

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

COVESTRO, LLC  
Plaintiff,

v.

Civil Action No.: 18-C-202  
Presiding Judge: Wilkes  
Resolution Judges: Carl and Nines

JOSEPH M. RUCK

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FILED

AXIALL CORPORATION,  
ALLTRANSTEK, LLC, and  
RESCAR COMPANIES,  
Defendants,

and

AXIALL CORPORATION,  
Third-Party Plaintiff,

v.

SUPERHEAT FGH SERVICES, INC.,  
Third-Party Defendant.

---CONSOLIDATED WITH---

AXIALL CORPORATION,  
Plaintiff,

v.

Civil Action No. 18-C-203  
Presiding Judge: Wilkes  
Resolution Judges: Carl and Nines

ALLTRANSTEK LLC, RESCAR, INC.  
t/d/b/a RESCAR COMPANIES, and  
SUPERHEAT FGH SERVICES, INC.,  
Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART AXIALL'S MOTION TO STRIKE COUNTERCLAIM AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR LEAVE TO FILE MORE DEFINITE STATEMENT INSTANTER**

This matter came before the Court this 27<sup>th</sup> day of August 2020 upon Plaintiff Axiall Corporation's Rule 12 Motion to Strike Counterclaim of Defendants AllTranstek LLC and Rescar Companies, Or In the Alternative, Rule 41 Motion for Involuntary Dismissal.

The parties have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

**FINDINGS OF FACT**

1. This civil action consists of two consolidated cases<sup>1</sup> containing causes of action surrounding a chlorine leak at the Plaintiff Axiall Corporation's (hereinafter "Plaintiff" or "Axiall") facility, which produces chlorine and other products, in Marshall County, West Virginia. *See* Def's Reply to Mot. to Refer, p. 3; *see also* Pl's Mem., p. 2. To transport chlorine from its Marshall County facility, Axiall operates a fleet of railroad tank cars. *See* Pl's Mem., p. 2.

2. There exists a related case pending in the Common Pleas Court of Allegheny County, Pennsylvania, Case No. GD-18-010944, assigned to the Honorable Christine Ward. *See* Def's Reply to Mot. to Refer, p. 4.

3. On March 28, 2019, Defendants AllTranstek and Rescar Companies (hereinafter "Defendants" or "AllTranstek and Rescar") filed their Answer and Affirmative Defenses to the Complaint filed by Axiall. *See* Pl's Mem., p. 3. Defendants also asserted a Counterclaim

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<sup>1</sup> *See* Order of Court consolidating cases entered 2/28/19.

against Axiall alleging it was negligently in failing to structurally enhance the railcar which ruptured. *Id.*

4. On April 15, 2019, Axiall filed a Motion to Dismiss the Counterclaim of Defendants AllTranstek and Rescar or, in the Alternative, for More Definite Statement, alleging Defendants failed to plead or demonstrate that Axiall owed a legal duty to Defendants, forming the elements/basis for a cognizable negligence claim. *Id.*

5. A hearing was held before the undersigned on August 30, 2019. At the hearing, counsel for Defendants averred it would amend the Counterclaim to add a more definite statement similar to what it had done or was doing in the related Pennsylvania action. In a ruling from the bench and by subsequent order entered September 4, 2019, this Court denied the motion to dismiss but granted the motion for more definite statement. Specifically, in said September 4, 2019 Order, this Court ordered Defendants to file a more definite statement of their Counterclaims within thirty days of the entry of that Order. *See Ord. of Court, 9/4/19.*

6. Defendants did not file a more definite statement within thirty days of the September 4, 2019 Order or at any time up until the filing of the instant motion in July 2020.

7. On or about July 17, 2020, Axiall filed the instant Axiall Corporation's Rule 12 Motion to Strike Counterclaim of Defendants AllTranstek LLC and Rescar Companies, Or In the Alternative, Rule 41 Motion for Involuntary Dismissal, requesting this Court enter an Order striking the Counterclaim of Defendants or, in the alternative, involuntarily dismissing Defendants' Counterclaim with prejudice for failure to comply with the Court's September 4, 2019 Order. *See Pl's Mem., p. 4.*

8. On or about July 27, 2020, Defendants filed their Response to Axiall's Motion to Strike/Dismiss Counterclaim, averring the failure to file a more definite statement within the

deadline contained in the Court's Order was an "oversight" that "fell through the cracks". *See* Defs' Resp., p. 3, 4. Further, Defendants argue there exists no prejudice because Axiall is on notice of the details in the more definite statement as discovery has been conducted in conjunction with the related Pennsylvania case, and the nature of their Counterclaim in this instant case is "almost identical" to that of the Counterclaim in the Pennsylvania case. *Id.* at 3.

9. In addition to its Response, Defendants contemporaneously filed a Motion for Leave to File Their More Definite Statement Instantly, along with its proposed More Definite Statement. The proposed More Definite Statement does not contain numbered and titled counts or causes of action, but it does describe the element of duty. Specifically, paragraph 8 states: "Because Axiall had AllTranstek and Rescar perform work on [the railroad tank car], Axiall owed a duty to AllTranstek and Rescar to provide them with tank cars to work on that were within industry standards and without latent defects that Axiall knew or should have known of." *See* Def's More Def. Statement, p. 3. Further, paragraph 10 states: "Axiall's negligence and breach of its duty to AllTranstek and Rescar has proximately caused AllTranstek and Rescar damages which include loss to their reputation and business dealings in the industry and costs associated with the various lawsuits regarding the August 27, 2016 [chlorine leak]." *Id.*

10. On August 3, 2020, Axiall filed an Omnibus Reply to both Defendants' response to the instant motion and Motion for Leave to File Their More Definite Statement Instantly, averring there exists no good cause for Defendant's oversight and Axiall will be prejudiced because the Counterclaim/More Definite Statement is not virtually identical to that of the related Pennsylvania action. *See* Pl's Reply, p. 2. Instead, Axiall contends the original Counterclaim that was virtually identical in the Pennsylvania case was dismissed on preliminary motions, and Defendants then filed a Second Amended New Matter Counterclaim on April 30, 2019, asserting

only claims for indemnity and contribution, and containing no claims for negligence or loss of reputation. *Id.* at 2-3. As a result, Axiall contends the discovery that was conducted as part of both cases jointly did not include any substantive discovery regarding the damages described in the proposed More Definite Statement regarding loss of reputation and business dealings and costs associated with various lawsuits. *Id.* a 3.

11. Specifically, Axiall contends that the only discovery that was conducted with regard to possible negligence claim by Defendants was a deposition in April 2020 of Defendants' general counsel, Daniel Madock. *Id.* at 4. Axiall proffered excerpts of Mr. Madock's deposition transcript indicating substantive allegations now sought in the proposed More Definite Statement were being abandoned. *Id.* at 4-5. For this reason, Axiall argues it would be prejudiced if Defendants were to assert these allegations at this late date. *Id.* at 5.

12. On or about August 17, 2020, Defendants filed an Omnibus Reply/Sur-Reply to Axiall's Reply<sup>2</sup>, urging the Court to grant its motion, or, in the alternative, "at least permit the Counterclaim with regard to the claims for indemnification and contribution, as those claims have been known to Axiall from very early on in the litigation...". *See* Defs' Sur-Reply, p. 2-3.

13. The Court now finds the instant Motion is ripe for adjudication.

#### CONCLUSIONS OF LAW

14. Pursuant to Rule 12(e) of the Rules of Civil Procedure, the trial court may require the plaintiff to file a more definite statement. *See Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 829 S.E.2d 45, 50 (2019). Rule 12(e) of the West Virginia Rules of Civil Procedure provides:

**(e) Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a

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<sup>2</sup> The Court notes by Order dated August 24, 2020 it granted Defendants' motion for leave to file such sur-reply.

party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

W. Va. R. Civ. P. 12.

15. Here, the Court first considers it is undisputed that Defendants did not file their More Definite Statement within the proscribed 10 days contained within 12(e) or the thirty-day deadline contained in this Court's September 4, 2019 Order.

16. However, the Court considers the parties' agreement to conduct discovery in conjunction with the related Pennsylvania action. The Court notes that it has been proffered that even Covestro, LLC, a party to the instant civil action but not the Pennsylvania action, has participated in this joint discovery process.

17. The Court considers the prejudice to Axiall. Given the fact that the parties have conducted discovery regarding, and Axiall has defended, almost identical claims for contribution and indemnity in the Pennsylvania action over the past year, the Court finds no prejudice would exist if Defendants were to be granted leave to file their More Definite Statement at this time.

18. However, when it comes to the negligence cause of action, specifically regarding claims for loss of business and industry reputation and costs associated with the various lawsuits stemming from the chlorine leak, prejudice would, in fact exist if Defendants were granted leave to amend their Counterclaim with these details at this late date.

19. In support of this conclusion, the Court considers Axiall contention that in the Pennsylvania action, the original Counterclaim that was alleged to have been virtually identical

was dismissed on preliminary motions, and Defendants then filed a Second Amended New Matter Counterclaim on April 30, 2019, asserting only claims for indemnity and contribution, and containing no claims for negligence or loss of reputation. *See* Pl's Reply, p. 2-3. As a result, Axiall contends the discovery that was conducted as part of both cases over the past several months jointly did not include any substantive discovery regarding the damages described in the proposed More Definite Statement regarding loss of reputation and business dealings and costs associated with various lawsuits. *Id.* a 3.

20. Further, Axiall proffered evidence to the Court supporting this contention. In its Reply, Axiall contended that the only discovery that was conducted with regard to possible negligence claim by Defendants was a deposition in April 2020 of Defendants' general counsel, Daniel Madock. *Id.* at 4. Axiall proffered excerpts of Mr. Madock's deposition transcript indicating substantive allegations now sought in the proposed More Definite Statement were being abandoned. *Id.* at 4-5. For this reason, Axiall argues it would be prejudiced if Defendants were to assert these allegations at this late date. *Id.* at 5. The Court agrees with this argument under the circumstances with regard to the negligence/loss of business reputation cause of action.

21. The Court, therefore, will grant Defendants' alternative relief, in which it seeks that the Court "at least permit the Counterclaim with regard to the claims for indemnification and contribution, as those claims have been known to Axiall from very early on in the litigation...". *See* Defs' Sur-Reply, p. 2-3.

22. AllTranstek and Rescar's request for leave to file a more definite statement of their Counterclaims with regard to the contribution and indemnity causes of action only is **GRANTED**. Such more definite statement should contain no causes of action for negligence, specifically regarding claims of loss of business reputation and damages including costs

associated with the various lawsuits. For this reason, the Court cannot accept the proposed More Definite Statement, and AllTranstek and Rescar are **ORDERED** to file a more definite statement of their Counterclaims complying with this Order within ten (10) days of the entry of this Order.

**CONCLUSION**

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff Axiall Corporation's Rule 12 Motion to Strike Counterclaim of Defendants AllTranstek LLC and Rescar Companies, Or In the Alternative, Rule 41 Motion for Involuntary Dismissal is hereby **DENIED IN PART AND GRANTED IN PART**.

WHEREFORE, it is further hereby **ORDERED** and **ADJUDGED** that Motion for Leave to File Their More Definite Statement Instantly is hereby **GRANTED IN PART** and **DENIED IN PART**. It is **ORDERED** that AllTranstek and Rescar's request for leave to file a more definite statement of their Counterclaims with regard to the contribution and indemnity causes of action only is **GRANTED**. It is further hereby **ORDERED** and **ADJUDGED** that AllTranstek and Rescar are **ORDERED** to file a more definite statement of their Counterclaims complying with this Order within ten (10) days of the entry of this Order.

The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

August 27, 2020  
date of entry

  
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JUDGE CHRISTOPHER C. WILKES  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION