

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

IPI, INC. and MATTHEW  
JOSEPH TAYLOR,

Plaintiffs/Counter-Defendants,

v.

Civil Action No. 18-C-14  
Judge Jeffrey D. Cramer

AXIALL CORPORATION and  
EAGLE NATRIUM, LLC,  
WESTLAKE CHEMICAL CORPORATION, and  
CHARLES ZEIGLER,

Defendants/Counter-Plaintiffs.

**ORDER GRANTING COUNTER-PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT REGARDING  
INDEMNIFICATION RELATED TO THE RAILCAR RELEASE**

Axiall Corporation and Eagle Natrium, LLC ("Counter-Plaintiffs"), brought on for hearing on July 18, 2022 their "Motion for Partial Summary Judgment Regarding Counter-Plaintiffs' Indemnification Claim Related to the Railcar Release" pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. Counter-Plaintiffs were represented by William Wilmoth, John Callcott, and Katherine Herrmann of Steptoe & Johnson PLLC and Counter-Defendants IPI, Inc. and Matthew Joseph Taylor ("Counter-Defendants") by Patrick Timony and Zachary Rosencrance of Bowles Rice LLP.

WHEREUPON, the Court considered the motion and subsequent briefing and following the arguments of the parties took the matter under advisement. Upon due and mature consideration, and for the reasons discussed more fully herein, the Court **FINDS** that there is no disputed material fact that IPI has breached the valid and enforceable indemnity provisions applicable to the Railcar Release and thus **GRANTS** the motion as set forth herein.

## A. FINDINGS OF FACT

1. IPI, Inc. ("IPI") was a vendor that provided maintenance services at the Natrium Plant on a project-by-project basis, including painting the exteriors of tanks and applying special coatings on their interiors.

2. Mathew Joseph Taylor ("Mr. Taylor") is IPI's President.

3. Eagle Natrium, LLC ("Eagle Natrium") owns the Natrium Plant and employed its personnel during the events relevant to this matter.

4. Axiall Corporation ("Axiall"), through a series of intermediaries, is the parent company of Eagle Natrium.

5. At all times pertinent to this lawsuit, IPI completed projects at the Natrium Plant pursuant to three governing documents: (1) an Agreement for On-Site Services ("AOS"), (2) Purchase Orders (a "PO") issued on a project by project basis and (3) General Terms and Conditions ("Terms and Conditions"), incorporated into each PO. The AOS was originally executed in 2007. IPI consented to its subsequent transfer.

6. The AOS created certain obligations regarding IPI's work at the Natrium Plant, including:

- a. No work could be performed at the Natrium Plant, except through the PO process, referred to in the AOS and as an "Accepted Order."
- b. IPI could legally bind itself to the obligations set forth in each PO in several different ways, including "by Contractor undertaking to provide the Services...."
- c. IPI agreed to indemnify the "Buyer," including the operating entity for the Natrium Plant and affiliated entities, for all claims of damages brought by it, or

personal injuries or damages sought by IPI's employees, except to the extent arising out of sole negligence or willful misconduct.

7. The AOS includes the following indemnification language:

Contractor assumes the risk of all damages, losses, costs and expenses, and agrees to indemnify, defend and hold harmless Buyer, their directors, officers, agents, and employees from and against any and all claims, liability, damage, loss, penalties, fines, cost and expense of any kind whatsoever which may accrue to or be sustained by any Buyer, their directors, officers, agents or employees, arising out of this Agreement and/or the Services, including, without limitation, for the death of or injury to persons or destruction of property involving Contractor, its employees, agents and representatives, sustained in connection with performance of the Services, arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device supplied by Buyer or their employees to Contractor, its employees, agents or representatives at the request of Contractor, its employees, agents or representatives), except the extent arising out of the sole negligence or willful misconduct of the Buyer or its employees acting within the scope of their employment. The indemnification obligation of this Section 4 shall be deemed modified as required to exclude that degree of indemnification required aforesaid which is expressly prohibited by applicable law, statute, or regulation, if any; but to the extent the aforesaid indemnification obligation is valid and enforceable, it shall remain in effect though modified. The indemnity obligations of contractor hereunder shall survive the termination or expiration of this agreement and of any applicable accepted order.

8. The Terms and Conditions, which were incorporated into each PO during times relevant to the Counter-Claims, contained additional IPI obligations, including the following:

- a. The Terms and Conditions were accepted by IPI if it undertook to provide the "materials, services or work" referenced in a PO.
- b. IPI agreed to indemnify the "Buyer," including the operating entity and all affiliated entities, for all claims of damage, including personal injury and damages sought by IPI's employees, except to the extent arising out of sole negligence of Buyer.

9. The Terms and Conditions include the following indemnification language:

Seller assumes the risk of all damage, loss, costs and expenses, and agrees to indemnify, defend and hold harmless Buyer, its officers, employees and representatives, from and against any and all damages, claims, demands, expenses (including reasonable attorneys' fees), losses or liabilities of any nature whatsoever, and whether involving injury or damage to any person (including employees of Seller and Buyer) or property, and any and all suits, causes of action and proceedings thereon arising or allegedly arising from or related to the subject matter of this Purchase Order, except where such injury or damage was caused by the sole negligence of Buyer. This indemnity shall survive the termination or cancellation of this Purchase Order, or any part hereof.

10. On Saturday, August 27, 2016, railcar AXL 1702 ("1702") experienced a crack, releasing approximately 178,400 pounds of chlorine (the "Railcar Release"). The Railcar Release occurred shortly after 1702 had been loaded with liquid chlorine for the first time after being returned to service at the Natrium Plant. 1702 had been inspected by AllTranstek, LLC ("AllTranstek"), a third party that provided railcar maintenance services. The Railcar Release occurred after 1702 was put back in service for the first time since returning from the care of AllTranstek and Rescar, third-party maintenance vendors who had charge of 1702 in order to repair and inspect it. In addition, during the shopping and repair process, Superheat GFH Services, Inc. ("Superheat"), performed specialized post weld heat treatments at areas adjacent to or in proximity to the crack.

11. Mr. Taylor does not know who is responsible for the Railcar Release. Counter-Defendants did not put forth any proposed expert testimony regarding who was responsible for the

Railcar Release. No competent evidence<sup>1</sup> has been presented to indicate that Counter-Plaintiffs were solely negligent<sup>2</sup> or engaged in any willful misconduct in relation to the Railcar Release.

12. At the time of the Railcar Release, Mr. Taylor and an IPI work crew were performing work at the Natrium Plant on Tank 24 pursuant to PO 4510044817, which referenced the AOS and incorporated the Terms and Conditions.

13. Upon learning of the Railcar Release, Mr. Taylor and the IPI work crew left the work area promptly. Believing he was exposed to chlorine, Mr. Taylor sought medical care. After being evaluated at Ruby Memorial Hospital in Morgantown, West Virginia, Mr. Taylor was released the same day. Mr. Taylor returned to work at the Natrium Plant the following Monday, the Railcar Release having occurred on a Saturday.

14. Counter-Defendants thereafter sued Counter-Plaintiffs and other affiliated parties seeking damages associated with the Railcar Release, among other causes of action.

15. Counter-Plaintiffs have incurred significant legal fees and costs, as well as expert fees and costs, associated with defending the claims brought by Counter-Defendants in relation to the Railcar Release.

16. IPI has refused to indemnify, defend, or hold harmless Counter-Plaintiffs from Counter-Defendants' claims brought against them regarding the Railcar Release.

17. The Court has yet to rule regarding the applicability of the indemnification provisions in the AOS and Terms and Conditions related to claims asserted by IPI and Mr. Taylor, other than the Railcar Release.

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<sup>1</sup> Counter-Defendants submitted numerous exhibits with their briefing that did not meet the threshold requirements for consideration as set forth in Rule 56 of the West Virginia Rules of Civil Procedure and as further discussed by the West Virginia Supreme Court of Appeals at Fn. 15 in *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 693 S.E.2d 789 (2010).

<sup>2</sup> The Court has analyzed this issue in the context of the contractual obligations presented by Counter-Plaintiffs' motion. This finding shall not be construed to infer that Counter-Plaintiffs were negligent to any degree in relation to the Railcar Release.

## CONCLUSIONS OF LAW

1. Summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

2. The Court’s role “is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Williams*, 194 W. Va. at 59, 459 S.E.2d at 336 (internal quotation marks omitted). “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Id.* at 60, 459 S.E.2d at 337 (internal quotation marks omitted). “Unsupported speculation is not sufficient to defeat a summary judgment motion.” *Id.* at 61, 459 S.E.2d at 338 (alternation omitted).

3. The AOS and Terms and Conditions contain valid choice of law provisions. Thus, this Court interprets the validity of the indemnification clauses as it relates to the Railcar Release under Pennsylvania law. Under West Virginia law, a choice of law provision is presumptively valid unless (1) “the provision bears no substantial relationship to the chosen jurisdiction” or (2) “the application of the laws of the chosen jurisdiction would offend the public policy of this State.” *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 471, 796 S.E.2d 574, 580 (2017); see Syl. Pt. 1, *Gen. Elec. Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981)).



4. Under Pennsylvania law, to establish a breach of contract claim, a plaintiff must demonstrate “(1) ‘the existence of a contract between the plaintiff and defendant, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) damages resulting from a breach of that duty.’” *Reeves v. Middletown Athletic Ass’n*, 2004 PA Super 475, ¶ 27, 866 A.2d 1115, 1125 (2004).

5. “Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims.” *Lehman v. Smith*, 270 A.3d 1128 (Pa. Super. Ct. 2021), *reargument denied* (Feb. 15, 2022).

6. Under Pennsylvania law, provisions requiring indemnification of another party’s negligence require “a clear and unequivocal agreement before a party may transfer its liability to another party.” *Bernotas v. Super Fresh Food Markets, Inc.*, 581 Pa. 12, 20, 863 A.2d 478, 482–83 (2004) (citing *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 588 A.2d 1, 7 (1991)).

7. Where an indemnification clause “precludes indemnification for injuries caused by [the indemnitees’] sole negligence . . . the negative inference to be drawn is that any injuries occurring by less than the sole fault of [the indemnitee] fall within the scope of the indemnification clause.” *Id.* at 1275. *See also Hershey Foods Corp. v. Gen. Elec. Serv. Co.*, 422 Pa. Super. 143, 149, 619 A.2d 285, 288–89 (1992); *DiPietro v. City of Philadelphia*, 344 Pa. Super. 191, 496 A.2d 407 (1985) (it is not contrary to public policy for a party to contract for indemnification of its own torts, but contract language must be clear and unequivocal).

8. IPI entered into binding and enforceable contracts, including independent indemnification obligations, as reflected in the AOS and the Terms and Conditions as incorporated in PO 4510044817. The indemnification provisions in the AOS and Terms and Conditions

explicitly provide the scope of the duty to indemnify—any and all claims, liability, damage, loss, penalties, fines, cost, and expense of any kind whatsoever, sustained in connection with performance of the Services arising from any cause whatsoever, except in circumstances of sole negligence or willful misconduct (under the AOS), or sole negligence (under the Terms and Conditions). The language of the indemnity provisions in the AOS and Terms and Conditions are clear and unequivocal.

9. Counter-Plaintiffs were not solely negligent and did not engage in willful misconduct in relation to the Railcar Release to warrant exception to the valid and independent indemnity provisions in the AOS and Terms and Conditions.

10. Pursuant to the AOS and the Terms and Conditions, IPI had, and continues to have, a duty to indemnify, defend and hold harmless Counter-Plaintiffs from Counter-Defendants' claims related to the Railcar Release.

11. To the extent Counter-Defendants incurred any type of damages related to the Railcar Release, all such damages arose out of the services being performed or otherwise being provided by IPI and Mr. Taylor pursuant to PO 4510044817, the incorporated Terms and Conditions and the AOS.

12. Counter-Defendants' claims associated with the Railcar Release and prosecuted in this cause of action are within the scope of the indemnity language within the AOS and Terms and Conditions.

13. The crack in 1702 leading to the Railcar Release, constitutes a "failure of or defect in any equipment, instrument, or device..." under the AOS.

14. Pursuant to the terms of the independently enforceable indemnification provisions in the AOS and the Terms and Conditions, IPI must indemnify, defend, and hold harmless Counter-



Plaintiffs from all claims by Counter-Defendants related to the Railcar Release. In addition, IPI must indemnify and otherwise make whole Counter-Plaintiffs for all legal fees and costs, including expert fees and costs, and further “any and all . . . cost and expense of any kind whatsoever, . . .” associated with the defense of Counter-Defendants’ claims related to the Railcar Release.

15. IPI breached the AOS, PO 4510044817, and the Terms and Conditions, including the indemnity obligations contained therein, by filing and prosecuting its causes of action against Counter-Plaintiffs related to the Railcar Release and by failing and refusing to indemnify, defend, and hold harmless Counter-Plaintiffs from the claims brought by Counter-Defendants related to the Railcar Release.

16. Because of IPI’s acts and omissions, Counter-Plaintiffs have suffered, and continue to suffer, substantial damages by having to defend Counter-Defendants’ claims related to the Railcar Release. These damages will be quantified by the Court at the appropriate time via an evidentiary hearing.<sup>3</sup>

17. Should either Counter-Plaintiff be found liable in whole or in part to Counter-Defendants for damages of any type arising out of the Railcar Release, IPI is required to indemnify, defend, and hold harmless Counter-Plaintiffs from the same.

18. Based upon the forgoing, the Court thus **GRANTS** summary judgment in favor of Counter-Plaintiffs and against IPI as to their breach of contract and express indemnity counter-claims as it pertains to the Railcar Release.

WHEREFORE, this Court **GRANTS** Counter-Plaintiffs’ “Motion for Partial Summary Judgment Regarding Counter-Plaintiffs’ Indemnification Claim Related to the Railcar Release” as

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<sup>3</sup> Nothing in this Order shall be interpreted to preclude a subsequent hearing regarding damages associated with the breaches of contract and the indemnification obligations as set forth in this Order.

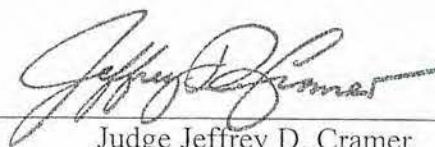
set forth herein and **ENTERS** judgment in favor of the Counter-Plaintiffs and against IPI in relation to their claims related to the Railcar Release.

This Court further **FINDS** no just reason for delay and finds that this entry constitutes a **FINAL JUDGMENT** as to the validity, applicability, and breach of IPI's contract and indemnity obligations in the AOS, PO 4510044817, and the Terms and Conditions as they relate to the Railcar Release, and that this Order is immediately appealable.

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to all parties and counsel of record.

DATED this 12<sup>th</sup> day of September, 2022

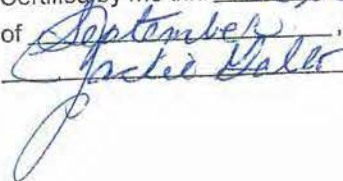


Judge Jeffrey D. Cramer

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Certified by me this 12<sup>th</sup> day  
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 Deputy

## Certificate of Service

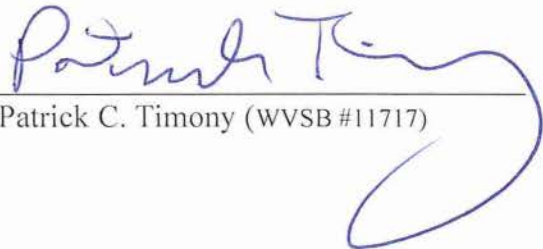
I, Patrick C. Timony, counsel for Plaintiffs, do hereby certify that on this **7th day of October 2022**, I served the attached *Notice of Appeal* upon the following by U.S. mail and email as follows:

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