WISEMAN OIL CO., INC. et al v. TIG INSURANCE COMPANY

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WISEMAN OIL CO., INC.,) ESTATE OF JOSEPH WISEMAN,) ESTATE OF RUTH N. WISEMAN,) EILEEN FANBURG, AS) EXECUTRIX)

Plaintiffs,)

v.) Civil Action No. 011-1011

District Judge Joy Flowers Conti TIG INSURANCE CO. F/K/A) Chief Magistrate Judge Lisa Pupo Lenihan TRANSAMERICA INSURANCE) ECF Nos. 64, 67, 69 CO.)

Defendant.)

REPORT AND RECOMMENDATION ON MOTION FOR PARTIAL SUMMARY JUDGMENT ON DUTY TO DEFEND, AND PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT ON

THE ISSUE OF REGULATORY ESTOPPEL

I. RECOMMENDATION For reasons set forth at length in the case history and legal analysis below, this Report recommends that (ECF No. 69) (ECF No. 64) be granted in part and denied in part Regulatory Estoppel (ECF No. 67) be denied as moot. More particularly, the Report recommends to Defend be granted in part as the Court has determined that the putative policy terms would not have clearly excluded, under the applicable standards, potential insurance coverage as to the underlying litigation, but would rather have given rise to a duty to defend on the part of the Defendant. Neither the putative policy definitions of the potential insureds nor policy exclusions (nor any other putative policy language before this Court) would abrogate under the relevant record - defend. 1

II. CASE HISTORY; SUMMATION

The claims presently before this Court are for (1) declaratory judgment as to Defendant

1 The Court notes its express reservation - of the legal determination of the existence of the policies. See observations in prior Court writings and infra, at Section II(B). Cf. (citing t 210,000 boxes of

un-indexed documents, and searched for policies by looking through approximately 100 three-ring binders containing unorganized 50 percent see also Opposition to TIG Insurance

at 17-23 and Ex. A thereto. concern defend and covenant of good faith and fair dealing; and (3) breach

A. CERCLA Complaint Plaintiffs Wiseman Oil Co., Inc. , Estate of Joseph Wiseman, Estate of Ruth N. Wiseman, s assert that they were entitled to a defense by the insurer, TIG, against claims brought in this Court by the United States under the Comprehensive Environmental Response, for environmental contamination at property previously owned by Joseph and Ruth Wiseman and leased to their family company, 2

and on which that company, Wiseman Oil, previously operated an industrial/commercial waste treatment/reprocessing facility. 3

Under the Fourth (and final)

2 Joseph and Ruth Wiseman were founders, shareholders, and Chairman of the Board and Secretary/Treasurer, respectively, of Wiseman Oil. At times relevant to the underlying litigation, their son Robert Wiseman served as President, and their son Stephen served as Executive VP of Sales and Marketing. The two sons, their parents, and a close friend of Joseph Wiseman comprised the five- divided fairly equally between the parents, their two sons, and one daughter, with a slightly larger share (26.75%) to the parents and a small 5% interest to another individual. The land on which Wiseman Oil operated was leased by Joseph and Ruth Wiseman to their family company under an agreement requiring that Wiseman Oil maintain insurance for the benefit of Joseph and Ruth Wiseman as lessors. See Transcript of Oral Argument of November 15, 2012 (hereafter for No. 76) at 3. The property was collateral for a loan to Wiseman Oil, and was obtained by - early 1982, following

3 Commercial customers named as Defendants in the CERCLA action included Alcoa, Allegheny Amended Complaint , liability was alleged for United States in responding to releases or threatened releases of hazardous subst the site, 4

which was subsequently operated by Breslube- acquired said property and facilities, and resumed waste oil reprocessing operations thereon, following Wiseman Oil late 1981-1982 . There ral years , i.e., CERCLA Complaint at 1-8 (outlining suit to recover costs related to Breslube Penn Superfund Site).

The CERCLA Complaint names the Estates of Joseph and Ruth Wiseman, and their

wife, jointly owned all or portions of the real property on which the [subject] site is located between 1974 and 1982, when Wiseman Road O) collected and stored waste oil on the property and/or operated a waste oil recycling operation on

Ludlum Corp., Atlantic Richfield Co., BP Products of North America, CBS Corp., Chevron U.S.A., Inc., CSX Transportation, Inc., Exxon Mobil Corp., Ford Motor Co., General Electric Co., General Motors Corp., Pennzoil-Quaker State Co., Port Authority of Allegheny County, Shell Oil Co., Texaco Co., and United States Steel Corp. 4 See also CERCLA C nclude sudden See 42 U.S.C. Sections 9601(22) & (29); id. at Section 6903(3). the prop 5

CERCLA Complaint at 13. Robert Wiseman an, [who] was the President of Wiseman Oil sometime between 1978 and 982, when Wiseman Oil operated a waste oil/sludge reprocessing -to- n operational control of the sit operating. CERCLA Complaint at 23. The Complaint asserts liability against both Wiseman

Estates (and their Executrix) and their son Robert under Section 107(a)(2) of CERCLA, which facility at which such hazardous -28.

additional allegations and parties were being added to support financial recovery as the Federal government ascertained more specific information.

The leading of the Complaint are that Wiseman Oil constructed a used oil/sludge reprocessing facility Wiseman Oil received and reprocessed a variety of The while under Wiseman . 5

Joseph Wiseman died in 1996, and Ruth Wiseman died in 2006. iseman the real CERCLA Complaint at 23-24

(emphasis added); see also (ECF No. 83) at 2. An EPA assessment of the site in 1993 revealed numerous hazardous substances including arsenic, mercury, lead, volatile organic compounds, polychlorinated biphenols , and it began a removal action for over 6,000 tons of contaminated soils and sludges. A Consent Decree was entered in the Underlying Litigation on April 20, 2011. See United States v. AK Steel Corp., et al, CA No. 97-1863, Docket No. 604. Accordingly, no judgment was ever rendered concerning the types of releases of hazardous substances that occurred during Wisema s Memo -3 (emphasis added). against 37 Defendants, claims were resolved against the Estates of Joseph and Ruth Wiseman,

their Executrix and the Wisemans' son,

. See Consent Decree at 3- Wiseman, the Estate of Joseph Wiseman, the Executrix of the Estate of Ruth Wiseman, the Executrix of the Estate of Joseph Wiseman, Wiseman Oil Corp. (and predecessor corporations and all officers and shareholders of Wiseman Oil except ost amounts due from the Estates totaled $700,000 plus interest (a slight majority of the total settlement amounts due from the seven parties named in the Table) and from Robert Wiseman $2,500. See Consent Decree at 7. And the Estates (as , and nothing in the Consent states from pursuing claims for insurance benefits or from bringing any Id. at 7, 12.

B. Insurance Policies; Requests for Defense In July, 2004, Plaintiffs corresponded with TIG, providing the First Amended Complaint in the Underlying Litigation, enclosing a certificate of insurance for policy number 12513225, and requesting a defense. 6

indicated that from the Defendants, including the owners and officers of Wiseman Oil Corp., incurred by the [EPA] in responding to releases or threatened releases of hazardous substances at or from the above mentioned site. The [United States] alleges that Joseph and Ruth Wiseman co- See

6 It appears that Defendant TIG ceased being an operating company sometime between 1997 and 2004. See, e.g. Memo Wiseman-028266). 7

In April, 2005, Defendant advised that it that the Wisemans The Underlying Litigation was administratively closed until December, 2009 and in February, 2010, Plaintiffs provided TIG: (1) a certificate of insurance discovered in the files of a customer and indicating the existence of policy 12513225 (covering September 1980-1981); and (2) certificates of insurance for three additional insurance policies numbered 12069979 (September 1979-1980), 18438624 (September 1981-1982), and 11324471 (September 1978-79). 8

Defendant responded that it By 7 See also Am. Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71 (3d Cir. 1985) discussed infra; 65) at 20. 8 insured, insurance company, type of insurance, policy number, policy periods, limits of liability

had successive one- have also produced other evidence of insurance - e.g., the deposition testimony (regarding, e.g.,

business practice of issuing certificates of insurance only with knowledge/review of details of insurance policy in effect) and other evidence (such as handwritten notes and calculations of licensed agent insurance brokers Young Brothers Insurance, and a related line item on the CPA-prepared income tax return in calendar year 1978. See generally cf. correspondence of June 22, 2010, TIG indicated that in the absence of copies of the alleged policies, it t if it did not

action.

cy was to stick stuff in boxes. It had no central database, no standard way of identifying things, and boxes of documents could be sent to Iron See January 31, 2012 Deposition at 192 (Ex. Opposition to Judgment). See also id. at 193, 198 (testifying that there are presently still Oil is in any of those . C. Present Litigation and Pending Motions this action was filed on August 4, 2011. As noted above, (ECF No. 69), and Plaintiffs Motions for Partial (ECF No. 64, hereafter and (b) Regulatory Estoppel (ECF No. 67, hereafter Motion for PSJ on Regulatory). This Report recommends that on

ied in part, and that Plaintiffs Motion for PSJ on Regulatory Estoppel be denied as moot. The Court

again notes its express reservation at - of the legal determination of the existence of the policies. More particularly, Defendant filed a Motion to Bifurcate and Stay, and requested that this Court, in the interest of judicial efficiency, bifurcate discovery and afford Defendant an opportunity by a phasing of Motions in this case - to present pleadings supporting its strongly-asserted position that, even presuming the insurance policies identified in the Certificates form for comprehensive general liability insurance) Defendant would still have owed no defense or coverage-related duties to the Plaintiffs.

Accordingly, following April Oral Argument, and by its Memorandum Order of May 22, 2012 (hereafter the address its defenses to coverage, including contentions regarding the identities of the persons sued, the pollution exclusion clause, and any other coverage issues it wished to interpose, as well as sufficiently clear at the time of tender (or any other relevant time) to excuse it from a duty to

defend as w further directed that Plaintiffs should terms encompass[ed] coverage in the underlying case or, alternatively, that the question of contentions regarding regulatory estoppel. Id. at 2-3. 9

III. STANDARD OF REVIEW A Motion for Summary Judgment may be granted only if, drawing all inferences in favor of the non- affidavits show that there is no genuine issue as to any material fact and that the movant is entitled

to judgment as a matter A principal purpose of the rule is to dispose of factually unsupported claims or defenses. Where the Defendant is the moving party, it must point to of the essential elements, to demonstrate that it is entitled to judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). And Plaintiff must identify evidence of record that supports those elements. Id. Upon a Motion for Summary Judgment and considering a duty to defend under an insurance policy, the Court resolves all doubts in favor of the insured and coverage clauses are interpreted broadly. See, e.g., Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1992); . HNI Corp., 482 F.Supp.2d 568, 607 (M.D. Pa. 2007). Policy

9 Material Fac See ECF Doc. Nos. 86 and 90. The Court is well-acquainted with the scope of evidentiary materials and statements of facts submissions only exclusions are interpreted narrowly, 10

and where Defendant asserts this affirmative defense it bears the burden of proof. See, e.g., HNI Corp., 482 F.Supp.2d at 607; Canal Ins. Co. v. , 435 F.3d 431, 435 (3d Cir. 2006).

IV. ANALYSIS AS TO essentially two (2) grounds: (A) Wiseman Oil was never a CERCLA defendant, and Plaintiffs were not sued in any covered capacity in the Underlying Litigation, i.e., as officers, directors or shareholders of Wiseman Oil, were subjected to liability solely as co-owners of the property on which Wiseman Oil conducted its storage/reprocessing operations; 11

and (B) as liability was not the result of any occurrence, but solely of releases occurring gradually over

time, liability was clearly excluded from Policy pollution exclusion under acknowledged . . . as the law in Pennsylvania. 12

This Report will take these grounds in turn.

10 Cf. rpreting a policy is generally (quoting J.C. Penney Life Ins. Co. v. Pilosi, 393 F.3d 356, 360 (3d Cir. 2004)).

11 12 Id. at 14. As a preliminary matter, however, the Court clarifies that the standard under which it considers is not, as Defendant would have it, whether the underlying Complaint expressly alleges specific factual predicates clearly within the applicable policy terms. To the contrary, the duty to defend arises whenever a fair reading of the underlying Complaint, with its assertions of relevant general or specific factual and statutory bases of liability, does not expressly rule out the possibility of insurance coverage under the applicable policy terms. See, e.g., Sikirica v. Nationwide Ins. Co., 416 F.3d 214 (3d Cir. 2005) (discussing duty to defend where Complaint ; Air Prods. & Chems., Inc. v. Hartford Acc. & Indem. Co., 24 F.3d 177, 179-180 (3d Cir. 1994) (observing that Pennsylvania law requires insurer of general liabi could potentially fall within (emphasis added); Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 58 (1963)

. 13

See also, e.g., Moffat v. Metropolitan Casualty Ins. Co. of N.Y., 238 F.Supp. 165, 173 (M.D. Pa. 1964) (noting obligation to defend

must id.

13 complaint that none of the [allegations] fa C. Raymond Davis & Sons, Inc. v. Liberty Mutual Ins. Co., 467 F.Supp. 17, 19 (E.D. Pa. 1979). inspection of the complaint to determine potential coverage, the insurer cannot take the viewpoint fend with the understanding that it is . 14 A. Existence of Potential Insured 1. Wiseman Oil e.g., Wiseman Oil, and those acting within the scope of their entity affi a resident of the same household; (b) if the named insured is designated in the declarations as . . .

(3) other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as See Memo -15 at TIG 02169 and other documents of record); id. at 14; MSJ at 10; see also in Support of PSJ on Duty at 17. As detailed in Section II above, the Underlying Litigation was an action by the Federal government to recover costs to remediate environmental contamination (releases or threatened releases) at a commercial waste/oil reprocessing facility operated by Wiseman Oil until its

14 Cf. Bracciale v. Nationwide Mut. Fire Ins. Co., 1993 WL 323594 at *5 (E.D. Pa. Aug. 20, 1993) (noting that where insurer refuses to p of an opportunity to litigate and establish that the underlying

claims fell outside its policy See generally -17 (providing additional citations regarding scope of duty to defend and consequences of refusal). bankruptcy in December 1981, and thereafter reopened and operated by Breslube. The still-open Estates of Joseph and Ruth Wiseman were assertedly liable because (a) jointly owned all or portions of the real property on which a used oil/sludge and on which and (b) Section 107(a)(2) of CERCLA affords liabili substances owned or operated any facility at which such hazardous substances were disposed of. This language does not preclude a conclusion that the government sued the Estates both because commercial enterprise on that property. 15

The government was, in the progression of its Complaints, continuing to add more specific individual allegations that would assist it in establishing/extending its ability to recover costs from individuals/entities with sufficient financial resources to pay apportioned contribution amounts. See supra Section II(A). Moreover, as discussed above, ms adjuster, by writing of July 30, 2004, summarized the Underlying Litigation, stating (without equivocation or indication that, as

15 Compare not sued because of any acts of Wiseman Oil. Cf. MSJ at 12 (citing cases in which Plaintiffs were held liable as owners and operators, both); id. at 13, n. 1 (distinguishing cases cited by Defendant which concerned CERCLA liability of banks n Support of MSJ at 7 (citing United States v. Pesses, 1996 WL 143875 (W.D. Pa. Feb. 14, 1996) (noting that Section 107(a)(2) Defendant argued at the November oral argument, he was reporting a litigation position of the Wi that (a) the CERCLA action of response costs from the Defendants, including the owners and officers of Wiseman Oil Corp.,

incurred by the [EPA] in responding to releases or threatened releases of hazardous substances at or from the above mentioned site (b) he Joseph and Ruth Wiseman co- This Report and Recommendation certainly agrees with Defendant that such writing constitutes neither a waiver nor an admission. 16

It is, however, significant indicia of understanding of the possible parameters of the Underlying Litigation, assessment at the time as to whether it would, assuming the existence of a CGL Policy, owe a duty to defend. See, e.g., Am. Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71, 75 (3d Cir. 1985) (where insurer issued letter recogniz[ing] certain officers of the insured organization] as insureds said see also Memo

17 The Court finds the language of the CERCLA Complaint asserted entitlement to summary 16

17 Cf. -4 judgment on grounds that the Underlying Litigation was unequivocally outside potential coverage afforded to Wiseman Oil, or to the Wisemans as its officers, directors or shareholders (and, ; and this Report recommends that the Order so hold. The Court further notes, however, that the terms of the Consent Decree also indicate that

was a not only a course of the Underlying Litigation. 18

As detailed above, the family business, Wiseman Oil, had been bankrupt and had ceased operation for over 15 years at the time the Federal government initiated the Underlying Litigation in 1997. Joseph Wiseman died in 1996 and, by the time of the Consent Decree, Ruth Wiseman was also deceased, having died in 2006. The Consent Decree defines the s including and all officers and shareholders of Wiseman Oil except (who was individually named and contributed to the settlement a comparatively nominal amount). And the government, in agreeing to settlement of the Underlying Litigation, expressly satisfied itself of the designated ecovery costs charged against

18 Cf. to provide a defense until facts were determined sufficient to narrow claim to recovery outside the

Wisemans were sued as owners, officers and directors of Wiseman Oil). them, and the Consent Decree held each designated individual or entity, including Wiseman Oil, . Under this chronology, settlement payment in restitution for environmental harm caused by/during Wiseman its commercial waste/oil storage and reprocessing operations was made from the residual location of remaining assets at the time, i.e., the Estate of the surviving spouse, Ruth Wiseman. 19

Thus, development of the Underlying Litigation, did not rule out (but rather further evidenced) that the Wisemans incurred costs of defense and liability directly related to their affiliations with and roles in the defunct family Enterprise, Wiseman Oil. 20

The Court further notes that, even in their additional roles as owners of real property subject to liability for harm caused by their lessee, Wiseman Oil, the Wisemans would presumably have been entitled to indemnification/recovery costs from Wiseman Oil. Cf. supra (noting that lease required that Wiseman Oil carry insurance in favor of the lessors). Compare November Oral Argument; in Support of MSJ at 8-9 (asserting that detailed operational allegations against Breslube (an on-going, financially-viable commercial entity/enterprise) as to Breslube Penn 19 Cf. -10 (noting that the Wisemans were the operators of Wiseman Oil, that the bankrupt/defunct company had no checking account, that monies were in the hands of Joseph and Ruth Wiseman and at their deaths in their Estates, and that ultimately Ruth Wiseman, as the surviving spouse, and later her Estate, expended litigation and settlement funds because they arose from the activities of the family busi Defendant having refused to defend). Cf. also

20 Cf. Depa , they owned the real property on which Wiseman Oil . 2. Joseph Wiseman This Court also notes that, in addition to the three (3) Certificates of Insurance naming Wiseman Oil, Plaintiffs identified a fourth Certificate of Insurance (Policy no. 12069979) also reflecting individual insurance for Joseph Wiseman. See, e.g.Memo Opposition to

The relevant definition of an Insured under Section IV of insured and, if an individual, the spouse of such named insured if a resident of the same household; (b) if the named insured is designated in the declarations as (1) an individual, the person so designated but only with respect to the conduct of a

business of which he is the sole proprietor, and

Defendant asserts that this presumed individual insurance policy clearly afforded no coverage with regard to the Underlying Litigation because it insured Joseph Wiseman, and his spouse, only with respect to the conduct of a business . Defenda at 11-12. 21

But

21 This Courrt rejects provisions of subsection (a) provided broader coverage to the Wisemans, independent of the insurance for conduct of a business under subsection (b). To the contrary, the form policy Defendant identifies no business operations of Joseph Wiseman and his spouse other than Wiseman Oil, and their related ownership and leasing of the land on which it operated. Ownership of real property for commercial-enterprise lease (which property is mortgaged for (i.e., commercial activity and/or economic dealings, as opposed to personal, residential

or leisure-related property ownership). Moreover, this issue could raise, of course, the question of an insured layperson at the time he purchased insurance providing individual business liability protection. It is, therefore, not clear that, even in the absence of a duty to defend on the part of Defendant arising from its presumed CGL policies insuring Wiseman Oil (which the Court expressly concludes would have been owed), Defendant would have owed no defense in the Underlying Litigation on the basis of its presumed individual insurance policy issued to Joseph Wiseman. 22

language clearly provides, in subsection (a), that the spouse of an individual insured is included within the otherwise applicable scope of coverage. And subsection (b) proceeds to define the ed, (2) a partnership or joint venture, and (3) another organization/entity. The individual policy therefore affords coverage, as Defendant Compare, e.g. Pla -15.

22 The Court notes that in light of its conclusions and Recommendation, this issue need not be further addressed at this time. See supra at 16- Complaint judgment on grounds that the Underlying Litigation was unequivocally outside potential coverage

afforded to Wiseman Oil, or to the Wisemans as its officers, directors or shareholders (and,

B. Sudden and Defined Occurrence; Potential Regulatory Estoppel and/or Trade Usage Considerations

repeated exposure to conditions which results in bodily injury or property damage neither expected See Support of PSJ on Duty at 17. And it contains an exclusion for discharge, dispersal, release or escape of . . . toxic chemicals, liquids or gases, waste materials or

other . . . contaminants or pollutants into or upon land . . .; but this exclusion does not apply if such

See P Support of MSJ at 12-13) .

1. Defendant asserts that the Complaint contains no allegations short time, and accidental, meaning unexp law .

See, e.g., s Brief in Support of MSJ at 13-14 (citing and quoting Lower Paxton Township v. U.S. Fidelity & Guaranty Co., 557 A.2d 393 (Pa. Super. 1989); Northern Ins. Co. of New York v. Aardvark Assocs., Inc., 942 F.2d 189, 194 (3d Cir. 1991)); in Opposition to Plaint to MSJ at 4 (asserting, as grounds for coverage exclusion, that CERCLA Complaint does not allege).

Defendant concludes that because generally that waste oil was stored and/or treated at the site from a least 1974 onwar then 23

its legal position is misguided by its misunderstanding/misstatement of the scope of its duty. The

proper measure is the possibility, under the language of the underlying complaint, liability for actions and consequences within the scope of policy coverage. In addition, as also discussed supra, under Pennsylvania law the insurer bears the burden of establishing the applicability of any exclusion or limitation on coverage, as an affirmative defense.

that Plaintiffs were clearly excluded from coverage because (a) the (i.e., abrupt) (i.e., unintended), (b) the CERCLA Complaint makes no specific allegations regarding an abrupt versus gradual nature of any alleged releases, and (c) no allegations exclusion, simply will not pass muster. For even accepting, arguendo of the policy provision, it erroneously flips the standard and makes an unduly crabbed assessment

of its obligation.

23 -15.

The record indicates that it was, indeed, possible that the general allegations in the proceeded, be determined to encompass and premise liability upon sudden and

And, critically, that Defendant could not reasonably conclude, on the face of the Complaint, that the allegations precluded or negated any potential applicability of these qualifiers. Compare De Brief in Opposition to Plaintiffs Motion for Partial Summary Judgment (Duty (ECF No. 84) at 18 (asserting that no allegations of the underlying Complaint release) with Plaintiffs s MSJ at 18 (noting that CE includes spilling , leaking ,); id. at 18-20 (providing citation to cases reiterating

ay or may not fall within the , e.g., t a release was non-accidental); id. at 25 (noting that no allegations of intentional dumping or regular discharges were asserted, and cases distinguish complaints that do

not detail how or when alleged (quoting Techalloy Co. v. Reliance Insur. Co., 487 A.2d 820, 827 (Pa. Super. 1984)). See also,

e.g., C.H. Heist Caribe Corp. v. Am. Home Assur. Co., 640 F.2d 479, 483 (3d Cir. 1981); Air Prods. & Chems., Inc. v. Hartford Acc. & Indem. Co., 25 F.3de 177, 180 (3d Cir. 1994); Am. Motorists Ins. Co. v. Levolor Lorentzen, Inc., 79 F.2d 1165, 1168 (3d Cir. 1989). 24

Plaintiffs introduced - and its affirmative defense of a policy exclusion - evidence of the possibility of liability within the scope of Defenda , including evidence regarding unusual/unpredictable flash-flooding accidental release . See Plaintiffs Memo Oppositi -21 (providing citations to r in Support of PSJ on Duty at 24-25. permissible with respect to its duty to defend, which must be based solely on the four corners of the underlying complaint, 25

again rather misapprehends the jurisprudence. More specifically, an insurer may not establish that it had no contemporaneous duty to defend by the introduction of evidence that, ultimately, it had no such duty, because the standard by which its duty is measured is broader and, accordingly, looks to the possibility of duty when the insured requests a defense

24 Cf. Murphy Oil USA, Inc. v. Unigard Security Ins. Co., 61 S.W.3d 807, 810, 816 (Ark. 2001) (concluding in context of assessment of duty to defend and possibility of coverage, that allegation sudden relea accidentally left open, or leakage through corroded hole); cf. also id. at 815 (noting opinion of Pennsylvania Supreme Court, in Sunbeam infra. 25 See generally (and, if denied, as the underlying litigation develops). 26

But because the insurer has a duty to reasonably assess its defense obligations in light of potential coverage under the facts, whether or not it met those obligations is appropriately, and necessarily, evaluated in light of the facts. See, e.g., Air Prods. introduction of evidence to show that an exception to an exclusion applies, while disallowing evidence to show that an exclusion

and, in particular, the s Memo in Su Statement of Material Facts (ECF No. 95) at 4-5 (explaining that where complaint

non- outside coverage) (quoting C. Raymond Davis, 467 F.Supp. at 19, and citing additional cases). 27

Moreover, the Court would not need expert evidence to observe that Defendant, as a general liability insurer in the business of insuring

26 See back ex-ante and say now that the case is over, I can prove that there would have been no coverage,

27 Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co. to consider expert

reports that suggested torrential rains may have caused damage, where the complaint against the insured alleged damage that was a result of a different cause numerous and varied commercial enterprises, may reasonably have been aware in conducting a good faith evaluation of its duty to defend - of (a) the possibility of an interim occurrence of severe weather during the years of s, and (b) the potential effects, of severe rain in particular, on the operations of a commercial client engaged in the storage and reprocessing of hazardous commercial waste materials (particularly one in proximity to water, i.e., Montour Run). As with the issue of a potential insured, this Court finds the language of the CERCLA Complaint a asserted grounds for entitlement to summary judgment Judgment on the que . Here, it is sufficient basis to reject

alternative assertions that the Underlying Litigation was clearly outside its potential defense or coverage obligations as an insurer for pollution harm arising only from a en and and the Report recommends that the Order so hold.

2. Potential Regulatory Estoppel or Trade Usage Considerations Affecting

Pollution Exclusion Clause The Report further notes, however, that assertion that it is ania law that the term , in a standard industry pollution

exclusion clause, carries a temporal restriction (i.e., abruptness and brevity) was - as Defendant effectively acknowledged during November Oral Argument - a patent misstatement. The law in Pennsylvania regarding the scope of this industry-standard pollution exclusion exception is unsettled present evidence regarding considerations of both regulatory estoppel and trade usage. 28 More specifically, the Pennsylvania Superior Court, in 1989, declined to consider the evidence concerning the drafting history and regulatory approval process of the pollution exclusion exception, and declined to consider implications of regulatory estoppel or custom/trade usage, ho requires that damages resulting from gradual releases of pollu Lower Paxton Twp. v. U.S. Fidelity & Guaranty Co., 557 A.2d 393, 397 (Pa. Super. 1989); id. at

399- g abrupt and lasting only a short time, and accidental,

. In 1991, the Court of Appeals for the Third Circuit held, in New Castle County v. Hartford Accident & Indemn. Co., 933 F.2d 1162, 1198 (3d Cir. 1991), a case arising under

should - in the context of a pollution exclusion clause be construed to mean 28 Compare at the November oral argument that question of regulatory estoppel is not decided in Pennsylvania with (characterizing Lower Paxton id. at 22 (noting that CERCLA Complaint

Cf. 29

But the Court declined to extend that holding to a case under Northern Ins. Co. of New York v.

Aardvark Assocs. Inc., 942 F.2d 189 (3d Cir. 1991) (concluding that, in accordance with Lower Paxton exception applied, in Pennsylvania, only to abrupt and unintended releases); id. at 193 (expressly

noting, in so holding, that the Circuit Court could not then Pennsylvania would reach a conclusion different from that of the Superior Court . . . if it

conf usion clause). 30

But t , elucidated by evolving factual history and jurisprudence, did come before

the Supreme Court of Pennsylvania in 2001, more than holding in Lower Paxton. And in that decision, the Pennsylvania Supreme Court concluded that

(1) the doctrine of regulatory estoppel applied to the question of recovery, under the then-standard CGL Policy pollution exclusion clause, for liability for the clean-up of environmental pollution occurring over time; (2) industry custom or trade usage is always relevant and admissible in 29 See also New Castle County v. Hartford Accident and Indemnity Co., 970 F.2d 1267, 1269 (3d of term). 30 Cf. , 896 F.Supp. 362, 371-72 (D.N.J. 1995) (discussing issue of es exclusion was intended only to clarify coverage previously afforded, i.e., to maintain coverage for construing commercial contracts and does not depend on any obvious ambiguity in the contract; and (3) memorandum to the State Department of Insurance when seeking approval of the exception was admissible evidence of a custom or special/trade usage that only d added no new requirement of abruptness where the memo drafted by a consortium of insurers purporting to represent the industry as a whole - represented that the modification would not result in any significant decrease in coverage and that coverage would continue for pollution or contamination- . See Sunbeam Corp. v. Liberty Mutual Ins. Co., 781 A.2d 1189 (Pa. 2001). Indeed, the Court went on to state that Having represented to the insurance department, a regulatory agency, that the new language in the . . . policies did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders. The United States Court of Appeals for the Third Circuit recently reached the same conclusion in Essex Chemical Corp. v. Hartford Accident and Indemnity Co., . . . New Jersey insurance commission). 31

31 Sunbeam, 781 A.2d at 1193 (emphasis added). See also Essex Chem. Corp. v. Hartford Accid. & Indemn. Co., 1995 WL 861533, *2 (D.N.J. Dec.15, 1995) (relying on New Jersey Supreme Court's conclusions that: insurance industry changed unexpected/ unintended language c

industry to [its] origi Hussey Copper, Ltd. v. Royal Ins. Co. of America, 2009 WL 2913959, *8 (W.D. Pa. Sept. 9, 2009)). Cf. generally Motion for Partial Summary Judgment (Regulatory summarizing regulatory history in Pennsylvania and other states); id. at 9 n. 2 (citing New Castle and other cases relating Compare

The Supreme Court it was error to dismiss the complaint without reversed the L, 32

and remanded the case for further proceedings, including judicial consideration of regulatory estoppel and custom/trade usage . See further discussion, infra. 33

would require the re- id. at 23 (requesting same).

Cf. Hussey, 2009 WL 2913959 at **9-10 (noting that the sudden/accidental provision is a Essex Court c Cf. also holdings and scholarship concluding that broader interpretation of pollution exclusion exception Support of PSJ on RE at 24-25 (discussing division/divergence in courts as to meaning of

32 The Sunbeam trial court had dismissed the complaint, and the Superior Court had affirmed, on grounds including that unambiguous and does not cover pollution occurring gradually over a long period of time whether Id. at 1192. Compare Littitz Mutual Ins. Co. v. Steely, 785 A.2d 975, 982 (Pa. 2001) (noting that in Sunbeam evidence of industry custom or trade usage is always relevant and admissible to demonstrate that words used in a c considered part of the contract, the presumption being that the contracting parties . . . contracted

33 Cf. -5

Despite its clearly and expressly articulated correction of Lower Paxton ambiguity-prerequisite to considerations of trade usage in contract interpretation, the Supreme

stead, the Supreme Court observed that Lower Paxton Twp., supra, the [lower] court [apparently]

created was evidence of a settled Id. at 1194 (emphasis in original). See also id. at 1194-95 (concluding that

that they

dismiss the complaint on the authority of Lower Paxon Twp., supra, as well as to disregard the 34

As noted above, the case was remanded for further proceedings

discussing considerati Mele v. Nutmeg Bakers Supply, 580 F.Supp. 887, 889 (E.D. Pa. 1984); McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 663 (3d Cir. 1980)). Cf. also Simon Wrecking Company, Inc. v. AIU Ins. Co, 530 F.Supp.2d 706, 711-12 (E.D. Pa. 2008)

34 Cf. Simon Wrecking Lower Paxton, on including the trial memorandum and policy revision; and, as the case settled, it did not come again before the Pennsylvania Supreme Court. Id. at 1195. 35

In sum, following an extended and careful review of the regulatory and case histories, it seems clear Sunbeam requires evaluation where, e.g., a CGL Policy insurer maintains it as an affirmative defense and resolution

of its meaning is necessary to determination of the duties disputed -

consideration of regulatory estoppel). 35 Following Sunbeam, our sister Court for the Eastern District of Pennsylvania observed that the Pennsylvania Supreme Cour in Pennsylvania. Simon Wrecking, 530 F.Supp.2d at 713; see generally id. (discussing, in context of motions for representations to Pennsylvania Insurance Department that revised language in CGL Policies would not result in any significant decrease in coverage). This sister Court has also expressly held that, in Sunbeam policies should be interpreted based on the custom and usage of terms in the industry . . . [and]

concluded that the exception applies to both gradual and abrupt pollution or contamination as long Bituminous Casualty Corp. v. Hems, 2007 WL 154564 at *6 d in a New Jersey landfill over an eight year period).

But see Simon Wrecking not to determine the issues of trade usage and regulatory estoppel [but] remanded the case to the trial court Simon Wrecking Co. v. AIU Insur. Co., 350 F.Supp.2d 624, 641 (E.D. Pa. 2004) (concluding that, under Sunbeam e of regulatory estoppel). Cf. Memorandum Order at 3, n. 1. , (a) with reference to both regulatory estoppel and trade usage and (b) in accord with other guidance as to these considerations set forth in the Sunbeam decision. See supra; cf. Plaintiffs Memo Opposition (asserting that grant of summary judgment in this case without consideration of regulatory estoppel or trade usage would violate Pennsylvania law). 36 Finally, although the Plaintiffs in Sunbeam elected to include in their Complaint department, 37

this Court concludes there is no requirement that regulatory estoppel be affirmatively pled. To the contrary, as the Pennsylvania Supreme Court has expressly observed, regulatory agencies) -created doctrine designed to protect the integrity

of the courts by preventing litigants . . . [from] adopting whatever position suits the moment. . . .

36 The Court feels compelled to observe that, in light of this jurisprudential history, it found consideration of this question in Sunbeam surprising - representations and implications to this Court regarding current Pennsylvania law. See, e.g., supra. See also and unambiguous and to operate to absolve an insurer of any duty to defend or indemnify an insured for any claims associated with a release of pollutants that is alleged to have occurred id. at 13- limitations, without acknowledgement that the Supreme Court had expressly called Lower Paxton

into question and expressly rejected its view of the determinative character of (i.e., preclusion based preemptively upon) common meaning). 37 See Sunbeam, 781 A.2d at 1192. Unlike collateral estoppel

or res judicata, it does not depend on relationships between parties, but Sunbeam, 781 A.2d at 1192. It

Motion for Summary Judgment, and at See, e.g., Hussey, 2009 WL 2913959 at *11 (observing that Plaintiff first raised regulatory estoppel in conjunction with its opposition to Defendants' Motions for Summary JudgmentSunbeam was permitted to explore and present the regulatory estoppel issue); UTI, 896 F.Supp. 362 (containing no suggestion that regulatory estoppel was pled, but appearing to the contrary that Defendants moved for summary judgment on the pollution exclusion and Plaintiff cross-moved on grounds of estoppel artial Summary Judgment on Regulatory Estoppel (ECF No. 96) at 2 (citing to PL Ex. 14 at paras. 30-31 and Atts. G- 38

Compare on RE at 18 n. 10 & 21 (asserting that at a time when complaint may be amended); id. 38

Cf. id. support its position that it reasonably expected . . . pollution exclusion to provide coverage for i.e., that new exclusion language retained the same meaning as in the prior CGL form, providing coverage as long as the event(s) giving rise to liability were neither expected nor intended by the insured). Cf. also Sunbeam their complaint to add suc with New Hampshire v. Maine, 532 U.S.

742, 750-51 (2001) (discussing application of judicial estoppel as an equitable doctrine invoked by the Court at its discretion). In the case sub judice, Plaintiffs have pled their entitlement to insurance coverage, and the issue of regulatory estoppel is neither a separate cause of action nor a part of their prima facie case; rather, it is affirmative defense of an applicable pollution exclusion (and one which Plaintiffs raised in the April Oral Argument). 39 C. Existence of Possible Occurrence As noted continuous or repeated exposure to conditions which results in bodily injury or property damage See Support of PSJ on Duty at 17. Cf. Sunbeam, 781 A.2d at 1195 (noting that CGL policies defined

policy period, in bodily injury or property damage that was neither expected nor intended from the

39 See -4 (noting that when, at April Oral Argument, Defendant raised prospective filing of motion on qualified pollution exclusion, Plaintiffs indicated such motion would implicate regulatory estoppel and promptly supplemented its discovery with, e.g., related declarations, deposition transcripts and document databases in June, 2012, as to which Defendant undertook no responsive discovery); cf. RE at 4 n. 3.

Although Defendant did not raise the non- Brief in Support of MSJ , it does assert, in the context of its that CLA Complaint did not . 40

And it further suggests, in its Opposition to Plaintiffs PSJ on Duty, that pollution created s day-to-day operations i.e., collecting, storing and reprocessing a variety of waste materials) and therefore not within any policy coverage. Plaintiffs PSJ on Duty at 14-16 (citing Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F.Supp. 132 (E.D. Pa. 1986) where contamination source was 41

As Plaintiffs counter, commercial waste/oil storage and reprocessing operations are activities and business operations distinguishable from either (a) intentional dumping or (b) , nment. 42

40 DSee also RE at 1 n. 1. 41 This Report need not further elaborate on the antithetical nature of this case. See Reply Memorandum of Law In Support of Motion for Partial Summary Judgment (Duty to long-standing routine polluting practices as alleged and established by evidence).

42 See Plain -25 (distinguishing Lower Paxton and Aardvark Assocs. id. at 25 (also distinguishing Techalloy, business operations in which accident rather than the routine conduct or nature of the enterprise - could result in environmental pollution; and that, as fully explained supra, is the consideration in

43 D. In sum, Plaintiffs briefing points persuasively to language of the CERCLA Complaint and to provisions of the presumed CGL policies (and to additional evidence of record) indicating that as to each of the above factors, and under a reasonable contemporaneous interpretation/evaluation of the applicable language at issue - Defendant owed a duty to defend in the Underlying Litigation. denial of this insurance obligation required a clearly and reasonably-premised ruling-out of any such duty, giving appropriate scope to the possibilities of liability raised by the Underlying Litigation. This Court finds, for the reasons detailed above, that Defendant would

25-year period).

43 Compare -16 (repeatedly asserting absence of express allegation in CERCLA Complai with e.g., the Third decision in C.H. Heist complaint for finding that [the release] was non-accidental . . . the allegations . . . state on their face See generally of PSJ on Duty at 4-5; see also id. at 6 n. 3. under the putative policy provisions have owed such duty. 44

It therefore recommends denial of

V. ANALYSIS AS TO PARTIAL SUMMARY JUDGMENT As telephone conference with counsel (see ECF No. 78), and as noted in its Memorandum Order, Sections A and B, and portions of Section C, of Plaintiffs Motion for PSJ on Duty, addressing bases for a finding that Wiseman Oil and/or Joseph Wiseman were insured by Defendant for periods of liability in the Underlying Litigation, are irrelevant to this stage of the bifurcated pleadings, which were proceeding in accordance with the existence of the policies in question under the Certificates of Insurance be - for purposes of assessing entitlement to summary judgment presumed. 45

44 As noted above, under Pennsylvania law, the interpretation of the scope of coverage of an insurance contract is a question of law properly decided and enforced by the Court. See, e.g., Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir.1999); Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (1983); see also State Farm Fire & Cas. Co., 589 F.3d at 110 (noting that, in

determining whether an insurer owes a duty to defend, the Court must examine the allegations in the underlying complaint and the language of the applicable insurance policy). Cf., e.g., Pac. Indem. Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985) (noting that an insurance company is obligated to defend an insured whenever the complaint filed by the injured party may potentially come within the policy's coverage); discussion supra. 45 Cf. expressly set aside for purposes of these Motions - insurance policies in the circumstances sub judice, it notes that at least at this point the record as to the existence of CGL insurance appears persuasive. See also, e.g., American States Ins. Co. v. Mankato Iron & Metal, Inc., 848 F.Supp. 1436, 1440-41 (D. Minn. 1993) (putative insured submitted evidence of the missing policy numbers and effective dates, and that insurer had issued The Court nonetheless concludes, for the reasons set forth at length in this Report, that Duty to Defend (ECF No. 64) should be granted in part, to reflect the Court i.e., that the putative policy terms would not have clearly excluded, under the applicable standards, potential insurance coverage as to the Underlying Litigation, but would rather have given rise to a duty to defend on the part of the Defendant. Under the terms of the presumed CGL policies, neither the definitions of the potential insureds nor policy exclusions (nor any other putative policy language before this Court) would abrogate under the relevant record - . The Court further concludes that 67) should be denied as moot, given its conclusion that the language of the CERCLA Complaint

did not preclude the possibility of a covered occurrence, even accepting, arguendo . 46

missing policies as CGL policies which contained related coverage clause that appeared without substantial variation for years); Americhem Corp. v. St. Paul Fire and Marine Ins. Co., 942 F.Supp. 1143, 1146 (W.D. Mich. 1995) (insured showed terms of lost policy by declarations form and coverage form, which were state-approved comprehensive general liability forms that insurer used during relevant time frame); Cf. 2 Handbook on Insurance Coverage Disputes, § 17.04, at of policy is known, it may be possible to establish the terms and conditions of the policy by reference to a standard form, such as the Comprehensive General Liability policy developed by the 46 The Court wishes to reiterate at this juncture of the litigation that pollution exclusion clause: (1) it appears to this Court that regulatory estoppel need not be affirmatively pled; cases, together with other related case law and documents concerning the regulatory history, leave it with the strong impression that, although there have been some inexactitudes in some of the writings, preclusion of liability, or preclusion of consideration VI. RECOMMENDATION

Accordingly, upon review of the pleadings and briefs of record, as well as the evidence before the Court, and on the grounds expressly delineated above, it is respectfully recommended that Motion for Summary Judgment (ECF No. 69) for Partial Summary Judgment on s Duty to Defend (ECF No. 64) be granted in part and denied in part as set forth herein; and Regulatory Estoppel (ECF No. 67) be denied as moot and without prejudice. For reasons provided supra, n. 9, it is further recommended

In accordance with the Magistrate Judges Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of service of a

copy of this Report and Recommendation to file objections. Any party opposing the

as to Pennsylvania law - decidedly not well settled. Indeed, to the contrary, in Sunbeam, the Pennsylvania Supreme Court (a) found it unnecessary, at that stage of the litigation, to issue a holding that would formally abrogate language of Lower Paxton; but (b) nonetheless clearly concluded that the policyholder should be afforded the opportunity to present evidence to the trial court on the effect of both regulatory CGL policy coverage determinations. objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.

Lisa Pupo Lenihan United States Chief Magistrate Judge

Date: January 22, 2013