

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01153-CMA-MEH

MARY MARQUEZ, individually and as the personal representative of the Estate of Robert L. Balerio,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

ORDER

Michael E. Hegarty, United States Magistrate Judge.

Defendant BNSF Railway Company seeks an order requiring Plaintiff Mary Marquez to file an amended complaint pursuant to Federal Rule of Civil Procedure 12(e). Mot. for More Definite Statement, ECF No. 6. Because the Complaint provides sufficient detail for BNSF to respond, the Court denies BNSF's motion.

BACKGROUND

Ms. Marquez initiated this action on May 9, 2017, individually and on behalf of her deceased husband, Robert L. Balerio. ECF No. 1. Ms. Marquez claims Mr. Balerio was exposed to a variety of toxic chemicals while he was employed by BNSF's predecessor, Colorado and Southern Railway. *Id.* at ¶¶ 4–5. According to Ms. Marquez, the cumulative exposure to at least eight substances over Mr. Balerio's nine-year employment caused him to develop esophageal cancer. *Id.* at ¶¶ 6–7. The railway's negligence alleged resulted in Mr. Balerio's exposure to these chemicals. *Id.* at ¶¶ 8–9.

On June 30, 2017, BNSF responded to the Complaint by filing the present Motion for a More Definite Statement. ECF No. 6. BNSF contends the Complaint “lacks sufficient substantive information to allow [it] to perform an adequate pre-answer investigation and provide a meaningful answer.” *Id.* at 2. BNSF requests that this Court issue an order requiring Ms. Marquez to amend her Complaint and include “the specific substances, the specific types of exposure(s), the specific manner of the exposure(s), the locations of the exposure(s), and the specific time frames of the exposure(s) alleged to have injured [Mr. Balerio].” *Id.* at 6.

Ms. Marquez objects to such an order. Resp. to Mot. for More Definite Statement, ECF No. 15. According to Ms. Marquez, the Complaint provides BNSF with sufficient information to respond. *Id.* Moreover, Ms. Marquez contends she “cannot plead with the specificity that [BNSF] demands simply because her husband did not know he was being exposed to carcinogens at various points in his railroad career.” *Id.* at 3. BNSF filed its reply brief on July 19, 2017. ECF No. 23.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(e) provides:

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.

Therefore, “[r]equiring a more definite statement is appropriate when addressing unintelligible or confusing pleadings.” *Mechler v. United States*, No. 12-1183-EFM-GLR, 2012 WL 5289627, at *1 (D. Kan. Oct. 23, 2012). “A motion for more definite statement should not be granted merely because the pleading lacks detail; rather, the standard to be applied is whether the claims alleged are sufficiently specific to enable a responsive pleading in the form of a denial or admission.” *Emp’rs Mut. Cas. Co. v. Downey Excavation, Inc.*, No. 10-cv-02043-MSK-KMT, 2011 WL 1335839, at *1

(D. Colo. Apr. 7, 2011) (quoting *Advantage Homebuilding, LLC v. Assurance Co. of Am.*, No. 03-2426-KHV, 2004 WL 433914, at *1 (D. Kan. Mar. 5, 2004)). Accordingly, Rule “12(e) motions are discouraged unless the complaint is so unintelligible that defendants cannot understand the allegations and are unable to respond.” *Fed. Deposit Ins. Corp. v. Wise*, 758 F. Supp. 1414, 1418 (D. Colo. 1991). The decision to grant or deny a motion for more definite statement rests within the trial court’s sound discretion. *Emp’rs Mut. Cas. Co.*, 2011 WL 1335839, at *1.

ANALYSIS

The Court holds that Ms. Marquez’s Complaint is sufficient to withstand a Rule 12(e) motion. Ms. Marquez states that BNSF’s predecessor railway employed Mr. Balerio as a trackman/machine operator from 1971 to 1980. Compl. ¶ 4. Further, she alleges that during Mr. Balerio’s employment, he was exposed to “chemicals, solvents, diesel fuel/exhaust, benzene, heavy metals, creosote, manganese, and rock/mineral dust and fibers,” the combination of which caused his esophageal cancer. *Id.* at ¶¶ 5–6. She contends that Mr. Balerio’s cancer was not caused by any one substance on any one day; instead, it was caused by the cumulative effect of the toxins. *Id.* at ¶ 7. Finally, Ms. Marquez pleads that Mr. Balerio was exposed to these substances, because the railway negligently took or failed to take a variety of actions. *Id.* at ¶¶ 8–9. Therefore, the Complaint informs BNSF of when Mr. Balerio was employed, his job title, the chemicals that combined to cause his esophageal cancer, and the specific ways in which the railway acted negligently. Although BNSF may prefer more detail, the Complaint is far from being “so unintelligible that [BNSF] cannot understand the allegations.” *Fed. Deposit Ins. Corp.*, 758 F. Supp. at 1418.

The holdings of other judges within this District support the Court’s denial of BNSF’s

motion. In *Roddy York v. BNSF Railway Co.*, the court denied BNSF's Rule 12(e) motion in a nearly identical case. No. 17-cv-01088-RM-STV, 2017 WL 3017655 (D. Colo. July 14, 2017).

According to the court:

the Complaint is not so vague and ambiguous as to be unintelligible. It asserts that Plaintiff worked as a brakeman/conductor for Defendant for fifteen years. Through the course of his employment, he was exposed to various toxic substances and carcinogens. The Complaint further provides eleven examples of Defendant's alleged negligence that caused Plaintiff's bladder cancer.

Id. at *1. Similarly, the Complaint in this case states Mr. Balerio's occupation, his length of employment, the substances to which he was exposed, and ten examples of how BNSF's negligence caused Mr. Balerio's esophageal cancer. Compl. ¶¶ 4–9.

Conversely, in *Maxton v. United States*, the court granted the defendant's motion for a more definite statement. No. 12-cv-00383-WYD-BNB, 2013 WL 852379 (D. Colo. Mar. 6, 2013). The plaintiff in that case alleged, "I were Assaulted and Beaten per AHSA S. Collins having this done out of Retaliation from complaining about a [unintelligible word] medical kill on 2010 and per having U.S. Senator Lindsay Graham having them send me to a urologist." *Id.* at *1. The Court required the plaintiff to amend his complaint, because he did "not make clear the actions or inactions of each defendant and how those actions or inactions violate any particular statutory or constitutional provision." *Id.* at *2. Here, in contrast, Ms. Marquez provides at least ten of the railway's actions or inactions that caused Mr. Balerio's injuries. *See* Compl. ¶ 9. For example, the railway allegedly did not reduce, modify, or eliminate certain job duties so as to minimize exposure to chemicals; it failed to test railroad facilities for the presence of toxic materials; and it did not test employees for exposure to toxic chemicals. *Id.* Accordingly, unlike the plaintiff in *Maxton*, Ms. Marquez provides sufficient detail for BNSF to respond.

BNSF claims the Complaint is insufficient, because it does not state the “‘who, what, where, when, why, and how’ of [Mr. Balerio’s] alleged exposures and his ‘related diseases.’” Reply 2. The Court disagrees. Ms. Marquez alleges who was involved—Mr. Balerio and Colorado and Southern Railway. Compl. ¶ 4. She states what caused the injury—exposure to a variety of chemicals over time. *Id.* at ¶ 5. She lists 1971 to 1980 as the time frame for the injury. *Id.* at ¶ 4. Furthermore, Ms. Marquez alleges how the exposure occurred—by touch, inhalation, or consumption. *Id.* at ¶ 6. Rule 8 does not require additional detail. Indeed, given that Mr. Balerio is deceased, Ms. Marquez may not have the ability to obtain additional details except through discovery. To demand that Ms. Marquez know precisely when and where her husband was exposed to each substance would “require expansion of the pleadings through Rule 12(e) when discovery is the proper method for obtaining information.” *Warner v. Bank of Am., N.A.*, No. 11-cv-00342-LTB-KLM, 2011 U.S. Dist. LEXIS 148447, at *2–3 (D. Colo. Oct. 25, 2011). Although the Complaint does not state where Mr. Balerio worked, the precise location of his employment is not necessary to respond to the Complaint. Moreover, BNSF’s assertion in its reply brief that Mr. Balerio worked in the “La Junta yard” demonstrates it has at least some knowledge of where he worked.¹ Reply 5 n.1.

BNSF also argues that the Complaint is improper and overly vague, because Ms. Marquez’s counsel uses “the same boilerplate complaint” in other cases. Mot. for More Definite Statement 2. Even assuming this is true, it does not follow that BNSF is unable to prepare a response. Indeed, similar complaints may be appropriate, and even necessary, where employees were exposed to substantially similar chemicals over comparable time frames. Moreover, to the extent BNSF argues

¹ Contrary to BNSF’s contention, Ms. Marquez does not plead that Mr. Balerio worked in the La Junta yard.

that the boilerplate nature of the Complaint makes it overbroad, “[a] motion for more definite statement should not be granted merely because the pleading lacks detail.” *Advantage Homebuilding, LLC*, 2004 WL 433914, at *1; *Ivar v. Elk River Partners, LLC*, 705 F. Supp. 2d 1220, 1231 (D. Colo. 2010) (denying a Rule 12(e) motion, because “[w]hile perhaps not always drafted with crystalline precision, the amended complaint does not suffer from such blatant ambiguity”).

BNSF cites *Slinski v. CSX Transportation* as a railway toxic tort case where the court granted the defendant’s motion for a more definite statement. No. 07-CV-10270-DT, 2007 WL 1377931 (E.D. Mich. 2007). In that case, the court granted the Rule 12(e) motion, because the plaintiff failed to specify exactly what type of injury the employee suffered. *Id.* at *1. Additionally, the plaintiff’s use of the word “or” when listing the exposed chemicals indicated that the stated toxins were only possible causes of the injury. *Id.* Accordingly, the court held that the complaint did not provide specificity as to the type of chemicals that actually caused the injury. *Id.* at *1 n.1. Here, the Complaint specifically states the injury—esophageal cancer. Compl. ¶ 6. Moreover, when listing the chemicals to which Mr. Balerio was exposed, Ms. Marquez uses “and” instead of “or.” *Id.* at ¶ 5. Therefore, unlike *Slinski*, Mr. Balerio was allegedly exposed to all of the listed chemicals, not just an indeterminable subset. Accordingly, because Ms. Marquez provides substantially greater detail than did the plaintiff in *Slinski*, the Court does not find that case persuasive to its present analysis.

Lastly, BNSF argues that Ms. Marquez’s counsel is attempting to shift the burden and require “BNSF to *disprove* that [the] work place caused *any* disease or illness.” Reply 4. The Court disagrees. At summary judgment and trial, Ms. Marquez will still carry the burden of proving that

the combination of the asserted substances caused Mr. Balerio's cancer. If she cannot present evidence that at least some of these substances were present during Mr. Balerio's employment and contributed to his cancer, her claim will not survive summary judgment. Accordingly, the burden remains on Ms. Marquez to prove each of her allegations by a preponderance of the evidence.

CONCLUSION

The Complaint provides sufficient detail to permit BNSF to prepare a response. As such, the Court will not require Ms. Marquez to file an amended complaint with additional allegations. Accordingly, BNSF's Motion for a More Definite Statement [filed June 30, 2017; ECF No. 6] is **denied**.

Entered and dated at Denver, Colorado, this 27th day of July, 2017.

BY THE COURT:



Michael E. Hegarty
United States Magistrate Judge