IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARKEL INSURANCE COMPANY,	§	
	§	
Plaintiff,	§	
	§	
AMTRUST INSURANCE COMPANY OF KANSAS, INC.,	§	**Civil Action No.: 4:19-cv-41-ALM-KPJ**
	§	
Intervenor,	§	
	§	
v.	§	
	§	
2 RJP VENTURES, LLC, ANNE DROPP, and AMY SLABAUGH,	§	
	§	
Defendants,	§	
	§	
ANNE DROPP and AMY SLABAUGH,	§	
	§	
Counterclaim-Plaintiffs,	§	
	§	
v.	§	
	§	
MARKEL INSURANCE COMPANY,	§	
	§	
Counterclaim-Defendant.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court are Plaintiff Markel Insurance Company's Fed. R. Civ. P. 12(b)(6) Motion and Supporting Brief (the "Motion to Dismiss") (Dkt. 14), Defendants/Counterclaimants' Motion for Summary Judgment ("Counterclaimant's Motion for Summary Judgment") (Dkt. 27), Markel Insurance Company's Motion for Summary Judgment ("Markel's Motion for Summary Judgment") (Dkt. 34), Markel Insurance Company's Motion for Default Judgment Against 2RJP Ventures, LLC (the "Motion for Default Judgment") (Dkt. 42),

and AmTrust Insurance Company of Kansas, Inc.'s Motion for Summary Judgment ("AmTrust's Motion for Summary Judgment") (Dkt. 69).

I. BACKGROUND

Decedent Ross Powell was the sole member, manager, and employee of 2 RJP Ventures d/b/a Lawn Doctor of McKinney-Allen ("2 RJP"), a lawn care service. *See* Dkt. 15 at 1. 2 RJP obtained two different insurance policies at issue in this case. Markel Insurance Company ("Markel") issued a commercial general liability insurance policy ("Markel Policy") (Dkt. 1-1) to 2 RJP for the period of August 16, 2017, to August 16, 2018. *See id*. AmTrust Insurance Company of Kansas ("AmTrust") issued a commercial auto liability policy ("AmTrust Policy") (excerpts at Dkts. 69-1, 69-2) for the same time period—August 16, 2017, to August 16, 2018. *See* Dkt. 69 at 6.

Ross Powell used a van in the course and scope of his employment (the "2 RJP Van") and maintained work related equipment in the 2 RJP Van, including a "Powerhorse Model 42411" gasoline-powered portable inverter-generator. *See* Dkt. 15 at 2. On October 25, 2017, Ross's father, Lyle Powell, accompanied Ross in the 2 RJP Van. *See id*. On that same day, the generator was left running inside the 2 RJP Van while Ross and Lyle Powell were in the vehicle, and though the generator was stationed inside a rear compartment behind a wall in the vehicle, the compartments shared airspace. *See id*. Tragically, Ross and Lyle Powell died sitting in the driver and passenger seats due to carbon monoxide poisoning from the fumes that emanated from the generator running inside of the 2 RJP Van. *See id*.

Lyle Powell had no surviving spouse or parents, but was survived by two daughters, Anne Dropp and Amy Slabaugh (the "Counterclaimants"). *See id*. On July 6, 2018, the Counterclaimants filed a lawsuit in the 158th Judicial District Court of Denton County for the wrongful death of their

father against 2 RJP (the "Underlying Lawsuit"). *See id*. Markel defended 2 RJP in the Underlying Lawsuit in order to ensure fulfilment with any contractual obligations it may have pursuant to the Markel Policy. *See id.*at 3. A trial was held in the Underlying Lawsuit and the jury returned a verdict in the Counterclaimants' favor for $1,390,000.00. *See* Dkt. 75 at 5, Dkt. 75-1.

The present action and the pending motions revolve around one central question: which insurance policy, the Markel Policy or the AmTrust Policy, if any, covers the damages caused by 2 RJP? On January 17, 2019, Plaintiff Markel filed suit in this Court seeking a declaratory judgment that it has no obligation to defend or indemnify 2 RJP in the Underlying Lawsuit. *See* Dkt. 1. Plaintiff named as Defendants 2 RJP, as well as Anne Dropp and Amy Slabaugh, as sole surviving heirs and wrongful death beneficiaries of their father Lyle Powell. *See id*.

Though Markel has attempted service of the lawsuit on 2 RJP through service on the Texas Secretary of State (*see* Dkt. 9), and though Markel defended 2 RJP in the Underlying Lawsuit, as Ross Powell was the sole member, manager, and employee of 2 RJP, service has never been perfected. *See* Dkt. 9. On August 5, 2019, Markel filed a Motion for Default Judgment (Dkt. 42) against 2 RJP.

The Counterclaimants filed an Answer and Counterclaim (Dkt. 6) on April 5, 2019, against Markel, requesting declaratory judgment that Markel has a duty to defend 2 RJP in the Underlying Lawsuit, that coverage exists under the Markel Policy, and that Markel has a duty to indemnify its insured in the Underlying Lawsuit. *See* Dkt. 6 at 11. Counterclaimants initially asserted a claim of estoppel but have since resolved this claim with Markel. *See* Dkt. 16. Counterclaimants also asserted a breach of contract claim and requested attorney fees pursuant to Texas Civil Practice & Remedies Code § 38.001. *See* Dkt. 6 at 12–13. Markel filed a Motion to Dismiss the Counterclaim

(Dkt. 14), Counterclaimants filed a response (Dkt. 19), Markel filed a reply (Dkt. 23), and Counterclaimants filed a sur-reply (Dkt. 26).

Addressing the substance of both the Complaint (Dkt. 1) and the Counterclaim (Dkt. 6), on June 20, 2019, Counterclaimants filed a Motion for Summary Judgment (Dkt. 27) (briefed in Markel's response (Dkt. 27) and Counterclaimants' reply (Dkt. 39)), and on July 16, 2019, Markel filed a Motion for Summary Judgment (Dkt. 34) (briefed in Counterclaimants' response (Dkt. 40), Markel's reply (Dkt. 46), and Counterclaimants' sur-reply (Dkt. 47)).

On September 6, 2019, AmTrust filed a Motion to Intervene (Dkt. 49), which the Court granted on October 22, 2019, following briefing and a hearing on the relevant issues. *See* Dkt. 66. In AmTrust's Intervenor Complaint, it requests a declaratory judgment that it has no duty to defend or indemnify 2 RJP pursuant to the AmTrust Policy for the claims asserted in the Underlying Lawsuit. *See* Dkt. 50 at 4. AmTrust filed a Motion for Summary Judgment (Dkt. 69) on its claims, Counterclaimants filed a response (Dkt. 75), AmTrust filed a reply (Dkt. 76), and Counterclaimants filed a sur-reply (Dkt. 77). Notably, Markel did not take a position with regards to AmTrust's Motion for Summary Judgment.

On February 20, 2020, the Court held a hearing on the substance of the pending Motions (the "Hearing").

II. LEGAL STANDARD

A. Motion to Dismiss

Rule 12(b)(6) provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). A claim will survive

an attack under Rule 12(b)(6) if it "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). In other words, a claim may not be dismissed based solely on a court's supposition that the pleader is unlikely "to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id*. at 563 n.8.

When considering a motion to dismiss, the court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint. *See Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)).

B. Motion for Summary Judgment

Summary judgment is appropriate when, viewing the evidence and all justifiable inferences in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). The appropriate inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). In sustaining this burden, the movant must identify those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party, however, "need not negate the elements of

the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant's burden is only to point out the absence of evidence supporting the nonmoving party's case. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996).

In response, the non-movant "may not rest upon mere allegations contained in the pleadings but must set forth and support by summary judgment evidence specific facts showing the existence of a genuine issue for trial." *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Anderson*, 477 U.S. at 255–57). Once the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record to show there is a genuine issue for trial. *Stults*, 76 F.3d at 655. The citations to evidence must be specific, as the district court is not required to "scour the record" to determine whether the evidence raises a genuine issue of material fact. E.D. TEX. LOCAL R. CV-56(d). Neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the nonmovant's burden. *Stults*, 76 F.3d at 655.

Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. *Evans v. Texas Dep't of Transp.*, 547 F. Supp. 2d 626, 636 (E.D. Tex. 2007), *aff'd*, 273 F. App'x 391 (5th Cir. 2008) (citing *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex Corp.*, 477 U.S. at 322). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322–23.

III. ANALYSIS

A. Markel's Motion to Dismiss (Dkt. 14)

Markel initially requested the dismissal of all three Counts asserted in the Counterclaim. *See* Dkt. 14 at 1. Following dismissal of Count II by stipulation and upon apparent review of the law presented in Counterclaimants' response, Markel's only present request is for dismissal of Count III. *See* Dkt. 23 at 5. With respect to Count III, Markel was not consistent across it's briefs regarding its argument for dismissal. In its Motion, Markel argued that Count III should be dismissed because Texas' "no direct action" rule bars Counterclaimants' claims against Markel. *See* Dkt. 14 at 1. However, in its reply, Markel instead contends that Count III (breach of contract), is futile. *See* Dkt. 23 at 1–3. At the Hearing, Markel changed its argument yet again, and presented an argument for dismissal due to a lack of standing.

"Reply briefs cannot be used to raise new arguments." *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016). Arguments raised for the first time in a reply brief are waived. *See Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 879 n. 18 (5th Cir. 2004). As Markel appears to have abandoned the argument asserted in its Motion, and the Court need not consider new arguments raised for the first time in a reply, the Court's analysis could stop there. However, Markel also did not sufficiently distinguish the case cited by Counterclaimants, *AIX Specialty Ins. Co. v. BBL Investments, Inc*, No. 4:14-CV-2645, 2015 WL 12778400, at *2 (S.D. Tex. Aug. 18, 2015), wherein the court held that a counterclaimant asserting a claim against its insurer who was seeking to rescind the insurance policy had standing regardless of Texas' "no direct action" rule, and found dismissal of the counterclaimant's anticipatory breach of contract claim was premature as the issue turned on the court's judgment declaring the rights of the parties. This same logic applies in the present case. Counterclaimants have standing to assert their counterclaims. Moreover, dismissal

of Counterclaimants' breach of contract claim is premature, as the Court has yet to issue judgment on the rights of the parties. The Court, therefore, recommends the Motion to Dismiss be denied.

B. Counterclaimants' Motion for Summary Judgment (Dkt. 27) and Markel's Motion for Summary Judgment (Dkt. 34)

Counterclaimants' and Markel's Motions for Summary Judgment (Dkts. 27, 34) concern the same issues. Markel seeks to avoid coverage under the Markel Policy, arguing that two exclusions apply. *See* Dkt. 27 at 2. Under Texas law, after coverage is established under an insurance policy, the insurer bears the burden of proving an exclusion applies that permits a denial of coverage. *See Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App. 2003—Fort Worth 2003, pet. denied). Markel confirmed at the Hearing that, if an exclusion does not apply, the Markel Policy applies, and Markel has a duty to defend 2 RJP and to provide coverage in the Underlying Lawsuit. Therefore, it is Markel's burden to demonstrate that an exclusion under the Markel Policy applies.

1. Pollution Exclusion

Markel contends coverage may be denied due to the "Pollution Exclusion," defined in the Markel Policy as follows:

> **SECTION I – COVERAGES**
>
> **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> * * *
>
> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **f. Pollution**
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

* * *

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor.

Dkt. 1-1 at 119–21. In its Complaint, Markel relied upon both sections 2.f.(1)(c) and 2.f.(1)(d) (*see* Dkt. 1 at 5), but after being challenged on both provisions by Counterclaimants, Markel abandoned its reliance on 2.f.(1)(d), arguing solely that 2.f.(1)(c) applies. *See* Dkt. 33 at 23–26. Markel elected not argue the Pollution Exclusion at the Hearing, stating that it would rely on its briefing on the issue.

Markel argues the Pollution Exclusion applies because carbon monoxide, uncontested as a "pollutant," was "transported, handled, stored, treated, disposed of, or processed ***as waste***." *See* Dkt. 33 at 23–26 (emphasis added). Markel attempts to distinguish the limited case law cited by Counterclaimants on this issue but does not offer a convincing argument or alternative interpretation of the provision. *See* Dkt. 33 at 23–26. Markel presents a dictionary definition of the term "waste." *See id.* at 25. However, whether the carbon monoxide was "waste" is not the real question at issue. Under the plain and ordinary meaning of the word, the carbon monoxide produced by the generator is most certainly "waste." *See N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1161 (9th Cir. 2003) (accepting the American Heritage Dictionary's definition of "waste" as "any useless or worthless byproduct of a process or the like;

refuse or excess material"). However, Counterclaimants highlight the problem with stopping the analysis at the determination that carbon monoxide produced by a generator is waste. *See* Dkt. 39 at 9. The Pollution Exclusion requires that the carbon monoxide was "transported as waste."

Counterclaimants point to the phrase "as waste," and contend that the provision noting the condition implies that it is being transported in the form of waste for a purpose, i.e., disposal or recycling. *See id.* at 9–10. The Court agrees. The plain reading of the provision is not that the Markel Policy excludes coverage for those pollutants which could be considered "waste," an unprincipled distinction, but rather that it excludes coverage for an action which carries additional risk, namely, the non-incidental transportation of pollutants "as waste."

Counterclaimants present an additional argument that the Markel Policy's Pollution Liability Transportation Coverage endorsement negates Markel's interpretation of the Pollution Exclusion:

> Paragraphs (1)(c) and (2) do not apply to "bodily injury" and "property damage" arising out of the "sudden and accidental" discharge, dispersal, seepage, migration, release or escape of "pollutants" caused by or resulting from the "loading or unloading" or transporting of "pollutants", provided that:
>
> > 1. The release occurs either while "pollutants" are being transported or towed by, or while "loading or unloading", solely by you onto or from, an "auto" owned by you and operated and driven by you or your "employee"; and
> >
> > 2. The operations meet all standards of any statute, ordinance, regulation or license requirement of any federal, state or local government which apply to the transportation of "pollutants", including but not limited to those issued by the Federal Department of Transportation or governmental unit having jurisdiction over such activity. . . .

Dkt. 39-1 at 2. Where it is not specified that the pollutants are being transported "as waste," the endorsement negates application of 2.f.(1)(c) of the Pollution Exclusion where release of pollutants is caused by or results from transporting pollutants under particular operation conditions. Here,

there is no accusation or evidence of failure by 2 RJP to comply with any applicable statute, ordinance, regulation or license requirement as discussed in the endorsement.

Markel proposes a strained argument that the endorsement does not apply because it specifies that the release occurs while being transported "solely by you," and in this case, the transportation was not done *solely* by 2 RJP because Lyle Powell, Ross Powell's father, was a passenger. *See* Dkt. 46 at 10. Markel does not present argument explaining how such a reading is reasonable. Even if it were, there is no evidence to suggest that Lyle Powell participated in the transportation of the carbon monoxide. The endorsement clearly indicates action ("are being transported or towed by"); in this case, there is evidence that Lyle Powell was present and was a passive passenger in the 2 RJP Van.

As previously noted, it is Markel's burden as the insurer to demonstrate the application of an exclusion under the Markel Policy. Markel has not carried its burden of proving the applicability of the Pollution Exclusion.

2. Aircraft, Auto or Watercraft Exclusion

Markel contends coverage may be denied due to the "Aircraft, Auto or Watercraft Exclusion," defined in the Markel Policy as follows:

> **SECTION I – COVERAGES**
>
> **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> * * *
>
> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *

> **g. Aircraft, Auto or Watercraft**
>
> "Bodily injury" . . . Arising out of the ownership, maintenance, use or entrustment to others of any . . . "auto" . . . operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.
>
> * * *
>
> **SECTION V – DEFINITIONS**
>
> * * *
>
> 2. "Auto" means:
>
> a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
> b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

Dkt. 1-1 at 119-22, 131. Counterclaimants admitted at the Hearing that this exclusion applies, that is, under Texas law, the injury at issue could be said to "arise out of" the use of the 2 RJP Van.

"Once the insurer proves the applicability of an exclusion, the burden then shifts back to the insured to demonstrate that he or she has coverage under an exception to the exclusion." *Venture Encoding*, 107 S.W.3d at 733. Therefore, it is Counterclaimants' burden to prove that an exception to the exclusion applies. The Aircraft, Auto or Watercraft Exclusion has an exception under the Markel Policy:

> This exclusion does not apply to:
>
> * * *
>
> (5) "Bodily injury" or "property damage" arising out of:
>
> * * *

(b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment."

* * *

SECTION V – DEFINITIONS

* * *

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

* * *

f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;
(b) Road maintenance, but not construction or resurfacing; or
(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

Dkt. 1-1 at 122, 131–33. Markel and Counterclaimant argued at the Hearing that, despite briefing on other issues, the case turns on interpretation of the provision, "The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of 'mobile equipment.'"

Counterclaimants contend that "generators" are clearly listed as machinery or equipment in Paragraph f.(3). *See* Dkt. 27 at 15. Hence, Counterclaimants' argument is that the relevant provision should be read as: "This exclusion does not apply to . . . '[b]odily injury' or 'property damage' arising out of . . . [t]he operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of 'mobile equipment,'" which includes, explicitly, "generators."

Markel, on the other hand, argues that one cannot merely read the provision as written; rather, the reference to "machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of 'mobile equipment'" must be understood to mean, essentially, the machinery or equipment in Paragraph f.(2) or f.(3) *as long as they are permanently attached to a self-propelled vehicle as defined in Paragraph f*. *See* Dkt. 34 at 22.

Though the Fifth Circuit has not addressed this specific issue, several circuit courts have analyzed identical policy language or language which is practically identical. In *Rakestraw v. S. Guar. Ins. Co. of Georgia*, 262 Fed. Appx 180, 182 (11th Cir. 2008), the Eleventh Circuit considered the same auto exclusion and exception. The injury in *Rakestraw* involved an accident arising out of the use of an air compressor. *See id*. The appellant asserted the same argument articulated by Markel herein, that "equipment listed in Paragraph . . . (f).(3)" was not "[a]ir compressors" but rather was "self-propelled vehicles with . . . permanently attached [air compressors]." *See id*. The Eleventh Circuit rejected this reading of the policy stating:

> The district court correctly concluded that the exception to the auto exclusion applied to injury arising from the operation of the air compressor, and not to injury arising from the operation of "self-propelled vehicles ... with permanently attached [air compressors]." The policy is unambiguous. The exception to the auto exclusion included air compressors but not the self-propelled vehicles to which an air compressor was attached.

Id. Markel argued at the Hearing that this case and others like it concern equipment which was permanently attached. But the *Rakestraw* decision does not support such a distinction. Rather, it specifically notes that the provision points to simply the air compressor itself as the referenced equipment listed in Paragraph (f).(3). The Tenth Circuit addressed the same language and came to the same conclusion in *Fed. Ins. Co. v. Tri-State Ins. Co.*:

> [The provision] excludes any injuries that 'arise out of' equipment listed in either paragraph 6.b. or 6.c. of Section V.G. As Tri–Stateargues, **pumps are clearly listed in paragraph 6.c.**

157 F.3d 800, 803 (10th Cir. 1998) (emphasis added); *see also Employers Ins. Co. of Wausau v. Lexington Ins. Co.*, No. EDCV 10-00810 VAP (DTB x), 2014 WL 4187842, at *10 (C.D. Cal. Aug. 19, 2014) (finding that the policy at issue provided "coverage for 'Bodily injury' or 'property damage' arising out of the operation of ***any 'pumps'*** through the Operations Exception to its Auto Exclusion") (internal citations excluded) (emphasis added), *aff'd*, 671 F. App'x 552 (9th Cir. 2016).

Markel's primary reliance is on a single district court case, *Salcedo v. Evanston Ins. Co.*, 797 F.Supp.2d 769 (W.D. Tex. 2011), *aff'd*, 462 Fed. Appx. 487 (5th Cir. 2012) (unpublished). Before addressing the reasoning in the case, it is worth noting that though the decision was affirmed by the Fifth Circuit, the court determined that the opinion should not be published and is thus not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. Additionally, the relevant issue before this Court was not addressed or considered by the Fifth Circuit. This crucial detail is highlighted by the Fifth Circuit in its ruling:

> [Appellant] does not argue on appeal that any exception to the auto exclusion applies and thus any argument he made to that effect at the district court is waived.

462 Fed. Appx. at 489 n. 2. Therefore, the reasoning in *Salcedo* on this issue must stand on its own and is not indicative of the Fifth Circuit's interpretation of similar contract language.[1]

In *Salcedo*, the court considered, in part, whether a similar exception applied wherein an individual was injured when oil being pumped from an oil truck into an asphalt plant through the use of a pump mounted on the asphalt plant sprayed onto him. 797 F.Supp.2d at 763. *Salcedo* does not address the argument made by Counterclaimants, that the referenced machinery or equipment

[1] The Court notes that since the *Salcedo* opinion was issued in 2011, only a single published case has cited the *Salcedo* district court opinion, and not for any analysis of a policy exception or exclusion. In *Hartford Cas. Ins. Co. v. Ewan*, a district court in the Western District of Tennessee merely cited *Salcedo* for the proposition that when a commercial general liability policy and auto policy are purchased at the same time by the same insured from the same insurer using identical language, there is a plausible inference that the policies dovetail rather than overlap or leave gaps. 890 F.Supp.2d 886, 892 (W.D.Tenn.2012).

is precisely the items listed in Paragraphs f.(2) and f.(3). The plaintiff in *Salcedo* made the argument that the asphalt plant was an auto and therefore an injury arising from the attached pump would fall in the exception. *See id.* at 774. But the court never reached the merits of that argument, that is *if* the asphalt plant were an auto, would the exception apply to an injury resulting from the use of a pump, because the court determined that the asphalt plant was not an auto. *See id*.

The provision clearly excepts injuries from particular equipment or machinery—on this both Markel and Counterclaimants agree; the difference of interpretation is whether such equipment or machinery is required to be permanently attached to a self-propelled vehicle. The *Salcedo* decision sets forth, in great contrast, that the policy "only excepts self-propelled vehicles from the reach of the auto exclusion." *Id.* That is, *Salcedo* seems to require that the exception would apply to all self-propelled vehicles with permanently attached air compressors, pumps, generators, which would, in theory, bring into coverage nearly any work truck. This could have the effect of covering a great deal of automobile liability, the basic province of auto insurance policies, within the general commercial liability policy. The Court finds it far more reasonable to understand the provision to mean that coverage is extended to certain types of injuries resulting from actual machinery or equipment which may be located in a vehicle rather than extending coverage to a wide manner of self-propelled vehicles.

The Court, therefore, finds that the decision in *Salcedo* does not directly address the issue before the Court. Moreover, the Court is unconvinced by the *Salcedo* court's interpretation of the policy language before it on a broad level. Rather, the Court is convinced by the Circuit Court decisions which directly address the issue before the Court, and thus finds that in referring to "the machinery or equipment **listed** in Paragraph f.(2) or f.(3) of the definition of 'mobile equipment,'" the Markel Policy unambiguously points to the **listed** items, which include generators.

The Court finds Counterclaimant have met their burden to demonstrate an exception applies; hence, the Aircraft, Auto or Watercraft Exclusion does not apply.

Further, as Markel has not demonstrated entitlement to an exclusion, the Court recommends the Markel's Motion for Summary Judgment be denied, and Counterclaimants' Motion for Summary Judgment be granted.

C. AmTrust's Motion for Summary Judgment (Dkt. 69)

AmTrust asserted a Motion for Summary Judgment on nearly identical language and supported Counterclaimant's interpretation such that the AmTrust Policy and the Markel Policy, taken out for the same coverage period by 2 RJP, would form a cohesive net of liability protection. Markel suggested at the Hearing that certain liability issues are simply not contemplated at the drafting or seeking of liability insurance, which could, in turn, create small holes of no coverage for the insured. The Court need not address the substance of such an argument in this opinion as it does not go to a legal issue, but questions the integrity of such a position—that identical language in two contracts seemingly taken to provide blanket coverage of liability could be read to leave the insured with zero coverage. Though the Court notes that, as the polices at issue in the case were issued by different insurers, the possibility for a gap in coverage is greater than if issued by a single insurer, the Court's analysis should focus on "what coverage is intended to be provided by insurers and acquired and shared by premium-payers." *Mid-Century Ins. Co. of Texas, a Div. of Farmers Ins. Grp. of Cos. v. Lindsey*, 997 S.W.2d 153, 158 (Tex. 1999).

Markel did not take a position on AmTrust's Motion for Summary Judgment. Counterclaimants contend the Markel Policy and the AmTrust Policy are written in a way to provide seamless coverage to 2 RJP, and only opposed the AmTrust Motion for Summary Judgment if the Court determined that the Markel Policy did not provide coverage. *See* Dkt. 75

at 8. As the Court finds that the Markel Policy provides coverage for the injury at issue, the AmTrust's Motion for Summary Judgment is, in practice, unopposed. The Court, therefore, recommends that AmTrust's Motion for Summary Judgment be granted.

D. <u>The Motion for Default Judgment (Dkt. 42)</u>

Markel stated at the Hearing that the Motion for Default Judgment would be moot if the Court found that the Markel Policy covered the injury at issue. As the Court has made such a determination, the Court recommends that the Motion for Default Judgment be denied.

IV. CONCLUSION

As set forth herein, the Court recommends as follows:

1. Plaintiff Markel Insurance Company's Fed. R. Civ. P. 12(b)(6) Motion and Supporting Brief (Dkt. 14) be **DENIED**;
2. Defendants/Counterclaimants' Motion for Summary Judgment (Dkt. 27) be **GRANTED**;
3. Markel Insurance Company's Motion for Summary Judgment (Dkt. 34) be **DENIED**;
4. Markel Insurance Company's Motion for Default Judgment Against 2RJP Ventures, LLC (Dkt. 42) be **DENIED AS MOOT**; and
5. AmTrust Insurance Company of Kansas, Inc.'s Motion for Summary Judgment (Dkt. 69) be **GRANTED**.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C). The parties are directed to Local Rule CV-72(c) for page limitations on objections.

Failure to timely file written objections to the proposed findings and recommendations contained in this report shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

So ORDERED and SIGNED this 27th day of February, 2020.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE