UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MOHAWK GAMING ENTERPRISES, LLC Plaintiff, v. AFFILIATED FM INSURANCE CO. Defendant.	)	Case No.: 8:20-cv-00701-DNH-DJS

PLAINTIFF MOHAWK GAMING ENTERPRISES' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Marsha K. Schmidt (NDNY Bar No. 512364)
Attorney-at-Law
14928 Perrywood Drive
Burtonsville, MD 20866
301-949-5176
marsha@mkschmidtlaw.com
Lead Counsel for Plaintiff Mohawk Gaming Enterprises, LLC

THE COPPOLA FIRM

Lisa A. Coppola (NDNY Bar No. 513450)
3960 Harlem Road
Buffalo, NY 14226
716-839-9700
lcoppola@coppola-firm.com
Co-counsel for Plaintiff Mohawk Gaming Enterprises, LLC

November 6, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MOHAWK GAMING ENTERPRISES, LLC Plaintiff, v. AFFILIATED FM INSURANCE CO. Defendant.	)	Case No.: 8:20-cv-00701-DNH-DJS

PLAINTIFF MOHAWK GAMING ENTERPRISES' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Mohawk Gaming Enterprises (MGE herein) moves, pursuant to Fed. Rule Civ. Pro. 56(a), for partial summary judgment asking the Court to hold that the contamination exclusion in the proVision all-risk insurance Policy (the Policy) purchased from Affiliated FM (AFM) is not applicable to MGE's claim for coverage under the Business Interruption - Civil Authority extension.

MGE's Policy covers claims for the business interruption resulting from a Civil Authority closure order that was "the direct result of physical damage of the type insured" at the location or within five miles of the location. The Policy provides that the presence of a communicable disease is physical damage and the actual presence of a communicable disease is a covered injury. MGE's casino, Akwesasne Mohawk Casino and Resort (AMCR) was closed by the Saint Regis Mohawk Tribe as a direct result of a communicable disease occurrence (a COVID-19

positive case) at the nearby St. Lawrence College. MGE's has therefore established physical damage of the type insured under the policy.[1]

AFM denies coverage for two reasons. Pinning its case on the fact that an exclusion for "contamination" includes "virus" in its list of substances, it claims: (1) COVID-19 is a virus that does not cause "physical damage" and (2) the presence of COVID-19 is not a damage "of the type insured" because the contamination exclusion precludes coverage.

The exclusion is not applicable for four reasons: (1) the contract definitions confirm that COVID-19 is a covered "communicable disease" and not an excluded "contamination"; (2) the contamination exclusion excludes claims for "costs" due to contamination but MGE is making a claim for business interruption losses, not costs; (3) the contamination exclusion applies only to property covered under the policy and cannot be invoked for a claim based on physical damage at a location five miles away; and (4) the reference to "virus" in the exclusion does not nullify the treatment of communicable disease as physical damage.

AFM's theory ignores the clearly delineated terms and coverages in the Policy. A "communicable disease" is precisely and separately defined with coverage triggered by its own identifying criteria—it is a disease (not simply a virus or other pathogen) that is transmissible by direct or indirect human-to-human contact. That the definition of contamination includes the word "virus" does not change the Policy's treatment of the presence of a communicable disease as a separate covered occurrence of physical damage. The common definition of communicable disease and related definitions show that a communicable disease can be caused by many of the

[1] MGE is aware that AFM intends to argue that the Tribe's closure order was not the "direct result" of the physical damage at the college. This is a separate issue that requires discovery. But it does not defeat this motion. After discovery MGE intends to file a motion for summary judgment on the issue of causation which will show the Tribe was prompted to act because of the incident at the college.

substances listed in the contamination definition. Thus, to define a communicable disease as an excluded contaminant by reference to the underlying list of substances—substances that can also be the cause of a communicable disease--would defeat the communicable disease coverage in its entirety or render it illusory at best. The important factor is transmissibility, the key which distinguishes a "communicable disease" from "contamination." The disease, no matter its cause, must be transmissible by human-to-human contact to qualify as a communicable disease. Any disease without that quality can be construed as a contamination.

In addition, "communicable disease" is not included among the AFM-drafted list of "contamination" substances. This omission is critical since the omission of a specifically defined Policy term must be interpreted as intentional. In the absence of the term "communicable disease," the linking of communicable disease to contamination must be implied through the word "virus." Under contract interpretation rules, an exclusion cannot be expanded by implication.

Aside from the definitional distinction, the Contamination Exclusion is also limited on its face in ways that render it inapplicable to MGE's claim. First, the Exclusion applies to claims for "costs," but MGE is claiming business losses. Second, the exclusion also applies only to claims for contamination to "property," also not at issue here. Finally, under the Policy's own express terms including the caption, its treatment in the sublimits and deductibles, and simply by its inclusion in a property damage policy, the presence of a communicable disease is property damage and the exclusion does not change this reading.

II. STATEMENT OF FACTS

A. Closure of the College and the AMCR

Like most businesses, MGE has been significantly affected by COVID-19. MGE's

property, the AMCR, located on the Saint Regis Mohawk Tribe reservation in Northern New York, was ordered closed by the Saint Regis Mohawk Tribe (the Tribe) on March 17, 2020. The closure order sprang from a communicable disease incident at Saint Lawrence College, located 4.5 miles from AMCR in Cornwall, Ontario, a town across the river from the reservation. Statement of Undisputed Material Facts 1, 4 ("MF" herein).

On March 15, 2020, the President of St. Lawrence College ordered the College closed due to the presence of a positive coronavirus case at the campus. MF 1. According to an official report from the Eastern Ontario Health Unit, a public health entity in Cornwall, a student who had recently traveled to New York City had a test-confirmed case of the coronavirus, COVID-19. MF 2. Four contacts of the infected person, including one contact at the college itself, were asked to self-isolate. *Id*. The student's attendance at a class while infected resulted in the closure of the campus. MF 1.

In response to the reported COVID-19 case and the College closure, on March 15, 2020, the Tribe issued a joint emergency declaration for the Akwesasne Territory including the American reservation. MF 3.

On March 16, 2020, members of the Tribal Council met with MGE representatives and AMCR management to discuss closing the casino. In that meeting, the Tribal Council members raised the incident at St. Lawrence College as a matter of serious concern because the casino has many patrons from Cornwall and the Casino could suffer the same fate as the College. The Tribal Council members advised MGE that the incident in Cornwall warranted the temporary closure of the casino. P.Ex. 9, Att. 6, P0119, Att. 7, P0121, Att. 8, ¶8, P0123.

That same day, the Tribe issued a written order closing the casino starting at 2:00 a.m. March 17, 2020. MF 5. Since this closure, MGE has lost millions of dollars.

B. Claim Submission

MGE's Policy, purchased in 2019 from AFM, is an all-risk policy, covering "all risk of physical loss or damage" to property unless excluded. P.Ex. 1, P0014, MF 6. MGE's interpretation of the Policy depends on two sections—Business Interruption Coverage Extension Section E.2 "Civil or Military Authority" and Section D.5, "Communicable Disease – Property Damage," an additional property coverage extension. The "Civil or Military Authority," provides in part:

> "This Policy covers Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a **location** provided such order is the direct result of physical damage of the type insured at a **location** or within five statute miles of it."

P.Ex. 1, P0037-38 (bold in original), MF 7.[2]

Thus, to establish coverage under the Civil Authority Section, MGE has to establish three facts: (a) an order of a civil authority prohibited access to a location; (b) the order was a direct result of physical damage of the type insured; and (c) the physical damage occurred at the location or within five miles of the location.

To show that physical damage "of the type insured," MGE looked to the "Communicable Disease – Property Damage" section, which expressly provides coverage if there is the "actual presence" of a "communicable disease" and access to the insured location is limited by official order. P.Ex. 1, P0020, MF 8. "Communicable disease" is broadly defined as a "disease that is transmissible from human-to-human by direct or indirect contact with an affected individual or the individual's discharges." P.Ex. 1, P0055, MF 9. The Communicable Disease coverage encompasses all diseases and the definition does not refer to virus, bacteria, or any other

[2] "Business Interruption Coverage loss" encompasses the actual loss of gross earnings or gross profit. P.Ex. 1, P0032-34.

pathogen. MF 10. Instead it looks to the broader category of "disease," regardless of the cause, but then limits the coverage only to human-to-human transmissible diseases. In this case, an actual communicable disease incident, a positive case of COVID-19, had occurred at St. Lawrence College, within five miles of the casino, and that incident resulted in the closure order.

On March 19, 2020, MGE notified AFM in writing that it intended to make a claim under Section E.2 "Civil and Military Authority" due to civil closure order issued by the Tribe. MF 23. AFM acknowledged the notice but described the claim as one under the "Communicable Disease" section, MF 4, even though MGE had not made a communicable disease claim. Over the course of weeks, AFM repeatedly insisted in its communications with MGE that COVID-19 qualified as a communicable disease under the Policy and that this was the only provision through which to make a claim, with no mention of the contamination exclusion being an impediment to a Civil Authority claim. MF 24-27.

At some time before AFM formally denied the claim, AFM circulated an undated memorandum to its adjusters and agents entitled "Talking Points on the 2019 Novel Coronavirus (2019 nCo-V)." P.Ex. 3. This memorandum served as a road map to its adjusters on how to interpret the proVision Policy in light of claims being made for coverage due to the COVID-19 pandemic. P.Ex. 3, MF 28. Answering the question: "What is the trigger of coverage for Property Damage?", the memo recognizes that the actual presence of a communicable disease is property damage which triggers coverage. P.Ex. 3, P0072, MF 28. But in addressing the "physical damage of the type insured" requirement under the Civil Authority coverage, the guidance takes the contrary position citing the contamination exclusion. AFM advises its adjusters that communicable diseases cannot serve as "physical damage of the type insured"

under the Civil Authority section because "[a] virus will typically not cause physical damage. Under either policy, the presence of a communicable disease does not constitute physical damage and is not of the type insured against as a virus falls within the definition of contamination, which is excluded." P.Ex. 3, P0073, MF 29.

Thus, the talking points posit that communicable disease property damage coverage is available as an additional coverage with the actual presence of a communicable disease like COVID-19. But AFM denies that same coverage can serve as support for a the Civil Authority claim because (1) the presence of a communicable disease does not cause "physical damage" and (2) because COVID-19 is a virus that is subject to the contamination exclusion, the presence of a communicable disease is not an injury "of the type insured." This reasoning is not even circular. It is nonsensical. It suggests, without any rational explanation, that the communicable disease coverage can exist as a stand-alone coverage without being affected by the contamination exclusion, but that same occurrence cannot be considered as an injury "of the type insured"--one that AFM just recognized as a type of injury that can be insured--because it is an excluded contamination.

On May 4, 2020, before MGE had even filed its written proof of claim, AFM sent a letter to MGE regarding the basis of MGE's claim for coverage. P.Ex. 2, MF 30. Not surprisingly, the letter mimicked the talking points. AFM explained that the civil authority provision required "physical loss or damage of the type insured," and MGE could not meet this condition for two reasons: the MGE Policy excluded any claim based on contamination by a virus and the presence of the virus was not physical damage. P. Ex. 2, P0069, MF 30-31. The letter then stated the contradictory position that COVID-19, a virus, "meets Policy's definition of a communicable disease." P.Ex. 2, P0069, MF 30. There was no explanation as to how a

communicable disease claim for COVID-19 could be valid but at the same time it could not be cited as a type of claim insured under the Civil Authority section.

On May 12, 2020, MGE submitted its Proof of Loss, including declarations and documents supporting its claim. P.Ex. 9, MF 32.

C. Claim Denial

On July 21, 2020, after suit was filed, AFM provided MGE a formal denial. MF 33. The denial repeated the same points from the talking points memorandum and the May 4 letter, with one significant change. The denial did not expressly admit that COVID-19 is a communicable disease under the Policy. Instead, having now fully developed its Policy defense, AFM declared "COVID-19 is a virus, pathogen and/or disease causing or illness causing agent," and if present is contamination and excluded from coverage. P.Ex. 11, P00142-0143, MF 34. It asserted that "[t]he presence or suspected presence of COVID-19 at a location does not constitute physical loss or damage." P.Ex.11, P0142, MF 33. It found "in addition" that COVID-19 is contamination by a virus and therefore such contamination is excluded under the Policy. For those two reasons, it concludes, the Civil Authority section "does not respond" because the presence or suspected presence of COVID-19 "does not constitute 'physical damage of the type insured.'" P.Ex. 11, P0143, MF 34. Finally, in direct contradiction to that reasoning, AFM addressed communicable disease coverage but concluded that absent the actual presence of COVID-19 at its casino location, MGE could not make a separate claim for Communicable Disease coverage. P.Ex. 11, P0143-0144, MF 35. No explanation was given as to why the contamination exclusion did not impact this claim.

D. Contamination Exclusion and Definitions

On its face, the contamination exclusion omits communicable diseases. Group III of the Policy excludes claims for "**contamination**, and any costs due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policy Exclusions Sec. C, Group III, ¶8, P.Ex. 1, P0018, MF 18.[3]

"**Contamination**" is defined as "any condition of property due to the actual or suspected presence of any foreign substance, impurity, . . . pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, ..." P.Ex. 1, P0055, MF 19. "Communicable disease," which is separately defined in the Policy, is not included in the list of substances qualifying as "contamination." MF 20.

Further, the Policy definitions create a stark distinction between contamination and communicable disease. Under the Policy, a communicable disease is not just a virus; it is a contagious disease spread by a human vector. The Policy reflects a known distinction that is also reflected in dictionary definitions which explain that communicable diseases are those spread by various vectors including by human-to-human contact.

In the Merriam-Webster Dictionary "Communicable Disease" is defined as:

> : an infectious disease (such as cholera, hepatitis, influenza, malaria, measles, or tuberculosis) that is transmissible by contact with infected individuals or their bodily discharges or fluids (such as respiratory droplets, blood, or semen), by contact with contaminated surfaces or objects, by ingestion of contaminated food or water, or by direct or indirect contact with disease vectors (such as mosquitoes, fleas, or mice)
>
> Note: The terms communicable disease and contagious disease are often used interchangeably. However, communicable diseases such as malaria or schistosomiasis that are spread by contact with disease vectors are not typically

[3] The exclusion applies "unless otherwise stated." P.Ex. 1, P0015. The Contamination exclusion has two exceptions, one for "contamination directly resulting from other physical damage not excluded" and "radioactive contamination which is excluded elsewhere in the Policy." P.Ex. 1, P0018, MF 21.

> considered to be "contagious" diseases since they cannot be spread from direct contact with another person.
>
> https://www.merriam-webster.com/dictionary/communicable%20disease (emph. added). (Last accessed on Nov. 3, 2020).[4] MF 36.

As indicated in the Note, diseases spread by human contact (as opposed to other vectors) are more precisely "contagious." The dictionary defines "contagious disease" as:

> : an infectious disease (such as influenza, measles, or tuberculosis) that is transmitted by contact with an infected individual or infected bodily discharges or fluids (such as respiratory droplets), by contact with a contaminated surface or object, or by ingestion of contaminated food or water
>
> Note: The terms contagious disease and communicable disease are often used interchangeably. However, communicable diseases such as malaria or schistosomiasis that are spread by contact with disease vectors (such as mosquitoes or ticks) are not typically considered to be "contagious" diseases since they cannot be spread from direct contact with another person.
>
> https://www.merriam-webster.com/dictionary/contagious%20disease. (Last accessed on Nov. 3, 2020). MF 38.

The National Foundation for Infectious Disease,[5] catalogs a full list of diseases caused by viruses and other substances listed in the contamination exclusion, some of which are transmissible by human-to-human contact, *i.e.,* they qualify as communicable diseases under the Policy definition, and some of which are spread by other disease vectors such as insects. See https://www.nfid.org/infectious-diseases/ : "influenza" (virus with human

---

[4] The Merriam-Webster Dictionary defines "infectious disease" as "a disease (such as influenza, malaria, meningitis, rabies, or tetanus) caused by the entrance into the body of pathogenic agents or microorganisms (such as bacteria, viruses, protozoans, or fungi) which grow and multiply there." https://www.merriam-webster.com/dictionary/infectious%20disease. (Last accessed on Nov. 3, 2020). MF 37.

[5] "The National Foundation for Infectious Diseases (NFID) is a non-profit 501(c)(3) organization dedicated to educating the public and healthcare professionals about the burden, causes, prevention, diagnosis, and treatment of infectious diseases across the lifespan." https://www.nfid.org/about-nfid/. (Last accessed Nov. 3, 2020).

transmission), https://www.nfid.org/infectious-diseases/influenza-flu/ ; "mumps" (virus with human transmission), https://www.nfid.org/infectious-diseases/mumps/ ; "zika" (virus with insect vector), https://www.nfid.org/infectious-diseases/zika/ ; "tetanus" (bacteria not human-to-human transmissible), https://www.nfid.org/infectious-diseases/tetanus/ ; "diphtheria" (bacteria with human-to-human transmission), https://www.nfid.org/infectious-diseases/diphtheria/ . (All web pages last accessed Nov. 3, 2020). MF 39.

Whatever definition is used, COVID-19 is not just a virus. It is a communicable disease, transmitted by human-to-human contact. It is defined as a communicable disease by leading health organizations.[6] AFM's has acknowledged that COVID-19 is a communicable disease when it categorized MGE's claim as one for communicable disease coverage and advised in various communications that COVID-19 qualified as a communicable disease under the Policy. MF 24-26, 31.

E. Policy Statement on Physical Damage.

AFM's claim denial also asserted that, as a virus, COVID-19 does not cause "physical damage." This conclusion contradicts the terms of the Policy. The Policy caption declares "Communicable Disease – *Property Damage*." While the Policy does not explicitly define "property damage," the definition is well known and equates it to "physical damage." The Merriam Webster dictionary defines "property damage" as "damage or destruction to houses, cars, etc." See https://www.merriam-webster.com/dictionary/property%20damage. (Last accessed Nov. 3, 2020). MF 43. "Damage" is defined as "loss or harm resulting from injury

[6] The World Health Organization, the CDC, and the State of New York Dept of Health have declared COVID-19 to be a communicable disease transmissible by human-to-human contact. MF40-42.

to person, property, or reputation...." https://www.merriam-webster.com/dictionary/damage (Last accessed Nov. 3, 2020). MF 44. *See also* LawInsider.com: " 'Property damage' means physical injury to, destruction of, or loss of use of tangible property." https://www.lawinsider.com/dictionary/property-damage. (Last accessed Nov. 3, 2020). MF 45. Businessdictionary.com: " 'Property Damage' means 'Physical injury or destruction of tangible property caused by either an individual who is not the owner of said property or by natural phenomenon.'" http://www.businessdictionary.com/define/property-damage.html. (Last accessed Nov. 3, 2020) MF 46.

Similarly, the Declaration provides a sublimit for "Communicable Disease – *Property Damage*," and the Policy equates communicable disease to "physical damage" in both the sublimits and deductibles. The Policy refers to "communicable disease" as an "occurrence," which is defined as "the sum total of all losses or damage of the type insured, including any insured Business Interruption loss, arising out of or caused by one discrete event or *physical loss or damage*, ..." P.Ex. 1, P0056, MF 12. (emph. added). The sublimits apply on a "per occurrence basis." P.Ex. 1, P0004. The Communicable Disease - Property Damage and Communicable Disease - Business Interruption coverages are "occurrences" both of which are subject to a $100,000 sublimit per annual aggregate. P.Ex.1, P0005-0006, MF 13.

The deductibles also apply "per occurrence." MF 14. The Communicable Disease - Property Damage and Communicable Disease - Business Interruption coverages each have a deductible per occurrence of $10,000 to be deducted from "*the insured loss or damage*." P.Ex. 1, P0007. The business interruption deductible also includes a two-day loss equivalent based on the value "that would have been earned had no loss occurred at the location where the *physical damage* happened...." P.Ex. 1, P0007, MF 14. (Emph. added.) .

Public records also shows that AFM itself interpreted the communicable disease section as coverage for physical damage. In 2015, AFM submitted a Communicable Disease Endorsement for regulatory approval by the New York State Department of Financial Services. P.Ex. 13, P0146. The proVision Healthcare Endorsement included the following sentence: "For the purpose of this coverage, *the presence and spread of communicable disease will be considered direct physical damage*...." P.Ex. 14, P0150, MF 15. (Emph. added.) This language was carried over from a 2010 form. P.Ex. 15, P0156.

In 2016, AFM added communicable disease coverage to its standard proVision policy. MF 16. The proVision policy had an existing contamination exclusion when the communicable disease coverage was added. P.Ex. 16, P0164, MF 16. AFM's regulatory submission shows that the previously approved communicable disease section was revised, including the deletion of the above quoted sentence. However, AFM assured regulators that the section was substantively the same as the regulators had approved in 2015 with only "grammatical and editorial changes" made for "clarification." P.Ex. 17, P0169. MF 17. AFM ended its explanation by declaring, "This is an overall expansion of coverage." *Id.*

III. STANDARD OF REVIEW

Summary judgment under Fed. Civ. Pro. Rule 56(a) is appropriate where the movant shows "there is no genuine issue of material fact to be tried and the facts for which there is no issue entitles the movant to judgment as a matter of law." *Chambers v. TRM Copy Cntrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994). "A fact is material for purposes of this inquiry if it might affect the outcome of the suit under the governing law." *Fulton Boiler Works, Inc. v. American Motorists Insurance Co.,* 828 F.Supp.2d 481, 488 (N.D.N.Y 2011)(quotations and citations omitted)

In resolving a summary judgment motion, "interpretation of an unambiguous contract is a question of law for the court." *Omni Quartz v. CVS Corp*., 287 F.3d 61, 64 (2d Cir. 2002); *see also Clarke v. Max Advisors,* 235 F. Supp.2d 130, 139 (N.D.N.Y. 2002) ("The task of interpreting and enforcing the language of a clear and unambiguous contract is one ideally suited for summary judgment, since interpretation of an unambiguous contract ordinarily implicates a question of law for the court."); *Madelaine Chocolate Novelties v. Great Northern Insurance Co.,* 399 F.Supp.3d 3, 8 (E.D.N.Y. 2019)("Even though a contract may be ambiguous, summary judgment may nonetheless be appropriate where a court is in position to resolve the ambiguities through a legal rather than factual, construction of its terms."

Once the moving party demonstrates there is no issue of material fact, the non-moving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor. "[I]t is well settled that a party opposing a motion for summary judgment may not simply rely on the assertions in its pleading." *Roberts v. Cuomo*, 339 F.Supp.3d 36, 59 (N.D.N.Y. 2018). To the extent the statement of material facts is undisputed, the court must accept that the evidence in the record supports the movant's assertions. *Id., citing Giannullo v. City of New York*, 322 F.3d 139, 143 n.5 (2d Cir. 2003).

IV. APPLICABLE LAW

In disputes involving the terms and interpretation of an insurance contract, "the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and [ ] the interpretation of such provisions is a question of law for the court." *Aspen Specialty Insurance Company v. 4 NYP Ventures LLC,* 162 F.Supp.3d 337, 342 (S.D.N.Y. 2016), *citing Broad St., LLC v. Gulf Ins. Co.,* 37 A.D.3d 126, 130–31, 832 N.Y.S.2d 1 (1st Dep't 2006). Ambiguity cannot be "created from whole cloth where none

exists." *Universal American Corp. v. Nat'l Union Fire Ins. Co.*, 25 N.Y.3d 675, 680, 16 N.Y.S.3d 21 (2015).

An insurance policy is unambiguous if "the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *El-Ad 250 West, LLC. v. Zurich American Ins. Co.*, 44 Misc.3d 633, 636 (Sup. Ct. NY Co. 2014), *aff'd* 130 A.D.3d 459 (1st Dept. 2015) *quoting Fed. Ins. Co. v. Int'l Bus. Machs. Corp.,* 18 N.Y.3d 642, 646 (2012). A policy is ambiguous if the policy fails to disclose its purpose or it is susceptible to more than one meaning. *Universal American Corp*, 25 N.Y.3d at 680. "An insurance contract is ambiguous only if its language is 'susceptible of two reasonable interpretations.'" *Aspen Specialty Ins. Co.* 162 F.Supp.3d at 342, *quoting MDW Enter., Inc. v. CNA Ins. Co.,* 4 A.D.3d 338, 340–41, 772 N.Y.S.2d 79 (2d Dep't 2004). An ambiguity can be identified by focusing on "the reasonable expectations of the average insured upon reading the policy and employing common speech." *Id.* Ambiguities are resolved against the insurer and in favor of the insured. *Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006). The court must look to the entire contract and an interpretation that would render any individual provision superfluous is disfavored. *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 86 (2d Cir. 2002)(citations omitted).

As the insured, MGE has the initial burden to establish coverage. AFM, as the Insurer, has the burden of showing an exclusion applies. *Consolidated Edison Co. of N.Y v. Allstate Ins. Co*. 98 N.Y.2d 208, 218, 746 N.Y.S.2d 622 (2002). "The burden is a heavy one and if the language is doubtful or uncertain in meaning, any ambiguity will be construed in favor of the insured against the insurer." *Lee v. State Farm Fire & Cas. Co.*, 32 A.D.3d 902, 904, 822

N.Y.S.2d 559, 561 (2 Dep't) *citing Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co*., 13 A.D.3d 599, 600, 788 N.Y.S.2d 142 (2d Dep't 2004) To "negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case and that its interpretation of the exclusion is the only construction that [could] fairly be placed thereon." *Throgs Neck Bagels, Inc. v. GA Ins. Co. of N.Y.*, 241 A.D.2d 66, 71, 671, N.Y.S.2d 66, 69 (1st Dep't 1998)(citations and quotation marks omitted). Policy exclusions "are not to be extended by interpretation or implication but are to be accorded a strict and narrow construction." *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873 (1984); *Kilroy Industries v. United Pacific Ins. Co.*, 608 F.Supp. 847, 855 (C.D. Cal. 1985)("Where the insuring clause of a policy clearly covers a risk, and a subsequent limiting clause does not clearly exclude the risk, the risk will be deemed covered by the policy."). Where enforcement of an exclusion "would carry with it 'danger of misconception' or a 'reasonable basis for a difference of opinion,' it should not be enforced." *Madelaine Chocolate*, 399 F.Supp.3d at 12 (citations omitted).

If the relevant contractual provision is ambiguous, the burden shifts to the insurer to prove its interpretation is correct. *Parks Real Estate Purchasing Group,* 472 F.3d at 42. If an ambiguous contract provision is "susceptible of at least two fairly reasonable meanings," the Court may consider extrinsic evidence to resolve its meaning. *Wards. Co., Inc. v. Stamford Ridgeway Assoc's,* 761 F.2d 117, 120 (2d Cir. 1985); *Morgan Stanley Group Inc. v. New England Ins. Co*., 225 F.3d 270, 275 (2d Cir. 2000)(internal quotes and citations omitted).

V. ARGUMENT

A. The Policy is Unambiguous—a Communicable Disease is not a Contaminant.

1. The Policy Terms Differentiate Between "Communicable Disease" and "Contamination."

When a policy provides both a general and a specific provision, the specific provision controls, particularly if there is an inconsistency. *Rocon Mfg. Inc. v. Ferraro*, 199 A.D.2d 999, 100, 605 N.Y.S.2d 591, 593 (1993); *In re Lehman Bros. Holdings Inc. v. Giddens*, 761 F.3d 303, 313 (2d Cir. 2014). Moreover, "specific terms and exact terms are given greater weight than general language." *Aramony v. United Way of Am.*, 254 F.3d 403, 413 (2d Cir. 2001) *citing* Restatement (Second) Contracts, §203(c)(1981); *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 442 F. Supp. 3d 576, 586 (S.D.N.Y. 2020).

Here, the Policy provides two clear and distinct definitions. "Contamination" is a general definition which lists substances that can be the source of contamination. That list does not include "communicable disease," a term specifically defined in the Policy. The "Communicable disease" definition makes no reference to virus, bacteria or other pathogens from the contamination list, but instead broadly covers "diseases" with a very specific method of disease transmission as the controlling factor in coverage. By attempting to redefine COVID-19 as an excluded contaminant simply because it is caused by a virus, AFM does violence to these definitional distinctions, ignoring the key characteristic of communicable disease which requires a disease *and* transmissibility. Under AFM's reading, all communicable diseases would have to be construed as contaminants because *all* diseases are included in the definition of contamination creating, not just conflicting provisions, but illusory coverage for communicable diseases. [7]

[7] This conflicted reading cannot be resolved by interpreting communicable disease coverage as an exception to the exclusion. The contamination exclusion expressly sets forth the exceptions to it and communicable disease coverage is not included among them. See note 3 above. Any such reading would have to be implied. Compare to Exclusion Group I, ¶4, which excludes specific policy coverages by express cross reference: "*except as provided* by the Off-Premises Data Services and Off-Premises Service Interruption coverages in this Policy." P.Ex. 1, P0016 (emph added).

The better option is to read the Policy coverage and exclusion together by looking to the transmissibility distinction. A communicable disease, by its nature, will include diseases that are caused by bacteria or viruses or other pathogens. The key distinction is that the communicable disease coverage requires a specific method of transmission of the disease. If that characteristic is not present, then the exclusion would apply to a disease. To illustrate: if MGE discovered that a pond on the property was the source of mosquitoes carrying the Zika virus, and a patron had contracted the disease, MGE could not make a claim for the cost of ridding the pond of those viral mosquitoes because the disease is not "communicable" as defined in the Policy, that is, transmitted by human-to-human contact. https://www.nfid.org/infectious-diseases/zika/. On the other hand, a virus such as a norovirus is highly contagious and spread by human-to-human transmission. https://www.nfid.org/infectious-diseases/norovirus/. If the norovirus was found in the casino, it should be covered under the communicable disease section of the Policy despite the fact that it is a virus. This reading harmonizes the terms of the Policy.

Cases considering specific definitions and coverages enforce similar distinctions. In *New Jersey Transit Corp. v. Certain Underwriters at Lloyd's London*, 461 N.J. Super. 440, 221 A.3d 1180 (2019), the Court considered whether damage from a storm surge was covered by a flood sublimit which referenced "surge" or by the named storm coverage sublimit which included "storm surge" in its definition. The insured claimed the damage was caused by a storm surge which was covered under the named storm coverage sublimit, a separately defined peril. The insurer claimed the flood sublimit applied because the damage was due, not to a "storm surge," but to a "surge." Giving effect to the whole policy, *id*. at 454, the court found the plain language of the policy intended to differentiate between a flood as a surge of water with no relationship to

a storm and a storm surge related to a named windstorm. *Id.* at 457. As a result, the court held the named storm coverage sublimit applied because of the more specific definition. *Id*. at 459.[8]

Here, the communicable disease/contamination distinction is no different. The Policy differentiates between (1) contamination caused generally by a virus or other pathogen, and (2) a communicable disease where coverage is triggered by the actual presence of a disease that is transmitted in a specific way.

The Policy is not ambiguous on this score. An insurance contract is ambiguous only if its language is "susceptible of two reasonable interpretations." *Aspen Specialty Ins. Co.,* 162 F.Supp.3d at 342. That is not the case here. AFM's interpretation is not in any way "reasonable." In fact, if AFM's interpretation is correct, then the communicable disease coverage would be rendered illusory and superfluous, neither of which is acceptable. *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 357 N.Y.S.2d 705 (1974)(argument to deny coverage for "some of the largest foreseeable elements of damage" would render the coverage illusory). Indeed, AFM's reading would cause the exclusion to swallow the coverage. *Reliance Ins. Co. v. Nat'l Union* Fire Ins. Co., 262 A.D.2d 64, 65, 691 N.Y.S.2d 458 (1st Dept. 1999).

In *Colony Ins. Co. v. Nicholson*, 2010 WL 3522138 (S.D. Fla. Sept 8, 2010), a nail salon brought suit to access coverage to defend a customer claim of bacterial infection. The policy had two exclusions: a communicable disease exclusion covering "an infectious or biological virus or

[8] *Contrast National R.R. Passenger Corp v. Arch Specialty Ins. Co*, 124 F.Supp.3d 264 (S.D.N.Y. 2015)(because "storm surge" was not separately defined from "flood," the insured could not claim coverage based on nonexistent distinction); *New Sea Crest Health Care Center, LLC. v. Lexington Ins. Co*. 2014 WL 2879839 (E.D.N.Y June 24, 2014)(the policy definition of flood "contains that precise word" "storm surge" making it a type of flood).

agent," and which had no geographical limitations and a separate "Fungi or Bacteria Exclusion" exclusion which applied to events that occurred only within the salon. The Insurer sought to invoke the communicable disease exclusion even though the infection was bacterial on the ground that the communicable disease coverage applied to "any infectious agent" and that some of the listed communicable diseases were actually bacterial in nature. Id. at *2.

The Court held that to read the policy as the Insurer suggested would "completely subsume" the separate bacteria exclusion and render that section superfluous. 2010 WL 3522138, *3. The Court found that, given the term "bacteria" appearing in the title and a separate broad exclusion for communicable diseases, a layperson would assume the insurer who drafted the contract intended the bacterial and communicable disease coverages to be interpreted according to its terms. "If a provision specifically referencing 'Bacteria' only excludes coverage for an injury arising from a bacteria contained within a salon, a reasonable lay person is likely to conclude that the policy does indeed provide coverage for an injury arising from bacteria contained without." *Id*.

Applying the ordinary person test to the Policy, the contamination exclusion does not expressly exclude communicable disease, a covered occurrence, and no sensible person would conclude that the expressly covered communicable disease would be excluded by a separate contamination exclusion. *See Cantrell v. Farm Bureau Town & Country Ins. Co.*, 876 S.W.2d 660, 664-665 (Mo. Ct. App. 1994)(contamination exclusion would not be interpreted by a reasonable person to exclude specifically covered losses, even if the losses could also be construed as a contaminant). A lay person would conclude that the Insurer wrote the Policy as it intended—to cover communicable disease when present, and to exclude general contamination claims not based on the presence of a "communicable disease" as defined in the Policy. *See also*

Pinnacle Entertainment, Inc. v. Allianz Global Risks U.S. Ins. Co., 2008 WL 6874270 (D. Nev. March 26, 2008), where the court considered whether "storm surge" was excluded from coverage when the different policies separately defined "flood" and "weather catastrophe." Because an exclusion must clearly and distinctly communicate its terms and "clauses providing coverage are to be construed broadly, while clauses excluding coverage are to be interpreted narrowly," 2008 WL 6874270, *4, the court found the inconsistencies in coverage meant the clear and distinct standard for exclusions was not met.

Indeed, the contamination exclusion does not clearly and distinctly say that it applies to covered communicable diseases when it could easily have done so. For example, the Policy does not define the clean-up of a communicable disease as a "decontamination" nor does it refer to a communicable disease as contamination. The Policy covers "the reasonable and necessary costs incurred by the Insured at such described location for the: a) *Cleanup, removal and disposal* of *such presence* of communicable disease from insured property...." Compare this language to the clear reference to clean up of *contamination* in "Land and Water Clean Up Expense" in Section D.17, which covers "the reasonable and necessary *costs to remove, dispose of or clean up* the actual but not the suspected presence of *contaminant(s)* from uninsured land or water or any substance in or on land, at a location, when such property is contaminated as a direct result of insured physical loss or damage to insured property." P. Ex. 1, P0025 (emph. added). The Policy also separately provides decontamination coverage in specific circumstances under the debris removal and decontamination sections where the terms "contaminant" and "contamination" are directly referenced. See P.Ex. 1, Sections D.7, D.8, P0021. Thus, AFM knew how to reference contaminants and contamination when that term was needed or intended.

It did not do so in setting out the coverage for communicable disease and therefore it should be construed that the drafter—AFM—did not intend to include it.

2. If the Court Finds the Policy Ambiguous, the Coverage Still Must be Read in Favor of the Insured.

Although MGE believes that the Policy is clear and unambiguous, if there is any doubt about the contract's meaning the Policy would be deemed ambiguous. If there is ambiguity in whether a viral "communicable disease" also is an excluded "contaminant," a reading that necessarily must be implied, then the Court must apply the rule that policy exclusions "are not to be extended by interpretation or implication but are to be accorded a strict and narrow construction," *Seaboard Surety Co.,*64 N.Y.S.2d at 311, and any ambiguity will be resolved against the insurer. The only possible result from the application of this longstanding rule is to read the communicable disease coverage to exist in harmony with the contamination exclusion by relying on the human-to-human transmission requirement as the operative distinction.

B. The Policy is Unambiguous—a Communicable Disease is Physical Damage.

AFM denied coverage on the ground that a communicable disease cannot cause physical damage. But the Policy is unambiguous. It covers "all risk of *physical loss or damage*" unless excluded. P.Ex. 1, P0014 (emph added). Thus, if an occurrence is included as an additional coverage, it *has* to be coverage for physical damage. Otherwise, the provision does not belong in the policy or the policy is providing for coverage beyond its stated purpose.

Here, coverage for the presence of a communicable disease is in the property damage section of the Policy in a section titled "Communicable Disease – *Property Damage*." P.Ex. 1, P0020 (emph. added). The very heading of the communicable disease coverage declares the coverage is for "Property Damage." "Captions are relevant to contract interpretation." *Int'l. Multifoods Corp.*, 309 F.3d at 85.

Other indicators in the Policy render it unambiguous as a matter of law. First, the plain meaning of "property damage" is "physical damage." There are many sources equating these terms by definition. See discussion above at 11-12. In setting out the extent of coverage for a communicable disease claim, the Policy itself treats the presence of a communicable disease as a covered physical loss or damage. See discussion above at 12 regarding occurrences, sublimits and deductibles. If the presence of a communicable disease was not physical damage, then this language would be pointless.

While MGE believes the meaning of the policy is unambiguous, if the Court finds there is ambiguity, those ambiguities are resolved against the insurer. To resolve its meaning, extrinsic evidence may be considered. See discussion above at 16. In this case, there is extrinsic evidence in the form of a public record setting out AFM's own interpretation of the policy.

As detailed above, AFM sought approval of the communicable disease provision from the New York Dept. of Financial Services (DFS).[9] At that time, the contamination exclusion was a standard part of the Policy. MF 16. The 2015 iteration of the provision expressly stated the coverage was for physical damage. "For the purpose of this coverage, *the presence and spread of communicable disease will be considered direct physical damage* and the expenses listed above will be considered expenses to repair such damage." P.Ex. 14, P0150, MF 15.

When AFM sought to add this coverage to its general commercial property form, MF 16, the paragraph was rewritten, and this particular sentence was removed. MF 17. But AFM assured the DFS that the agency had already approved the communicable disease language and that any revisions (including the deletion of the sentence) were merely grammatical and editorial only, not substantive. It further assured DFS that the communicable disease section was an

[9] The DFS regulates insurers. *See Who We Supervise*, https://www.dfs.ny.gov/who_we_supervise (last visited 10/28/20).

expansion of coverage under its commercial property form. P.Ex. 17, P0169, MF 17.

That the first version of the provision expressly defined the communicable disease coverage as one for "physical damage" was only stating the obvious. This is an all-risk property damage policy. Included coverages have to be for physical damage, or the Policy is providing for coverage beyond its stated purpose. If the Policy is ambiguous, the Court must read the Policy against AFM.

C. The Contamination Exclusion Can Only be Invoked Only Against Claims for "Costs," Not Business Interruption "Losses."

MGE is claiming business interruption *losses* which are specifically defined in the Policy as loss of gross earnings or profit. The contamination exclusion excludes only claims for "*costs* due to contamination," not losses. P.Ex. 1, P0018. AFM was well aware of how to exclude claims for losses and in the contamination exclusion it did not do so.

In the exclusions, the favored phrase is "loss or damage." *See* Group I, "Policy excludes loss or damage ....", P.Ex. 1, P0015; Group II, ¶ 4 - Policy excludes "Loss or damage caused by or resulting from....", *Id.*, P0017; Group III, ¶¶ 1, 4, 7, all excluding "loss or damage." *Id.* at P0017-18. The phrase "Loss or damage" does not appear in the contamination exclusion. In fact, the word "cost" is used in the exclusions only twice—in the contamination exclusion and in an exclusion for the cost of removing debris. Group III, ¶6(b). *Id.*, P0017. The ubiquity of the phrase "loss or damage" and the rarity of the word "cost" in the several pages of exclusions supports an interpretation that AFM intentionally chose the word "cost" instead of "loss or damage." If AFM wanted the contamination exclusion to exclude something more than costs such as loss or damage, it just had to say so. *See Kilroy Industries*, 608 F.Supp. at 853 (fact that income reduction was included but not also mentioned in exclusion means at very least policy is ambiguous).

AFM also knew how to distinguish between coverage of costs and losses. That distinction appears in many places in the Policy but most significantly in the two coverages for communicable disease. In Sec. D.5 Communicable Disease – Property Damage, the *costs* of cleanup is covered. P.Ex. 1, P0020. In Sec. E.3 Communicable Disease – Business Interruption coverage, *losses* are covered. *Id.*, P0038. Under principles of contract interpretation, including the rule that exclusions are to be interpreted narrowly, the exclusion does not apply to MGE's business interruption claim for business losses.

D. The Contamination Exclusion Applies Only to "Property."

MGE's business interruption claim because it is based on an incident that occurred at a location *other than* MGE's property, as is permitted under the Civil Authority coverage. Yet, the contamination exclusion applies only to contamination at the "property." The Policy states, "The Policy covers *property*, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OF DAMAGE, except as hereinafter excluded while located as follows: [location schedule]." P.Ex. 1, P0014 (emph added). But MGE claims COVID-19 was actually present outside of the covered property but within five miles. Once again, the exclusion, by its own terms, does not apply to MGE's specific claim.

VI. CONCLUSION

MGE requests partial summary judgement on the legal issues that (1) "communicable disease" is not a "contaminant" under the Policy and the exclusion does not apply; (2) the exclusion covers only "costs," not losses; (3) the exclusion applies only to contamination on "property"; and (4) the Policy defines communicable disease coverage as coverage for "physical damage."

Respectfully submitted,

/s/ Marsha K. Schmidt
(NDNY Bar No. 512364)
Attorney-at-Law
14928 Perrywood Drive
Burtonsville, MD 20866
301-949-5176
marsha@mkschmidtlaw.com
Lead Counsel for Plaintiff Mohawk Gaming Enterprises, LLC

THE COPPOLA FIRM

By: Lisa A. Coppola
(NDNY Bar No. 513450)
3960 Harlem Road
Buffalo, NY 14226
716-839-9700
lcoppola@coppola-firm.com
Co-counsel for Plaintiff Mohawk Gaming Enterprises, LLC

November 6, 2020