

the cross-claims.¹ Defendants are swimming upstream in their efforts to join new parties and claims to this litigation; thus, for the reasons that follow, the Court will grant the instant motions, sever the Third-party Complaint, and strike Defendants' cross-claims.

I. FACTUAL AND PROCEDURAL HISTORY

Given the extensive history of this case, the Court incorporates its previous opinions and the factual and procedural background therein and sets forth the following recitation for purposes of resolving the instant motions only.² Plaintiffs commenced suit by filing their Complaint against Defendants Rick's Mushroom Service, Inc. ("Rick's"), M.A.Y. Farms, Inc. ("MAY"), and Richard Masha ("Masha") (collectively, "Defendants") on July 26, 2001. Plaintiffs' Complaint alleged that Defendants were improperly storing, processing, and disposing of agricultural waste generated by the mushroom farming industry, called "spent mushroom substrate ("SMS"), in violation of the Clean Water Act ("CWA"),³ the Pennsylvania Clean Streams Law ("CSL"),⁴ and Pennsylvania common law. Plaintiffs specifically alleged that Defendants caused SMS-polluted wastewater to

¹ On April 14, 2006, Plaintiffs filed the Motion to Strike or Sever presently under consideration, and numerous Third-Party Defendants have either joined Plaintiffs' motion or filed their own motions. The motions filed by third-party defendants seek, in the alternative, to dismiss Cutone's claims or to require a more definite statement as to those claims.

² This case was not originally assigned to this Court. On July 10, 2002, as discovery moved forward, it was reassigned to this Court through the "random reassignment" process. Since inheriting the case, the Court has heard significant evidence and issued various written opinions. First, on February 24, 2003, the Court issued an opinion granting partial summary judgment for Plaintiffs and against Defendants. Reynolds v. Rick's Mushroom Serv., Inc., 246 F. Supp. 2d 449 (E.D. Pa. 2003) [hereinafter Reynolds I]. Second, on November 17, 2003, the Court issued an opinion striking Defendants' Third-party Complaint. Reynolds v. Rick's Mushroom Serv., Inc., No.01-3773, 2003 WL 22741335 (E.D. Pa. Nov. 17, 2003) [hereinafter Reynolds II]. Third, on March 29, 2004, after evidentiary hearings spanning six days, the Court issued an opinion granting a preliminary injunction against Defendants. Reynolds v. Rick's Mushroom Serv., Inc., No. 01-3773, 2004 WL 620164 (E.D. Pa. Mar. 29, 2004) [hereinafter Reynolds III].

³ 33 U.S.C. §§ 1251-1387 (2000).

⁴ 35 Pa. Stat. Ann. §§ 691.1-691.1001 (2006).

flow from its property into Trout Run, and eventually into a pond on Plaintiffs' property. On September 27, 2001, Defendants filed their Answer to the Complaint.

After the close of discovery, Plaintiffs moved for summary judgment. On February 24, 2003, the Court granted partial summary judgment on Plaintiffs' claims under section 301 of the CWA and section 401 of the CSL.⁵ The Court concluded, among other things, that Defendants discharged wastewater into Trout Run from a point source for purposes of those two statutes.⁶ The Court denied summary judgment on Plaintiffs' common law claims of public nuisance, private nuisance, and trespass, finding that Plaintiffs had not established that no genuine dispute of material fact existed as to whether Defendants' interference with Plaintiffs' property was unreasonable.⁷

Thereafter, Plaintiffs hired new counsel and filed an Amended Complaint on April 10, 2003. Defendants filed an Answer to the Amended Complaint on April 23, 2003, and an Amended Answer on May 5, 2003. They filed on May 7, 2003, without leave of court, a Third-party Complaint against nineteen third-party defendants seeking contribution and indemnity on the theory that those third-party defendants may also be responsible for polluting Plaintiffs' pond.

Plaintiffs moved to strike the Third-party Complaint as untimely. On November 17, 2003, the Court granted Plaintiffs' motion to strike, holding that Defendants had failed to file their Third-party Complaint within ten days of their "original answer," which was the Answer they filed on September 27, 2001 in response to the initial Complaint.⁸ The Court declined to permit the

⁵ Reynolds I, 246 F. Supp. 2d 449.

⁶ Id. at 456-58.

⁷ Id. at 460.

⁸ Reynolds II, 2003 WL 22741335.

untimely Third-party Complaint, reasoning:

First, adding nineteen new parties to this action would significantly prejudice Plaintiffs by increasing the inconvenience and costs of litigation. . . . Second, the addition of nineteen additional parties would certainly complicate the issues at trial. The Third Party Complaint would inject into this case complex factual and legal questions concerning who or what (besides Defendants) may have contributed to pollution in the stream of Plaintiffs' pond. . . . Third, trial of this matter would be substantially delayed by permitting joinder.⁹

On June 28, 2004, Plaintiffs filed a motion for leave to join Cutone as a defendant in this action. Cutone operates forty mushroom growing houses, eight of which are located on MAY's property.¹⁰ He directs and is responsible for the daily operations of MAY, and also is involved in the daily operations of Rick's.¹¹ Plaintiffs renewed their motion to join Cutone on November 4, 2004. The Court deferred action on Plaintiffs' original and renewed motions to join Cutone while the parties' engaged in substantial settlement efforts. When it became clear in late 2005 that settlement efforts would not prove fruitful and that Cutone's addition to the lawsuit would substantially aid settlement or resolution of this matter, Plaintiffs again renewed their request to join Cutone and sought other relief designed to ready this case for trial. On January 31, 2006, the Court, among other things, granted Plaintiffs' leave to join Cutone as a defendant. The Court also specially listed this case for trial beginning on August 14, 2006.

On February 21, 2006, Plaintiffs filed a second Amended Complaint joining Cutone and asserting common law claims of trespass and nuisance against him, which Cutone answered on

⁹ Id. at *5.

¹⁰ Reynolds III, 2004 WL 620164, at *2 ¶ 7.

¹¹ Id. at ¶ 7.

March 17, 2006. On March 28, 2006, Cutone filed a Third-party Complaint against thirty-four third-party defendants seeking contribution and indemnity for any amounts for which he may be liable to Plaintiffs on their trespass and nuisance claims. Shortly thereafter, on April 6, 2006, Defendants filed cross-claims against the thirty-four third-party defendants impleaded by Cutone also seeking contribution and indemnity. Cutone and Defendants allege that “[e]ach of the Third-Party Defendants has over the span of 45-50 years owned, leased or utilized property upstream from the Reynolds Pond, and has engaged in activities which have or may have contributed to polluted conditions in Trout Run affecting the water quality in the Reynolds Pond.”¹²

II. DISCUSSION

Defendants, on the strength of Cutone’s Answer, seek to achieve now what they could not before: the joinder of third parties as a source for contribution and indemnity on any liability Defendants may incur for polluting Plaintiffs’ pond. The only relevant change between then and now is the addition of Cutone as a Defendant, which the Court permitted because it found that Cutone’s involvement was necessary to aid settlement or judicial resolution of this matter due to his supervisory role vis-a-vis the Defendants. Notwithstanding Cutone’s involvement, the outcome now is the same as before: this Court will not allow a third-party complaint adding thirty-four new parties to prejudice, delay, and complicate these proceedings any further.

A. Cutone’s Third-Party Complaint

Plaintiffs argue that the Court should strike or sever Cutone’s Third-party Complaint for two reasons: (1) Cutone failed to file his Third-party Complaint within ten days of the “original answer” and therefore needed to seek leave of court; (2) Cutone’s Third-party Complaint will unduly

¹² Def. Michael Cutone’s Third-party Compl. ¶ 38; Defs.’ Cross-Claims ¶ 5.

delay and complicate the upcoming trial and prejudice Plaintiffs.

Plaintiffs' first argument is without merit. Pursuant to Federal Rule of Civil Procedure Rule 14(a), a defendant seeking to file a third-party complaint need not obtain leave of court if he files the third-party complaint "not later than 10 days after serving the original answer."¹³ In the Court's previous opinion on this issue, the Court adopted a functional approach to determining whether an answer is the "original answer" for purposes of Rule 14.¹⁴ Under that approach, "'the original answer' can be an answer to an amended complaint, so long as the basis for impleader is that which is new, i.e. 'original,' in the answer to the amended complaint."¹⁵ Thus, this Court held that "[w]hat is significant is whether the Amended Complaint created 'new theories of liability.'"¹⁶

Here, Cutone timely filed his Third-party Complaint within ten days of the original answer for purposes of Rule 14(a). Despite Plaintiffs' creative—but wholly unsupported—argument that Cutone is in privity with the original Defendants to this action, it cannot seriously be doubted that the second Amended Complaint joining Cutone as a defendant represented the *first* instance of liability asserted against him, and by logical extension created "new theories of liability" against him in this matter. Thus, Cutone's answer filed on March 17, 2006 was his "original answer." Cutone filed his Third-party Complaint within ten days of that answer. Therefore, Cutone was not required to seek leave of Court to serve his third-party complaint.

Nonetheless, as Plaintiffs' second argument suggests, and contrary to Defendants'

¹³ Fed. R. Civ. P. 14(a).

¹⁴ Reynolds II, 2003 WL 22741335, at *3.

¹⁵ Fed. Trade Comm'n v. Capital City Mortgage Co., 186 F.R.D. 245, 247 (D.D.C. 1999).

¹⁶ Reynolds II, 2003 WL 22741335, at *4 (quoting Oberholtzer v. Scranton, 59 F.R.D. 572, 575 (E.D. Pa. 1973)).

assertion, there is no absolute right to join third parties in an action. Rule 14(a) provides that “[a]ny party may move to strike the third-party claim, or for its severance or separate trial.”¹⁷ The 1963 Advisory Committee note to Rule 14 clarifies that a party’s ability to move to strike or sever a third-party claim exists regardless of whether it was timely or untimely filed:

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff’s claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized by the next-to-last sentence of the subdivision, added by amendment.¹⁸

Thus, as a leading civil procedure treatise explains, “there really is no doubt” that a district court may exercise its discretion to strike or sever a third-party complaint whether defendants made a timely or untimely filing.¹⁹

Courts in this District have uniformly recognized the discretion to strike or sever under Rule 14.²⁰ Scott v. Walter Kidde Portable Equipment set forth the following factors to guide

¹⁷ Fed. R. Civ. P. 14(a).

¹⁸ Fed. R. Civ. P. 14 advisory committee’s note (1963).

¹⁹ See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1443 (2d ed. 1990).

²⁰ Scott v. Walter Kidde Portable Equip., Inc., No. 02-1460, 2002 WL 1880521, at *1 (E.D. Pa. Aug. 12, 2002) (“Leave to file a third-party complaint is within the sound discretion of the trial court.”); Shuba v. Consol. Rail Corp., No. 91-7735, 1992 WL 164751, at *1 (E.D. Pa. June 26, 1992) (same); Fuel Transport. Co. v. Fireman’s Fund Ins. Co. of Newark, N.J., 108 F.R.D. 156, 158 (E.D. Pa. 1985) (“The decision whether to permit joinder in a particular case, however, is committed to the discretion of the district court.”); see also Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 439 (3d Cir. 1971) (holding that a trial court’s decision to permit or deny joinder is reviewed for abuse of discretion). Accord Feinaugle v. Pittsburgh and Lake Fire R.R. Co., 595 F. Supp. 316, 317 (W.D. Pa. 1983) (“[J]oinder of third-party defendants under Rule 14 is not automatic; rather, the decision to permit joinder rests with the sound discretion of the trial court.”).

The cases cited by Defendants, Delco Wire & Cable Co. v. Keystone Roofing Co., 80 F.R.D. 428, 430 (E.D. Pa. 1978) and Cierra Rutile Ltd. v. Katz, No. 90 Civ. 4913, 1994 WL 533625 (S.D.N.Y. Sept. 30, 1994), do

a court's exercise of that discretion:

(1) the timeliness of the Rule 14 motion; (2) whether the filing of the third-party suit would complicate the case at trial; (3) the likelihood and extent of delay in the trial; (4) whether the third-party complaint would avoid multiple litigation and settle related matters in one suit; (5) the merit of the third-party complaint, and finally; (6) the possible prejudice to the plaintiff.²¹

Based on those factors, Scott denied joinder of a timely-filed third-party complaint because the presence of the third-party defendants would complicate and delay the trial, increase the risk of juror confusion, and not settle the case in one proceeding.²²

Applying those factors here, the Court will exercise its discretion to strike or sever Cutone's Third-party Complaint. With the exception of the first factor—the timeliness of the filing of the Third-party Complaint—the same reasons the Court gave in its 2003 opinion on this issue apply with even greater force now. First, Cutone's third-party claims would undoubtedly complicate the case at trial because the presence of defendants seeking to avoid and/or shift liability would create a “battle of the experts” likely to confuse the fact finder.²³ Adding to this case thirty-four new parties, each potentially with their own expert witness, on the theory that each may have played some role, no matter how insubstantial, in polluting the Trout Run watershed would render trial unmanageable.

Second, Cutone's third-party claims will certainly delay the August 14, 2006 trial date

not hold otherwise. They merely reaffirm that Rule 14(a) permits the filing of a third-party complaint without leave of court, i.e. “as of right,” within ten days of the original answer's filing. They do not, however, contradict a court's discretion to strike or sever a third-party complaint once it is filed, whether filed “as of right” or by leave of court.

²¹ Scott, 2002 WL 1880521, at *1.

²² Id. at *4.

²³ Reynolds II, 2003 WL 22741335, at *5.

because discovery would need to reopen to ascertain what, if any, role each of the third-party defendants may have played in polluting Plaintiffs' pond. The length of such delay is likely to be significant, since that discovery would involve thirty-four new parties—each with its own deposition, document production, and interrogatory needs—and would probe the events of the last forty-five to fifty years, the time period alleged in Cutone's third-party claims. Given that this case has already taken more than five years to proceed to trial, the likelihood and extent of further delay weighs strongly in favor of striking or severing Cutone's Third-Party Complaint.

Third, although the Third-party Complaint here purports in theory to settle all matters arising from this dispute between Plaintiffs and Defendants, the practical result of adding so many parties and claims at this juncture is quite the opposite: the additional discovery and enlarged scope of trial would delay resolution of this matter for many more years.

Finally, even assuming Cutone's third-party claims are meritorious, those claims “would significantly prejudice Plaintiffs by increasing the inconvenience and costs of litigation” for all the reasons provided above.²⁴

Based on the foregoing, the Court will strike or sever Cutone's Third-party Complaint. Having decided to deny joinder, the Court must consider which procedural method is more appropriate: striking or severing Cutone's third-party claims. According to the 1963 Advisory Committee Note to Rule 14, a court may strike a third-party claim only if it is “obviously unmeritorious,” which is not the case here. Thus, the Court believes severance of Cutone's Third-Party Complaint is more appropriate, leaving Cutone to pursue his third-party claims in a separate

²⁴ Id. (citing Indus. Valley Bank & Trust Co. v. First Commercial Corp., No. 86-1265, 1986 U.S. Dist. LEXIS 22526, at *17 (E.D. Pa. July 22, 1986)).

action.²⁵

B. Defendants' Cross-Claims

Plaintiffs also request that the Court strike or sever the “cross-claims” of the original Defendants against the third-party defendants joined by Cutone. Plaintiffs argue that the claims between Defendants and the third-party defendants are not “cross-claims” under Federal Rule of Civil Procedure 13, but rather third-party claims under Rule 14. Since this Court already rejected Defendants’ efforts to bring third-party claims in 2003, Plaintiffs assert that Defendants should not be allowed to circumvent that ruling by merely repackaging their claims under a different Federal Rule.

The Court agrees with Plaintiffs. Rule 13(g) permits cross-claims between co-parties, not adverse parties.²⁶ The Federal Rules do not define who is a “co-party” for purposes of Rule 13(g), and the courts in this Circuit have not settled the issue of whether an original defendant and a third-party defendant are co-parties such they may assert cross-claims against one another.²⁷ Some courts have permitted cross-claims between original defendants and third-party defendants.²⁸ In those cases, the original defendant and third-party defendant “were considered ‘co-parties’ since they

²⁵ See, e.g., Official Comm. of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 354-55 (E.D. Pa. 2000) (explaining that the effect of severing claims for misjoinder is to create a separate action).

²⁶ Rule 13(g) provides: “A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.” Fed. R. Civ. P. 13(g). See also Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir.1970).

²⁷ See Keystone Coke Co. v. Pasquale, No. 97-6074, 1999 WL 130626, at *1 (E.D. Pa. Mar. 9, 1999).

²⁸ Id.; Prudential-LMI Commercial Ins. Co. v. Windmere Corp., No. 94-197, 1995 WL 472103, at *2 (E.D. Pa. Aug. 9, 1995); Jorgenson Co. v. T.I. United States, Ltd., 133 F.R.D. 472, 475 (E.D. Pa. 1991); Capital Care Corp. v. Lifetime Corp., No. 88-2682, 1990 WL 2165, at *1 (E.D. Pa. Jan. 11, 1990).

were not opposing parties and were clearly non-adverse before the filing of the cross-claim.”²⁹

Without deciding the issue any more broadly than is necessary, the Court holds that in this particular case the original Defendants and third-party defendants are not “co-parties” because their interests were adverse before the filing of the cross-claims. Defendants’ actions prove as much, as Defendants originally attempted to file the same exact claims under Rule 14 as third-party claims against some of the same parties now impleaded by Cutone.³⁰ The addition of Cutone and Cutone’s Third-party Complaint to this lawsuit do not alter the adversarial nature of the relationship between the original Defendants and the third-party defendants. Therefore, the Defendants’ claims against the third-party defendants are not “cross-claims” under Rule 13, but rather third-party claims that must comply with the requirements of Rule 14. The Court has already rejected Defendants’ attempt to file these claims under Rule 14, and thus the Court *strikes* the “cross-claims” of Rick’s, MAY, and Masha for the same reasons they were stricken in the court’s 2003 opinion.³¹

III. CONCLUSION

For the forgoing reasons, the Court grants Plaintiffs’ Motion to Strike or Sever the Cutone’s Third-Party Complaint. The Court severs Cutone’s claims against all third-party defendants, dismisses those third-party defendants from this action, and grants Cutone leave to re-file those claims in a separate action within fourteen days of the date of this Order. The Court strikes Defendants’ cross-claims and dismisses them with prejudice. An appropriate Order follows.

²⁹ Keystone Coke, 1999 WL 130626, at *1.

³⁰ See Schwab v. Erie Lackawanna R.R. Co., 438 F.2d 62, 65 (3d Cir. 1971) (noting that “third-party litigants” are necessarily adverse to each other and cannot be treated as “co-parties”).

³¹ Striking the claims amounts to a dismissal of those claims. See Pitcavage v. Mastercraft Boat Co., 632 F. Supp. 842, 849 n.3 (M.D. Pa. 1985).

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**WARREN REYNOLDS, JOHN REYNOLDS,
through his guardians, Jacklen E. Powell and
Wilmington Trust Co., and WILMINGTON
TRUST CO., as Trustee,
Plaintiffs**

v.

**RICK’S MUSHROOM SERVICE, INC.,
M.A.Y. FARMS, INC. RICHARD
MASHA, and MICHAEL CUTONE
Defendants**

**CIVIL ACTION
NO. 01-3773**

ORDER

AND NOW, this 26th day of May 2006, upon consideration of Plaintiffs’ Motion to Strike or to Sever Defendant Michael Cutone’s Third-Party Complaint and Cross Claims of Defendants Rick’s Mushroom Service, Inc., M.A.Y. Farms, Inc., and Richard Masha as to Third-Party Defendants [Doc. #208], Defendants’ Response thereto [Doc. #220], and Plaintiffs’ Reply [Doc. #233], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Plaintiffs’ Motion is **GRANTED** as follows:

1. Defendant Michael Cutone’s Third-Party Complaint [Doc. #197] and the third-party claims therein are **SEVERED** from the above-captioned action. The Third-party Defendants named in Cutone’s Third-Party Complaint are hereby **DISMISSED** from the above-captioned action . Cutone is granted leave, within fourteen (14) days of this Order, to re-file his third-party claims in a separate suit;

2. The Cross-Claims of Defendants Rick’s Mushroom Service, Inc., M.A.Y. Farms,

Inc., and Richard Masha [Doc. #204] are **STRICKEN WITH PREJUDICE**.

Furthermore, upon consideration of the Motions to Strike, Dismiss, or for a More Definite Statement filed by Third-party Defendants [Docs. #210, 212, 213, 222, 226, 227, 231] and Defendants' Responses thereto [Docs. #228, 236, 237, 238, 239, 240], it is hereby **ORDERED** that the Motions are **GRANTED IN PART**, insofar as they request that Cutone's Third-party Complaint be stricken. The Motions are **DISMISSED IN PART WITHOUT PREJUDICE**, insofar as the requests to dismiss or for a more definite statement are **MOOT**.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.