

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

COVESTRO, LLC,

Plaintiff,

v.

AXIALL CORPORATION,
ALLTRANSTEK, LLC, and
RESCAR COMPANIES,

Defendants.

CIVIL ACTION NO. 18-C-202

HON. DAVID W. HUMMEL, JR.

JOSEPH M. RUCKI

2018 NOV 21 PM 12:14

FILED

**ANSWER OF DEFENDANTS, ALLTRANSTEK, LLC AND RESCAR COMPANIES, TO
CROSS-CLAIM OF DEFENDANT/CROSS-CLAIMANT, AXIALL CORPORATION**

AND NOW, COME, the Defendants, AllTranstek, LLC and Rescar Companies (hereinafter “AllTranstek” and “Rescar”), by and through their undersigned counsel, and for their Answer to the Cross-claim of Defendant/Cross-claimant Axiall Corporation, state as follows:

COMMON LAW INDEMNITY
Axiall v. AllTranstek and Rescar

1. Paragraph 1 of the Cross-claim does not require a response. To the extent a response is required, AllTranstek and Rescar deny that any act or omission on the part of either AllTranstek or Rescar contributed to the causation of any of the alleged injuries or damages. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in the following cases – one pending in the Common Pleas Court of Allegheny County, Pennsylvania (*Axiall Corporation v. AllTranstek, LLC and Rescar, Inc., t/d/b/a Rescar Companies, et al.*; GD-18-010944) and the other pending in this Court before the Honorable Jeffrey D. Cramer (*Axiall Corporation v. AllTranstek, LLC and Rescar Companies, et al.*; 18-C-203). AllTranstek and Rescar have filed Preliminary Objections in

the Pennsylvania case, which are set for Hearing on November 19, 2018. AllTranstek and Rescar have filed a Motion to Dismiss in the West Virginia case, a copy of which is attached hereto as Exhibit "A" and incorporated herein.

2. The allegations contained in Paragraph 2 of the Cross-claim set forth conclusions of law to which no response is required. To the extent a response is required, AllTranstek and Rescar are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Cross-claim, and therefore, such allegations are denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

3. The allegations contained in Paragraph 3 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

4. The allegations contained in Paragraph 4 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

EXPRESS INDEMNITY
Axiall v. AllTranstek and Rescar

5. The allegations contained in Paragraph 5 of the Cross-claim set forth conclusions of law to which no response is required. To the extent a response is required, AllTranstek and Rescar are without knowledge or information sufficient to form a belief as to the truth of the allegations contained

in Paragraph 5 of the Cross-claim, and therefore, such allegations are denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

6. The allegations contained in Paragraph 6 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

7. The allegations contained in Paragraph 7 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

8. The allegations contained in Paragraph 8 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

9. The allegations contained in Paragraph 9 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

10. The allegations contained in Paragraph 10 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other

cases (as more fully described in paragraph 1 above).

11. The allegations contained in Paragraph 11 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

12. AllTranstek and Rescar admit that Axiall Corporation sent railcar AXLX 1702 to Rescar's DuBois, Pennsylvania facility in January of 2016, but the remaining allegations contained in Paragraph 12 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in the two other cases (as more fully described in paragraph 1 above).

13. The allegations contained in Paragraph 13 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

14. The allegations contained in Paragraph 14 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

15. The allegations contained in Paragraph 15 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

17. AllTranstek and Rescar are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Cross-claim, and therefore, such allegations are denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

18. The allegations contained in Paragraph 18 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

19[1]. The allegations contained in the first Paragraph 19 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

19[2]. The allegations contained in the second Paragraph 19 of the Cross-claim are specifically denied. By way of further response, AllTranstek and Rescar state that the claims asserted by Axiall Corporation in its Cross-claim in this case are the very same claims asserted by Axiall Corporation in two other cases (as more fully described in paragraph 1 above).

AllTranstek and Rescar further state that any allegation contained in the Cross-claim not specifically responded to above is herewith specifically denied.

AFFIRMATIVE DEFENSES

First Defense

AllTranstek and Rescar incorporate by reference, as if fully set forth herein, any and all affirmative defenses asserted in their *Answer and Affirmative Defenses to Plaintiff's Complaint*.

Second Defense

The Cross-Claim of Axiall Corporation, in whole or in part, fails to state a claim upon which relief may be granted.

Third Defense

AllTranstek and Rescar deny any negligence or intentional wrongdoing in this case.

Fourth Defense

AllTranstek and Rescar exercised due care and diligence in all of the matters alleged in the Complaint, and no act or omission by AllTranstek and Rescar was the proximate cause of any damage, injury or loss to the Plaintiff.

Fifth Defense

The injuries, damages, and losses alleged in the Complaint, none being admitted, were caused, in whole or in part, by the actions or inactions of the Plaintiff, Co-Defendant, and/or non-parties over whom AllTranstek and Rescar exercised no control, had no opportunity to anticipate or right to control, and with whom AllTranstek and Rescar had no legal relationship by which liability could be attributed to them.

Sixth Defense

AllTranstek and Rescar assert that a nonparty(s) was wholly or partially at fault for the incident, injuries, and/or damages referred to in the Complaint and the recovery of the Plaintiff, if

any, must therefore be reduced by the percentage of fault chargeable to such nonparty(s). *See* W. Va. Code § 55-7-13d(a).

Seventh Defense

AllTranstek and Rescar deny any and all cross-claims, claims of indemnity, claims of contribution, claims of negligence and/or claims of wrongdoing or fault that may be asserted by any other party or non-party against them.

Eighth Defense

AllTranstek and Rescar adopt and incorporate by reference all other affirmative defenses stated by the Co-Defendant which are not specifically enumerated herein.

Seventh Defense

AllTranstek and Rescar assert the affirmative defenses of assumption of risk, contributory negligence, intervening causes, comparative fault, release, accord and satisfaction, statute of limitations, lack of personal and subject matter jurisdiction, lack of venue, and any other matter which constitutes an avoidance of liability or affirmative defense so as to preserve these defenses pending further discovery.

Seventh Defense

AllTranstek and Rescar assert that the Plaintiff's claims may be barred by the equitable doctrines of unclean hands, estoppel, waiver, laches and/or res judicata.

Eighth Defense

AllTranstek and Rescar assert that Axiall Corporation and/or Plaintiff may have failed to join necessary and indispensable parties to this action who may have caused and contributed to the alleged damages and injuries of Plaintiff, making resolution of this matter impossible.

Ninth Defense

This Defendant adopts and incorporates by reference any and all affirmative defenses available under Rule 8 and Rule 12 of the West Virginia Rules of Civil Procedure.

RESERVATION OF RIGHTS TO AMEND AFFIRMATIVE DEFENSES

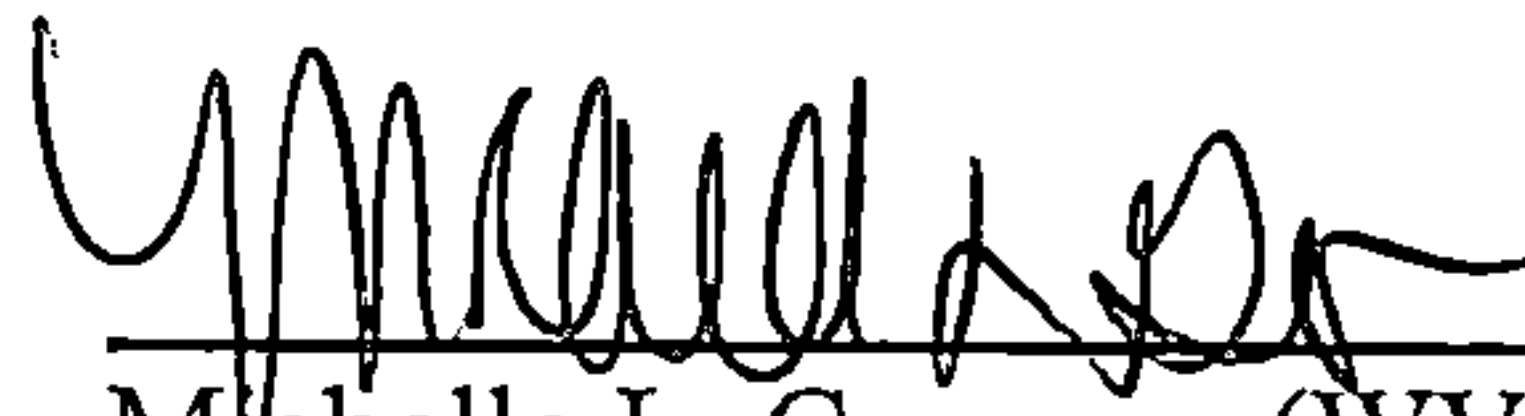
AllTranstek and Rescar reserve the right to supplement these Affirmative Defenses as discovery and equity permit.

WHEREFORE, the Defendants AllTranstek and Rescar, hereby pray that the Cross-claim against them be dismissed, with prejudice, and that they recover their costs and reasonable attorney's fees incurred herein, and for such other and further relief to which these Defendants may be entitled by law.

Respectfully submitted,

LEWIS, BIRSBOIS, BISGAARD & SMITH LLP

By:



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*Counsel for Defendants,
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IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

COVESTRO, LLC,

Plaintiff,

v.

AXIAL CORPORATION,
ALLTRANSTEK, LLC, and
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Defendants.

CIVIL ACTION NO. 18-C-202

HON. DAVID W. HUMMEL, JR.

JOSEPH M. BRUCKI

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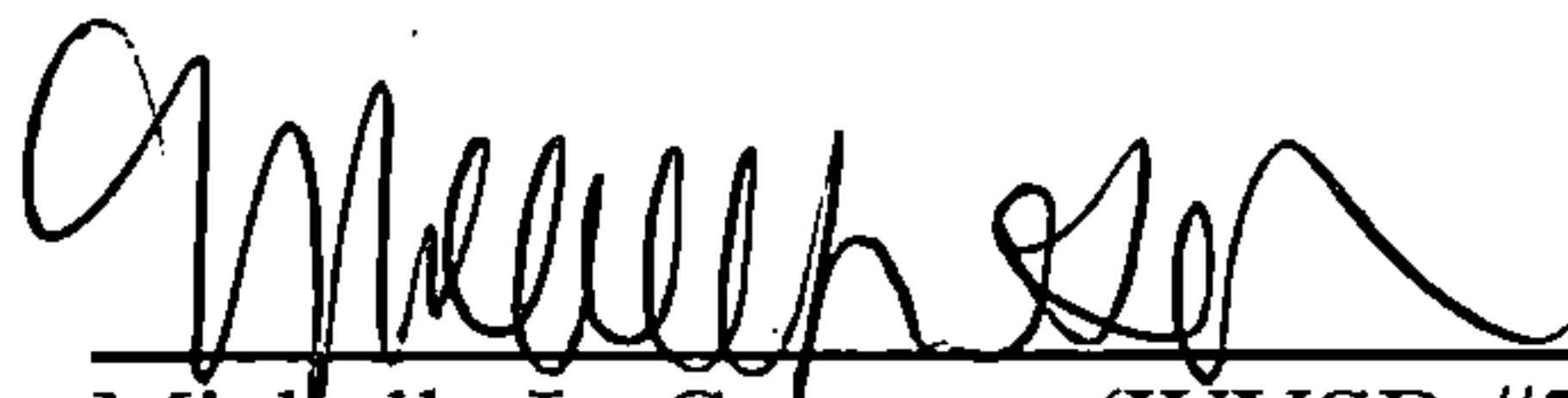
CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing *Answer of Defendants, AllTranstek LLC and Rescar Companies, to Cross-claim of Defendant/ Cross-claimant, Axial Corporation* was served, via regular U.S. Mail, postage prepaid, this 20th day of November, 2018, upon the following:

Kathryn M. Kenyon, Esq.
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Counsel for Defendant/Cross-claimant, Axial Corporation

Kevin M. Eddy, Esquire
BLANK ROME LLP
501 Grant Street, Suite 850
Pittsburgh, PA 15219
Counsel for Plaintiff

By:



Michelle L. Gorman (WVSB #7329)

*Counsel for Defendants,
AllTranstek LLC and Rescar Companies*

FILED

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

2018 OCT -6 AM 9:47

AXIAL CORPORATION,

Plaintiff,

JOSEPH M. RUCKI

v.

CIVIL ACTION NO. 18-C-203

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

HON. JEFFREY D. CRAMER

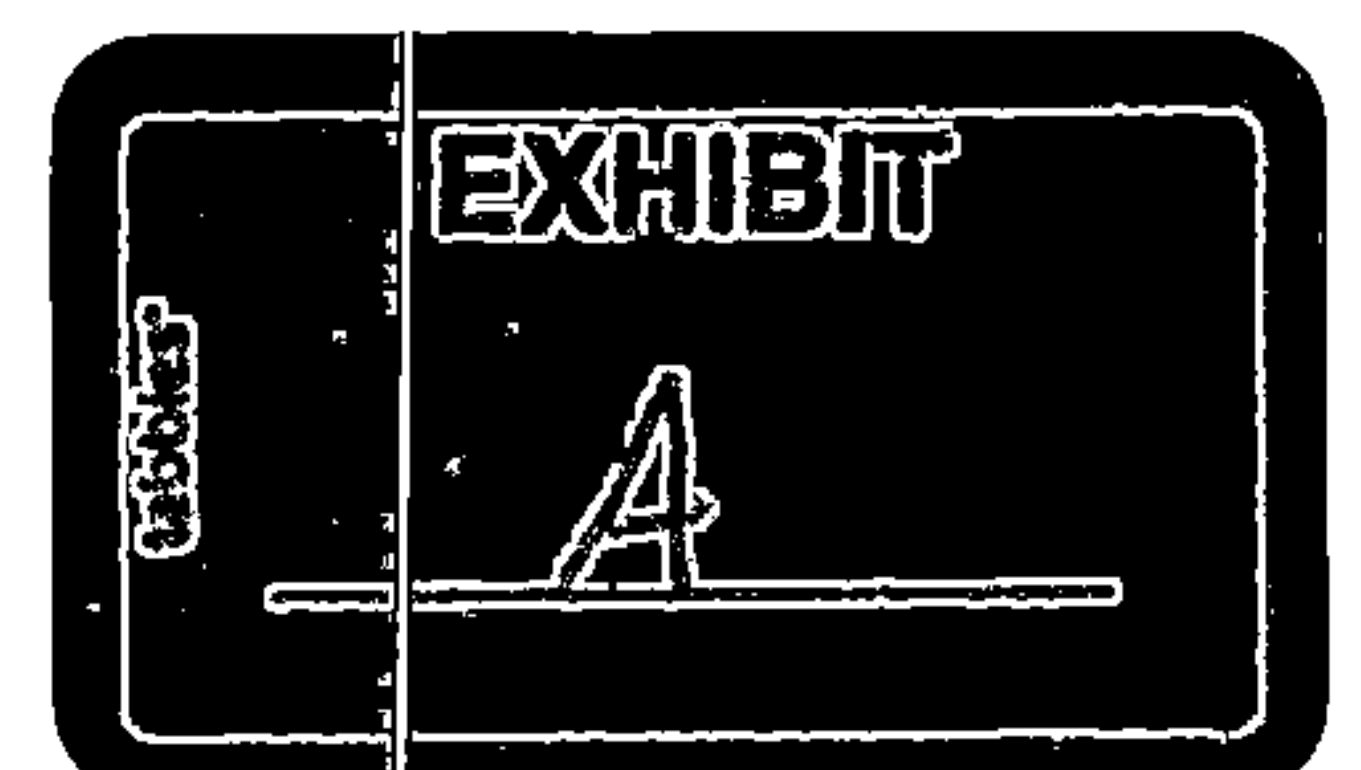
Defendants.

**MOTION TO DISMISS¹ OF DEFENDANTS, ALLTRANSTEK LLC AND
RESCAR COMPANIES, IN RESPONSE TO PLAINTIFF'S COMPLAINT**

AND NOW, COME, the Defendants, AllTranstek LLC ("AllTranstek") and Rescar Companies ("Rescar"), by and through their undersigned counsel, and respectfully move this Honorable Court for an order dismissing Plaintiff's Complaint, in its entirety, in accordance with the mandatory alternative dispute resolution clause and the forum-selection provision contained in the Subject Contract (defined below) alleged by Plaintiff to control the parties' relationship. In the alternative, Plaintiff's negligence claims against AllTranstek and Rescar should be dismissed under the "gist of the action" doctrine. In support of this Motion to Dismiss, Defendants AllTranstek and Rescar state as follows, and as more fully set forth in their Memorandum in Support filed simultaneously herewith.

1. Plaintiff, Axial Corporation ("Axial" or "Plaintiff") owns a facility in Natrium, West Virginia where it manufactures chlorine products. The company also owns and operates a fleet of railroad tank cars used to transport chlorine from the facility. Exhibit A, ¶8.

¹ Although this Motion is styled as a Motion to Dismiss, movants recognize that the use of exhibits transform it, procedurally, to a Motion for Summary Judgment.



2. Defendant AllTranstek provided railroad tank car fleet management services to Axiall. Exhibit A, ¶10.

3. Defendant Rescar provided railroad tank car maintenance and repair services to Axiall. Exhibit A, ¶11.

4. Plaintiff alleges in its Complaint that the relationship between Axiall and AllTranstek and Axiall and Rescar is governed by written contract.² Exhibit A, ¶12-13. Axiall has attached to its Complaint a copy of what is alleged as the relevant contract entitled “*Purchase Order General Conditions (Rev. 01/28/2013) for Axiall Corporation and All of Its Direct and Indirect Subsidiaries (Collectively, the “Buyer”*” (hereinafter “the Subject Contract”). See Exhibit A-1, §15.

5. The Subject Contract sets forth the parties’ obligations and duties, including a clause mandating a dispute resolution process, including mediation with the CPR Institute, as a precondition to initiating legal action if any dispute under the terms of Subject Contract occurs. Further, the Subject Contract contains a forum-selection provision stating that any litigation shall be filed only in Federal District Court or in the Commerce and Complex Litigation Center in Pittsburgh, Pennsylvania. *Id.*

6. The Complaint goes on to allege that Axiall sent a railroad tank car, AXLX1702, to Rescar in January 2016 for maintenance and repairs. See Exhibit A, ¶19 (incorrectly numbered as ¶3 page 3). Rescar allegedly performed the work on the tank car and AllTranstek allegedly inspected the tank car. See Exhibit A, ¶20, 22. On August 27, 2016, after it was loaded with liquid chlorine, AXLX1702 ruptured and liquefied chlorine escaped from the tank car and formed a chlorine plume, which allegedly caused property damage to Axiall’s facility and neighboring properties. See Exhibit

² Also attached to the Complaint are unsigned purchase orders between Axiall and AllTranstek and Axiall and Rescar that Plaintiff alleges were for AllTranstek’s and Rescar’s services and specifically incorporate the *Purchase Order General Conditions* (Exhibit A-1).

A, ¶23-26.

7. Axiall seeks to hold the Defendants liable for damages allegedly resulting from their actions and omissions. *See* Exhibit A, ¶32.

8. As a result of these events, Axial initiated this action on August 24, 2018, by filing a Complaint against Defendants AllTranstek, Rescar, and Superheat FGH Services, Inc. (“Superheat”), stating claims for Breach of Express Warranty, Breach of Contract, Negligence, Express Indemnity and Implied Indemnity/Contribution. *See* Exhibit A.

9. It is significant to note that on August 24, 2018, Plaintiff herein filed a substantially similar Complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, styled *Axiall Corporation v. AllTranstek, LLC, Rescar, Inc., t/d/b/a Rescar Companies, and Superheat FGH Services, Inc.*, being Case No. GD-18-010944, stating the exact same claims of Breach of Express Warranty, Breach of Contract, Negligence and Declaratory Judgment – Duty To Indemnify. *See* Exhibit B.³

10. Defendants AllTranstek and Rescar are filing their Motion to Dismiss in this case pursuant to Rule 12(b)(1), 12(b)(3) and 12(b)(6) of the West Virginia Rules of Civil Procedure.

11. In ruling on a Rule 12(b) motion to dismiss, a court ordinarily assumes the allegations stated in the complaint to be true, and construes the pleading in the light most favorable to the plaintiff. *State ex rel. McGraw v. Scott Runyan Pontiac Buick Inc.*, 461 S.E.2d 516, 522 (W. Va. 1995).

12. If a plaintiff can prove no set of facts in support of its claim which would entitle it to relief, the complaint should be dismissed. *Strum v. Board of Education of Kanawha County*, 672

³ This case should also be dismissed because the Pennsylvania case was actually filed first, at 3:34 p.m. on August 24, 2018, whereas this case was filed at 4:22 p.m. on August 24, 2018.

S.E.2d 606, 609 (W. Va. 2008).

13. West Virginia law favors settlement and parties resolving their disputes efficiently, wherever possible. *See* W.Va. Code § 55-10-2.

14. With regard to the instant matter, Plaintiff has specifically alleged that a valid agreement to mediate exists between Axiall, AllTranstek and Rescar. The Subject Contract contains a mandatory alternative dispute resolution clause. *See* Exhibit A-1, §15. Therefore, this Honorable Court must determine whether the claims set forth in Plaintiff's Complaint fall within the scope of the mediation provisions contained within the Subject Contract.

15. In this case, Section 15.1 of the Subject Contract states that the mandatory alternative dispute clause applies to all claims arising out of the Subject Contract, except those disputes related to a confidentiality obligation or collections on an undisputed delinquent account.⁴ Section 15.1 mandates that compliance with the terms of the clause are a precondition to instituting legal action.⁵ Axiall's claims against AllTranstek and Rescar arise directly from the express terms of the Subject Contract, and are unrelated to confidentiality obligations or collections on an undisputed delinquent account. *See* Exhibit A. Because Plaintiff has alleged that there is an express agreement to mediate, and this controversy clearly falls within the scope of the mandatory alternative dispute clause contained in the Subject Contract, then Plaintiff's Complaint should be dismissed.⁶

16. Further, pursuant to the Subject Contract, which Plaintiff relies upon in its Complaint, there is a forum-selection provision stating that litigation "shall be commenced only in a Federal

⁴"Except to the extent of a claim to enforce confidentiality obligations or to collect on an undisputed delinquent account, and as a precondition to instituting any legal action, any controversy, claim or dispute between Buyer and Seller arising out of or relating to the provisions of this Purchase order...." *See* Exhibit A-1, §15.

⁵ *Id.*

⁶ The Complaint alleges Superheat provided "services as a subcontractor to Rescar in connection with the work Rescar performed for Axiall" (Exhibit A, ¶17-18), so any claims against Superheat are a dispute about a subcontractor to Rescar performing services under the Subject Complaint, and therefore, would similarly fall under the alternative dispute resolution clause.

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.” See Exhibit A-1 §15.⁷

17. Under West Virginia law, “a valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent”. *Zimmerer v. Romano*, 223 W.Va. 769, 679 S.E. 2d 601, 610 (W.Va. 2009).

18. In addition, West Virginia is generally cautious in permitting tort recovery based on a breach of a contract. See *Backwater Props., LLC v. Range Resources Appalachia, LLC*, No. 1:10CV103, 2011 U.S. Dist. LEXIS 48496, 2011 WL 1706521 (N.D. W.Va. 2011). Known as the “gist of the action” doctrine, West Virginia recognizes that plaintiffs are precluded from recasting breach of contract claims as tort claims. *Id.* The question of whether the gist of the action doctrine applies is an issue of law. Axiall’s claims, if any at all, should be limited to a contract claim when it expressly alleges that the obligations of the parties are defined by contractual terms of the Subject Contract rather than social policies.

19. Here, Axiall’s negligence claims, as alleged against Rescar and AllTranstek, arise from a breach of contractual terms of the Subject Contract rather than violations of social policies. Therefore, pursuant to the gist of the action doctrine, Axiall’s claim arises from an alleged breach of contract claim, not a tort claim, as a matter of law. Moreover, Axiall’s claims for negligence are entirely dependent upon the express terms of the Subject Contract. The alleged breaches of the standard of care directly stem from Rescar’s and AllTranstek’s duties arising under the Subject

⁷ Plaintiff relies on this clause in the Subject Contract to establish jurisdiction in the Pennsylvania action. See Exhibit B-1, §15).

Contract, namely:

- a. *In failing to use ordinary care in the fulfillment of their work on or in connection with the railroad tank car;*
- b. *In failing to comply with the standard of care in the industry in performing their work on or in connection with the railroad tank car;*
- c. *In the case of Rescar, in failing to perform repair work with the minimal level of care required in order to prevent the railroad tank car's shell rupturing upon first post-repair use;*
- d. *In the case of AllTranstek, in failing to employ the reasonable care required to recognize that Rescar's repairs were faulty, and that the railroad tank car was not fit for return to chlorine service;*

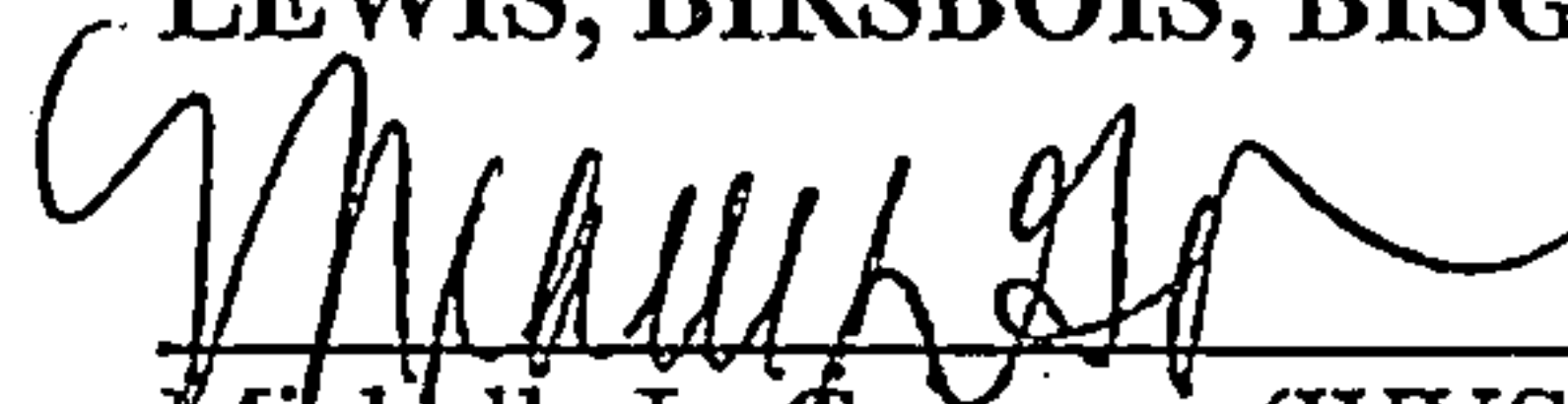
See Exhibit A, ¶55. The negligence claims are merely a way of restating the breach of contract claim. The gravamen of Axiall's negligence claim is that Rescar and AllTranstek, by their careless or negligent conduct, improperly failed to perform their contractual obligations. Therefore, Axiall's negligence claims are barred by the "gist of the action."

WHEREFORE, the Defendants AllTranstek and Rescar respectfully request that pursuant to Rule 12(b)(1), and/or Rule 12(b)(3), and/or Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and/or the "gist of the action" doctrine, this Honorable dismiss Plaintiff's Complaint and grant whatever other relief may be just and proper.

Respectfully submitted,

LEWIS, BIRSBOIS, BISGAARD & SMITH

By:



Michelle L. Gorman (WVSB #7329)

Thomas P. Mannion (WVSB #6694)

LEWIS BRISBOIS BISGAARD & SMITH

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304-224-2006; 304-224-2263 (Fax)

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Counsel for Defendants,

AllTranstek LLC and Rescar Companies

IN THE CIRCUIT OF COMMON OF MARSHALL COUNTY, WEST VIRGINIA
AXIAL CORPORATION,

Plaintiff,

v.

CIVIL ACTION NO.

ALLTRANSTEK LLC,
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HON. JEFFREY D. CRAMER

Defendants.

CERTIFICATE OF SERVICE

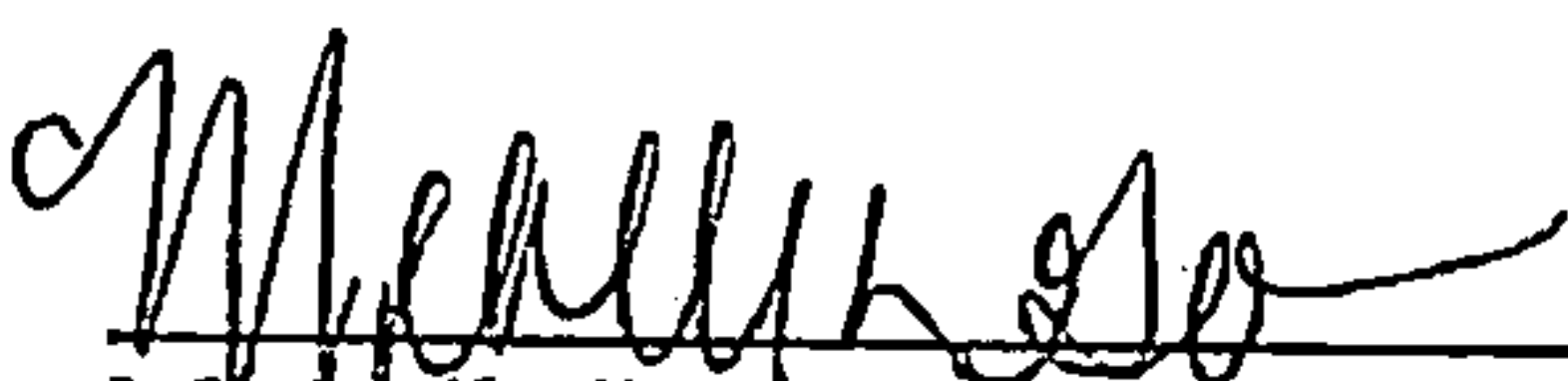
The undersigned does hereby certify that a true and correct copy of the foregoing *Motion to Dismiss* was served, via regular U.S. Mail, postage prepaid, this 3rd day of October, 2018, upon the following:

William D. Wilmoth, Esquire
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Russell J. Ober, Jr., Esquire (*pro hac vice* pending)
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Counsel for Plaintiff

*Superheat FGH Services, Inc.
313 Garnet Drive
New Lenox, IL 60451*

By: 
Michelle L. Gorman (WVSB #7329)
*Counsel for Defendants,
AllTranstek LLC and Rescar Companies*

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

AXIAL CORPORATION,

Plaintiff,

v.

ALLTRANSTEK LLC,
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SUPERHEAT FGH SERVICES, INC.,

Defendants.

CIVIL ACTION NO. 18-C-203

HON. JEFFREY D. CRAMER

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS¹ OF
DEFENDANTS, ALLTRANSTEK LLC AND RESCAR COMPANIES,
IN RESPONSE TO PLAINTIFF'S COMPLAINT**

AND NOW, COME, the Defendants, AllTranstek LLC ("AllTranstek") and Rescar Companies ("Rescar"), by and through their undersigned counsel, and for their Memorandum in Support of Motion to Dismiss state as follows:

I. INTRODUCTION

Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1), 12(b)(3) and 12(b)(6) of the West Virginia Rules of Civil Procedure in accordance with the mandatory alternative dispute resolution clause and the forum-selection provision contained in the Subject Contract (defined below) alleged by Plaintiff in its Complaint to control the parties' relationship. Additionally, Plaintiff's claims for negligence should be dismissed under the "gist of the action" doctrine.

II. RELEVANT BACKGROUND

Plaintiff, Axial Corporation ("Axial" or "Plaintiff") owns a facility in Natrium, West Virginia where it manufactures chlorine products. The company also owns and operates a fleet of railroad tank

¹ Although this Motion is styled as a Motion to Dismiss, movants recognize that the use of exhibits transform it, procedurally, to a Motion for Summary Judgment.

cars used to transport chlorine from the facility. Exhibit A, ¶8. Defendant AllTranstek provided railroad tank car fleet management services to Axiall. Exhibit A, ¶10. Defendant Rescar provided railroad tank car maintenance and repair services to Axiall. Exhibit A, ¶11.

Plaintiff alleges in its Complaint that the relationship between Axiall and AllTranstek and Axiall and Rescar is governed by written contract.² Exhibit A, ¶12-13. Axiall has attached to its Complaint a copy of what is alleged as the relevant contract entitled “*Purchase Order General Conditions (Rev. 01/28/2013) for Axiall Corporation and All of Its Direct and Indirect Subsidiaries (Collectively, the “Buyer”) (hereinafter “the Subject Contract”)*. See Exhibit A-1, §15. The Subject Contract sets forth the parties’ obligations and duties, including a clause mandating a dispute resolution process, including mediation with the CPR Institute, as a precondition to initiating legal action if any dispute under the terms of Subject Contract occurs. Further, the Subject Contract states that any litigation shall be filed in Federal Court or in State Court in Pennsylvania. *Id.*

The Complaint goes on to allege that Axiall sent a railroad tank car, AXLX1702, to Rescar in January 2016 for maintenance and repairs. See Exhibit A, ¶19 (incorrectly numbered as ¶3 page 3). Rescar allegedly performed the work on the tank car and AllTranstek allegedly inspected the tank car. See Exhibit A, ¶20, 22. On August 27, 2016, after it was loaded with liquid chlorine, AXLX1702 ruptured and liquefied chlorine escaped from the tank car and formed a chlorine plume, which allegedly caused property damage to Axiall’s facility and neighboring properties. See Exhibit A, ¶23-26. Axiall seeks to hold the Defendants liable for damages allegedly resulting from their actions and omissions. See Exhibit A, ¶32. As a result of these events, Axiall initiated this action on August 24, 2018 by filing a Complaint against Defendants AllTranstek, Rescar, and Superheat FGH Services,

² Also attached to the Complaint are unsigned purchase orders between Axiall and AllTranstek and Axiall and Rescar that Plaintiff alleges were for AllTranstek’s and Rescar’s services and specifically incorporate the *Purchase Order General Conditions* (Exhibit A-1).

Inc. ("Superheat"), stating claims for Breach of Express Warranty, Breach of Contract, Negligence, Express Indemnity and Implied Indemnity/Contribution. *See* Exhibit A.

It is significant to note that on August 24, 2018, Plaintiff herein filed a substantially similar Complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, styled *Axiall Corporation v. AllTranstek, LLC, Rescar, Inc., t/d/b/a Rescar Companies, and Superheat FGH Services, Inc.*, being Case No. GD-18-010944, stating the exact same claims for Breach of Express Warranty, Breach of Contract, Negligence, and Declaratory Judgment – Duty To Indemnify. *See* Exhibit B.³

III. STANDARD OF REVIEW

Defendants AllTranstek and Rescar are filing their Motion to Dismiss in this case pursuant to Rule 12(b)(1), 12(b)(3) and 12(b)(6) of the West Virginia Rules of Civil Procedure. In ruling on a Rule 12(b) motion to dismiss, a court ordinarily assumes the allegations stated in the complaint to be true, and construes the pleading in the light most favorable to the plaintiff. *State ex rel. McGraw v. Scott Runyan Pontiac Buick Inc.*, 461 S.E.2d 516, 522 (W. Va. 1995). If a plaintiff can prove no set of facts in support of its claim which would entitle it to relief, the complaint should be dismissed. *Strum v. Board of Education of Kanawha County*, 672 S.E.2d 606, 609 (W. Va. 2008).

IV. ARGUMENT

A. **In accordance with the mandatory alternative dispute resolution clause contained in the Subject Contract, this action should be dismissed.**

The Courts are divided as to whether failure to comply with a contractual pre-suit dispute resolution requirement deprives a court of jurisdiction under Rule 12(b)(1), or is more properly considered under Rule 12(b) (6). *See United States ex rel. Northstar Founds, Inc. v. Satterfield &*

³ This case should also be dismissed because the Pennsylvania case was actually filed first, at 3:34 p.m. on August 24, 2018, whereas this case was filed at 4:05 p.m. on August 24, 2018.

Pontikes Constr., Inc. 2013 U.S. Dist. LEXIS 201242 (N.D. W.Va. June 19, 2013). However, under West Virginia law, “a valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent”. *Zimmerer v. Romano*, 223 W.Va. 769, 679 S.E. 2d 601, 610 (W.Va. 2009).

West Virginia law favors settlement and parties resolving their disputes efficiently, wherever possible. *See* W.Va. Code § 55-10-2. With regard to the instant matter, Plaintiff has specifically alleged that a valid agreement to engage in an alternative dispute resolution process, including mediation, exists between Axiall, AllTranstek and Rescar. *See* Exhibit A-1, §15. Therefore, this Honorable Court must determine whether the claims set forth in Plaintiff’s Complaint fall within the scope of the mediation provisions contained within the Subject Contract.

In this case, Section 15.1 of the Subject Contract states that the mandatory alternative dispute clause applies to all claims arising out of the Subject Contract, except those disputes related to a confidentiality obligation or collections on an undisputed delinquent account.⁴ Section 15.1 mandates that compliance with the terms of the clause are a precondition to instituting legal action.⁵ Axiall’s claims arise directly from the express terms of the Subject Contract and are unrelated to confidentiality obligations or collections on an undisputed delinquent account. Because Plaintiff has alleged there is an express agreement to engage in an alternative dispute resolution process, including mediation, and this controversy clearly falls within the scope of the mandatory alternative

⁴“Except to the extent of a claim to enforce confidentiality obligations or to collect on an undisputed delinquent account, and as a precondition to instituting any legal action, any controversy, claim or dispute between Buyer and Seller arising out of or relating to the provisions of this Purchase order....” *See* Exhibit A-1, §15.

⁵ *Id.*

dispute clause contained in the Subject Contract, then Plaintiff's Complaint should be dismissed.⁶

The Southern District of West Virginia has recently addressed a case involving a contract requiring pre-suit mediation. *All. Consulting, Inc. v. Warrior Energy Res., LLC*, No. 5:17-cv-03541, 2017 U.S. Dist. LEXIS 128506 (S.D. W. Va. Aug. 14, 2017). In that case, Alliance Consulting filed suit against Warrior Energy under a contract involving mining permits. Alliance declined to complete permit applications after not being paid by Warrior for its work. Alliance filed suit and Warrior moved to dismiss, asserting that the parties' contract required pre-suit mediation. The Court determined that it didn't matter whether Rule 12(b)(1) or Rule 12(b)(6) was applied, the terms of the contract governed and dismissal was required. The same is true in the present case, as the Subject Contract relied upon by Plaintiff requires a pre-suit alternative dispute resolution process, including mediation.

B. This action should be dismissed based on the forum-selection provision contained in the Subject Contract.

Pursuant to the Subject Contract, which Plaintiff relies upon in its Complaint, there is a forum-selection provision stating that 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." *See* Exhibit A-1 §15.⁷

In 2009, the West Virginia Supreme Court of appeals had the first opportunity to address the substantive issues involving forum-selection clauses. *Caperton v. A.T. Massey Coal Co.*, 225 W.

⁶ The Complaint alleges Superheat provided "services as a subcontractor to Rescar in connection with the work Rescar performed for Axial" (Exhibit A, ¶17-18), so any claims against Superheat are a dispute about a subcontractor to Rescar performing services under the Subject Complaint, and therefore, would similarly fall under the alternative dispute resolution clause.

⁷ Plaintiff relies on this clause in the Subject Contract to establish jurisdiction in the Pennsylvania action. *See* Exhibit B-1, §15).

Va. 128, 690 S.E.2d 322 (2009). A forum-selection provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship. 17A Am Jur 2d Contracts § 259 at 255. Forum-selection clauses were historically disfavored, but that is no longer the case if they are fair and reasonable.

In the *Caperton* case, the court adopted the test set for the United States Court of Appeals for the Second Circuit.⁸ That test involves a four part analysis: (1) whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory or permissive; (3) whether the claims and the parties involved in the suit are subject to the forum-selection clause, and (4) whether the resisting party has rebutted the presumption of enforceability by making a showing that enforcement would be unreasonable and unjust.

With regard to the Subject Contract, it was drafted by and/or on behalf of Plaintiff, and therefore, was reasonably communicated to and known by Plaintiff. The clause is mandatory because it includes the term “shall”. The mandatory alternative dispute clause in this case applies to all claims with the exception of confidentiality and collections on an undisputed delinquent account. The subject case does not involve the collection of a delinquent account or confidentiality. Finally, Plaintiff cannot argue that the enforcement of its own contract terms would be unreasonable and unjust.

An analysis of the Subject Contract and the allegations contained in the Complaint reveals that all four elements of the *Caperton* test have been met. Therefore, the forum-selection provision should be enforced and this case should be dismissed due to improper venue under Rule 12 (b)(3) of the West Virginia Rules of Civil Procedure.

⁸ See *Phillips v. Audio Active Limited*, 494 F. 3d 378 (2d Cir. 2007).

C. West Virginia law precludes Axiall's claim of Negligence.

In addition, West Virginia is generally cautious in permitting tort recovery based on a breach of a contract. A negligence claim requires a breach of a duty of care. If the action is not maintainable without pleading and proving the contract, it is, in substance, an action in contract. *Cochran v. Appalachian Power Co.* 162 W. Va. 86, 92, 246 S.E. 2d 624, 628 (1978).

Recovery in tort will be barred if any of the following factors are demonstrated:

- (1) Where liability arises solely from the contractual relationship between the parties;
- (2) When the alleged duties breached were grounded in the contract itself;
- (3) Where any liability stems from the contract; and
- (4) When the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.⁹

Axiall's claims, if any at all, should be limited to contract-based claims when it expressly alleges that the obligations of the parties are defined by the contractual terms of the Subject Contract rather than social policies. Here, Axiall's negligence claims, as alleged against Rescar and AllTranstek, arise from a breach of contractual terms of the Subject Contract rather than violations of social policies. Therefore, pursuant to the "gist of the action" doctrine, Axiall's claims arise from an alleged breach of contract, not a tort claim, as a matter of law.

Moreover, Axiall's claims for negligence are entirely dependent upon the express terms of the Subject Contract. The alleged breaches of the standard of care directly stem from Rescar's and AllTranstek's duties arising under the Subject Contract, namely:

- a. In failing to use ordinary care in the fulfillment of their work on or in connection*

⁹ *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP* 231 W.Va. 577, 586, 746 S.E. 2d 568, 577 (2013).

with the railroad tank car;

- b. In failing to comply with the standard of care in the industry in performing their work on or in connection with the railroad tank car;*
- c. In the case of Rescar, in failing to perform repair work with the minimal level of care required in order to prevent the railroad tank car's shell rupturing upon first post-repair use;*
- d. In the case of AllTranstek, in failing to employ the reasonable care required to recognize that Rescar's repairs were faulty, and that the railroad tank car was not fit for return to chlorine service;*

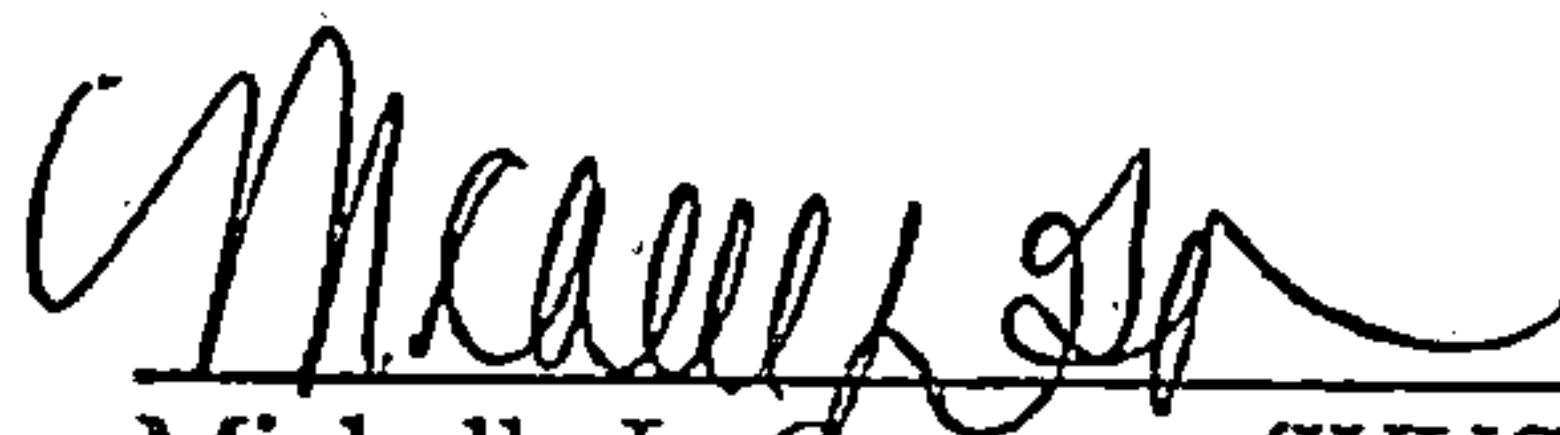
See Exhibit A, ¶55. The gravamen of Axiall's negligence claims is that Rescar and AllTranstek, by their careless or negligent conduct, improperly failed to perform their contractual obligations. The negligence claims are merely a way of restating the breach of contract claims and calling them "negligence". Therefore, Axiall's negligence claims are barred by the "gist of the action."

V. CONCLUSION

WHEREFORE, the Defendants AllTranstek and Rescar respectfully request, pursuant to Rule 12(b)(1), and/or Rule 12(b)(3), and/or Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and/or the "gist of the action" doctrine, that this Honorable Court dismiss Plaintiff's Complaint and grant whatever other relief may be just and proper.

Respectfully submitted,

LEWIS, BIRSBOIS, BISGAARD & SMITH

By: 
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FILED
2018 OCT -16 AM 10:11
JOSEPH M. RUCKI
IN THE CIRCUIT OF COMMON OF MARSHALL COUNTY, WEST VIRGINIA

AXIAL CORPORATION,

Plaintiff,

v.

CIVIL ACTION NO.

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

HON. JEFFREY D. CRAMER

Defendants.

CERTIFICATE OF SERVICE

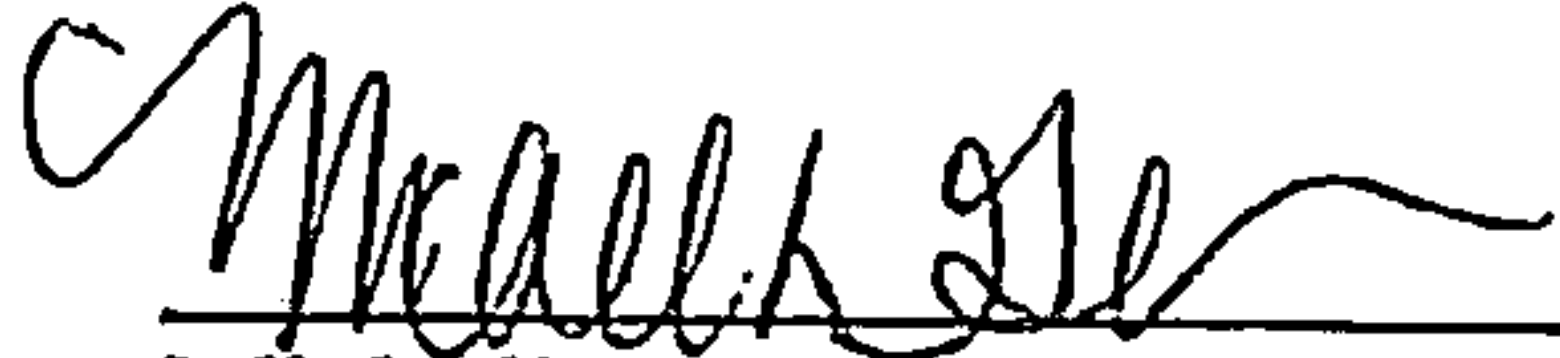
The undersigned does hereby certify that a true and correct copy of the foregoing *Memorandum in Support of Motion to Dismiss* was served, via regular U.S. Mail, postage prepaid, this 3rd day of October, 2018, upon the following:

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FILED

2018 NOV 21 PM 12:13

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November 20, 2018

File No. 9168-2088

Via FedEx Priority Overnight

Circuit Clerk
Circuit Court of Marshall County, WV
600 7th Street, Rm 127
Moundsville, WV 26041

Re: **Covestro v. AllTranstek, LLC, et al.**
18-C-202; Hon. David W. Hummel, Jr.

Dear Circuit Clerk:

Enclosed please find an original and one (1) copy of the **Answer of Defendants, AllTranstek, LLC and Rescar Companies, to Cross-claim of Defendant/Cross-claimant, Axiall Corporation** for filing in the above-referenced matter. 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,

A handwritten signature in black ink, appearing to read 'Michelle L. Gorman', with a long horizontal flourish extending to the right.

Michelle L. Gorman of
LEWIS BRISBOIS BISGAARD & SMITH LLP

MLG/kla
Enclosures

cc(w/encl.): Kevin M. Eddy, Esq.
Kathryn M. Kenyon, Esq.