EXHIBIT C

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONTINENTAL CASUALTY COMPANY, et al., Plaintiffs, v. GENERAL BATTERY CORPORATION, et al., Defendants. EXIDE CORPORATION, et al, Counterclaimants, Cross-Claimants, and Third-Party Plaintiffs, v. CONTINENTAL CASUALTY COMPANY, et al., Counterclaim Defendants, AETNA CASUALTY & SURETY COMPANY, et al., Cross-Claim Defendants, and CNA FINANCIAL CORPORATION, et al., Third-Party Defendants.	C.A. No: 93C-11-008-WCC

MEMORANDUM OF LAW OF CNA IN SUPPORT OF MOTION TO STRIKE AMENDED COUNTERCLAIMS, CROSS-CLAIMS AND THIRD-PARTY COMPLAINT OF GENERAL BATTERY

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I. INTRODUCTION

Anderson, Kill, Olick & Oshinsky, on behalf of General Battery Corporation, Exide Corporation, Dixie Metals, Inc., and GBC Newco, Inc. (collectively "General Battery") and many other insureds is at war with the insurance industry. Legal wars are fought with words but they are wars nonetheless. General Battery's Amended Counterclaims, Cross-claims, and Third-Party Complaint ("Amended Counterclaim") is both Anderson, Kill's declaration of war on behalf of General Battery, as well as its declaration to this Court that in the battle of words, quantity, not quality, and blunderbuss, not reason, will be its methods of attack.

The Amended Counterclaim is 424 pages and 1073 paragraphs long, not including exhibits. It is redundant, immaterial, impertinent, scandalous, inadmissable, and harassing. It should be struck in its entirety.

II. PROCEDURAL BACKGROUND

On November 1, 1993, Continental Casualty Company, Transportation Insurance Company, American Casualty Company of Reading, and Columbia Casualty Company (collectively "CNA"), filed a Complaint in this Court (Dkt. No. 2) seeking declaratory judgment pursuant to Del. Code Ann. tit. 10, § 6501 et seq. As stated in the introduction to the Complaint, CNA seeks

> this Court's determination concerning the scope and nature of [CNA's] obligations, if any, and the obligations, if any, of certain insureds with respect to certain claims against General Battery

> Corporation ("General Battery"), and/or its affiliates under insurance policies allegedly issued to defendants General Battery and Northwest Industries, Inc.

See Complaint at p. 3. In accordance with the Delaware declaratory judgment statute, the Complaint names as party defendants General Battery, Fruit of the Loom, Inc., p/k/a Northwest Industries, Inc. (at one time the owner of General Battery Corporation), and every insurer of General Battery in order to ensure that all entities with any potential interest in the outcome of the controversy are parties before the Court. The Complaint lists the insurers, the insurance policies, and the sites that CNA believed were at issue when it filed the Complaint. The Complaint places the question of insurance coverage for all of General Battery's environmental claims at issue for all parties.[1] The Complaint includes 98 paragraphs (75 of which set forth the parties and the jurisdiction of the Court) in 23 pages.

In response to the Complaint, certain of the defendant insurance companies filed cross-claims against General Battery seeking declaratory relief as to their policies of insurance. Since that time, various stipulations, motions, and Orders filed with or by the Court have, by agreement of the parties, limited and particularized the policies, the insurers and the 43 sites

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[1] CNA's Complaint does not seek a declaration of "no obligations" on the part of CNA. Rather, in accordance with the principles of the Delaware declaratory judgment statute, the Complaint seeks a declaration of what obligations, if any, exist as to CNA and the other insurers.

which remain the subject of this litigation. See Stipulation and Order dated December 1, 1995 (Dkt. No. 759), and related motions for and Orders granting dismissal.

On September 7, 1995, General Battery filed its Answer, Counterclaims, Cross-Claims and Third-Party Complaint (Dkt. No. 688). The Answer, consisting of 102 paragraphs in 14 pages, responded to the allegations of the Complaint and to the other insurers' cross-claims. There followed, then, General Battery's 435 page, 1069 paragraph undifferentiated "Counterclaims, Cross-claims, and Third-Party Complaint" (the "Counterclaim"). The first 90 pages came apparently by way of introduction to the counts of the Counterclaim, and purported to describe "insurance history" beginning in 1940. This "history" consisted of excerpts from statements and writings by various entities (some parties, many not) concerning insurance generally and the introduction of what is known as the "qualified pollution exclusion" in 1970. It further contained opinions and conclusions as to the "proper" interpretation of insurance policies generally and the motives of the "insurance industry" in the second half of the 20th century.

The next 345 pages of the Counterclaim pleaded 113 counts alleging:

(1) a request for the same declaratory relief requested in CNA's Complaint as to the sites and policies at issue;

(2) breach of contract by all of the insurers, including CNA, as to all of the sites and policies at issue;

(3) breach of contract separately and again

by CNA as to four of the sites[2];

(4) bad faith by CNA with respect to these same four sites under Illinois and Pennsylvania law;

(5) violation by CNA of the Illinois Consumer Fraud statute with respect to these same four sites;

(6) conspiracy by all the insurers to misrepresent or conceal facts;

(7) negligent inspection and provision of loss control services by CNA;

(8) sale of a defective product by all insurers;

(9) breach of a warranty of uniformity by all insurers;

(10) breach of an implied warranty of fitness for intended purposes by all insurers;

(11) estoppel against all insurers; and

(12) a right to recover attorneys' fees.

The requests for declaratory relief and damages for breach of contract were separately and repeatedly stated in individual counts for each of the forty-three sites at issue.

In response to this Counterclaim, CNA, joined by other insurers, filed a motion to strike the pleading in its entirety and motions to dismiss particular counts (Dkt. No. 717). CNA also informally advised General Battery that CNA believed that the Counterclaim was improperly pleaded and included claims for which there was no legal basis.

Thereafter, on January 22, 1996, General Battery filed

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[2] The four sites are: Berks Landfill, Browns Battery, N.L. Taracorp, and Wortham.

an Amended Answer, Answer to Cross-Claims, Counter-Claims, Cross-claims, and Third-Party Complaint ("Amended Counterclaim") (Dkt. No. 829). This pleading deleted the bad faith claims against CNA under the Illinois Consumer Fraud Act, and all three of the UCC type claims against the insurers, including sale of a defective product, breach of warranty of uniformity and breach of warranty of fitness for intended purpose. It also deleted certain factual averments from the remaining bad faith counts against CNA. On January 24, 1996, CNA, joined again by other insurers, filed a motion to strike the entire Amended Counterclaim as well as motions to dismiss particular counts (Dkt. No. 833).

Despite the amendments, the Amended Counterclaim, as a pleading, is just as objectionable as the original Counterclaim. It is still 410 pages and 971 paragraphs long. It still contains 90 pages of "history", opinion, and argument completely unrelated to the facts of the case before this Court. The entire monstrous exercise, denominated a "pleading", cannot be read in a single day, much less a single sitting. It is redundant, immaterial, impertinent, scandalous, inadmissable, harassing and frivolous. This Court should strike it in its entirety.

III. ARGUMENT

A. The Delaware Standard.

No one should be required to respond to what General Battery calls its Amended Counterclaim. It is not a pleading in accord with the Delaware rules. It is harassing by virtue of its length alone and its content is irrelevant,

repetitive and argumentative. The Delaware Superior Court Civil Rules provide that:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or a third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled.

Rule 8(a)(1) (emphasis added). Rule 8 goes on to provide that:

> [e]ach averment of a pleading shall be simple, concise and direct.

Rule 8(e)(1) (emphasis added). The Delaware Rules further provide that:

> Upon motion made by a party before responding to a pleading ... the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 12(f). A motion to strike will be granted "where a plea upon its face appears to be frivolous, dilatory, vexatious or nugatory". Pack & Process, Inc. v. The Celotex Corp., Del. Supr., 503 A.2d 646 (1985) (citations omitted).[3] And, although

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[3] "The Court must consider whether the pleaded matter has some relevancy to the cause of action, is directly in reply to the matter which is pleaded and is offered in support of a direct issue. ...Thus, 'a plea which does not set out any issuable fact ... will be ordered stricken out.'"

Id. at 660 (Citations omitted).

Delaware courts have not often dealt with such motions,[4] the circumstances of this case support the grant of a motion to strike in this matter.

B. General Battery's "Factual" Introduction to its Amended Counterclaim Consists of Immaterial, Harassing, and Inadmissible Material.

The purported factual premise for General Battery's Amended Counterclaim, the first 90 pages, provides no facts describing any alleged wrongdoing by the parties to this lawsuit concerning the policyholder, the policies or the sites at issue in this matter. Instead, General Battery's predicate for its claims is a lengthy assault on what it calls the "insurance industry" and how it believes the insurance industry has acted in the past and how it ought to act in the future.

The first section of this "factual" introduction outlines in the broadest, sweeping terms, the insurance companies' conduct. Without referring to any particular

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[4] CNA has found no reported decisions in Delaware on motions to strike since the Pack & Process decision. However, unreported decisions make clear that Delaware courts can and do grant motions to strike. See, James River-Pennington Inc. v. CRSS Capital, Inc., Del. Ch., No. 13780, 1995 WL 106554, Steele, V.C. (Mar. 6, 1995); Poore v. Fox Hollow Enter., Del. Super., No. 93A-09-005, 1994 WL 150872, Steele, J. (Mar. 29, 1994); Moffett v. Zitvogel, Del. Super., No. 89C-OC-27, 1990 WL 123068, Graves, J. (Aug. 1, 1990); Vets Welding Shop, Inc. v. Nix, Del. Super., No. 86C-JA-82, 1988 WL 67703, Gebelein, J. (June 20, 1988); Myer v. Dyer, Del. Super., No. 86C-MY-96, 1987 WL 9669, Martin, J. (Apr. 10, 1987); recent unreported decisions granting motions to strike. While these cases do not concern insurance, the grant of such motions in matters where the challenged pleading contained only a fraction of the volume challenged here is informative for the Court's decision on CNA's motion to strike here.

insurance company, General Battery alleges that all of them have failed or will fail in their duties, contractual and otherwise, and that they have engaged in a nationwide practice of "nullification of insurance coverage through litigation against policyholders" and a practice of refusing to pay large claims regardless of merit. General Battery then speculates as to the economic motivations of the insurance companies and concludes by avering "on information and belief" that the insurance companies in this case have or will repudiate representations they or their agents made in state insurance department regulatory filings or in judicial filings (¶¶ 140-150). The "pleading" then goes on, for nearly 100 pages, to argue: the legal duties of insurance companies; the purpose of state regulators; and General Battery's version of the history of the development of insurance policy language. This broadbrush characterization of the "insurance industry" is based on assorted comments and statements of individuals, companies, insurance organizations, authors, lawyers, courts and others, made over a fifty year period in letters, briefs, speeches, articles, internal memoranda, advertisements, and other sources. Interspersed are arguments and conclusions as to the meaning of these comments and statements. General Battery (or more properly, its counsel) has submitted a discourse in place of a pleading[5].

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[5] Paragraphs 147 through 370 and 1021 through 1048 (250 paragraphs) are paragraphs of the type regularly stricken by courts as not proper pleadings. These detailed "evidentiary" and legal arguments do not belong in a notice pleading. Burks,

(continued...)

A look at a sampling of the "headings" in this part of the Amended Counterclaims demonstrates the nature of the discourse:

> The Standardization of Insurance Policy Language was Intended to Promote Uniformity of Interpretation.. Amended Counterclaim, p. 33;
>
> The Illinois and Pennsylvania Insurance Regulatory Programs and the Insurance Industry Rating Organizations. Amended Counterclaim, p. 35;
>
> The Development of the Standard Form CGL Insurance Policy and Insurance Company Representations Regarding its Coverage. Amended Counterclaim, p. 51;
>
> The Standard Form CGL Insurance Policy was Intended and Represented by the Insurance Industry to Provide Insurance Coverage for All Risks, Including Unknown Risks, Not Specifically Excluded. Amended Counterclaim, p. 51;
>
> The Development of the 1966 Standard Form CGL Insurance Policy. Amended Counterclaim, p. 62;
>
> The Standard Form CGL Insurance Policy was Intended to Provide Insurance Coverage for Gradual Pollution Damage That Was Neither Expected Nor Intended by the Policyholder. Amended Counterclaim, p. 64;
>
> The "Polluters' Exclusion" was a Mere Clarification of the "Occurrence" Definition.

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[5](...continued)
et al v. City of Philadelphia, 904 F. Supp. 421, 424 (E.D. Pa. 1995).

Counterclaim, p. 71;

Insurance Industry Representations
About the General Principles of
Interpreting Insurance Policies.
Amended Counterclaim, p. 78;

These are not the averments of a pleading. They are a narrative of "history" and argument divided into numbered paragraphs. In fact, these same allegations have been repeatedly published by Anderson, Kill lawyers (or cooperating counsel) as the advocative exercise they so obviously are.[6]

The "allegations" on which this discourse is based are not case specific, not party specific, and not policy specific. Instead, the presentation assumes that every statement made by whomever, whenever and in connection with whatever, can be attributed to every insurance carrier in this case. The presentation quotes sentences and even partial sentences out of context; many of these are then connected by ellipses to create new statements that may or may not accurately reflect the original message. The result is a collage of bits and pieces of information. If the collage refers to insurance carriers in this action, it is only a passing coincidence. Instead, the information is connected to the insurance carriers in this case

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[6] See, e.g., Eugene R. Anderson & William G. Passannante, *Insurance Industry Doublethink: The Real and Revisionist Meanings of "Sudden and Accidental"*, INSURANCE LITIGATION, May, 1990, at 186; Eugene R. Anderson & William G. Passannante, *'Dishonesty' and the 'Sudden and Accidental' Con Game: It's a Beautiful Thing, the Destruction of Words*, MEALEY'S LITIGATION REPORTS *INSURANCE*, March 5, 1991, at 11; Eugene R. Anderson and Maxa Luppi, *Environmental Risk Insurance: You Can Count on It*, MEALEY'S LITIGATION REPORTS *INSURANCE*, January 26, 1988, at 21.

by inserting the words "the Counterclaim, Cross-claim and Third Party Defendants..." before general allegations about the insurance industry.

Taken as a whole, this presentation of fragments of evidence and arguments that precedes the Counts of the Amended Counterclaim is not about this case. It is not about this insured, General Battery, which is not mentioned even once in its own right.[7] It is about Anderson, Kill, Olick & Oshinsky, which files an ever expanding version of this "pleading" in all of the environmental coverage cases in which it represents an insured.[8]

Significantly, while the discourse goes to great length on immaterial issues (such as statements of non-parties allegedly made to state regulatory agencies of states other than those at issue in this matter), it is silent on material issues. No allegation is made as to any representation, much less any misrepresentation, to General Battery. The closest the "pleading" comes to alleging anything connected to General Battery are its allegations that some of the insurance carriers

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[7] The only references to General Battery, and they are sporadic, are references to the public, to policyholders, and to insureds generally, after which a phrase like "such as GBC" is inserted. Such references are not actual allegations about General Battery. They are generic, and as to General Battery, hypothetical.

[8] What becomes apparent when you look at the cases prosecuted by General Battery's counsel is that each subsequent claim grows. Regardless of its relevance to the particular case, every bit of information which they garner from each preceding case is grafted onto their succeeding pleading. Point in fact, the court should note that the allegations raised by General Battery in its Amended Counterclaim involve numerous entities not even parties to this action.

belonged to certain insurance organizations that allegedly made misrepresentations to certain insurance regulators whose alleged function was the protection of the citizens of their states in insurance matters. Since General Battery was at all times a citizen of Pennsylvania and its prior parent, Northwest Industries, Inc., was a citizen of Illinois, these are the only two states as to whom any allegations, even under General Battery's scenario, can be relevant. It is, therefore, necessary to look at what the Amended Counterclaim actually says about alleged misrepresentations to the regulatory agencies of Pennsylvania and Illinois. These allegations are contained under the heading "Insurance Industry Representations to the Illinois and Pennsylvania Insurance Commissioners", (¶¶ 193-200).

First, the allegations are made "on information and belief". Second, what is alleged is that,

> [t]he MIRB submitted a form of polluters exclusion to the Illinois and Pennsylvania Insurance Commissioners that was either identical to or similar, to certain of the polluters' exclusions at issue in this action.

This allegation is then followed, without a break, by the following purported description of what the MIRB said

> [t]he MIRB explained that it was filing the polluters' exclusion to clarify that the 1966 standard form CGL Insurance Policy did not cover pollution or contamination damage that was expected or intended by the policyholder:

However, the actual quote of what the MIRB said, which follows the colon, is not a quote from the MIRB's submission to

Pennsylvania or Illinois. It is not a quote from any communication to Pennsylvania or Illinois. It is a quote from an internal memorandum from the MIRB to its members and subscribers. And notwithstanding General Battery's amazing conclusion to the contrary, it makes no mention of nor even any reference to a state agency submission, let alone any Illinois or Pennsylvania submission. See, Amended Counterclaim ¶¶193-195.

The paragraphs that follow, under this heading, argue that the representation (by the MIRB to its members) was not true when made (¶ 196); that by making it, the filings with Pennsylvania and Illinois confirmed what the polluters' exclusion covered (¶ 197); that a counsel for Aetna in an internal Aetna memorandum commented on whether or not the polluters' exclusion reduced coverage (¶ 199); and finally, that the "representations" now referred to as "made in the regulatory filings to the Illinois and Pennsylvania Insurance Commissioners" are implied terms of the policies that contain the polluters' exclusion (¶ 200). General Battery has taken two internal memoranda - one from an insurance organization, the other from Aetna and, by first juxtaposing them with an allegation that the polluters' exclusion was submitted to Pennsylvania and Illinois, and by then falsely alleging that the representations in them were made in the regulatory filings to Pennsylvania and Illinois, has made it look as though it has identified a misrepresentation concerning the meaning of the polluters' exclusion to Pennsylvania and Illinois. It has not done so.

The above is the sum total of "substantive" allegations contained in the section of General Battery's "pleading" called "Insurance Industry Representations to the Illinois and Pennsylvania Insurance Commissioners". There is no other allegation in the pleading concerning any representation to Pennsylvania or Illinois.

The rest of the "introduction" to the Counts is the same except that it is, by its own terms, not focused on Pennsylvania or Illinois. When all of the paragraphs of general historical narrative are removed; when all of the paragraphs of allegations concerning statements to persons and organizations not associated with General Battery or Pennsylvania or Illinois regulators are removed; when all of the paragraphs of allegations concerning statements by carriers other than CNA are removed; when all of the paragraphs of argument are removed; there is nothing left. The Emperor has no clothes. But we, the Court and the insurance carriers, are being asked to pay for all the cloth, tinsel and gilt, if the insurers must answer the allegations of the Amended Counterclaim.

To respond to this narrative would defeat the very purpose of notice pleading. The purpose of a pleading is to place the opposing party on notice of facts upon which a claim is based. If an allegation does not "pertain to something specific to the parties [to the] action," it does not belong in a pleading. Robeson Indus. Corp. v. Hartford Accident and Indem. Co., Bankr. D. N.J., No. 93-33265, Adv. No. 94-3362TF, Ferguson,

J., (Oct. 17, 1994) (TRANSCRIPT OF MOTION TO STRIKE) (emphasis added). Instead of placing the insurers on notice of the grounds for General Battery's claims, General Battery "pleads" endless legal conclusions and the conduct of those who are not even parties to this action.[9]

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[9] By way of example, General Battery alleges:

> In the 1940's, E.W. Sawyer, an attorney for the NBCU, a rating organization, wrote an article in The Casualty Insurance Educator extolling the virtues of the standard form CGL Insurance Policy. Sawyer wrote:
>
> > Within the limitations established by the standard insuring clauses and by the standard exclusions, it is obvious that the policy covers all hazards of liability loss whether such hazards are or are not known to exist. The significance of this radical change from past practices lies in the fact that the insurer assumes the burden of discovering and charging premium for all hazards, and provides insurance against such hazards whether or not they are discovered. No longer is the insurance limited to hazards for which the insured has asked protection and paid premiums. The hazards embraced by the comprehensive liability policy are, therefore, not only the known hazards but the unknown hazards.
>
> E.D. Sawyer, Comprehensive Liability Insurance, The Casualty Insurance Educator, Ser. II (Woodhull Hay ed., 1943), at 29.

See, ¶223. General Battery also avers that:

> The unique exemption from the application

(continued...)

To provide a good faith response to these and countless other allegations like them would require each insurer to engage in extensive research regarding legal principles and events that span several decades.

Courts faced with this sort of rhetoric regularly strike such allegations. The court in Trustees of Princeton Univ. v. Aetna Casualty and Sur. Co., N.J. Super., No. L-5106-94, Rebeck, J.S.C. (Sept. 23, 1994) (TRANSCRIPT OF PROCEEDINGS), facing exactly this sort of "pleading" by Anderson, Kill (but on a much smaller scale), struck these types of allegations, holding, with a certain sense of outrage, that:

> You expect them [the insurers] to respond to what the industry did in 1940. You expect them to respond to articles written in 1940. ...You tell me how this is appropriate. ...[T]hat may very well be something that's relevant in discovery. It may be relevant at the time of trial but where does it fit into this complaint? ...Why should it be in the complaint? Basically in a complaint you set forth facts upon which you base your complaint.... I don't believe that comports with our rules

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[9](...continued)

> of federal antitrust laws for members of the insurance industry rests on the recognition that insurance companies have public as well as private obligations. In particular, standardized insurance policy terms are designed to serve the public interest by facilitating uniformity of insurance coverage and consistency in the interpretation of the terms of insurance policies.

See ¶ 168.

> regarding the manner in which a complaint should be plead and to which you expect someone to respond. It may very well be that the material contained within those paragraphs are relevant in terms of discovery, in terms of trial, but not in a complaint and I'm not going to ask them to respond to that.

Id. (emphasis added).

In Robeson Indus. Corp. v. Hartford Accident and Indem. Co., the court, when recently faced with a similar Anderson, Kill insurance industry discourse, stated:

> All of the allegations pertaining to standard policy language, the regulatory history, patterns and practices in the industry, etc., may well be relevant evidence, but they are not properly included in the complaint. . . . [T]hey are entirely extraneous to a short and plain statement of the cause against these defendants.

Robeson Indus. Corp. v. Hartford Accident and Indem. Co., Bankr. D. N.J., No. 93-33265, Adv. No. 94-3362TF, Ferguson, C.J., (TRANSCRIPT OF MOTION TO STRIKE) (Oct. 17, 1994). In yet another case by Anderson, Kill in the New Jersey courts, another judge similarly struck these allegations as inappropriate pleadings. Am. Employers Inc., et al. v. Elf Atochem N. Am., et al., N.J. Super. Ct. Law Div., UNN-L-5333-94, Weiss, J., (Mar. 10, 1995) (ORDER). Similarly, in Samuels Recycling Co. v. CNA Ins. Co., Wis. Cir. Ct., No. 93-CV-1480, Bartell, C.J. (Jan. 6, 1994) (ORDER), the Wisconsin court struck complaint paragraphs describing "insurance industry regulatory and marketing history" because they were not a "concise and direct averment of facts identifying the transaction, occurrence or event out of which the

claim arises." See also, HM Holdings, Inc. v. Aetna Casualty & Sur. Co., N.J. Super., No. L-5685-94, Rebeck, J.S.C. (Nov. 29, 1993) (TRANSCRIPT OF MOTION) (Anderson, Kill - plaintiff's counsel); Grantors to the Diaz Refinery PRP Comm. Site Trust; 20th Century Fiberglass Inc., et al. v. Sentry Ins. Co., et al., Ark. Cir., No. Civ-91-56, Erwin, J., (June 3, 1992) (ORDER); and Goodyear Tire & Rubber Co. v. Aetna Casualty & Sur. Co., et al., Ohio App., C.A. No. 16993, Slaby, J. (July 12, 1995) (DECISION AND JOURNAL ENTRY) (Anderson, Kill counsel).[10]

Only a few months ago, Judge Bechtel of the Federal District Court for the Eastern District of Pennsylvania was faced with a motion to strike an entire complaint pursuant to Fed. R. Civ. P. 8, upon which the Delaware Rule is modeled.[11] While that case was factually dissimilar, it is instructive in that, just as with this Amended Counterclaim, the party attempted to have its pleading serve as a narrative of its argument instead of a notice of its claims. The Court struck the entire Complaint

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[10] Comparison of the paragraphs struck in these other cases in which Anderson, Kill was also counsel to the insured discloses that the paragraphs are verbatim repetitions from case to case. The "pleadings" generated by Anderson, Kill are the height, or perhaps more accurately the nadir, of the word processing, data processing computer era.

[11] The Superior Court's Civil Rules are patterned upon the Federal Rules of Civil Procedure. Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991), citing Hoffman v. Cohen, Del. Supr., 538 A.2d 1096, 1097 (1988). Delaware courts "have repeatedly noted that construction of identical rules by the federal judiciary is accorded 'great persuasive weight' in our interpretation of the Delaware counterparts. (citations omitted)". Smith v. State of Delaware, Del. Supr., 647 A.2d 1083, 1088 (1994).

finding that:

> Plaintiff's complaint is a fact laden, thirty-six page, 128 paragraph narrative that describes in unnecessary, burdensome, and often improper argumentative detail, every instance of alleged [wrongdoing] perpetuated by defendants over the period of 1993 and 1994.... [T]he complaint reads more like a novel than the legal pleading it purports to be.... [T]he complaint improperly and amateurishly repeats, more than a dozen times, . . . bold allegation[s].... To shift the factual emphasis from the discovery stage back to the pleading stage distorts both the purposes and the function of the Federal Rules of Civil Procedures and the administration of this civil case.... This pleading represents a gross departure from both the letter and the spirit of Rule 8(a). ...This court will strike the complaint in its entirety.

Burks, et al. v. City of Philadelphia, 904 F. Supp. 421, 424 (E.D. Pa. 1995).

Just as in Burks, General Battery inappropriately uses its pleading as a vehicle for presenting "unnecessary, burdensome, and often improper argumentative detail", reading "more like a novel than the legal pleading it purports to be."[12]

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[12] Were this filed as a memorandum of law, General Battery would have been limited by Delaware's Rules to 35 pages. See, Delaware Superior Court Civil Rule 107(g). By filing it as a "pleading", General Battery hopes to introduce hundreds of pages of argument to the Court. The time will come for the filing of briefs--after this Court rules on the admissibility of the "evidence" General Battery includes in its "pleading" and, to the extent admissible, after that evidence is of record. When that time comes, the briefs will be expected to conform to the Delaware rules.

Only General Battery's pleading is more than ten times as long as Burks' and unlike Burks', it pleads no specific alleged wrongdoing by CNA. If Judge Bechtel was concerned that "to shift the factual emphasis from the discovery stage back to the pleading stage distorts both the purposes and the function of the Federal Rules of Civil Procedure and the administration of [the] civil case", this Court should be even more concerned when the "facts" shifted may not be relevant or admissible, were they properly evaluated in the discovery stage. The "facts" that General Battery inserts at this pleading stage relate to matters extrinsic to the actual dealings between General Battery and its insurers. They are the first propaganda salvo in the campaign to turn a contract case into a referendum on the "insurance industry".

This use of pleadings to circumvent the rules of discovery and evidence is not, like Burks', "amateurish". It is a calculated strategy designed to force CNA and the other insurers to respond to allegations and issues before this Court has had an opportunity to determine whether the allegations and issues are a proper subject of this action. What makes this strategy even more troublesome is that General Battery has incorporated all of these paragraphs into each and every count of its Amended Counterclaim, tainting the entire pleading with the inadmissable and irrelevant. This Court should strike General Battery's Amended Counterclaim in its entirety and direct General Battery to file a proper pleading that includes a specific

factual basis for the claims against CNA and that does not include general and unrelated factual and legal argument.

C. **The Counts of the Amended Counterclaim Are Repetitive, Redundant, and Lack Substance.**

The defects in General Battery's Amended Counterclaim are not limited to the 250 paragraphs of immaterial and improper "factual" introduction and argument. The rest of the Amended Counterclaim consists of separate counts. More than ninety percent of the 721 paragraphs setting forth the counts are redundant. More importantly, they are boilerplate counts that contain virtually no substantive allegations particular to this case or to any interaction between these insurers and this insured and add nothing of substance to the requested relief.

First, forty-three counts (constituting 301 paragraphs and 86 subparagraphs) seek the same declaratory relief as is sought in the Complaint and the Crossclaims.[13] These paragraphs should be stricken as redundant and frivolous. These counts are also redundant as to each other. The only variation from count to count is in the name of the site to which it applies and a single line which alleges what General Battery feels are the applicable policy years, an issue which is already the subject of the requested declaratory relief. While a count as to each site might be acceptable or necessary if General Battery were providing specific site data which differs from

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[13] Counts 1, 3, 9, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 45, 47, 49, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, and 101.

count to count, such is not the case here. These 301 paragraphs request the same relief sought in the Complaint and Crossclaims and do so in the most repetitive, redundant and burdensome manner.

Second, Exide pleads an additional 43 counts (constituting another 215 paragraphs and 129 subparagraphs) for breach of contract for each of the 43 sites.[14] Again, these counts are completely redundant as to each other. The only difference from count to count is the naming of a site and appparently the same single allegation of applicable policy periods as set forth in the above referenced declaratory judgment counts. To the extent that these policy period averments are necessary to put the insurers on notice of its claims, they can and should be pleaded succinctly, and once.

Third, although CNA is a named party in each of the 43 "breach of contract" counts, Exide pleads four more breach of contract counts (5, 11, 41 and 51) (involving an additional 25 paragraphs and 12 subparagraphs) against CNA alone, re-alleging breach of contract claims against CNA for 4 of the 43 sites. These 4 counts are completely redundant and similarly unnecessary. Either a breach of contract claim was stated against CNA in the first breach of contract count on each of these sites, in which case a second count is unnecessary, or, if

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[14] Counts 2, 4, 10, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 46, 48, 50, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, and 102.

the first time around the claim was insufficient, then restating it virtually verbatim does not help.

These declaratory judgment and breach of contract counts constitute 540 paragraphs of unnecessary, repetitive pleadings which add nothing to the case, are burdensome for each of the carriers to respond to and waste time and trees. General Battery's Amended Counterclaim, if not stricken, will require this Court to review literally fifteen thousand or more paragraphs of responsive pleadings once all of the remaining insurers have responded to all of these paragraphs.

More important, however, is the fact that General Battery's assault of words gives only the semblance of substance to its counts. Once the redundant allegations are removed, what is left are insufficient facts to put CNA or anyone else on notice of the substance of the claims. In each of the breach of contract counts, General Battery alleges that "some or all of the insurers received notice"; "some or all refused to pay"; "each failed and refused to determine, reasonably and promptly, whether coverage exists"; or that "each failed and refused to investigate, defend, or mitigate losses and pay". General Battery does not put any individual insurer on notice of its alleged conduct which would support a breach of contract claim and to which it can respond. Certainly, it doesn't take 43 counts to make boiler plate, non-specific breach of contract allegations.

Fourth, General Battery pleads a set of three bad faith counts against CNA alone. It pleads the same set four times, raising identical allegations as to each of four sites for bad faith under Illinois common law, the Illinois Insurance Code, and Pennsylvania's bad faith insurance statute.[15] Each set of counts repeats identical formulaic allegations, changing only the name of the site. This repetition accounts for a further redundancy of 108 paragraphs, assuming that a single recitation of the 27 "non-repetitive" paragraphs are necessary to put CNA on notice of these claims.

Finally, each count in the Amended Counterclaim incorporates all previous paragraphs. Therefore, the counts not only repeat each other verbatim, but they also incorporate each other. Neither the repetition nor the incorporation is necessary: certainly not both. The results of what General Battery has done are clear. General Battery's repetitions and incorporations create a geometric increase in the size of each count; each count is tainted with the problems that came before it; and response to each count necessarily requires response to all previous paragraphs. Attempts to evaluate the sufficiency of each count requires reference to the hundreds of pages and hundreds of paragraphs that precede it. Second, each count incorporates indiscriminately all 250 paragraphs of "factual" introduction that precede the counts. The result is that it is

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[15] Set (1) Counts 6, 12, 42 and 52, Set (2) Counts 7, 13, 43 and 53, and Set (3) Counts 8, 14, 44 and 54).

impossible to evaluate any claim because there is no way to know which, if any, preceding paragraph really is offered to support that claim.

IV. CONCLUSION

General Battery's "pleading" is lazy. Rather than thinking selectively about what to plead and how, Anderson, Kill cut, pasted, borrowed from other cases, and then called it General Battery's Amended Counterclaim.[16] Neither the other parties nor this Court should be forced to do General Battery's work for it.

Striking the "pleading" will force General Battery to consider what, if any, factual basis exists for its claims and to put each insurance carrier on proper notice of the claims against it. It will require General Battery to substitute a proper pleading for the barrage of irrelevant, argumentative, and repetitive paragraphs that, like white noise, are intended to obfuscate and confuse communication. An Order striking General Battery's Amended Counterclaim, with direction to do it right, will be an important step in the management of this complex coverage case and in the resolution of the actual issues in this

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[16] The Amended Counterclaim is more or less the same as the Illinois Complaint filed by General Battery when the motivation was presumably to make the Illinois Complaint appear more comprehensive than the Delaware matter. When the time came to respond to the Complaint in this matter, after having withdrawn their opposition to the Delaware forum, General Battery apparently took the path of least resistance: they made minor changes to their Illinois Complaint (to which no response beyond motions to dismiss was ever required or made) and utilized it as the basis for their response here.

case.

For all the reasons set forth in this Memorandum of Law, in any affidavits subsequently filed in support hereof, or asserted by any other carrier in this lawsuit which are applicable to CNA, plaintiffs, Continental Casualty Company, Columbia Casualty Company, Transportation Insurance Company, and American Casualty Company of Reading, PA, request this Court to strike General Battery's Counterclaims, Cross-Claims and Third-Party Complaint in their entirety.

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