

1 **FOR DEFENDANT-APPELLEE:**

JONATHAN D. HACKER, O’Melveny & Myers LLP, Washington, DC (Jennifer B. Sokoler, O’Melveny & Myers LLP, New York, NY, and Thomas McKay, III and Melissa F. Brill, Cozen O’ Connor, New York, NY, *on the brief*).

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8 Appeal from a judgment of the United States District Court for the Eastern District of New
9 York (Raymond J. Dearie, *Judge*).

10 **UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED,**
11 **ADJUDGED, AND DECREED** that the September 27, 2017 judgment of the District Court is
12 **VACATED** and **REMANDED**.

13 Plaintiff-Appellant Madelaine Chocolate Novelties, Inc. (“Madelaine Chocolate”) appeals a
14 judgment of the District Court granting summary judgment to Defendant-Appellee Great Northern
15 Insurance Company (“Great Northern”).

16 BACKGROUND

17 In 2012, Madelaine Chocolate suffered significant damage to its business due to storm surges
18 caused by Hurricane Sandy. A storm surge is a phenomenon “produced by water being pushed toward
19 the shore *by the force of the winds.*” *Madelaine Chocolate Novelties, Inc. v. Great N. Ins. Co.*, No. 15-CV-
20 5830(RJD)(SMG)(GRB), 2017 WL 2954630, at *7 (E.D.N.Y. June 30, 2017) [hereinafter Magistrate
21 R&R] (emphasis added). Madelaine Chocolate, having purchased an “all-risks” insurance policy (the
22 “Policy”) from Great Northern, filed a timely proof of loss for property damage of approximately \$40
23 million and business income loss and extra operational expenses of \$13.5 million. Great Northern
24 refused to pay most of the claimed amount, reasoning that storm surge damage was excluded from
25 coverage under the Policy.

26 The Policy states that Great Northern will pay for damage or direct physical loss to a “building;
27 or personal property, caused by or resulting from a peril not otherwise excluded.” J.A. 166. The
28 Policy also states that Great Northern “will pay for the actual: business income loss . . . [and] extra
29 [operational] expense[s] . . . caused by or result[ing] from direct physical loss or damage by a **covered**
30 **peril** to property, unless otherwise stated.” J.A. 195 (emphasis in original). It is undisputed that, for
31 purposes of the Policy, a “windstorm” is a covered peril. J.A. 264, 149, 184, 271; Oral Arg. at 11:13–
32 11:19. However, the Policy’s main forms do not expressly define “windstorm.” Instead, the Policy
33 contains an endorsement (the “Windstorm Endorsement”), which defines the term “windstorm” for
34 the entire Policy. The Windstorm Endorsement provides, in relevant part:

35 Under Definitions, the following is added:

36 **Windstorm** means:
37

- 1 • wind;
- 2 • wind-driven rain;
- 3 • erosion of soil or other land caused by or resulting from wind or wind driven
- 4 rain;
- 5 • hail; or
- 6 • collapse of a building or other structure caused by or resulting from wind,
- 7 regardless of any other cause or event that directly or indirectly:
- 8 • contributes concurrently to; or
- 9 • contributed in any sequence to,
- 10 the loss or damage, even if such other cause or event would otherwise be covered.

11 **Windstorm** does not mean:

- 13 • frost;
- 14 • cold weather;
- 15 • snow; or
- 16 • sleet or ice (other than hail),
- 17 whether driven by wind or not.

18 J.A. 321 (emphasis in original).

19 The Windstorm Endorsement contains its own anti-concurrent causation (“ACC”) clause. *Id.*
20 (“**Windstorm** means: wind . . . *regardless of any other cause or event that directly or indirectly: contributes*
21 *concurrently to; or contributed in any sequence to, the loss or damage . . .*” (second emphasis added)). Madelaine
22 Chocolate interprets the Windstorm Endorsement—in particular, its ACC clause—to encompass
23 losses caused by storm surge, a wind-driven peril. Nevertheless, Great Northern denied coverage to
24 Madelaine Chocolate based on the Policy’s flood exclusion provision (the “Flood Exclusion”), which
25 states:

26 This insurance does not apply to loss or damage caused by or resulting from:

- 27 • waves, tidal water or tidal waves; or
- 28 • rising, overflowing or breaking of any boundary,
- 29 of any natural or man-made lakes, reservoirs, ponds, brooks, rivers, streams, harbors,
- 30 oceans or any other body of water or watercourse, whether driven by wind or not,
- 31 regardless of any other cause or event that directly or indirectly:
- 32 • contributes concurrently to; or
- 33 • contributes in any sequence to,
- 34 the loss or damage, even if such other cause or event would otherwise be covered.

35 This Flood exclusion does not apply to ensuing loss or damage caused by or resulting
36 from a **specified peril**.

37 J.A. 182 (emphasis in original).

1 The parties dispute whether storm surge damage is excluded from coverage under the Flood
2 Exclusion in light of the Windstorm Endorsement’s ACC clause. Judge Dearie, adopting the report
3 and recommendation of Magistrate Judge Gary R. Brown, granted summary judgment to Great
4 Northern, reasoning that the Flood Exclusion unambiguously excluded storm surge damage from
5 coverage under the Policy.

6 DISCUSSION

7 “Because interpretation of an insurance agreement is a question of law,” this Court must
8 “review the district court’s construction . . . *de novo*.” *U.S. Fid. & Guar. Co. v. Fendi Adele S.R.L.*, 823
9 F.3d 146, 149 (2d Cir. 2016) (emphasis added). When interpreting insurance policies under New York
10 law, the burden is on the insurer to set forth applicable exclusions of coverage “in *clear and unmistakable*
11 *language*. . . . [Exclusions] are not to be extended by interpretation or implication, but are to be accorded
12 a *strict and narrow construction*.” *Ins. Co. of Greater N.Y. v. Clermont Armory, LLC*, 923 N.Y.S.2d 661, 663
13 (N.Y. App. Div. 2011) (emphasis added) (quoting *Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 275
14 (N.Y. 1984)).

15 “Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose
16 and the parties’ intent . . . or where its terms are subject to more than one reasonable interpretation.”
17 *Universal Am. Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 37 N.E.3d 78, 80 (N.Y. 2015) (internal
18 quotation marks omitted). Ambiguities in coverage exclusions are resolved in favor of the insured.
19 *See, e.g., Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 17 (N.Y. 2003); *Birnbaum v. Jamestown Mut.*
20 *Ins. Co.*, 83 N.E.2d 128, 131 (N.Y. 1948).

21 After reviewing the record, we vacate the District Court’s judgment and remand for further
22 proceedings consistent with this order. The District Court determined that the Policy unambiguously
23 excluded damage caused by storm surges. *Madelaine Chocolate Novelties v. Great N. Ins. Co.*, No. 15-CV-
24 5830(RJD)(SMG)(GRB), 2017 WL 4280550, at *1 (E.D.N.Y. Sept. 26, 2017) [hereinafter District
25 Court Opinion]. Its reasoning proceeded in two parts. First, the District Court cited two non-
26 precedential opinions from this Circuit categorizing storm surges as “floods” under similar insurance
27 policies. *See Nat’l R.R. Passenger Corp. v. Aspen Specialty Ins. Co.*, 661 F. App’x 10, 13 (2d Cir. 2016); *New*
28 *Sea Crest Health Care Ctr., LLC v. Lexington Ins. Co.*, No. 12-CV-6414(RJD)(RLM), 2014 WL 2879839,
29 at *3 (E.D.N.Y. June 24, 2014). These cases are inapposite because the insurance policies analyzed
30 therein did not involve endorsements that explicitly added to the definition of a covered peril. Here,
31 by contrast, the Windstorm Endorsement adds an ACC clause to the definition of a covered peril for
32 the entire Policy.

33 Second, the District Court relied on cases from the Fifth Circuit (the “Katrina Cases”)
34 interpreting similar endorsements as merely “shift[ing] some of the insurer’s [covered] risk . . . to the
35 insured . . . by setting a limit on the value of the covered losses below which the insurer is not obligated
36 to pay.” District Court Opinion at *2 (quoting *Penthouse Owners Association, Inc. v. Certain Underwriters*

1 *at Lloyds, London*, 612 F.3d 383, 387 (5th Cir. 2010)); *see also* Magistrate R&R at *10 (citing cases).
2 However, there are multiple reasons why the Windstorm Endorsement in this case is distinguishable
3 from the endorsements analyzed in the Katrina Cases. *See* Appellant’s Br. Ex. B. Mainly, the
4 Windstorm Endorsement contains a separate “Definitions” section that explicitly adds an ACC clause
5 to the definition of “windstorm” for the entire Policy, J.A. 321; *see also* Appellant’s Br. Ex. A, a feature
6 that Great Northern does not dispute, Oral Arg. at 10:09–10:11, 16:08–16:16 (“It’s added to the
7 Definitions section, which applies to the whole Policy.”). Because none of the Katrina Cases involved
8 policies with this specific feature, they are of limited relevance to this case. For this reason, the District
9 Court erred by analogizing the Windstorm Endorsement to the hurricane deductible endorsements in
10 the Katrina Cases without further analyzing the function of an ACC clause when added to the
11 definition of a covered peril for the entire Policy.

12 On remand, the District Court must assess whether the Windstorm Endorsement’s ACC
13 clause conflicts with, or otherwise creates an ambiguity *vis-à-vis*, the Policy’s Flood Exclusion. In so
14 doing, the District Court may consider permitting discovery into interpretive materials relating to the
15 Windstorm Endorsement and its relationship to the Policy’s coverage provisions. Further, in making
16 this determination, the District Court should continue to be mindful of well-established precedents
17 requiring exclusions to be set out in “clear and unmistakable language” and to be accorded a “strict
18 and narrow construction.” *Clermont Armory*, 84 A.D.3d at 1170. Any ambiguities in the Policy must
19 be construed in favor of the insured. *See, e.g., Belt Painting Corp.*, 795 N.E.2d 15, 17; *Birnbaum*, 83
20 N.E.2d 128, 131.

21 For the foregoing reasons, we **VACATE** the judgment of the District Court and **REMAND**
22 for further proceedings consistent with this summary order.

23 FOR THE COURT:
24 Catherine O’Hagan Wolfe, Clerk
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