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April 17, 2019

File No. 9168-2088

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

Re: Covestro, LLC v. Axiall Corporation, et al. (18-C-202)  
Consolidated With  
Axiall Corporation v. AllTranstek, LLC, et al. (18-C-203)

Dear Ms. Gaiser:

Enclosed please find an original and one (1) copy of a **Reply Memorandum to Judicial Motion to Refer Case to Business Court Division** for filing on behalf of the Defendants, AllTranstek, L.L.C. and Rescar Companies, in these consolidated matters. Please return a file-stamped copy in the pre-addressed, postage paid envelope provided.

Thank you for your assistance in this regard. Should you have any questions or concerns, please feel free to contact me.

Very truly yours,

Michelle L. Gorman of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

MLG/kla  
Enclosures

cc(w/encl.): Hon. David W. Hummel, Jr.  
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WV Business Court Division, ATTN: Carol A. Miller, Business Court Executive Director

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COVESTRO, LLC,

Plaintiff,

CIRCUIT COURT OF MARSHALL  
COUNTY, WV

v.

CIVIL ACTION NO. 18-C-202

AXIALL CORPORATION,  
ALLTRANSTEK, LLC, and  
RESCAR COMPANIES,

HON. DAVID W. HUMMEL, JR.

Defendants,

and

AXIALL CORPORATION,

Third-Party Plaintiff,

v.

SUPERHEAT FGH SERVICES, INC.,

Third-Party Defendant.

----- *CONSOLIDATED WITH* -----

AXIALL CORPORATION,

Plaintiff,

CIRCUIT COURT OF MARSHALL  
COUNTY, WV

v.

CIVIL ACTION NO. 18-C-203

ALLTRANSTEK LLC,  
RESCAR COMPANIES, and  
SUPERHEAT FGH SERVICES, INC.,

HON. DAVID W. HUMMEL, JR.

Defendants.

**RESPONSE MEMORANDUM TO AXIALL'S REPLY  
TO JUDICIAL MOTION TO REFER CASE TO BUSINESS COURT**

AND NOW, COME, the Defendants, AllTranstek, LLC and Rescar Companies (collectively "these Defendants"), by and through their undersigned counsel, and submits this Response to Axiall

Corporation's ("Axiall") Reply Memorandum to Judicial Motion to Refer Case to Business Court Division.

## I. INTRODUCTION

These Defendants did not file a Response to the Judicial Motion to Refer Case to Business Court, as these Defendants do not oppose the transfer of these consolidated actions to the Business Court. These Defendants are also confident that these consolidated actions could proceed in a proper and efficient manner in the Circuit Court of Marshall County, WV.

In its 11-page memorandum, Axiall did not assert a single legal argument as to why these consolidated cases should not be transferred to the Business Court Division. The entire Memorandum is solely a reiteration of Axiall's Motion to Reconsider Order Lifting Stay and Motion for Reconsideration of Consolidation Order. It is unclear why Axiall opposes the transfer to the Business Court Division when the Pennsylvania case (which Axiall admitted is identical to the pending West Virginia matter) is pending before the Commerce and Complex Litigation Center of the Civil Division of the Court of Common Pleas of Allegheny County, PA. The Commerce and Complex Litigation Center is a specialized court which only hears complex commercial disputes.

As this court is aware, the West Virginia Business Court Division is also a specialized court which only hears complex commercial cases. It takes commercial cases out of the normal circuit court docket, gives those cases to judges who are trained to handle commercial matters, and then expedite the process so that these cases are resolved efficiently. Axiall's argument that these cases should not be transferred to Business Court in West Virginia when an identical case is pending in Pennsylvania's counterpart to the West Virginia Business Court Division is a slap in the face to this Court's jurisdiction. Apparently, Axiall does not feel West Virginia's Business Court Division is capable of presiding over the instant lawsuit.

Finally, Axiall argues that the Pennsylvania matter should continue and the West Virginia case should be stayed because the Pennsylvania matter is further along. This is simply misleading. Although some written discovery has been issued, the Pennsylvania matter is in the early stages of discovery and these Defendants have agreed to apply any discovery that has taken place in the Pennsylvania matter to the West Virginia case. As a result, this argument is without merit.

It should also be noted that on March 20, 2019, Axiall and Covestro filed a Joint Motion to Reconsider the Consolidation Order and in that Joint Motion, Axiall misrepresented to the Court that Covestro agreed to be bound by the determinations in the action filed by Axiall pending in the Court of Common Pleas of Allegheny County, PA. Covestro subsequently filed a separate document to address the misrepresentation made by Axiall so that the Court would be made aware that Covestro had not agreed to accept the determinations in the Pennsylvania action; rather, it would continue to prosecute its case in West Virginia – whether in the Business Court Division or the Circuit Court of Marshall County, West Virginia. *Id.* See Covestro’s Response to Axiall’s Reply Memorandum to Judicial Motion to Refer Case to Business Court, at pg. 1.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On or about August 27, 2016, there was a chlorine leak at the Axiall facility in Marshall County, West Virginia. It is alleged that the chlorine leak caused and continues to cause damage to the Covestro Plant (*Covestro Comp.* ¶¶ 14-26), the Axiall facility, and neighboring property (*Axiall Comp.* ¶¶ 23-28). As a result of the alleged damages from the chlorine leak, three (3) separate lawsuits have been filed, namely:

- a. The first case captioned above filed on August 24, 2018 at 2:06 p.m.;
- b. The second case captioned above filed on August 24, 2018 at 4:22 p.m.; and,

- c. A case pending in the Common Pleas Court of Allegheny County, Pennsylvania and captioned *Axiall Corporation v. AllTranstek, L.L.C., Rescar Companies, d/b/a Rescar Companies, Inc., and SuperHeat FGH Services, Inc.*, being Case No. GD-18-010944, assigned to the Honorable Christine Ward, which case was filed on August 24, 2018 at 3:27 p.m.

On January 22, 2019, Axiall filed a Motion requesting that its West Virginia lawsuit be stayed. The Court granted Axiall's Motion on January 28<sup>th</sup>, 2019. Subsequently, these Defendants filed a Motion to Lift the Stay. The Court lifted the stay on February 22, 2019. On the same day, these Defendants filed a Motion to Consolidate Axiall's West Virginia case with the Covestro action. The Court granted the consolidation motion on February 28, 2019. Although these Defendants had previously filed a Motion to Dismiss the West Virginia case, the Motion to Dismiss pending in Marshall County was voluntarily withdrawn on March 26, 2019. Since the Motion to Dismiss has been withdrawn, all allegations that Rescar and AllTranstek are making inconsistent arguments is moot.

### III. ARGUMENT

Axiall failed to state a single reason that the West Virginia Business Court is an improper forum for this case. Rule 29.04 defines business litigation, in pertinent part, as one or more pending actions in circuit court in which: (1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities actions. These consolidated cases fit squarely within the aforementioned definition.

Ironically, Axiall moved to have a virtually identical case transferred to the Commerce and Complex Litigation Center in Allegheny County, PA. The West Virginia Business Court Division is the counterpart to the Commerce and Complex Litigation Center in Allegheny County, PA. It would

seem to make sense that Axiall, therefore, would want the case to proceed in the Business Court in West Virginia, as well. It appears that Axiall's Reply Brief simply sets forth why it believes its case should not be in West Virginia at all. Yet more irony given that Axiall filed its case in West Virginia.

Although Axiall's arguments have no bearing on whether the consolidated cases should be transferred to the business division, these Defendants find it necessary to address Axiall's "arguments" in turn: (1) the order consolidating Axiall's WV action and the Covestro case should not be dissolved, and (2) the consolidated cases should be transferred to WV's Business Division.

**A. The Order Consolidating Axiall's WV Action and the Covestro Case Should Not Be Dissolved**

Contrary to Axiall's arguments, West Virginia Rule of Civil Procedure 42(a) makes it clear that these two cases should remain consolidated. Rule 42 states that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Consolidation is mandatory when two or more actions "arise out of the same transaction or occurrence." Civ. R. 42(b). The reason for the rule is to avoid unnecessary cost or delay and the necessity of two trial instead of one, therefore avoiding the possibility of judgments in direct conflict. *State ex rel. Bank of Ripley v. Thompson*, 149 W. Va. 183 (1964).

The facts and circumstances surrounding rail car AXLX 1702 and Axiall's Chlorine Spill—as well as the alleged and disputed potential liability of Axiall, AllTranstek, Rescar, and SuperHeat—would be litigated twice and tried twice should these actions not be consolidated.

Axiall – not Covestro, not Rescar, not AllTranstek, filed a Third-Party Complaint against SuperHeat in the Covestro case. Apparently, Axiall found it necessary to join SuperHeat in the

Covestro matter. This is additional evidence that these cases should remain consolidated, as the issues are related.

Axiall argues that consolidating these cases places an unnecessary burden on Covestro because it will “be compelled to participate in the extensive litigation of an issue in which it has absolutely no interest.” At the same time, however, Axiall represents to the Pennsylvania Court that “Covestro has agreed to conduct discovery in its lawsuit jointly with the discovery conducted in [the Pennsylvania] action.” Axiall further represents that “Covestro is certainly seeking to recover its damages from the party(ies) found to be liable in this action, it does not wish to be involved in the time-consuming and expensive litigation of that issue.” However, Covestro filed its own response, specifically denying ever stating that it agreed to apply the PA Court’s determination of liability regarding of its case. *See Covestro’s Response Memorandum to Axiall’s Reply Memorandum to Refer Case to Business Court Division at pg. 1.*

Axiall has argued that the findings of the Pennsylvania matter, which is identical to the pending West Virginia matter, will resolve the issues in the Covestro matter and that collateral estoppel will apply. Yet, Axiall argued that the Covestro and Axiall (WV) cases should not be consolidated. *See Plaintiff’s Reply Memorandum in Support of Motion to Reconsider Order Lifting Stay.* Axiall argued that “[t]he PA Court’s determination of liability will be entitled to collateral estoppel by all parties in the Covestro case.” *Id.* Axiall cannot have it both ways, it cannot argue that collateral estoppel will apply to the Covestro case while arguing that the cases are not similar enough to remain consolidated. It is axiomatic that the cases are similar and should be remain consolidated.

Even further, Axiall is suggesting that Covestro and the West Virginia courts should and will automatically invoke “offensive collateral estoppel.” It is worth noting that “offensive use of collateral estoppel is generally disfavored in this jurisdiction.” *Holloman v. Nationwide Mut. Ins. Co.*, 217 W. Va. 269, 275, 617 S.E.2d 816, 822 (2005). Based on Axiall’s arguments, Covestro,

who is a stranger to the Pennsylvania action, would be using collateral estoppel to its benefit because it would not be required to prove elements of its case. The application of offensive collateral estoppel is often disfavored “because it can engender the precise opposite incentive intended – rather than encouraging joinder and limiting repetitive litigation, inappropriate offensive application may instead encourage a party to deliberately avoid consolidation or joinder in the first action to ‘wait and see’ its outcome with nothing to lose and everything to gain.” *See Conley v. Spillers*, 171 W. Va. 584, 592, 301 S.E.2d 216, 223-24 (1984).

Moreover, invoking the doctrine of offensive collateral estoppel is not automatic and the trial court has “rather broad discretion in determining when it should be applied.” *Id.* Clearly, in the interests of judicial economy these cases should remain consolidated.

#### **B. Axiall’s West Virginia Action Should Not be Stayed**

Axiall filed the lawsuit against Rescar and AllTranstek in the Circuit Court of Marshall County, West Virginia. It was Axiall, not Rescar nor AllTranstek that chose to file the lawsuit in two different states simultaneously. If Axiall did not want this case to proceed then it should not have filed it in West Virginia in the first place. Axiall’s sole reason for doing so is because it was concerned about the statute of limitations. However, West Virginia Code §55-2-18 provides for one year extension of the statute of limitations due to involuntary dismissals, such as improper venue. The extension is granted whether the first action was in another state court or in a federal court. *Litten v. Peer*, 156 W. Va. 791, 197 S.E.2d 322, 1973 W. Va. LEXIS 273 (W. Va. 1973); *Stare v. Percy*, 617 F.2d 43, 1980 U.S. App. LEXIS 19934 (4th Cir. W. Va. 1980). There is simply no logical or legal reason as to why Axiall filed two identical lawsuits simultaneously in two separate jurisdictions. Most importantly, these cases belong in West Virginia because the subject incident occurred in West Virginia and all records relating to any damages are located in West Virginia.



#### IV. CONCLUSION

Based on the foregoing reasons, the consolidated cases should proceed in West Virginia regardless of whether the cases remain in the Circuit Court of Marshall County, WV or are transferred to the Business Court Division. The consolidation order should not be dissolved and Axiall's West Virginia action should not be stayed.

Respectfully submitted,

**LEWIS, BRISBOIS, BISGAARD & SMITH**

Date: April 17, 2019

By:



Michelle L. Gorman (WVSB #7329)

Thomas P. Mannion (WVSB #6694)

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COVESTRO, LLC,

Plaintiff,

CIRCUIT COURT OF MARSHALL  
COUNTY, WV

v.

CIVIL ACTION NO. 18-C-202

AXIALL CORPORATION,  
ALLTRANSTEK, LLC, and  
RESCAR COMPANIES,

HON. DAVID W. HUMMEL, JR.

Defendants,

and

AXIALL CORPORATION,

Third-Party Plaintiff,

v.

SUPERHEAT FGH SERVICES, INC.,

Third-Party Defendant.

----- *CONSOLIDATED WITH* -----

AXIALL CORPORATION,

Plaintiff,

CIRCUIT COURT OF MARSHALL  
COUNTY, WV

v.

CIVIL ACTION NO. 18-C-203

ALLTRANSTEK LLC,  
RESCAR COMPANIES, and  
SUPERHEAT FGH SERVICES, INC.,

HON. DAVID W. HUMMEL, JR.

Defendants.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing *Response Memorandum of Defendants, AllTranstek LLC and Rescar Companies, to Axiall's Reply to Judicial Motion to Refer Case to Business Court Division* was served via email transmission and

U.S. Mail, postage prepaid, this 17<sup>th</sup> day of April, 2019, upon the following:

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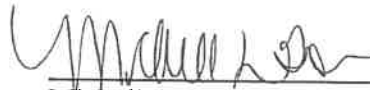
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By:



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*Counsel for Defendants,*

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March 20, 2019

West Virginia Supreme Court  
Edythe Nash Gaiser, Clerk of the Court  
Capitol Complex  
1900 Kanawha Boulevard East  
Room E-317  
Charleston, WV 25305

RE: Covestro, LLC v. Axiall Corporation, et al.  
Case No. 10-C-202  
Axiall Corporation v. AllTranstek, LLC, et al.  
Case No. 10-C-203

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Dear Ms. Gaiser:

Enclosed for filing on behalf of Axiall Corporation please find its Reply Memorandum to Judicial Motion to Refer Case to Business Court Division. Kindly time-stamp the extra cover sheet and return it to me in the self-addressed envelope provided.

Thank you in advance for your assistance in this matter.

Very truly yours,

Russell J. Ober, Jr.

RJO/das  
Enclosure

cc: Judge David W. Hummel, Jr.  
Kevin M. Eddy, Esquire  
Michelle L. Gorman, Esquire  
Thomas Mannion, Esquire  
Ryan M. Krescanko, Esquire  
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