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CHRISTOPHER L. JACOBS
SENATOR, 60TH DISTRICT

May 18, 2020

The Honorable Letitia James
Attorney General for the State of New York
Office of the Attorney General
New York State Capitol Building
Albany, NY 12224-0341

Re: Commencing Legal Action against the People's Republic of China for its Role in Causing the COVID-19 Pandemic

Dear Attorney General James,

I urge you to consider taking legal action against the People's Republic of China ("PRC") on behalf of the State of New York and the millions of state residents and businesses that have suffered tremendous loss due to both the actions and inactions of PRC authorities. The PRC must be held accountable for their role in the global COVID-19 pandemic and it is imperative that those responsible, be required to compensate the citizens of our state for the immense losses they have suffered.

Within the Foreign Sovereign Immunities Act, hereafter "FSIA" several exceptions to immunity from jurisdiction exist, including both the "commercial activity" exception under 28 U.S.C. §1605(a)(2) and the exception that applies to non-commercial tortious acts or omissions in 28 U.S.C. §1605(a)(5). It is my belief that the actions of the PRC leading to this global pandemic, meet either or both of these exceptions.

It has become quite clear, that those that dominate the PRC, primarily the leaders of the Communist Party of China¹, hereafter "CPC" control and direct virtually all activities within the borders of that nation, including the actions of state-run laboratories and academic institutions, such as the Wuhan Institute of Virology and the Chinese Academy of Sciences, hereafter "CAS."

¹ "China anniversary: How the Communist Party runs the country," BBC News (Sept. 30, 2019), available at: <https://www.bbc.com/news/world-asia-china-49631120>.



On the “Introduction” page of the CAS website, CAS claims to be “the linchpin of China’s drive to explore and harness high technology and the natural sciences for the benefit of the China and the world.”² CAS also claims to strengthen “ties with the industrial sector to conduct joint research and commercialize discoveries.”³ According to the CAS website, as of 2014, CAS had reached more than 10,000 technology transfer contracts; in 2014 alone, more than seven hundred CAS “spin-off companies” grossed approximately \$56 billion (US dollars).⁴ The Wuhan Institute of Virology has been under the administration of the CAS since the 1970’s and claims to have made “a series of important progresses” in animal viruses in the 1980’s and 1990’s.⁵

Under 28 U.S.C. §1603(d), commercial activity is defined as “either a regular course of commercial conduct or a particular commercial transaction or act.” According to Newsweek, the Wuhan Institute “has collected more bat coronaviruses from remote caves than any other lab in the world.”⁶ The article also explains that the Institute uses “gain of function” and “animal passage,” techniques, in which a mutated virus is injected into mammals, typically ferrets, until several lab animals are infected; thus demonstrating that a particular virus can be transmitted.⁷ This practice is controversial because it can turn a virus into a human pathogen.⁸ Clearly the activities conducted at the Wuhan Institute’s Animal Experiment Center, where animals, often bats, are used to discover coronaviruses, fits the definition of commercial activity.

28 U.S.C. §1605(a)(2) provides in pertinent part, “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case - ... (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; ... or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” Obviously, the Wuhan Institute engages in commercial activities within the City of Wuhan, in the PRC and many people believe that these activities, intended “to benefit China and the world” may have had a direct effect on the United States and may have created especially tragic consequences for the State of New York.

The theory that SARS-CoV-2 was spread by a Wuhan Institute lab because of human error or negligence, or worse, intentional acts has yet to be proven. The more commonly accepted theory is that the virus was passed from an animal, likely a bat(s) to a human at a wet market in Wuhan, likely the Huanan Seafood Wholesale market.⁹ This theory has not been proven either.

² “About Us,” Chinese Academy of Sciences, available at:

http://english.cas.cn/about_us/introduction/201501/t20150114_135284.shtml.

³ *Id.*

⁴ *Id.*

⁵ “About WIV,” Wuhan Institute of Virology, CAS, available at:

http://english.whiov.cas.cn/About_Us2016/Brief_Introduction2016/

⁶ “The Controversial Experiments and Wuhan Lab Suspected of Starting the Coronavirus Pandemic,” Newsweek (April 27, 2020), available at: <https://www.newsweek.com/controversial-wuhan-lab-experiments-that-may-have-started-coronavirus-pandemic-1500503>.

⁷ *Id.*

⁸ *Id.*

⁹ “Pneumonia of unknown cause – China,” World Health Organization, Disease outbreak news (Jan. 5, 2020), available at: <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/>.

Nevertheless, if the actual reason for the spread of COVID-19 is attributed to contact between humans and animals (bats) in the City of Wuhan, I believe a different exception to foreign immunity applies to the PRC, the non-commercial tort exception, 28 U.S.C. §1605(a)(5).

28 U.S.C. §1605(a)(5) provides in pertinent part, “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case - ... (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of this office or employment; except this paragraph shall not apply to – (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, Misrepresentation, deceit, or interference with contract rights.” An action brought against the PRC, a foreign state, on behalf of the State of New York would seek money damages from the PRC for personal injury, death, damage to and loss of property, all of which occurred within the United States and appear to have been caused by the tortious acts and omissions of the PRC and the governing officials of the PRC while such officials acted within the scope of their offices.

One can reasonably conclude that for several weeks following the identification of the novel coronavirus 2019, the PRC likely engaged in efforts to mislead the public in an attempt to cover up the threat of COVID-19. Although the World Health Organization, hereafter “WHO” was first informed on December 31, 2019 of cases “of pneumonia etiology (unknown cause) detected in Wuhan City.”¹⁰ WHO also stated on January 5, 2020, “[a]ccording to media reports, the concerned market in Wuhan was closed on January 1, 2020 for environmental sanitation and disinfection.”¹¹ Yet, the South China Morning Press has reported that the first case of the novel coronavirus can be traced to November 17, 2019.¹²

According to the New England Journal of Medicine, by utilizing the reported findings of the Chinese Center for Disease Control and Prevention, one can determine that the number of COVID-19 cases had doubled nearly every week (approximately 7.4 days) and that “[h]uman to human transmission among close contacts has occurred since the middle of December.”¹³ According to the South China Morning Press, on January 15th the Wuhan Health Commission made the following statements online, “although significant evidence confirming human-to-human transmission has yet to be found, the possibility of limited human-to-human transmission cannot be ruled out” and “[y]et the risk of sustained human-to-human transmission is rather low.”¹⁴ On January 14, 2020, WHO tweeted, “Preliminary investigations conducted by the

¹⁰ *Id.*

¹¹ *Id.*

¹² “Coronavirus: China’s first confirmed Covid-19 case traced back to November 17,” South China Morning Press (March 13, 2020), available at: <https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back>.

¹³ “Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus–Infected Pneumonia,” New England Journal of Medicine (Jan. 29, 2020), available at: <https://www.nejm.org/doi/full/10.1056/NEJMoa2001316>.

¹⁴ “China CDC chief defends early outbreak action: ‘I never said there was no human-to-human transmission,’” South China Morning Press (April 21, 2020), available at:

Chinese authorities have found no clear evidence of human-to-human transmission of the novel #coronavirus (2019-nCoV) identified in #Wuhan, #China.”¹⁵ One can reasonably conclude that this highly inaccurate and dangerous message can be attributed wholly, or at least partially, to the incorrect information that Chinese health officials had been communicating up to the middle of January, or later.

It is simply illogical to accept that Chinese health officials honestly believed there was no human-human transmission of the novel coronavirus, or that the risk of such transmission was “rather low,” as recently as mid-January 2020. To the contrary, one can conclude that PRC officials either deliberately lied to or misled the public, or failed to adhere to International Health Regulations, requiring that WHO be notified “within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory.”¹⁶ PRC officials were either, slow to act, or they chose to wait to notify WHO of this new dangerous communicable disease; and when notification was provided, the details were less than accurate, misleading and likely lies.

Chinese officials acted to further cover up the threat of COVID-19 when in early January, Wuhan officials took legal actions against Dr. Li Wenliang because he allegedly “published and shared rumors online.”¹⁷ Dr. Wenliang had communicated to several fellow physicians, his former classmates, that they should “be careful” as the novel coronavirus appeared to cause pneumonia and was very dangerous.¹⁸ In less than week after sharing his warning, Dr. Wenliang was asked to sign a statement admitting that he had committed the misdemeanor offense by spreading “unverified information.” Dr. Wenliang also agreed to refrain from committing “unlawful acts.”¹⁹ It was widely reported that Wuhan police officers referred to Dr. Wenliang as “rumormonger.”²⁰ Clearly, this was an effort to silence Dr. Wenliang and other physicians and health officials that sought warn people of risks of COVID-19.

In addition, Chinese officials made no warnings, nor restricted any travel for the hundreds of thousands of Wuhan residents that chose to travel around the globe for the Lunar New Year.²¹ On January 8, using the information provided by the PRC, WHO did not “recommend any specific measures for travelers” and advised “against the application of any travel or trade

<https://www.scmp.com/news/china/society/article/3080838/china-cdc-director-defends-early-outbreak-action-i-never-said>.

¹⁵ “An infamous WHO tweet saying there was ‘no clear evidence’ COVID-19 could spread between humans was posted for ‘balance’ to reflect findings from China,” Business Insider (April 18, 2020), available at: <https://www.businessinsider.com/who-no-transmission-coronavirus-tweet-was-to-appease-china-guardian-2020-4>.

¹⁶ “International Health Regulations (2005), Second Edition,” Article 6.1, World Health Organization, available at: https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf?sequence=1.

¹⁷ “A Chinese doctor tried to save lives, but was silenced. Now he has coronavirus,” CNN (Feb. 4, 2020), available at: https://www.cnn.com/asia/live-news/coronavirus-outbreak-02-04-20/h_f885b7c9bdd2474e309d68e92bd0d7c0.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ “How the Virus Got Out,” The New York Times (Mar. 22, 2020), available at: <https://www.nytimes.com/interactive/2020/03/22/world/coronavirus-spread.html>

restrictions on China.”²² PRC officials later forced drastic quarantine restrictions upon the residents of Wuhan in early February,²³ but by then the highly communicable virus had been allowed to leave the City of Wuhan and this led to more than 4.7 million infections and more than 315,000 deaths globally, including over 1.4 million cases and more than 89,000 deaths in the United States.²⁴

The precise cause of the first case of COVID-19 in a human may not be known at this time. Hopefully a thorough investigation will answer questions such as, (1) did the virus leave a laboratory and if so, how? As well as, (2) did one or more humans, contract COVID-19 through contact with a bat at a wet market? However, currently the world understands that the novel coronavirus emerged from the City of Wuhan, China and but for, either the acts of PRC officials through commercial activities administered by the state-run CAS, or the acts and omissions of PRC officials in threatening well-meaning medical professionals, not restricting international travel and failing to timely provide accurate notification and warning of the threat of COVID-19, the global pandemic could have been minimized and far fewer people would have been infected and killed.

As of today, the number of New York residents who have tested positive for COVID-19 has surpassed 350,000.²⁵ Tragically, more than 22,000 New Yorkers have died because of this pandemic,²⁶ an incredibly sad and staggering statistic that far outpaces any state in the nation.²⁷

Yet the loss of life is not the only hardship that New Yorkers have been forced to deal with. Governor Cuomo has stated publicly that we can now expect a budget shortfall of at least \$13.3 billion, due to a 14% decline in the State’s projected receipts.²⁸ As reported by CNBC, the Governor claims that forecasts show \$61 billion in lost revenue for state fiscal year 2020-21.²⁹ The New York Times has reported that New York City’s Independent Budget Office anticipates a tax revenue shortfall of \$9.7 billion in fiscal years 2020 and 2021.³⁰ The tremendous loss of

²² “WHO Statement regarding cluster of pneumonia cases in Wuhan, China,” World Health Organization (Jan. 9 2020) available at: <https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china>.

²³ “Sealed in: Chinese trapped at home by coronavirus feel the strain,” Reuters (Feb. 22, 2020), available at: <https://www.reuters.com/article/us-china-health-guarantine/sealed-in-chinese-trapped-at-home-by-coronavirus-feel-the-strain-idUSKCN20GOAY>.

²⁴ “COVID-19 Dashboard,” Center for Systems Science and Engineering at Johns Hopkins University, Coronavirus Resource Center (May 18, 2020), available at: <https://coronavirus.jhu.edu/map.html>.

²⁵ “NYSDOH COVID-19 Tracker,” New York State Department of Health (May 17, 2020), available at: <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n>.

²⁶ *Id.*

²⁷ “Coronavirus Disease 2019 Cases in the U.S.,” Centers for Disease Control and Prevention (May 17, 2020), available at: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

²⁸ “New York will suffer 13.3 billion revenue shortfall from original forecast due to coronavirus, Cuomo says,” CNBC (April 24, 2020), available at: <https://www.cnbc.com/2020/04/24/new-york-coronavirus-cuomo-says-state-will-suffer-13point3-billion-revenue-shortfall.html>.

²⁹ *Id.*

³⁰ “Virus Costing N.Y.C. Billions,” The New York Times (April 15, 2020), available at: <https://www.nytimes.com/2020/04/15/nyregion/coronavirus-new-york-update.html>.

tax revenue that has occurred due to the closing of much of our state's economy has caused enormous budgetary challenges for both state and local governments. Far too many New Yorkers have been, and will continue to be, harmed by severe budget cuts.

Obvious evidentiary and enforcement challenges exist in any lawsuit against the PRC, but these challenges should not dissuade you from seeking justice. Lawsuits against the State of Libya led to an agreement in which that nation accepted responsibility for the bombing of Pan Am Flight 103 in 1988 and agreed to pay \$2.7 billion to the families of the victims of that, and several other attacks.³¹ In addition, your office has a great opportunity to send a strong message to China and to governments all over the world, that acts meant to intimidate and silence those that selflessly choose to warn others of threats, will not be tolerated. Your office can show that New York stands for the rights of whistleblowers like Dr. Li Wenliang.

It is for these reasons, that I respectfully request your strong consideration of the option to file a complaint against the People's Republic of China on behalf of the State of New York, the state that has been harmed more than any other by the COVID-19 pandemic, seeking damages for the tremendous injury, death and economic loss that appears to have been caused by PRC officials' commercial activities and tortious actions and omissions. Thank you for your time and consideration.

Sincerely,



Chris Jacobs
New York State Senator
60th District

³¹ "Libya compensates terror victims," BBC News (Oct 31, 2008), available at: <http://news.bbc.co.uk/2/hi/americas/7703110.stm>.