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April 18, 2019


Edythe Nash Gaiser
Clerk of Court
West Virginia Supreme Court
Capital Complex
1900 Kanawha Blvd., East
Room E-317
Charleston, WV 25305

RE: Covestro, LLC v. Axiall Corporation, et al. (No. 18-C-202)
Consolidated with
Axiall Corporation v. AllTranstek, LLC, et al.
No. 18-C-203

Dear Ms. Gaiser:

Enclosed for filing please find two copies of Axiall Corporation's Sur-Reply Memorandum to Judicial Motion to Refer Case to Business Court Division.

Very truly yours,


Kathryn M. Kenyon

KMK/das
Enclosure

cc: Hon. David W. Hummel, Jr. (via U.S. mail only; w/encl.)
WV Business Court Division Attn. Carol A. Miller, Business Court Executive Director
(via U.S. mail only, w/encl.)
Ryan M. Krescanko, Esquire
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(Service on All Counsel via Electronic and U.S. mail)

MUS3216996

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COVESTRO, LLC,

Plaintiff

v.

Marshall County Circuit Court

Civil Action No. 18-C-202

HON. DAVID W. HUMMEL, JR.

AXIALL CORPORATION,
ALLTRANSTEK LLC, and RESCAR, INC.
t/d/b/a RESCAR COMPANIES,

Defendants

AXIALL CORPORATION,

Third-Party Plaintiff

v.

SUPERHEAT FGH SERVICES, INC.,

Third-Party Defendant

-----AND-----

AXIALL CORPORATION,

Plaintiff

v.

Marshall County Circuit Court

Civil Action No. 18-C-203

HON. DAVID W. HUMMEL, JR.

ALLTRANSTEK LLC, RESCAR, INC.
t/d/b/a RESCAR COMPANIES, and
SUPERHEAT FGH SERVICES, INC.,

Defendants

**SUR-REPLY MEMORANDUM TO JUDICIAL
MOTION TO REFER CASE TO BUSINESS COURT DIVISION**

Plaintiff Axiall Corporation (“Axiall”), by its undersigned counsel, submits this Sur-Reply Memorandum to the Judicial Motion to Refer Case to Business Court Division (the “Motion”) to correct the misstatements and inflammatory comments contained in the Reply Memorandum to Judicial Motion to Refer Case to Business Court Division filed by Defendants AllTranstek LLC (“AllTranstek”) and Rescar Companies (“Rescar”) (“Reply of AllTranstek and Rescar”).

As Axiall made clear in its Reply Memorandum to Judicial Motion to Refer Case to Business Court Division (“Axiall’s Reply”), it opposes the referral of these consolidated cases to the Business Court Division (the “Division”) on the grounds that Civil Action No. 18-C-203 filed by Axiall (“Axiall’s WV Action”) should be again stayed until Axiall’s nearly identical first-filed action in Pennsylvania is concluded.¹ Additionally, as Axiall argued in its Reply, the Order consolidating Axiall’s WV Action with Civil Action No. 18-C-202 filed by Covestro, LLC (“Covestro”) should be vacated because the consolidation of those cases will burden the parties and will not conserve judicial resources or avoid expenses.² Axiall does not believe, nor has it ever claimed, that the West Virginia Business Court Division is incapable of presiding over the

¹ On March 1, 2019 Axiall filed a Motion for Reconsideration of Order Lifting Stay, a true and correct copy of which is attached to Axiall’s Reply as Exhibit A. Defendants AllTranstek and Rescar filed a Response in Opposition to that Motion on March 6, 2019. On March 7, 2019, Axiall filed a Reply in Further Support of its Motion for Reconsideration of Order Lifting Stay, a true and correct copy of which is attached to Axiall’s Reply as Exhibit B.

² On March 20, 2019, Axiall and Covestro filed a Joint Motion for Reconsideration of Consolidation Order and Memorandum of Law in Support of the same, a true and correct copy of which is attached to Axiall’s Reply as Exhibit C.

consolidated cases. Indeed, nothing in Axiall's Reply suggests that to be true. While Axiall believes that the West Virginia Business Court Division is fully capable of handling the consolidated cases, it also believes that Axiall's claims should be heard in Pennsylvania in accordance with the parties' forum selection clause. (Compl., Tab 1, Terms and Conditions, ¶15) ("The litigation shall be commenced only in a Federal District Court or State court (the Civil | Commerce and Complex Litigation Center for the State court) located in Pittsburgh, Pennsylvania and each respective Party hereto submits to the jurisdiction of the court in which such litigation is commenced.") AllTranstek's and Rescar's contention that "Axiall does not feel that West Virginia's Business Court Division is capable of presiding over the instant lawsuit" (Reply of AllTranstek and Rescar at 2) is not only without merit but apparently was made in an attempt to mislead this Court regarding the positions actually taken by Axiall.

The same is true of AllTranstek's and Rescar's claim that Axiall misrepresented to this Court Covestro's agreement to be bound by the determinations made by the Pennsylvania Court. (Reply of AllTranstek and Rescar at 3.) Axiall's statements regarding Covestro's intentions were based on the following representations made by Covestro and Axiall in these parties' Joint Motion:

- "Moreover, the issue of liability for the release and Axiall's resulting damages will and should be tried in the Allegheny County Court of Common Pleas." (Axiall's Reply, Exhibit C, Memorandum in Support of Joint Motion at 7)
- "The PA Court's determination of liability will be binding in the Covestro action." (*Id.*)
- "Covestro has agreed to conduct discovery jointly with the PA action, does not wish to be directly involved in the litigation of liability for the release and does not wish to have any involvement in litigating Axiall's resulting damages." (*Id.*)
- "Rather, it is most efficient to first allow the PA Court to determine both liability for the release and Axiall's resulting damages (while Axiall's WV

case is stayed) and to then apply the PA Court's liability determination in Covestro's case, so that only the parties determined to be liable need participate in the litigation of Covestro's damages." (*Id.* at 7-8)

Based on these representations, Axiall certainly did not misrepresent Covestro's stated intentions to this Court.

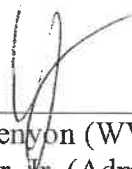
I. CONCLUSION

For the reasons set forth in Axiall's Reply and this Sur-Reply, the consolidated cases should not be transferred to the Division. Rather the consolidation order should be vacated and Axiall's WV Action should be again stayed and remain in the Circuit Court of Marshall County pending the conclusion of PA action.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Sur-Reply Memorandum to Judicial Motion to Refer Case to the Business Court Division were served upon counsel for defendants by electronic and first class United States mail, postage prepaid this 18th day of April, 2019 addressed as follows:

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