IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

ROCKLAND FUNDING, L.L.C. d/b/a/ WESTBROOK PARTNERS, Appellant, v. ACE AMERICAN INSURANCE COMPANY, et al., Appellees	Case No. 4D22-2690 L.T. Case No.: 50-2021-CA-002735

ANSWER BRIEF OF ACE AMERICAN INSURANCE COMPANY

On Appeal from a Final Judgment of the
Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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PREFACE

Appellant Rockland Funding, L.L.C., d/b/a Westbrook Partners will be referred to as "Westbrook." Appellee Ace American Insurance Company will be referred to as "ACE." Appellee Continental Casualty Company will be referred to as "CNA." Appellee Endurance American Specialty Insurance will be referred to as "Endurance." Appellee Everest Indemnity Insurance Company will be referred to as "Everest." Appellee Starr Surplus Lines Insurance Company will be referred to as "Starr."

Citations to the Record on Appeal are designated as (R. ___). Citations to the Amended Initial Brief are designated as (Init. Br. ___).

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

This appeal governed by New York law is yet another chapter in the saga of insureds seeking property insurance coverage for alleged losses caused by the COVID-19 pandemic. Undaunted by nearly one-thousand nationwide decisions finding no coverage for these claims, Westbrook argues that the trial court erred in dismissing its complaint on the ground that Westbrook failed to allege that the coronavirus[1] caused direct physical loss or damage to its properties.

When Westbrook filed this appeal, no court applying New York law had allowed a similar claim to survive a motion to dismiss. The New York Court of Appeals[2] then accepted jurisdiction to consider an insured's challenge to one such dismissal order in Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp., 41 N.Y.3d 415 (N.Y. 2024) ("CRO"). On Westbrook's motion, this Court stayed

[1] SARS-CoV-2 is the virus that causes the respiratory disease COVID-19. ACE refers to SARS-CoV-2 as the "coronavirus" herein.

[2] The Court of Appeals is the court of last resort in the New York court system—equivalent to the Florida Supreme Court. The Supreme Court, Appellate Division, is the intermediary appellate court and consists of four departments covering different groups of counties—equivalent to the Florida District Courts of Appeal.

this appeal pending the outcome of CRO, which Westbrook hoped would breathe new life into its rejected theories of recovery.

Contrarily, the CRO court affirmed dismissal of the insured's complaint with prejudice and expressly declined to depart from the nationwide weight of authority, emphasizing that "no appellate court has allowed an insurance coverage claim under similar policy terms to proceed past a motion to dismiss." Id. at 432.

Westbrook attempts to circumvent this controlling precedent by misinterpreting CRO as creating a pathway to recovery for coronavirus-related property insurance claims. This Court should decline Westbrook's invitation to misapply the New York Court of Appeals' decision and affirm the trial court's dismissal of its complaint and denial of rehearing in all respects.

B. Westbrook's First Amended Complaint

Westbrook filed a First Amended Complaint against ACE, CNA, Everest, Endurance, and Starr, alleging that it is a real estate investment management company that owns offices, hotels, and other properties throughout the United States. (R. 7–8, 13–14). Westbrook obtained several property insurance policies from these

insurers for coverage from August 1, 2019, through August 1, 2020. (R. 10–11, 14–20, 42–623).[3]

Westbrook alleged that after the coronavirus was identified in early 2020, it began spreading across the globe, resulting in governmental restrictions and shutdowns. (R. 21–22, 24). Westbrook asserted that when the coronavirus contacts a surface, it creates a weak chemical bond that persists until broken through intervening forces, such as cleaning with soapy water. (R. 26–27).

According to Westbrook, until this bond is broken, the coronavirus physically alters property by transforming it into a dangerous condition that could transmit the virus to humans. (R. 27–28). Westbrook asserted that HVAC systems can absorb and redistribute the coronavirus, exacerbating transmission risks. (R. 28). Westbrook alleged that the coronavirus' alteration of its hotel properties constituted direct physical loss or damage requiring that it either repair or replace the affected properties. (R. 30).

Westbrook contended that this direct physical damage entitled it to various Policy coverages, including loss or damage to property,

[3] We refer to ACE's policy as the "Policy." (R. 45–173).

direct time element losses, losses due to orders of civil authority, losses due to impairment of ingress or egress, contingent time-element losses, expediting costs, and extra expenses. (R. 29–32).[4] Westbrook asserted one count for declaratory relief and one count for breach of contract, alleging that the insurers improperly denied coverage under their respective policies. (R. 36–39).

C. ACE Moves to Dismiss Westbrook's Complaint

ACE moved to dismiss Westbrook's First Amended Complaint with prejudice. (R. 626–64).[5] ACE first argued that the Policy's insuring agreement required direct physical loss or damage to property as a prerequisite to coverage:

> **3. INSURING AGREEMENT**
>
> This Policy covers property, as described in this Policy, against ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMGE, except as hereinafter excluded, while located at an Insured location or within 1,000 feet thereof.

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[4] Westbrook also sought coverage from the other insurers for attraction properties, closings due to death or disease, and losses due to cancellation of bookings. (R. 32–34). ACE's Policy does not provide these coverages.

[5] ACE, CNA, Everest, and Starr jointly filed this motion. Endurance filed a separate motion to dismiss. (R. 665–792).

(R. 49, 636). The direct physical loss or damage requirement applies to all coverages, including time element coverages for loss of ingress or egress, protection and preservation of property, and interruption by civil or military authority. (R. 636–37).

The Policy reinforces the direct physical loss or damage requirement by providing that ACE will pay covered claims in the amount necessary to "repair," "rebuild," or "replace" damaged property. (R. 93–94). The time element provisions similarly cover specified financial losses incurred "from the time of physical loss or damage of the type insured against" to the time such damaged property can be "repaired or replaced" and "made ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage[.]" (R. 89).

ACE cited myriad cases applying New York law and dismissing similar complaints with prejudice because the coronavirus does not physically damage property. (R. 645–47). While Westbrook alleged that the coronavirus creates a weak chemical bond with the surfaces it contacts, it conceded that basic cleaning measures would break this bond. (R. 648). ACE argued that property requiring cleaning is not damaged, and the Policy did not cover purely economic losses

untethered to direct physical damage. (R. 648–49). ACE emphasized that courts nationwide dismissed hundreds of similar cases in which insureds sought property insurance coverage for alleged damage due to the coronavirus. (R. 653).

ACE further argued that, even had Westbrook sufficiently alleged that the coronavirus physically damaged its property, the loss was excluded by the Policy's Pollution and Contamination Exclusions and Related Coverage Extension with Sub-Limits Endorsement (the "Contamination Endorsement"). (R. 659–60). Specifically, the Contamination Endorsement excludes losses caused by or resulting from the actual or threatened discharge of a virus:

> 1. This insurance does not apply to:
>
> . . . .
>
> B. **Loss or damage caused by**, resulting from, contributed to, or made worse by actual, **alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants**, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy;
>
> . . . .
>
> 3. The following definition is added to this policy:
>
> **Contaminants or Pollutants means any material which after its release can cause or**

> **threaten damage to human health or human welfare** or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, **including but not limited to** bacteria, fungi, **virus** or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency.

(R. 145–47) (emphasis added). ACE argued that the coronavirus fell squarely within the Contamination Endorsement's plain language, and it cited several cases denying coverage based on the same or similar policy exclusions. (R. 659–60). Because Westbrook sought coverage for alleged losses directly caused by the coronavirus, ACE argued that the Contamination Endorsement excluded the claim based on Westbrook's own allegations. (R. 660).

Lastly, ACE argued that the claim was excluded pursuant to the Policy's Loss of Market and Loss of Use Exclusion (the "Loss of Use Exclusion"), which provides:

> **PROPERTY DAMAGE – SECTION B**
>
> . . . .
>
> **5. EXCLUSIONS.**
>
> The following exclusions apply unless specifically stated elsewhere in this Policy:

> A. This Policy excludes:
>
> 1) indirect or remote loss or damage.
>
> 2) interruption of business, except to the extent provided by this Policy.
>
> 3) loss of market or loss of use except as noted in the Extended Period of Indemnity Coverage.

(R. 77, 660). ACE argued that the Loss of Use Exclusion reinforces that the Policy excludes economic losses untethered to physical loss or damage. (R. 660). Because Westbrook failed to allege such physical loss or damage, it effectively sought coverage for its temporary loss of use and loss of market during the time the government ordered it to close its properties to the public, which loss fell within the Loss of Use Exclusion. (R. 660–61).

D. Westbrook's Responds to ACE's Motion to Dismiss

Westbrook responded that it sufficiently alleged direct physical loss or damage because the coronavirus attached to and altered its properties. (R. 798–850). Westbrook also argued that basic cleaning measures could not remedy the "damage" to its HVAC systems from viral particles. (R. 807–08, 830). According to Westbrook, it had to remediate or replace affected property. (R. 811–12, 822).

Westbrook further argued that the Contamination Endorsement applied only to traditional environmental pollutants, but not viruses, even though it expressly defined "contaminants or pollutants" to include a "virus." (R. 844–45). Westbrook lastly argued that the Loss of Use Exclusion did not apply because the coronavirus physically damaged its properties. (R. 845–46).

E. ACE Replies to Westbrook's Response

ACE replied that Westbrook glossed over the New York cases it cited finding similar conclusory allegations insufficient to state a claim for coronavirus-related property damage. (R. 914–37). ACE cited several additional decisions in which courts explained that the coronavirus cannot damage property. (R. 921–22). ACE also argued that mere loss of use due to the threat of contamination did not equate to physical damage. (R. 925–26). Westbrook's own allegations that simple cleaning can remove the coronavirus from surfaces underscored that no such loss or damage occurred. (R. 926–27).

F. The Trial Court Dismisses Westbrook's Complaint

After a reported hearing, (R. 1109–1255), the trial court entered an order dismissing Westbrook's First Amended Complaint with prejudice as to ACE, relying on numerous cases in which courts

applying New York law dismissed similar claims because the coronavirus does not physically damage property. (R. 960–974). The trial court found Westbrook's allegations that the coronavirus altered its properties insufficient, explaining that mere loss of use does not equate to physical loss or damage. (R. 967–69). The trial court emphasized Westbrook's own allegation that viral particles could be remedied with basic cleaning, which further showed the lack of physical loss or damage. (R. 970–71).[6] Although it acknowledged ACE's policy exclusion arguments, the trial court did not reach those arguments having determined that Westbrook failed to allege direct physical loss or damage.

G. Westbrook Moves for Partial Rehearing

Westbrook moved for partial rehearing, requesting that the trial court grant it leave to amend its complaint. (R. 975–1023). Westbrook attached to its motion a proposed Second Amended Complaint that,

[6] The trial court did not dismiss the amended complaint with prejudice as to Everest, Starr, and CNA because their respective policies include coverage for closings due to death or disease and/or cancellation of bookings, which ACE's policy does not. (R. 972).

it claimed, cured any defects in its prior pleading. (R. 982–1023).[7] Westbrook's proposed Second Amended Complaint was largely the same as its First Amended Complaint save for a handful of additions and deletions.

As for deletions, Westbrook removed the allegation that the coronavirus contacting a surface "entails merely a physical presence of the viral particle on the surface (akin to spilled flour) and is readily reversible; in this instance the virus is relatively easy to remove from the surface." (R. 26, 1001). Westbrook also removed the allegation that the "bond between viral particles and physical objects persists until broken through intervening forces. An effective way to break the bond between the viral particles and a surface they have adhered to is to wash the surface with water containing detergents (e.g., soapy water) or organic solvents, such as alcohol (ethanol)." (R. 27, 1002).

Westbrook added new allegations addressing four of the hotels for which it sought coverage. (R. 1004–08). For example, as to the Ritz Carlton in Washington D.C., Westbrook alleged that it incurred extra expenses for installing signage, plexiglass barriers, and hand

[7] To be clear, ACE refers to the proposed second amended complaint attached to Westbrook's motion for rehearing.

sanitizers. (R. 1005). Other expenses included a "substantial upgrade to its air filters in the HVAC system[.]" (R. 1005). Westbrook also alleged that it discarded food and beverages in guest rooms and employee dining areas, and that the "air filters in guest rooms were physically damaged by SARS-CoV-2 and needed to be disposed of long before the expiration of their normal useful life." (R. 1005).

Westbrook asserted functionally identical allegations as to the three other hotels it identified, asserting that it had to "upgrade" the HVAC system, dispose of perishable food and beverages, and replace air filters. (R. 1006–08). Westbrook alleged that it suffered a "significant loss of perishable food product" from in-room dining and restaurants, as well as "expired beverage products in hotel bars and in-room minibars that had to be disposed of." (R. 1011).

The trial court denied Westbrook's motion for rehearing, finding that any further attempts to plead direct physical loss or damage due to the coronavirus would be futile. (R. 1035–37).

This appeal followed. (R. 1038–56).

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed Westbrook's First Amended Complaint and did not abuse its discretion in denying rehearing. This Court should reject Westbrook's attempt to obtain a more favorable standard of review by combining the two appealed orders into one argument. This Court reviews the trial court's dismissal order de novo, but it reviews the rehearing order for an abuse of discretion. Westbrook failed to separate these orders into two distinct issues on appeal, focusing solely on its proposed Second Amended Complaint. Given Westbrook's myopic focus on the proposed Second Amended Complaint, the abuse of discretion standard applies.

On the merits, the trial court did not abuse its discretion in finding that Westbrook failed to allege direct physical loss or damage. The trial court astutely recognized that "courts applying New York law have consistently held that allegations that the virus physically altered property are conclusory and insufficient to state a claim." (R. 967). The recent CRO decision does not open the door to recovery and instead lends only further support to the trial court's ruling.

Indeed, the New York Court of Appeals affirmed dismissal with prejudice of a functionally identical complaint alleging that viral

particles physically altered structures. The Court also found that the insured failed to plead persistent contamination and complete dispossession because it did not allege that its properties were totally uninhabitable. Westbrook's claim likewise fails because it alleged that some guests and employees continued to use the properties even after the closure orders.

Westbrook also had three attempts to identify damaged property, failing at each opportunity. Westbrook's novel argument that it had to discard expired food and beverages misses the mark because it failed to plead that those consumables were damaged by the coronavirus. Westbrook's claim regarding upgraded air filters is equally deficient because the HVAC systems themselves never stopped working, and upgrading filters was merely a preventive measure unrelated to physical damage.

Even if this Court finds that Westbrook stated a claim for direct physical loss or damage, it should still affirm because the Policy's Contamination Endorsement excludes coverage for the loss. That endorsement expressly applies to losses caused by a "virus." Westbrook based its cause of action on alleged viral contamination,

and its own allegations conclusively demonstrate that the Contamination Endorsement bars coverage.

This Court should also affirm based on the Policy's Loss of Use Endorsement, which underscores that the Policy covers only those losses stemming from direct physical loss or damage. Because Westbrook failed to plead such loss or damage, it effectively sought coverage for its loss of use and loss of market during the time the government required it to close its hotels to the public. The Loss of Use exclusion bars that loss from coverage.

Lastly, this Court should deny Westbrook's request for leave to further amend its complaint. In its second argument on appeal, Westbrook does not request that this Court reverse and allow it to proceed under its proposed Second Amended Complaint. Westbrook instead argues that this Court should allow it an opportunity to file a new complaint based on the CRO decision. This Court lacks jurisdiction to grant leave to amend on appeal. And even if this Court had jurisdiction, any further attempts to plead direct physical loss or damage would clearly be futile.

For these reasons, the Final Judgment in ACE's favor should be affirmed in all respects.

ARGUMENT

Standard of Review:

This Court reviews de novo a trial court's order granting a motion to dismiss for failure to state a claim. Morali v. Mayan, 377 So. 3d 1182, 1184 (Fla. 4th DCA 2024).

This Court reviews a trial court's order on a motion for rehearing for an abuse of discretion. Orfanos v. 45 Ocean Condo. Ass'n, Inc., 368 So. 3d 995, 996 (Fla. 4th DCA 2023) (citation omitted). The abuse of discretion standard also applies to a trial court's order denying a party's leave to amend a pleading. Universal Ins. Co. of N. Am. v. Sunset 102 Office Park Condo. Ass'n, Inc., 48 Fla. L. Weekly D2329 (Fla. 3d DCA Dec. 13, 2023).

Under New York law, interpretation of an insurance policy is a matter of law for the court to decide. Ewald v. Erie Ins. Co. of N.Y., 185 N.Y.S.3d 465, 467 (N.Y. App. 4th Dep't 2023) (quoting Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co., 28 N.Y.3d 675, 681 (N.Y. 2017)). When an insurance policy's provisions are clear and unambiguous, "they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement." Roundabout Theatre Co. v. Cont'l Cas. Co., 751 N.Y.S.2d 4, 6 (N.Y.

App. 1st Dep't 2002) (citation omitted). The court cannot alter the insurance policy "to accomplish its notions of abstract justice or moral obligation." Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc., 31 N.Y.3d 51, 63 (N.Y. 2018) (quoting Breed v. Ins. Co. v. N. Am., 46 N.Y.2d 351, 355 (N.Y. 1978)).

I. Westbrook improperly framed the standard of review and abandoned its argument that the trial court erred by dismissing its First Amended Complaint.

As an initial matter, Westbrook improperly combines separate issues concerning different orders into one point on appeal in an attempt to circumvent the abuse of discretion standard of review. In doing so, Westbrook abandons any challenge to the dismissal of its First Amended Complaint and focuses on the proposed Second Amended Complaint it filed in support of its motion for rehearing.

Recall that Westbrook appealed two separate orders subject to different standards of review. This Court reviews de novo the order dismissing Westbrook's First Amended Complaint. However, it reviews the order denying Westbrook's motion for rehearing and incorporated motion for leave to file its proposed Second Amended Complaint for an abuse of discretion.

Westbrook should have raised two separate points on appeal to address these different orders and standards of review. Instead, Westbrook combines the issues into one point on appeal. See, e.g., State Comprehensive Health Ass'n v Carmichael, 706 So. 2d 319, 321 (Fla. 4th DCA 1997) ("[T]o obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal" (citation omitted)). And in its standard of review section, Westbrook argues that the de novo standard applies to the dismissal order but does not identify what standard applies to the order on its motion for rehearing. (Init. Br. 6).

To make matters worse, Westbrook frames both its statement of facts and argument as though the allegations in its proposed Second Amended Complaint were all contained in its First Amended Complaint. The Record citations in pages 7–15 of Westbrook's Initial Brief, in which it discusses its complaint's allegations, refer to the Second Amended Complaint, not the complaint that the trial court dismissed. Westbrook likewise cites its proposed Second Amended Complaint throughout the argument section of its Initial Brief. At no point in its argument does Westbrook attempt to distinguish between

the two complaints, two different orders on appeal, and two separate standards of review.

This Court should reject Westbrook's attempt to sidestep the abuse of discretion standard of review. By focusing on the proposed Second Amended Complaint and failing to separate the issues, Westbrook abandoned any challenge to the dismissal order. Accordingly, ACE will rest on its filings below as to the dismissal order and address why the trial court did not abuse its discretion in denying Westbrook's request for leave to amend on the basis that the proposed Second Amended Complaint was futile.

II. The trial court did not abuse its discretion in denying Westbrook's request for leave to amend its complaint because the proposed Second Amended Complaint failed to allege direct physical loss or damage.

The trial court did not abuse its discretion in denying Westbrook's motion for rehearing because Westbrook's proposed Second Amended Complaint failed to allege that the coronavirus caused direct physical loss or damage to its properties. The trial court's order is consistent with every case applying New York law, as well as the overwhelming weight nationwide of authority.

Contrary to Westbrook's assertions, CRO did not create a new pathway for recovery in these cases. It instead provides only further support for the trial court's conclusion that Westbrook failed to state a cause of action. At bottom, no matter how artfully Westbrook attempts to frame its claim, the coronavirus simply does not cause direct physical loss or damage to property.

A. New York courts uniformly hold that the coronavirus does not damage property.

New York law provides that direct physical loss or damage requires "actual, demonstrable physical harm thereto." Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp., 142 N.Y.S.3d 903, 918 (N.Y. Sup. Ct. 2021).[8] Physical loss or damage results in affected property requiring repair, replacement, or rebuilding. Kim-Chee LLC v. Phila. Indem. Ins. Co., 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022). Considering this accepted definition, "every New York court

[8] While ACE agrees that New York law governs this dispute, applying Florida law would compel the same result because both jurisdictions similarly interpret the term "direct physical loss or damage." See, e.g., Commodore, Inc. v. Certain Underwriters at Lloyd's London, 342 So. 3d 697, 705 (Fla. 3d DCA 2022) (affirming dismissal with prejudice where insured failed to plausibly allege that the coronavirus caused direct physical loss or damage); SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London, 32 F.4th 1347, 1350 (11th Cir. 2022) (applying Florida law) (same).

interpreting the phrase 'direct physical loss' has read it the same way and denied coverage" for coronavirus claims. 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., 21 F.4th 216, 224 (2d Cir. 2021).

These courts rejected conclusory allegations that viral particles physically damage property. For example, the Second Circuit highlighted the coronavirus' "inability to physically alter or persistently contaminate property," which distinguishes it from other harmful conditions. Kim-Chee LLC, 2022 WL 258569, at *2; see also Spirit Realty Cap., Inc. v. Westport Ins. Corp., 568 F.Supp.3d 470, 473–74 (S.D.N.Y. Oct. 21, 2021) ("[T]he overwhelming weight of precedent, both from lower New York courts and district courts in this Circuit, holds that COVID-19 does not qualify as 'physical loss or damage.'"); Benny's Famous Pizza Plus Inc. v. Sec. Nat'l Ins. Co., 149 N.Y.S.3d 883, 883 (N.Y. Sup. Ct. 2021) ("[T]he mere presence of the COVID-19 virus in the air or on surfaces of a covered property does not qualify as damage to the property itself.").

Courts applying New York law also recognize that basic cleaning measures can remove viral particles. Cleaning is not synonymous with repair or replacement. See Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd., 524 F. Supp. 3d 242, 249 (S.D.N.Y. 2021)

("[C]ontamination of the premises by a virus does not constitute a 'direct physical loss' because the virus's presence can be eliminated by 'routine cleaning and disinfecting,' and 'an item or structure that merely needs to be cleaned has not suffered' a direct physical loss" (quoting Tappo of Buffalo, LLC v. Erie Ins. Co., 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020))).

Several decisions also emphasize that governments ordered businesses to temporarily close to the public not because the coronavirus physically damaged their properties, but rather to prevent the spread of COVID-19. See J. Kleinhaus & Sons, LLC v. Valley Forge Ins. Co., 2021 WL 5909978, at *4 (S.D.N.Y. Dec. 14, 2021) (reasoning that closure orders were issued to prevent human infection and "not on account of any physical loss or damage to any specific property" (citation omitted)); Office Sol. Grp., LLC v. Nat'l Fire Ins. Co. of Hartford, 544 F. Supp. 3d 405, 415 (S.D.N.Y. 2021) (finding government closure orders unrelated to any alleged physical damage to the insured's property).

The overwhelming nationwide weight of federal and state authority is in accord with New York law. See, e.g., Oregon Clinic, PC v. Fireman's Fund Ins. Co., 75 F.4th 1064, 1071 (9th Cir. 2023)

(noting that more than 800 state and federal cases found that coronavirus does not physically damage property). Many of the decisions allowing claims to survive dismissal were decided under California law. The California Supreme Court recently ended the debate and aligned with the nationwide weight of authority, holding that the coronavirus "does not constitute 'direct physical loss or damage to property' for the purposes of coverage under a commercial property insurance property." Another Planet Entm't, LLC v. Vigilant Ins. Co., 548 P.3d 303, 331 (Cal. 2024).

B. CRO does not create a pathway for recovery based on Westbrook's allegations.

Westbrook does not acknowledge these abundant authorities. Indeed, it cites only a couple cases addressing a coronavirus claim in the entirety of its Initial Brief. Westbrook instead argues that the New York Court of Appeals' decision in CRO created a new pathway for insureds to recover losses caused by the coronavirus. Westbrook's argument is misplaced because the Court of Appeals affirmed dismissal with prejudice of a similar complaint for reasons that apply with equal force in this case.

In CRO, the plaintiff-insured restaurant operator sued its insurer for all-risk property insurance benefits after it had to curtail its operations due to the coronavirus. Consol. Rest. Operations, Inc. v. Westport Ins. Corp., 167 N.Y.S.3d 15, 20 (2022), aff'd, 41 N.Y.3d 415 (N.Y. Feb. 15, 2024). The plaintiff alleged that: (1) the coronavirus "was physically present in and physically altered its premises," (2) "the physical droplets and respiratory particles that transmit the virus are so resilient that they cannot be entirely eradicated from property"; and (3) the coronavirus "actually damaged its property by altering the surfaces of its restaurants and the air within them, resulting in direct physical loss." Id. The First Department affirmed dismissal of the plaintiff's complaint with prejudice, finding these allegations insufficient to state a claim for direct physical loss or damage. Id. at 86.

The Court of Appeals affirmed the First Department and rejected the insured's argument that direct physical loss is synonymous with a partial or complete loss for a limited time. CRO, 41 N.Y.3d at 428. The court explained that this interpretation would impermissibly transform coverage for physical damage into coverage for loss of use. Id. The court analogized this theory to the loss of a

password for a phone, which it distinguished from a phone itself being stolen. Id. Thus, physical loss required not temporary loss of use, but rather "actual, complete dispossession." Id. This conclusion was bolstered by the policy's reference to the time for repairing or replacing affected property, which contemplated actual damage or complete dispossession that could not be regained. Id. at 428–29.

The court noted that the caselaw remained unsettled as to whether persistent contamination of a building amounted to physical loss absent an actual alteration of the property. Id. at 431. Since the insured alleged neither persistent contamination nor total uninhabitability, however, the court reasoned that it "need not decide today whether such allegations could fairly be equated with actual material dispossession, and thus 'direct physical loss.'" Id.

Specifically, the insured did not allege a complete shutdown, which would require that its employees also could not enter the properties. Id. While the insured alleged that it had to close its restaurants, it did not allege that those closures occurred due to viral contamination. Id. And even if the virus prompted significant remediation efforts, the court found that the property was not completely uninhabitable. Id. The court highlighted the insured's

own allegation that the virus could survive on surfaces for days or weeks, which it found insufficient to show "persistent and complete uninhabitability." Id. at 432.

The court further explained that it would not depart from federal court decisions applying New York law, all of which dismissed complaints alleging coronavirus-related property damage. Id. at 432–33. The court's nationwide research revealed that "no appellate court has allowed an insurance coverage claim under similar policy terms to proceed past a motion to dismiss." Id. at 432. Those decisions reached the same outcome "where the alleged loss of use was due to the presence of the coronavirus on insured property." Id. 432–33.

Equally unavailing was the insured's argument that it sufficiently stated a claim for physical damage. Id. at 433–34. While the insured alleged that the virus attached to property and compromised its structural integrity, it identified no property requiring repair or replacement. Id. at 434. The court found that the insured's allegations concerning the coronavirus' potential harm to humans, not property, did not trigger coverage. Id.

The court relied on the decision in Northwell Health, Inc. v. Lexington Insurance Co., 550 F. Supp. 3d 108 (S.D.N.Y. 2021), which

found allegations that coronavirus droplets compromised property surfaces insufficient to establish a direct physical loss because the coronavirus harms people, not property. Id. Because the insured failed to sufficiently allege direct physical loss or damage to its property, the Court of Appeals affirmed the dismissal of its complaint with prejudice and did not reach the issue of whether any policy exclusions would bar coverage. Id. at 435.

Westbrook nonetheless argues that CRO "firmly rejected" the premise that the coronavirus does not cause direct physical loss or damage and "made clear there is a pathway to recovery" in this case. (Init. Br. 19). Even a cursory review of CRO reveals the erroneous nature of Westbrook's contention. The Court of Appeals affirmed the dismissal of the insured's complaint with prejudice, emphasized that the coronavirus does not physically alter property, and expressly declined to depart from the nationwide authority rejecting Westbrook's same theories of recovery. No reading of CRO supports Westbrook's assertion that the court intended to open the door to these claims. The Court of Appeals instead locked the door that every other New York court previously closed.

1) Westbrook failed to allege that it was completely dispossessed of its properties.

Westbrook first contends that CRO permits recovery based on actual, complete dispossession of property and persistent contamination. (Init. Br. 23). But CRO did not so hold. Rather, the Court of Appeals explained that there was a split of authority on this issue, and that it need not decide whether such allegations constituted direct physical loss.

In any event, Westbrook did not allege total dispossession. The Court of Appeals advised that such dispossession requires complete uninhabitability, not temporary loss of use. The court found that the insured did not plead persistent and complete uninhabitability because it failed to allege that its employees could not enter the insured properties while they were closed to the public.

Westbrook's allegations are equally deficient in this regard. It readily admits that it was forced to close its hotels only to the public, not its own employees. (Init. Br. 26). Westbrook specifically alleged that at least one of its hotels housed "one long-term guest and some relocated employees" even after the closure orders. (R. 1005).

As such, Westbrook's attempt to distinguish CRO misses the mark. Total uninhabitability occurs only when no persons can enter the property, including employees. For that reason, several federal appellate courts have determined that the plaintiff failed to plead total dispossession due to the coronavirus. See Sagome, Inc. v. Cincinnati Ins. Co., 56 F.4th 931, 937 (10th Cir. 2023) (holding dispossession requires that property be completely unusable and distinguishing the coronavirus from a gas leak causing uninhabitability by all persons); Lawrence Gen. Hosp. v. Cont'l Cas. Co., 90 F.4th 593, 602 (1st Cir. 2024) (finding insured's building was not uninhabitable where it remained open for some purposes); Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327, 334 (7th Cir. 2021) (explaining that complete dispossession makes entering the property impossible).

Westbrook has not shown that the trial court abused its discretion in denying its motion for rehearing because Westbrook failed to plead total uninhabitability and complete dispossession due to the coronavirus. Westbrook recognizes that its properties were not uninhabitable by all persons, which bars its claim on this theory.

2) Westbrook failed to sufficiently allege that the coronavirus physically damaged its properties.

Westbrook next argues that it pleaded a cause of action for direct physical loss because the coronavirus damaged hotel supplies and HVAC systems. (Init. Br. 28). As set forth *supra*, every court applying New York law has held that the coronavirus does not physically damage property. See, e.g., St. George Hotel Assocs., LLC v. Affiliated FM Ins. Co., 577 F. Supp. 3d. 135, 145 (E.D.N.Y. 2021) ("This Court agrees with the great weight of authority concluding that the presence of COVID-19 does not actually 'damage' insured property."); Broadwall Mgmt. Corp. v. Affiliated FM Ins. Co., 2022 WL 3030315, at *7 (S.D.N.Y. Aug. 1, 2022) ("[W]hile the presence of COVID-19 may render property potentially harmful to people, it does not constitute harm to the property itself" (citation omitted)). Westbrook's allegations that the coronavirus attaches to surfaces and physically alters them until the bond is broken by intervening forces are functionally identical to the allegations CRO found insufficient to state a claim for direct physical loss or damage.

Westbrook attempted to distinguish its loss from those suffered by every other business by alleging in its proposed Second Amended

Complaint that it had to dispose of food and beverages in individual hotel rooms and employee dining areas. (Init. Br. 28–29). But Westbrook admitted that it discarded "perishable food product" and "expired beverages." (R. 1011). In other words, Westbrook does not allege that it tested these consumables and found that they were contaminated by the coronavirus. Westbrook instead alleged that these products expired while its properties were closed.

Westbrook's reliance on its discarding of expired snacks and sodas as the lynchpin triggering its right to recover "tens of millions of dollars" in insurance benefits is emblematic of the fact that the coronavirus did not physically damage its properties. (R. 982). The government certainly did not order Westbrook to close its hotels until it could refresh its minibars. Westbrook—like every other businessowner—was forced to close operations to prevent the spread of COVID-19 to humans.

As one federal court in the Middle District of Florida explained in dismissing an insured's complaint seeking coverage for loss of beer due to the coronavirus, Westbrook "fails to elucidate how the virus itself 'directly' caused the loss of the beer. Clearly, the market and the government's responses to the pandemic were the direct causes

of Plaintiff's loss—but the Policy does not cover such causes." Harvest Moon Distribs., LLC v. S.-Owners Ins. Co., 522 F. Supp. 3d 1127, 1132 (M.D. Fla. 2021). Westbrook cites no contrary authority finding coverage for food and beverages that expired because of the closure of an insured's business due to the pandemic.

Westbrook's argument regarding its HVAC system and air filters is equally misplaced. Westbrook alleged that the coronavirus rendered HVAC systems dangerous because they can exacerbate viral transmission, but that does not constitute physical damage to the systems themselves. (R. 1003). Westbrook further alleged that it incurred expenses for "upgrade[s] to its air filters in the HVAC system." (R. 1005–08). Westbrook's other expenses included installation of plexiglass barriers, COVID-19 signage, and hand sanitizers, as well as implementing mask mandates and temperature checks. (R. 1005–08, 1011).

Myriad courts have found similar precautionary efforts unrelated to physical property damage. In fact, one federal court in the Southern District of New York found that these same measures—"including installing hand sanitizing stations, plexiglass shields, COVID-related signage, and enhanced HVAC systems"—were

intended to protect people, not to repair or replace damaged property. John Gore Org., Inc. v. Fed. Ins. Co., 2022 WL 873422, at *12 (S.D.N.Y. Mar. 23, 2022).

The only "damage" Westbrook identified in this regard concerns certain air filters, which it alleged were "physically damaged by [the coronavirus] and needed to be disposed of long before the expiration of their normal useful life." (R. 1005–07). But Westbrook simultaneously alleged that it installed new air filters as an "upgrade." (R. 1005–07). Westbrook did not allege that it tested the air filters for coronavirus or otherwise explain how it determined that such physical damage occurred. This was simply another precautionary measure to limit the spread of the virus.

Westbrook cites no authorities supporting the proposition that upgrading air filters triggers property insurance coverage for direct physical loss or damage. Rather, courts have consistently rejected this same theory:

> As generally happens during routine maintenance, the filters apparently performed their function (though quicker than anticipated) and were replaced. And there is no claim that the units themselves no longer function as intended; it is not indicative of damage that changing business needs cause a piece of

> equipment to no longer perform at its required level.

Amphenol Corp. v. Factory Mut. Ins. Co., 2023 WL 3057146, at *4 (D. Conn. Apr. 24, 2023); see also Lawrence Gen. Hosp., 90 F. 4th at 596–97 (finding that replacement of air filters due to the coronavirus did not trigger property insurance coverage).

This Court should conclude that Westbrook's allegations regarding air filters did not state a claim for direct physical loss or damage because those efforts were taken to limit viral transmission to humans, not to repair damaged property. Westbrook did not allege that the HVAC systems ever stopped working. Rather, Westbrook replaced and upgraded air filters as part of overall safety measures. Westbrook has not demonstrated that the trial court abused its discretion in finding that Westbrook failed to allege that the coronavirus caused direct physical loss or damage to its properties.

3) The coronavirus did not uniquely affect Westbrook's properties.

It bears emphasis that Westbrook's hotels are no different from the thousands of other hotels and similar properties forced to close to the public during the pandemic. New York courts addressing claims by other hotel operators found that they failed to sufficiently

allege that the coronavirus caused direct physical loss or damage. See, e.g., 6593 Weighlock Drive, LLC v. Springhill SMC Corp., 147 N.Y.S.3d 386, 394 (N.Y. Sup. Ct. 2021) (dismissing hotel operator's claim); Fed. Ins. Co. v BD Hotels LLC, 2022 WL 783949, at *2–4 (N.Y. Sup. Ct. 2022) (same); SJ 1st St. Hotel, LLC v Sompo Am. Ins. Co., 2021 WL 5742451, at *3–4 (N.Y. Sup. Ct. 2021) (same).

Numerous federal circuit courts likewise found no coverage for insured hotel operators. See Abbey Hotel Acquisition, LLC v. Nat'l Sur. Corp., 2022 WL 1697198, at *2–3 (2d Cir. May 27, 2022); Hotel Mgmt. of New Orleans, L.L.C. v. Gen. Star Indem. Co., 2023 WL 3270904, at *3 (5th Cir. May 5, 2023) (unpublished); Mikmar, Inc. v. Westfield Ins. Co., 2022 WL 17832178, at *4 (6th Cir. Dec. 21, 2022); Bradley Hotel Corp. v. Aspen Specialty Ins. Co., 19 F. 4th 1002, 1005 (7th Cir. 2021); Torgerson Props., Inc. v. Cont. Cas. Co., 38 F. 4th 4, 6 (8th Cir. 2022); Worthy Hotels, Inc. v. Fireman's Fund Ins. Co., 2024 WL 2182838, at *2 (9th Cir. May 15, 2024) (unpublished).

Westbrook advances no legal or logical basis to treat its hotels differently than every other hotel affected by the coronavirus. Westbrook asserts the exact same cause of action as all of these

insured hotel operators, and courts have uniformly found no coverage for their claims.

Rather, as explained above, Westbrook has not met its burden to demonstrate that the trial court abused its discretion in denying Westbrook's request for leave to file the proposed Second Amended Complaint. CRO does not support Westbrook's cause of action because the Court of Appeals unequivocally refused to deviate from the overwhelming weight of nationwide authority. There is no dispute that direct physical loss or damage is required to trigger coverage under the Policy, including for all time element losses. (Init. Br. 33–34). Westbrook did not plead such physical loss or damage, and therefore, this Court should affirm the trial court's denial of Westbrook's motion for rehearing in all respects.

III. This Court should affirm under the tipsy coachman doctrine because the Policy's Contamination Endorsement excludes coverage for the claimed loss.

Even had Westbrook plausibly alleged direct physical loss or damage to its properties, this Court should affirm under the tipsy coachman doctrine[9] based on the Policy's Contamination

[9] The tipsy coachman doctrine provides that an appellate court will uphold a trial court's ruling if it reaches the correct result, but for

Endorsement. This endorsement, which applies to all coverages, excludes losses caused by or resulting from a virus, as follows:

> 1. This insurance does not apply to:
>
> . . . .
>
> B. Loss or damage caused by, resulting from, contributed to, or made worse by actual, alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy;
>
> . . . .
>
> 3. The following definition is added to this policy:
>
> **Contaminants or Pollutants means any material which after its release can cause or threaten damage to human health or human welfare** or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, **including but not limited to** bacteria, fungi, **virus** or hazardous substances as listed in the Federal

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the wrong reasons, provided that any basis in the record supports the judgment. Millien v. State, 336 So. 3d 354, 361 (Fla. 4th DCA 2022) (quoting Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002)). The parties briefed and argued the applicability of the Contamination Endorsement to the trial court. The trial court acknowledged the parties' arguments in its order, but it did not reach the issue having determined that Westbrook failed to allege direct physical loss or damage. Given the parties' detailed submissions and arguments on this issue, this Court should consider the Contamination Endorsement's applicability based on the four corners of Westbrook's proposed Second Amended Complaint and attached Policy.

> Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency.

(R. 145–47) (emphasis added). The Contamination Endorsement "supersede[s] any term, provision, or endorsement to the contrary in this policy and apply notwithstanding such term, provision or endorsement." (R. 145).

A. Courts applying New York law uniformly hold that the coronavirus constitutes a contaminant or pollutant.

While courts nationwide have dismissed claims for coronavirus-related losses due to the insured's failure to allege direct physical loss or damage, many courts have gone further and found that exclusions for pollutants and contaminants barred coverage. No reported New York decision has addressed this issue, but several federal courts applying New York law dismissed similar claims with prejudice based on applicable policy exclusions for loss due to a "virus."

In fact, one court dismissed the insured's complaint based on this same Contamination Endorsement. In Northwell Health, 550 F. Supp. 3d 108, the insured sought coverage for coronavirus under a policy containing an identical endorsement. Id. at 111–13. The court

found that, setting aside the insured's failure to plead direct physical loss or damage, the insured's own allegations demonstrated that the Contamination Endorsement barred coverage. Id. at 121. Specifically, the plaintiff alleged that infected persons spread the coronavirus by talking, sneezing, or coughing, which fell squarely within the Contamination Endorsement's language regarding "discharge" or "dispersal." Id.

Similarly, in OTG Management PHL LLC v. Employers Insurance Co. of Wausau, 557 F. Supp. 3d 556 (D.N.J. 2021), the district court applied New York law and rejected the plaintiff-insured's argument that the term "virus" in an analogous exclusion did not encompass the coronavirus. Id. at 566. In dismissing the complaint, the district court joined the "overwhelming majority of courts" applying similar contamination and pollution exclusions to bar coronavirus claims. Id. at 567.

Another court applying New York law reached the same conclusion and declined the insured's "invitation to engage in the type of mental gymnastics that would permit a finding that the COVID-19 coronavirus is not a virus within the meaning of the

Contaminant Exclusion." Ascent Hosp. Mgmt. Co., LLC v. Emp'rs Ins. Co. of Wausau, 537 F. Supp. 3d 1282, 1288–89 (N.D. Ala. 2021).[10]

Three other courts dismissed complaints for claimed losses due to the coronavirus based on an identical Contamination Endorsement. APX Operating Co., LLC v. HDI Glob. Ins. Co., 2021 WL 5370062, at *7 (Del. Super. Ct. Nov. 18, 2021) ("[N]o reasonable interpretation of the Pollution and Contamination Exclusion would permit the conclusion that COVID-19 is not a 'virus,' and the Court cannot contort the Policy's plain terms to avoid the exclusion's application."); W. Union Co. v. Ace Am. Ins. Co., 623 F. Supp. 3d 1153, 1160 (D. Colo. 2022) ("Plaintiffs' claims for insurance coverage premised on losses resulting from the COVID-19 pandemic and any related Closure Orders are barred by the Pollution and Contamination Exclusion."); Zwillo V, Corp. v. Lexington Ins. Co., 504 F. Supp. 3d 1034, 1043 (W.D. Mo. 2020) ("[T]he Court finds

[10] The Eleventh Circuit affirmed based on the lack of direct physical loss or damage and did not address the contamination exclusion. Ascent Hosp. Mgmt. Co., LLC v. Emp'rs Ins. Co. of Wausau, 2022 WL 130722, at *3 n.2 (11th Cir. Jan. 14, 2022)

Defendant has met its burden of establishing that the exclusion applies and is entitled to dismissal.").

Westbrook unquestionably based its cause of action against ACE on allegations that its properties were damaged by the actual or threatened release, discharge, or dispersal of the coronavirus. Westbrook states in its summary of the argument that "[b]oth complaints alleged that the virus persistently contaminated Westbrook's hotels." (Init. Br. 17). Westbrook raised that same allegation throughout its proposed Second Amended Complaint:

- "Plaintiff has incurred substantial losses caused by the actual presence at its properties and/or third-party locations, including, but not limited to, attractions near Westbrook's properties, of the communicable disease ('COVID-19' or the 'disease') and/or the underlying virus, SARS-CoV-2."

- "Westbrook has incurred additional losses resulting from the threat posed to property and persons at its properties and/or third-party locations by the physical prevalence of the SARS-CoV-2 virus and COVID-19 …."

- "The SARS Co-V-2 virus is expelled from the mouth and/or nose, and it travels within respiratory droplets when humans cough, sneeze, scream, sing, or even speak loudly or breath heavily."

(R. 983–84, 999–1000).

These are only a handful of examples in which Westbrook directly alleged that its claimed losses occurred solely due to the "alleged or threatened release, discharge, escape or dispersal" of the coronavirus. And Westbrook posited no alternative theory of recovery not directly tied to viral contamination. As the Ninth Circuit held, "[t]o the extent [Westbrook] relies on the presence of the COVID-19 virus on its property, its own theory of recovery bars coverage." In-N-Out Burgers v. Zurich Am. Ins. Co., 2023 WL 2445681, at *1 (9th Cir. Mar. 10, 2023) (unpublished).

B. The Contamination Endorsement extends beyond traditional environmental pollutants.

Westbrook does not address the Contamination Endorsement in its Initial Brief, but it argued below that the Contamination Endorsement applies only to traditional environmental pollutants and not the coronavirus. (R. 844–45).

Westbrook relied on the Court of Appeals' decision in Belt Painting Corp. v. TIG Insurance Co., 100 N.Y.2d 377 (N.Y. 2003), in which a painting company's commercial general liability policy excluded coverage for bodily injury or property damage caused by pollutants. Id. at 382. The policy defined "pollutants" as "any solid,

liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste." Id. The plaintiff sued the insured for injuries caused by inhalation of paint or solvent fumes in an office building where the insured had worked. Id. The insured argued that its insurer owed it a defense and indemnity in the underlying personal injury action. Id. at 382–83.

The Court ruled that the pollution endorsement did not unambiguously apply to "ordinary paint or solvent fumes that drifted a short distance from the area of the insured's intended use and allegedly caused inhalation injuries to a bystander." Id. at 387–88. The Court noted that the definition of the term "pollution" had "environmental implications" making it ambiguous as to whether it applied to paint fumes. Id. at 388.

The Belt Painting decision is distinguishable and has no bearing on whether the Contamination Endorsement applies to Westbrook's alleged loss. The Court of Appeals did not broadly pronounce that all pollution exclusions apply only to traditional environmental issues. Instead, it found that a different exclusion in a commercial general liability policy—not a property insurance policy—did not unambiguously apply to "ordinary paint or solvent fumes." Id.

Unlike the provision at issue in Belt Painting, the Contamination Endorsement expressly applies to losses caused by a "virus," which includes the coronavirus as the decisions cited herein have repeatedly held. Given this definition, no basis exists to find the provision ambiguous in this context. The Northwell Health court distinguished Belt Painting for that very reason, reasoning that the policy at issue defined the term "contaminants or pollutants" to include viruses. 550 F. Supp. 3d at 121. The court concluded that it was bound to apply the endorsement's plain language and could not interpret it in a manner rendering the term "virus" meaningless. Id.

Westbrook relies exclusively on CRO as purportedly creating a pathway for recovery in this case, but the Court of Appeals cited Northwell Health approvingly throughout its decision. Consol. Rest. Operations, Inc., 41 N.Y.3d at 432–34. While CRO did not reach the issue of policy exclusions, ACE submits that the Court of Appeals would not have relied extensively on Northwell Health if it believed that the district court had misapplied Belt Painting.

Several state supreme courts have also found that inclusion of the term "virus" rendered similar exclusions clearly applicable to the coronavirus. See, e.g., Starr Surplus Lines Ins. Co. v. Eighth Jud.

Dist. Ct. in & for Cnty. of Clark, 535 P.3d 254, 268 (Nev. 2023) (explaining that the term "virus" transforms the exclusion to one that includes both health-harming contaminants and environmental pollutants); AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co., 307 A.3d 1174, 1190 (N.J. 2024) (affirming dismissal of complaint alleging losses due to the coronavirus based on similar contamination exclusion).

As these authorities demonstrate, the Contamination Endorsement bars coverage based on Westbrook's own allegations. New York law does not limit the endorsement's applicability to "traditional" environmental losses because it expressly defines contaminants to include a "virus." Westbrook cannot reasonably suggest that the coronavirus does not constitute a virus. Accordingly, this Court should affirm because, even if Westbrook sufficiently alleged that the coronavirus caused physical loss or damage, the Contamination Endorsement excludes that loss from coverage.

IV. This Court should affirm under the tipsy coachman doctrine because the Policy's Loss of Use Exclusion bars coverage for the claimed loss.

This Court should also affirm under the tipsy coachman doctrine[11] because the Policy's Loss of Market or Loss of Use Exclusion (the "Loss of Use Exclusion") unambiguously bars coverage for Westbrook's alleged economic losses:

> **PROPERTY DAMAGE – SECTION B**
>
> . . . .
>
> **5. EXCLUSIONS.**
>
> The following exclusions apply unless specifically stated elsewhere in this Policy:
>
> A. This Policy excludes:
>
> 1) indirect or remote loss or damage.
>
> 2) interruption of business, except to the extent provided by this Policy
>
> 3) loss of market or loss of use except as noted in the Extended Period of Indemnity Coverage. . . .

(R. 77).

[11] As with the Contamination Endorsement, the parties briefed and argued the applicability of the Loss of Use Exclusion in the trial court. This Court should consider this alternative basis for affirmance.

The Loss of Use Exclusion underscores that the Policy covers losses stemming from physical property damage. As CRO explained, interpreting the Policy to provide coverage absent physical loss or damage "would collapse coverage for 'direct physical loss' into coverage for 'loss of use.'" 41 N.Y.3d at 428; see also Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co., 534 F. Supp. 3d 216, 223 (N.D. N.Y. 2021) (reasoning that "a complaint which only alleges loss of use of the insured property fails to satisfy the requirement for physical damage or loss" (quoting Food for Thought Caterers Corp., 2021 WL 860345, at *4)).

The decision in Visconti Business Services, LLC, 142 N.Y.S. 3d 903, is instructive on this issue. The insured sought coverage for lost income due to the coronavirus. Id. at 905–06. The insurer denied coverage on several grounds, including the exclusion for "delay, loss of use or loss of market." Id. at 906–07. In granting the insurer's motion to dismiss, the court ruled that the loss of use exclusion applied to bar the claim. Id. at 918. It observed that the policy at issue "explicitly excludes '*loss or damage caused by or resulting from … loss of use.*' That exclusion undermines [insured]'s primary argument in this case, i.e., that a loss of use or functionality of its

property is a covered loss under the policy." Id. (alteration and emphasis in original).

Similarly, the Policy's Loss of Use Exclusion undermines the very premise of Westbrook's cause of action: that temporarily closing its hotels to public sufficed as physical loss or damage. But as these courts have found, the Loss of Use Exclusion makes clear that any such loss falls outside the scope of the coverage. Because Westbrook did not sufficiently allege such direct physical loss or damage, the entire loss is excluded under the Loss of Use Exclusion, and this Court should also affirm on this basis.

V. This Court lacks jurisdiction to grant Westbrook leave to amend its complaint.

In its second point on appeal, Westbrook requests that this Court grant it leave to file a new amended complaint in the trial court. To be clear, Westbrook does not argue in this section of its Initial Brief that the trial court improperly denied leave to amend below. Westbrook instead requests that this Court provide it "one full opportunity to plead a case in light of CRO's recent issuance." (Init. Br. 34–35). Stated differently, Westbrook asks this Court to grant it

leave to file a new proposed complaint raising matters not previously contained in its three prior complaints based on the CRO decision.

Respectfully, this Court lacks jurisdiction to entertain this request. The district courts of appeal are error correcting courts. See generally Pitcher v. Schneider, 236 So. 3d 1195, 1195 (Fla. 5th DCA 2018). As such, this Court has jurisdiction to consider final and certain nonfinal trial court orders. Art. V, § 4(b)(1), Fla. Const.; Fla. R. App. P. 9.030(b)(1). This Court's original jurisdiction is limited to issuance of writs of mandamus, prohibition, quo warranto, and others necessary to effectuate its jurisdiction. Art. V, § 4(b)(3), Fla. Const.; Fla. R. App. P. 9.030(b)(3).

Westbrook's request for this Court to grant leave to further amend its complaint does not fall within this Court's limited original jurisdiction. No basis exists for this Court to reverse and remand to allow Westbrook to raise new allegations that were not contained in its prior pleadings. And even if this Court had jurisdiction to consider this request, Westbrook does not identify what new allegations it would assert to state a cause of action, which prevents this Court from considering the sufficiency of those claims.

In any event, Westbrook cannot escape the futility of its cause of action. New York law forecloses recovery for Westbrook's claim because no matter how artfully Westbrook frames the issue, the coronavirus simply does not physically damage property. See, e.g., Sharde Harvey DDS PLLC v. Sentinel Ins. Co. Ltd., 2022 WL 558145, at *11 (S.D.N.Y. Feb. 24, 2022) ("[A]ny amendment would be futile. Plaintiff has amended on three prior occasions and has not succeeded in articulating any cognizable 'physical loss of or physical damage to' its property."). For these reasons, this Court should deny Westbrook's request to grant it leave to further amend its complaint.

CONCLUSION

For the reasons stated herein, this Court should affirm the trial court's orders dismissing with prejudice Westbrook's complaint and denying Westbrook's motion for partial rehearing in all respects.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail using the Court's ePortal system on **Jeffrey D. Fisher, Esq.** and **Zachary R. Potter, Esq.**, Rottenstreich, Farley, Bronstein, Fisher, Potter, Hodas, LLP, 515 N. Flagler Drive, Suite 800, West Palm Beach, FL 33401, Attorneys for Appellant, eservice@RFPllp.com; aedelman@RFPllp.com; **Robert J. Gilbert, Esq.**, and **Nathan A. Sandals, Esq.**, Latham & Watkins LLP, 200 Clarendon Street, Boston, MA 02116, Attorneys for Appellant, robert.gilbert@lw.com; nathan.sandals@lw.com; **David A. Barrett, Esq.**, Latham & Watkins LLP, 555 Eleventh Street, NW, Washington, DC 20004, Attorney for Appellant, david.barrett@lw.com; **Kirsten C. Jackson, Esq.**, Latham & Watkins LLP, 10250 Constellation Blvd. Suite 1100, Los Angeles, CA 90067, Attorney for Appellant, kirsten.jackson@lw.com; **Christine M. Renella, Esq.**, Zelle LLP, 110 E. Broward Blvd., Ste. 2000, Ft. Lauderdale, FL 33301, Attorney for Appellees Starr Surplus Lines Insurance Company and Everest Indemnity Insurance Company, crenella@zelle.com; jhoffman@zelle.com; mgonzalez@zelle.com; **Brooke O. Turetzky, Esq.**, Mound Cotton Wollan & Greengrass LLP, 110 E. Broward Blvd.

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s/ Samuel B. Spinner
Samuel B. Spinner

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rules 9.045 and 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in Bookman Old Style 14-point font and contains 9663 words.

By: */s/ Samuel B. Spinner*