UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORTHWELL HEALTH, INC.,	:	Civil Action No. 1:21-cv-01104-JSR
Plaintiff,	:	
v.	:	
LEXINGTON INSURANCE COMPANY and INTERSTATE FIRE & CASUALTY COMPANY,	:	
Defendants.	:	

PLAINTIFF NORTHWELL HEALTH INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff Northwell Health, Inc. ("Northwell"), submits this memorandum of law in support of its motion for partial summary judgment against Lexington Insurance Company ("Lexington") and Interstate Fire & Casualty Company ("Interstate," together with Lexington "Defendants").

PRELIMINARY STATEMENT

This action arises out of Northwell's pursuit of, and Defendants' failure to provide, insurance coverage for Northwell's significant losses arising out of the ongoing COVID-19 pandemic. Northwell seeks coverage under the broad Time Element coverage contained in the "All Risk" Policies it purchased from Defendants, as well as coverage under Special Coverages such as Interruption by Communicable Disease. Defendants have refused to pay any portion of Northwell's claim. In litigation, Defendants have asserted two contamination exclusions as a basis to deny Northwell's claim for Time Element coverage, one contamination exclusion contained in section 3.03 of the Policies' main form, and another contamination exclusion added by Defendants via Endorsement #003. Neither exclusion applies to Northwell's claim.

First, the contamination exclusion in Endorsement #003 is limited to the "actual, alleged or threatened release, discharge, escape or dispersal" of contaminants or pollutants, which include "bacteria, 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." Under binding New York law, the contamination exclusion in Endorsement #003 is limited to harms caused by traditional environmental or industrial pollutants and contaminants, which bear little resemblance to Northwell's claim for losses resulting from COVID-19.

Second, Defendants raise the contamination exclusion contained in section 3.03 of the Policies' main form for the first time in this litigation. Defendants *never* raised section 3.03's

contamination exclusion as a basis to deny coverage in their denial letter, even though they had over six months to formulate a response to Northwell's claim. Instead of raising this exclusion, Defendants affirmatively maintained during the adjustment process that the contamination exclusion added by Defendants in Endorsement #003 was the operative exclusion that specifically "modifies and *supersedes*" the Policies' main form. Defendants cannot now invoke a "contamination exclusion" in the Policies' main form that, by their own reasoning, no longer applies.

Third, Defendants' reliance on the contamination exclusion in section 3.03 fails based on the plain language of the exclusion. The exclusion only applies to Northwell's out-of-pocket "costs," *i.e.*, costs Northwell has to pay due to contamination—not business interruption "loss" that Northwell suffers. If Defendants intended section 3.03's contamination exclusion to apply to "loss," they could have sought to say as much when the Policies were negotiated and issued. Defendants chose not to do so and cannot now, after the fact, try to rewrite their own policy terms to narrow coverage.

As a hospital and health care system at the center of the COVID-19 crisis, Northwell has been devastated by the pandemic. Defendants have already conceded in their motion to dismiss that the two exclusions they rely on do not apply to Northwell's claim for Interruption by Communicable Disease. Northwell now moves for partial summary judgment on the application of those two contamination exclusions to the remainder of its broad Time Element coverage. The unambiguous policy language alone demonstrates that Defendants' attempt to bar coverage for Northwell's Time Element losses must fail. Accordingly, Northwell respectfully requests that the Court grant its motion for partial summary judgment.

STATEMENT OF MATERIAL FACTS

A. The Broad Coverage Provided by the All-Risk Policies

In exchange for a substantial premium of over $15 million, Defendants sold Northwell "All Risk" Commercial Property Policies. 56.1 ¶¶ 1, 2. Lexington sold Northwell an "All Risks" Commercial Property Insurance Policy No. 025032100 for policy period March 1, 2018 to March 1, 2021. 56.1 ¶ 1. Likewise, Interstate sold Northwell an "All Risks" Commercial Property Policy No. RTX200112 18 for the same policy period. *Id.* ¶ 2. The Policies' limit is $1.25 billion in the aggregate, with Lexington covering 90% and Interstate covering 10% on a quota share basis. *Id.* ¶ 3. Both Policies follow the same common form and endorsements. *Id.* ¶ 4.

The Policies cover two distinct types of damages. First, they cover "costs," including, among other costs, the "cost to remove and return patients," "replacement cost," "increased cost of construction," and "logistics extra cost." 56.1 ¶ 5. They also separately cover "losses" from the suspension of Northwell's business activities. *Id.* ¶ 12. The main Time Element coverage applies when physical loss of or damage to Northwell's property causes a slowdown or suspension of Northwell's business activities. *Id.* ¶ 13. The types of Time Element coverages that are available include, "Gross Earnings Loss," which includes the "actual loss sustained by the Insured during the Period of Liability" and "Leasehold Interest Loss." *Id.* ¶¶ 14, 15.

The following chart provides a summary of the types of costs and losses covered under the Policies that may be implicated by the facts of the coronavirus pandemic:

	Type of Coverage	Description	Limit of Liability
Costs	Decontamination Costs	Increased cost of decontamination and/or removal of contaminated property	$25 million
	Protection of Patients	Costs incurred to temporarily remove and return patients	$10 million
	Protection and Preservation of Property	Costs incurred to temporarily protect or preserve covered property	$25 million
	Expediting Costs	Costs incurred to pay for the temporary repair of direct physical loss of or damage	$25 million
	Logistics Extra Cost	Extra cost incurred due to the disruption of the normal movement of goods or materials	$100,000
	Professional Fees	Reasonable fees paid to Northwell's accountants, architects, auditors, engineers, or other professionals	$5 million
Loss	Gross Earnings Loss	Loss of revenue or profit due to physical loss of or damage to Northwell's properties	$1.25 billion
	Interruption by Communicable Disease	Loss incurred because a government order declares Northwell's properties uninhabitable	$25 million
	Civil or Military Authority	Loss incurred by Northwell if order of civil or military authority prohibits access to Northwell's properties	$50 million
	Ingress/Egress	Loss incurred by Northwell due to physical obstruction to Northwell's properties	$50 million
	Contingent Time Element	Loss incurred by Northwell due to physical loss of or damage sustained at premises of Northwell's customers or suppliers	$250 million
	Protection and Preservation of Property	Loss sustained by Northwell during the time Northwell takes reasonable action for temporary protection and preservation of covered property	$25 million
	Mobile Medical Equipment	Loss incurred by Northwell due to the physical loss of or damage to property used in Northwell's business activities that are away from an insured location	$5 million
	Tenants Prohibited Access	Loss sustained if access to Northwell's properties is physically obstructed due to the owner or landlord prohibitting access to the properties.	$250,000

56.1 ¶¶ 5-22.

B. The Exclusions in the All-Risk Policies

In litigation, Defendants have raised two contamination exclusions to bar coverage for Northwell's Time Element claim. First, Defendants raise *for the first time* the "contamination exclusion" contained in section 3.03 of the Property Damage section. MTD at 15-16. Defendants never cited the contamination exclusion in section 3.03.01.01 of the Policies' main agreement in either of their two denial letters as a basis to deny coverage. 56.1 ¶¶ 44, 51. The contamination

exclusion in section 3.03.01.01 expressly applies only to certain "costs" (not loss) arising out of "contamination," and states:

> 3.03.01 This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy.
>
> 3.03.01.01. Contamination, and any ***cost*** due to Contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy.

56.1 ¶ 24 (emphasis added).

The contamination exclusion in section 3.03.01.01 of the policy form stands in stark contrast to other exclusions in the Policies, some of which broadly exclude coverage for certain types of business loss. For example, other exclusions in Section 3.03 explicitly exclude "[l]oss or damage" arising from specified causes. 56.1 ¶¶ 27-32. It is also in stark contrast to the exclusions used in section 4.02.05 of the Time Element section, which exclude "[a]ny loss" and "[a]ny Time Element Loss" resulting from specified causes. *Id.* ¶¶ 33-35. It is also different from the exclusions that explicitly state when they are excluding costs and losses, and not merely costs. *Id.* ¶¶ 36-39 (exclusions written to preclude "[a]ny loss, cost, damage or expense").

The second contamination exclusion relied on by Defendants to deny coverage for Northwell's Time Element claim is the contamination exclusion contained in Endorsement #003. MTD at 16. In their coverage letters, Defendants relied on the contamination exclusion in this endorsement as the basis for their complete denial of coverage. 56.1 ¶¶ 42, 49, 50. The contamination exclusion in Endorsement #003 provides:

> This Policy does not cover 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.

. . .

> CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, 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, 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. Waste includes materials to be recycled, reconditioned or reclaimed.

56.1 ¶ 28 (emphasis added).

C. Northwell's Claim for Coverage and Defendants' Denial of Coverage

In April 2020, during the early height of the COVID-19 pandemic in New York, Northwell gave prompt notice of its claim to Defendants. 56.1 ¶ 40. On October 30, 2020, over 6 months after Northwell noticed its claim, Defendants sent Northwell a letter stating their "preliminary determination" was that there was no coverage for Northwell's claim ("October 30 Letter"). *Id.* ¶¶ 41-45. The October 30 Letter informed Northwell that the communicable disease and decontamination costs coverage it had bargained for never existed. In particular, Defendants claimed:

> Paragraph 6.16.01 of the General Policy Conditions makes clear that the Insurers ***may change the Policies by endorsements.*** Paragraph 6.16.01 provides that, "[o]nly endorsements issued by the Company and made a part of this Policy can change this Policy." Endorsement #003 was issued by the Insurers and made a part of the Policies. Endorsement #003 ***modifies and supersedes*** any coverage provided under paragraph 5.02.36 for Interruption by Communicable Disease and paragraph 5.02.07 for Decontamination Costs (including Communicable Disease due to physical damage), excluding loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of virus. No one disputes that SARS-CoV-2 is a virus. Accordingly, the Policies do not cover Northwell's claims for Interruption by Communicable Disease or Decontamination Costs (including Communicable Disease due to physical damage).

56.1 ¶ 45 (emphases added). In their October 30 Letter, while Defendants expressly invoked the "contamination exclusion" in Endorsement #003 as a basis to deny coverage in full, Defendants never cited the "contamination exclusion" in 3.03.01.01 as a basis to deny coverage. *Id.* ¶ 43.

On December 18, 2020, Northwell urged Defendants to reconsider their position that Endorsement #003 modified and superseded the main agreement's coverage for Interruption by Communicable Disease and Decontamination Costs. 56.1 ¶ 46. Northwell pointed out that Endorsement #003 does not even mention the Interruption by Communicable Disease or Decontamination Costs coverage, much less state that Endorsement #003 acts to eliminate those coverages. *Id.* ¶ 47.

On January 6, 2021, Defendants refused to reconsider their position, and reiterated that the "contamination exclusion" in Endorsement #003 modified and superseded the terms of the Policies' main form ("January 6 Letter"). 56.1 ¶¶ 48-49. Specifically, Defendants stated:

> The Insurers must respectfully disagree with your contention that the virus exclusion added by endorsement does not apply to modify the coverage terms of the Policies. As explained in the October 30, 2020 letter, Paragraph 6.16.01 of the General Conditions provides that the Policies can be changed by endorsements issued by the Insurers and made a part of their respective Policies. Pursuant to Paragraph 6.16.01, the Insurers added Endorsement #003, Pollution, Contamination, Debris Removal Exclusion Endorsement, to the Policies. The Insurers ***specifically added Endorsement #003 to modify the main form of the Policies*** and the language of the Endorsement clearly provides that it modifies the insurance provided by the Policies. Endorsement #003 supersedes any coverage provided under Interruption by Communicable Disease, Paragraph 5.02.36, and Decontamination Costs, Paragraph 5.02.07 and excludes all loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release by virus.

56.1 ¶ 50 (emphasis added). Again, in their January 6 Letter, while Defendants relied on the modified "contamination exclusion" in Endorsement #003, they did not cite the original "contamination exclusion" in the Policies' main form as a basis to deny coverage. *Id.* ¶ 51.

The argument adopted by Defendants in this litigation, now that Northwell has commenced suit and brought them to task for their complete denial of coverage, departs dramatically from the position taken in Defendants' denial letters. *First*, Defendants have abandoned their argument, as they must, that Endorsement #003 wholly eliminates the Policies' coverages for Communicable Disease and Decontamination Costs. 56.1 ¶ 52. *Second*, Defendants raise for the first time the original "contamination exclusion" in section 3.03.01.01 of the Policies' main form as a bar to coverage, despite never citing this exclusion in their denial letters. *Id.* ¶¶ 43, 51. *Third*, Defendants now argue that Endorsement #003 "extends" an exclusion in the main form, even though they previously insisted that Endorsement #003 "modifies and supersedes" the main form. MTD at 16. The only provision in the main form that the "contamination exclusion" in Endorsement #003 "modifies and supersedes" is the original "contamination exclusion." Defendants cannot now rely on the original "contamination exclusion," an exclusion that they never raised and, by their own reasoning, should be "modified and superseded" by Endorsement #003. In any event, as explained further below, the policy form "contamination exclusion" is inapplicable to Northwell's claim for coverage for its significant business interruption losses.

LEGAL STANDARDS

A movant is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56). "While the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, the party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts." *Mason Tenders Dist. Council Welfare Fund*

v. Kafka Constr., Inc., 2018 WL 2138621, at *3 (S.D.N.Y. May 9, 2018) (citations and internal quotation marks omitted).

Under New York law, "[i]nsurance policies are, in essence, creatures of contract, and accordingly, subject to principles of contract interpretation." *In re Estates of Covert*, 97 N.Y.2d 68, 76 (2001). The meaning of a contract is a question of law for the court to determine. *White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 267 (2007). In determining meaning, "unambiguous provisions of an insurance contract" are given "their plain and ordinary meaning." *Selective Ins. Co. of Am. v. County of Rensselaer*, 26 N.Y.3d 649, 655 (2016). "When contract language is unambiguous, 'the district court [may] construe it as a matter of law and grant summary judgment accordingly.'" *AGCS Marine Ins. Co. v. World Fuel Servs., Inc.*, 220 F. Supp. 3d 431, 436 (S.D.N.Y. 2016) (quoting *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006)).

Insurance contracts, including undefined terms therein, must be interpreted according to "common speech" and consistent with the "reasonable expectations" of the average insured. *See Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003); *Brown Bros. Elec. Contrs. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 400 (1977) ("[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations."). New York courts consistently look to dictionary definitions to determine the plain meaning of policy language. *See, e.g.*, *CT Inv. Mgmt. Co., LLC v. Chartis Specialty Ins. Co.*, 9 N.Y.S.3d 220, 224 (1st Dep't 2015).

Like any contract, an insurance policy "should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v. Macklowe*, 953 N.Y.S.2d 21, 23 (1st Dep't 2012). Courts must construe the policy in a way that "affords a fair meaning to all of the language employed by the parties in the contract and

leaves no provision without force and effect." *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257 (2016). If there is any ambiguity in the policy language, it must be resolved against the insurer and in favor of coverage. *See AGCS*, 220 F. Supp. 3d at 436 ("[I]f policy language is ambiguous, New York law provides that such ambiguities must be construed in favor of the insured and against the insurer."). Any arguably reasonable reading of the policy in favor of the policyholder controls as a matter of law. *See Nat'l Football League v. Vigilant Ins. Co.*, 824 N.Y.S.2d 72, 76 (1st Dep't 2006) (insured's "plausible interpretation" supporting coverage "must be sustained").

The rules safeguarding the reasonable expectations of the insured are especially rigorous in the context of exclusions. Under well-established New York law, the insurer bears the "heavy burden" of proving that claims fall entirely and unambiguously within any exclusion, which must be interpreted strictly and narrowly in favor of coverage. *Belt Painting*, 100 N.Y.2d at 383; *see also Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 698 (2d Cir. 1997) ("the insurer bears the heavy burden of demonstrating that it would be unreasonable for the average [person] reading the policy to construe it as the insured does and that its interpretation of the insurance policy provisions is the only construction that fairly could be placed on the policy.").

The rule that any ambiguity must be resolved in favor of the insured "is particularly applicable where . . . the ambiguity is contained within an exclusion clause." *Brabender v. N. Assurance Co. of Am.*, 65 F.3d 269, 273 (2d Cir. 1995). Policy exclusions "are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" and will not be interpreted to make the coverage provided by the policy illusory. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984); *see also Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361 (1974) (rejecting an insurer's interpretation of an exclusion because the interpretation would render the coverage nearly illusory). Indeed, an insurer must establish that

the exclusion is clear and unmistakably is subject to no other reasonable interpretation, and applies in the particular case. *See Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 652 (1993).

ARGUMENT

I. The Modified Contamination Exclusion in Endorsement #003 Does Not Bar Coverage

The Policies do not have a "virus" exclusion intended to exclude coverage for losses arising out of a pandemic, despite the insurance industry claiming that it drafted just such an exclusion for that purpose in 2006. 56.1 ¶¶ 53-55. Defendants' attempt to fit a square peg into a round hole does not carry their heavy burden to show that modified contamination exclusion in Endorsement #003 bars coverage.

"Under an all-risk agreement, once the insured demonstrates the existence of the all-risk policy and the loss, the insurer bears the burden to prove that the loss was caused by a peril specifically excluded from coverage." *Fabozzi v. Lexington Ins. Co.*, 639 F. App'x 758, 760 (2d Cir. 2016) (internal quotations mark omitted). "[I]t is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favoring them is the only reasonable reading of at least one of the relevant terms of exclusion." *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2d Cir. 1974). Thus, to preclude coverage, an insurer must: (1) write the exclusion in obvious and unambiguous language in the policy; (2) establish that the interpretation excluding coverage under the exclusion is the *only* interpretation of the exclusion that could be fairly made; and (3) establish that the exclusion clearly applies to this particular case. *Belt Painting*, 100 N.Y.2d at 383.

Here, the Endorsement #003's modified contamination exclusion precludes coverage for "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." 56.1 ¶ 28. Endorsement #003 defines "CONTAMINANT" and "POLLUTANT" as the same:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, 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 of property insured hereunder, including, but not limited to, bacteria, 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.

Id.

The modified contamination exclusion's reference to "release, discharge, escape, or dispersal" of contaminants and pollutants shows that it was intended by Defendants to apply only to contaminants and pollutants used or maintained in the course of an insured's industrial business – such as chemicals used in manufacturing or cleaning processes, or bacteria or virus kept in a lab – that are accidentally released or discharged from their containers. This exclusion does not apply to losses resulting from a pandemic. Rather, it is limited to losses resulting from traditional environmental or industrial harms.

Indeed, the New York Court of Appeals has refused to broaden similar exclusions beyond the reasonable expectations of the insured. In *Belt Painting*, a personal-injury plaintiff alleged he was injured "as a result of inhaling paint or solvent fumes in an office building where plaintiff insured was performing stripping and painting work." 100 N.Y.2d at 382. In denying coverage, the insurer relied on the policy's total-pollution exclusion, which excluded coverage for bodily injury that would not have occurred but for the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." *Id.* As the insurer argued, "the

injury-causing element here—the paint or solvent fumes—[was] well within the defined pollutants, which specifically include[d] 'fumes.'" *Id.* at 384. The Court of Appeals disagreed. The court reasoned "the terms used in the exclusion to describe the method of pollution – such as 'discharge' and 'dispersal' – are 'terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste.'" *Id.* at 387; *see also Cont'l Cas. Co.*, 80 N.Y.2d at 654 ("The terms used in the exclusion to describe the method of pollution—such as 'discharge' and 'dispersal'—are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste"). The Court in *Belt Painting* further reasoned "it strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to the injured party's lungs, had somehow been 'discharged, dispersed, released, or escaped.'" 100 N.Y.2d at 388.

Following *Belt Painting*, New York courts routinely find that exclusions with the "discharge" clause, like the one in the Policies here, are limited to losses that are environmental or industrial in nature. *See Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 788 N.Y.S.2d 142, 144 (2d Dep't 2004) (pollution and contamination exclusion "does not apply to exclude the alleged losses claimed by [the insured], which are non-environmental in nature"); *Ocean Partners, LLC v. N. River Ins. Co.*, 546 F. Supp. 2d 101, 111 (S.D.N.Y. 2008).[1] The Second Circuit, applying New York law, has confirmed use of the words discharge and dispersal "make clear that the 'reasonable expectations of a businessperson' viewing the contested Policy language would be that it is

[1] New York law is in accord with numerous jurisdictions that have limited virtually identical exclusions to losses resulting from the discharge of contaminants into the environment. *See, e.g.*, *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 644-45 (2003) (agreeing with majority of courts holding that such exclusions were not formulated to exclude "all injuries from toxic substances" but rather to avoid liability from the "discharge of hazardous substances *into the environment*"); *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398 (2014) ("a reasonable policyholder could construe the absolute pollution exclusion to only apply to traditional environmental pollution").

intended to [address] environmental harm resulting from the disposal or containment of hazardous waste." *Colonial Oil Indus. Inc. v. Indian Harbor Ins. Co.*, 528 F. App'x 71, 75 (2d Cir. 2013).

Moreover, Endorsement #003's modified contamination exclusion's use of "virus" or "contamination" does not mean it applies to the current pandemic, divorced from the intended purposes of the exclusion. Under *noscitur a sociis*, these words are read in conjunction with the words surrounding them in order to ascertain their application. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (relying on "the principle of *noscitur a sociis* – a word is known by the company it keeps – 'to avoid ascribing one word a meaning so broad that it is inconsistent with its accompanying words, thus giving [it] unintended breadth'"); *Harris v. Allstate Ins. Co.*, 309 N.Y. 72, 76-77 (1955) (applying the principle of *noscitur a sociis* to interpret the meaning of a word in a list in an insurance contract); *Vanguard Graphics LLC v. Hartford Fire Ins. Co.*, 2020 WL 1703794, at *6 (N.D.N.Y. Apr. 8, 2020) (applying *noscitur a sociis* to words used together in a policy exclusion). Here, "virus" and "contaminant" are used with "smoke," "vapor," "soot," "fumes," "alkalis," "chemicals," "waste" and "hazardous substances" listed in specified environmental regulatory acts or governed by the Environmental Protection Agency. It is not reasonable to expect that "virus" as used here was meant to encompass COVID-19, a naturally occurring, communicable disease that was neither maintained at the insured premises nor "released," "discharged," or "dispersed" on those premises.

Defendants are aware that the contamination exclusion in Endorsement #003 was not intended to apply to COVID-19 losses. The insurance industry through the Insurance Services Office has, since 2006, written an exclusion that they claim *was* intended to apply to losses from viruses without limitation: ISO Form CP 01 40 07 06, titled "Exclusion of Loss Due to Virus or Bacteria," excludes coverage for "loss or damage caused by or resulting from any virus, bacterium

or other microorganism that induces or is capable of inducing physical distress, illness or disease." 56.1 ¶¶ 53-55.

Moreover, a pandemic exclusion for first-party property policies was available in the marketplace for use at the time Defendants issued Northwell's Policies. *See, e.g.*, *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1037-38 (D. Neb. 2016) (highlighting an exclusion for "loss or damage caused by or resulting from . . . [t]he actual or suspected presence or threat of any virus, organism or like substances that is capable of inducing disease, illness, physical distress or death, whether infections or otherwise, *including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu*") (emphasis added)). An insurer's failure to use existing and available language in an exclusion demonstrates that it did not intend to limit coverage. *See, e.g.*, *Barnes v. Am. Int'l Life Assurance Co. of N.Y.*, 681 F. Supp. 2d 513, 524 (S.D.N.Y. 2010) ("If AIG had wanted to exclude losses resulting from medical or surgical treatment, it could have included such an exclusion. It did not. Indeed . . . such an exclusion existed in [other policies]."); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 952 (S.D.N.Y. 1996) ("[I]f the insurance company had wanted to exclude certain claims, especially foreseeable claims, it could have and should have listed those exclusions in the policy and, if necessary, bargained for their adoption."). Defendants cannot now seek to rewrite the Policies to exclude Northwell's losses from the COVID-19 pandemic, after collecting substantial premiums for Policies that do not exclude losses from viruses or pandemics.

Defendants neglect to mention that many the cases they cite in support of excluding Northwell's COVID-19 losses addressed policies that expressly adopted the broad ISO virus exclusion, which bears little resemblance to the exclusions Defendants included in the Policies they sold Northwell. *See Wilson v. Hartford Cas. Co.*, 2020 WL 5820800 (E.D. Pa. Sept. 30,

2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. Aug. 13, 2020) (broad virus exclusion for loss or damage); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, 483 F. Supp. 3d 1189 (M.D. Fla. Sept. 2, 2020); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492 (E.D. Mich. Sept. 3, 2020).

Defendants also cite a number of cases decided under law of states that are not bound by the holding of the New York Court of Appeals in *Belt Painting*. *See Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, at *6 (W.D. Mo. Dec. 2, 2020) (Missouri law); *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 2021 WL 769660, at *5-6 (D. Nev. Feb. 26, 2021) (Nevada law). Finally, Defendants' cited case *10012 Holdings, Inc. v. Sentinel Insurance Co.* is on appeal and decided the application of the policy's pollution and contamination exclusion only in dicta. 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020). Additionally, the court in *10012 Holdings* failed to cite, much less consider, the binding precedent in *Belt Painting* when interpreting the reach of the policy's pollution exclusion.

In the COVID-19 context, numerous courts have already rejected insurers' attempts to apply pollution and contamination exclusions, like the one in Northwell's Policies, to COVID-19, even though they use the word "virus." *See, e.g.*, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020) (insurer "has not shown it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to traditional environmental and industrial pollution and contamination that is not at issue here, where [the policyholder's] losses are alleged to be the result of a naturally-occurring, communicable disease"); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 489 F. Supp. 3d 1297, 1302 (M.D. Fla. Sept. 24, 2020) ("Denying coverage for losses stemming from COVID-19, however,

does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.").

Accordingly, under the clear policy language and well-settled New York law addressing identical exclusions, Endorsement #003's modified contamination exclusion applies only to traditional environmental or industrial harm, and it does not preclude coverage for Northwell's claim arising from COVID-19.

II. The Original Contamination Exclusion in Section 3.03 Does Not Bar Coverage

Defendants' reliance on the Policies' original contamination exclusion in section 3.03 to exclude Northwell's significant business interruption losses also fails as a matter of law.

A. The Original "Contamination Exclusion" in Section 3.03 Has Been "Superseded" by the Modified "Contamination Exclusion" in Endorsement #003

In litigation, Defendants raise for the first time the original contamination exclusion as a basis to deny coverage even though (i) after six months of reviewing Northwell's claim, they never raised the original contamination exclusion in their denial letter (56.1 ¶¶ 43, 51); and (ii) Defendants have insisted that the "contamination exclusion" in Endorsement #003 "modifies and *supersedes*" the Policies' main form, therefore "superseding" the "contamination exclusion" they now try to invoke (*id.* ¶¶ 45, 50).

In their denial letter, Defendants never raised the original contamination exclusion as a basis to deny coverage, even though they had six months to formulate a response to Northwell's claim and had in their possession all material facts that would have allowed them to assert this defense. Instead, Defendants relied solely on the contamination exclusion in Endorsement #003,

which they affirmatively maintained "modifies and supersedes" the Policies' main form, including the coverage for Communicable Disease and Decontamination Costs. 56.1 ¶¶ 43-45, 50-51.[2]

Specifically, Defendants refused to pay any insurance proceeds under the Policies because, according to Defendants, they "specifically added Endorsement #003 to modify the main form of the Policies." 56.1 ¶ 50. The only provision in the main form of the Policies that the "contamination exclusion" in Endorsement #003 "modifies and *supersedes*" is the "contamination exclusion" as originally set forth in the Policies – *i.e.*, the exclusion on which Defendants now rely to exclude Northwell's claim. Thus, Defendants rely on a contamination exclusion in the main form that, by their own reasoning, should no longer apply. This alone demonstrates that the original contamination exclusion does not apply to preclude Northwell's claim as it has been superseded. *See, e.g.*, *Phil. Indem. Ins. Co. v. Yeshivat Beth Hillel of Krasna, Inc.*, 2019 WL 499765, at *5 (E.D.N.Y. Feb. 8, 2019) (exclusion did not apply where it was "superseded" by endorsement); *Janart 55 W. 8th LLC v. Greenwich Ins. Co.*, 614 F. Supp. 2d 473, 481 (S.D.N.Y. 2009) (noting the "irony" in insurer's reliance on "provisions in the basic policy form, since its central argument is that Endorsement No. 2, the Pollution Exclusion Clause, supersedes all the pollution provisions in the basic policy").

B. The "Contamination Exclusion" in Section 3.03 Does Not Apply to Northwell's Business Interruption Losses

Even had it not been superseded, on its face, the original contamination exclusion in section 3.03 does not apply to Northwell's business interruption losses caused by COVID-19. The original contamination exclusion only excludes "contamination [including virus], and any cost due to

[2] Defendants have since abandoned this argument in litigation. 56.1 ¶ 52. As they must. The "contamination exclusion" in Endorsement #003 does not even mention the Communicable Disease coverage Northwell specifically bargained and paid for, much less state that it supersedes it.

contamination . . .” 56.1 ¶ 24. As the below chart reflects, this is in stark contrast to other exclusions in section 3.03 of the Property Damage section of the All-Risk Policies, which exclude “loss or damage” arising from specified causes. *Id.* ¶¶ 29-32. It is also contrary to the exclusions included in the Time Element coverage section, which all expressly apply to “any loss” during specified times or due to specified causes. *Id.* ¶¶ 33-35. Other exclusions also make clear when they want to exclude both losses and costs, and specifically exclude “[a]ny loss, cost, damage or expense.” *Id.* ¶¶ 36-39. The All-Risk Policies demonstrate that if Defendants wanted the original contamination exclusion to apply to “losses” as well as “costs,” they could have sought to include language in that exclusion to achieve that result, but did not do so when considering the original contamination exclusion in the policy form.

Provision	**Lead-In Language**	**Exclusion**
3.03.01.01	This Policy excludes the following unless it results from physical loss or damage not excluded by this Policy.	Contamination, and any **cost** due to Contamination
5.02.42	This Additional Coverage does not apply to:	Any expenses or **costs** that usually would have been incurred in conducting the business during the same period had there been no disruption of normal movement of goods and materials.
5.02.23	This Coverage will not include	the fees and **costs** of attorneys, Public Adjusters, and loss appraisers
3.03.01.03	This Policy excludes the following unless it results from physical loss or damage not excluded by this Policy.	**Loss** or damage arising from the enforcement of any law, ordinance, regulation or rule regulating or restricting the construction, installation, repair, replacement, improvement, modification, demolition, occupancy, operation or other use, or removal including debris removal of any property.
3.03.02.03	This Policy excludes:	**Loss** or damage arising from the interference by strikers or other persons with rebuilding, repairing or replacing property or with the resumption or continuation of the Insured’s business.
3.03.03.01	This Policy excludes direct physical **loss** or damage	Nuclear reaction or radiation, and any by-product of nuclear reaction, any radiological

	directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured by the Policy, contributing concurrently or in any other sequence to the loss:	material or radioactive contamination however caused . . .
4.02.05.01	This Policy does not insure against:	Any loss during any idle period that would have been experienced had the Suspension of business activities not occurred.
4.02.05.02.01-04	This Policy does not insure against:	Any increase in Time Element loss due to: suspension, cancellation or lapse of any lease, contract, license or orders; Fines or damages for breach of contract or for late or non-completion of orders; Penalties of any nature; or Any other consequential or remote factors.
Endorsement #003	The Company shall not be liable for	loss, damage, costs, expenses, fines or penalties incurred by or imposed on the Insured at the order of any Government Agency, Court, or other Authority arising from any cause whatsoever.
Endorsement #006	[I]t is agreed that this insurance excludes	loss, damage, cost or expense of whatsoever nature directly in directly caused by, resulting from or in connection with any of the following regardless of any other cause or event contributing concurrently or in any other sequence to the loss.
Endorsement #012	The Company will not pay for:	Any loss, cost, damage or expense arising out of a breach in confidentiality or privacy of, or release of, any electronic data for any reason.

This distinction between a "cost" (which is commonly defined as "the amount of equivalent paid or charged for something") and a "loss" (which is commonly defined as "the amount of an insured's financial detriment by death or damage that the insurer becomes liable for")[3] is also confirmed in parts of the All-Risk Policies other than the exclusion sections. Through the All-Risk Policies, the terms distinguish between "costs" and "loss." There are whole sections devoted specifically to costs. The All-Risk Policies cover certain "costs" that must be paid to others; for

[3] *See* Merriam-Webster's Collegiate Dictionary (10th ed. 1999).

example, the Policies cover "costs incurred for actions to temporarily remove and return patients," "logistics extra cost," "expediting costs," and "professional fees" paid to others. 56.1 ¶¶ 7-11. Other parts of the All-Risk Policies deal solely with "loss." In particular, the Time Element coverage separately covers "Gross Earnings loss," which is the "actual loss" sustained by Northwell. *Id.* ¶ 14. Each of the Time Element coverages have their own section providing how to calculate loss. *Id.* ¶¶ 14-15. Viewing the Policies as a whole, as New York law requires, there must be a distinction between "cost" and "loss," because the Policies uses these terms in distinct contexts with distinct meanings. *See Viking Pump, Inc.*, 27 N.Y.3d at 257 (requiring courts to give "a fair meaning to all of the language employed by the parties in the contract").

Courts also regularly distinguish between "costs" and "loss." *See, e.g.*, *7001 E. 71st St. LLC v. Chubb Custom Ins. Co.*, 417 F. Supp. 3d 150, 152–63 (E.D.N.Y. 2019) (distinguishing throughout between property owner's "costs" incurred to repair property damage and business interruption "losses"); *Granite Ridge Energy, LLC v. Allianz Global Risk US Ins. Co.*, 2012 WL 13036791, at *2 (S.D.N.Y. July 30, 2012) (same); *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1172 (9th Cir. 2012) ("'[L]oss' and 'costs' are distinct concepts."). The use of the term "costs" in the exclusion, rather than "loss," which is used elsewhere in the All-Risk Policies, reasonably suggests that the original contamination exclusion was only intended to encompass costs paid for contamination, not losses sustained from contamination, such as loss of gross earnings.

Courts have not hesitated to find the use of the word "costs" in an exclusion limits the exclusion to costs, and only costs. In *American Motorists Insurance Co. v. Trane Co.*, for example, the Seventh Circuit considered an exclusion that excluded from coverage "damages or expense which represents the cost of, replacing" the policyholder's goods or equipment. 718 F.2d 842, 844

(7th Cir. 1983). In that case, the insurer argued that because the underlying suit arose out of repairing or replacing damaged property, the exclusion barred coverage for the policyholder's entire claim. The court rejected this position and found that the exclusion applied only to claims that sought damages for the costs of replacing the policyholder's equipment, but did not apply to claims that sought damages other than costs arising out of faulty products—such as harm to business reputation or related contractual liabilities. *Id.* at 845.

Defendants' broad reading of the exclusion to exclude business interruption losses resulting from contamination would violate basic contract interpretation principles, which require policy provisions not be read in a manner that makes other provisions illusory. *See Thomas J. Lipton, Inc.*, 34 N.Y.2d at 361 (rejecting an insurer's interpretation of an exclusion because the interpretation would render the coverage nearly illusory); *Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co.*, 28 N.Y.3d 675, 684–85 (2017) (citing *Lipton* and explaining under New York law insurance policies cannot be interpreted such that coverage is rendered illusory). For example, if the exclusion were read to exclude all "costs" and "losses" arising out of any "virus," as Defendants have suggested, it would swallow the express coverage granted by the Interruption by Communicable Disease coverage provision. This provision covers Northwell's reasonable and necessary cleanup costs and the "Gross Earnings loss" arising from the presence of a communicable disease and the "actual not suspected presence of the substance(s) causing the spread of such communicable disease." 56.1 ¶ 16.

In light of this conflict, the contamination exclusion reasonably should be read only to encompass certain costs associated with contamination, such as costs associated with the temporary use of other property due to contamination at the insured property. However, it cannot reasonably be read broadly to exclude all losses resulting from contamination, such as losses

arising from the actual or threatened disease caused by a virus, or those arising from government orders issued to address the spread of such diseases. As the court in *Ungarean, DMD v. CNA* recognized, a contamination exclusion "does *not* altogether exclude loss of use of property caused by viruses in any manner." 2021 WL 1164836, at *12 (Pa. Com. Pl. Mar. 25, 2021). The court reasoned that "[i]f Defendants wanted to exclude coverage for any loss caused by viruses in any manner whatsoever, Defendants could have easily included such a provision clearly and unambiguously in the contract." *Id.* This same result is particularly appropriate given that policy exclusions must be "strictly construed and read narrowly," *Century Sur. Co. v. All In One Roofing, LLC*, 63 N.Y.S.3d 406, 409-10 (2d Dep't 2017), and must be drafted in "clear and unmistakable language" and "subject to no other reasonable interpretation." *Cont'l Cas. Co.*, 80 N.Y.2d at 652.

At a minimum, the contamination exclusion is ambiguous. As the court found in *Thor Equities, LLC v. Factory Mutual Insurance Co.*, a similar contamination exclusion was ambiguous because the insured's interpretation limiting the exclusion only to "costs" was reasonable. 2021 WL 1226983, at *4 (S.D.N.Y. Mar. 31, 2021). But even assuming the contamination exclusion is ambiguous, Defendants cannot meet their heavy burden in opposing summary judgment of establishing through the policy language or extrinsic evidence that their broad interpretation of the exclusion is the *only* reasonable one. *See, e.g.*, *Haber*, 137 F.3d at 698; *Ment Bros. Iron Works Co., Inc. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 121 (2d Cir. 2012) ("Under New York law . . . an insurer bears the burden of proving that an exclusion applies"); *Ungarean*, 2021 WL 1164836, at *15 (granting policyholder summary judgment in COVID-19 case where "Plaintiff's interpretations . . . of the insurance contract were, at the very least, reasonable" and "Defendants failed to demonstrate that any of the insurance contract's exclusions [including a contamination exclusion] clearly and unambiguously prevent coverage").

Accordingly, the Court can resolve any ambiguity in Northwell's favor on summary judgment as a matter of law under the rule of *contra proferentem*, which dictates that ambiguities, particularly in exclusions, must be interpreted in favor of the insured. *See Westchester Resco Co., L.P. v. New England Reinsurance Corp.*, 818 F.2d 2, 2 (2d Cir. 1987) (affirming summary judgment in favor of insured under an ambiguous policy based on "the well-established contra proferentem principle"); *Brabender*, 65 F.3d at 273 (directing district court to enter summary judgment in insured's favor where the extrinsic evidence raised by the insurer left the court "unable to resolve the ambiguity"); *McCostis v. Home Ins. Co. of Ind.*, 31 F.3d 110, 113 (2d Cir. 1987) (the rule of *contra proferentem* "is especially applicable when the ambiguity is found in an exclusionary clause").

In sum, a straightforward reading of the All-Risk Policies demonstrates that Northwell's losses, including its business interruption losses, do not fall within the original contamination exclusion. Defendants cannot meet their burden of proving that a broader reading of the exclusion is the only reasonable one. Thus, partial summary judgment in Northwell's favor on this issue is appropriate.

CONCLUSION

For the foregoing reasons, Northwell respectfully requests that the Court grant its motion for partial summary judgment.

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/s/ Robin L. Cohen

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