

**IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
CIVIL DIVISION**

ALLTRANSTEK, LLC and
RESCAR COMPANIES

Plaintiffs,

v.

AXIAL CORPORATION,

Defendant.

Civil Action No. _____

Judge _____

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COME the Plaintiffs, AllTranstek, LLC (“*AllTranstek*”) and Rescar Companies (“*Rescar*”), by their undersigned counsel, and state for their causes of action against the Defendant, Axiall Corporation (“*Axiall*”), the following:

PARTIES

1. Axiall is a Delaware corporation which maintains its principal place of business at 2801 Post Oak Boulevard, Houston, Texas 77056.
2. AllTranstek is a Nevada limited liability company with a principal place of business located in Downers Grove, Illinois.
3. Rescar is a Nevada corporation with a principal place of business located in Downers Grove, Illinois.

JURISDICTION AND VENUE

4. Pursuant to W. Va. Code § 55-13-1, this Court has jurisdiction to “declare rights, status and other legal relations whether or not further relief is or could be claimed.” Therefore, this Court has jurisdiction over this matter.
5. Pursuant to W. Va. Code § 55-13-2, AllTranstek, Rescar, and Axiall are parties to

a Settlement Agreement and Mutual Release (“Settlement Agreement”), have an interest in the interpretation of the Settlement Agreement, and therefore, have standing to seek declaratory judgment to determine any questions as to the Settlement Agreement’s construction or validity.

6. This Court has jurisdiction over non-resident Axiall pursuant to W.Va. Code § 56-3-33(1), (3), and (6), because Axiall—at all relevant times—transacted business in West Virginia, entered into the subject Settlement Agreement in West Virginia, and has an interest in real property in West Virginia.

7. Venue is appropriate in the Marshall County Circuit Court pursuant to W.Va. Code § 56-1-1(1), because Marshall County, West Virginia is where the underlying cause of action arose and/or because the Settlement Agreement was executed in and involved litigation pending in Marshall County, West Virginia.

FACTUAL BACKGROUND

8. The initial controversy arises from the rupture of railroad tank car owned by Axiall that occurred on August 27, 2016 (the “*Incident*”) at Axiall’s facility in Natrium, West Virginia (the “*Natrium Plant*”).

9. Minutes before the rupture, Axiall filled the tank car with 90-tons of liquid chlorine. The underlying action alleges that Rescar made repairs to the subject tank car and AllTranstek provided fleet management and inspection services pertaining to the subject car.

10. The Incident resulted in chlorine gas escaping the tank car, traveling across portions of the Natrium Plant and onto portions of a neighboring properties—most notably a chemical plant operated by Covestro, LLC (“*Covestro*”).

Covestro’s Lawsuit

11. On August 24, 2018, Covestro commenced a civil action in the Circuit Court of

Marshall County, West Virginia, Civil Action No. 18-C-202 (the “*Covestro Action*”).

12. Covestro’s Complaint named Axiall, AllTranstek, and Rescar as defendants and sought damages for Covestro’s alleged property damages. (See Covestro’s Complaint attached as **Exhibit 1**).

13. On October 31, 2018, Axiall filed crossclaims against AllTranstek and Rescar in the Covestro Action asserting claims of defense, indemnification and attorney fees against AllTranstek and Rescar for any liability Axiall may have to Covestro in the Covestro Action.

Axiall’s Lawsuits

14. On August 24, 2018 (a few hours after the Covestro Action’s filing), Axiall commenced two civil actions against AllTranstek and Rescar: one in Allegheny County, Pennsylvania and one in Marshall County, West Virginia.

15. Axiall filed a Complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, Case No. G.D. 18-010944 (the “*Pennsylvania Action*”), which was ultimately assigned to Judge Christine A. Ward. (See Axiall’s Pennsylvania Complaint attached as **Exhibit 2**).

16. Axiall filed a nearly identical Complaint in the Circuit Court of Marshall County, West Virginia, Civil Action No. 18-C-203 (the “*West Virginia Action*”), which was ultimately assigned to Judge Christopher Wilkes. (See Axiall’s West Virginia Complaint attached as **Exhibit 3**).

17. In the Pennsylvania Action, Axiall asserted against Rescar claims for: (1) breach of express warranty; (2) breach of contract; (3) negligence; and (4) declaratory judgment. (See Exhibit 2). Axiall asserted the same claims against AllTranstek—although Axiall’s claims against AllTranstek were based upon different services and different purchase orders.

18. In the West Virginia Action, Axiall asserted the same claims against Rescar and AllTranstek that Axiall asserted in the Pennsylvania Action, with the addition of a claim for “Implied Indemnity/Contribution.” (See Exhibit 3, Count V, ¶¶ 65-67).

19. In the Pennsylvania Action and West Virginia Action, Axiall also named as a defendant Superheat FGH Services, Inc. (“*Superheat*”), a Canadian company that performed remote monitoring of postweld heat treatment on the subject tank car.

20. The Covestro Action and the West Virginia Action were consolidated for purposes of discovery and Judge Wilkes presided over the consolidated actions.

Trial in the Pennsylvania Action

21. Although the Covestro Action was the first filed action related to the Incident, Axiall sought to prosecute the Pennsylvania Action first.

22. The Pennsylvania case proceeded to trial in September of 2021. On October 14, 2021, after a six-week jury trial, the jury in the Pennsylvania Action returned a verdict. The jury determined that Axiall, AllTranstek, and Rescar were each negligent and causally contributed to the Incident. The jury found that Superheat was not negligent. Pursuant to Pennsylvania’s Fair Share Act, the jury in the Pennsylvania Action allocated 40% fault to Axiall, 20% to AllTranstek, and 40% to Rescar.

23. The jury in the Pennsylvania Action determined that Axiall incurred \$12.8 million in compensatory damages resulting from the Incident, which the jury divided into three categories: (1) Axiall’s lost profits, (2) damage to Axiall’s property, and (3) amounts Axiall paid to settle third-party claims.

24. Judge Christine Ward, in the Pennsylvania Action, determined that all issues related to the Covestro Action would be determined in the Covestro Action, and not by the jury in the

Pennsylvania Action.

25. On February 16, 2022, Judge Ward granted, in part, and denied, in part, Axiall's Motion to mold the jury's verdict to include attorneys' fees, pre-judgment interest, and delay damages.

26. On August 10, 2022, after conducting a hearing on Axiall's alleged attorneys' fees, the court entered a judgment in the amount of \$22,589,524.71, plus post-judgment interest (the "*Judgment*"). The Judgment included attorneys' fees, costs, and expenses in the amount of \$8,324,073.25.

27. During the hearing on attorneys' fees, Axiall never identified the portion of its alleged costs, expenses, and attorneys' fees that Axiall incurred in defense of third-party claims asserted against Axiall.

28. At the time of the attorneys' fees hearing in the Pennsylvania case, the Covestro Action was still pending and remained unresolved.

29. A portion of the attorneys fees' that Axiall submitted into evidence during the attorneys' fees hearing included invoices totaling \$1,050,121 from the law firm of Steptoe & Johnson. Steptoe & Johnson did not represent Axiall in the Covestro Action and its legal services primarily involved settling third-party claims on behalf of Axiall and defending Axiall against third-party claims.

30. The Pennsylvania Judgment did not identify what portion, if any, of the \$8,324,073 was attributable to costs, expenses, and attorneys' fees that Axiall incurred in defense of the third-party claims—as opposed to costs, expenses, and attorneys' fees Axiall incurred in litigating and pursuing the Pennsylvania Action.

31. On October 21, 2022, Axiall dismissed its West Virginia Action with prejudice.

Appeal of the Pennsylvania Judgment

32. AllTranstek and Rescar timely appealed the Judgment in the Pennsylvania Action to the Superior Court of Pennsylvania, Case No. 966 WDA 2022, based upon, *inter alia*, the trial court's denial of Rescar's post-trial motions and the trial court awarding Axiall \$8,324,073.25 in costs, expenses, and attorneys' fees.

33. On appeal, AllTranstek and Rescar argued that the trial court erred when it awarded Axiall \$8,324,073.25 in costs, expenses, and attorneys' fees in violation of the American Rule. AllTranstek and Rescar argued that Section 13.1 of Axiall's Terms and Conditions did not qualify as a "clear agreement of the parties" that allowed Axiall—as the purported "prevailing party" in the Pennsylvania Action—to shift to AllTranstek and Rescar the costs Axiall incurred in pursuing and litigating the Pennsylvania Action.

34. Axiall filed a cross-appeal in the Pennsylvania Action with the Superior Court of Pennsylvania, Case No. 1016 WDA 2022, asserting various evidentiary errors.

35. The Superior Court of Pennsylvania affirmed, in part, and reversed, in part, the Judgment. (See Superior Court Opinion attached as **Exhibit 4**).

36. The Superior Court affirmed the \$12.8 million jury verdict.

37. The Superior Court vacated the \$8,324,073.25 award for attorneys' fees, costs, and expenses.

38. The Superior Court found that the trial court erred by interpreting Paragraph 13.1 of Axiall's Terms and Conditions as a fee-shifting provision that entitled Axiall to recover costs, expenses, and attorneys' fees that Axiall incurred in pursuing and litigating the Pennsylvania Action. According to the Superior Court, the indemnification obligations contained in Paragraph 13.1 applied only to costs, expenses, and attorneys' fees that Axiall incurred in defense of third-

party claims—not costs, expenses, and fees that Axiall incurred in the Pennsylvania Action or in pursuit of Axiall’s own claims.

39. The Superior Court vacated the entire \$8,324,073.25 attorneys’ fees award and remanded the case to the trial court with instruction to enter a new judgment that included only fees Axiall incurred in defending against and settling third-party claims asserted against Axiall.

40. Because the Superior Court affirmed the \$12.8 million compensatory damages jury verdict, Axiall’s cross-appeal was moot.

Settlement of the Covestro Action

41. While the parties awaited a decision from the Superior Court of Pennsylvania, the Covestro Action settled at a November 3, 2023 Settlement Conference with the Court.

42. The parties to the Covestro action, including Covestro, Axiall, Rescar and AllTranstek, memorialized the settlement reached during the Settlement Conference in a Memorandum of Understanding, signed off on by all of the parties (See “*Memorandum of Understanding*” attached as **Exhibit 5**)

43. Covestro’s claims against Rescar, AllTranstek, and Axiall were forever discharged, released, and dismissed as a result of the settlement reached among the parties.

44. Axiall’s crossclaims against AllTranstek and Rescar in the Covestro Action were forever discharged, released, and dismissed.

45. The Covestro Action was dismissed with prejudice.

46. On or about December 15, 2023, Covestro, Axiall, AllTranstek, and Axiall (collectively, the “*Parties*”) entered into a Settlement Agreement and Mutual Release. (See “*Settlement Agreement*” attached as **Exhibit 6**). The terms of the Memorandum of Understanding (Exhibit 5) are part of the Settlement Agreement.

47. The Settlement Agreement defined and used the term the “West Virginia litigation” to collectively refer to the Covestro Action (No. 18-C-202) and the West Virginia Action (No. 18-C-203). (Exhibit 6, p. 2).

48. As part of the Settlement Agreement, AllTranstek and Rescar agreed to pay Covestro \$11 million in exchange for Covestro releasing all claims against AllTranstek, Rescar, and Axiall. (Exhibit 6, ¶¶1-2).

49. Axiall agreed to reimburse AllTranstek and Rescar 40% of the \$11 million settlement payment if the Judgment in the Pennsylvania Action “...is reversed and remanded such that no contract/warranty claims are part of the judgment...” (Exhibit 6, ¶ 5).

50. The Settlement Agreement provides:

Axiall agrees it will not seek any attorney fees or other fees and expenses from AllTranstek/Rescar related to the West Virginia litigation. AllTranstek and Rescar agree that this provision will not be deemed to reduce any attorney fees or expenses included in the Allegheny County judgment, to the extent that the same are affirmed on appeal.

(Exhibit 6, ¶ 6).

51. Paragraph 18 of the Settlement Agreement further provides:

It is understood and agreed by the Parties that each is obligated to pay its own costs of suit, including attorneys’ fees and expenses, if any, arising from or related to the above-captioned actions, including but not limited to, those costs and attorney’s fees associated with all litigation related to or arising out of the above-captioned civil actions.

(Exhibit 6, ¶ 18) (emphasis added).

A Real Case and Controversy Exists

52. On or about June 24, 2024, Attorney Brad Whalen, counsel for Axiall, emailed counsel for AllTranstek and Rescar indicating that Axiall intends to pursue costs, expenses, and attorneys’ fees that Axiall allegedly incurred in the Covestro Action and/or in defense of

Covestro's claims against Axiall as part of the recovery of attorney fees in the Pennsylvania action. (See June 24, 2024 email attached as **Exhibit 7**)

53. Attorney Whalen stated that, on remand in the Pennsylvania Action, Axiall would be seeking to recover \$4.8 million in costs, expenses, and attorneys' fees that Axiall incurred in the Covestro Action and/or in defense of Covestro's claims against Axiall.

54. Attorney Whalen arrived at \$4.8 million by first subtracting \$1 million (Steptoe & Johnson's fees) from \$8.3 million (the vacated attorneys' fees award in the Pennsylvania Action). In his correspondence, Attorney Whalen argued that Axiall incurred two-thirds of the \$7.3 million (\$4.8 million) in the Covestro Action and/or in defense of Covestro's claims against Axiall.

55. On or about July 1, 2024, Axiall filed *Axiall Corporation's Motion for Attorney Fees Incurred on Appeal* in the Pennsylvania action. (See "July 1, 2024 Motion for Attorney Fees Incurred on Appeal" attached as **Exhibit 8**).

56. In the July 1, 2024 Motion for Attorney Fees, Axiall seeks the portion of previously awarded attorneys' fees related to third party claims and attorney fees related to third party claims which were incurred on appeal. (Exhibit 8, ¶4).

57. The July 1, 2024 Motion for Attorney Fees also states that Axiall seeks to recover the *substantial* attorneys' fees related to third-party claims it has incurred in the appeals of this matter. (Exhibit 8, ¶13).

58. The July 1, 2024 Motion for Attorney Fees in conjunction with the June 24, 2024 email, indicate that Axiall is clearly seeking to recover attorney fees, including fees incurred in the Covestro action.

59. AllTranstek and Rescar assert that pursuant to the Settlement Agreement, Axiall expressly waived its right to recover any costs, expenses, and attorneys' fees that Axiall allegedly

incurred in the Covestro Action or in defense of Covestro's claims against Axiall.

60. Axiall's stated position and plan to pursue \$4.8 million in costs, expenses, and attorneys' fees "related to the West Virginia litigation"—which includes the Covestro Action—deprives AllTranstek and Rescar the benefit of their bargain and a material part of the consideration supporting the Settlement Agreement.

61. In the Settlement Agreement, AllTranstek and Rescar agreed to pay the entire \$11 million settlement payment to Covestro—with no financial contribution from Axiall—in exchange for Axiall waiving and promising not to pursue costs, expenses, and attorneys' fees that Axiall allegedly incurred in the Covestro Action, incurred in the defense/resolution of Covestro's claims against Axiall, and/or were "related to" the Covestro Action. (Exhibit 5, ¶ 6).

62. The Superior Court of Pennsylvania vacated the entire \$8,324,073.25 attorneys' fees award in the Pennsylvania Action.

63. AllTranstek and Rescar are not attempting to use Paragraph 6 of the Settlement Agreement to "reduce" attorneys' fees or expenses included in the Allegheny County Judgment, because the Judgment in the Pennsylvania Action was vacated.

64. Axiall is intentionally misconstruing the second sentence of Paragraph 6 of the Settlement Agreement. The subject provision in Paragraph 6 would apply, for example, if the Superior Court of Pennsylvania *affirmed* the trial court's \$8,324,073.25 attorneys' fees award. In that scenario, Rescar and AllTranstek would be prevented from using Paragraph 6 of the Settlement Agreement to reopen the affirmed Judgment and try to reduce the awarded fees.

65. The second sentence of Paragraph 6 of the Settlement Agreement has no impact on Paragraph 18 of the Settlement Agreement, in which Axiall agreed it would bear its own costs of suit, including attorney's fees "arising from or related to the above-captioned actions..."

(Exhibit 5, ¶ 18). The “above-captioned actions” included the Covestro Action and the West Virginia Action—both of which sought to recover from AllTranstek and Rescar costs, expenses, and attorneys’ fees that Axiall allegedly incurred in defense of Covestro’s claims against Axiall.

66. A real case or controversy exists regarding the interpretation of the Settlement Agreement and the contractual rights under the Settlement Agreement.

67. On or about March 3, 2025, Axiall filed a Motion for Status Conference in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking a status conference and a hearing date on the issue of attorneys’ fees attributable to settlement and defense of third party claims. (*See “Motion for Status Conference”* attached as **Exhibit 9**).

COUNT I (Declaration of Rights and Responsibilities of Parties)

68. AllTranstek and Rescar incorporate Paragraphs 1-67 of this Complaint as if fully restated herein.

69. AllTranstek and Rescar request the court to issue the following declarations applying West Virginia law and based upon the plain language of the Settlement Agreement:

- a. That by executing the Settlement Agreement, Axiall waived all claims and right to recover costs, expenses, and attorneys’ fees: (1) Axiall incurred in the Covestro Action, (2) Axiall incurred in defending itself against Covestro’s claims against Axiall, and (3) Axiall incurred in settling/resolving the Covestro Action (collectively, “***Covestro Fees***”).
- b. That Axiall is precluded from seeking to recover the Covestro Fees from AllTranstek and/or Rescar in the Pennsylvania Action upon remand from the Pennsylvania Superior Court pursuant to the Covestro Settlement Agreement.
- c. That pursuant to Paragraph 19 of the Settlement Agreement, AllTranstek and Rescar are entitled to recover attorneys’ fees and costs incurred in relation to this declaratory action.

WHEREFORE, for the reasons stated above, AllTranstek and Rescar ask this Honorable Court to issue the requested declaratory relief and award AllTranstek and Rescar its costs,

expenses, and attorneys' fees incurred in this action.

COUNT II (Contractual Attorneys' Fees)

70. AllTranstek and Rescar incorporate Paragraphs 1-69 of this Complaint as if fully restated herein.

71. Paragraph 19 of the Settlement Agreement provides:

In the event that any party has to seek enforcement of the Agreement it is agreed that the party seeking enforcement, if the party is successful, is entitled to recover attorneys' fees and costs.

(Exhibit 5, ¶ 19).

72. In this action, AllTranstek and Rescar seek to enforce the Settlement Agreement and therefore, are entitled to their costs, expenses, and attorneys' fees.

WHEREFORE, for the reasons stated above, AllTranstek and Rescar ask this Honorable Court to find Axiall liable to AllTranstek and Rescar in an amount that equals the amount of costs, expenses, and attorneys' fees that AllTranstek and Rescar have incurred in pursuing this action.

Respectfully submitted,

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