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

MENARD, INC.,

Plaintiff,

v.

TEXTRON AVIATION, INC., DALLAS AIRMOTIVE, INC., and PRATT & WHITNEY CANADA INTERNATIONAL, INC.,

Defendants.

OPINION AND ORDER

18-cv-844-wmc

On November 7, 2019, defendant Dallas Airmotive, Inc. ("DAI"), formally moved for leave to file counterclaims for tortious interference with contracts and defamation, after the court previously struck those same counterclaims filed without leave of court. (Dkt. #60.) The court intended to issue an opinion and order today granting the motion, but yesterday DAI filed a separate lawsuit with the same claims asserted in the proposed counterclaims in this lawsuit, *see Dallas Airmotive, Inc. v. Menard*, No. 19-cv-1036 (W.D. Wis. Dec. 19, 2019), and also filed a letter in this lawsuit, stating it wished to withdraw its November 7th motion (dkt. #70). DAI did not explain its reason for these actions -- whether it was concerned with any delay in ruling on the present motion or whether it was motivated to bring these claims as a separate lawsuit for other reasons. Regardless, because of the common facts in plaintiff Menard's claims and DAI's claims (whether counterclaims in this action or claims in another action), the court would be inclined to try them all together in front of one jury for efficiency's sake. As such, the court will issue this opinion and order, indicating its *intent* to grant the motion for leave to file counterclaims, but will withhold formal ruling pending a telephonic status conference with the parties on Monday,

December 23, 2019, at 10:00 a.m., as to whether the court should grant the motion, deem it withdrawn but still consolidate what are now two cases for much the same reasons, or allow the parties' claims to proceed as separate lawsuits.

BACKGROUND

On September 14, 2018, plaintiff Menard, Inc., filed a lawsuit in the Circuit Court for Eau Claire County, Wisconsin, against defendants Textron Aviation, Inc., and Pratt & Whitney Canada International, Inc., and DAI, asserting negligence and breach of contract concerning the overhaul of engines of two corporate jets owned by Menard. On October 12, 2018, defendants properly removed this action to this court under 28 U.S.C. §§ 1441(b) and 1446. Defendants Pratt Whitney and DAI filed motions to dismiss for lack of personal jurisdiction. (Dkt. ##4, 22.) While those motions were pending, DAI also filed counterclaims for tortious interference with contracts and defamation on September 6, 2019. (Dkt. #41.)

On October 24, 2019, the court denied defendants' motions to dismiss for lack of personal jurisdiction and also struck the counterclaims on the basis that DAI was required to seek leave to file counterclaims under Federal Rule of Civil Procedure 13(e). (Dkt. #57.) The court, however, invited DAI to file a motion for leave to assert these counterclaims, which it did on November 7, 2019. DAI also filed its answer the day before, on November 6, 2019. (Dkt. #59.)

While all this was going on, plaintiff also filed a motion to amend the pretrial conference order, seeking to extend the dispositive motion deadline, expert disclosures and set a later date for trial. (Dkt. #47.) On October 28, 2019, Magistrate Judge Crocker

granted that motion, extending the dispositive motion deadline to February 28, 2020, amending other dates consistent with that extension, and resetting the trial for August 3, 2020. (Dkt. #58.)

Finally, material to DAI's remaining, pending motion for leave to assert counterclaims, Menard's corporate counsel Michael Tidley sent a letter on May 29, 2019, to hundreds of companies who Menard believed own airplanes with Pratt & Whitney 530A engines, informing them of "a potential safety risk that we discovered with these engines" *and* advising them that "[t]hese engines are not safe to fly in their current condition." (Proposed Countercl., Ex. A (dkt. #61-1).) The letter also asserts that DAI "performed engine overhaul work" on these engines and Menard believes "there may be other engines that are currently operating with broken diffuser bolts." (*Id.*) The letter ends, "Safety is a top priority for us, as I am sure that it is a top priority in your organization as well. If you have concerns or issues regarding your engines, I invite you [to] contact me directly." (*Id.*)

DAI learned from nonparties about the existence of this letter in June 2019. After DAI filed its original counterclaims, but before the court struck them, the parties engaged in discovery on these counterclaims, including DAI moving to compel Menard to disclose the letter and the names of the recipients, among other requests, which Judge Crocker granted. (Dkt. #45.)

OPINION

I. Preliminary Issues

DAI's motion raises two preliminary issues, which the court will address briefly, but

need not decide definitively. *First*, DAI contends that Federal Rule of Civil Procedure 13(e) does not apply, because at the time it originally filed its proposed counterclaims, it had not answered the complaint and, therefore, its counterclaims were not a "supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading." Fed. R. Civ. P. 13(e). DAI's point is interesting and perhaps well-taken, at least as a technical matter. With its motion to dismiss pending, DAI had not answered the complaint, and, therefore, DAI's filing of counterclaims as a stand-alone pleading on September 6, 2019, does not fall squarely within the plain language of that rule. That said, requiring leave of court to file counterclaims acquired after the commencement of the lawsuit insures that the defendant acted diligently in asserting the counterclaims, allows the court to consider and ameliorate any prejudice to the plaintiff and is important for the court's management of the case, as well as its overall docket. These interests support a broad reading of Rule 13(e). Regardless, because the court finds the assertion of these counterclaims proper, the court need not determine whether DAI should have been allowed to file these counterclaims as of right, without leave of court.

Second, DAI contends that these counterclaims are compulsory. "In order to be a compulsory counterclaim, Rule 13(a) requires that the claims (1) exist at the time of pleading, (2) arise out of the same transaction or occurrence as the opposing party's claim," and (3) involve parties over whom the court has jurisdiction. *Burlington N. R. Co. v. Strong*, 907 F.2d 707, 710–11 (7th Cir. 1990). While DAI's counterclaims touch on whether the overhaul of the engines was conducted negligently -- or at least on a possible defense that the statements in the May 29, 2019, letter are truthful and privileged -- the counterclaims

do not arise out of the same transaction or occurrence as the negligence claims at issue in Menard's complaint. Instead, the counterclaims arise out of Menard's sending the May 29 letter to hundreds of companies. As such, it would appear that these counterclaims are not compulsory, though DAI's motion does not turn on resolution of this issue.

Regardless, this finding is only material if DAI sought to bring these claims in a separate proceeding, and that court determined DAI was required to bring them in this action. *See Ross ex rel. Ross v. Bd. of Educ. of Twp. High Sch. Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) ("These counterclaims are 'compulsory' only in the sense that a failure to include them in the suit means that they are thereafter barred."). For the reasons explained below, the court finds the counterclaims sufficiently related to the Menard's claims to find efficiencies in adding them to this action, making the question of their being compulsory in nature moot. *See* Fed. R. Civ. P. 13(b) (defining "permissive counterclaims" as "any claim that it not compulsory"); *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) (permissive counterclaim allows all claims between parties to be resolved in one proceeding).

II. Leave to Amend

With those initial issues aside, the court turns to whether to grant defendant DAI leave to file its counterclaims, including in particular whether "the litigation may be unduly disrupted if new claims are belatedly injected." *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 360–61 (7th Cir. 1990) (analyzing whether to grant leave to file counterclaims under Rule 13(e)). This analysis is similar to that applied under Rule 15(a) in determining whether to allow a *plaintiff* to amend its complaint. *See generally* 3 James Wm. Moore,

Moore's Fed. Practice § 13.43[2] (3d ed. 2019).

Menard opposes defendant's motion on three grounds: (1) DAI unduly delayed asserting its counterclaims; (2) the counterclaims are not closely related to the underlying claims from either a factual or legal prospective; and (3) Menard would be unfairly prejudiced by the inclusion of these counterclaims in this action. The court rejects all three grounds. *First*, as to undue delay, the action giving rise to the counterclaims occurred approximately nine months *after* plaintiff filed the present lawsuit, and DAI filed its counterclaims within two months of learning about the extent of the communications, alerting Menard to its concerns, and providing Menard opportunity for informal resolution of the dispute. The court does not view this delay as even arguably undue, much less so long that it would warrant denial of the motion for leave to assert these counterclaims, *especially* in light of Judge Crocker's recent order -- entered at the request of *Menard* -- which extended pretrial deadlines and moved the trial date.[1]

Second, Menard argues that the counterclaims are not sufficiently related to Menard's negligence claims to create efficiencies in trying the counterclaims and claims in the same action. The court disagrees. While the addition of the counterclaims necessarily raises some new legal issues, the question of whether the statements were defamatory and the related defense of truthfulness is largely teed up by Menard's negligence claims, creating obvious efficiencies in trying these claims in the same action. Moreover, by allowing the claims to proceed in one lawsuit, the very real risk of inconsistent verdicts is

[1] Both sides are on notice that the court views these extensions more than adequate to complete any necessary discovery on these counterclaims provided they act promptly, particularly with respect to any third-party discovery.

greatly reduced. Finally, the fact that there are some differences in the issues between the claims and counterclaims is not grounds to deny a permissive counterclaim to proceed. Indeed, permissive counterclaims would not be allowed at all if Menard's effective argument -- that the counterclaims must be so close as to concern the *same* factual and legal determinations as the claims already at issue in an action -- were adopted.

Third, Menard contends that the issues raised in the counterclaims will confuse or mislead the jury. (Menard's Opp'n (dkt. #64) (citing *Stiller v. Colangelo*, 21 F.R.D. 316, 317 (D. Conn. 2004)).) Nonsense. The court commonly tries claims and counterclaims to the same jury without undue confusion. With proper and clear instructions about the legal elements of the claims and the respective burdens of the parties, and use of a straight-forward special verdict form, the court is confident that any jury confusion can be prevented. Moreover, contrary to Menard's suggestion, the facts of this case are distinct from those in *Stiller v. Colangelo*, 221 F.R.D. 316 (D. Conn. 2004), where the district court expressed a concern about the jury's ability to differentiate between an attorney's "behavior as Stiller's legal representative and his behavior as Stiller's legal adversary." *Id.* at 317. Menard's principal argument as to prejudice seems to focus on the possibility that the counterclaims will reflect poorly on Menard in litigating its own claims, but again that is almost always the case when counterclaims are asserted and it is *not* a basis to deny leave to amend.

Having rejected Menard's objections, the court concludes that the proposed counterclaims are sufficiently related to the claims at issue in this case to afford certain efficiencies in trying them together, and in light of the recently amended schedule, the

addition of these counterclaims will not unduly disrupt the litigation of Menard's claims or otherwise unduly prejudice Menard's.

ORDER

IT IS ORDERED that:

1) Defendant Dallas Automotive Inc.'s motion for leave to file counterclaims (dkt. #60) is RESERVED.

2) The court will hold a telephonic status conference with the parties on December 23, 2019, at 10:00 a.m. Counsel for Dallas Airmotive, Inc. shall initiate the call to chambers at 608-264-5087.

Entered this 20th day of December, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge