

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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|---------------------------|---|-----------------------|
| CONSOLIDATED RESTAURANT | : | Index No. |
| OPERATIONS, INC., | : | |
| | : | Date Purchased: |
| Plaintiff, | : | |
| v. | : | <u>SUMMONS</u> |
| | : | |
| WESTPORT INSURANCE CORP., | : | |
| | : | |
| Defendant. | : | |
| | : | |

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The insurance policy that constitutes the subject matter of this action contains a forum-selection clause. Through that clause, you have consented to the jurisdiction of the courts of the State of New York. *Cf.* SP 10 564 1117 ("The parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law, the parties expressly waive all

rights to challenge or otherwise limit such jurisdiction.”). Accordingly, the Court has personal jurisdiction over these claims. Moreover, because neither party resides in the State of New York, and because Plaintiff may therefore designate any county for the place of trial, venue in this Court is proper. *Cf.* N.Y. C.P.L.R. §503(a).

Dated: New York, New York
August 5, 2020

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Consolidated Restaurant
Operations, Inc.***

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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|---------------------------|---|-----------------------------------|
| CONSOLIDATED RESTAURANT | : | Index No. |
| OPERATIONS, INC., | : | |
| | : | <u>COMPLAINT</u> |
| | : | |
| Plaintiff, | : | <u>JURY TRIAL DEMANDED</u> |
| | : | |
| v. | : | |
| | : | |
| WESTPORT INSURANCE CORP., | : | |
| | : | |
| Defendant. | : | |
| | : | |

Plaintiff Consolidated Restaurant Operations, Inc. ("CRO" or "Plaintiff"), by and through its undersigned attorneys, as and for its Complaint against Westport Insurance Corp. ("Westport" or "Defendant"), alleges as follows:

INTRODUCTION

1. This is an action for declaratory relief as well as damages for breach of contract arising out of Westport's repudiation of its contractual duty to pay claims for direct physical loss or damage to property stemming from the COVID-19 pandemic.

2. CRO operates more than 27 full-service and 27 franchise restaurants in 12 states and the United Arab Emirates. CRO employs more than 3,200 full and part-time employees. And in a region that is home to more than 25 Fortune 500 companies and 6.4 million residents, CRO ranks as the 70th largest privately held company in Dallas-Fort Worth. It serves more than 7 million meals annually.

3. The very qualities that make CRO a successful global restaurant group made it particularly vulnerable to the virus. In March 2020, all of CRO's insured

locations (the “Restaurants”) were forced to close by various stay-at-home orders (the “Orders”), which directed all non-essential businesses to cease operations. The Orders explained that these drastic measures were needed because of the unique characteristics of the virus and, of particular relevance here, its propensity to damage property.

4. The Orders have devastated CRO’s business. Overnight, the Restaurants went from busy, bustling destinations for dining to virtual ghost-towns, decimating CRO’s business. Indeed, CRO has experienced tens of millions of dollars in losses and expects to suffer tens of millions more in future losses from lost revenue, as well as other losses and expenses in connection with the pandemic.

5. A prudent business, however, CRO had the foresight to purchase \$50 million of per-occurrence business interruption insurance from Westport that covers “all risks.” The “all risks” include the very risk to CRO’s business that materialized during the pandemic. That policy (the “All-Risk Policy”), policy no. NAP 2002671 01, is attached to this Complaint. *See Exhibit A.*

6. In violation of its duties under the All-Risk Policy, Westport has given every indication it will not cover losses stemming from the pandemic. Its principal position is that neither the virus nor the attendant disease causes physical loss or damage to property, as that terminology is used in the All-Risk Policy. That position contravenes the plain meaning of the coverage language and case law in New York and across the country interpreting the same or similar language. Westport’s refusal to cover CRO’s losses thus lacks any justifiable basis in law or fact.

7. As a result, CRO has been forced to bring this breach of contract action through which it seeks damages and a declaratory judgment that Westport's "defenses" do not bar coverage.

THE PARTIES

8. Plaintiff Consolidated Restaurant Operations, Inc., is a corporation organized under the laws of Texas with its principal place of business at 1200 Stemmons Freeway, Suite 100, Dallas, TX 75234.

9. Upon information and belief, Defendant Westport Insurance Corp. is a corporation organized under the laws of Missouri with its principal place of business at 5200 Metcalf Avenue, Overland Park, KS 66201, and with its registered agent at 120 South Central Avenue, Clayton, MO 63105.

JURISDICTION AND VENUE

10. Because Defendant has consented to the jurisdiction of the courts of the State of New York through a forum-selection clause, the Court has personal jurisdiction over these claims. *Cf.* Ex. A, at SP 10 564 1117 ("The parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.").

11. Because neither party resides in the State of New York, and because Plaintiff may therefore designate any county for the place of trial, venue in this Court is proper. *Cf.* N.Y. C.P.L.R. § 503(a).

FACTUAL ALLEGATIONS

I. The Coronavirus Outbreak

12. In December 2019, during the term of the All-Risk Policy, an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first identified in Wuhan, Hubei Province, China. In an event that has not occurred in more than a century, a pandemic of global proportions then ensued, with the virus quickly spreading to Europe and then to the United States.

13. From the first reported case in the United States in January 2020 to the present, the impact of the virus and the resulting disease has been staggering on life and property. And specifically, the impact on businesses whose livelihoods depend on foot-traffic, such as CRO, has been particularly acute.

14. As of February 26, 2020, the Centers for Disease Control and Prevention (the “CDC”) warned that community transmission of the disease existed in the United States. The virus was spreading with no ability to trace the origins of new infections.¹ Moreover, the nature of the virus has made its containment particularly challenging. Numerous scientific studies and articles have concluded the virus spreads when droplets from an infected person land on objects and surfaces and then, after contacting the infected objects and surfaces, other individuals touch their eyes, noses, or mouths.

¹ *CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S.*, Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html> (last visited July 24, 2020).

15. Indeed, according to the CDC, “everyone is at risk for getting COVID-19.” Per the CDC and World Health Organization (the “WHO”), a person may become infected by: (1) coming into close contact (about 6 feet) with a person who has COVID-19; (2) absorbing respiratory droplets when an infected person talks, sneezes, or coughs; or (3) touching surfaces or objects that have the virus on them and then touching his or her mouth, eyes, or nose.

16. An experiment commissioned in Japan underscores just how easy it is to spread the virus.² The experiment involved 10 individuals, one who played the infected person. Fluorescent paint was applied to that person’s palms to replicate what might happen after a sneeze was covered with the hands. All 10 individuals then ate a buffet-style meal for just 30 minutes before a black light was used to track the spread of the “virus.” Traces of the fluorescent paint had spread to numerous dishes, the faces of three people, and the hands of *all* 10 participants.

17. COVID-19 is not only highly contagious but deadly. According to the CDC, more than 4.8 million Americans have contracted the disease, of which more than 150,000 have died.

18. Besides being deadly, the virus is challenging to contain because infected individuals can be asymptomatic—and thus unaware that they might be spreading the virus through the mere touching of objects and surfaces. Indeed, studies have estimated that more than 40% of infected individuals may never

² See *How Easily COVID-19 Might Spread Through a Restaurant in This Black Light Experiment*, KXAN (May 16, 2020, 12:02 AM), <https://www.kxan.com/news/coronavirus/see-how-easily-covid-19-might-spread-through-a-restaurant-in-this-black-light-experiment/>.

develop any symptoms.³ But even individuals who appear healthy and present no identifiable symptoms of the disease will still spread the virus by merely breathing, speaking, or touching objects and surfaces.

19. Though droplets carrying the virus are not visible, they are nonetheless physical objects that attach to and cause harm to property. Studies have shown that the virus can survive on a whole range of surfaces, including stainless steel, wood, paper, plastic, glass, ceramic, cardboard, and cloth.

20. And unlike many other viruses that are unable to survive for long periods of time outside the body, the novel coronavirus is resilient and can survive on surfaces for days and even weeks. For instance, the CDC reported that the virus was identified on surfaces on the *Diamond Princess* cruise ship 17 days after cabins were vacated.⁴

21. The virus thus compromises the physical integrity of the structures it permeates and poses an imminent risk of physical damage to all other structures. The virus likewise renders such structures unusable.

22. Restaurants are particularly susceptible to circumstances favorable to the spread of the virus. An article published in April 2020 analyzed a case study, soon to be published by the CDC, of three families (families A, B, and C) that had eaten at an air-conditioned restaurant in Guangzhou, China. One member of family

³ Erika Edwards, *Asymptomatic COVID-19 Cases May Be More Common Than Suspected*, NBC News (May 27, 2020, 12:43 PM), <https://www.nbcnews.com/health/health-news/asymptomatic-covid-19-cases-may-be-more-common-suspected-n1215481>.

⁴ *Public Health Responses to COVID-19 Outbreaks on Cruise Ships—Worldwide, February-March 2020*, Centers for Disease Control and Prevention, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm> (last visited July 24, 2020).

A, patient A1, had recently traveled from Wuhan, China. On January 24, 2020, that family member ate at a restaurant with families A, B, and C. By February 5, 2020, 4 members of family A, 3 members of family B, and 2 members of family C had become ill with COVID-19. The only known source of the virus for those infected persons in families B and C was patient A1 at the restaurant.

II. Governments' Responses to the Pandemic

23. On December 31, 2019, the Chinese government notified the WHO of a “pneumonia of unknown cause” discovered in China’s Wuhan province. On January 3, 2020, the U.S. federal government received its first formal notification of the outbreak in China. The United States reported its first COVID-19 case on January 20, and on January 30, the WHO declared the pandemic a “Public Health Emergency of International Concern.” Yet in the first few months of 2020, the federal government failed to recognize the severity of the pandemic and did not contain the virus.

24. By the beginning of February, 11,000,000 people in China’s Wuhan province were under quarantine, and the extent of transmission was clear. Aside from limiting travel from Wuhan, however, the federal government took little action. Even though funding and medical equipment were being depleted by the day, the federal government did not authorize new funds or require the production of testing kits, ventilators, or personal protective equipment for healthcare workers.

25. In February, the virus spread throughout the United States largely undetected. Though the CDC began shipping testing kits to laboratories on February 5, the kits were later determined to be flawed, rendering the test

unreliable. By February 26, the CDC were still testing fewer than 100 patients daily, notwithstanding that the CDC were telling state and local officials that their testing capacity was more than adequate to meet current testing demands.

26. On March 13, 2020, the federal government declared a national emergency. Three days later, the CDC and members of the national Coronavirus Task Force issued public guidance, styled as “30 Days to Slow the Spread,” that advocated for the first time far-reaching social-distancing measures, such as working from home; avoiding shopping trips and gatherings of more than 10 people; and staying away from bars, restaurants, and food courts.

27. The failure of the federal government to build an effective wall preventing the continued migration of the virus from states that were hit early to the rest of the country meant that states took the lead in combating the virus’s spread. State after state imposed sweeping restrictions on residents’ daily lives to protect them and stop the spread.⁵ Most states restricted or prohibited the operation of non-essential businesses or public gatherings or required individuals to stay at home except for essential purposes.

28. According to a Columbia University study, if the government had imposed social-distancing measures just one week earlier—on March 8 instead of March 15—the United States would have avoided 703,975 confirmed cases (62%) and 35,927 reported deaths (55%) as of May 3. And if social distancing and

⁵ Jasmine C. Lee et al., *See How All 50 States Are Reopening (and Closing Again)*, N.Y. Times (updated July 31, 2020), <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html>.

lockdowns had begun just two weeks earlier—on March 1—the country would have seen a reduction of 960,937 (84%) cases and 53,990 (83%) deaths.

III. CRO's Direct Physical Losses and Damage

29. Beginning in early-March 2020, many state and local governments began to act to stem the tide of the virus. They issued Orders suspending or severely curtailing the operations of all non-essential or high-risk businesses. These businesses included CRO's Restaurants at issue in this lawsuit.

30. In March 2020, states, counties, and cities where the Restaurants are located declared states of emergency to limit the spread of the virus.

31. In March 2020, states, counties, and cities where the Restaurants are located issued orders prohibiting all restaurants within those states, counties, and cities from serving food on premises and prohibiting bars from serving alcohol. The Orders allowed restaurants to continue to operate only for purposes of preparing and offering food for drive-thru, takeout, or delivery (subject to certain restrictions). These Orders, together with similarly construed orders issued by governmental officials, effectively limited the Restaurants' on-premises dining and operations, resulting in an interruption of necessary operations and an immediate time element loss.

32. Some of the state, county, and city orders referenced above specifically stated they were being issued because the virus has caused, causes, or will cause physical loss or damage to property.

33. As the pandemic has evolved, the Orders have been renewed and amended by such authorities and continue to impose severe restrictions on all non-essential businesses.

IV. CRO's Business Interruption Losses

34. The Orders have had a devastating effect on CRO's business. Before the pandemic, CRO's Restaurants attracted thousands of visitors each day. As access has been prohibited, the Restaurants lost virtually all foot-traffic overnight.

35. As a result, CRO has suffered, and will continue to suffer, significant business interruption losses in the tens of millions of dollars. Indeed, since the end of 2019, CRO has been forced to close 30 restaurants and to exit 5 states entirely.

36. The 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; the threatened presence of the virus in the Restaurants due to its ubiquity; and the loss of function, purpose, and use of the Restaurants—all caused by the virus, the resulting disease, the pandemic, governmental negligence, or the Orders.

37. The Restaurants are within one statute mile of many other restaurants, cafes, bars, parks, and hotels that also have suffered and continue to suffer direct physical loss or damage to property arising out of the pandemic.

38. As of the filing of this Complaint, CRO has sustained tens of million of dollars in losses, which will increase substantially depending on the length and ultimate severity of the pandemic and governmental responses. Indeed, many jurisdictions have halted or reversed plans to reopen non-essential businesses. For

example, as of late-July, Arizona; California; Colorado; Florida; Kentucky; Louisiana; Michigan; Nevada; New Mexico; and Texas have reversed their reopening plans, and Alabama; Arkansas; Connecticut; Delaware; Idaho; Indiana; Mississippi; New Jersey; North Carolina; Oregon; South Carolina; and Washington have paused their plans. CRO maintains Restaurants in 5 of these jurisdictions.

V. The Westport All-Risk Policy

39. In exchange for a very substantial premium, Westport sold the All-Risk Policy covering CRO as the First Named Insured for the policy period July 1, 2019 to July 1, 2020. *See* SP 10 563 1117 at 7. The All-Risk Policy provides a per-occurrence⁶ limit of liability of \$50,000,000, with various sublimits, time limits, and waiting periods for certain coverages, and a per-occurrence deductible of \$25,000. *See* SP 10 563 1117 at 9–16.

40. Unless damage is clearly included within a listed sublimit, the full \$50,000,000 limit of liability is available for CRO's damages. *See* SP 10 563 1117 at 9–10.

41. The Restaurants are insured under the All-Risk Policy, and CRO has paid all premiums due to Westport to purchase the policy and has complied with all applicable duties under the policy.

⁶ "Occurrence" means "[t]he sum total of all loss or damage of the type insured caused by or arising out of one event, including any insured time element loss, regardless of the number of locations affected." *See* SP 10 563 1117 at 64. Note that terms capitalized or bolded in the All-Risk Policy have not been so formatted here. CRO defines the terms as applicable. When language is bolded in the Complaint, it is done so for emphasis, not to track the All-Risk Policy's formatting.

42. The property damage, time element losses, and other losses incurred and continuing to be incurred by CRO are covered under the All-Risk Policy.

43. The All-Risk Policy begins with the clear obligation that, subject to certain conditions, it broadly “insures all risks of direct physical loss or damage to insured property.”⁷ *See* SP 10 563 1117 at 1.

44. The All-Risk Policy does not define the phrase “direct physical loss or damage to [property].”

45. Direct physical loss or damage to property may be reasonably interpreted to occur when a covered cause of loss threatens property or renders property unusable or unsuitable for its intended purpose or unsafe for normal human occupancy or continued use.

46. As part of the protection from “all risks” insured under the All-Risk Policy, the policy contains time element coverage, which provides coverage for losses from the interruption of CRO’s business operations. The categories of compensable losses include, but are not limited to, gross earnings; extra expense;⁸ and rental insurance.⁹

⁷ “Insured Property” means, among other things, “[r]eal property owned by [CRO] or in which [CRO] has an insurable interest.” *See* SP 10 563 1117 at 17.

⁸ “Extra Expenses” are, among other things, “the reasonable and necessary extra costs incurred by [CRO] . . . as respects . . . extra costs to temporarily continue as nearly normal as practicable the conduct of [CRO’s] business.” *See* SP 10 563 1117 at 34–35.

⁹ “Rental Insurance” is “the Actual Loss Sustained by [CRO] . . . as respects” “the fair rental value of any portion of an insured location(s) occupied by [CRO] that [CRO] is unable to occupy following physical loss or damage,” “the income reasonably expected from rentals of unoccupied or unrented portions of insured location(s) available for rent at the time of physical loss or damage,” and “the rental income from the rented portions of insured location(s) according to bona fide leases, contracts or agreements in force at the time of physical loss or damage,” “all not to include non-continuing charges and expenses.” *See* SP 10 563 1117 at 35.

47. In addition to covering time element losses resulting from physical loss or damage to the Restaurants themselves, the All-Risk Policy includes several potentially applicable “extensions.” These extensions apply when, owing to physical loss or damage to other property, CRO suffers time element losses. They include, but are not necessarily limited to:

- Loss and extra expenses directly resulting from necessary interruption of CRO’s normal business operations;
- Loss relating to attraction properties;
- Loss relating to royalty, licensing fee, franchise fee, or commission agreements;
- Loss relating to suppliers or customers;
- Loss relating to ingress or egress;
- Loss relating to leaseholds; and
- Loss relating to orders of a civil authority.

48. The All-Risk Policy covers **attraction property** losses—that is, losses “directly resulting from direct physical loss or damage . . . to property of the type insured, but not owned or operated by [CRO], that directly attracts business to an insured location(s).” *See* SP 10 563 1117 at 35.

49. The All-Risk Policy covers **commissions, licensing fees and royalties losses**—that is, losses in the form of “royalty, licensing fee, franchise fee or commission agreements between [CRO] and another party which [are] not realizable due to direct physical loss or damage . . . to any property . . . of the other party.” *See* SP 10 563 1117 at 35–36.

50. The All-Risk Policy covers **contingent time element losses**—that is, losses

incurred by [CRO] . . . directly resulting from direct physical loss or damage . . . to any property . . . at any location(s) of suppliers or customers, provided that such physical loss or damage prevents:

I. such suppliers from supplying goods or services directly or indirectly to [CRO];

II. such customers from receiving goods or services directly or indirectly from [CRO].

See SP 10 563 1117 at 36.¹⁰

51. The All-Risk Policy covers **ingress/egress losses**—that is, losses

incurred by [CRO] due to the necessary interruption of [CRO's] business, provided that:

a. the interruption directly results from the prevention of direct ingress to or direct egress from insured location(s), whether or not insured property at such insured location(s) is damaged; and

b. the prevention above is caused by direct physical loss or damage as insured by th[e] policy to any property, including property excluded under Property Not Insured.

See SP 10 563 1117 at 37.

52. The All-Risk Policy covers **communicable disease losses**:

If an insured location owned, leased or rented by [CRO] has the actual not suspected presence of communicable disease¹¹ and access to such

¹⁰ CRO purchased coverage only for direct unnamed suppliers and customers. *See* SP 10 563 1117 at 11.

¹¹ “Communicable Disease” means “[d]isease” that is” “transmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges” or “[l]egionellosis.” *See* SP 10 563 1117 at 60.

insured location is limited, restricted or prohibited by:

- a. an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or
- b. a decision of an Officer of [CRO] as a result of the actual not suspected presence of communicable disease,

th[e] policy is extended to insure loss . . . incurred by [CRO] . . . at such insured location with the actual not suspected presence of communicable disease.

See SP 10 563 1117 at 38.¹²

53. The All-Risk Policy covers **leasehold interest losses**:

In the event of direct physical loss or damage insured by th[e] policy to insured location(s) at which [CRO] leases space and pursuant to a written lease, if the lease agreement requires continuation of rent and if the property is wholly untenable or unusable due to such physical loss or damage:

- I. the actual rent payable for the unexpired term of the lease; or,
- II. if the property is partially untenable or unusable, the proportion of the rent payable for the unexpired term of the lease; or,
- III. if the lease is canceled by the lessor pursuant to the lease agreement or by the operation of law:
 - 1) the lease interest for the first three (3) consecutive calendar months following the physical loss or damage; and
 - 2) the net lease interest for the remaining unexpired term of the lease.

See SP 10 563 1117 at 38–39.

¹² The Policy contains an analogous provision in the Property Damage section. *See* SP 10 563 1117 at 19. Together, these are the “Communicable Disease provisions.”

54. The All-Risk Policy covers **order of civil or military authority losses**—that is, losses

incurred by [CRO] due to the necessary interruption of [CRO's] business, provided that:

a. the interruption directly results from an order of a civil or military authority that prohibits partial or total access to insured location(s); and

b. the order referenced above is caused by direct physical loss or damage as insured by th[e] policy to property, including property excluded under Property Not Insured.

See SP 10 563 1117 at 40.

55. Throughout the pandemic, CRO has taken actions, some of which might qualify to protect the property, and thus Westport, from further loss. The All-Risk Policy covers time element losses “incurred by [CRO] for a period of time after [CRO] has first taken reasonable action for the temporary protection and preservation of property insured by th[e] policy provided such action is necessary to prevent immediately impending direct physical loss or damage insured by th[e] policy to such insured property.” *See* SP 10 563 1117 at 40.¹³

56. None of the All-Risk Policy's exclusions preclude CRO's claim for coverage. The exclusions are not the product of discussions or negotiations between Westport and any individual policyholder, including CRO. Rather, the exclusions in the All-Risk Policy consist of standardized language and terms that have been developed by the insurance industry through its trade associations and are used

¹³ The Policy contains an analogous provision in the Property Damage section. *See* SP 10 563 1117 at 26.

industry-wide and nationwide. These terms have acquired specialized meaning and application over time as they have been interpreted by courts.

57. The All-Risk Policy purports to conditionally exclude, as a type of loss or damage not insured, “mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health, wet rot or dry rot.”

See SP 10 563 1117 at 45. The All-Risk Policy also purports to conditionally exclude, as a cause of loss not insured, “[l]oss or damage due to the discharge, dispersal, seepage, migration, release or escape of contaminants.”¹⁴ *See* SP 10 563 1117 at 45.

VI. CRO’s Claim to Westport

58. After the Restaurants were shuttered and access denied, CRO gave prompt notice of its claim to Westport on April 16, 2020. Engle Martin & Associates (“EM & A”), which is Westport’s adjuster, initially responded to that notice nearly one month later, on May 12, 2020, and requested 15 different categories of information related to CRO’s claim.

¹⁴ “Contaminant(s)” means:

- (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, vaccines, waste, and hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, or as designated by the United States Environmental Protection Agency or any other local governmental agency.

- (b) However, contaminants do not include fungi.

See SP 10 563 1117 at 60.

59. On June 15, 2020, CRO responded to all these requests and provided documentation in support of its covered losses.

60. After receipt of that information, instead of honoring its obligations under the All-Risk Policy, on July 13, 2020, EM & A (on behalf of Westport) effectively denied coverage (the “July 13 Letter”). Westport stated, “The actual or suspected presence of the severe acute respiratory syndrome coronavirus 2 (‘SARS-CoV-2’) responsible for coronavirus disease 2019 (‘COVID-19’) does not constitute physical loss or damage to property.”

61. Westport’s position is erroneous. As pleaded, there has been direct physical loss or damage to property, including, but not necessarily limited to, the actual presence of the virus in the Restaurants; the threatened presence of the virus in the Restaurants due to its ubiquity; and the loss of function, purpose, and use of the Restaurants—all caused by the virus, the resulting disease, the pandemic, governmental negligence, or the Orders.

62. Westport indicated its view that, to the extent it believes coverage is available, coverage is limited to the Communicable Disease provisions. As Westport wrote, “The Communicable Disease Response and Interruption by Communicable Disease coverage is limited to \$250,000 combined, in the Annual Aggregate.”

63. That position is likewise erroneous. CRO’s significant costs and losses are not limited to recovery under the Communicable Disease provisions. For one, the virus might not be actually present at the Restaurants, and even for Restaurants where it was present, 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. Regardless, the threatened presence of the virus at the Restaurants or the loss of function, purpose, and use of the Restaurants qualifies as “physical loss or damage to [property].” Moreover, the Orders might have regulated not the communicable disease itself but the threat of the communicable disease or the spread of the virus that causes the disease.

64. Westport also invoked a variety of exclusions. It stated, for example, “SARS-CoV-2/COVID-19 is a ‘substance whose presence poses an actual or potential threat to human health’” and “SARS-CoV-2/COVID-19 falls within the definition of contaminant.” These assertions amount to the unmistakable conclusion that Westport’s position is CRO’s losses are excluded from coverage under the All-Risk Policy.

65. No exclusion applies, however, because, among other potential reasons, CRO’s losses do not stem from “mold, mildew, fungus, spores or other microorganism of any type, nature, or description” or from a “contamination” event or from the “discharge, dispersal, seepage, migration, release or escape of contaminants.”

66. In fact, in 2006, the Insurance Services Office (an insurance industry trade group) drafted a new endorsement, CP 01 40 07 06, acknowledging that claims for business interruption losses would be filed under existing policy language for losses resulting from the presence of disease-causing agents. The endorsement, which other insurers have since incorporated in policies, provides that the insurer

“will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” Westport chose to not include this endorsement or an analogous provision in the All-Risk Policy; instead, it included only the exclusion for “contamination.”

67. CRO’s losses, moreover, resulted from a number of causes other than the virus or disease, including, but not necessarily limited to, the pandemic, governmental negligence, or the Orders, all of which are other covered causes of loss under the All-Risk Policy.

68. The July 13 Letter thus sent a clear message that Westport did not intend to pay CRO’s significant losses covered under the All-Risk Policy.

VII. Fulfillment or Waiver of All Conditions Precedent to This Lawsuit

69. The All-Risk Policy has a Negotiation and Mediation provision. *See* SP 10 563 1117 at 52. That provision generally requires the parties to negotiate any dispute related to the Policy “promptly” and in “good faith” and, if those efforts are unsuccessful, to mediate. *Id.* For reasons explained below, Westport has waived the provision.

70. Westport has rejected CRO’s efforts to negotiate and mediate this dispute. On June 3, CRO asked Westport to contact CRO by June 10 to merely schedule a negotiation. On June 10, Westport wrote via email that it would respond “in due course.” On June 15, still hearing nothing from Westport, CRO proposed to Westport three neutral mediators as required by the All-Risk Policy and asked Westport to contact CRO by June 22 with its selection of a mediator or a proposed

mediator of its own. On June 22, Westport again wrote via email that it would respond “in due course.” To date, Westport has refused to select a date for negotiation or to select or propose a mediator.

71. Westport’s refusal to provide a date certain by which it will select a date for negotiation or to select or propose a mediator, let alone to adjust CRO’s claim, is a waiver of the Negotiation and Mediation provision, to the extent it has not yet been fulfilled.

FIRST CAUSE OF ACTION
(Breach of Contract)

72. Plaintiff repeats and realleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

73. The All-Risk Policy constitutes a valid and enforceable contract between CRO, as the “First Named Insured,” and Westport, as the “Company” providing the insurance, under the All-Risk Policy.

74. As described above, CRO has sustained, and is continuing to sustain, losses covered under the All-Risk Policy and during the policy period.

75. CRO provided prompt notice of its losses, performed all obligations required of it under the All-Risk Policy, or was ready, willing, and able to perform its obligations under the All-Risk Policy at the time Westport effectively denied coverage on July 13.

76. The July 13 Letter was a clear expression that Westport would not perform its obligations to provide coverage to CRO under the All-Risk Policy and in breach of the All-Risk Policy.

77. Under the terms of the All-Risk Policy, Westport must pay up to \$50,000,000 for any loss covered under the policy, subject only to sublimits, time limits, waiting periods, or deductibles for specific coverages.

78. Westport has not paid any amounts to CRO in connection with its claim. Instead, Westport has asserted various inapplicable bases to wrongfully deny coverage for CRO's claim.

79. As a direct and proximate result of Westport's breach of contract, CRO has suffered and will continue to suffer damages in an amount to be determined at trial, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

80. Plaintiff repeats and realleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

81. Pursuant to the terms of the All-Risk Policy, Westport is obligated to pay, up to the limit of liability, for property damage or time element losses covered under the All-Risk Policy and not otherwise excluded from coverage.

82. As detailed above, CRO's losses are covered under multiple coverages of the All-Risk Policy and are not excluded from coverage.

83. Westport disputes, or CRO reasonably believes Westport will dispute, Westport's legal obligation to pay CRO's claim.

84. CRO seeks a declaration by this Court of Westport's obligations under its All-Risk Policy.

85. An actionable and justiciable controversy exists or will exist between CRO and Westport concerning the proper construction of the All-Risk Policy, and the rights and obligations of the parties thereto, with respect to CRO's claim for expenses or losses arising out of the pandemic.

86. CRO seeks a declaratory judgment in favor of CRO and against Westport declaring the following:

- CRO has experienced "direct physical loss or damage to [property]" as that phrase is used in the All-Risk Policy, sufficient to trigger coverage;
- No exclusion, including the so-called contamination exclusion, bars that coverage, and the virus is not "mold, mildew, fungus, spores or other microorganism of any type, nature, or description";
- Westport must pay CRO up to the limits of liability for all losses covered under the All-Risk Policy; and
- The award of such additional relief as the Court deems just and appropriate.

87. A declaratory judgment would be useful in resolving this case or controversy. CRO's losses are ongoing. By clarifying the parties' rights and duties under the All-Risk Policy, a declaratory judgment would guide Westport's treatment of CRO's covered but yet unaccrued losses. Because CRO's unaccrued losses have not yet ripened such that a coercive remedy like damages is appropriate, the declaratory judgment claim would afford CRO relief independent of the breach of contract claim.

PRAYER FOR RELIEF

WHEREFORE, CRO prays for relief as follows:

- a. On the First Cause of Action, CRO requests that the Court enter judgment against Westport, awarding CRO damages in an amount to be determined at trial, but at least \$100,000, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law;
- b. On the Second Cause of Action, CRO requests that the Court enter a declaratory judgment in favor of CRO against Westport that CRO's losses are covered under the All-Risk Policy, declaring that Westport is required to pay CRO, up to the applicable limits of the policy, for claimed amounts under the policy;
- c. For all Causes of Action, all pre-judgment and post-judgment interest as allowed by law and all CRO's costs incurred as a consequence of having to prosecute this lawsuit, including attorneys' fees; and
- d. CRO requests such other and further relief as the Court deems just and proper.

JURY DEMAND

CRO hereby demands a trial by jury on all issues so triable.

Dated: New York, New York
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