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March 28, 2016

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
March 28, 2016
Part of
Public Record

Re: STB Finance Docket No. 36014, Ingredion, Inc. – Petition for Declaratory Order

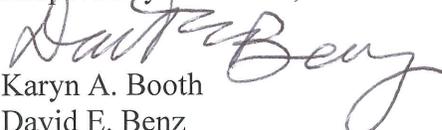
Dear Ms. Brown:

Ingredion, Inc. (“Ingredion”) filed a Petition for Declaratory Order (“Petition”) in the above-captioned proceeding on March 24, 2016. Attached to the Petition were several exhibits, including a Notice of Removal (“Notice”) and a Motion to Dismiss or, in the Alternative, Stay (“Motion”) that were also filed on March 24th in the U.S. District Court for the Northern District of Illinois.

Due to the coordination necessary to complete the various documents that were filed on March 24th at the Surface Transportation Board (“Board”) and the U.S. District Court, the Notice and Motion that were attached as Exhibits to Ingredion’s Petition were not date-stamped, and the Motion was unsigned and consisted only of the Memorandum in Support. To ensure that the Board has the signed and date-stamped court filings, with the Case Number assigned by the U.S. District Court, Ingredion is hereby submitting the Notice and complete Motion, date-stamped by the court, as attachments to this letter.

Ingredion respectfully requests that the Board accept these documents into the record in this proceeding pursuant to 49 CFR § 1117.1. No party will be prejudiced by the Board’s acceptance of these documents given that no other filings have been made in this proceeding so far and also that the Petition itself was filed just a few days ago.

Respectfully submitted,


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David E. Benz
THOMPSON HINE LLP, and

Rodney Perry
BRYAN CAVE LLP
Attorneys for Ingredion, Inc.

cc: Counsel for Coulas Viking Partners LP
Counsel for The Belt Railway Company of Chicago

enclosures

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COULAS VIKING PARTNERS,
an Illinois general partnership,

Plaintiff,

v.

THE BELT RAILWAY COMPANY OF
CHICAGO, an Illinois corporation, and
INGREDION INCORPORATED f/k/a Corn
Products Manufacturing Company, a Delaware
corporation,

Defendants.

Case No. 16-cv-3583

DEFENDANT INGREDION INCORPORATED'S NOTICE OF REMOVAL

Defendant Ingredion Incorporated f/k/a Corn Products Manufacturing Company (“Ingredion”), by and through its counsel and pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446, hereby removes this action from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, to the United States District Court for the Northern District of Illinois, Eastern Division. In support thereof, Ingredion states as follows:

State Court Action

1. On December 27, 2013, Plaintiff Coulas Viking Partnersjoh (“Viking”) filed suit against Defendant Belt Railway Company of Chicago (“Belt”) under Cause No. 13 CH 28409, in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, *Coulas Viking Partners, L.P. v. The Belt Railway Company of Chicago* (the “State Court Action”). Viking amended its complaint several times, and filed its Second Amended Complaint on January 12, 2015. A copy of the Second Amended Complaint (the “Complaint”) filed in the

State Court Action is attached hereto (without exhibits) as **Exhibit A**.¹ Viking filed a jury demand and alleged causes of action for: (i) declaratory judgment; (ii) trespass; and, (iii) ejectment. *Id.* A copy “of all process, pleadings, and orders served upon” Ingredion in the State Court Action, as well as a copy of all operative pleadings is attached hereto as **Exhibit B(1)-(8)**.

2. Viking alleges that Belt does not have permission to use Viking’s property for the operation of a spur line railway (the “Spur Line”) that crosses over Viking’s property, that a 1909 easement agreement (the “1909 Easement Agreement”) that allowed Belt to do so terminated in 1912 as a result of Belt’s predecessors’ failure to obtain consent from Viking’s predecessors to assign the easement agreement, and that Belt’s continued use of the Spur Line constitutes a trespass on Viking’s property. (Compl., ¶¶ 6-9, 13, 16-24, 26-33.) Viking seeks an order declaring that Belt has no legal right to use the Spur Line, enjoining Belt from using the Spur Line, and requiring removal of the Spur Line from the property altogether. (Compl., Prayer for Relief at pp. 10-12.)

3. Ingredion is a global ingredient solutions provider to the food, beverage, brewing and pharmaceutical industries as well as numerous industrial sectors. It uses corn, tapioca, potatoes and other raw materials to manufacture a myriad of ingredients.

4. Ingredion owns and operates a large manufacturing facility in Bedford Park, Illinois (referred to as the Argo, Illinois facility) on property adjacent to the land owned by Viking that is the subject of this litigation. (*See, e.g.*, Compl., ¶ 7.) The Spur Line that crosses Viking’s property—which Viking seeks to prevent Belt from using—has been used for many decades and is being used to transport corn on rail cars to Ingredion’s facility. (*See, e.g.*, Compl., ¶¶ 8-9.) Approximately 50% of the corn coming into Ingredion’s Argo, Illinois facility is moved

¹ The Second Amended Complaint with exhibits is included as part of the record of the State Court Action, attached hereto as Exhibit B(1).COU

by Belt over the Spur Line. The Spur Line is crucial to the movement of corn products to Ingredion's facility. (*Id.*)

5. Ingredion was the original grantee of the easement across Viking's Property in the 1909 Easement Agreement, which granted Ingredion an easement in perpetuity for the construction, maintenance and operation of the Spur Line. (Compl., ¶ 17.) On the same day it entered into the 1909 Easement Agreement, Ingredion (then Corn Products Manufacturing Company), assigned the easement to Chicago Peoria Western Railway Company. (Compl., ¶ 21.) Since it was originally granted, the easement has been used to deliver corn to Ingredion's Argo, Illinois facility.

6. In addition, on or about August 3, 2006, Ingredion entered into a Track License Agreement with Belt for the staging of certain rail cars in Ingredion's possession, custody, or control on the Spur Line until such time that those rail cars and the corn in them could be moved into Ingredion's facility, and where the empty rail cars could be parked until removed by Belt.

7. On December 15, 2015, Ingredion filed its Motion to Intervene in the State Court Action. A copy of Ingredion's Motion to Intervene is attached hereto as **Exhibit C**. The court granted Ingredion's Motion to Intervene on February 23, 2016. A copy of the Feb. 23, 2016 Order granting Ingredion's Motion to Intervene is attached hereto as **Exhibit D**.

Timeliness of Notice of Removal

8. An intervenor may petition for removal as long as the intervenor does so within thirty (30) days of its motion to intervene being granted. *See Baker v. Nat'l Blvd Bank of Chicago*, 399 F. Supp. 1021, 1023 (N.D. Ill. 1975). Thus, in accordance with 28 U.S.C. § 1446(b)(3), this Notice of Removal is being filed within thirty (30) days of receipt by Ingredion

of a copy of the order granting Ingredion's Motion to Intervene, which was entered on February 23, 2016. *See* Ex. D, Feb. 23, 2016 Order.

9. Belt consents to the removal of the State Court Action.

Federal Question Jurisdiction

10. The doctrine of complete preemption "creates an exception to the rule that courts look only to the plaintiff's well-pleaded complaint to determine whether federal jurisdiction exists. If the complaint pleads a state-law claim that is completely preempted by federal law, the claim is removable to federal court." *In re Repository Techs., Inc.*, 601 F.3d 710, 722–23 (7th Cir. 2010). Thus, "under this jurisdictional doctrine, certain federal statutes have such extraordinary pre-emptive power that they convert an ordinary state common law complaint into one stating a federal claim." *Id.* at 722 (citation omitted).

11. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101, *et seq.*, gave the Surface Transportation Board ("STB") exclusive jurisdiction over:

(1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, **routes, services, and facilities** of such carriers; and

(2) the construction, acquisition, **operation, abandonment, or discontinuance of spur**, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state.

49 U.S.C. § 10501(b) (emphasis added).

12. Congress has defined the term "transportation" under the ICCTA to include, among other things, railroad property, facilities, and equipment of any kind "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement

concerning use; services related to that movement, including receipt, delivery . . . storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10102(9).

13. There are two manners in which the ICCTA can preempt state action: “(1) categorical, or *per se*, preemption, and (2) ‘as applied’ preemption.” *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 679 (7th Cir. 2011) (citing *CSX Transp., Inc. – Petition for Declaratory Order*, STB Fin. No. 34662, 2005 WL 1024490, at *2 (May 3, 2005)). State and local actions are categorically preempted when, regardless of the context or rationale for the action, they involve: (1) “permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized;” or (2) the “regulation of matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines (*see* 49 U.S.C. §§ 10901–10907).” *CSX Transp., Inc.*, 2005 WL 1024490, at *2.

14. Courts have held that because a state may regulate through an award of damages as effectively as it may regulate “as through some form of preventative relief,” a state common law cause of action may qualify as “regulation” for purposes of the ICCTA preemption. *See, e.g., Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (state claims of negligence and negligence per se concerning a railroad’s alleged road blockages of road leading to plaintiff’s business preempted); *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (state law nuisance claim pertaining to railway traffic preempted); *Rushing v. Kan. City S. Ry. Co.*, 194 F. Supp. 2d 493, 500-01 (S.D. Miss. 2001) (state law nuisance and negligence claims that would interfere with operation of railroad switchyard preempted).

15. Viking alleges that the Spur Line is used to connect Ingredion’s plant to the main line, *see* Compl., ¶ 10, and that Belt uses the Spur Line “on an almost daily basis,” *see* Compl., ¶

13, to “park[] railroad cars . . . until they are needed.” (*See* Compl., ¶ 10.) As part of the relief it seeks, Viking requests that the Court enjoin Belt from using the property upon which the Spur Line sits, require the removal of the Spur Line from the property, declare that Belt is not entitled to use the property upon which the Spur Line sits, and award it punitive damages. This amounts to a request that the Court order Belt to abandon the Spur Line, and is therefore categorically preempted by the ICCTA because the abandonment and operation of rail lines are “matters directly regulated by the Board.” *See CSX Transp., Inc.*, 2005 WL 1024490, at *2; *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007); 49 U.S.C. §§ 10901-10907.

16. State action is preempted “as applied” where the action has the effect of “preventing or unreasonably interfering with railroad transportation” or “otherwise unreasonably burdening interstate commerce.” *Chicago Transit Auth.*, 647 F.3d at 679; *CSX Transp., Inc.*, 2005 WL 1024490, at **3-4. Viking’s claims are preempted as applied because the relief sought by Viking would unreasonably interfere with and burden interstate commerce and/or railroad transportation provided by Belt to Ingredion using the Spur Line. Specifically, approximately 50% of the corn products purchased by Ingredion for its Argo, Illinois facility comes from Wisconsin and is transported to Ingredion’s manufacturing facility over the Spur Line. (Motion to Intervene, ¶ 4; Ex. A to Motion, ¶¶ 12-13.) Ingredion has no reasonable and equivalent alternative other than the Spur Line to transport these products to its facility. (*Id.*) An order that the Spur Line can no longer be used would significantly and unreasonably burden Ingredion’s ability to transport its products from Wisconsin to Illinois by forcing Ingredion to seek alternative means of transportation at far increased cost and considerable inconvenience. (Motion to Intervene, ¶ 14; Ex. A to Motion, ¶¶ 13-17.)

17. Under the doctrine of complete preemption, whether categorical or as applied, the preemptive force of the ICCTA is so complete that it transforms Viking's Complaint, although styled as containing ordinary common-law claims, into one stating a federal claim. *See Cedarapids, Inc. v. Chicago, Centr. & Pac. Ry. Co.*, 265 F. Supp. 2d 1005, 1013-1015 (N.D. Iowa 2003) (finding that state common law claims that would effectively require the abandonment of intrastate spur track preempted by ICCTA). Because Viking's Complaint seeks to make Belt completely discontinue rail service, abandon, and remove the Spur Line, and also would otherwise unreasonably burden interstate commerce, it should be "considered from its inception to raise a federal law and therefore arises under federal law" for removal purposes. *See id.*; *CSX Transp., Inc.*, 2005 WL 1024490, at *4. Accordingly, the State Court Action is removable to federal court pursuant to 28 U.S.C. § 1441 as an action arising under federal law.

Venue is Proper in This Court

18. The United States District Court for the Northern District, Eastern Division, is the District Court of the United States and the division thereof within which the State Court Action is currently pending.

Filing of Removal Papers

19. Pursuant to 28 U.S.C. § 1446(d), simultaneously with removing this action, Ingredion is providing written notice of removal to Viking's counsel, and filing a Notice of Removal with the Clerk of the Circuit Court of Cook County, Illinois. A copy of Ingredion's Notice of Removal being filed in the State Court Action is attached hereto as **Exhibit E**.

Relief Requested

20. Ingredion requests that the United States District Court for the Northern District of Illinois, Eastern Division, assume jurisdiction over the above-captioned action and issue such

further orders and processes as may be necessary to bring before it all parties necessary for the trial of this action.

WHEREFORE, Defendant Ingredion Incorporated hereby gives notice that the above-referenced action now pending against it in the Circuit Court of Cook County, Illinois has been removed to this Court.

Dated: March 24, 2016

Respectfully submitted,

BRYAN CAVE LLP

By: /s/ Donald A. Cole
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Attorneys for Ingredion Incorporated

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Notice of Removal was served on March 24, 2016, via U.S. Mail, 1st Class, on or before the hour of 5:00 p.m. on the following:

John M. Touhy
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Counsel for Coulas Viking Partners

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/s/ Donald A. Cole

Donald A. Cole

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COULAS VIKING PARTNERS,
an Illinois general partnership,

Plaintiff,

v.

THE BELT RAILWAY COMPANY OF
CHICAGO, an Illinois corporation, and
INGREDION INCORPORATED f/k/a
CORN PRODUCTS MANUFACTURING
COMPANY, a Delaware corporation,

Defendants.

Case No. 16-cv-3583

**DEFENDANT INGREDION INCORPORATED'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, STAY THE ACTION**

Defendant Ingredion Incorporated f/k/a Corn Products Manufacturing Company ("Ingredion"), by and through its counsel, hereby respectfully moves this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff's Complaint for failure to state claims upon which relief can be granted on the grounds that the Surface Transportation Board has exclusive jurisdiction over the abandonment of spur tracks under the Interstate Commerce Commission Termination Act of 1995.

Accordingly, Ingredion moves to dismiss Plaintiff's complaint with prejudice or, in the alternative, to stay this action and refer the matter to the STB where a related proceeding is underway. In support of its motion, Ingredion has concurrently submitted its Memorandum in Support of Motion to Dismiss or, In the Alternative, Stay the Action.

WHEREFORE, Defendant Ingredion Incorporated respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

Date: March 24, 2016

INGREDION INCORPORATED

By: /s/ Rodney Perry
One of its attorneys

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Meryl Macklin (*pro hac vice* pending)
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Counsel for Ingredion Incorporated

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion to Dismiss or, in the Alternative, Stay the Action was served on March 24, 2016, via U.S. Mail, 1st Class, on the following:

John M. Touhy
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/s/ Rodney Perry
Rodney Perry

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COULAS VIKING PARTNERS,
an Illinois general partnership,

Plaintiff,

v.

THE BELT RAILWAY COMPANY OF
CHICAGO, an Illinois corporation, and
INGREDION INCORPORATED f/k/a
CORN PRODUCTS MANUFACTURING
COMPANY, a Delaware corporation,

Defendants.

Case No. 16-cv-3583

**DEFENDANT INGREDION INCORPORATED'S MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY THE ACTION**

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Counsel for Ingredion Incorporated

Plaintiff's Complaint seeks to require Belt to abandon and remove a spur track that is used to service Ingedion's manufacturing facility in Bedford Park, Illinois. The Surface Transportation Board ("STB") has exclusive jurisdiction over the abandonment of spur tracks under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). Accordingly, Ingedion moves to dismiss Plaintiff's complaint with prejudice or, in the alternative, to stay this action and refer the matter to the STB where a related proceeding is underway.¹

INTRODUCTION

For more than a century, Ingedion has continuously used a common rail carrier, Belt (and its predecessors), to ship goods to and from Ingedion's largest manufacturing facility using a spur track that crosses over Plaintiff's property adjacent to Ingedion (the "Spur Line"). Notwithstanding the undisputed fact that Ingedion has used the Spur Line for its rail transportation needs for over 100 years, Plaintiff now seeks, more than thirty (30) years after acquiring the underlying land (the "Viking Property"), to prohibit Belt from further using the Spur Line by alleging that Belt's easement rights are now non-existent. This would force the abandonment of the Spur Line, force the discontinuance of rail service to Ingedion, and allow Plaintiff to gain exclusive possession and control over the Spur Line.

Plaintiff's state law claims should be dismissed with prejudice for three reasons: (i) as a matter of well-settled federal law, Section 10501(b) of the ICCTA expressly preempts state law claims like the Plaintiff's that, on their face, seek to completely halt and prevent rail transportation and impinge the rights of shippers such as Ingedion; (ii) Belt has an easement to operate the Spur Line; and (iii) Plaintiff has acquiesced to Belt and Ingedion's use of the easement in asserting its purported rights in the real estate underneath the Spur Line by waiting more than thirty (30) years to challenge the use, and it is therefore equitably estopped from asserting any related claims.

¹ On March 24, 2016, Ingedion filed a Petition for Declaratory Order with the STB, asking it to declare that the ICCTA preempts Plaintiff's claims, attached hereto as **Exhibit A**.

RELEVANT FACTUAL BACKGROUND

In November 1909, Chicago Title and Trust Company (“Chicago Trust”), the original owner and title holder of the Viking Property, granted Ingridion, then known as Corn Products Manufacturing Company, an easement in perpetuity over the Viking Property for the construction, maintenance, and operation of the subject Spur Line (the “1909 Easement Agreement”). (Second Am. Compl. (“Compl.”), ¶¶ 7, 16-17; Ex. B to Compl., pp. 1-2.) Since that time, Ingridion has continually benefitted from (and relied on) Belt’s operations on the Spur Line, which are the primary means by which Ingridion receives inbound corn at its manufacturing facility from Wisconsin. (*See* Compl., ¶¶ 7-8.)

Chicago Trust subsequently granted Belt an easement over the Spur Line pursuant to an unrecorded easement dated April 30, 1914 (the “1914 Easement Agreement”). (*See* Ex. F to Compl. (“[T]he Belt Companies and their respective successors and assigns shall have the right in perpetuity to use said track between the points indicated by the letters ‘A’ and ‘H’ on said Exhibit ‘B’ (including the undercrossing of the tracks of the Terminal Company) for the movement of all traffic including traffic to and from the plant of [Ingridion].”).) The 1914 Easement Agreement was subsequently ratified in 1929 when Chicago Trust and Belt modified its terms to account for the extension of Harlem Avenue over and across the Spur Line on the Viking Property. (*See generally* Ex. G to Compl., pp. 1-2; *see also N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998) (holding where exhibits contradict the allegations in a complaint to which they are attached, the exhibits “trump the allegations.”).

On November 30, 1981, James J. Coulas, Sr. acquired the Viking Property, and subsequently transferred it in whole in two separate transactions to Plaintiff Coulas Viking Partners on January 8, 2008, and December 1, 2009, respectively. (Compl., ¶ 12.) Plaintiff acknowledges, however, that prior to its acquisition of the Viking Property (approximately 32 years before filing this lawsuit), it

was well aware that “a single railroad rack [*i.e.*, the Spur Line] was built on the Viking Property.” (Compl., ¶ 8.) Despite Plaintiff’s constructive and actual notice of the Spur Line and Plaintiff’s knowledge of Belt’s use of the Spur Line for transporting Ingedion’s goods, *see id.* at ¶ 8 (“[t]he railroad track built upon the Viking Property is used as a [Spur Line] to connect the [Ingedion] manufacturing facility to a nearby large railway yard.”), Plaintiff requests that this Court annul and invalidate Belt’s easement for the Spur Line. Such a ruling, however, would have the effect of infringing upon Ingedion’s lawful right under the Interstate Commerce Act to receive rail service via the Spur Line, which is regulated exclusively by the STB.

Thus, Plaintiff seeks an order declaring that Belt has no legal right to use the Spur Line, enjoining Belt from using the Spur Line (thereby preventing transport of Ingedion’s goods by Belt), and requiring removal of the Spur Line from the property altogether. (Compl., Prayers for Relief at pp. 10-12.) This amounts to a request that the Court order Belt to abandon the Spur Line, severely constricting Ingedion’s right to have common carrier service, a right that it has reasonably exercised via the Spur Line for more than a century. *Accord Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150, 158-60 (4th Cir. 2010) (city cannot seek to regulate interstate commerce indirectly by regulating trucks that would use the carrier’s transload facility.). The STB would agree:

Even if we assume this track is private track . . . this does not permit the Town to deprive [the shipper] of its federal right to receive common carrier rail service over the track . . . [o]therwise, states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network.

Boston and Maine Corp. and Springfield Terminal R.R. Co. - Petition for Declaratory Order, Fin. Docket No. 35749, 2013 WL 3788140, at *4 (STB July 19, 2013). As one court aptly put it, “[a]ll state-born attacks aimed at [rail transportation], no matter the weapon used, are rebuffed by the shield of federal supremacy.” *Kiser v. CSX Real Prop., Inc.*, No. 07-cv-1266, 2008 WL 4866024, at *4 (M.D. Fla. Nov. 7, 2008). Because Plaintiff’s Complaint seeks to have this Court order Belt to discontinue

rail service, and abandon and remove the Spur Line, thus unreasonably burdening interstate commerce, its claims are preempted by the ICCTA, and Plaintiff's Complaint should therefore be dismissed.

ARGUMENT

I. Legal Standard.

"[U]nder Article VI of the Constitution, federal law is the "supreme Law of the Land," and "it preempts state laws that 'interfere with, or are contrary to, federal law.'" *520 S. Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1124 (7th Cir. 2008) (citing *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002)). Federal law preempts state law in three circumstances: (1) where a statute has an express preemption provision; (2) where Congress intends federal law to "occupy the field completely;" and (3) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 918 (7th Cir. 2007). Plaintiff's claims here are preempted on each of these bases.²

II. Plaintiff's Claims Are Expressly Preempted by the ICCTA and Subject to the Surface Transportation Board's Exclusive Jurisdiction.

A. The ICCTA Preempts State Regulation of Rail Transportation

Plaintiff's claims are preempted by the ICCTA because Plaintiff seeks to directly regulate rail operations via state tort law. *See Tubbs v. Surface Transp. Bd.*, No. 14-cv-3898, 2015 WL 9465907, at *5 (8th Cir. Dec. 28, 2015) (affirming STB ruling that state law claims for trespass, nuisance, negligence, inverse condemnation, and statutory trespass preempted by the ICCTA); *14500 Ltd. v. CSX Transp., Inc.*, No. 12-cv-1810, 2013 WL 1088409, at *5 (N.D. Ohio Mar. 14, 2013) (state law adverse possession, quiet title, and prescriptive easement claims preempted because they were

² "Issues of express or field preemption are generally purely legal questions," *Wisc. Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008), and whether a state law cause of action is preempted by federal law may be properly decided on a motion to dismiss for failure to state a claim. *See, e.g. Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989) (affirming order granting a motion to dismiss for failure to state a claim on grounds of preemption, following removal from state court under complete preemption doctrine).

“attempts to take railroad property”). “[T]he courts have long recognized a need to regulate railroad operations at the federal level.” *City of Auburn v. U.S.*, 154 F.3d 1025, 1029 (9th Cir. 1998). The history of railroad regulation since the passage of the Interstate Commerce Act in 1887 has been one of steady reduction of state regulatory authority. By enacting the ICCTA, Congress went even further and federalized many aspects of railway operation that had been previously reserved for the states. *See Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1011 (N.D. Iowa 2003).

Effective January 1, 1996, the ICCTA replaced the Interstate Commerce Commission with the STB, and vested the STB with exclusive jurisdiction over rail transportation, expressly preempting all state law “remedies” with respect to “regulation of rail transportation.” *See* 49 U.S.C. § 10501(b); *see also Guckenberg v. Wisc. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001). Specifically, the ICCTA vests the STB with exclusive jurisdiction over:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), ***practices, routes, services, and facilities*** of such carriers; and
- (2) the construction, acquisition, operation, ***abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities***, even if the tracks are located, or intended to be located, entirely in one state

49 U.S.C. § 10501(b) (emphasis added). The ICCTA expressly states that “the remedies provided under [the ICCTA] with respect to regulation of rail transportation are ***exclusive and preempt the remedies provided under Federal or State law.***” *Id.* (emphasis added).

Unsurprisingly, “Congress’s intent in [the ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping.” *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011); *see also City of Auburn*, 154 F.3d at 1030 (“It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”). Moreover, the House Report on the ICCTA makes clear that broad preemption of

state and local regulation is necessary to preserve the free flow of interstate commerce and to prevent the “balkanization and subversion of the federal scheme of minimal regulation.” H.R. Rep. No. 104-311, at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808.

Every federal circuit - including the Seventh Circuit - has ruled that if a state remedy has “the effect of regulating” rail transportation, it is “expressly preempted by the ICCTA.” *Elam v. Kan City S. By.*, 635 F.3d 796, 806, 807 (5th Cir. 2011); *see also Chicago Transit Auth.*, 647 F.3d at 682 (“Federal preemption . . . applies to those situations where a regulation prevents or unreasonably interferes with railroad transportation.”); *Norfolk S. By. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010); *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1070 (11th Cir. 2010); *Fayus Enters. v. BNSF By. Co.*, 602 F.3d 444, 446 (D.C. Cir. 2010); *Adrian & Blissfield B.B. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *Port City Props v. Union Pac. B.B. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008); *N.Y. Susquehanna & W. By. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *Green Mountain B.B. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir 2005); *City of Lincoln v. STB*, 414 F.3d 858, 860-61 (8th Cir. 2005); *City of Auburn*, 154 F.3d at 1030-31.

As these courts have explained, the ICCTA preempts state tort actions as well as other forms of state regulation. *See, e.g., Pace*, 613 F.3d at 1069-70 (nuisance action); *Elam*, 635 F.3d at 807 (negligence per se action); *see also Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1269 (2012) (tort claim for damages is a form of state regulation). Through the ICCTA, Congress’s objective is to exempt railroad operations from the patchwork of state regulations that would otherwise burden interstate commerce. *See Cedarapids*, 265 F. Supp. 2d at 1015.

i. The ICCTA Defines “Transportation” Broadly to Include All Services Relating to the Movement of Property by Rail on Spur Lines.

Consistent with the STB’s expansive jurisdiction, the ICCTA defines rail “transportation” broadly to include any property, facility, structure, or equipment “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use”

and all “services related to that movement.” 49 U.S.C. § 10102(9). This definition clearly encompasses Belt’s transportation of Ingredion’s goods on the Spur Line, which are plainly “related to the movement of . . . property . . . by rail.” *Id.*; see also *Union Pac. R.R. Co. v. Chi. Transit Auth.*, No. 07-cv-229, 2009 WL 448897, at *5 (N.D. Ill. Feb. 23, 2009) (describing the ICCTA’s “panoptic definition of transportation”).

ii. The Activity that Plaintiff Complains About – the Operation of the Spur Line – and the Remedy it Seeks – the Abandonment of the Spur Line – are Squarely Within the Range of Preempted Claims.

Plaintiff’s Complaint implicates two types of railroad activities: (1) the operation of trains entering and leaving the Spur Line, Compl., ¶¶ 12-14, 20; and (2) the abandonment of the Spur Line. (Compl., Prayers for Relief at pp. 10-12.) Courts, however, have repeatedly held that the ICCTA categorically preempts state regulation of these very activities.

In particular, courts have held that the ICCTA expressly preempts state actions relating to the operation of railroad tracks. See, e.g., *Tex. Cent. Bus. Lines v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding that the ICCTA grants “exclusive jurisdiction” over the operation of rail tracks to the STB, “**leaving no room for local regulation**”) (emphasis added); *Smith v. CSX Transp., Inc.*, 381 Fed. App’x. 885, 886 (11th Cir. 2010) (“Congress’s intent is clear that any state law involving where to construct and how to operate a sidetrack is preempted.”); *Pace*, 613 F.3d at 1069 (“The language of section 10501(b) plainly conveys Congress’s intent to preempt all state law claims pertaining to the operation or construction of a side track.”); *Port City Props.*, 518 F.3d at 1188 (“all regulation” of tracks is completely preempted under the ICCTA’s “broad jurisdictional grant” to the STB); *City of Auburn*, 154 F.3d at 1028, 1030 (“the plain language . . . of the ICCTA explicitly grant[s] the STB exclusive authority over railway projects like” the side track location). The STB has reached the same conclusion. See, e.g., *Boston and Maine Corp. and Springfield Terminal R.R. Co. - Petition for Declaratory Order*, 2013 WL 3788140, at *3 (the ICCTA “plainly” preempts a local order directing the

railroad to cease track operations for violating zoning laws).

Further, Plaintiff alleges that Belt, a common carrier of Ingredion's goods, "has no right, title or interest" in an easement over the Spur Line, and seeks as part of its prayer for relief that this Court determine that Belt has no "legal right or interest, including an easement, to use the Viking Property on which the Spur Line is built." (Compl., p. 10, Prayer for Relief.) Thus, in effect, Plaintiff pleads that either the Spur Line on the Viking Property, the sole limited purpose for which the easement exists, should be declared abandoned by Belt pursuant to state law or that Belt's operation of the Spur Line is subject to interpretation and determination by this Court. However, the STB has exclusive jurisdiction over the acquisition and abandonment of railroad spur tracks pursuant to 49 U.S.C. § 10501(b)(2). Plaintiff's claims for a declaratory judgment as to the Spur Line, and for trespass and ejectment are therefore preempted by the ICCTA, and this Court should dismiss its Complaint in its entirety. *See Pace*, 613 F.3d at 1068-69 (state law claims related to side track preempted); *Port City Props.*, 518 F.3d at 1188 ("jurisdiction over spur, industrial, team, switching or side tracks, or facilities rests solely with the STB."); *Cedarapids, Inc.*, 265 F. Supp. 2d at 1015.

In *Cedarapids, Inc.*, the court recognized that the STB has exclusive jurisdiction over the abandonment of railroad tracks and held that it did not have the authority to rule on a claim that had the **effect** of forcing the abandonment of rail. 265 F. Supp. 2d at 1007. The court held that, because the intention of Congress in the passage of the ICCTA was to completely occupy the field of railroad transportation, "to the extent that Cedarapids' state law claims seek to force CC&P to abandon the track in question, such claims are preempted by the ICCTA." *Id.* at 1014. In dismissing plaintiff's claim for injunctive relief seeking a ruling that defendant no longer had a right to use the spur tracks in question, the court determined that "Cedarapids' success on the state law claims included in Count I of its Complaint necessarily involves a finding that the tracks at issue

have been abandoned by CC&P and that CC&P no longer has any right to use the tracks . . . [T]he determination of whether the railroad tracks were abandoned is within the exclusive jurisdiction of the STB.” *Id.* at 1015. In short, like in *Cedarapids, Inc.*, the activities Plaintiff seeks to have this Court regulate – the operation and abandonment of the Spur Line – plainly involve and have a transportation purpose and thus fall squarely within the STB’s exclusive jurisdiction under Section 10501(b).

The relief sought by Plaintiff would also act as an impermissible preclearance requirement for Belt to continue operating on the same track as it has done for over 100 years. Effectively, the Plaintiff seeks to condition Belt’s rail operations on actions for trespass and ejectment under state law; subjecting BRC’s operations to these state law standards is no different from applying an impermissible state law preclearance requirement. Board precedent is clear that preclearance requirements are preempted because they give the state law a veto power over rail transportation. *See, e.g., Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declaratory Order*, STB Docket No. 35749, slip op. at 5 (served July 19, 2013) (preemption bars local government’s attempt to apply its zoning laws to rail service provided by Board-licensed carrier).

When the activity at issue falls within the STB’s exclusive jurisdiction, the “remedies provided” by the ICCTA are “exclusive and preempt” the remedies provided under state law. *See* 49 U.S.C. § 10501(b). Plaintiff cannot avoid preemption under the ICCTA by casting its claims as seeking declaratory relief, trespass, and ejectment. *See Port City Props.*, 518 F.3d at 1188 (“jurisdiction over spur, industrial, team, switching or side tracks, or facilities rests solely with the STB.”). To the contrary, as shown below, the courts have applied these same concepts to preempt landowner state tort claims under the ICCTA.

B. Plaintiff’s Claims for Declaratory Relief, Trespass, and Ejectment Constitute Preempted State Law “Regulation” under the ICCTA

Courts have interpreted “regulation” broadly to include any litigation under state law that

“would have the effect of preventing or unreasonably interfering with railroad transportation.” *Chi. Transit Auth.*, 647 F.3d at 679; *see also Pace*, 613 F.3d at 1070 (“[T]o permit monetary liability to accrue under a state law nuisance claim where that liability is based on decisions the ICCTA purposefully freed from outside regulation would contradict the language and purpose of [the ICCTA].”).

Applying these principles, courts have held that the ICCTA can preempt all manner of state law tort and property claims as impermissible state regulation where they unreasonably interfere with or prevent railroad operations. *See, e.g., Chi. Transit Auth.*, 647 F.3d at 683 (state condemnation action preempted); *Tubbs*, 2015 WL 9465907, at *5 (state law claims for trespass, nuisance, negligence, inverse condemnation, and statutory trespass preempted by the ICCTA); *Pace*, 613 F.3d at 1069 (state law nuisance claim related to side track preempted); *14500 Ltd.*, 2013 WL 1088409, at *5 (state law adverse possession, quiet title, and prescriptive easement claims preempted because they were “attempts to take railroad property”); *B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1258 (E.D. Wash. 2012), 889 F. Supp. 2d at 1258 (the “ICCTA completely preempts this state law adverse possession cause of action because not only would it interfere with railroad operations, but [it] would divest the railroad of the very property with which it conducts its operations.”); *Louisiana v. Ill. Cent. R.R. Co.*, 928 So. 2d 60, 62 (La. Ct. App. 2005) (state law trespass claims preempted).

Given the ICCTA’s broad scope and Congress’s clear intent, it is evident that all of the Plaintiff’s state law claims are expressly preempted. Put simply, Plaintiff’s claims, on their face, seek to do precisely what the ICCTA forbids; that is, to use state law to impede Belt’s ability to conduct rail operations using the Spur Line. *See Chicago Transit Auth.*, 647 F.3d at 679 (holding that the ICCTA preempts any state law claim that “would have the effect of preventing . . . rail transportation”).

Plaintiff's claims would clearly prevent rail transportation because they seek not merely to interfere with or hinder Ingression's rights as a shipper but to actually take the Spur Line out of service, remove the tracks, and halt or prevent any rail transportation. (*See* Compl., pp. 11-12) (demanding Belt "surrender possession of the Viking Property upon which the Spur Line is built" and that Belt "remove from the Viking Property all railway ties and equipment" used to conduct rail transportation on the Spur Line). Plaintiff's claims go even further by seeking to acquire the very railroad right-of-way on which Ingression currently relies for the rail transportation of its goods. *See, e.g., 14500 Ltd.*, 2013 WL 1088409, at *4 (holding that the ICCTA completely preempts state law claims that are "attempts to take railroad property"); *B & S Holdings*, 889 F. Supp. 2d at 1258 (the "ICCTA completely preempts this state law adverse possession cause of action because not only would it interfere with railroad operations, but [it] would divest the railroad of the very property with which it conducts its operations.").

Indeed, there is no more obvious way to prevent rail transportation and violate the ICCTA than by physically removing the Spur Line, as Plaintiff hopes to do here. Such efforts represent "the most extreme type of control" of rail transportation imaginable. *See Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000). Accordingly, Plaintiff's state law claims for declaratory judgment, ejectment, and trespass all constitute "regulation" subject to the ICCTA's broad preemption, and Plaintiff's Complaint should therefore be dismissed in its entirety.

III. Apart from Being Preempted by the ICCTA, Belt's Easement on the Spur Line is Valid.

Plaintiff's primary objection to the 1914 Easement Agreement is that it was "never recorded with the Cook County Recorder of Deeds." (Compl., ¶ 25.) However, under Illinois law, an easement need not be recorded to be enforceable. *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 102 (1st Dist. 2004) ("an unrecorded easement . . . is binding against a subsequent purchaser."); *see also Coomer v. Chicago & N.W. Transp. Co.*, 91 Ill. App. 3d 17, 21 (3d Dist. 1980).

And although Plaintiff would have this Court look to extrinsic evidence in an attempt to disavow the 1914 Easement Agreement:

the rules with respect to easements are well-established. A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments . . . The extent of an easement created by express grant depends on the terms of the grant. If it is specific in terms, it is decisive of the limits of the easement. In other words, if the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.

Duresa, 348 Ill. App. 3d at 101 (citation omitted).

Where, as here, the language of the 1914 Easement Agreement is unambiguous, this Court need not, and should not, look outside the four corners of the document in deciding what easement rights were created by the 1914 Easement Agreement. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 7 N.E.3d 756, 765 (1st Dist. 2014) (“If the language of the [easement] agreement is facially unambiguous, then the circuit court interprets the contract as a matter of law without the use of extrinsic evidence.”).

Moreover, even though the 1914 Easement Agreement was unrecorded, Plaintiff had sufficient constructive notice of its existence such that the Court should enforce it. (*See* Compl., ¶ 8) (“Prior to the time Viking Partners owned the Viking Property, a single railroad track was built upon the Viking Property. The railroad track built upon the Viking Property is used as a spur line to connect the Corn Products manufacturing facility to a nearby large railway yard.”). At the very least, when Plaintiff purchased the property and saw the track, it should have inquired as to the status of the easement for the railroad. The court in *Duresa*, after examining case law from other jurisdictions involving unrecorded easements, held that “actual, open and obvious possession is constructive notice to all the world of whatever right the occupant has in the land and puts upon inquiry those acquiring any title to or lien upon the land so occupied to ascertain the nature of the rights the occupant has in the premises.”).

Here, like in *Duresa* where the plaintiffs were found to have had constructive notice of the electric company's easement "since poles were in existence on their property," Plaintiff in this matter too had constructive notice of the 1914 Easement Agreement, given its own admission that the Spur Line was there prior to its acquisition, and that Belt "has used and continues to use the Spur Line on an almost daily basis." (Compl., ¶¶ 8, 13.) In light of Plaintiff's own allegations concerning the 1914 Easement Agreement, Plaintiff's claim that Belt does not have a valid easement over the Spur Line should be dismissed with prejudice as a matter of law. *See Siegel v. Braver*, No. 10-cv-541, 2010 WL 1883459, at *1 (N.D. Ill. May 11, 2010) ("To be totally blunt, [Plaintiffs] have succeeded in pleading themselves out of court.").

IV. Apart from Being Preempted by the ICCTA, Plaintiff's Claims are Barred By Its Acquiescence to the Spur Line.

The doctrine of acquiescence bars any effort to remove Belt from the Spur Line. Courts have long held that when a landowner stands by, without objecting, until the rights of the public and of third parties have intervened, public policy provides that he cannot recover the possession of the land, nor maintain injunction against such parties. *See, e.g., N. Pac. R.R. Co. v. Smith*, 171 U.S. 260, 275 (1898) ("if a landowner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road, without having complied with a statute requiring either payment by agreement, or proceedings to condemn, remains inactive, and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejection for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages."); *Hellman v. Roe*, 275 Ill. 158, 161 (1916) ("when they have acquiesced in and recognized a line as the true one for a period of 20 years they are bound and concluded by such acts."); *Brandenburg v. Country Club Bldg. Corp.*, 332 Ill. 136, 149 (1928) ("since nearly 17 years of the 25-year period of the restriction had expired at the date of the decree, in view of the neglect of the complainant in permitting the defendant to go on and incur great expense after she had knowledge of the nature of the invasion of

the reserved space by its building, her right, after the building was completed, to a mandatory injunction requiring its removal is barred by her laches.”); *Sonken v. Gemmill*, 151 N.E. 355, 358 (Ind. App. 1926) (barring ejectment when “land is seized by a railroad company without right” and landowner “stood by and permitted [the] railroad . . . to operate its line of railroad across and over his land” from 1906 to 1913, or only approximately seven (7) years).

Plaintiff in this instance has delayed in asserting its rights, such as they are, for more than thirty (30) years after it acquired the property, and nearly 100 years after the railroad track was laid and began to be used. (*See* Compl., ¶ 12 (“The Viking Property . . . was acquired . . . on November 30, 1981.”). Under these circumstances, this Court can determine, as a matter of law, that Plaintiff (and its predecessors), have acquiesced in the easement, and dismiss Plaintiff’s Complaint with prejudice in its entirety

V. In the Alternative, the Court Should Dismiss or Stay this Action and Refer it to the STB Under the Doctrine of Primary Jurisdiction.

Alternatively, the Court should dismiss or stay this action and refer it to the STB for resolution under the primary jurisdiction doctrine. *See Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195 (1st Cir. 2000) (holding that district court should stay the ICCTA claims while referring them to the STB). Primary jurisdiction is a judicially created doctrine whereby a court may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency. *See Hansen v. Norfolk & W. Ry. Co.*, 689 F.2d 707, 710 (7th Cir. 1982) (“The doctrine of primary jurisdiction is a reflection of the fact that when a court is confronted with a claim as to which it shares concurrent jurisdiction with an administrative agency, there may be sound reasons for the court to stay its hand until the agency has applied its expertise to the salient questions.”). “The primary jurisdiction doctrine comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending

referral of such issues to the administrative body for its view.” *U.S. v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (holding matter of tariff rates to be within exclusive primary jurisdiction of the Interstate Commerce Commission). Under the doctrine of primary jurisdiction, the Court has discretion to stay the matter or to dismiss the case without prejudice for filing with the appropriate agency. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

Congress has given the STB exclusive authority over the abandonment of rail lines as well as the transportation of goods by rail carriers. 42 U.S.C. § 10102(9); 10501(b)(2). Plaintiff’s claims seeking the effective abandonment of the Spur Line fall squarely within the special competence of the STB. On March 24, 2016, Ingredion filed the STB Declaratory Proceeding, seeking a ruling that Viking cannot force the abandonment or removal of the Spur Line (see attached [without exhibits]). The STB is the proper forum for resolution of these issues. Under these circumstances, if the Court does not dismiss Plaintiff’s claims based on federal preemption, the Court should either stay or dismiss the case under the doctrine of primary jurisdiction, allowing the STB to rule on the STB Declaratory Proceeding, which will also resolve all issues in this matter.

CONCLUSION

For the foregoing reasons and authorities, Defendant Ingredion Incorporated respectfully requests the Court grant its motion to dismiss for failure to state a claim, dismiss Plaintiff’s claims with prejudice or, in the alternative, to stay the matter pending resolution in the now-pending STB Declaratory Proceeding, and award Ingredion all other just and appropriate relief.

Date: March 24, 2016

INGREDION INCORPORATED

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum in Support of Ingridion's Motion to Dismiss or, in the Alternative, Stay the Action and was served on March 24, 2016, via U.S. Mail, 1st Class, on the following:

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