*To be Argued by:*
AIDAN M. MCCORMACK
*(Time Requested: 30 Minutes)*

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

# Court of Appeals

*of the*

# State of New York

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

*Appellant,*

– against –

WESTPORT INSURANCE CORPORATION,

*Respondent.*

## BRIEF FOR RESPONDENT

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

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Respondent Westport Insurance Corporation states that it is a direct, wholly owned (100%) subsidiary of SR Corporate Solutions America Holding Corporation, which is a wholly owned (100%) subsidiary of Swiss Re Corporate Solutions Holding Company Ltd., which is a wholly owned (100%) subsidiary of Swiss Reinsurance Company Ltd., which is a wholly owned (100%) subsidiary of Swiss Re Ltd., a publicly traded company listed on the SIX Swiss Exchange. No publicly traded company owns 10% or more of the stock of Swiss Re Ltd.

Respondent's subsidiaries and affiliates are: 1997 Fund Ltd, AccuQuote, Inc., ACP Hyperdrive Co-Invest LLC, Advent Global Technology-B, L.P., Advent International GPE IX-B, L.P., Airpark Leipzig S.à r.l., Alltrust Insurance Company Limited, American Sentinel Insurance Company, Americo Financial Life and Annuity Insurance Company, Apollo Investments Limited, Aquarius SR sp. z o.o, Aquiline Financial Services Fund (Offshore) L.P., Aquiline Financial Services Fund II, L.P., Aquiline Financial Services Fund III, L.P., Aquiline Financial Services Fund IV, L.P., Ares ECSF XI (S) Holdings S.À R.L., Ares European Credit Strategies Fund XI (S), L.P., Ascribe Opportunities Fund IV, L.P., Belfor, BlackRock Growth Markets I, L.P., BlackRock Growth Markets II, L.P., BlackRock Private Equity Partners III, L.P. - European Venture Capital Portfolio, BlackRock Private Equity

Partners IV, L.P., BlackRock Private Equity Partners V, L.P., BlackRock Private Equity Partners VI US Feeder, L.P., BlackRock Private Equity Partners VI US, L.P., BlackRock Private Equity Partners VI, L.P., BlackRock Private Infrastructure I, L.P., BlackRock Private Infrastructure II, L.P., BlackRock Private Opportunities Fund IV (Cayman), L.P., BlackRock Private Opportunities III (Cayman), L.P., BlackRock Private Opportunities III (Delaware), L.P., Bokserska SR sp. z o.o., Britam Holdings plc, BURGER KING France SAS, BVBF AG, Castlelake V Dislocated Opportunities, L.P., Cherokee Investment Partners IV, L.P., China Environment Fund III, L.P., China Pacific Insurance (Group) Co., Ltd., Cobalt Strategic Partners I, L.P., Compañía Aseguradora de Fianzas S.A. Confianza, Corsair III Financial Services Offshore Capital Partners, L.P., Corsair IV Financial Services Capital Partners L.P., Corsair Korea Investors LLC, CVC Credit Partners Global Special Situations Fund II, L.P., Definity Financial Corporation, Digital Infra Credit Fund LP, Digital Solutions and Risk Engineering GmbH, Element Partners II, LP., Elips Life Insurance Company, Elips Versicherungen AG, Elips Versicherungen AG, Irish Freedom of Service, elipsLife EMEA Holding B.V., Ellington sp. z o.o., Elmswell sp. z o.o., Environmental Technologies Fund, L.P., EXTREMUS Versicherungs-Aktiengesellschaft, FWD Group Ltd, FWD Ltd, Generation IM Climate Solutions Fund (Cayman) L.P., Getsafe GmbH, Global Environment Emerging Markets Fund III, L.P., Global Life Distribution Holdings

Limited, Global Long Short Partners Offshore LP, Hamilton Lane Impact Fund, LP, Hamilton Lane Secondary Fund V, L.P., HL Secondary Aggregator II, L.P., HNL INVESTMENTS LIMITED, Husky Injection Molding Systems Ltd., ICG Recovery Fund II SCSp, iptiQ Americas Inc., iptiQ Asia Holding Limited, iptiQ EMEA P&C Holding B.V., iptiQ EMEA P&C S.A., iptiQ EMEA P&C S.A., Luxembourg, Zweigniederlassung Zürich, iptiQ EMEA P&C S.A., Nederlandse vestiging, iptiQ EMEA P&C S.A., Niederlassung Deutschland, iptiQ EMEA P&C S.A., Sede Secondaria Italiana, iptiQ EMEA P&C S.A., Sucursal en España, iptiQ Group Holding Limited, UK Branch, iptiQ Group Holding Ltd, iptiQ Life S.A., iptiQ Life S.A. Succursale pour la France, iptiQ Life S.A., Irish Branch, iptiQ Life S.A., Nederlandse vestiging, iptiQ Life S.A., Niederlassung Deutschland, iptiQ Life S.A., Sucursal en España, iptiQ Life S.A., UK Branch, Jackson National Life Insurance Company, Kewstoke sp. z o.o., Knapton sp. z o.o., Leadway Assurance Company Ltd., Leadway Holdings Limited, LeapFrog Financial Inclusion Fund II, LP, Litchfield Joint Venture, Litchfield Joint Venture IV, Litchfield Joint Venture V, Lumico Life Insurance Company, MAIN CAPITAL VI C.V., Malvern sp. z o.o., Manzi Finances S.A., Mittenmang Holding Ltd, Mittenmang I GmbH, Mittenmang II GmbH, Mittenmang III GmbH, Mittenmang IV GmbH, Mittenmang V GmbH, Movingdots GmbH, Movinx GmbH, MYTHENQUAI INVESTMENT SERVICES LIMITED, Neptune Gdańsk Sp.zo.o, New Silk Route PE Asia Fund, L.P., NL

Amsterdam City Logistics, North American Capacity Insurance Company, Orpington Structured Finance II Limited, Pensionskasse der Mitarbeiter der ehemaligen Frankona Rückversicherungs-AG V.V.a.G., Pensionskasse Schweizerische Rückversicherungs-Gesellschaft (Swiss Re), PEP SR I Umbrella L.P., Pillar RE Holdings LLC, Private Equity Partners VII (Delaware), L.P., Private Equity Partners VII (Scotland), L.P., Pro US Holdings, Inc., ReIntra GmbH medizinisch-berufskundlicher Beratungs- und Reintegrationsdienst, ROLAND Partner Beteiligungsverwaltung GmbH, Schweizer Pool für die Versicherung von Nuklearrisiken, Shanghai Swiss Re Consultancy Management Company Limited, Sirame sp. z o.o., SRCS HL PE 1 (MASTER) LP, SRCS HL PE 1 LP, SRE HL PE 1 (Master) LP, SRE HL PE 1 LP, SREH HL PE 1 (Master) LP, SREH HL PE 1 LP, SRZ HL PE 1 (Master) LP, SRZ HL PE 1 LP, SRZ US (PE) 2, SRZ US PE, STONEPEAK DIGITAL INFRA FUND A (LUX) SCSP, Stonepeak Digital Infra Holdings (Lux) S.a.r.l., Stonepeak Digital Infra Lower Holdings LP, Swiss Pillar Investments – Australia, Swiss Pillar Investments AG (Swiss Pillar Investments Ltd), Swiss Pillar Investments Europe SARL, Swiss Pillar Investments UK Limited, Swiss Re Africa Limited, Swiss Re America Holding Corporation, Swiss Re Asia Holding Pte. Ltd., Swiss Re Asia Pte. Ltd., Swiss Re Asia Pte. Ltd., Australia Branch, Swiss Re Asia Pte. Ltd., Hong Kong Branch, Swiss Re Asia Pte. Ltd., Japan Branch, Swiss Re Asia Pte. Ltd., Korea Branch, Swiss Re Asia Pte. Ltd., Malaysia

Branch, Swiss Re Atrium Corporation, Swiss Re Australia Ltd, Swiss Re Brasil Resseguros S.A., Swiss Re Capital Markets Corporation, Swiss Re Capital Markets Europe S.A., Swiss Re Capital Markets Limited, Swiss Re Capital Markets Limited, Australia Branch, Swiss Re Colombia, Oficina de Representación, Swiss Re Corporate Solutions Africa Ltd, Swiss Re Corporate Solutions America Insurance Corporation, Swiss Re Corporate Solutions America Insurance Corporation - Canadian Branch, Swiss Re Corporate Solutions Brasil Holding Ltda, Swiss Re Corporate Solutions Brasil Seguros S.A., Swiss Re Corporate Solutions Capacity Insurance Corporation, Swiss Re Corporate Solutions Elite Insurance Corporation, Swiss Re Corporate Solutions Global Markets Inc., Swiss Re Corporate Solutions Insurance China Ltd, Swiss Re Corporate Solutions Insurance China Ltd Beijing Branch, Swiss Re Corporate Solutions Insurance China Ltd Jiangsu Branch, Swiss Re Corporate Solutions Investment Holding Company Ltd, Swiss Re Corporate Solutions México Seguros, S.A. de C.V., Swiss Re Corporate Solutions México Servicios, S. de R.L. de C.V., Swiss Re Corporate Solutions Premier Insurance Corporation, Swiss Re Corporate Solutions Services Ltd, Swiss Re Corporate Solutions Services Ltd - Irish Branch, Swiss Re Corporate Solutions Services s.r.o., Swiss Re Denmark Services A/S, Swiss Re Direct Holdings AG, Swiss Re Direct Investments Company Ltd, Swiss Re Europe Holdings S.A., Swiss Re Europe S.A., Swiss Re Europe S.A., filial af Swiss Re Europe S.A., Luxembourg, Swiss Re

Europe S.A., Niederlassung Deutschland, Swiss Re Europe S.A., organizačná zložka Slovensko, Swiss Re Europe S.A., Rappresentanza per l'Italia, Swiss Re Europe S.A., Succursale de Paris, Swiss Re Europe S.A., Sucursal en España, Swiss Re Europe S.A., UK branch, Swiss Re Finance (Luxembourg) S.A., Swiss Re Finance (UK) Plc, Swiss Re Finance Holdings (Jersey) Limited, Swiss Re Finance Midco (Jersey) Limited, Swiss Re Financial Markets Corporation, Swiss Re Financial Products Corporation, Swiss Re Foundation, Swiss Re Funds (Lux) I, Swiss Re Funds (Lux) I – Dynamic Asset Allocation Fund USD, Swiss Re Funds (Lux) I – Strategic Asset Allocation Fund Yield USD, Swiss Re Funds (Lux) I – USD, Swiss Re GB Pension Trustee Limited, Swiss Re Germany GmbH, Swiss Re Global Business Solutions India Private Limited, Swiss Re Global Business Solutions India Private Limited, Hyderabad, Swiss Re Insurance-Linked Investment Advisors Corporation, Swiss Re Insurance-Linked Investment Management AG, Swiss Re International SE, Swiss Re International SE Singapore Branch, Swiss Re International SE, Australia Branch, Swiss Re International SE, Hong Kong Branch, Swiss Re International SE, Japan Branch, Swiss Re International SE, Labuan Branch, Swiss Re International SE, Luxembourg, Zurich Branch, Swiss Re International SE, Nederlandse vestiging, Swiss Re International SE, Niederlassung Deutschland, Swiss Re International SE, pobočka poisťovne z iného členského štátu, Swiss Re International SE, Rappresentanza per l'Italia, Swiss Re International SE,

Succursale pour la France, Swiss Re International SE, Sucursal en España, Swiss Re International SE, UK branch, Swiss Re International, filial af Swiss Re International SE, Luxembourg, Swiss Re Investment Management Limited, Swiss Re Investments Company Ltd, Swiss Re Investments Holding Company Ltd, Swiss Re Investments Ltd, Swiss Re Investors (Mauritius) Limited, Swiss Re Life & Health America Holding Company, Swiss Re Life & Health America Inc., Swiss Re Life & Health Australia Limited, Swiss Re Life & Health Australia Limited, New Zealand Branch, Swiss Re Life Capital EMEA Holding B.V., Swiss Re Management (US) Corporation, Swiss Re Management AG, organizačná zložka, Swiss Re Management Ltd, Swiss Re Management Ltd, UK Branch, Swiss Re Mexico Servicios, S. de R.L. de C.V., Swiss Re Nexus Reinsurance Company Ltd, Swiss Re Nexus Reinsurance Company PE, Swiss Re Nexus Reinsurance Company PE II, Swiss Re Principal Investments Company Asia Pte. Ltd., Swiss Re Principal Investments Company Ltd, Swiss Re Property & Casualty America Inc., Swiss Re Reinsurance Holding Company Ltd, Swiss Re Retakaful WAQF Funds, Swiss Re Services India Private Ltd, Swiss Re Services Limited, Swiss Re Serviços de Consultoria em Seguros e Resseguros Ltda., Swiss Re Solutions Ltd, Swiss Re Strategic Investments UK Limited, Swiss Re Treasury (US) Corporation, Swiss Re Zurich Corso Home, Swiss Re Zurich Corso Home (Inforce), Swiss Re Zurich Corso US PE, Swiss Re Zurich Corso US PE (Inforce), Swiss Re Zurich Corso US

PLI/Fronting, Swiss Reinsurance America Corporation, Swiss Reinsurance America Corporation - Escritório de Representação no Brasil Ltda., Swiss Reinsurance America Corporation, Oficina de Representación en México, Swiss Reinsurance Company Ltd - Escritório de Representação no Brasil Ltda, Swiss Reinsurance Company Ltd, Beijing Branch, Swiss Reinsurance Company Ltd, Canadian Branch, Swiss Reinsurance Company Ltd, Canadian Branch - L&H, Swiss Reinsurance Company Ltd, Canadian Branch - P&C, Swiss Reinsurance Company Ltd, India Branch, Swiss Reinsurance Company Ltd, Israel Branch, Swiss Reinsurance Company Ltd, Ivory Coast, Swiss Reinsurance Company Ltd, Oficina de Representación en México, Swiss Reinsurance Company, Agency PE, SwissRe Finance Limited, The Lincoln National Life Insurance Company, TMS Re, Inc., USA Family Protection Insurance Services LLC, USS Soluções Gerenciadas S.A., Vectis Claims Services Ltd., Vietnam National Reinsurance Corporation, VSR Insurance Solutions, LLC, Waterdrop Inc., Westport Insurance Corporation - Canadian Branch, Westport Insurance Corporation - Escritório de Representação no Brasil Ltda., Westport Insurance Corporation, Oficina de Representación en México, Wing Re II Inc., Wing Re II Inc. Corso, and Wing Re Inc.

## STATEMENT OF RELATED CASES

Pursuant to Court of Appeals Rule 500.13(a), there are no related cases.

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## I. PRELIMINARY STATEMENT

The commercial property insurance contract issued to CRO contains an insuring agreement requiring the insured to establish its loss was caused by direct physical loss or damage to insured property. It also only provides coverage for reduction in business income during the period in which the property was being replaced (if physically lost) or repaired (if physically damaged). CRO, a sophisticated insured, made no allegation that any covered property was broken, torn, dented, or destroyed by COVID-19 or any government stay-at-home orders. Its property is as sound now as before the pandemic. Indeed, its Restaurants are open once again for customers to patronize. The tables and chairs are intact.

As of this writing, at least 306 state and 866 federal cases, including over 200 appellate courts, have come to the inescapable determination that economic loss from efforts to protect human health from COVID-19 is not "direct physical loss or damage" to insured property under property insurance contracts. But long before the pandemic, New York courts held the same—that temporary loss of use of property, like that CRO alleges, is not covered. This was then and is now among the most universally held tenets in all of insurance law.

The First Department's decision here accords with long-standing precedent. The 2002 decision in *Roundabout* is perhaps one of the most relied upon insurance precedents in the country. And today, unanimously, New York courts have

dismissed similar COVID-19 business interruption claims in more than 106 decisions. There is nothing unique about CRO's allegations that should compel this Court to disturb well-settled law.

Finally, four exclusions apply to bar coverage, which independently require affirmance. They are the Contamination Exclusion for any loss due to any "pathogen or pathogenic organism, disease causing or illness causing agent [or] virus"; the Microorganism Exclusion for "any substances whose presence poses an actual or potential threat to human health"; the Loss of Market/Interruption of Business Exclusion for "indirect or remote loss or damage"; and the Concurrent Closures Exclusion for loss "for any reason other than physical loss or damage."

This Court should affirm.

## II. COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Appellate Division correctly affirm the Supreme Court's Decision that CRO failed to meet its burden to reasonably allege that its financial loss was caused by "direct physical loss or damage to insured property"?

   Westport answers "Yes."

2. Do any exclusions bar coverage?

   Westport answers "Yes."

## III. STATEMENT OF THE CASE

Defendant-Respondent Westport Insurance Corporation ("Westport") issued to Plaintiff-Appellant Consolidated Restaurant Operations, Inc. ("CRO") a

commercial property insurance contract number NAP 2002671 01, with a policy period of July 1, 2019, to July 1, 2020 ("Insurance Contract"). R76-165.

The Insuring Agreement provisions relevant here are presented below. For convenience, the relevant exclusions appear in Section IV(D) below and are not reproduced here.

> A. Insuring Agreement
>
> 1. … this POLICY … insures all risks of direct physical loss or damage to INSURED PROPERTY while on INSURED LOCATION(S) ….

R84. The Time Element section of the Insurance Contract provides coverage as follows:

> **A. Loss Insured**
>
> 1. This POLICY insures TIME ELEMENT loss, during the **Period of Liability** directly resulting from direct physical loss or damage insured by this POLICY to INSURED PROPERTY at INSURED LOCATION(S) ….

R113 (emphasis in original.) The Period of Liability is defined as:

> a. For building and equipment, the period of time:
>
> I. starting on the date of physical loss or damage insured by this POLICY to INSURED PROPERTY; and
>
> II. ending when with due diligence and dispatch the building and equipment could be repaired or replaced with current materials of like size, kind and quality and made ready for operations; …

R115.

CRO operates more than 27 full-service and 27 franchise restaurants (the "Restaurants"). R51 ¶ 2. In March 2020, all of CRO's Restaurants were forced to close by various stay-at-home orders, which directed all non-essential businesses to cease operations. R52 ¶ 3. "Overnight, the Restaurants went from busy, bustling destinations for dining to virtual ghost-towns …." *Id.* ¶ 4.

Beginning in early March 2020, many state and local governments began to act to prevent humans from being sick. R59 ¶ 29. They issued Orders suspending or severely curtailing the operations of all non-essential or high-risk businesses. *Id.* These businesses included CRO's Restaurants. *Id.* In March 2020, states, counties, and cities where the Restaurants are located issued orders prohibiting all restaurants within those jurisdictions from serving food on premises and prohibiting bars from serving alcohol. *Id.* ¶ 31.

The Orders allowed restaurants to continue to operate only for purposes of preparing and offering food for drive-thru, takeout, or delivery. *Id.* The Orders limited the Restaurants' on-premises dining and operations. *Id.* CRO alleges that the Orders had a "devastating effect" on its business and that the Restaurants lost virtually all foot-traffic overnight. R60 ¶ 34.

CRO alleges that it suffered alleged economic loss as a result of the pandemic and government orders to control its spread. R60 ¶ 35. CRO filed a claim on the Insurance Contract but filed suit before Westport issued its coverage determination.

R52 ¶ 6. The Supreme Court granted Westport's motion to dismiss, concluding that CRO had not reasonably alleged direct physical loss or damage to property, a required trigger for coverage. R4-45. The First Department affirmed. R2061-77.

Below, CRO argued that direct physical loss or damage was caused by (1) the actual presence of the virus, (2) the threat of its presence, (3) and the loss of function, purpose, and use of its Restaurants. R60 ¶ 36. In this Court, however, CRO advances only the first theory—that the actual presence of the COVID-19 virus caused physical loss or damage to property—and has abandoned the other two. App. Br. at 16.

## IV. ARGUMENT

### A. Applicable Legal Standard

#### 1. *De Novo* Review.

This Court reviews the grant of a motion to dismiss *de novo*. *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 403, 960 N.Y.S.2d 404 (1st Dep't 2013). It must consider whether the plaintiff can succeed upon a reasonable view of the facts stated. *Id.* The motion can alternatively be granted where documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002). As the Appellate Division recognized, the insurance contract qualifies as "documentary evidence" under CPLR

3211(a)(1). *See, e.g., Ralex Servs., Inc. v. Southwest Mar. & Gen. Ins. Co.*, 155 A.D.3d 800, 802, 65 N.Y.S.3d 49 (2d Dep't 2017).

**2. The Insurance Contract Is Construed As A Matter Of Law.**

It is undisputed that New York law applies since the Insurance Contract contains a New York choice of law provision. R139. Under New York law, interpretation of an insurance contract is subject to the general principles of contract interpretation. *Univ. Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 25 N.Y.3d 675, 680, 16 N.Y.S.3d 21 (2015). The "provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." *Id.* Of course, it is the insured—here CRO—that bears the burden to prove that the insurance contract covers the loss. *See Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 6, 751 N.Y.S.2d 4 (1st Dep't 2002). "Labeling the policy as 'all risk' does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy." *Id.*

"Where the provisions of a policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. Courts may not make or vary the contract of insurance to accomplish their notions of abstract justice or moral obligation." *Id.* (citations omitted.) "An insurance policy should not be read so that some provisions are rendered meaningless." *Id.* at 8.

If the "intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract." *Dreisinger v. Teglasi*, 130 A.D.3d 524, 527, 13 N.Y.S.3d 432 (1st Dep't 2015) (citing *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 460, 161 N.Y.S.2d 90 (1957)). No ambiguity is created where the parties have a dispute over the meaning of the words in a contract. It is for the court to decide what is the reasonable interpretation. *Id.* (citing *Ashwood Capital, Inc. v. OTG Mgt., Inc.*, 99 A.D.3d 1, 7-8, 948 N.Y.S.2d 292 (1st Dep't 2012)).

Where, as here, the insured is a sophisticated business enterprise, like CRO, represented by a world-class broker, here Lockton, traditional rules of contract interpretation do not apply. *See Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 n. 2 (2d Cir. 1983) ("a number of courts have recognized that in cases involving bargained-for contracts, negotiated by sophisticated parties, the underlying adhesion contract rationale for the doctrine is inapposite."); *Westchester Fire Ins. Co. v. MCI Communications Corp.*, 74 A.D.3d 551, 902 N.Y.S.2d 350 (1st Dep't 2010) ("Nor is there a need to resort to contra proferentem, which, in any event, would be inapplicable to this sophisticated policyholder."); *Cummins, Inc. v. Atlantic Mut. Ins. Co.*, 56 A.D.3d 288, 290, 867 N.Y.S.2d 81, 83 (1st Dep't 2008) ("The doctrine of *contra proferentem* does not apply as the evidence submitted on the motions shows … that plaintiff is sophisticated … and had equal bargaining power ….").

### 3. CRO Has The Burden To Establish Coverage.

The insured bears the burden to show that the insurance contract covers the loss. *See Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d at 6 (1st Dep't 2002).

## B. CRO's Allegations Do Not Reasonably Allege Its Financial Loss Was Caused By Direct Physical Loss Or Damage To Property

### 1. Direct Physical Loss Or Damage To Property Requires Actual, Tangible Physical Loss Or Damage To Insured Property.

As noted above, the relevant provisions of the Insurance Contract here require "direct physical loss or damage" to insured property. That phrase (or similar language) has served as the cornerstone of coverage in modern commercial property insurance contracts for decades.

New York courts, consistent with the nationwide majority view, have long required that an insured suffer actual physical harm to its insured property to trigger coverage.[1] *See Roundabout Theatre*, 302 A.D.2d at 7. That harm can be physical

[1] A minority of states have recognized "uninhabitability" or "uselessness" as a proxy for physical destruction, but New York, like most states, has not. *See, e.g.*, *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 142 (3d Cir. 2023) (in New Jersey, uninhabitability of a structure as proxy for total loss of possession). CRO does not directly press for this change in the law. Nor could it because CRO's premises were and are habitable—and were inhabited. R59 ("The Orders allowed restaurants to continue to operate only for purposes of preparing and offering food for drive-thru, takeout or delivery ….").

damage, which needs repair, or physical destruction or physical loss, such as by theft, which requires replacement. *Id.*

*Roundabout*'s interpretation of the contract language is sound. It is grounded in the plain text of the contract and fundamental rules of contractual interpretation. In that case, an elevator collapsed near the insured's premises. New York City's Office of Emergency Management issued a directive that physically closed 43rd Street between Broadway and 6th Avenue for 37 days. *Id.* at 3. As a result of the government order, the theater was inaccessible to the public, causing the cancellation of 35 performances.

After a careful analysis of the insurance contract language, the Appellate Division held that the financial losses to the theater were not covered: "[T]he only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property." *Id.* at 7. Employing familiar contractual-interpretation principles, the Court concluded that the temporary loss of use of property cannot itself be a "physical loss of" property. *Id.* The Court reasoned that the contract's requirement for "physical" loss or damage meant that such loss or damage must be tangible. And that conclusion makes sense. It is the only interpretation of the contract language that gives effect to the plain meaning of "physical."

As the *Roundabout* court explained, the structure and purpose of the insurance contract lead directly to the conclusion that tangible damage is required to trigger coverage. This conclusion is informed by the coverage grant itself as well as by the period of liability—the period during which coverage for lost business income is recoverable. *Id.* at 7-8 (coverage is available during "such length of time as would be required with exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been lost, damaged or destroyed"). The Insurance Contract has a similar provision called the Period of Liability, which is defined as:

> I. starting on the date of physical loss or damage insured by this POLICY to INSURED PROPERTY; and
>
> II. ending when with due diligence and dispatch the building and equipment could be repaired or replaced with current materials of like size, kind and quality and made ready for operations; …

R115. A similar clause, often called the "period of restoration," appears in virtually every commercial property insurance contract.[2]

[2] Hundreds of courts—including 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. *See, e.g.*, *Sandy Point Dental, P.C. v. Cincinnati Ins. Co*., 20 F.4th 327, 333 (7th Cir. 2021) ("Without a physical alteration to property, there would be nothing to repair, rebuild, or replace."); *Oral Surgeons, P.C. v. Cincinnati Ins. Co*., 2 F.4th 1141, 1144 (8th Cir. 2021) ("The unambiguous requirement that the loss or damage be physical in nature accords with the policy's coverage of lost business income and incurred extra expense during the 'period of restoration.'"); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.,* 22 F.4th

And *Roundabout*'s analysis makes sense because interpreting "direct physical loss or damage" to include intangible loss or damage, as CRO urges, would render the Period of Liability's language relating to repair or replacement mere surplusage. *Consol. Edison Co. of New York v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221-22, 746 N.Y.S.2d 622 (2002) ("We construe the policy 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.'") (citation omitted.) It would also make the Period of Liability virtually undefinable—or only defined by the success of governmental efforts to control the spread of the virus among *humans* and not the insured's diligence in repairing or replacing *property*.

CRO contends that *Roundabout* is inapplicable because the policyholder there sought coverage because of "off-site property damage." App. Br. at 33. But CRO misses the point of *Roundabout's* holding. The *Roundabout* Court considered the inability to use the insured property and rejected the argument that "loss of" must include "loss of use." *Id.* The Court held that the requirement for "direct physical loss or damage" to property "narrows the scope of coverage and mandates the

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450, 456 (5th Cir. 2022) ("The [business income and extra expense] provision provides coverage only for a 'period of restoration.' This period necessarily contemplates a tangible alteration to the property that requires repair, rebuilding, or replacement."); *Deer Mountain Inn LLC v. Union Ins. Co.*, 541 F. Supp. 3d 235, 247 at n. 13 (N.D.N.Y. 2021) (finding the period of restoration provision "further demonstrates" that coverage is "only for losses that are physical in nature.").

conclusion that losses resulting from off-site property damage do not constitute covered perils under the Policy." *Id.*

*Roundabout* also highlighted two key decisions that supported its holding. In *Whitaker v. Nationwide Mut. Fire Ins. Co.*, 115 F.Supp.2d 612 (E.D. Va. 1999), the court rejected claims that faulty workmanship of a home constituted "direct physical loss" because the faulty work was not an external event which changed the property into an unsatisfactory state. *Id*. at 616. And in *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Assn.*, 793 F. Supp. 259 (D. Or. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992), the court rejected claims that the removal of insulation containing asbestos was "direct physical loss" to property because the building itself was "physically intact and undamaged," even if there were asbestos in the insulation. *Id.* at 263. The court there concluded (as should this Court) that the "only loss is economic." *Id.*

CRO contends that the 106 unanimous New York State and federal decisions discussing COVID-19 claims have gotten *Roundabout* wrong. Not so. For two decades, New York and other courts have consistently followed *Roundabout*'s well-reasoned holding—including in situations (like this case) that involved the alleged presence of a noxious or harmful substance on the premises. And the 106 recent decisions are perfectly consistent with that precedent. What CRO is actually doing is side stepping *Roundabout's* plain holding that the phrase "direct physical loss or

damage" requires "physical damage to the insured's property," and that "loss of use" not caused by "physical damage" to the insured's property is not covered. *Id.* That holding has been consistently applied by New York courts.

For example, in *Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.*, a laboratory was ordered to shut down after a discharge of noxious fumes caused tenants in the building to become ill. 6 A.D.3d 300, 301 (1st Dep't 2004). The Court held that there was no coverage because there was no "direct physical loss to property," such as a break in a pipe. *Id.*

The Court cogently explained that the "purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against." *Id.* The Court concluded that the presence of noxious fumes in the building and the later government orders restricting occupancy of the building until after the ventilation system was upgraded were not "covered loss … within the meaning of the policy." *Id.*

The same result is called for here. CRO's financial loss was not caused by "direct physical loss or damage" to any of its walls, tables, chairs, floors, etc. And no property has needed repair or replacement, as required under the Period of Liability to trigger coverage.

CRO sought to distinguish *Cytopath* below but does not address it here. That is telling. Just as in this case, the property at issue in *Cytopath* was not damaged by the airborne contaminant. Rather, those airborne contaminants were harmful to humans. CRO admits that its properties were not rendered unusable and uninhabitable and alleges that they were available for drive-thru, takeout, or delivery. R59 ¶ 31. CRO's loss is thus analogous to the loss in *Cytopath*. As the First Department held, "there was no covered loss here," which required "direct physical loss to property." *Cytopath*, 6 A.D.3d at 301.

New York courts unanimously agree. *See, e.g., Satispie, LLC v. Travelers Prop. & Cas. Co. of Am.*, No. 17-cv-06234, 2020 WL 1445874 (W.D.N.Y. Mar. 25, 2020) ("Under New York law, the phrase 'risks of direct physical loss' has been interpreted to mean 'some form of actual, physical damage' to the insured property.") (citation omitted); *United Airlines Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp 2d 343, 349 (S.D.N.Y. 2005), *aff'd*, 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' … supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Ins. Co.*, 385 F. Supp 2d 280, 287-288 (S.D.N.Y. 2005) ("'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property … which must be caused by a 'covered cause of loss.'").

CRO also contends that the presence of the virus in its Restaurants is just like a flood or fire. App. Br. at 17. We respectfully disagree. Water and fire *physically* damage and destroy property. The property is tangibly changed and altered. Fire burns, destroys, and changes property to the point where it needs to be physically repaired or replaced. If a ceiling beam is damaged by a fire, it needs to be replaced with a new beam. On the other hand, if the kitchen stove unfortunately burning the chef there is no "direct physical loss or damage" to the insured's property. The presence of a potentially harmful substance is not enough.

Likewise, a flood can cause massive damage to insured property. Homes may be wiped out and need to be replaced. On the other hand, spilling water on the kitchen floor and mopping it up is not "direct physical loss or damage" to property. The mere presence of water is not enough.

Put another way, a closure and resulting financial loss is an aspect of loss measurement, but not "direct physical loss or damage" to insured property. The insured must show the loss (to be measured) was caused by "direct physical loss or damage to insured property." There must be a cause ("direct physical loss or damage to insured property") followed by an effect (a measured financial impact). The latter does not define the former. Thus, CRO's focus on how long property was restricted missed the mark. It is not about how long a property is closed, but *why* the property is closed.

In one of the very first rulings on COVID-19 coverage, Judge Valerie E. Caproni in *Soc. Life Mag. Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-cv-3311, 2020 WL 2904834 (S.D.N.Y. May 14, 2020) perhaps captured it best. Her Honor explained that "what has caused the damage is that the governor has said you need to stay home. It is not that there is any particular damage to your specific property." *Id.* at 4. When Her Honor questioned counsel for the insured to identify the alleged damage, counsel responded that "the virus exists everywhere." *Id.* at 5. Her Honor rebuffed that argument stating: "It damages lungs. It doesn't damage printing presses." *Id.* Counsel for the insured further argued that if the virus "lands on something and you touch it, you could die from it." *Id.* at 6. But as Her Honor recognized "That damages you. It doesn't damage the property." *Id.*

CRO argues that the presence of the SARS-CoV-2 virus on insured property altered the property and the air, impaired the Restaurants' functionality, and rendered them unusable for their intended purpose. App. Br. at 1. But that is not what CRO alleges in its Complaint. R59 ¶ 31 ("These Orders … effectively limited the Restaurants' on-premises dining and operations …."); R68 ¶ 63 ("no Restaurants had access limited or prohibited due to an order by a governmental agency or CRO officer due to the actual not suspected presence of the virus."). CRO, importantly a sophisticated insured, itself confirms that the impairment of functionality—indoor

dinning—was caused by government orders restricting access, not by the virus damaging property.

### a. The Presence Of COVID-19 Does Not Cause Direct Physical Loss Or Damage.

As explained above, CRO advanced only one theory of coverage here: that its financial losses are because the COVID-19 virus on its premises caused direct physical loss or damage to property. *See* App. Br. at 16. The allegations in CRO's Complaint, however, bear little resemblance to the contentions in its Brief. For example, CRO contends that SARS-CoV-2 droplets "physically attached to the surfaces" in its Restaurants. *Id.* at 7. CRO cites to paragraphs 17-20, 36, and 61 of the Complaint. *Id.* None of those paragraphs, however, allege that the virus droplets "physically attached" to CRO's Restaurant surfaces. At most, CRO only alleges in conclusory fashion, without any factual support, the "actual presence of the virus in the Restaurants …." R60 ¶ 36; R68 ¶ 61. As another example, in that same sentence CRO contends that the virus "tangibly altered the Restaurants' air." App. Br. at 7. None of the cited paragraphs mention the Restaurants' air—which is not covered property anyway because CRO has no insurable interest in the air. As another example, CRO asserts that it alleged the SARS-CoV-2 virus "'compromise[d] the physical integrity of' the Restaurants and 'render[ed] [the Restaurants] unusable.'" App. Br. at 8. That "quote" is just a series of words taken out of context. The cited paragraph has nothing to do with CRO's Restaurants.

Moreover, even if CRO's Complaint supported its contention of the virus's presence, the mere presence of COVID-19 particles on the premises does not establish direct physical loss or damage. As explained above, the First Department cogently rejected a similar argument in *Cytopath*. The noxious fumes in that case presented a hazard to humans. 6 A.D.3d at 301. But they did not damage the property itself. *Id.* Accordingly, the loss was not covered.

As in *Cytopath*, here "[c]ommon sense" shows that "the pandemic impacts human health and human behavior, not physical structures." *Uncork & Create LLC v. Cincinnati Ins. Co*., 498 F. Supp. 3d 878, 884 (S.D. W. Va. 2020), *aff'd*, 27 F.4th 926 (4th Cir. 2022). It is plain that "the Policy requires 'direct physical loss or damage to property,' not merely a physical substance *on* property." *Circle Block*, 2021 WL 3187521, at *7 (italics in original.)

At least 1,172 cases in state and federal courts nationwide concur with this long-standing principle of New York law. *See, e.g., Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022) ("Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property."); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742, 743 (S.C. 2022) ("[T]he presence of COVID-19 and corresponding government orders prohibiting indoor dining do not fall within the policy's trigger language of

'direct physical loss or damage.'"); *United Talent Agency v. Vigilant Ins. Co*., 77 Cal. App. 5th 821, 838 (2022) ("[T]he presence or potential presence of the virus does not constitute direct physical damage or loss."); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021) (The virus's "impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days."); *100 Orchard St., LLC v. Travelers Indem. Ins. Co. of Am*., 542 F. Supp. 3d 227, 229 (S.D.N.Y. 2021) ("[W]hile the presence of COVID-19 may render property potentially harmful to people, it does not constitute harm to the property itself."); *Gilreath Family & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co*., No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) ("[W]e do not see how the presence of [COVID-19] particles would cause physical damage or loss to the property.").

And that makes sense because COVID-19 poses no more threat to property than the common cold. Adopting CRO's theory would turn every sneeze in New York into a potential property insurance claim. *See United Talent*, 77 Cal. App. 5th at 835 ("[T]he virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks."); *Dino Drop, Inc. v. Cincinnati Ins. Co*., 544 F. Supp. 3d. 789, 800 (E.D. Mich. 2021), *aff'd*, 544 F. Supp.

3d. 789 (6th Cir. 2022) ("[T]he presence of COVID-19 at the premises is analogous to the presence of virus particles causing influenza or the common cold.").

**b. Property That Merely Needs To Be Cleaned Is Not Damaged; Cleaning Is Not Repair Or Replacement.**

Further, an item or structure that merely needs to be cleaned has not suffered "loss" or "damage" which is both "direct" and "physical." *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 871-72 (11th Cir. 2020). As the Eleventh Circuit explained,

> Like the dust and debris in *Mama Jo's*, COVID-19 did not cause any material alteration of the insureds' properties. It did require that the properties be cleaned to eliminate the particles of the virus, but as *Mama Jo's* explains, that does not constitute a "physical loss of or damage to" the properties.

*SA Palm Beach*, 32 F.4th at 1347. The Supreme Judicial Court of Massachusetts agreed.

> Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property.

*Verveine*, 184 N.E.3d at 1276. Further, "the use of cleaning products on covered property does not constitute actual harm, as required for coverage …." *Café La Trova LLC v. Aspen Specialty Ins. Co.*, 519 F. Supp. 3d 1167, 1181 (S.D. Fla. 2021).

Courts nationwide agree. *See, e.g., Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574 n.8 (6th Cir. 2012) (holding that there is no physical loss

or damage where the contaminant can be removed using "basic cleaning" with Lysol and hot water); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co*., 512 F. Supp. 3d 1019, 1024 (N.D. Cal. 2021) ("[C]ontaminated surfaces can be disinfected and cleaned, thereby demonstrating COVID-19 does not cause 'physical alteration' or 'physical change in the condition' of property."); *Sandy Point Dental*, 20 F.4th at 335 ("[D]eadly or not, [COVID-19] may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days.").

In fact, the only reason to "clean" property on which the COVID-19 virus is suspected to be present is to inactivate the virus as a threat to humans, not to protect the property itself from physical loss or damage. *See, e.g., R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co*., No. 8:20-cv-2323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021) ("COVID-19 impacts human health and human behavior. COVID-19 does not impact physical structures, other than to require additional cleaning and sanitizing of those structures."); *see also Kim-Chee LLC v. Phila. Indem. Ins. Co*., 535 F. Supp. 3d 152, 161 (W.D.N.Y. 2021), *aff'd*, No. 21-1082-cv, 2022 WL 258569 ("[COVID-19] presents a mortal hazard to humans, but little or none to buildings which remain intact and available for use once the human occupants no longer present a health risk to one another."). The Insurance Contract protects against physical risks to property, not to human health.

### c. Loss Of Use Is Not Enough.

CRO argues that loss of use constitutes direct physical loss or damage. That argument was rejected by *Roundabout* and its progeny for logical, persuasive reasons. *Roundabout*, 302 A.D.2d at 7 (construing physical loss as loss of use is "flawed").

Other pre-pandemic New York federal courts applying New York law have reached the same conclusions. For example, in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), the insured sought coverage for loss of business income as a result of its inability to access its office during a power outage caused by a storm. *Id.* at 328-29. The insured conceded that its office "did not sustain any structural damage as a result of" the storm. *Id.* at 329. The insured argued that its loss of use caused by an external event that changed the state of the property was sufficient. *Id.* The court rejected that argument because the phrase "direct physical loss or damage" in the insurance contract "require[d] some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage." *Id.* at 331.

*Couch on Insurance*, an insurance treatise widely cited by New York courts, concurs. "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured

merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." 10A Couch on Insurance §148:46 (3d ed. June 2020).

And virtually every other appellate court in the country to have considered this argument in more than 200 opinions agrees with existing New York law. As the Supreme Court of Iowa explained, "'[p]hysical' has to mean something …. The mere loss of use of property, without more, does not meet the requirement for a direct physical loss of property." *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 552 (Iowa 2022). As the Sixth Circuit noted, CRO's argument "skates over the unrelenting imperative that the policy covers only 'physical' losses." *Santo's Italian Café*, 15 F.4th at 404. And as the Tenth Circuit explained, "[t]he words 'intangible' and 'physical' have opposite meanings." *Oral Surgeons*, 2 F.4th at 1144; *Wakonda Club*, 973 N.W.2d at 552 ("'Physical' has to mean something."). This is true whether phrased as "loss of use" or, as CRO phrases it, "inability to use for its intended purpose." *Deer Mountain Inn LLC v. Union Ins. Co.*, No. 21-1513, 2022 WL 598976, at *1 (2d Cir. Mar. 1, 2022) (rejecting the argument that loss of use or "inability to use the insured property for its intended purpose" is sufficient); *Uncork & Create*, 27 F.4th at 930 (same); *Terry Black's*, 22 F.4th at 457-58 (same); *Goodwill*, 21 F.4th at 710 (same); *SA Palm Beach*, 32 F.4th at 1352 (same).

Further, to adopt such an argument would expand coverage beyond anything contemplated by the Insurance Contract's plain language. As another court explained:

> [T]he following scenarios would trigger insurance coverage under [the insured]'s expansive view: (1) a city changes its maximum occupancy codes to lower the caps, meaning that a particular restaurant can no longer seat as many customers as it used to; (2) a city amends an ordinance requiring restaurants located in residential zones to cease operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby wildfires (a consequence of this is that all businesses must suspend operations), but lifts the order three weeks later when the wildfires are extinguished without, fortunately, any destruction of property. The Court here agrees that to adopt [the insured]'s view would be to reach an overbroad view of "physical loss."

*Park 101 LLC v. Am. Fire & Cas. Co*., No. 20-cv-00972-AJB-BLM, 2021 WL 2685188, at *5 (S.D. Cal. June 30, 2021); *see also Santo's Italian Café*, 15 F.4th at 404 ("[W]hat if the State had taken no action in response to the pandemic, but most people had stayed home anyway for fear of catching COVID-19? Would that not prevent the restaurant from using the restaurant space as well?").

And a court in the Southern District of New York used a particularly relatable analogy to explain why loss of use is not physical loss:

> The idea that "loss of use" does not constitute a "direct physical loss of or damage to" property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a "direct physical loss of or damage to" the car. The teenager was precluded from driving it. But the car's

> physical condition remained unchanged, and its presence likely remained at the residence. Similarly, imagine a fisherman visits a public pond each day to cast his line. One morning he arrived and found that the pond was closed for fishing because a nearby town was hosting its annual swim race. Did the fisherman lose the use of the pond for the day? Yes. He could not enjoy the premises for his intended use (*i.e.*, to fish). But could anyone reasonably conclude there was a "direct physical loss of or damage to" the pond because he could not fish? No. The condition of the pond was not altered physically.

*Michael Cetta, Inc. v. Admiral Indem. Co*., 506 F. Supp. 3d 168, 177 (S.D.N.Y. 2020). So too here.

**d. CRO Alleged No Causal Nexus.**

Even if this Court determines that the presence of COVID-19 can cause direct physical loss or damage, it should nonetheless affirm because CRO has not reasonably alleged that its alleged economic losses directly resulted from direct physical loss or damage to insured property. Each form of coverage requires that the predicate direct physical loss or damage *cause* the claimed loss. Time Element coverage applies only to a "loss, … *directly resulting from* direct physical loss or damage insured by this Policy to Insured Property at insured locations …." R113.

CRO's only allegations on this point are conclusory. It 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. R60 ¶¶ 34-36. CRO made no *factual* allegations linking its lost revenue to direct physical loss or damage.

The reality, of course, is CRO's lost revenue was caused by government orders and patrons who decided to stay home to avoid being sick or worse. That is plain from its Complaint. *See, e.g.*, R51-52 ¶ 3 ("In March 2020, all of CRO's insured locations … were forced to close by various stay-at-home orders, which directed all non-essential businesses to cease operations."). These orders' purpose was to slow the spread of the disease. R58 ¶ 26 (government-issued "public guidance, styled as '30 Days to Slow the Spread'"). And complying with them caused CRO's alleged economic loss. R60 ¶ 34 ("the Restaurants lost virtually all foot-traffic overnight"); R60 ¶¶ 34-35 (government orders "have had a devastating effect on CRO's business" and "[a]s a result, CRO has suffered, and will continue to suffer, significant business interruption losses in the tens of millions of dollars").

Thus, as another court put it, "even if [CRO] 'had thoroughly sterilized its premises to remove any trace of the virus,' the insured 'would *still* have continued to incur a suspension of operations because the Orders would *still* have been in effect and the normal functioning of society *still* would have been curtailed.'" *Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 704 (2021); *accord Rialto Pockets, Inc. v. Beazley Underwriting Ltd.*, No. 21-55196, 2022 WL 1172134, at *1 (9th Cir. Apr. 20, 2022). Because there is not a causal nexus, there is no coverage.

### 2. New York COVID-19 Decisions Are Unanimous.

This analysis is bolstered by the overwhelming case law—unanimous in New York and virtually everywhere else. It is hard to overstate the weight of authority here. Every New York court to have considered the questions presented in at least 106 state and federal court decisions—including the Second Circuit—agrees. This unanimity reflects not only the well-reasoned preexisting law discussed above, but also the careful analysis of scores of accomplished jurists each considering and rejecting the arguments CRO makes here.

For example, the Second Circuit explained that loss of access to property "as a result of COVID-19 and the governmental shutdown orders," like CRO alleges here, cannot trigger coverage because there has been no physical loss. *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 223 (2d Cir. 2021). The Supreme Court in *Raymours* concurred: "business interruption insurance coverage exists only for damage caused by direct physical loss, damage or destruction. Here there wasn't any. Covid-19 … simply does not constitute anything covered by the policies." *Raymours Furniture Co., Inc. v. Lexington Ins. Co.*, No. 655167/2020, 2021 WL 4789148, at *1 (N.Y. Sup. Ct. Oct. 14, 2021). And Judge Matsumoto, Eastern District of New York, persuasively explained that, although the "virus has the potential to cause significant harm to people, the court is not aware of any scenario in which its presence can cause 'physical damage' to property such as a

building, or other inanimate objects." *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest*, No. 20-cv-2777, 2021 WL 1091711, at *4 (E.D.N.Y. Mar. 22, 2021).

Indeed, in a case involving New York's largest hospital system, the Court in *Northwell Health, Inc. v. Lexington Ins. Co.*, No. 21-cv-1104, 2021 WL 3139991 (S.D.N.Y. July 26, 2021), held that the insured's interpretation "risks impermissibly collapsing coverage for direct physical loss or damage into 'loss of use' coverage." *Id.* at *6. The Court also noted that the coronavirus, *unlike* invisible fumes and chemicals, does not "persist" and "irreversibly alter the physical condition of a property." *Id.*

### 3. Courts Nationwide Have Overwhelmingly Rejected Similar Claims.

New York's unanimous approach to these cases is bolstered by at least 1,172 similar decisions nationwide.[3] Appellate courts are nearly unanimous. To date, supreme courts and courts of appeal have issued more than 200 opinions consistent with the First Department's decision. They include opinions from 10 state high courts, every numbered federal circuit, and intermediate appellate courts from 10

[3] See Covid Coverage Litigation Tracker, University of Pennsylvania School of Law, *available at* https://cclt.law.upenn.edu/ (as of March 1, 2023, 784 suits dismissed with prejudice).

states. Together, these courts have rejected every argument that CRO asserts. *See*, *e.g.*,

- *Colectivo Coffee Roasters, Inc. v. Society Ins.*, 401 Wis.2d 660, 672, 974 N.W.2d 442 (Wis. June 1, 2022) ("[T]he presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property." (internal quotation marks and citation omitted));

- *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 552 (Iowa 2022) ("'Physical' has to mean something. … The mere loss of use of property, without more, does not meet the requirement for a direct physical loss of property.");

- *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. Sup. Jud. Ct. 2022) ("[T]he suspension of business at the restaurants was not in any way attributable to a direct physical effect on the plaintiffs' property that can be described as loss or damage.");

- *Uncork & Create LLC*, 27 F.4th at 933 ("Here, neither the closure order nor the Covid-19 virus caused present or impending material destruction or material harm that physically altered the covered property requiring repairs or replacement so that they could be used as intended. Thus, we hold that the policy's coverage for business income loss and other expenses does not apply to Uncork's claim for financial losses in the absence of any material destruction or material harm to its covered premises.");

- *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 711 (10th Cir. 2021) ("Goodwill's temporary inability to use its property for its intended purpose was not a 'direct physical loss.' To conclude otherwise would ignore the word 'physical' and violate the requirement that every part of a policy be given meaning.");

- *Oral Surgeons*, 2 F.4th at 1144 ("The policy here clearly requires direct 'physical loss' or 'physical damage' to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property. … The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage.");

- *Sandy Point Dental*, 20 F.4th at 335 ("Sandy Point does not even attempt to describe how either the presence of the virus or the resulting closure orders physically altered its property. It points only to the loss of the property's 'intended use.' As we have explained, this is not enough. Sandy Point may have been unable to put its property to its preferred (and, we assume, its most lucrative) use. But this is a far cry from the complete physical dispossession of property ….");

- *Bridal Expressions LLC v. Owners Ins. Co*., No. 21-3381, 2021 WL 5575753, at *2 (6th Cir. Nov. 30, 2021) ("Throughout the coverage period, Bridal Expressions retained possession of its property and could put it to use. The company's inability to use the property in the same way as it did before the pandemic—not unlike the situation faced by restaurants at the time—does not satisfy the policy's language. 'A loss of use simply is not the same as a physical loss.'" (quoting *Santo's Italian Café LLC v. Acuity Ins. Co*., 15 F.4th 398 (6th Cir. 2021)));

- *SA Palm Beach, LLC v. Certain Underwriters at Lloyds London*, 32 F.4th 1347, 1358 (11th Cir. May 5, 2022) ("There is therefore no coverage for loss of use based on intangible and incorporeal harm to the property due to COVID-19 and the closure orders that were issued by state and local authorities even though the property was rendered temporarily unsuitable for its intended use.");

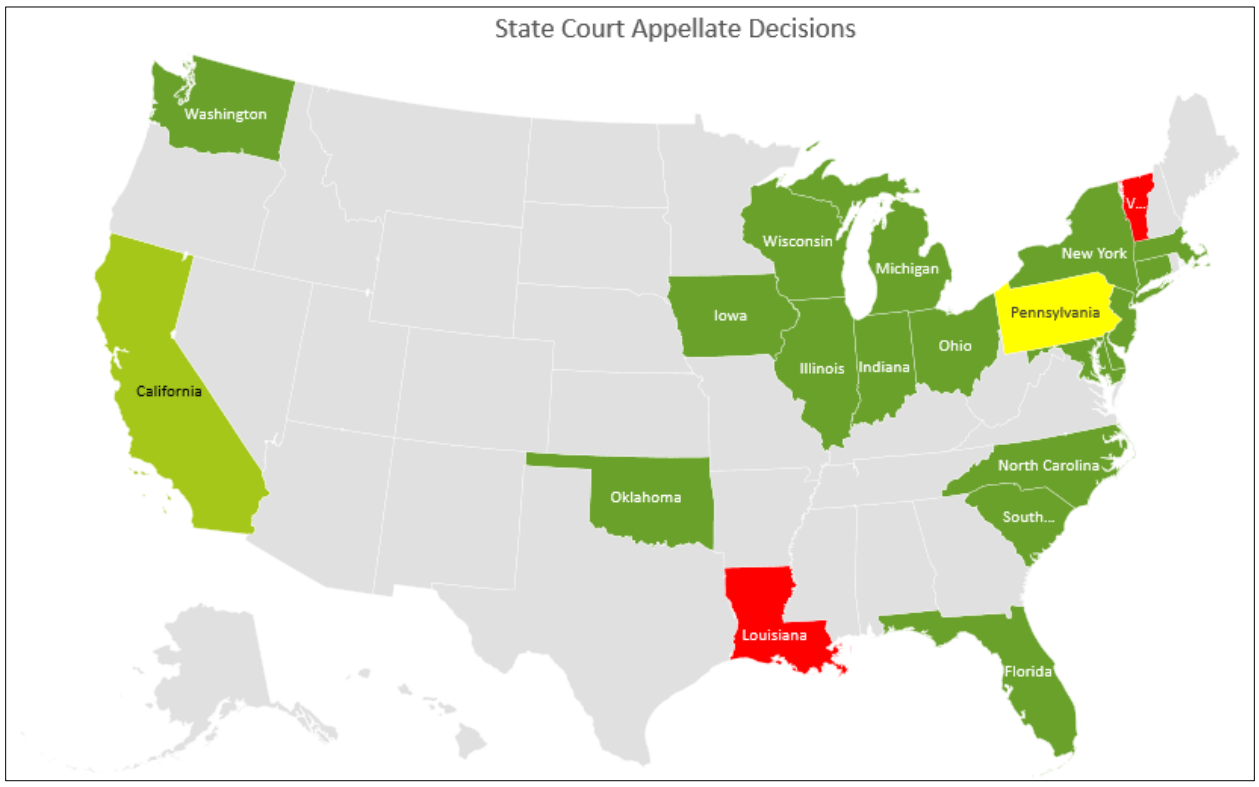
- *Indiana Repertory Theatre v. Cincinnati Cas. Co*., 180 N.E.3d 403, 408 (Ind. Ct. App. 2022) ("If loss of use alone qualified as direct physical loss to the property, then the term 'physical' would have no meaning.");

- *Inns by the Sea v. Cal. Mut. Ins. Co*., 71 Cal. App. 5th 688, 706-07 (2021) ("[T]he words 'direct' and 'physical' preclude the argument that coverage arises in a situation where the loss incurred by the policyholder stems solely from an inability to use the physical premises to generate income, without any other physical impact to the property.");

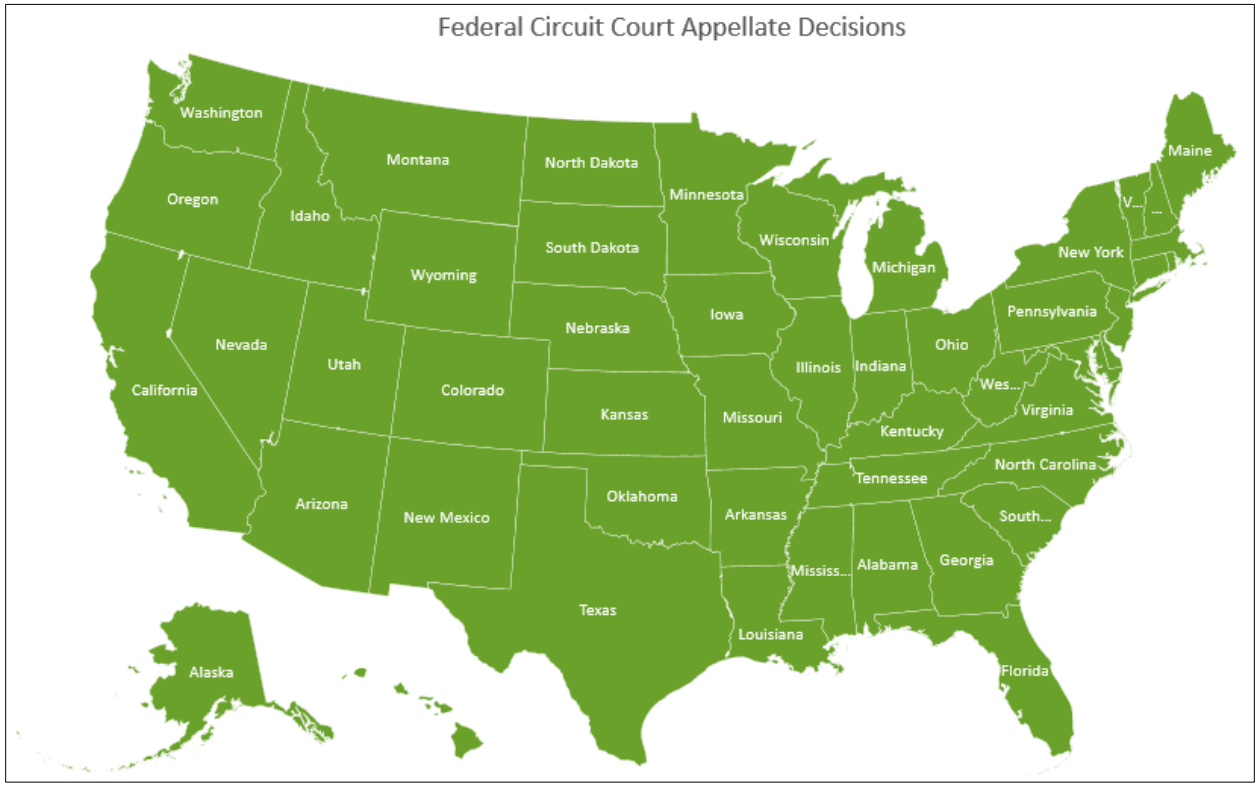
- *Nail Nook, Inc. v. Hiscox Ins. Co*., 182 N.E.3d 356 (Ct. App. Ohio 2021) ("[A]ssuming all of the allegations in Nail Nook's complaint were true, Nail Nook did not have a valid claim for coverage because it could not prove 'direct physical loss of or damage to Covered Property.'"); and

- *Sweet Berry Café, Inc. v. Society Ins., Inc.*, No. 20-CH-266, slip op. at *26 (Ill. Ct. App. Mar. 15, 2022) ("We conclude that the policy unambiguously requires a physical alteration or substantial dispossession, not merely loss of use, which is what Café sufficiently pleaded it experienced.").

There is such a vast number of decisions, we thought images might aid the Court in seeing this precedent. First, the state court appellate decisions dismissing COVID-19 property coverage cases are shown in green below:



Second, the federal circuit court decisions dismissing COVID-19 property coverage cases are shown in green below:




Hundreds of lower courts from across the country, which are far too numerous to list, also concur.[4]

[4] Contrary to CRO's contention, this unanimity does not reflect some sort of judicial "echo chamber." App. Br. at 37. The uniformity with which courts, state and federal, have decided these issues in the COVID-19 context is hardly surprising. It reflects the fact that contract-interpretation principles are materially identical state to state. It also reflects the underlying uniformity of pre-COVID decisions in this area of law, as has been explained by insurers and *amici* in hundreds of courts. After all, "'[p]hysical' has to mean something." *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 552 (Iowa 2022). There is no reason that a court in New York applying the same principles of interpretation to the same alleged facts and same insurance contract language should differ in its decision from one in Iowa or Florida

## C. CRO's Arguments To The Contrary Are Unavailing

### 1. The Appellate Division Applied The Correct Standard Of Review.

CRO argues that the Appellate Division failed to give its pleaded facts due deference. *See* App. Br. at 43-52. It argues that the courts below failed to credit reasonable inferences in its favor and disregarded the "science" of COVID-19.

But CRO's well-pleaded facts—even ignoring the caveats explained at Section IV(B)(1)(a) above—allege, at most, the presence of the COVID-19 virus "attached" to surfaces at its Restaurants and could infect humans. *See* App. Br. at 47 (citing relevant portions of the record.) The courts below properly took these facts as true and determined that—as a matter of contract interpretation—the Insurance Contract did not afford coverage. CRO also claims that its allegation that the presence of COVID-19 causes direct physical loss or damage is entitled to deference as a *fact*. *Id.* But that allegation is an obvious legal conclusion. Indeed, it is *the legal conclusion* that this Court is being asked to make. As such, it is entitled to no deference. *Cardinale v. New York City Dep't of Educ.*, 204 A.D.3d 994, 998, 168 N.Y.S.3d 90, 94 (2022), *appeal dismissed*, 39 N.Y.3d 966, 200 N.E.3d 120 (2022) (no deference given to "'the legal conclusions drawn by the pleader nor [the] interpretation of the statutes [or contracts]' invoked in the petition" (quoting *City of*

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or Texas. In fact, the opposite would be most unusual. At bottom, CRO does not really have an issue with the courts' uniformity. It just does not like the conclusion the courts have reached.

*Albany v. McMorran*, 16 A.D.2d 1021, 230 N.Y.S.2d 438, 440 (1962)).[5] And even if one could call such allegations "facts," the Appellate Division correctly rejected them as well. *See, e.g.*, *Barnes v. Hodge*, 118 A.D.3d 633, 633, 989 N.Y.S.2d 467 (1st Dep't 2014) ("conclusory allegations … are insufficient to survive a motion to dismiss").

**2. CRO Finds No Support In Pre-COVID New York Law.**

CRO cites two pre-COVID New York authorities for the proposition that coverage is triggered. The first is the Second Department decision in *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 806 N.Y.S.2d 709 (2d Dep't 2005). CRO claims that the Appellate Division's Decision "turned *Pepsico* on its head." App. Br. at 34. CRO is wrong because *Pepsico* is completely consistent with the First Department's decision below.

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[5] CRO also accuses the First Department of relying on "junk science." *See* App. Br. at 51. But the decision below—like that of more than 200 other appellate courts—turns on contractual interpretation. The First Department properly took as true all of CRO's non-conclusory allegations about COVID-19's effect on property. Doing so, it determined that, as a matter of *contract law*, the parties did not intend for insurance coverage under those facts. Even a courtroom full of Nobel Laureates confirming CRO's allegations would not change the outcome.

Similarly unpersuasive are the amicus briefs filed in other cases by doctors' lobby groups. None of them say anything of use to any court, and they pretend a neutrality that does not exist. Doctors, hospitals, and other medical professionals whose business was impacted by temporary government prohibitions on elective procedures make up a large number of plaintiffs in COVID-19 property insurance lawsuits nationwide.

*Pepsico* concerned two appeals regarding the manufacture of soda using faulty ingredients. In the first appeal, the court explained that "Pepsico used faulty raw ingredients supplied by third-party suppliers," which "resulted in the finished product having an off-taste," "rendered the products unmerchantable[,] and necessitated their destruction." *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 13 A.D.3d 599, 599, 788 N.Y.S.2d 142 (2d Dep't 2004). In the second appeal, the same court determined that the soda was physically damaged because it was physically unsaleable and had to be destroyed. *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d at 744 (2d Dep't 2005).

Here, CRO's financial loss is not due to direct physical damage that required insured property to be destroyed like the soda in *Pepsico*. As the Appellate Division explained below in distinguishing the case, "the product (soda) was, in fact, physically altered so as to render it unsellable to consumers." *Consolidated Restaurant*, 167 N.Y.S.3d at 24. And the physically altered soda had to be replaced because it was unsellable. By contrast, CRO alleges no destruction and no repair or replacement of any kind.

CRO's second case is an unpublished table decision in *Schlamm Stone & Dolan, LLP. v. Seneca Ins. Co.*, 6 Misc. 3d 1037(A) (Sup. Ct., New York Cty. 2005). In that case, the insurance contract was a "Special Business Owners" contract that used materially different wording. It specifically defined "property damage" to

include "physical injury to or destruction of tangible property … including the *loss of use* thereof at any time" or the "*loss of use* of tangible property which *has not* been physically injured or destroyed." *Id.* at *4 (italics added.) CRO did not purchase such coverage, and the *Schlamm* insurance contract is not comparable to Insurance Contract here.

At any rate, the facts in *Schlamm* would not give rise to coverage for direct physical loss or damage anyway. The insured in that case suffered dust and debris in its downtown offices after the terrorist attacks of September 11. *Id.* at *1. Despite cleaning the carpets, airshafts, furniture, and surfaces, the dust and debris problem persisted. *Id.* The insured was also not allowed to return to its office for the first five days after the attacks by order of New York City. The Supreme Court concluded there was no coverage because the insured did not show that losses were caused by "damage to its premises," and the City's order was a "superseding, intervening cause of its injury." *Id.* at *3. As for the claims for loss following the first five days after the terror attacks, the Court determined that there was a potential for coverage only because the insurance contract in that case expressly covered loss of use. *Id.*

Here, of course, the Insurance Contract does not cover "loss of use." Moreover, in *Schlamm*, the persistence of the debris after cleaning rendered it a "permanent, physical alteration of property," unlike the transient, ephemeral presence of the SARS-CoV-2 virus. *See Buffalo Xerographix, Inc. v. Sentinel Ins.*

*Co., Ltd.*, No. 20-cv-520, 2021 WL 2471315, at *4 (W.D.N.Y. June 16, 2021) (distinguishing *Schlamm*); *see also Sharde Harvey, D.D.S., PLLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-3350, 2021 WL 1034259, at *10 (S.D.N.Y. Mar. 18, 2021) (distinguishing *Schlamm* based on persistence of debris, unlike SARS-CoV-2 virus, which is eliminated by "routine cleaning and disinfecting").

CRO cites no other New York authority in support of its argument that coverage is triggered.

### 3. CRO's Contract-Interpretation Arguments Are Incorrect.

#### a. The Absence Of A Virus Exclusion Is Irrelevant.

CRO, a sophisticated insured, next argues that the lack of an ISO (Insurance Services Office) virus exclusion in the Insurance Contract proves that the Insurance Contract covers losses from the alleged presence of a virus. App. Br. at 10; 26-27. But doing so would contravene basic tenets of contract interpretation. Because the Insurance Contract is construed based on the words it contains, "[t]he absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention to provide coverage." *Com. Union Ins. Co. v. Flagship Marine Servs., Inc.*, 190 F.3d 26, 33 (2d Cir. 1999) (citation omitted); *accord Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 31 N.Y.3d 131, 137, 74 N.Y.S.3d 162 (2018) ("Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to

decide."); *Last Time Beverage Corp. v. F & V Distrib. Co.*, 98 A.D.3d 947, 951, 951 N.Y.S.2d 77 (2d Dep't 2012) ("matters extrinsic to the agreement may not be considered when the parties' intent can be gleaned from the face of the instrument …."). Indeed, even the *presence* of an exclusion cannot be used to draw "negative inferences from the policy's exclusions" because "it is a 'basic principle that exclusion clauses subtract from coverage rather than grant it.'" *Raymond Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 163, 800 N.Y.S.2d 89 (2005) (citation omitted.)

Accordingly, in COVID-19 cases, New York state and federal courts have concluded that the absence of a virus exclusion cannot create coverage. *See, e.g.*, *Rye Ridge Corp. v. Cincinnati Ins. Co.*, 2021 WL 1600475, at *3 (S.D.N.Y. Apr. 23, 2021) ("Plaintiffs' argument that there is no virus exclusion in the Policies is irrelevant because the Complaint does not meet its initial burden of pleading that the Policies apply.").

Finally, (1) an ISO exclusion is not necessary and (2) this is not an ISO form insurance contract where one may find such an exclusion. As such, the absence of an ISO form exclusion bears on nothing.

CRO's reliance on *Westview Assocs. v. Gaur. Nat'l Ins. Co.*, 95 N.Y.2d 334, 717 N.Y.S.2d 75 (2000) is misplaced. *Westview* dealt with a *single* insurance contract. This Court analyzed whether an exclusion limited to Coverage A of that

insurance contract could also apply to Coverage B *of the same* insurance contract. This Court concluded that it could not. But this was based on the plain reading of the insurance contract. It was not because some other exclusion may or may not have existed and was not included.

**b. The Interruption-By-Communicable-Disease Provision Is Irrelevant.**

CRO also contends that the Insurance Contract's Interruption By Communicable Disease coverage extension—under which CRO has disavowed coverage—suggests that the presence of a virus can constitute direct physical loss or damage. App. Br. at 25. But the opposite is the case. The separate Communicable Disease Interruption provision does *not* require direct physical loss or damage. Rather, it is triggered by "the actual not suspected presence of communicable disease" coupled with a restriction or prohibition of access. R121. So it offers no support for CRO's assertion. What that provision in fact shows is such coverage was available to CRO, but not under the business interruption caused by direct physical loss or damage to property provision it pursues. CRO chose both at the Supreme Court and at the Appellate Division to not pursue the Communicable Disease coverage it purchased. CRO consistently makes no claim in its opening Brief here, thus waving any such claim.

### c. CRO Misstates The Import Of An "All-Risk" Insurance Contract.

CRO contends that the Insurance Contract "broadly" covers "all risks unless specifically excluded." App. Br. at 9. That is not so. The Insurance Contract insures a limited subset of all potential fortuitous loss: "all risks of *direct physical loss or damage to insured property*," unless excluded. R84 (italics added.) And it is irrelevant: "The label 'all risk' is a misnomer. All risk policies are not 'all loss' policies" as CRO implies. *See, e.g.*, *Ingenco Holdings, LLC v. Ace Am. Ins. Co*., 921 F.3d 803, 814 n.9 (9th Cir. 2019) (quoting *Standard Structural Steel Co. v. Bethlehem Steel Corp*., 597 F. Supp. 164, 192 (D. Conn. 1984)). As another court explained in rejecting a similar argument,

> [a]lthough the term "all-risk" is afforded a broad, comprehensive meaning, an 'all-risk' policy is not an 'all loss' policy, and thus does not extend coverage for every conceivable loss. Rather, the loss must be one that is covered based on a reasonable construction of all the terms of the policy.

*Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, 608 F. Supp. 3d 1170, 1175 (M.D. Fla. 2020).

As the First Department explained in *Roundabout* "the fact that a loss was fortuitous under an 'all risk' policy does not automatically imply that such defects were covered by the policy; the 'direct physical loss' language in the policy provides a further limitation on the types of fortuitous loss covered." *Roundabout*, 302 A.D.2d at 6.

### 4. CRO's Out-of-State Authorities Are Unpersuasive.

CRO cites several decisions from outside the state that it claims support its position. Each of these cases is either distinguishable or inapplicable.

The cited cases all involve a tangible, physical alteration to property requiring repair or replacement of the insured property itself. And each of these cases has been addressed and rejected by several courts in similar COVID-19 cases.

- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am*., No. 2:12-cv-04418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia leak made the premises uninhabitable and unusable for any purpose and required extensive physical remediation);

- *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C.4th 271 (Com. Pl. 1992) (insurance contract covered "direct loss" to property "caused by vandalism or malicious mischief" with potential for coverage after the home was "heavily damaged by fire" where a fuel oil tank "ruptured");

- *Netherlands Ins. Co. v. Main St. Ingredients, LLC*, 745 F.3d 909 (8th Cir. 2014) ("property damage" defined to include certain "loss of use" alone, in third-party liability insurance contract rather than first-party property insurance contract).

- *Cooper v. Travelers Indem. Co. of Ill.*, 2002 WL 32775680, at *1-2 (N.D. Cal. No. 4, 2002) (well water on property contaminated with e. coli bacteria was permanently destroyed and required replacement);

- *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) ("gasoline and vapors thereof infiltrated and contaminated the foundation and halls and rooms of the church building" requiring over $21,000 spent on repairs, including repairing a gas leak);

- *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396 (D. Minn. 1989) (under-processed cans of corn contained "undesirable organisms" making them "unfit for human consumption," requiring them to be discarded);

- *Farmers Ins. Co. of Or. v. Trutanich*, 858 P. 2d 1332, 1336 (Or. Ct. App. 1993) (methamphetamine cooking physically damaged building components);

- *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616 (Mass. Super. Ct. Mar. 15, 1996) (pervasive oil fumes following an oil leak at a house caused damage that required extensive remediation);

- *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (case concerned expert witness admissibility issues; no analysis of contract terms; court made no express holdings on coverage);

- *Matzner v. Seaco Ins. Co*., No. Civ. A. 96-0498-B, 1998 WL 566658 (Mass. Sup. Ct. Aug. 12, 1998) (apartment building evacuated due to carbon monoxide gas, requiring repairs to chimney and ventilation system);[6] and

- *Mellin v. N. Sec. Ins. Co*., 115 A.3d 799, 805 (N.H. 2015) (pervasive odor of cat urine in condominium could not be successfully remediated; court found potential coverage due to "distinct and demonstrable alteration of the insured property").

In contrast to the above cases, CRO's allegations make clear that the presence of the virus on property is self-correcting and temporary: (1) the virus does not permanently remain on property, R56 ¶ 20, (2) there is no value to disinfecting surfaces unless an infected person has been present, R55 ¶ 18, and (3) viral presence persists only because of the continual circulation of infected persons. R54 ¶ 14.

In short, the SARS-CoV-2 virus's transient presence on property surfaces is not analogous to the contamination of property with asbestos or other substances

[6] The Massachusetts Supreme Judicial Court distinguished *Matzner* in a COVID-19 appeal because the chimney in that case was blocked and, thus, physically damaged. *Verveine*, 184 N.E.3d at 1275.

that require complex repair work or replacement to restore property to its previous state. *Accord Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 333-34 (7th Cir. 2021) (rejecting analogy between viral presence and cases involving asbestos, termite infestation, and gas infiltration).

The Third Circuit's decision in *Port Auth. Of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), illustrates this point. Cited by CRO at the Appellate Division, CRO now ignores it on appeal. The Third Circuit first held that "physical damage to a building as an entity by sources unnoticeable to the naked eye *must meet a higher threshold*." *Id.*

The Court determined that when the "presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss." *Id.*

The Third Circuit concluded that the "structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage." *Id.* The Third Circuit also concluded that future loss from the presence of asbestos "lacks the distinct and demonstrable character

necessary for first-party insurance coverage." *Id.* It is no wonder that CRO fails to address it now.

SARS-CoV-2 simply does not destroy the physical functionality of a structure. Indeed, many locations stayed fully open throughout the pandemic. Hospitals, police stations, grocery stores, and gas stations are a few examples. None of these physical structures were found so dangerous as to be "uninhabitable" or had their "function nearly eliminated or destroyed."

Courts in New York have addressed these same arguments made by other insureds and rejected them. In *Northwell Health*, for example, Judge Rakoff analyzed *Port Authority*, noting that it "harms rather than helps [the insured's] position." *Northwell Health*, 2021 WL 3139991, at *6 ("Intangible or particulate matter must 'contaminat[e] the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable.'").

The non-New York decisions cited by CRO say nothing about the impairment of "functionality." As the Third Circuit held, a "higher threshold" is required. *Port Authority*, 311 F.3d at 235. CRO does not even accurately represent the high threshold found in these non-New York cases. The non-New York decisions almost uniformly hold that a structure must be rendered "useless or uninhabitable," or its function "nearly eliminated or destroyed." *Id.* at 236. Thus, a "less demanding standard" would not "comport with the intent of a first-party 'all-risks' insurance

policy." *Id.* The Court should reject CRO's efforts to overturn decades of New York law and impose a lower standard than even the non-New York decisions.

### D. Four Separate Exclusions Apply To Bar Coverage For CRO's Claims

#### 1. The Contamination Exclusion C.5.

Even if CRO could establish direct physical loss or damage to insured property, its alleged losses are barred by the Contamination Exclusion. The Contamination Exclusion expressly excludes loss resulting from any pathogen or pathogenic organism, disease-causing or illness-causing agent, or virus:

> The POLICY does not insure against loss or damage caused by any of the following: …
>
> 5. Loss or damage due to the discharge, dispersal, seepage, migration, release or escape of CONTAMINANTS ….
>
> * * *

R128. "Contaminants" is defined in the Insurance Contract, in part as:

> C. CONTAMINANT(S)
>
> a. Materials that may be harmful to human health, wildlife or the environment. CONTAMINANTS include any impurity, solid, liquid, gaseous or thermal irritant or pollutant, poison, toxin, pathogen or pathogenic organism, disease-causing or illness-causing agent, asbestos, dioxin, polychlorinated biphenyls, agricultural smoke, agricultural soot, vapor, fumes, acids, alkalis, chemicals, bacteria, virus, ….
>
> * * *

R143.

CRO alleges that its losses "result from direct physical loss or damage to property, including, but not necessarily limited to, the actual presence of the virus in the Restaurants [and] the threated presence of the virus in the Restaurants due to its ubiquity …." R60 ¶ 36. The SARS-CoV-2 virus is a virus. Therefore, CRO's claims are excluded by the plain terms of the Contamination Exclusion.

There is no coverage for any "loss or damage due to the discharge, dispersal, seepage, migration, release or escape of … materials that may be harmful to human health … [including] pathogen or pathogenic organism, disease-causing or illness-causing agent, [or] virus." SARS-CoV-2 is "harmful to human health." It is also a "pathogen or pathogenic organism." It is also a "disease-causing or illness-causing agent." It is also a "virus." R143.

Courts applying New York law have repeatedly dismissed near-identical cases based on similar exclusions. For example, in *Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108 (S.D.N.Y. 2021), the court dismissed nearly identical COVID-19 claims where the insurance contract there excluded losses caused by the "release, discharge, escape or dispersal" of "contaminants or pollutants" and, like the Insurance Contract here, specifically defined "contaminant" to include viruses. *Id.* at 121. *See also Off. Sol. Grp., LLC v. Nat'l Fire Ins. Co. of Hartford*, 544 F. Supp. 3d 405, 417 (S.D.N.Y. 2021) (insurance contract "unambiguously excludes

coverage for damage caused by the COVID-19 virus" based on microbe exclusion barring coverage for losses caused by "virus").

In *Chef's Warehouse, Inc. v. Liberty Mut. Ins. Co.*, No. 20-cv-04825-(KPF), 2022 WL 3097093 (S.D.N.Y. May 2, 2022), the court concluded there was no coverage when a similar contamination exclusion barred coverage. There, the exclusion barred coverage for "contamination" where "contamination" was defined as "any condition of property that results from a contaminant," with "contaminant" defined to include "virus or any disease-causing or illness-causing agent." *Id.* at *2. The court held that "the ordinary meaning of the contamination exclusion extends to plaintiff's claim in this case," and granted dismissal. *Id.* at *9.

Courts across the country considering COVID-19 claims and similar exclusions agree with New York law:

- *OTG Mgmt. PHL LLC v. Employers Ins. Co. of Wausau*, 557 F. Supp. 3d 556, 562, 567 (D.N.J. 2021) (applying New York law and dismissing claims based on a Contamination Exclusion that, as here, defined "contaminant" to include "virus," ruling that the court "joins the overwhelming majority of courts that have considered Plaintiffs' argument with respect to the interpretation of similar insurance coverage exclusions in the context of the COVID-19 pandemic and concludes that the Contamination Exclusion is unambiguous and applies to insurance claims under the Policy for losses due to the COVID-19 pandemic.");

- *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021), *aff'd*, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022) ("I find that the SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy's pollutants-or-contaminants exclusion. Circus Circus cannot reasonably claim that SARS-CoV-2 is not a virus. Its own pleadings support a finding that the virus has been released, dispersed,

and discharged into the atmosphere, resulting in infections and transmissions."); and

- *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041-43 (W.D. Mo. Dec. 2, 2020) (claims barred by exclusion for losses "caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS," which (as here) was expressly defined to include "virus").

As numerous courts in New York and throughout the country have already held, exclusions materially similar to the Contamination Exclusion bar coverage for CRO's alleged SARS-CoV-2-related losses. Contracts of insurance must be interpreted "so as to give effect to the intention of the parties as expressed in the unequivocal language employed," *Broad Street, LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 130, 832 N.Y.S.2d 1 (1st Dep't 2006). There is no dispute that the loss barred by the Contamination Exclusion includes loss due to virus, which necessarily includes the SARS-CoV-2 virus. Thus, there is no coverage under the Insurance Contract for CRO's claims.

CRO asserts that the Contamination Exclusion does not apply because it can be interpreted only as a standard environmental pollution exclusion. Bizarrely, however, CRO admits that the words "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" in an exclusion would apply to bar coverage here. App. Br. at 10. Although it recognizes that this exclusion and the Contamination Exclusion here are virtually identical, CRO claims that the

inclusion of the words "discharge, dispersal, seepage, migration, release or escape" at the beginning of the Contamination Exclusion eliminates the word "virus" from the exclusion and means it only applies to "traditional environmental pollutants." App. Br. at 54-55. CRO cites *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 763 N.Y.S.2d 790 (2003) for support. But that argument ignores the plain language of the Contamination Exclusion.

First, the *Contamination* Exclusion, which bars losses caused by a "virus," is nothing like a traditional *pollution* exclusion. Thus, CRO cannot rely on *Belt Painting*, which only addressed a traditional environmental pollution exclusion that did not mention "virus." The Third Department rejected a similar attempt.

In *Broome Cty. v. Travelers Indem. Co.*, 125 A.D.3d 1241, 6 N.Y.S.3d 300 (3d Dep't 2015), the Third Department reversed the trial court because it found that the plain meaning of a similar exclusion applied to bar coverage. The exclusion in *Broome County*, like the Contamination Exclusion here, was modified to expand its scope beyond the exclusion at issue in *Belt Painting*. Specifically, the exclusion there included in the definition of "pollutant" the phrase "and any unhealthy or hazardous building materials (including but not limited to asbestos and lead products or materials containing lead)." *Id.* at 1242.

The Third Department distinguished *Belt Painting* on the basis that the insurance contract in *Belt Painting* was a third-party commercial general liability

contract. *Id.* Like CRO does here, the insured in *Broome County* argued that the words "discharge" and "disposal" were terms of art in environmental law and only referred to damage "caused by disposal or containment of hazardous waste." *Id.* at 1243.

The Third Department rejected this argument. The Court found that if the words "discharge, dispersal, seepage, migration, release or escape" were read as "terms of art in environmental law" and only applied to "traditional environmental pollution," then "the exclusion [would have] no significance at all in this first-party policy." *Id.* Indeed, the Third Department highlighted the fact that the addition of "building materials" in the definition of pollutants was not found in the exclusion in *Belt Painting*. Thus, the "only reasonable reading that gives the pollution exclusion here a meaning" is that it "precludes coverage for the loss at issue." *Id.*

The same reasoning applies here. The Contamination Exclusion unambiguously applies to any loss caused by the "discharge, dispersal, seepage, migration, release or escape" of a "pathogen or pathogenic organism, disease-causing or illness-causing agent, … bacteria, [or] virus." It thus is significantly broader than a typical environmental pollution exclusion. It applies to bar CRO's claim which results from the COVID-19 pandemic brought on by the SARS-CoV-2 virus.

Second, the Court in *Northwell Health* considered and rejected CRO's same argument. In *Northwell Health*, the Honorable Jed Rakoff noted "what is a sneeze or cough if not a discharge or dispersal?" *Northwell Health*, 2021 WL 3139991, at *9. The Court rejected the plaintiff's argument that the exclusion was an "environmental exclusion" because it used the words "release" and "discharge" and therefore the court should treat the word "virus" in the clause as if it were not there. *Id.* The Court held that a similar exclusion "unambiguously excludes coverage." The Court distinguished the exclusion in *Belt Painting* because the exclusion at issue in *Northwell* contained a definition that included viruses and must be considered to avoid rendering that part of the insurance contract "meaningless." *Id.*

As for CRO's claim that certain words like "dispersal" and "discharge" can be used *only* in the context of a traditional environmental pollution exclusion, the Contamination Exclusion also uses the word "migration." Migration means "the act, process, or an instance of migrating."[7] Migrate means "to move from one country, place or locality to another," or "to pass usually periodically from one region or climate to another for feeding or breeding," or "to change position or location in an organism or substance."[8] What is the activity of a virus that starts in China and

[7] https://www.merriam-webster.com/dictionary/migration.
[8] https://www.merriam-webster.com/dictionary/migrate.

travels all over the world causing a pandemic if not migration? The definition fits perfectly.

Contamination is defined to include "virus." The government orders were entered for one reason: the coronavirus. Without the coronavirus there would be no government orders. As a result, the Contamination Exclusion bars coverage for CRO's losses.

**2. The Microorganism Exclusion B.6.**

CRO's alleged losses also fit in the Microorganism Exclusion. It states:

> This POLICY does not insure against the following types of loss or damage: …
>
> > 6. mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substances whose presence poses an actual or potential threat to human health, wet rot or dry rot ….
>
> * * *

R128.

The plain wording of the Microorganism Exclusion bars coverage here. There is no coverage for any "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, …." *Id.* The opinions analyzed in Section IV(D)(1) above all support the conclusion that the Microorganism Exclusion bars coverage here. The exclusion is not ambiguous.

CRO's claim that SARS-CoV-2 or COVID-19 fall outside the exclusion for an "other microorganism of any type, nature, or description, including but not limited to any substances whose presence poses an actual or potential threat to human health" has no merit.

The CDC itself describes SARS-CoV-2 as a microorganism. R218, 222. The word "microorganism" also appears in numerous federal and state regulations, and in each such instance, it is defined broadly to include viruses. R240, 242, 249, 253, 265, 269, 275, 276, 277, 278, 282. The language is neither vague nor ambiguous and, therefore, the coverage barred includes the SARS-CoV-2 virus.

In addition, the Seventh Circuit in *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303 (7th Cir. 2021), held that the identical microorganism exclusion applied to bar coverage. In *Crescent Plaza*, the Seventh Circuit noted that since "microorganism" was not defined in the insurance contract, the Court was to "construe it as an ordinary reader or policyholder would." *Id.* at 309.

The Court looked to the dictionary definition and noted many dictionaries included "virus" in the definition of "microorganism." *Id.* It was true that some dictionaries did not include "virus," but the Court did not find that persuasive because "debate among experts is not necessarily enough to render the exclusion ambiguous." *Id.* Rather, the question is how an *ordinary* reader or policyholder, not a scientist, understands the term as used in the contract.

The Court held that the context in which the term "microorganism" was used confirmed that the "exclusion unambiguously applies to viruses." *Id.* at 310. The Court noted that the wording is deliberately broad and "signal clearly that the exclusion applies to losses caused by viruses." *Id.* The Microorganism Exclusion broadly bars coverage for microorganisms of "any type, nature, or description" and applies broadly to "any substance whose presence poses an actual or potential threat to human health." R128.

The Seventh Circuit concluded that "rather than attempting to list every conceivable example of a microorganism," the provision "used broad language that a reasonable reader would understand to include viruses." 20 F.4th at 310. Therefore, SARS-CoV-2 falls within the wording in the Microorganism Exclusion as it is a "microorganism of any type, nature, or description," and its "presence poses an actual or potential threat to human health." *Id.* As a result, the Microorganism Exclusion bars coverage for CRO's losses.

**3. The Loss of Market/Interruption Of Business Exclusion B.1.**

The Loss of Market/Interruption of Business Exclusion states as follows:

> This POLICY does not insure against the following types of loss or damage:
>
> 1. a. indirect or remote loss or damage;
> b. delay or loss of market; or
> c. interruption of business unless otherwise provided hereon;
>
> * * *

R127.

The plain meaning of the Loss of Market/Interruption of Business Exclusion applies to exclude CRO's alleged losses here. CRO alleges that the government orders "devastated" CRO's business and turned its Restaurants into "virtual ghost-towns." R52 ¶ 4. CRO's alleged losses are due to the government orders that closed or limited its Restaurants, which resulted in a loss of market for CRO. The stay-at-home orders also limited customers from venturing out to dine. The alleged losses that resulted from the decrease in the customer base or customer demand is excluded from coverage as a loss of market.

CRO claims that the application of the Loss of Market/Interruption of Business Exclusion is only meant for "losses resulting from economic changes [such as] competition, shifts in demand, or the like." App. Br. at 57. CRO's argument has no merit.

In *U.S. Airways v. Commonwealth Ins.*, 64 Va. Cir. 408 (Cir. Ct. 2004), the court held that the loss of market exclusion applied to certain "market share" losses claimed by the policyholder under its business interruption insurance contract. The Court agreed with the insurer that the loss of market exclusion barred coverage "for loss of market share as a result of business interruption" because it was clear and unambiguous. *Id.* at *6. CRO's losses are explicitly alleged to be from the loss of

people due to government orders, leaving their Restaurants "virtual ghost-towns." Thus, the Loss of Market/Interruption of Business Exclusion applies to bar coverage.

**4. The Concurrent Closures Exclusion D.1.**

The Concurrent Closures Exclusion applies to bar coverage. It states:

> This POLICY does not insure against TIME ELEMENT loss for any period during which business would not or could not have been conducted for any reason other than physical loss or damage insured by this POLICY to INSURED PROPERTY.
>
> * * *

R129.

Here, the time element losses sought by CRO are barred because the period that its business "would not or could not have been conducted" is not due to physical loss or damage insured by the Insurance Contract, as outlined above. All purported loss allegedly directly results from government orders implemented to slow the spread of COVID-19, and not any physical loss or damage insured by the Insurance Contract to insured property. Thus, the Concurrent Closures Exclusion applies to bar coverage.

**5. CRO's Argument That The Insurance Contract's Exclusions Prove That It Covers "Physical Loss Or Damage" Caused By Viruses Has No Merit.**

Lastly, CRO also asserts that the Insurance Contract's exclusions confirm that a viral substance can cause "physical loss or damage." CRO seeks to walk a tightrope here because it wants to argue that the fact there is an exclusion barring coverage for

a "viral substance" proves that a "viral substance" can cause "direct physical loss or damage to insured property." At the same time, CRO must also argue that the same exclusion for "viral substance" does not apply to bar coverage. CRO, however, slips off the tightrope and its admissions are telling.

First, as explained above in Section IV(C)(3)(a), exclusions do not create coverage. Second, CRO's admission that the Insurance Contract excludes viruses is fatal. CRO admits that the Insurance Coverage "bars coverage for 'loss or damage' due to a long list of noxious substances released or discharged 'unlawfully' or as traditional environmental pollution," and that this includes "*specifically*, 'loss or damage' caused by viruses." App. Br. at 26.

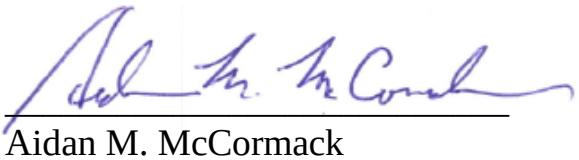
CRO then vaguely dedicates half a sentence as to why the virus exclusion it identifies (the Contamination Exclusion) does not apply. CRO's meager explanation is that the exclusion does not apply "in certain specific circumstances absent here." *Id.* CRO does not explain what those circumstances are. Thus, CRO's admission that the Insurance Contract excludes coverage for "loss or damage" caused by viruses confirms there is no coverage. Any belated explanation of the "specific circumstances absent here" is irrelevant because, as explained above, the Contamination Exclusion applies to bar coverage.

## V. CONCLUSION

CRO asks this Court not only to overrule the First Department, but to upend decades of New York property insurance law. Their requested relief is unsupported by the facts and existing law. This Court should affirm the judgment of the First Department.

Dated: March 1, 2023

Respectfully submitted,



Aidan M. McCormack
Robert C. Santoro
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, New York 10020
aidan.mccormack@us.dlapiper.com
robert.santoro@us.dlapiper.com

*Counsel for Defendant-Respondent Westport Insurance Corporation*

**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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Dated: March 1, 2023

Aidan M. McCormack
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, New York 10020
(212) 335-3500
Attorneys for Westport Insurance Corporation

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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 March 1, 2023**

deponent served the within: **Brief for Respondent**

**upon:**

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

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on March 1, 2023**

Mariana Braylovskiy

**MARIANA BRAYLOVSKIY**
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

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