Docket #0146 Date Filed: 5/26/2023

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re ALDRICH PUMP LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 20-30608 (Jointly Administered)
ARMSTRONG WORLD INDUSTRIES, INC. ASBESTOS PERSONAL INJURY SETTLEMENT TRUST, *et al.* Plaintiffs, v. ALDRICH PUMP LLC, *et al.* Defendants.	Miscellaneous Proceeding No. 22-00303 (JCW) (Transferred from District of Delaware)
AC&S ASBESTOS SETTLEMENT TRUST, COMBUSTION ENGINEERING 524(G) ASBESTOS PI TRUST, GI HOLDINGS INC. ASBESTOS PERSONAL INJURY SETTLEMENT TRUST, GST SETTLEMENT FACILITY, KAISER ALUMINUM & CHEMICAL CORPORATION ASBESTOS PERSONAL INJURY TRUST, QUIGLEY COMPANY, INC. ASBESTOS PI TRUST, T H AGRICULTURE & NUTRITION, L.L.C. ASBESTOS PERSONAL INJURY TRUST, and YARWAY ASBESTOS PERSONAL INJURY TRUST, Petitioners, v. ALDRICH PUMP LLC, *et al.*	Miscellaneous Proceeding No. 23-00300 (JCW) (Transferred from District of New Jersey)

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC (2290) and Murray Boiler LLC (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

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Respondents,

VERUS CLAIM SERVICES, LLC,

Interested Party,

NON-PARTY CERTAIN MATCHING CLAIMANTS,

Interested Party.

DEBTORS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR REHEARING

Aldrich Pump LLC ("Aldrich") and Murray Boiler LLC ("Murray"), as debtors and debtors in possession (together, the "Debtors"), submit this consolidated Reply in support of the *Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions* [Misc. No. 22-00303, Dkt. 54] (the "Motion")[2] and in response to the additional objections filed by: (1) the Delaware Claims Processing Facility ("DCPF");[3] (2) DCPF's Third-Party Asbestos Trusts ("DCPF Trusts");[4] (3) Verus Claims Services, LLC ("Verus");[5] and (4) Verus's Third-Party Asbestos Trusts ("Verus Trusts," and together with DCPF, the DCPF Trusts, and Verus, the "Objectors").[6]

[2] The Debtors also filed their Reply in Support of their Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions [Misc. No. 22-00303, Dkt. 87].

[3] Joinder of the Delaware Claims Processing Facility, LLC to the Third-Party Asbestos Trusts' Supplemental Filing in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions [Misc. No. 22-00303, Dkt. 143] (the "DCPF Opposition").

[4] Third-Party Asbestos Trusts' Supplemental Filing in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions [Misc. No. 22-00303, Dkt. 141] (the "DCPF Trusts Opposition").

[5] Verus Claim Services, LLC's Supplemental Brief in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on Verus' Subpoena-Related Motion [Misc. No. 22-00303, Dkt. 136] (the "Verus Opposition").

[6] Non-Party Verus Trusts' Supplemental Brief in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motion [Misc. No. 22-00303, Dkt. 138; Misc. No. 23-00300, Dkt. 59] (the "Verus Trusts Opposition," and together with the DCPF Opposition, the DCPF Trusts Opposition, and the Verus Opposition, the "Oppositions").

PRELIMINARY STATEMENT

In ruling on the Motion, the Court will decide whether the Objectors will be required to fully comply with subpoenas served last July seeking discrete categories of electronic information concerning the 12,000 claimants who resolved mesothelioma claims against the Debtors between January 1, 2005 and June 18, 2020 (the "Subpoenas"), or whether that response will be limited to a ten percent sample of those claimants.

In the course of discovery and briefing on this issue, there is no disagreement on a number of critical points:

- Analysis of an entire population rather than a sample of that population, by definition, ensures there is no sampling error. Deposition Transcript of Objectors' Expert, Dr. Abraham Wyner, May 17, 2023 ("Wyner Tr."), attached as Exhibit A to the May 26, 2023 Declaration of Morgan Hirst ("Hirst Decl."), at 36:10–13.

- The difference between the true value of the parameter being measured in the population and its estimate is the sampling error. Wyner Tr. at 33:9–13.

- Sampling error refers to differences between the sample and the entire population that exist only because of the observations that happened to be selected from the sample. Wyner Tr. at 32:3–8.

- Sampling error is an error that is expected to occur when making statements about a population that is based only on the observations contained in a sample taken from that population. Wyner Tr. at 32:10–15.

- The use of a sample in place of the entire population introduces sampling variation: that is, the results from one sample will differ from those provided by another sample. Wyner Tr. at 35:4–8.

- Where the entire population is obtainable, the chief motive for examining a sample rather than that entire population is cost, so one should undertake a cost-benefit analysis as to whether to use the sample or the entire population. Wyner Tr. at 37:1–11.

- If the cost of analyzing the entire population is zero, the entire population should be utilized rather than just a sample. Wyner Tr. at 119:20–120:7.

Within this context, the dispute is not overly complicated. This Court should order the Objectors to fully comply with the Subpoenas for at least three reasons:

First, when this Court authorized the Debtors to serve the Subpoenas last year [Base Case No. 20-30608, Dkt. 1240] (the "Trust Discovery Order"), it listed specific "Permitted Purposes" for which the Debtors could use the information produced in response to the Subpoenas (the "Trust Data"). For those Permitted Purposes, the Debtors intentionally requested only a subset of their total asbestos claims history (over 400,000 claimants), limiting it to 12,000 mesothelioma claimants who resolved their claims against the Debtors from 2005 to the Petition Date. Further limiting the Debtors to a ten percent sample of that Trust Data adds unnecessary uncertainty to the forecasts the Debtors can provide to the Court related to all the Permitted Purposes. To be clear, it is possible to arrive at the necessary forecasts for the formulation of a plan of reorganization, the confirmation of a plan of reorganization, and the value of the Debtors' current and future asbestos claims for estimation purposes with a ten percent sample. But the use of such a sample will create greater uncertainty in the reliability of those forecasts, particularly as it relates to various forecasts surrounding the counts of future claims.[7] The full Trust Data will provide a more complete historical exposure picture of the Debtors' claimants, including exposure and industry information, which will enhance the reliability of the resulting future forecasting. With this enhanced reliability that comes from the full Trust Data, the Court will be in a much better position to reach the findings that will be required at each of the identified stages of these cases. In addition, any resultant trust will be in a better position to reserve sufficient funds to provide equitable treatment to future claims relative to pending claims. Thus, there are valid and compelling reasons to avoid the uncertainty that would result from sampling.

[7] As discussed *infra*, the 12,000 claimants are already a "sample" of the Debtors' historical asbestos claims, so some sampling error already exists. Reducing the discovered Trust Data more, in the Debtors' view, leads to larger and unnecessary uncertainty and will result in estimates with a broader range.

Second, the benefit in avoiding this additional uncertainty resulting from a sample of the Trust Data is even more apparent when measured against the "cost" of ensuring greater certainty. The burden on the Objectors of producing the full Trust Data sought by the Subpoenas is minimal to non-existent. In terms of dollars, the Debtors will be reimbursing the Objectors for their costs in producing that Trust Data, so the net dollar cost to the Objectors is zero. In terms of potential data privacy issues, the extensive protections required by the Court's Trust Discovery Order to both ensure the redaction and removal of any PII inadvertently included in the Trust Data, and to ensure the confidentiality of the Trust Data that is produced, result in no measurable or meaningful additional risk of PII disclosure.

Third and finally, in *DBMP*, this Court ordered full compliance with identical subpoenas and rejected arguments that production be limited to a sample. Although the Court has consistently reminded the parties that these are different cases, both common sense and judicial economy would be well served by consistency in these cases when faced with identical Subpoenas seeking identical categories of Trust Data.

The Debtors respectfully request the Court grant the Motion for Rehearing and order the Objectors to produce all of the information sought by the Subpoenas.

ARGUMENT

I. A TEN PERCENT SAMPLE OF TRUST DATA WILL INTRODUCE UNNECESSARY UNCERTAINTY INTO THE DEBTORS' EFFORTS TO SATISFY THE PERMITTED PURPOSES FOR WHICH THIS COURT AUTHORIZED THE SUBPOENAS.

When the Court ordered rehearing on the Objectors' Motions to Quash at the March 30, 2023 hearing, the key question the Court directed the parties to answer was whether sampling is sufficient to satisfy the Debtors' needs. Mar. 30, 2023 Trans. at 189:22–25 [Misc. No. 22-00303, Dkt. 137, Ex. A].

The starting place in answering that question is this Court's Trust Discovery Order that granted the Debtors the right to issue the Subpoenas in the first place. In the Trust Discovery Order, the Court authorized the issuance of the Subpoenas for a number of Permitted Purposes "in connection with the estimation of the Debtors' liability for current and future asbestos-related claims and the negotiation, formulation, and confirmation of a plan of reorganization in these cases." Trust Discovery Order ¶ 5. The Court found the information sought by the Subpoenas was "relevant and necessary" to:

> the determination of whether pre-petition settlements of mesothelioma claims provide a reliable basis for estimating the Debtors' asbestos liability; the estimation of the Debtors' asbestos liability; and the development and evaluation of trust distribution procedures for any plan of reorganization confirmed in these cases (the "Permitted Purposes").

Id. The Trust Discovery Order was attached to the Subpoenas and served on the Objectors.

As was discussed and argued at the time the Debtors sought this Court's approval to issue the Subpoenas, the Subpoenas only seek information concerning those claimants who had resolved mesothelioma claims against the Debtors or their predecessors through settlement or verdict between January 1, 2005 and June 18, 2020. This turned out to be approximately 12,000 claimants, which represents less than half of the Debtors' historical mesothelioma claimants and just three percent of the more than 400,000 asbestos claimants who had asserted asbestos-related personal injury claims against the Debtors and their predecessors. *See* Deposition Transcript of Dr. Charles H. Mullin, May 8, 2023 ("Mullin Tr."), attached as Exhibit B to Hirst Decl., at 64:17–21; 155:10–18. This subset of the Debtors' claims history focused the discovery on the claims most relevant for estimation and trust forecasting (i.e., those claims that would provide the greatest benefit to the task) at a much reduced cost.

Further reducing the population of claimants to just ten percent of those 12,000 claimants may significantly impair the Debtors' ability to reliably fulfill the Permitted Purposes for which the Court authorized the Subpoenas in the first place.

A. A Sample Introduces Unnecessary Uncertainty and Imprecision.

Imposing a ten percent sample on the Trust Data produced will create higher levels of uncertainty in any estimates provided by the experts in these cases. Ultimately, if sampling of Trust Data is ordered, the Court will be forced to evaluate the size of the uncertainty in addressing the various expert opinions put before it at estimation and plan confirmation. This also may cause additional delay if there are additional disputes about how to best extrapolate from the sample for purposes of development and evaluation of trust distribution procedures or other plan of reorganization and confirmation related analyses. This uncertainty can easily be eliminated, at essentially no cost, by the production of all of the Trust Data.

Sample size is a "classic concern[] regarding reliability and relevance that district courts should weigh when deciding whether to admit expert evidence." *See In re Lipitor Mktg., Sales Pracs. & Prod. Liab. Litig.*, 892 F.3d 624, 635 (4th Cir. 2018). As Dr. Wyner admits, use of a sample introduces uncertainty that production of the complete Trust Data would not. *See* Wyner Tr. at 36:5–13 ("Q. Would you agree that the results of sample surveys are always subject to some uncertainty because only part of the population has been measured? A. Yes. Q. Would you agree that if you analyze the entire data set rather than a sample, by definition there is no sampling error? A. Yes.").

In these cases, Dr. Mullin testified that limiting production of the Trust Data to a ten percent sample could more than triple the level of uncertainty associated with any future estimates. Mullin Tr. at 74:9–20 ("So -- and what you can do definitively is talk about what's the relative improvement in precision. … So asking to take a tenth of the sample is asking you to slightly more

than triple your level of uncertainty in everything you're doing."). That uncertainty caused by sampling further mushrooms for estimates that are a product of several inputs, such as the value and count of the Debtors' future asbestos claims, as the uncertainty associated with each of those inputs increases. *See id.* at 80:11–15 ("And so every time you tell me to triple my uncertainty, I get nervous. If three different inputs all tell me to triple my uncertainty -- this is one input into estimation. Now the uncertainty is 27 times as big."); *see also id.* at 81:1–6 ("Each uncertainty interacts with the other ones, and they -- it's more multiplicative in nature. So it's not that this is the only parameter that matters and creates uncertainty; there are others. And as you fold them, they start to get larger.").

B. Limiting The Trust Data To A Sample May Limit The Debtors' Ability To Reliably Forecast Future Claims For Estimation And Plan Confirmation.

As explained by Dr. Mullin, given all of the Permitted Purposes and related uses of the data, it is impossible to know how much the level of uncertainty will increase until he can see the totality of the data. Mullin Tr. at 141:8-20. The simplest example of this involves the various subpopulations of claimants highly relevant to future claim forecasting. Particular occupation and industry groups are prime examples. *See* Declaration of Dr. Charles Mullin ("Mullin Decl.") [Misc. No. 22-00303, Dkt. 55] ¶ 15. Essentially, if a useful or critical subpopulation relating to claimant characteristics turns out to be very small, "you will have confidence intervals that are quite broad that -- in my experience, broad enough that most courts would say, that's not very precise; I don't know if we're going to rely on it." Mullin Tr. at 75:13–76:8; *see also id.* at 89:13–15 ("But as you shrink, the odds that the analysis you would want to perform to give the Court better guidance would become unfeasible."). For occupational exposures, for example, a more precise estimate brought about by the full Trust Data "can move your estimate 5 or 10 percentage

points." *Id.* at 59:13–20. And as a practical matter, "when you're talking hundreds of millions of dollars, 5 or 10 percentage points can be a lot of money." *Id.* at 60:2–4.

As it relates to estimation, the "relationship of exposures alleged to the various occupations and trades of the Debtors' historical claimants and the extent to which the full range of alleged exposures is changing over time are important to estimating a defendant's legal liability share." *See* Mullin Decl. ¶ 15. Similarly, for trust distribution and plan feasibility purposes, Dr. Mullin would intend to project the number of individuals that will develop mesothelioma in the future that would have claims that are compensable by the Debtors, or ultimately, a trust on behalf of the Debtors. *See id.* But not all claimants or groups of claimants are the same, nor will they be in the future. Thus, Dr. Mullin would likely consider specific subpopulations of the overall claimant population, including industry and occupational work backgrounds. *See id.; see also* Mullin Tr. at 45:13–19 ("When doing that exercise, the industry and occupational work backgrounds of Claimants matters. That affects the odds that they will be compensable. So when you're doing this forecast, you'd really like to break Claimants down into industry and occupational groups that have different levels of valuation associated with them."). This is because the number of claimants in some of these occupation and industry groups "taper off more quickly, so the claims [brought in the future] would decrease faster. Some will decrease more slowly. So to get a more precise estimate of the number of future claims that the Trust would receive, you really want to do the analysis by industry and occupational groups[.]" *Id.* at 46:4–10.

Limiting the Debtors to a ten percent sample of the Trust Data will limit, and in some cases, render impossible, the study of these subpopulation groups. Studying these subpopulation groups is particularly important to protecting the interests of future claimants and ensuring that the number of future claimants is appropriately estimated. While forecasting the number of claims that will

be brought against the Debtors one year after these bankruptcy cases have concluded might be relatively easy, estimating that number 20 years from now is not. "The further into the future you go, the more uncertainty. And so we want to minimize that because we really don't want to be in a position where future Claimants are getting paid less than the pending Claimants, so improving that forecast is important." *Id.* at 46:20–47:3.

In order to accurately study and analyze these subpopulations, both for purposes of estimation and for trust distribution procedures, the population size "also [must] be big enough to give reliable opinions and [an] accurate[] estimate." *Id.* at 48:14–16; *see also id.* at 60:21–61:10; 63:5–22. If the Objectors' production of Trust Data in response to the Debtors' Subpoenas were limited to just 1,200 claimants, the size of some of these subpopulation groups would be much smaller than that and would risk becoming too small to accurately analyze. *Id.* For example, as Dr. Mullin explained in his deposition, if the Trust Data is limited to 1,200 claimants, only 100 might be pipefitters. That number is likely insufficient to perform an analysis of the subpopulation of pipefitters with an appropriate degree of confidence for either estimating the Debtors' liability to that subpopulation, or setting up appropriate trust distribution processes for the same. Mullin Tr. at 47:19–48:4. Dr. Mullin explained how sampling would impact his analysis:

> So when you start peeling down, if you really want to ask a question that's just one average for the whole population, 1,200 claims, in general, would be enough. But as soon as you start saying there's a subpopulation of interest, like maybe pipefitters and electricians are different from carpenters, maybe certain jurisdictions are different from others, so you need to look at a subset, I no longer get to look at 1,200 claims, and so I need those subsets to also be big enough to give reliable opinions and accurately estimate the future.

Id. at 48:5–16.

The importance of studying these subpopulation groups cannot be contested. Indeed, the Objectors' expert, Dr. Wyner served as an expert in the NARCO Trust litigation, where he helped

develop the individual review model, designed to come up with the value of individual claims under the trust distribution procedures in that case. Wyner Tr. at 26:18–21; 27:6–17. As part of that work, Dr. Wyner used attributes of different subpopulations of claimants in his analysis, including many of the same attributes Dr. Mullin seeks to analyze here (including the parties' occupation, industry, and law firm). *Id*. at 27:22–29:3. In performing his work in the NARCO Trust Litigation, Dr. Wyner used the entire claims database for the NARCO Trust and was not constrained by any sample, as the Objectors claim Dr. Mullin should be here. *Id*. at 29:4–14.

C. The Objectors And Dr. Wyner Display A Lack Of Understanding Of The Estimation Analysis Dr. Mullin Plans To Undertake.

The Objectors either intentionally ignore, or misunderstand, both the Permitted Purposes identified in the Trust Discovery Order for use of the Trust Data and the analyses that Dr. Mullin intends to undertake.

Dr. Wyner opines that a ten percent sample "would fulfill all of the Debtors' reasonable needs." Expert Report of Abraham J. Wyner, Ph.D. [Misc. No. 22-00303, Dkt. 142-1] (the "Wyner Report") ¶ 6. Dr. Wyner bases his opinion that the "driving purpose" behind the Debtors' pursuit of the Trust Data is to determine whether claimants' exposure history revealed by the Trust Data is different than what was disclosed to the Debtors in the tort system. Wyner Tr. at 46:4–7; *see also* Wyner, Tr. at 68:14–17 ("So, I mean, the question is what is this about. And from everything I could tell, it's all about exposure allegations."). But as discussed above, and as the Court's Trust Discovery Order specifically envisions and permits, the Debtors intend to use the Trust Data for many more purposes than simply determining non-disclosure in the tort system. *See* Trust Discovery Order ¶ 5; Mullin Decl. ¶ 15; Mullin Tr. at 45:1–49:4. As to these broader Permitted Purposes, Dr. Wyner's testimony demonstrated he either lacked expertise in those areas (including asbestos bankruptcy estimation and the negotiation, formulation, or plan of reorganization in an

asbestos bankruptcy case), or failed to appreciate the analyses that Dr. Mullin intended to perform in furtherance of those Permitted Purposes. Wyner Tr. at 51:22–52:7; 82:6–83:1; 86:11–87:7.

In a similar vein, the Objectors and Dr. Wyner claim that Dr. Mullin does not "quantify the potential loss of accuracy" that a sample would impose. *See, e.g.*, DCPF Trusts Objection ¶¶ 9, 24; *see also* Wyner Report ¶ 8 ("At no point does Dr. Mullin quantify the potential loss of accuracy. He implies the loss is substantial enough to justify the costs without explanation, calculation, or quantification of any kind."). Although Dr. Mullin's declaration did not attempt to "quantify" the potential loss of accuracy in an unknown and unseen set of data, that restraint should be true for any statistician. In response to Dr. Wyner's critique, Dr. Mullin noted: "There's an irony. Well, he complains that 'at no point does Dr. Mullin quantify the potential loss of accuracy.' I think he very much knows that is an exercise you can't do *ex ante* when the very data you're seeking is fundamental to what subpopulations you need to analyze later. That's an impossibility." Mullin Tr. at 107:10–17. While the exact costs that a sample brings cannot be known until that sample is known and analyzed, the potential costs are great: "So you said 'quantify.' Going to the 10 percent sample will add tens of millions of uncertainty, maybe 100 million." *Id*. at 81:21–82:1. Any marginal benefit that a sample potentially brings is simply not worth the cost of failing to eliminate such a significant amount of uncertainty, as neither the alleged confidentiality or burden concerns advanced by the Objectors provide a reason to limit the Subpoenas to a sample.

There is certainly irony in Dr. Wyner's criticism of Dr. Mullin for not "quantifying" the loss of accuracy that would come from imposing a ten percent sample, while admitting that he has no experience in several of the areas for which Dr. Mullin seeks to use the Trust Data. Indeed, Dr. Wyner has no experience in asbestos bankruptcy estimation, the negotiation, formulation, or plan of reorganization in an asbestos bankruptcy case, yet feels qualified to opine that adding additional

error into Dr. Mullin's analysis by imposing a sample is "irrelevant." Wyner Tr. at 81:13–18; 82:6–83:1.

In addition, the Objectors appear to advance a claim that the Debtors already have some of the information concerning occupation and industry codes in their own claims database. *See* DCPF Trusts Objection ¶ 11. This is incorrect and overlooks two realities.

First, one of the significant findings in *Garlock* surrounded the differing product exposure information provided to the bankruptcy trusts as opposed to what was provided to defendants in the tort system. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 85–86 (Bankr. W.D.N.C. 2014) ("Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel identified 161 cases during the relevant period where Garlock paid recoveries of $250,000 or more. The limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse."). The Debtors' database only contains information available in the tort system, so, based on *Garlock*, it is likely that the occupational, industry, and work histories in possession of the Debtors are incomplete. Indeed, the Court stated in DBMP that a "close and careful look" was required to evaluate allegations of suppression of exposure evidence. Apr. 13, 2023 DBMP Trans., attached as Exhibit C to Hirst Decl., at 30:3–30:8. As such, imposition of a sample and introduction of uncertainty or error into the associated analysis should be avoided. A full production of the Trust Data ensures that the Debtors can provide the most accurate information to the Court on this issue.

Second, as the Debtors have previously explained, the nature of the asbestos litigation in the tort system ultimately required that the Debtors resolve certain claims because it was cheaper

to resolve them than it was to defend them. As to many of those claims, the Debtors obtained very limited occupational, work, and industry information. The Trust Data in these areas will allow the Debtors to supplement what they do have and gain a much clearer profile of claimants likely to claim against the Debtors in the future.

Finally, the Objectors and Dr. Wyner repeatedly invoke Dr. Jorge Gallardo-Garcia's declaration in *Bestwall* as favorable to their arguments. Objectors claim that "[i]n his declaration, Dr. Gallardo-Garcia praised the use of sampling for Trust Claimant discovery and estimation[.]" *See*, *e.g.*, DCPF Trusts Opp. ¶ 20. As Dr. Mullin testified, this characterization of Dr. Gallardo-Garcia's declaration is "explicitly wrong." Mullin Tr. at 106:14–107:9. Instead, as this Court is well aware, Dr. Gallardo-Garcia's declaration in *Bestwall* was executed after the Delaware District Court had, as is relates to the subpoena served on DCPF in that case, ordered that only a sample of the Trust Data would be permitted.[8] As a result, in his declaration, Dr. Gallardo-Garcia was not endorsing sampling, but instead stating that the sample Bestwall proposed to conform with the District Court's order ensured representativeness and efficiency:

> [S]ampling is a useful strategy if gathering and reviewing information for the whole population by conducting a census is not an option, for example, due to the financial cost or time delay associated with such an exercise. Because a sample includes only a fraction of the whole population, it invariably increases the analytical burden and can reduce the precision of results when compared to performing the same analysis on data for the whole population. Thus, any sample of a population should be designed in a manner that reduces the analytical burden and the uncertainty in the results.

See Declaration of Jorge Gallardo-Garcia, Ph.D., *In re Bestwall LLC*, No. 17-31795 [Dkt. 2183, Ex. B] (W.D.N.C. Oct. 28, 2021), attached as Exhibit D to Hirst Decl., ¶ 15. When asked about

[8] As the Court is also well aware, the Third Circuit later reversed this decision, and the debtor in *Bestwall* received a complete set of trust data, including unredacted PII, in response to their subpoenas to DCPF and the DCPF Trusts in that case. *In re Bestwall LLC*, 47 F.4th 233 (4th Cir. 2022).

this statement in his deposition, Dr. Wyner agreed that "sampling relative to a full data set analysis increases the analytical cost and reduces the precision of the results." Wyner Tr. at 117:6–118:5.

Dr. Gallardo-Garcia's declaration in *Bestwall* is simply irrelevant to the question of whether a sample is appropriate here. What is relevant to the question is that Dr. Mullin, Dr. Gallardo-Garcia, and Dr. Wyner all agree that the use of a sample introduces variation and uncertainty that does not exist when reviewing the full population. *See id.*; *see also* Wyner Tr. at 35:4–8; Mullin Tr. at 138:18–143:7.

The potentially significant costs imposed by the use of a sample of the Trust Data are simply not worth any marginal benefit that a sample might bring.

II. THERE IS NO BENEFIT TO ORDERING A SAMPLE.

While there are clearly numerous problems in limiting the Trust Data produced in response to the Subpoenas here to a sample, there are no underlying benefits to doing the same. In such a situation, as even Dr. Wyner acknowledges, there is absolutely no reason to utilize a sample. Wyner Tr. at 119:20–120:4 ("Q: Would you agree that if analyzing the entire population of the data set is costless, then you should look -- you should analyze the entire data set rather than a sample….THE WITNESS: So, I'll slightly rephrase it. You're saying if the cost is zero, then you should always prefer the population to be sampled, yes. Q: You said it better than I did. I'm not surprised.").

A. There Is No Undue Burden Created By The Subpoenas That Necessitates A Ten Percent Sample.

To level set: the only burden that the Objectors have identified in responding to the Subpoenas is the work in identifying and redacting Personally Identifiable Information ("PII") that may exist in certain exposure-related fields the Subpoenas seek. This is not a valid basis to limit

the response to a ten percent sample, as any costs to the Objectors associated with this alleged burden: (1) are unnecessary; and (2) will be fully reimbursed by the Debtors in any event.

First, the burden is unnecessary because the Debtors already have the claimants' PII by virtue of the fact that those claimants resolved claims against the Debtors in the tort system. Even if they did not (or even if some non-claimant PII that the Debtors did not already have existed in the Trust Data) the Trust Discovery Order *requires* that the Debtors' expert "search for and permanently delete any such names and SSNs that may be inadvertently included in the" Trust Data produced. Aldrich Trust Order ¶ 10 n.8. While the Objectors are certainly permitted under the Trust Discovery Order to take on the task (at the Debtors' cost) of reviewing and redacting this PII, their voluntary decision to do so should not be a basis to quash or otherwise limit their responses to the Subpoenas. *See, e.g., Amann v. Off. of Utah Att'y Gen.*, No. 2:18-cv-00341-NP-DAO, 2021 WL 2187262, at *2 (D. Utah May 28, 2021) ("Mr. Hanks cannot fairly complain about the burden of conducting the initial search where he rejected the AGO's offer to pay a neutral third party to perform this step."); *Morgan Hill Concerned Parents Ass'n v. Cal. Dep't of Educ.*, No. 2:11-cv-3471 KJM AC, 2017 WL 445722, at *7 (E.D. Cal. Feb. 2, 2017) (rejecting a party's purported burden because it was a "problem of [its] own making").

Second, contrary to the Objectors' argument, the Debtors do not "hand wav[e]" away the cost of redacting this PII from the Trust Data if the Objectors insist on doing so. DCPF Trusts Objection ¶ 10. Instead, the Debtors are reimbursing the Objectors for any costs they incur in doing so.[9] *See* Trust Discovery Order ¶ 19. In doing so, the Debtors have eliminated the Objectors'

[9] The Objectors did not inform their expert, Dr. Wyner, about the fact that the Debtors were responsible for reimbursing the costs the Objectors incurred in responding to the Subpoenas. *See* Wyner Tr. at 39:14–17.

claims of undue burden.[10] *See, e.g., Seven Z Enters., Inc. v. Giant Eagle, Inc.*, No. 2:17-cv-740, 2020 WL 7240365, at *4 (W.D. Pa. Mar. 6, 2020) ("[A]ny potential undue burden can be mitigated by cost shifting permitted under Rule 45(d)(2)(B)(ii), which requires nonparties to be protected from significant expense resulting from compliance with a subpoena."); *Cash Today of Tex., Inc. v. Greenberg*, No. 02-MC-77-GMS, 2002 WL 31414138, at *4 (D. Del. Oct. 23, 2002) (finding no undue burden where a party offered to copy "over 20,000 individual loan files" at its own expense, making the burden "substantially reduced such that the burden is not 'undue'").

Finally, the Objectors complain that even if the costs are reimbursed by the Debtors, there are still non-quantifiable burdens in performing this redaction work that will cause damage to their businesses, including delays and distraction from their core business activities. *See, e.g.*, Verus Opposition ¶ 27; DCPF Trusts Opposition ¶ 4. These complaints ring particularly hollow given the evidence here. Just two months ago, Verus's Chief Executive Officer, Mark Eveland, filed a declaration in these cases in support of its request to be retained by the ACC to review and analyze the responses to Personal Injury Questionnaires. *See* Declaration of Mark Eveland Pursuant to Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure and Section 328 of the United States Bankruptcy Code in Support of the *Ex Parte* Application of the Official Committee of Asbestos Personal Injury Claimants to Retain and Employ Verus LLC as PIQ Data Administrator for the Personal Injury Questionnaire Responses [Main Case No. 20-30608, Dkt. 1636-1] ("Eveland Decl."). Verus's work will involve reviewing substantial amounts of highly confidential information submitted by claimants in response to the PIQs in these cases, including medical records, pathology reports, economic loss reports/documentation, and related claimant

[10] As this Court is aware, the costs DCPF incurred in undertaking the same exercise in response to the subpoenas in *DBMP* totaled approximately $86,000, which was reimbursed by the debtor in that case. *See* Feb. 9, 2023 DBMP Trans., attached as Exhibit E to Hirst Decl., at 56:11–15.

information. *Id.* ¶ 4. Verus would be paid for this work by the Debtors' estates. *Id.* ¶ 5; *see also* Deposition of Mark Eveland, May 16, 2023 ("Eveland Tr."), attached as Exhibit F to Hirst Decl., at 85:7–86:8. Mr. Eveland suggests this PIQ-related work could take thousands of hours to complete. *Id.* at 83:3–15. Nonetheless, while Verus strenuously complains about the damage to its business it believes will be caused by responding to these Subpoenas (at the Debtors' expense), Mr. Eveland was clear that the far more burdensome task of reviewing the PIQ Responses (again at the Debtors' expense) would not distract or otherwise interfere with Verus's core business of processing asbestos trust claims. *Id.* at 84:6–85:6.

Likewise, DCPF's Chief Operating Officer, Richard Winner, testified that DCPF developed a software application that "worked well" and "helped us" with the redaction exercise in *DBMP*. Deposition Transcript of Richard Winner, May 16, 2023 ("Winner Tr."), attached as Exhibit G to Hirst Decl., at 142:18–145:12. Apparently, some of the burden related to the *DBMP* redaction was because employees were stretched thin by the start of claims processing for the Paddock and Rapid American trusts. *Id*. at 95:10–96:7. However, DCPF does not anticipate that it will begin processing claims for any new trusts in the next six months, so that element of the alleged burden will not be present here. *Id*. at 146:15–19.

In sum, at the same time Mr. Eveland filed a declaration in these cases seeking to be retained for this mammoth amount of PIQ-related work on the Debtors' dime, he submitted declarations and testimony alleging the massive interference with Verus's business that would be caused by the comparatively modest task of responding to the Debtors' Subpoenas, again at the Debtors' cost. Similarly, DCPF has made clear that one of the major events that made its production in *DBMP* allegedly "burdensome" will not be the case here. These ironies are rich, and the conclusion is obvious: Verus and DCPF have no issue taking on significant work to be paid

by the Debtors when they want to, but will claim "undue burden" to avoid responding to Subpoenas (Subpoenas which multiple courts have already found to be valid), paid by the same Debtors when they do not.

B. There Are No Confidentiality Concerns Created By The Subpoenas That Necessitate A Ten Percent Sample.

Second and relatedly, the confidentiality concerns raised by the Objectors and Dr. Wyner in his expert report are much smaller than the Objectors portray them to be. Dr. Wyner opines:

> If a sample of 10% is released, then the size of the at-risk population is 10 times smaller. Since the damage in a confidentiality breach is measured in proportion to the size of the number of individuals that are exposed the potential damage to the individual claimants *is 10 times smaller*.

Wyner Report ¶ 32 (emphasis in original). This statement is, at best, misleading. As noted *supra*, prior to production of the Trust Data, the Trust Discovery Order provides the Objectors the option to review and redact any inadvertently included PII, at the Debtors' cost. Trust Discovery Order ¶ 10, n 8. Regardless of whether the Objectors choose to redact that information, the Debtors, through Bates White, are required to do so upon receipt of the Trust Data. *Id.*

The result is as follows: if the Objectors take on that task—as they claim they will—then that data will have been reviewed and redacted twice (again at the Debtors' cost) to ensure that no PII (which the Debtors already largely possess in any event) is not disclosed to the Debtors as part of the Trust Data. In explaining the theoretical risk of PII being exposed despite these redaction efforts, Dr. Mullin testified:

> So if we had 12,000 Claimants, if 5 percent of the Claimants had a field with some additional PII, 99 percent of it gets redacted by [DCPF], 99 percent of what they gets missed gets redacted by Bates White, you're talking .01 incremental piece of PII, when you would have already 12,000 people's PII in a data breach. So going from 12,000 people to 12,001, I don't want to be trivial about anybody's PII, but it's one more out of 12,000. So when you say, is this

> materially increasing the risk that already exists, going from 12,000 to 12,001, that's not a particularly material increase.

Mullin Tr. 96:17–97:7. The risk that the Objectors miss any PII during their review and redaction process, and then again that same PII is missed by Bates White in its own Court-ordered review, is minimal. As Dr. Mullin explained, the Debtors already possess the claimants' PII and any additional non-claimant PII that is inadvertently produced by the Objectors (and that the Debtors don't already have) moves the needle only minimally. *See id.* at 127:4–13 ("[T]he real risk of the data breach is the 12,000 we already have, not the handful that are going to make it through all the screenings that come along first. So saying this is fundamentally changing the risk of data breach is ignoring the amount of data that's sitting at risk.").

The Objectors also claim that limiting the Trust Data to a ten percent sample will ensure less data is exposed in the event of a data breach. But the mere possibility of a data breach cannot be the basis to not respond to lawful subpoenas. *See, e.g., Green v. Cosby*, 314 F.R.D. 164, 173 (E.D. Pa. 2016) ("Cosby contends that he and the other witnesses will be burdened by the production of [a] case file because sensitive information about them will become public. … Cosby's concern about public disclosure is purely speculative and does not support a motion to quash."). That is particularly true here, where Bates White already has the claimant PII that the Objectors suggest could be breached. Further, of all of the parties who have the claimant level PII (Verus, DCPF, Bates White), Bates White far and away employs the most extensive protections to ensure the data it stores is kept safe. *See* Mullin Decl. ¶ 29. This includes, among other things, Bates White's certifications under the specialized HITRUST and SOC2 standards, considered the most rigorous information security standards. *Id.* Neither DCPF nor Verus is HITRUST or SOC2 certified, though Mr. Eveland testified that Verus intends to seek such certifications in the future. *See* Eveland Tr. 87:25–88:8; 88:23–89:11. At DCPF, Mr. Winner testified that it does not require

security certifications of claimant law firms seeking to access the DCPF Trust online database. Winner Tr. 57:23–58:14. In short, the Trust Data is better protected in the hands of Bates White than it is in the hands of DCPF and Verus.

Finally, the extensive protections for the confidentiality of the Trust Data in the Trust Discovery Order, far beyond those of a standard protective order, are the types of protections our legal system relies on to allow a free exchange of information between parties. *See Stein v. I 5 Exteriors Inc.*, No. 3:21-CV-5093-DWC, 2021 WL 4902518, at *4 (W.D. Wash. Sept. 15, 2021) ("Moreover, Plaintiff is correct that if any information responsive to the subpoena is revealed to be confidential it can easily be safeguarded by the existing Protective Order."). As United States Bankruptcy Court Judge Laurie Silverstein recognized when overruling similar arguments seeking to impose additional restrictions governing the production and use of the Paddock Trust Data, "I do think this information is sensitive and that is – it has to be protected, but we deal with it all the time and we deal with it through protective orders. We assume the good faith, quite frankly, of the people who are – who have access to that information and, if we can't depend on the good faith of the people who have access to the information, then that just throws the whole scheme out." Jan. 6, 2023 Paddock Trans., attached as Exhibit H to Hirst Decl., at 18:24–19:6.

III. THE COURT SHOULD NOT TREAT THE SUBPOENAS HERE ANY DIFFERENTLY THAN THE SUBPOENAS IN *DBMP*.

The Debtors recognize and agree with this Court's and the ACC's prior statements that, while involving quite similar issues, these bankruptcy cases and the *DBMP* case are different cases and will have, at times, different rulings. Here, however, the Subpoenas are identical and the issues are identical, and there is no reason to treat the Subpoenas here any differently than those in *DBMP*. Indeed, if the Court does restrict the Debtors to a sample here, it will find itself in the unfortunate position of having more complete information available in *DBMP*, on which to rely for its

estimation and plan confirmation rulings. This is not to mention the potential additional motion practice that might arise in these cases because of the different approach in the two cases that would result from ordering just a sample of Trust Data be produced here. This is simply not a situation that the Court should endorse or desire, given the lack of burden on the Objectors in fully responding to the Subpoenas in these cases. The Court was correct in its ruling in *DBMP*, and it should make that same ruling in these cases.

IV. THERE IS NO BASIS TO BAR DR. MULLIN FROM TESTIFYING.

Finally, recognizing that they cannot refute the real costs that a sample brings, the Verus Trusts claim in their Opposition that the Debtors "move[] the proverbial goalpost" and that Dr. Mullin's testimony should be excluded because his declaration failed to provide the "complete statement of all opinions" he would express in violation of Federal Rule of Civil Procedure 26(a)(2)(i). Verus Trusts Opposition ¶ 2. The position is meritless, both factually and legally.

First, nothing in Dr. Mullin's deposition testimony—elicited solely on questioning by the Objectors—was new, and there is no reason that his deposition testimony or his prior declaration should be stricken. The Trust Discovery Order, which was served on the Objectors with the Subpoenas last July, clearly identified the Permitted Purposes for which the Debtors were authorized to use the Trust Data. *See* Trust Discovery Order ¶ 5. Dr. Mullin further explained how the Debtors would use the Trust Data in his declaration offered in support of the Debtors' Motion for Rehearing, specifically identifying that he intended to analyze "the relationship of exposures alleged to the various occupations and trades of the Debtors' historical claimants" and "supplement the Debtors' own claims database with additional work history, exposure, and occupation information, all of which will also provide more data that will improve the quality of our estimation and claims forecasting work." Mullin Decl. ¶ 15. The fact that Dr. Mullin further explained the details of his planned estimation analysis, in response to questions propounded by

the Objectors at his deposition, does not render his declaration incomplete. *See, e.g.*, *Montgomery v. CSX Transp.*, Civ. No. SAG-14-1520, 2016 WL 5390809, at *5–6 (D. Md. Sept. 27, 2016) (denying motion to exclude expert testimony where expert "identified the specific industrial safety label for his theory of" liability "for the first time during his deposition," because "this mere labeling of the theory cannot be deemed to be new information" and thus finding that the expert's "opinion remain unchanged throughout his reports and during his deposition").

Second, there is no legal basis to strike Dr. Mullin's testimony under Rule 26(a)(2). The instant Motion is a contested matter under Bankruptcy Rule 9014. Pursuant to Bankruptcy Rule 9014, Rule 26(a)(2) "shall not apply in a contested matter unless the court directs otherwise." Fed. Bankr. R. 9014(c); *see also In re Moon*, No. 13-12466-MKN, 2019 WL 5783253, at *3 (Bankr. D. Nev. Sept. 7, 2019) ("That FRBP 9014 (c) expressly excludes the initial disclosure requirements under FRCP 26(a)(1) in contested matters as well as the expert disclosure requirements under FRCP 26(a)(2) also is well known."). This Court never directed that Rule 26(a)(2) applies to the instant Motion, and thus the entire basis of the Verus Trusts' request is legally baseless. Moreover, even if Rule 26(a)(2) did apply, and the Objectors were somehow surprised by the fact that Dr. Mullin's deposition testimony went beyond him simply parroting back the exact words of his declaration in response to every question, they have suffered zero prejudice: they deposed him for four hours, their own expert Dr. Wyner had the opportunity to respond to Dr. Mullin's deposition testimony at his own deposition (nine days after Dr. Mullin's deposition), and they will have yet another chance to examine Dr. Mullin in open court during the June 6, 2023 hearing.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Debtors' previous filings, the Debtors request that this Court enter an order requiring the Objectors to comply with the Subpoenas in full.

Dated: May 26, 2023
Charlotte, North Carolina

Respectfully submitted,

/s/ John R. Miller Jr.

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