view of the words "physical loss or damage" ignores that these words also reasonably encompass a third scenario where, as here, a policyholder's ability to physically use its property is impaired because of the presence of a dangerous, physical substance in and on the property. Indeed, contrary to Westport's suggestion that New York law unanimously supports its position, the reality is that this third scenario falls squarely within the Policy's coverage under a long line of New York authority.

For example, Westport omits that in *Pepsico, Inc. v. Winterthur International America Insurance Co.*, the Second Department expressly rejected the tangible alteration standard Westport now advances. 24 A.D.3d 743, 744 (2d Dep't 2005). Westport's suggestion that the unmerchantable soda in *Pepsico* is somehow

[8] At most, *Cytopath* simply repeated *Roundabout*'s error of limiting coverage to physical "damage."

distinguishable from the unusable dining areas of CRO's Restaurants because the soda had to be destroyed misses the point. The soda in *Pepsico* was visibly unaltered; the soda was simply rendered useless *for its intended purpose* – consumption – by the presence of an invisible, noxious substance. The same is true of CRO's dining rooms, which were rendered unusable by the presence of an invisible, noxious substance. The fact that Pepsi destroyed the soda, whereas CRO did not need to destroy its properties, may impact the *duration* of coverage or the *amount* of loss, but it does not negate that coverage was triggered in the first place.

Similarly baseless is Westport's effort to recast *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co*., 17 F. Supp. 3d 323 (S.D.N.Y. 2014), as a case supporting its interpretation. Opp. Br. at 22. Westport ignores *Newman Myers*'s recognition that, under New York law, the term "physical loss or damage . . . does not require that the physical loss or damage be tangible, structural or even visible." 17 F. Supp. 3d at 330. The *only* reason the court ruled for the insurer is because the policyholder's loss was not caused by any physical substance on or physical impact to insured property and, thus, the court found that the case was akin to *Roundabout*. Thus, *Newman Myers* confirms that *Roundabout* is inapplicable where, as here, the policyholder has alleged that a dangerous substance on its properties caused its losses.

Indeed, Westport's contention that "New York courts unanimously agree" with *Roundabout* is undermined by the very cases Westport cites for this proposition. First, in *Satispie, LLC v. Travelers Property & Casualty Co. of America*, 2020 WL 1445874 (W.D.N.Y. Mar. 25, 2020), the court recognized that ammonia contamination of pies *would* constitute physical loss or damage and *only* ruled in the insurer's favor because the policyholder conceded that the ammonia did not impact the pies. CRO makes no such concession here, and alleges the exact opposite. R55-57 ¶¶ 15-22; R60 ¶ 36. Second, in *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F.3d 128, 129 (2d Cir. 2006), the policy did not include the words "physical loss," and coverage was limited to "physical damage" only. Thus, *United Air Lines* underscores that Westport's interpretation would require this Court to delete the words "physical loss" from the Policy. Third, in *Philadelphia Parking Authority v. Federal Insurance Co.*, 385 F. Supp. 2d 280, 283 (S.D.N.Y. 2005), the policyholder sought coverage for purely economic damages when its parking facility was shut down during the 9/11 terrorist attack. Like in *Roundabout*, there was no physical "problem" with the insured property; the opposite is true here.

Particularly given Westport's mischaracterization of historical New York cases, it should come as no surprise that its treatment of more recent New York authority is similarly off base. Westport's contention that "[e]very New York court to have considered the questions presented [here] in at least 106 state and federal

court decisions" agree that COVID-19 cannot cause physical loss or damage is simply incorrect. Opp. Br. at 27. First, Westport does not identify a single case in New York interpretating a policy like CRO's Policy. Second, as CRO established in its opening brief, the vast majority of these cases are readily distinguishable because, among other things, the policyholder did not allege the presence of the virus on insured property and/or the policy included a broad virus exclusion. Br. at 37-40. Finally, nearly all these decisions held that *Roundabout*'s interpretation was binding. Nevertheless, Westport does not address, let alone rebut, these critical, distinguishing factors, choosing instead to pretend they do not exist.

E. Westport Misstates Nationwide Authority Regarding "Physical Loss or Damage"

Similar to its treatment of New York law, Westport ignores or misstates all of the cases nationwide finding coverage or otherwise espousing CRO's interpretation of "physical loss or damage." For example, although CRO made clear in its opening brief that *three* separate state supreme courts had recently confirmed *CRO's* reasonable interpretation of the Policy, Westport fails to distinguish these cases, and does not even mention *Huntington Ingalls*, in which the Vermont Supreme Court ruled in favor of the policyholder on the very issue before this Court.

Rather than grapple with this authority, Westport baldly states, without citation, that more than 1,000 cases nationally have concluded that COVID-19 cannot cause physical loss or damage. But it does not dispute that the overwhelming

majority of these cases (1) did not include any allegations that the virus was present on insured property; (2) included a standard virus exclusion; (3) did not include the terms and conditions of the Policy here, such as "communicable disease" coverage; (4) improperly made findings of fact at the motion to dismiss stage; and/or (5) applied the heightened federal plausibility standard. This last point in particular distinguishes *all* federal cases cited by Westport, which employ a significantly higher pleading standard than in New York.

Although Westport punctuates its brief with string cites that purportedly support its position, and even bullet points certain cases, these very cases illustrate Westport's overreach. Opp. Br. at 29-31. For example, in *Wakonda Club v. Selective Insurance Co. of America*, 973 N.W.2d 545, 552-53 (Iowa 2022), the court agreed that "contamination can cause a direct physical loss of property as long as the contamination is physical in nature," but found in favor of the insurer only because the policyholder "affirmatively disavowed any knowledge that the COVID-19 virus was ever on its premises[.]" Similarly, in *Verveine Corp. v. Strathmore Insurance Co*., 184 N.E.3d 1266, 1276 (Mass. 2022), the court recognized that "persistent pollution of a premises" is sufficient to constitute "direct physical loss of or damage to property," but found that this did not apply to COVID-19, which it concluded was "evanescent." Here, in contrast, CRO alleged that COVID-19 *was* present on its properties, and that it is resilient and cannot be easily cleaned – an allegation

confirmed by multiple state medical associations. Further, CRO's Policy expressly covers CRO when it is "partially prevented from producing goods or continuing business operations or services." R113-14 § V.B.3.a. Thus, CRO sufficiently alleged coverage even under Westport's own exemplar cases.

Equally misleading are Westport's maps, framed as a purported "aid" to the Court. Opp. Br. at 31-32. For example, although Westport uses green shading to identify California as a state supporting Westport's coverage position, numerous California appellate courts have ruled in favor of *policyholders* on this issue or, at the very least, have remanded to afford policyholders the opportunity to amend their complaint to more robustly allege facts relating to the nature and presence of COVID-19 on insured property.[9]

Westport also identifies Washington and Iowa as states supporting its position, but *both* states' supreme courts have recognized that contamination by an invisible substance such as COVID-19 *can* cause physical loss or damage.[10] These courts only ruled in favor of the insurer because the policyholder, unlike CRO, did not allege that COVID-19 was present on insured property.

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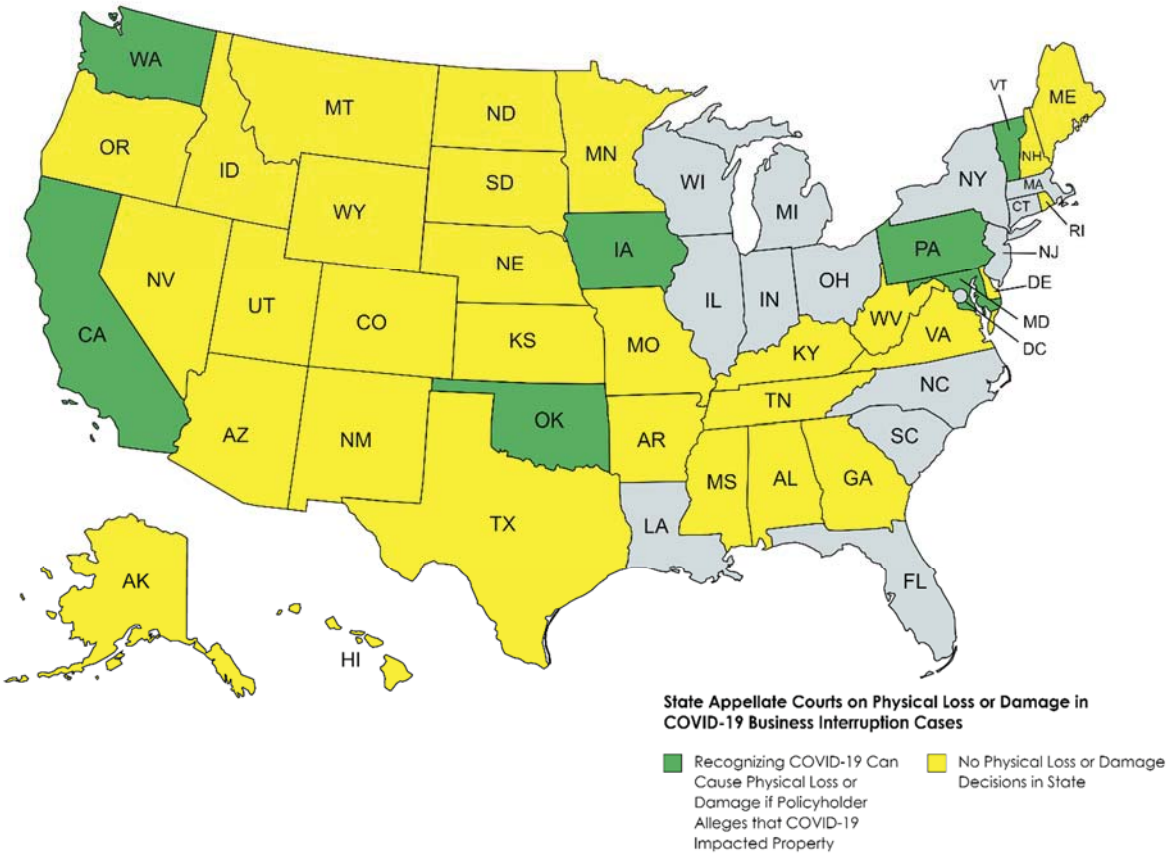
[9] *See, e.g.*, *Marina*, 296 Cal. Rptr. 3d 777; *Shusha, Inc. v. Century-Nat'l Ins. Co.*, 303 Cal. Rptr. 3d 100 (Ct. App. 2022), *review filed*, (Feb. 14, 2023).

[10] *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 533 (Wash. 2022); *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 492 P.3d 843 (Wash. Ct. App. 2021); *Jesse's Embers, LLC v. W. Agric. Ins. Co.*, 973 N.W.2d 507, 510 (Iowa 2022).

In contrast to Westport's misleading maps, the map below identifies every state where an appellate court has recognized that COVID-19 *can* cause physical loss or damage, and states without *any* appellate decisions on the issue:



Also unavailing is Westport's selective citation to *Couch on Insurance*, which omits *Couch*'s recognition that "contamination by persistent chemical or biological agent, not otherwise excluded from coverage, may cause 'direct physical loss' if it renders insured property unusable, even though contamination may be gaseous, microscopic, or invisible; covered losses are not confined to obvious physical changes to building caused by fire or bad weather." 10A Couch on Insurance

§ 148:46 (3d ed. June 2020). And Westport does not even mention the numerous other insurance treatises supporting CRO's interpretation.[11]

Notably, these treatises are consistent with historical caselaw from across the country interpreting "physical loss or damage." Although Westport seemingly concedes that substances such as asbestos, gas infiltration, E. coli, vapors, fumes, and cat urine can cause physical loss or damage, it argues that these substances are different than COVID-19 as a matter of law because COVID-19 is purportedly "transient" and "temporary," whereas these other substances require "complex repair work or replacement." Opp. Br. at 42-43. This distinction, however, mischaracterizes the cases involving these substances, as well as COVID-19 itself.

For example, in *Gregory Packaging Inc. v. Travelers Property Casualty Co. of America*, the court, ruling for the policyholder, held that the presence of ammonia constituted "physical loss or damage" even though the ammonia dissipated in less than a week with the use of fans, washing surfaces, and "air[ing]" of the property, and caused no "damage" to property. 2014 WL 6675934, at *4 (D.N.J. Nov. 25, 2014). Similarly, in *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, 2016 WL 3267247, at *2 (D. Or. June 7, 2016), *vacated on other*

[11] *See, e.g.*, Steven Plitt et al., *Cat Claims: Insurance Coverage for Natural and Man-Made Disasters* § 8:6; 3 Allan D. Windt, *Insurance Claims and Disputes* § 11:41 (6th ed.) (the "physical loss of or damage . . . requirement can be satisfied by any 'detriment,' and a 'detriment' can be present without there having been a physical alteration of the object.").

grounds, 2017 WL 1034203 (D. Or. Mar. 6, 2017), the court found that poor air quality in a theater caused by a nearby wildfire caused "physical loss or damage" even though the smoke in the air dissipated in a matter of days with the use of air filters, and only light cleaning was required for surfaces. These remediation efforts are far less than those undertaken by CRO.

Westport's observation that "many locations stayed fully open throughout the pandemic" and that CRO was still able to provide takeout services does not undermine this conclusion. Opp. Br. at 44. Certain locations remained partially open during the pandemic *despite* the lethal presence of COVID-19 and its impact on property only because these locations were deemed "essential." Further, CRO's ability to use *certain* portions of its property for limited purposes does not negate its inability to use its dining areas, which triggers coverage. The Policy affords coverage specifically when CRO is even "*partially* prevented from producing goods or continuing business operations or services." R114 § V.B.3.a (emphasis added). And even if the Policy was more restrictive, Westport's contention in the very first paragraph of its brief that the "Restaurants are open once again for customers to patronize" is false. Opp. Br. at 1. As CRO made clear in its complaint, "CRO has been forced to close 30 restaurants and to exit 5 states entirely." R60 ¶ 35.

Finally, even if Westport's false dichotomy between COVID-19 and other noxious substances reflected an actual distinction in the caselaw, Westport's request

that this Court effectively take judicial notice of the properties of COVID-19 is not evidence-based; rather, it is pure argument and contrary to CRO's allegations that COVID-19 is resilient and difficult to clean. R56 ¶¶ 19-20; R1937-38 ¶¶ 28-30. As discussed in Section II, *infra*, prevailing science strongly supports these allegations.

II. CRO SUFFICIENTLY ALLEGED TANGIBLE ALTERATION

Even if "tangible damage" was the *only* reasonable way to interpret "physical loss or damage," CRO sufficiently alleged that COVID-19 tangibly altered and harmed its property – an allegation that *must* be accepted as true at the pleading stage. Westport's retorts fail.

First, in contravention of New York's pleading standards, Westport slices and dices CRO's complaint, ignoring logical connections between related paragraphs. Specifically, Westport contends that CRO's allegation that the virus was present on insured property is somehow disconnected from its allegations that COVID-19: (1) "attach[es] to and cause[s] harm to property"; (2) "compromises the physical integrity of the structures it permeates"; (3) "renders . . . structures unusable"; and (4) is "resilient and can survive on surfaces for days and even weeks." R56 ¶¶ 19-21. Thus, according to Westport, CRO failed to adequately allege that COVID-19 attached to and altered CRO's Restaurants. Opp. Br. at 16-17. But CRO's allegations regarding the presence of the virus on insured property and its allegations regarding the nature and impact of the virus to property are logically and obviously

related. This is particularly true here, where all reasonable inferences must be drawn in CRO's favor.[12]

Second, irrespective of CRO's allegations of tangible alteration, Westport argues that COVID-19 can never cause "physical loss or damage" as a matter of law because it is "transient," "ephemeral," "[e]vanescent," and can be easily removed through "basic cleaning." Opp. Br. at 20-21, 36. But rather than cite any evidence to support this scientific conclusion, Westport instead relies on cases where courts improperly reached this conclusion absent any evidentiary record. *Id.* at 20-21.

Similarly, Westport's assertion that COVID is dangerous to health and not property is not only contrary to CRO's allegations and prevailing science, but also misses the point. Courts have long recognized that property can suffer "physical damage" when a foreign physical substance causes it to become hazardous or undesirable for human use. *See, e.g.*, *Pepsico*, 24 A.D.3d at 744. In any event, there is no basis under New York law for this Court to cast aside the pleadings standard and reach that conclusion, and thereby reject CRO's allegations without an evidentiary record.

[12] Westport's contention that whether COVID-19 altered the air within its Restaurants is irrelevant because "CRO has no insurable interest in the air" is wrong. New York courts consider air to be a part of insured property that, if impacted by toxic substances, constitutes physical loss or damage. *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 6 Misc. 3d 1037(A), 2005 WL 600021, at *4-5 (N.Y. Sup. Ct., N.Y. Cnty. 2005); *D'Amico v. Waste Mgmt. of N.Y., LLC*, 2019 WL 1332575, at *5 n.2 (W.D.N.Y. Mar. 25, 2019).

This error is exemplified by the very cases Westport relies on. In *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Insurance Co. of the Midwest*, 2021 WL 1091711, at *4 (E.D.N.Y. Mar. 22, 2021), a federal district judge observed, without *any* evidentiary basis, that the "virus has the potential to cause significant harm to people," but that "the court is not aware of any scenario in which its presence can cause 'physical damage' to property." But that court's idiosyncratic "awareness" of the impact of a highly complex viral substance to property is irrelevant absent *evidence*, and is certainly not the type of factual finding subject to judicial notice under New York law such that a state court can simply dismiss the plaintiff's contrary allegations.

Put simply, Westport invites this Court to repeat the First Department's error and declare, without any evidence and contrary to CRO's express allegations, that COVID-19 is akin to the "common cold." Opp. Br. at 19. New York law, however, does not permit courts to reject a plaintiff's allegations by taking judicial notice of disputed scientific facts.

Notably, in rejecting the argument Westport makes here, a California appellate court recently held that, although "it might be more efficient if trial courts could dismiss lawsuits at the pleading stage based on the judges' common sense and understanding of common experience rather than waiting to actually receive evidence to determine whether the plaintiff's factual allegations can be proved," that

"is not how the civil justice system works." *Marina*, 296 Cal. Rptr. 3d at 792. Similarly, in *Los Angeles Lakers, Inc. v. Federal Insurance Co.*, the court recognized that it "lacks the scientific expertise necessary to conclude, based solely on the allegations in the [complaint], that it is not plausible for the [policyholder's] property to have been physically altered by the Virus[.]" 2022 WL 16571193, at *2 (C.D. Cal. Oct. 26, 2022) (internal citations omitted). And in *Huntington Ingalls*, the Vermont Supreme Court recognized that "[a]lthough the science when fully presented may not support the conclusion that presence of a virus on a surface physically alters that surface in a distinct and demonstrable way, it is not the Court's role at this stage in the proceedings to test the facts or evidence." 287 A.3d at 535-36. Thus, the court remanded the case for fact-finding, which it concluded was "consistent with the philosophy underlying notice pleading," the same philosophy espoused in New York. The result should be no different here.

This is particularly true given that at least five well-respected medical associations representing more than 60,000 medical professionals have submitted amicus briefs in COVID-19 coverage disputes that describe Westport's contention that COVID-19 is transient and can be easily cleaned as misinformation and *junk science*. *See, e.g.*, C-424. Tellingly, rather than address the substance of these amicus briefs, Westport impugns the integrity of their authors, suggesting that these associations – comprised of thousands of *doctors* – are lying about the properties of

COVID-19 to secure insurance. Opp. Br. at 34 n.5. The fact that Westport's only retort to evidence supporting the truth of CRO's allegations is to ask this Court to pass on the *credibility* of the proponents of that evidence underscores the First Department's error in rejecting the truth of CRO's allegations. Indeed, Westport does not dispute (or even mention) that the only state court jury to have assessed whether COVID-19 can cause "physical loss or damage" found that it can. *Baylor Coll. of Med. v. XL Ins. Am., Inc.*, No. 2020-53316-A (Tex. Dist. Ct. Harris Cnty.).

Finally, in a last-ditch effort to defend the First Department's decision, Westport suggests that CRO failed to adequately allege that its losses were caused by the presence of COVID-19 in and on its Restaurants. But this assertion is belied by a cursory review of CRO's complaint. R56-57 ¶¶ 20-21; R60-61 ¶¶ 34-38. Even Westport concedes (as it must) that CRO "alleged that the SARS-CoV-2 virus was present in its Restaurants, that this condition constituted or *caused* direct physical loss or damage to property, and that this condition has *caused* CRO to suffer a loss in revenue." Opp. Br. at 25 (emphasis added). Given these allegations, which must be accepted as true, Westport's suggestion that CRO's losses were really caused by governmental orders implicates a quintessential question of fact that cannot be resolved at the pleading stage. *See* 7 Couch on Insurance § 101:59 ("The majority of cases addressing causation disputes under an insurance policy hold that the causal relationship of a loss to a particular alleged instrumentality is a question of fact to

be decided by the jury."). It also ignores that the orders were issued, in part, because the virus was causing damage to property. R51-52 ¶ 3; C-540.

In any case, Westport's argument is self-defeating. If, as Westport suggests, patrons bypassed the restaurants to "avoid being sick or worse," Opp. Br. at 26, due to the dangerous viral particles in and on CRO's properties, that is a quintessential "physical loss" of the Restaurants to CRO. This would be no different than if patrons avoided the Restaurants' dining areas because they were inundated with radiation, radon, carbon dioxide, or ammonia – all of which are substances courts have found constitute "physical loss or damage."

III. NO EXCLUSION BARS COVERAGE

Westport's omits that under New York law, it bears a heavy burden to avoid coverage based on an exclusion. *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003). Westport cannot meet this burden.

A. The Contamination Exclusion Does Not Apply

In *Belt Painting*, this Court held that where an exclusion applies to the "discharge, dispersal, seepage, migration, release or escape of pollutants," those terms "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. This Court held that an exclusion with this prefatory language only applies to traditional environmental pollution. The Contamination Exclusion in CRO's Policy includes

the exact same prefatory language. Thus, if a virus was released or migrated in the form of biohazardous waste which is regulated by environmental statutes, that *might* fall within the exclusion. Here, however, the virus was not present on CRO's properties as a result of the discharge or release of hazardous waste or traditional pollution. Thus, *Belt Painting* forecloses Westport's reliance on the Contamination Exclusion.[13]

This conclusion is strongly reinforced by Westport's failure to even mention *Belt Painting* until five pages into its argument regarding the Contamination Exclusion. When Westport finally gets to *Belt Painting*, it suggests that *Broome County v. Travelers Indemnity Co.*, 125 A.D.3d 1241 (3d Dep't 2015), a non-binding Third Department decision, restricts *Belt Painting*'s holding to third-party liability cases. *Broome County*, however, made no such finding. Indeed, courts have applied *Belt Painting* to first-party property cases. *See, e.g.*, *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 788 N.Y.S.2d 142 (2d Dep't 2004).

Moreover, Westport's contention that "the *Contamination* Exclusion . . . is nothing like a traditional *pollution* exclusion," Opp. at 49, is belied by the exclusion's use of prefatory language *identical* to the exclusion in *Belt Painting*. Although the exclusion in *Belt Painting* did not include "virus," the Court's focus

[13] This is reinforced by the fact that the Contamination Exclusion references a series of environmental statutes, certain of which regulate viral and disease-related pollutants. *See, e.g.*, *Nat'l Primary Drinking Water Regs*., EPA4 (summarizing regulations of viruses in water).

was on the import of the exclusion's prefatory language rather than the ensuing list of potential contaminants. For example, it found that the exclusion did not apply to losses resulting from paint fumes, even though the word "fumes" was identified in the exclusion as a potential contaminant.[14]

Finally, Westport notes that certain courts have found that similar exclusions apply in the COVID-19 context, but makes no attempt to distinguish the cases cited in CRO's opening brief finding similar exclusions inapplicable in the COVID-19 context. The decisions cited in CRO's opening brief holding that the Contamination Exclusion does not apply to CRO's claim are consistent with New York law as established by this Court in *Belt Painting*.

B. SARS-CoV-2 Is Not Unambiguously a "Microorganism"

Westport concedes that (1) there are varying definitions of "microorganism," some of which include virus and some which do not; and (2) experts debate whether a virus constitutes a microorganism. Opp. Br. at 53. Westport's concessions confirm that the Microorganism Exclusion does not apply here. Under New York law, inconsistencies in dictionary definitions of "microorganism" and any debate or

[14] Westport argues that the geographical course of the pandemic from China constitutes a "migration." Opp. Br. at 51-52. Apart from not being the type of migration the Contamination Exclusion contemplates, this misses the point of *Belt Painting*, which is that while the exclusion's prefatory language *could* be interpreted broadly to encompass events like paint or solvent fumes traveling from an office being painted to an injured person, that reading is not consistent with New York law. This Court has made clear that the language applies to the disposal or containment of hazardous waste, not an individual sneeze or cough or the global path of a pandemic.

confusion among experts over whether a virus constitutes a "microorganism" indicate that the term "obviously is capable of more than one meaning," and therefore, "the exclusory clause must be resolved in favor of the insured." *Sincoff v. Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 390 (1962). This accords with the result reached by other courts that have considered this issue in the COVID-19 context. *See Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Cos.*, 2021 WL 4029204, at *11 (N.H. Super. Ct. June 15, 2021). Westport cannot meet its heavy burden of showing that CRO's COVID-19-related losses are clearly and unambiguously barred by the Microorganism Exclusion.

C. The Loss of Market Exclusion Does Not Apply

CRO has alleged that its losses were caused by "physical loss or damage" to its Restaurants due to the presence of COVID-19. In contrast, the Loss of Market Exclusion bars coverage for loss completely untethered to "physical loss or damage," caused by "loss of market" or shifts in competition or demand. *U.S. Airways, Inc. v. Commonwealth Insurance Co.*, 64 Va. Cir. 408 (2004), cited by Westport, offers a prime example of "loss of market" losses, namely, business interruption losses due to the government closure of Reagan Airport in the wake of the 9/11 terrorist attacks, and therefore underscores why the Loss of Market Exclusion does not apply here.

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

The "Reasons Not Covered" Exclusion (dubbed the "Concurrent Closures" Exclusion by Westport for the first time before this Court) confirms the Policy's "physical loss or damage" to property requirement. Because CRO has adequately pleaded "physical loss or damage" in detail, as extensively set forth above, the "Reasons Not Covered" Exclusion is inapplicable.

CONCLUSION

For the foregoing reasons, this Court should reverse the First Department's decision.

Dated: New York, New York
April 7, 2023

COHEN ZIFFER FRENCHMAN & MCKENNA LLP

By: Orrie A. Levy

Robin L. Cohen
Orrie A. Levy
Alex Sugzda
1325 Avenue of the Americas
New York, NY 10019
Telephone: (212) 584-1890
Fax: (212) 584-1891

Attorneys for Appellant

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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COHEN ZIFFER FRENCHMAN & MCKENNA LLP

By: 

Orrie A. Levy
1325 Avenue of the Americas
New York, NY 10019
Telephone: (212) 584-1890
Fax: (212) 584-1891

Attorneys for Appellant

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
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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.

On April 6, 2023

deponent served the within: **Reply Brief for Appellant**

upon:

DLA PIPER LLP
Attorneys for Respondent
1251 Avenue of the Americas
New York, New York 10020
Tel.: (212) 335-4500
Fax: (212) 335-4501
robert.santoro@dlapiper.com
aidan.mccormack@us.dlapiper.com

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T. Heath

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