IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

SHANER HOTEL HOLDINGS, LP, *Plaintiff,*	:	**March Term 2021** **No. 2381**
v.	:	
ACE AMERICAN INSURANCE COMPANY, ET AL., *Defendants.*	:	**COMMERCE PROGRAM** **Control No. 23042000**

ORDER

AND NOW, this 24nd day of April 2023, upon consideration of Plaintiff Shaner Hotel Holdings, LP's Motion for Partial Reconsideration of the Court's Orders dated March 20, 2023, (at Control Nos. 22084931 and 22085005) and Insurer Defendants' responses in opposition, it is hereby **ORDERED** that the motion is **DENIED.**

BY THE COURT

RAMY I. DJERASSI, J.

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FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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SHANER HOTEL HOLDINGS, LP, *Plaintiff,*	:	**March Term 2021** **No. 2381**
v.	:	
ACE AMERICAN INSURANCE COMPANY, ET AL., *Defendants.*	:	**COMMERCE PROGRAM**
	:	**Control No. 2304200**

MEMORANDUM OPINION

Djerassi, J. April 24, 2023

Plaintiff Shaner Hotel Holdings, LP, ("Shane") requests reconsideration of this Court's Orders of March 20, 2023, which granted two Motions for Judgment on the Pleadings filed by two groups of Defendants – three primary all-risk insurance companies (at Control No. 22084931) and four excess all-risk insurance companies (at Control No. 22085005), respectively. Plaintiff seeks partial reconsideration of the Court's Orders as they pertain to the three primary all-risk Defendants – Ironshore Specialty Insurance Company, Endurance American Specialty Insurance Company, and Everest Indemnity Insurance Company – and two of the four excess all-risk Defendants – Interstate Fire & Casualty Company and Princeton Excess and Surplus Lines Company. This opinion summarizes why Plaintiff's Motion for Reconsideration is **DENIED.**

I. Facts and Procedural Background

This action concerns losses claimed by Plaintiff Shaner, an operator of forty hotel properties in twelve states, during the COVID-19 pandemic and ensuing shut-down starting in

contaminant as "any material that after its release can cause or threaten damage to human health or welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use of property insured by this Policy." Merriam-Webster defines "material" as "the elements, constituents, or substances of which something is composed or can be made."[5] Merriam-Webster defines "release" as "the state of being freed."[6]

The exclusion clarifies that damage to human health/welfare or the loss of use of property may include, but is not limited to, bacteria, virus, or hazardous substances as listed in specified federal environmental standards. That is, damage resulting from the release of a material that can cause or threaten damage to human health/welfare or property does not have to be a virus to preclude coverage. Likewise, damage is not restricted to hazardous substances listed in federal environmental statutes. The Court disagrees with Shaner's assertion that the exclusion's reference to these statutes narrows the entire exclusion to "traditional environmental pollution."[7] On the contrary, the Court finds that because the exclusion neither defines nor delimits the term *material* and because damage is not limited to bacteria, virus, or hazardous substances listed in federal statutes, the provision is not tailored to traditional environmental pollution concerns associated, for example with water or air pollution caused by affirmative actors.

After examining the plain language of the exclusion, our next step is to map defendants' policy language as applied to Shaner's claim of physical loss of use of property.

We start with Shaner's own averments of loss" "[b]ecause of the [Pennsylvania government orders], the Shaner Pennsylvania Hotels suffered a substantial loss of business income due to necessary interruption of its business as a result of the physical loss of the

[5] https://www.merriam-webster.com/dictionary/material.
[6] https://www.merriam-webster.com/dictionary/release.
[7] Plaintiff's Brief in Support of Its Partial Motion for Reconsideration considering *Ungarean* and *Pebblebrook*, n.13.

premises for ordinary and usual occupancy and business use, loss of functionality, and loss of economic utility."[8] For each eleven states in which Shaner has its forty hotel properties, Shaner makes this same claim.

Superimposing the exclusion's language upon Shaner's claim of physical loss in its complaint, our analysis is as follows:

> Shaner claims a physical loss of its property, resulting from the spread of a contaminant arising from any cause whatsoever. This contaminant was a *material,* namely the SARS-CoV-12 virus, that after its release *threatened damage to the health or welfare of Shaner's guests and employees* and *caused* or threatened the loss of use of Shaner's properties insured by this policy. While the language of the exclusion says damage *resulting* from the release of such material may include bacteria, virus, or hazardous substances listed in federal environmental statutes, covered loss is not limited to these three things.
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> Covid 19 virus in this case was the *cause* of the damage, but it was not the *result* of the damage. And, because Covid 19 virus is a *material* that in the words of the policy "threatened damage to the health or welfare of Shaner's guests and employees," it is a *material* that is excluded under the language of the policy.

We conclude defendants' "Pollution, Contamination" exclusions clearly preclude the coverage Shaner seeks in its complaint.

Undeterred by the plain language of the exclusion,,Shaner asserts that the "Pollution, Contamination" exclusion in this case is the "same," "virtually identical," and "materially identical" as the exclusion language in *Pebblebroo*k supra. This argument does not have merit. Because the language in Shaner's policies and in *Pebblebrook* is not the same; they are materially different.

As discussed, Shaner's 'Pollution, Contamination" exclusion defines contaminants or pollutants as "any *material* that after its release...." (*Italics added*). By contrast, the exclusion in *Pebblebrook* does not use the term "material" at all. Rather, the *Pebblebrook* exclusion limits

[8] Complaint at ¶ 78.

contaminants or pollutants to those that are "any solid, liquid, gaseous or thermal, irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste, which after its release...." In our *Pebblebrook* Order dated December 28, 2022, we noted that the parties in that case- were in dispute in the context of a motion for judgment on the pleadings. Compared to the clear policy language in the exclusions in Shaner's case stemming from the use of the world *material,* uncertainty reigns in *Pebblebrook,* precluding a Motion for JOP.[9] Our *Pebblebrook* ruling is not definitive at this point; it holds pollution exclusion there to be *either* open or closed to coverage for COVID-19.[10]

In any event, our JOP decision in *Pebblebrook* is not germane to *Shaner.* In this case, plaintiff presumably had a chance to negotiate the exclusions and the policy language Shaner ultimately agreed to is different from the one in *Pebblebrook.* [11]

We also disagree that the Superior Court's decision in *Ungarean* controls here. In *Ungarean*, the Court considered whether a plaintiff's claim for COVID-related loss is within the scope of a Contamination and Pollution exclusion. The Superior Court agreed with the trial court that the exclusion does not apply for two reasons. First, because the provision defined a pollutant as a "contaminant," the provision's language is circular and ambiguous.[12] Second, because plaintiff "neither alleged nor introduced evidence that the COVID-19 virus was present at [plaintiff's] dental offices," there was no connection between the loss alleged by plaintiff and the exclusion claimed by defendant.[13] Thus, the Superior Court held that the exclusion did not prevent coverage of plaintiff's claim for reasons specific to the facts of the case.

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[9] Court Order of December 28, 2022, at Control No. 22042754.
[10] Plaintiff's Brief in Support of Its Partial Motion for Reconsideration considering Ungarean and Pebblebrook, p. 7.
[11] For this reason, the Court will not engage in a review of its ruling in *Brandywine Realty Trust v. American Guaranty and Liability Ins. Co.*, No. 210400618.
[12] *Ungarean*, 286 A.3d at 364.
[13] *Id.* at 364-65.

Shaner also argues that if its insurers intended to exclude coverage for losses from any virus or material that is hazardous to human health, the insurers could have, and should have, included a standard-form virus or communicable disease exclusion. Shaner contends that because its insurance companies did not include a specific virus exclusion causing loss, then any virus-related loss, including Covid 19 is covered.

We disagree because the causation between Covid 19 and physical loss in Pennsylvania is still undecided. The problem is we do not know whether an all risk policy covers this case. All risk does not mean necessarily mean any risk.[14] Shaner's argues that absent a specific virus exclusion, its claim is covered. This is an immaterial hypothetical under the status of this case where on reconsideration, defendants' exclusion is clear.

Had Shaner sought to ensure that defendants would not exclude themselves from covering court-approved physical losses from any virus or communicable diseases, Shaner could have, and should have, negotiated specific language. As the case stands today, we find the "Contaminants or Pollutants" exclusion in defendants' policies is clear and applicable even if our Supreme Court would hold Covid 19 virus caused physical loss.

III. Conclusion

For the reasons stated, the Court DENIES Shaner's Motion for Reconsideration of the Court's two orders granting Defendants' Motions for Judgment on the Pleadings. We find the language in defendants' "Contaminants or Pollutants" exclusion is clear, unambiguous, and directly applicable to Shaner's claims of physical loss caused by Covid 19.

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[14] See *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 234 (3d Cir. 2002) ("'all risks' does not mean every risk.... A loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any specific exceptions. Consequently, the responsibility under a first-party 'all-risks' policy must be determined by the terms and conditions of the contract."). And in Pennsylvania, clarification falls to our Supreme Court whether an "all -risk" policy covers physical loss via dissemination of Covid 19.

We conclude also that neither our previous judgment on the pleadings ruling in *Pebblebrook* nor the Superior Court's holding in *Ungarean* govern.

And, we find that the exclusion applies to any "material" and Covid 19 is an unfortunate matter of nature.

BY THE COURT

RAMY I. DJERASSI, J.