

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re

ALDRICH PUMP LLC and MURRAY
BOILER LLC,¹

Debtors.

Chapter 11

Case No. 20-30608

**DBMP'S OBJECTION TO THE MOTION BY OFFICIAL
COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS
TO QUASH SUBPOENAS SENT TO DEBTORS**

DBMP LLC (“**DBMP**”) objects to the *Motion by Official Committee of Asbestos Personal Injury Claimants to Quash Subpoenas Sent to Debtors* (Dkt. 2157) (the “**Motion**”), by which the Official Committee of Asbestos Personal Injury Claimants in this chapter 11 case (the “**Aldrich/Murray Committee**”) seeks an order striking document subpoenas (the “**Subpoenas**”) served by DBMP on non-parties Aldrich Pump LLC (“**Aldrich**”), and Murray Boiler LLC (“**Murray**,” and together with Aldrich, “**Aldrich/Murray**” or the “**Debtors**”).²

¹ The last four digits of the Debtors’ taxpayer identification are 2990 (Aldrich) and 0679 (Murray). The Debtors’ address is 800-E. Beaty Street, Davidson, North Carolina 28036.

² DBMP also served a subpoena on Bestwall in Bestwall’s chapter 11 case. Separate objections and motions to strike or quash also were filed in DBMP’s chapter 11 case by the Official Committee of Asbestos Personal Injury Claimants in the DBMP proceeding (the “**DBMP Committee**”) and in Bestwall’s chapter 11 case by the Official Committee of Asbestos Claimants in the Bestwall proceeding (the “**Bestwall Committee**”). See *Official Committee of Asbestos Personal Injury Claimants of DBMP LLC’s Objection to and Motion to Strike Subpoenas Issued by Debtor to Aldrich Pump LLC, Bestwall LLC, and Murray Boiler LLC, In re DBMP LLC*, Case No. 20-30080 (Bankr. W.D.N.C. March 20, 2024) (Dkt. 2730); *Motion by the Official Committee of Asbestos Claimants to Quash Subpoena Sent to Debtor, In re Bestwall LLC*, Case No. 17-31795 (Bankr. W.D.N.C. March 22, 2024) (Dkt. 3327). The motion in *DBMP* is scheduled to be heard on April 17, 2024, together with the Motion in this case, and the motion in *Bestwall* is scheduled to be heard on April 18, 2024.



INTRODUCTION

The Subpoenas, which were served on February 29, 2024, seek production of limited, non-privileged, non-confidential information from Aldrich/Murray's pre-petition claimant database regarding a small subset of DBMP mesothelioma claimants who also asserted asbestos-related mesothelioma claims against Aldrich or Murray.³ Two years ago, similar subpoenas seeking identical categories of information from DBMP and Aldrich/Murray were served by Bestwall, and largely approved by Judge Beyer and this Court following motions to strike or quash by the Bestwall Committee, the DBMP Committee, and the Aldrich/Murray Committee. Specifically, during a May 26, 2022, combined hearing in this case and *DBMP*, this Court overruled the objections of the DBMP and Aldrich/Murray Committees and approved Bestwall's subpoenas. Among other things, this Court held that the discovery sought by Bestwall was appropriate and did not implicate personal identifying information. See 5/26/22 Hr'g Tr. at 112-16. In her May 18, 2022 ruling in *Bestwall*, Judge Beyer similarly overruled the objections of the Bestwall Committee, finding that the Bestwall subpoenas sought relevant information and did not seek privileged or otherwise protected data.⁴ See 5/18/22 Hr'g Tr. in *In re Bestwall*, Case No. 17-31795 (Bankr. W.D.N.C.), at 20-25 (attached as Ex. 1) ("**Bestwall 5/18/22 Hr'g Tr.**"). This Court and Judge Beyer subsequently issued written orders incorporating these rulings.⁵

³ Copies of the Subpoenas are attached as Ex. A to the Motion.

⁴ Judge Beyer did limit the universe of claimants about whom Bestwall could obtain information from DBMP and Aldrich/Murray (based on the agreed claims sample in use in the *Bestwall* case) and also ruled that the information produced to Bestwall should be subject to a protective order. As explained below, DBMP's Subpoenas abide by these limitations.

⁵ See *Order Denying the Motion by Official Committee of Asbestos Personal Injury Claimants to Quash Subpoenas Sent to Debtors* (Dkt. 1204); *Order Denying the Motion by Official Committee of Asbestos Personal Injury Claimants to Quash Subpoena Sent to Debtor, In re DBMP LLC, et al.*, Case No. 20-30080 (Bankr. W.D.N.C. June 14, 2022) (Dkt. 1465); *Order Granting in Part and Denying in Part the Official Committee of Asbestos Claimants' (I) Objection to and Motion to Strike Subpoenas Issued by Debtor to Aldrich Pump LLC, DBMP LLC, Murray Boilers LLC, and Paddock Enterprises, LLC; or (II) In the Alternative, to Determine that the Debtor has Waived*

Barely acknowledging these directly on-point decisions, the Motion repeats the same objections that this Court and Judge Beyer rejected two years ago. The Aldrich/Murray Committee argues that (1) the Subpoenas seek personal, sensitive, and/or confidential information (Motion at ¶¶ 12-26); (2) the information sought exceeds the permissible scope of discovery under Fed. R. Civ. P. 26 (Motion at ¶¶ 27-29); (3) the Subpoenas cannot be issued without leave of Court under the *Barton* doctrine (Motion at ¶¶ 30-32); and (4) the asbestos claimants identified in the Subpoenas should have received notice and an opportunity to challenge the Subpoenas (Motion at ¶¶ 33-35). Alternatively, the Aldrich/Murray Committee argues that if the Court denies the Motion, the confidentiality provisions in the order governing Aldrich/Murray's discovery of information from various asbestos trusts should govern any production.⁶ (Motion at ¶¶ 36-37.) These arguments were all included in the motions challenging Bestwall's subpoenas and were addressed and expressly or implicitly rejected by this Court's and Judge Beyer's 2022 rulings.⁷

As this Court has commented in the related context of discovery sought from asbestos trusts, while the *Bestwall*, *DBMP*, and *Aldrich* cases present different issues that may lead to

Privilege to the Case Files of any Matched Claimant, In re Bestwall LLC, Case No. 17-31795 (Bankr. W.D.N.C. June 13, 2022) (Dkt. 2608).

⁶ The Aldrich/Murray Committee also argues that it has standing to object to the Subpoenas. (Motion at ¶¶ 12-18.) DBMP disagrees, because the standing arguments are all premised on the faulty notion that the Subpoenas seek confidential information, among other reasons. But since this Court previously found that the DBMP and Aldrich/Murray Committees had standing to challenge the Bestwall subpoenas, 5/26/22 Hr'g Tr. at 115:1-17, DBMP will concede the issue for purposes of this objection rather than wasting the Court's time by asking it to revisit the standing question.

⁷ *Motion by Official Committee of Asbestos Personal Injury Claimants to Quash Subpoenas Sent to Debtors* (Dkt. 1056), at ¶¶ 17-20, 23-25, 27, 33-36 (the "**Aldrich/Murray Committee Motion to Quash**"); *Motion by Official Committee of Asbestos Personal Injury Claimants to Quash Subpoena Sent to Debtor, In re DBMP LLC*, Case No. 20-30080 (Bankr. W.D.N.C. March 19, 2022) (Dkt. 1373), at ¶¶ 16-19, 22-24, 26, 30-33; *Official Committee of Asbestos Claimants' Motion (I) Objection to and Motion to Strike Subpoenas Issued by Debtor to Aldrich Pump LLC, DBMP LLC, Murray Boilers LLC, and Paddock Enterprises, LLC; or (II) In the Alternative, to Determine that the Debtor Has Waived Privilege to the Case Files of any Matched Claimant, In re Bestwall LLC*, Case No. 17-31795 (Bankr. W.D.N.C. March 21, 2022) (Dkt. 2470), at ¶¶ 4-21, 34-36.

different results, where “the facts and circumstances appear to be all but identical, I believe consistency will be helpful,” 6/15/23 Hr’g Tr. at 18:25-19:2. The Aldrich/Murray Committee offers no legitimate reason why this Court should revisit or reconsider its prior ruling and thereby deny DBMP the same discovery Bestwall was allowed to pursue. Instead, as it did in 2022, it argues that the Subpoenas should be rejected because they seek “sensitive,” “confidential,” and “personal” information. (Motion at ¶¶ 2, 12-26.) In so arguing, the Motion completely ignores Judge Beyer’s ruling that the Bestwall subpoenas “don’t seek highly personal, sensitive, confidential, or privileged data,” Bestwall 5/18/22 Hr’g Tr. at 21, and this Court’s ruling that “I don’t see the discovery requested here being, having PII. I don’t think that we have a real threat of identity theft under the circumstances.” 5/26/22 Hr’g Tr. at 115. The Aldrich/Murray Committee contends—without support or example—that “highly personal or confidential” information would be produced in response to the Subpoenas. (Motion at ¶ 20.) The only supposedly private topic it identifies, however, is settlement information. (*Id.* at ¶ 21.) But, with respect to settlement, the Subpoenas ask merely whether a claimant settled with Aldrich/Murray (a yes or no proposition) and, if so, the date of such settlement and the date of any settlement payment. (Motion, Ex. A.) There is nothing confidential, privileged, or sensitive about these matters, as this Court and Judge Beyer already have found.

Second, the Aldrich/Murray Committee suggests that because DBMP has subpoenaed information about resolved mesothelioma claims from various asbestos bankruptcy trusts and has received PIQs from pending claimants, this discovery is unnecessary. (Motion at ¶¶ 5, 27-29.) But the fact that DBMP has received some discovery about these claimants from other sources is not grounds to quash the Subpoenas. To the contrary, the scope of discovery is broad, and

extends to all information “relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1); Fed. R. Bankr. P. 7026, 9014(c).

Notably, neither Aldrich nor Murray object or otherwise argue that responding will impose upon them an undue burden or expense. Further, the fact that DBMP already has some claimant information does not obviate the need for it to obtain additional information, given the central relevance of such information to estimation. As it has previously explained to the Court, DBMP at estimation will present a legal liability methodology that depends, in significant part, on assessing DBMP claimants’ claims against other parties and exposure to their products. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 73, 96 (Bankr. W.D.N.C. 2014). The information sought by DBMP’s Subpoenas—whether and when Aldrich and Murray settled DBMP claimants’ claims, and the exposures claimed against those companies—is directly relevant to this issue.

The information sought by the Subpoenas also bears on DBMP’s rebuttal of the DBMP Committee’s and FCR’s anticipated plan to rely on DBMP’s historical settlements to value the company’s current and future liability. DBMP contends that these settlements overstate its liability; the extent to which DBMP claimants asserted claims against co-defendants, identified exposures to their products, and settled those claims, will be relevant to DBMP’s expert’s response to the DBMP Committee’s and the DBMP FCR’s settlement methodology. *See Bates Decl.*, ¶¶ 32-35, 38-40 (attached as Ex. 2).

The Aldrich/Murray Committee’s remaining arguments for quashing the Subpoenas are likewise unavailing. As this Court and Judge Beyer have previously found, the *Barton* doctrine does not preclude issuance of the Subpoenas, and there are no grounds to require DBMP to provide the claimants with notice of the Subpoenas.

Implicitly acknowledging the weakness of their arguments, the Aldrich/Murray Committee alternatively suggests that any information gathered pursuant to the Subpoenas should be subject to the strict confidentiality and use restrictions imposed by this Court in its *Order Granting Motion of the Debtors for an Order Authorizing the Debtors to Issue Subpoenas on Asbestos Trusts and Paddock Enterprises, LLC* (Dkt. 1240). This request too ignores that the Subpoenas do not seek the sort of personal or confidential information warranting such heightened and unusual protections. Moreover, when Aldrich/Murray produced a much larger data set, including confidential settlement amounts, from its pre-petition claimant database to experts for the Aldrich/Murray Committee and FCR, the Court ordered that any information produced from such database would be protected by the *Agreed Protective Order Governing Confidential Information, In re Aldrich Pump LLC*, Case No. 20-30608 (Dkt. 345) (the “**Aldrich/Murray Protective Order**”).

DBMP’s Subpoenas likewise provide that DBMP will treat any information produced in response as confidential in accordance with the *Agreed Protective Order Governing Confidential Information, In re DBMP LLC*, Case No. 20-30080 (Dkt. 251) (the “**DBMP Protective Order**”), which has the same database protections contained in the Aldrich/Murray Protective Order. *See* Subpoena to Aldrich, Ex. A at ¶ 14; Subpoena to Murray, Ex. A at ¶ 13. This is consistent with the protections this Court and Judge Beyer ordered for the information produced in response to Bestwall’s subpoenas. There is, accordingly, no reason for imposition of the more stringent restrictions imposed in connection with the data produced by the asbestos bankruptcy trusts.

STATEMENT OF RELEVANT FACTS

DBMP served the Subpoenas on Aldrich/Murray on February 29, 2024, seeking limited information about: (1) each mesothelioma claimant who had resolved a mesothelioma claim

asserted against DBMP or its predecessor, the former CertainTeed Corporation, prior to the Petition Date and who is identified in the agreed sample used in *DBMP* for estimation purposes as identified on Exhibit A to the *Agreed Order with Respect to Resolved Claims Sampling for Purposes of Estimation Discovery, In re DBMP LLC*, Case No. 20-30080 (Dkt. 2506) (such claims on Exhibit A, the “**DBMP Agreed Claims**”); and (2) mesothelioma claimants who timely filed and did not withdraw a Proof of Claim in *DBMP* pursuant to the *Order (I) Establishing Bar Date for Pending Mesothelioma Claims, (II) Approving Proof of Claim Form, (III) Approving Notice to Claimants, and (IV) Directing Submission of Personal Injury Questionnaires by Pending Mesothelioma Claimants, In re DBMP LLC*, Case No. 20-30080 (Dkt. 1461) (the “**Pending Claims**”). (Motion, Ex. A at ¶¶ 1, 4.) Collectively, there are just over 4,000 claimants whose information is potentially the subject of the Subpoenas. The Subpoenas, however, seek information about these claimants only to the extent they also filed pre-petition mesothelioma claims against Bestwall or Aldrich/Murray, and so it is anticipated that the actual number of claimants whose information will be produced in response to the Subpoenas will be smaller.

The Subpoenas seek information identical to the information sought by the Bestwall subpoenas approved by this Court and Judge Beyer in 2022. The information sought is a small subset of that contained within Aldrich/Murray’s pre-petition claims database, namely only fields that record: (1) the name of the law firm or firms who represented the claimant; (2) the jurisdiction and state in which the claimant filed his or her claim against Aldrich/Murray; (3) the status of the claim against Aldrich/Murray (*e.g.*, settled, dismissed, etc.); (4) if resolved, the date the claim was resolved; (5) if a settlement or judgment were paid, the date of payment; and (6) the claimant’s exposure allegations, including dates, manner, and location of exposure. (*See* Motion, Ex. A.)

Neither Aldrich nor Murray objected to the Subpoenas. Each is prepared to produce the requested information.⁸

ARGUMENT

I. The Subpoenas Do Not Seek Privileged or Otherwise Protected Data.

As a non-target of the Subpoena, the Aldrich/Murray Committee must show that the data sought requires disclosure of their “potentially privileged and otherwise protected matter.” *CineTel Films, Inc. v. Does 1-1,052*, 853 F. Supp. 2d 545, 554 (D. Md. 2012) (citations omitted); accord *United States v. Idema*, 118 Fed. Appx. 740, 744 (4th Cir. 2005) (“[A] party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena.”) (citations omitted); 9A Wright & Miller § 2459 (party has no standing to quash a subpoena issued to nonparty “unless the objecting party claims some personal right or privilege with regard to the documents sought”); Fed. R. Civ. P. 45(d)(3).

In an effort to satisfy this requirement, the Aldrich/Murray Committee argues that the Subpoenas seek “highly personal and confidential information” and that there is “clearly potential harm to the Aldrich/Murray asbestos claimants” in allowing such personal and confidential information to be shared with DBMP. (Motion at ¶ 24.) Putting aside whether concerns about confidentiality are sufficient grounds under Rule 45 for a non-target to challenge a third-party subpoena, the Aldrich/Murray Committee is flat wrong in its characterization of the information sought by DBMP. As this Court and Judge Beyer previously ruled when considering the identical requests of Bestwall, most of the data sought such as the claimants’ law firm, the

⁸ DBMP informed Aldrich/Murray that they need not produce responsive documents until the Motion and the motion to strike filed in *DBMP* are resolved. See March 21, 2024, e-mail from Valerie Ross to C. Michael Evert, Jr. (attached as Ex. 3).

court where the claim was filed, and certain basic exposure information, are derived from the claimants' public court filings, and hence is neither personal nor confidential. *E.g.*, Bestwall 5/18/22 Hr'g Tr. at 21:25-22:2 ("Most of the information sought pursuant to the *subpoenas* could be found in complaints and other public court filings.") (emphasis in original).⁹

The Motion fails to explain what part of DBMP's requests seek sensitive or personal or confidential information. It talks generally about "settlement negotiations" and "settlement agreements" (Motion at ¶¶ 21-22), but does not correlate such matters with the information requested in the Subpoenas. In reality, the Subpoenas do not ask about the substance of any settlement negotiations or agreements. Rather, the only settlement data DBMP seeks are the claim status, *i.e.*, whether the claimant settled with Aldrich or Murray, and, if so, the date of settlement and the date of payment. None of this information is confidential. *E.g.*, *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005) (plaintiff not obliged to accept Rule 68 offer of judgment conditioned on fact of settlement being confidential because "party engaged in litigation is not entitled to insist on confidentiality"); *Arbour v. Alterra Wynwood of Meridian*,

⁹ In addition, the Aldrich/Murray Committee is precluded from relitigating whether the Subpoenas seek "highly personal and confidential information." (Motion at ¶ 24.) Issue preclusion applies where: "(1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). In determining the relevant issue for issue preclusion, it is enough if there is "substantial overlap" between the "argument to be advanced in the second proceeding and that advanced in the first," particularly if the claims in the two proceedings are "closely related." Restatement (Second) of Judgments § 27 cmt. c (1982). Here, after the Aldrich/Murray Committee raised its argument that the subpoenas served by Bestwall requested "highly personal and confidential" information, *see* Aldrich/Murray Committee Motion to Quash at 6-8, the Court found that those subpoenas did not implicate personal identifying information. *See* 5/26/22 Hr'g Tr. at 112-16. Importantly, the Subpoenas here and the subpoenas served by Bestwall are closely related because the subpoenas all seek the same type of non-confidential information. As a result, the parties have already litigated, and this Court already resolved, the issue of whether the information sought here is highly personal in nature. Further, the Court's order denying the Aldrich/Murray Committee Motion to Quash was not appealed, and the Aldrich/Murray Committee had a full and fair opportunity to litigate the issue of the nature of the information sought. The Court should not countenance the Aldrich/Murray Committee's efforts to relitigate previously decided issues.

No. 1:09-CV-246, 2010 WL 11688550, at *2 (W.D. Mich. Mar. 9, 2010) (court agrees to redaction of settlement amounts in settlement agreement filed on public court docket but “fact of settlement itself need not and should not be redacted”); *Church v. Dana Kepner Co., Inc.*, No. 11-cv-02632-CMA-MEH, 2013 WL 24437 at *7 (D. Colo. Jan. 2, 2013) (denying plaintiffs’ motion for a protective order against information sought by defendant on settlements of mesothelioma claims and requiring the plaintiffs “to provide information concerning **the fact of the settlements** in the California litigation, including the identities of each defendant with whom the Plaintiffs [] settled and **the date of each settlement.**”) (emphasis added); *see also* D.C. Bar Ethics Op. 355 (2006) (settlement agreement that seeks to compel counsel to keep confidential “fact that the case has settled” violates D.C. Rule of Prof. Conduct 5.6(b)).

In short, the Subpoenas do not seek confidential, sensitive, or personal information, and so should not be quashed on those grounds.

II. The DBMP Subpoenas Are Limited in Scope and Proportional to the Needs of the Case.

Parties are broadly entitled to obtain discovery on “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1); Fed. R. Bankr. P. 7026, 9014(c). This standard for discovery is “accorded broad and liberal construction.” *Greene v. Shapiro & Ingle, LLP*, No. 3:17-CV-263-RJC-DCK, 2018 WL 1566336, at *1 (W.D.N.C. Mar. 30, 2018). As the party objecting to the Subpoenas, the Aldrich/Murray Committee has the burden of showing that they are not appropriate under this broad standard. *Ultra-Mek, Inc. v. Man Wah (USA), Inc.*, 318

F.R.D. 309, 316 (M.D.N.C. 2016) (“District courts within the Fourth Circuit have long held that the burden of persuasion rests with the party opposing discovery.”).

The Aldrich/Murray Committee does not come close to meeting its burden. It objects that the Subpoenas are the “epitome of cumulative discovery that not only can be obtained from alternative sources, but in large part likely has been obtained from alternative sources.” (Motion at ¶ 29.) As Bestwall explained in opposing the Bestwall Committee’s motion, however, that argument is incorrect for several reasons, including that: (i) some claims were resolved through a private administrative procedure not visible to DBMP; (ii) DBMP may not have been apprised when another entity resolved a claim; (iii) DBPM may have resolved cases before claimants settled with Aldrich and/or Murray, and thus would not have any records of what happened later in the case; (iv) certain claimants may have asserted claims in lawsuits DBMP never knew about, and (v) one of the primary purposes of the discovery is to test whether or not the exposure and claims resolution information DBMP received from claimants in the tort system was accurate and complete. Although claimants are aware of which entities they filed and resolved claims against, DBMP does not have the full picture of settlements claimants may have received from other parties. The information sought by the Subpoenas is hence vital to estimating the share of liability that could be attributed to DBMP for a particular claimant.

More generally, the Subpoenas target a limited population of claimants and are narrowly tailored. Thus, consistent with Judge Beyer’s ruling that Bestwall could only subpoena information about claimants with pending Bestwall claims or who were in the Bestwall resolved claim sample, Bestwall 5/18/22 Hr’g Tr. at 24, the DBMP subpoenas seek information only about the subset of the just over 4,000 DBMP Agreed Claims and Pending Claims of claimants who also filed pre-petition claims against Aldrich or Murray. The data sought about each

overlapping claimant consists of a limited number of data fields from the pre-petition claims database of Aldrich and Murray.¹⁰ Aldrich/Murray do not argue or object that it would be burdensome for them to produce this limited information, and the Aldrich/Murray Committee does not contend otherwise.

In *Bestwall*, Judge Beyer credited similar arguments about the need for this sort of information, finding that “the discovery the debtor seeks is consistent with discovery the Court previously found was relevant and ordered from the trusts and through the personal injury questionnaires for purposes both of the debtor’s estimation case and rebuttal of the ACC and FCR’s case.” *Bestwall* 5/18/22 Hr’g Tr. at 23:11-15. And this Court likewise found that “the discovery is appropriate under the circumstances.” 5/26/22 Hr’g Tr. at 114:24-25.

The Aldrich/Murray Committee tries to distinguish Judge Beyer’s ruling in *Bestwall* on the grounds that DBMP already has obtained information from various bankruptcy trusts, as well as through the PIQ process. They point to Judge Beyer’s observation at the May 2022 hearing that *Bestwall* had not yet been able to acquire claims data from the asbestos trusts and that multiple *Bestwall* claimants had refused to submit PIQs. (Motion at ¶ 28 (citing *Bestwall* 5/18/22 Hr’g Tr. at 23:22-24:1)). This ignores, however, that Judge Beyer described *Bestwall*’s difficulties in obtaining discovery from the asbestos trusts and from certain pending claimants to explain why she was allowing the *Bestwall* subpoenas despite a concern that the then scheduled

¹⁰ When DBMP responded to the similar subpoena from *Bestwall*, in addition to three numeric or alpha-numeric fields used to identify claimants and lawsuits, DBMP’s production consisted of 14 (out of 125) substantive data fields from its pre-petition database: State, Jurisdiction, Injured_Party_Lawsuit_Status_Description [e.g., “Settled”, “Open”, “Dismissed With Prejudice”], Injured_Party_Lawsuit_Status_Category [e.g., “Sett”, “Open”, “Zero”], Resolution_Date, First_Paid_Date, Jobsite, Occupation, Start_Date, End_Date, Is_Secondary [a check box], Counsel, Primary [a check box], and Type [either “Local Plaintiff Counsel” or “National Plaintiff Counsel”]. Note that the same company that maintained DBMP’s pre-petition database also maintained the pre-petition databases of *Bestwall*, Aldrich, and Murray, and so DBMP anticipates that their productions would contain similar if not the identical data fields.

October 2023 estimation hearing was fast approaching and might be jeopardized if the parties were allowed to pursue significant new discovery. In other words, the fact that the estimation hearing had already been scheduled led Judge Beyer to question whether the discovery sought by the Bestwall subpoenas was proportional to the needs of that case. Bestwall 5/18/22 Hr’g Tr. at 22:11-15 (“I was initially compelled by Ms. Ramsey’s argument regarding proportionality and the need to rein in rather than broaden the scope of discovery at this point in order to stick with our estimation hearing date of October 2023.”).¹¹ Judge Beyer ultimately decided proportionality was satisfied because of the issues Bestwall had with obtaining information from the trusts and through the PIQ process.

DBMP does not have those same issues obtaining other discovery, but also no scheduled date for DBMP’s estimation hearing will potentially be jeopardized by allowing DBMP to pursue this discovery. To the contrary, this Court recently suspended the previously set deadlines in the Estimation Case Management Order. *In re DBMP LLC*, Case No. 20-30080 (Dkt. 2718.) The parties in *DBMP* are in the midst of document discovery, and deadlines for discovery after the completion of written discovery (such as for expert reports and depositions) have not even been set. Accordingly, Judge Beyer’s concerns about proportionality and expediency of discovery, and her related overcoming of those concerns based on the difficulties Bestwall was then having in obtaining information from other sources, simply do not apply in this case.¹²

¹¹ Ultimately, the October 2023 trial date was not maintained for other reasons. Currently, no estimation hearing is scheduled in *Bestwall*.

¹² The Motion similarly references in its Introduction this Court’s comment, in connection with its initial ruling that Aldrich/Murray could seek trust discovery only on a sample of claimants, that it was concerned about discovery “ballooning up and we’re getting more and more demands for a great deal of data.” (Motion at ¶ 5 (citing 11/30/22 Hr’g Tr. at 77:14-18)). The Aldrich/Murray Committee ignores, however, that after a rehearing this Court overcame that concern and ultimately did not limit Aldrich/Murray’s trust discovery to a sample. And one of the reasons given by the Court for its ruling following rehearing was that neither DBMP nor Bestwall had been limited to a sample in their pursuit of trust discovery, and where the issues across the cases are identical, consistency makes sense. 6/15/23

As this Court recognized several times in the related context of DBMP's efforts to subpoena information from various asbestos trusts, estimation involves "a difficult chore of trying to get our arms around how much is really owed for, for these claims by this particular debtor." *In re DBMP LLC*, Case No. 20-30080, 10/31/22 Hr'g Tr. at 73:15-16. And, because that is "an inexact science," "it requires a great deal of data and we have to find it where we can." *Id.* at 73:17-18. The Aldrich/Murray Committee has not shown any valid reason for denying DBMP access to this relevant data. To the contrary, it is not "a misuse of the bankruptcy to, to allow this type of information. It's certainly unique, but like Judge Beyer, I don't see a reason there not to do it." 5/26/22 Hr'g Tr. at 116:10-13.

III. The *Barton* Doctrine Does Not Apply.

In another effort to block or delay valid discovery, the Aldrich/Murray Committee contends that the *Barton* doctrine requires DBMP to seek leave of court to issue the Subpoenas. (Motion at ¶¶ 30-32.) In 2022, acknowledging that applying *Barton* to preclude a hearing on the merits of the Bestwall subpoenas would serve no purpose, this Court rejected the Aldrich/Murray and DBMP Committees' similar argument in connection with their challenges to the Bestwall subpoenas. 5/26/22 Hr'g Tr. at 114. The Motion does not even acknowledge that prior ruling, much less try to distinguish it or identify any new law on the topic.

That ruling was correct. As in *Bestwall*, DBMP is already before this Court defending the Aldrich/Murray Subpoenas, and Aldrich/Murray has committed not to respond to the Subpoenas until this Motion is resolved. Requiring DBMP to file a separate motion for leave, as the

Hr'g Tr. at 18-19. The importance of such consistency applies equally to the issues presented by the Motion, given that Bestwall has already been permitted to pursue identical discovery.

Aldrich/Murray Committee urges, would result only in needless delay and expense, which is precisely what the *Barton* doctrine is designed to avoid.

In any event, the *Barton* doctrine does not apply to the Subpoenas. As the Fourth Circuit explained in *McDaniel v. Blust*, the purpose of the *Barton* doctrine is to prevent claims against court-appointed trustees because a trustee is an appointee of the court and claims against trustees increase the cost of being a trustee. 668 F.3d 153, 157 (4th Cir. 2012) (the doctrine “serves the principle that a bankruptcy trustee is an officer of the court that appoints him, and therefore that court has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties.”) (citations omitted). Courts have disagreed about whether the *Barton* doctrine applies to subpoenas at all, e.g., *In re Media Grp., Inc.*, No. BAP NC-05-1432-SA1MA, 2006 WL 6810963, at *6 (B.A.P. 9th Cir. Nov. 15, 2006), but even if it does, it is not applicable to these Subpoenas.

The cases the Aldrich/Murray Committee cites in support of its attempt to argue otherwise are inapposite. Unlike the situation here, they involve subpoenas that threatened to impede the proper distribution of assets in bankruptcy or otherwise interfere with the administration of the estate. For example, *In re Eagan Avenatti, LLP*, 637 B.R. 502, 506 (Bankr. C.D. Cal. 2022) (Motion at ¶ 30), involved a subpoena to the trustee to testify in a criminal case proceeding against the bankrupt firm. Since the trustee would have been required “to expend estate funds to comply with a subpoena or to turn over estate property,” the subpoena threatened the *in rem* jurisdiction of the bankruptcy court over the property of the estate and implicated the *Barton* doctrine’s purpose of allowing the bankruptcy court “unimpeded supervision of the administration of estates.” *Id.* at 508. Similarly, *In re Circuit City Stores, Inc.*, 557 B.R. 443, 449 (Bank. E.D. Va. 2016) (Motion at ¶ 31), involved a subpoena served on a liquidating trust in

connection with litigation in which the liquidating trust was no longer a party. The liquidating trustee filed a motion for protection from the subpoena in the bankruptcy court that had created the trust and the bankruptcy court determined that leave of court was required before the subpoena could be issued because the liquidating trustee was no longer a party to the case and the subpoena would have required “inappropriate expenditure of trust resources and would interfere with the Liquidating Trustee’s administration of the estate.” *Id.* at 451.

The *Avenatti* and *Circuit City* cases permit a trustee to seek to restrain discovery efforts that threaten to impede the administration of the case or threaten to dissipate property of the estate without just cause. These cases do not stand for the proposition that parties who do not have to incur costs or face the burdens of complying with a subpoena can object that a subpoena was issued without leave of court. This Court should pay no heed to the Aldrich/Murray Committee’s red herring argument misapplying the *Barton* doctrine.

IV. The Claimants Are Not Entitled to Notice of the Subpoenas.

The Aldrich/Murray Committee contends that DBMP should be required to give claimants whose data is sought notice and an opportunity to challenge the Subpoenas. (Motion at ¶¶ 33-35.) This argument, like much of the Motion, rests on the false assertion that the Subpoenas seek “personal information,” and should be rejected for this reason alone.

Putting that impediment aside, there are no legal grounds for imposing this sort of a notice obligation. To the contrary, when the Aldrich/Murray Committee demanded, and Aldrich/Murray produced to the Aldrich/Murray Committee, all of the non-privileged fields in its database (including the limited data fields sought by the Subpoenas) for hundreds of thousands of individual claimants, the Aldrich/Murray Committee never suggested that notice and opportunity to object should first be provided to the claimants.

The Motion cites only the advisory committee’s note to the 1991 amendments to Fed. R. Civ. P. 45. That note, however, concerns what was then paragraph (b)(1) and is now paragraph (a)(4) of the rule, which in turn concerns notice to **other parties to the action in which the subpoena was served**. *See* Fed. R. Civ. P. 45(a)(4) (“Notice to Other Parties Before Service. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served **on each party**”) (emphasis added). The reason for such notice is to give such other parties an opportunity to object or to seek additional information by serving their own subpoenas. Fed. R. Civ. P. 45 advisory committee’s note to 2013 amendment (“Rule 45(a)(4) is added to highlight and slightly modify a notice requirement first included in the rule in 199. . . . The amendments are intended to achieve the original purpose of enabling **the other parties** to object or serve a subpoena for additional materials.”) (emphasis added).

DBMP provided the required notice. *See Notice of Service of Subpoenas to Produce Documents, In re DBMP*, Case No. 20-30080 (Bankr. W.D.N.C. Feb. 28, 2024) (Dkt. 2704). And, as this Court is aware, one of the parties to *DBMP* that received such notice—namely the DBMP Committee—has in fact objected. Nothing in Rule 45 or elsewhere required DBMP to give any additional notice. It was for this reason presumably that Judge Beyer found that Bestwall was not obligated to serve the claimants whose information was sought in its subpoenas. Bestwall 5/18/22 Hr’g Tr. at 22:8-9 (notice “was not required to be served on the claimants”). There is no reason for this Court to do otherwise.

V. There Is No Need to Impose the Confidentiality and Use Restrictions Adopted in Connection with Trust Discovery.

The Motion argues alternatively that if the Court allows the Subpoenas, it should impose the same confidentiality and use restrictions imposed in this Court's *Order Granting Motion of the Debtors for an Order Authorizing the Debtors to Issue Subpoenas on Asbestos Trusts and Paddock Enterprises, LLC* (Dkt. 1240). (Motion at ¶ 36). Once again, this contention is premised on the false assertion that the information requested by the Subpoenas is private or confidential. As shown above, and as previously found, there is nothing confidential or private sought by the Subpoenas.

Nonetheless, consistent with Judge Beyer's and this Court's prior rulings, the DBMP Subpoenas expressly provide in Exhibit A that DBMP will deem the information produced in response confidential pursuant to the DBMP Protective Order. (Motion, Ex. A.) Indeed, the DBMP Protective Order, which was negotiated with and agreed to by the DBMP Committee, is what protects the much more extensive claimant database that was produced by DBMP to the DBMP Committee, the DBMP FCR, and their respective professionals at the outset of that case. A substantially similar protective order protects the Aldrich/Murray claimant database that was produced to the claimant representatives and professionals in this case and that will be the source of any information produced to DBMP in response to the Subpoenas. *See Aldrich/Murray Protective Order at ¶¶ A(3), J.*

In the years since the DBMP and Aldrich/Murray claimant databases were produced to the claimant representatives and their professionals, there has been no indication of any data breach or other improper use of the claimant data. Nor, more generally, is there any evidence that DBMP or Aldrich/Murray experienced any such issues during the decades pre-petition in which they maintained and relied upon their claimant databases in the litigation. There is, accordingly,

no reason to require DBMP to comply with significantly more onerous restrictions with respect to a much more limited data set.

CONCLUSION

The issues presented by the Motion have been litigated three times and have been ruled on by both this Court and Judge Beyer. The Aldrich/Murray Committee's Motion does not present any compelling reasons to litigate these same issues a fourth time, nor any basis for the Court to reach a different result. For these reasons, and those stated above, the Motion should be denied.

Dated: April 3, 2024
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

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ATTORNEYS FOR DBMP LLC

Exhibit 1

1

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3	IN RE:	:	Case No. 17-31795-LTB
4	BESTWALL LLC,	:	Chapter 11
5	Debtor.	:	Charlotte, North Carolina
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LAURA TURNER BEYER,
UNITED STATES BANKRUPTCY JUDGE

11	APPEARANCES (via Teams):
----	--------------------------

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19	Audio Operator:	COURT PERSONNEL
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produced by transcription service.

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SANDER L. ESSERMAN

Future Claimants' Representative

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Dallas, TX 75201-2689

24

25

1 P R O C E E D I N G S

2 (Call to Order of the Court)

3 THE COURT: All right. Good morning.

4 We are here in the Bestwall case, Case No. 17-31795.
5 We've got a few matters on the calendar and admittedly, I'm
6 having to remember how to do this by Teams. But I think,
7 probably, rather than having everybody who is on the camera
8 announce their appearance, what I'm going to ask you to do is
9 to turn on your camera if you anticipate having a speaking role
10 at today's hearing. Otherwise, if everybody would turn your
11 camera off -- and I don't see too -- so that we can announce
12 appearances.

13 So go ahead and turn your camera on if you anticipate
14 having a speaking role and then I'm going to, I'll call your
15 name and ask you to announce your appearance. I think that
16 might be the best way to go about doing this. All right.

17 Mr. Waldrep, you were the first one in my screen. So
18 I'll ask you to announce your appearance, please.

19 MR. WALDREP: Good morning, your Honor. Tom Waldrep
20 on behalf of several claimants.

21 THE COURT: All right.

22 Mr. Wolf? It says Richard Wolf, but you are not
23 Richard Wolf. Mr. Worf. Sorry. I just --

24 MR. WOLF: That makes me sound a --

25 THE COURT: I looked --

1 MR. WORF: -- a lot more fierce than I am.

2 Richard Worf, your Honor, Robinson Bradshaw, for the
3 debtor. I'm in the room with Hana Crandall and I believe
4 Mr. Cassada, Preetha Rini, and Kevin Crandall are also on the
5 phone.

6 THE COURT: Okay, very good.

7 MR. WORF: Thank you.

8 THE COURT: My apologies, Mr. Worf. I just read the
9 name. I didn't even look at your face.

10 Ms. Zieg.

11 MS. ZIEG: Good morning, your Honor. Sharon Zieg of
12 Young Conaway Stargatt & Taylor on behalf of the Future
13 Claimants' Representative. It's interesting, your Honor. My
14 team asked me how this was going to work this morning and I
15 said, "It's been so long I can't even remember. You introduce
16 yourself or I introduce you."

17 With that said, the members of Young Conaway that are
18 on the phone today or participating via Teams are Ms. Edwards,
19 Ms. Bradley, and Mr. Harron. North Carolina counsel, Felton
20 Parrish, is on the line and Mr. Esserman is also on the line.

21 THE COURT: Okay, very good. Thank you.

22 MS. ZIEG: Thank you.

23 THE COURT: I think they're laughing at our expense,
24 Mr. Worf.

25 Ms. Ramsey.

1 MS. RAMSEY: Good morning, your Honor. Natalie Ramsey
2 on behalf of the Asbestos Claimants' Committee and also on the
3 line is Mr. Wright from my office.

4 THE COURT: Okay, very good. Thank you.
5 And Mr. Gordon.

6 MS. RAMSEY: Thank you.

7 MR. GORDON: Good morning, your Honor. Greg Gordon,
8 Jones Day, on behalf of the debtor. Also with me are Jeff
9 Ellman and Jim Jones.

10 THE COURT: Okay, very good.

11 So in looking, folks, we've got a couple matters on
12 the calendar and I'll start by noting that the hearing on the
13 motion to reconsider the order and debtor's response -- that's
14 the way it's listed on the calendar -- that that has been
15 continued to June 23, 2022.

16 And so that leaves us with the continued hearing on
17 the motion to strike for which the Court will give its ruling,
18 but in looking at the Notice of Agenda, of course, we also have
19 the status conference regarding the debtor's supplemental
20 motion to enforce the PIQ order and as we tend to do, we, we
21 typically start with that.

22 And so, Mr. Worf and Mr. Waldrep, is that what you all
23 were anticipating?

24 MR. WALDREP: Yes, ma'am, I was.

25 MR. WORF: That is just fine with us, your Honor.

1 THE COURT: All right. So, Mr. Worf -- and we do have
2 -- and if I call you Mr. Wolf, that is the name on the screen.
3 So bear with me if I do that -- we will start with the status
4 conference regarding the debtor's supplemental motion to
5 enforce PIQ order with respect to non-compliant claimants.

6 MR. WORF: Thank you, your Honor. Richard Worf for
7 the debtor, Robinson Bradshaw.

8 So your Honor entered the sanctions order on April
9 25th which set forth sanctions that were imposed on certain
10 claimants who had failed to comply with one or more of Parts 8,
11 8A, 10 or Tables A, B, and C in the PIQ and had been found in
12 contempt. The order provided that claimants would incur a
13 daily fine beginning on the 14th day after entry of the order
14 if they had not purged their contempt and that day was May 9th.

15 Since the sanctions order was entered, there has been
16 additional compliance with your Honor's orders and I'll put up
17 on the screen a, some slides that summarize the current state
18 of compliance.

19 So as your Honor will recall, as of the April 6th
20 hearing 493 claimants remained noncompliant with one or more of
21 those parts and then there was no additional compliance between
22 the April 6th hearing and the entry of the sanctions order on
23 April 25th, but since the entry of the order on April 25th
24 there has been additional compliance and, in the debtor's view,
25 111 of the 493 claimants, or about a quarter, have now fully

1 complied with those PIQ parts and, in the debtor's view, have
2 purged their contempt. Eighty-four of those 111 claimants, in
3 the debtor's view, fully complied before any fine was incurred
4 beginning on May 9th, while 27 of those claimants fully
5 complied after some amount of fine was incurred. And I'll get
6 into the, the details of that in, in a moment. 382 claimants
7 remain noncompliant with one or more of those PIQ parts, but
8 even among those claimants 357 of those claimants have provided
9 partial additional compliance since the Court entered the
10 sanctions order on April 25th. And I'll get into more detail
11 on that as well.

12 We have provided to the Court and the parties an
13 exhibit that is modeled on the Exhibit A that your Honor has
14 seen on previous occasions and this exhibit lists the 493
15 claimants who are subject to the sanctions order and lists
16 their law firms and their names. We shared a version of this
17 with counsel for the claimants last Friday and then shared a
18 version of it yesterday when we shared it with the Court with
19 claimants as well as the ACC and the FCR. The exhibit like
20 previous versions of this exhibit indicates the parts that
21 claimants still have not complied with in the columns listed
22 Part 8, 8A, Table A, B, and C, and Part 10. Additional columns
23 that we've now added are the Date Complied column and the
24 Sanctions Owed column. The Date Complied column lists if a
25 claimant is still noncompliant with one or more of those parts

1 or, alternatively, lists the date the claimant fully complied
2 with those parts. And finally, the Sanctions Owed column
3 calculates the, the sanctions that each claimant owes based on
4 when the claimant complied with the Court's order.

5 One note about how we calculated the sanctions that
6 are in the Sanctions Owed column. The order said that
7 sanctions would start accruing on May 9th. The debtor adopted
8 a claimant-friendly interpretation of that under which the
9 sanction on a particular day is not accrued until the end of
10 the day so that claimants whose materials were received and,
11 and who became fully compliant on May 9th did not incur any
12 fine, in the debtor's view, and claimants who complied on May
13 10th incurred a fine of a hundred dollars and so on and so
14 forth.

15 We provided a slightly updated exhibit, version of
16 this exhibit to the Court this morning. We heard yesterday
17 afternoon that 49 of The Gori Law Firm claimants who are now
18 fully compliant believed their responses had been received by
19 the claims agent on May 9th rather than May 10th. Donlin had
20 told us they were received on May 10th, but we went and checked
21 on that and it turns out that Donlin's mailroom had received
22 those responses on May 9th. They didn't make their way to the
23 relevant personnel at Donlin until May 10th, but, long story
24 short, we did agree with The Gori Law Firm on that and changed
25 the date of compliance for them to May 9th which meant that

1 those 49 claimants did not incur any fine. And that change
2 has, has been made in the exhibit.

3 The other change from the version we shared with the
4 Court yesterday is that we learned later yesterday that five of
5 the SWMW law firm claimants are no longer asserting pending
6 claims. And so we've also provided that those claimants are
7 compliant as of yesterday.

8 So where does this leave us? This is a version of a
9 slide that the Court has seen before which summarizes where
10 compliance stands by part and one of the interesting things is
11 that because of the partial compliance that we've had over the
12 last almost a month there are now relatively few claimants who
13 are not compliant with Part 8 on aggregate settlement amounts
14 and aggregate recoveries from trusts as well as Part 8A on
15 lawsuit information. Notably, the Shrader law firm, which
16 represents 330 of the 382 remaining non-compliant claimants,
17 has now responded to Part 8 for almost all of the claimants
18 they represent and that, that's a striking result because Part
19 8 has been the most hotly contested PIQ part since the original
20 litigation over the PIQ.

21 So there are now, of the claimants who submitted PIQs
22 indicating that they assert pending claims, there are now only
23 56 claimants out of the 1,955 who, who have not answered Part
24 8, which is 3 percent. The 1,955 has gone down some because
25 additional claimants informed us that they do not have pending

1 mesothelioma claims.

2 But the problem is now with sections that historically
3 have been much less controversial, including Tables A, B, and C
4 on tort claims, trust claims, and claims against other entities
5 as well as Part 10 requiring submission of trust claim forms.
6 We do believe we're moving in the right direction and the
7 Court's order is accomplishing what it is intended to do.

8 On this slide, I've broken it out by law firm and the
9 Court can see the approaches to this still do vary by law firm.
10 Some law firms' claimants have now fully complied or, or almost
11 fully complied, including the Dean Omar firm, the Robins Cloud
12 firm, and, with, with just a few exceptions, The Gori Law Firm.
13 Other law firms have, have claimants who, who have partially
14 complied in, in a uniform way, including the Shrader firm and
15 the Provost Umphrey firm, and we understand that the Provost
16 firm is in the process of fully complying and we, and we hope
17 they will finish that as soon as they possibly can. Other
18 firms' claimants have not provided any additional compliance
19 and your Honor can see those on this list.

20 But the debtor thinks it, it make sense to continue to
21 play this process out and we hope that by the time of the next
22 omnibus hearing that all or most of these claimants will have
23 fully complied. Only nine claimants appealed the Court's
24 sanctions order to the district court and all but the same nine
25 claimants have now dismissed their appeal of the contempt order

1 that led to the sanctions order.

2 So we hope that is a sign that there will be
3 additional compliance and the debtor will, as we have been
4 doing, will continue to diligently monitor additional
5 submissions and determine whether claimants have fully complied
6 with the Court's orders.

7 In the meantime, the debtor believes that it also
8 makes sense before the next omnibus hearing for the parties to
9 brief the question the Court left open in the sanctions order
10 which is when, to whom, and at what intervals the daily fine
11 will be paid. At the time your Honor entered the order the
12 debtor urged the Court and the Court agreed that those matters
13 should be deferred as the debtor observed at that time
14 claimants had not incurred any sanctions and we hoped that no
15 claimants would. But claimants now have incurred sanctions and
16 the questions the Court deferred do need to be decided and we
17 think it makes sense for the parties to submit simultaneous
18 briefs on that before the next hearing. Also, perhaps the
19 prospect that fines are going to have to start being paid on
20 some regular basis would inspire further compliance and get us
21 to the point where we have all or the vast majority of these
22 claimants fully complying with the Court's orders.

23 So the debtor would request that the Court entertain
24 that briefing and we think it makes sense to submit
25 simultaneous briefs by June 16th, if your Honor is amenable to

1 that.

2 As part of those briefs, the parties could also brief
3 another dispute that has arisen which is how to treat claimants
4 who first told us that they do not have pending mesothelioma
5 claims only after the fine under the Court's sanctions order
6 started accruing? I believe so far this affects seven
7 claimants, including the five claimants that we first heard
8 this for yesterday. The debtor does believe those claimants
9 incurred a fine. All of those claimants had previously told us
10 they did have pending claims and they had checked the, the box
11 so indicating in Part 1 of the PIQ. They could have told us at
12 any time in the many months of litigation before sanctions were
13 ordered that they did not have pending claims and why, but
14 chose not to do so and apparently would not have done so
15 without a fine and the debtor does not think that claimants
16 should have the opportunity to essentially wait and see what
17 the fines are and then unilaterally escape a fine by asserting
18 they are no longer asserting a pending claim and we urge any
19 claimants who are not asserting pending claims to let us know
20 at the earliest opportunity so we can mark them as compliant
21 with the PIQ order.

22 So unless your Honor has questions, that is the
23 debtor's status update.

24 THE COURT: I don't. Thank you, Mr. Worf.

25 MR. WOLF: Thank you, your Honor.

1 THE COURT: Thank you.

2 We'll hear from Mr. Waldrep.

3 MR. WALDREP: Thank you, your Honor.

4 So I'll start with the, the numbers. I don't think
5 that the claimants are in any substantial disagreement about
6 the numbers. There is some disagreement. We have, as before,
7 your Honor, been going back and forth with looking at versions
8 of Exhibit A and, and, and us questioning certain ones. They
9 making changes.

10 So that process has gone on many times. I won't say
11 it goes on daily, but almost daily quite a bit. There are even
12 some that we challenged as to whether they really are in
13 compliance or not and Bestwall's still looking at that.

14 So that's an ongoing process, but our numbers are not
15 that different from the numbers. We would have said there are
16 362 non-compliant claimants which would mean that overall
17 compliance is at 81.5 percent. Now Bestwall's number is a
18 little higher than that, 382, which would be 80.5 percent, but
19 that's not, you know, a 1 percent difference, that's not enough
20 to, to really matter.

21 Now on the idea of the briefing, your Honor remembers
22 at April, at the April 21st status hearing -- and there the
23 terms of the status order were discussed -- I urged the Court
24 on behalf of the claimants to provide in the sanctions order
25 for further terms, such as to whom the fines were to be paid,

1 when they were to be paid, and we advocated for a position, a
2 provision, rather, that any fine be set off against any claim
3 against the future trust, that that was -- and so we, we took
4 those positions on that day and Bestwall argued there was no
5 need for any of that.

6 April 25th, the sanctions order was entered and then
7 on May 3rd we appealed the sanctions order. We stated the
8 issues on appeal and one of them was that the sanctions order
9 was fatally flawed because it failed to provide the terms that
10 we urged the Court to include. Now today, May 18th, Bestwall
11 now realizes their error and advocates what we urged the Court
12 to do and exactly the opposite of what they urged the Court to
13 do on April 21st. Since then the -- since the appeal -- the
14 appeal of the contempt order and the appeal of the sanctions
15 order have been consolidated by the district court, as they
16 should be, with no opposition by Bestwall and we -- and -- and
17 we all understand it's all part of the same process.

18 So with regard to the position of Bestwall that we
19 should now brief these issues, I want to raise what I think is
20 a threshold issue and that is does the appeal divest the Court
21 of jurisdiction to amend or add to the sanctions order? I
22 think, I think that is a threshold issue that if the Court is
23 inclined now to consider these additional terms, I think that
24 threshold issue also needs to be briefed. Again, it was what
25 we advocated on April 21st.

1 And the additional issue of, you know, claimants who
2 said they were nonpending only after the fine, yeah, we can
3 brief that as well if the Court wants to, to hear that.

4 So that's our response, your Honor.

5 THE COURT: All right. Thank you.

6 And let me ask you to respond to that last issue that
7 was raised by Mr. Waldrep, Mr. Worf, with respect to did the,
8 does the appeal divest the Court of jurisdiction to basically
9 alter or amend the sanctions order at this point?

10 MR. WOLF: Yes, your Honor.

11 As to the jurisdictional question, we do not believe
12 it divests the Court of jurisdiction, although we're happy to
13 brief that as part of the, the brief we contemplated. The
14 debtor is, is going to be filing a motion to dismiss the
15 appeals. Your Honor may recall we filed a motion to dismiss
16 the previous contempt appeals with respect to the Illinois
17 lawsuit matter and for many of the same reasons we believe that
18 the sanctions and contempt order, the latest contempt and
19 sanctions orders, are not final, including for the additional
20 reason that the Court did not decide the issue of to whom the
21 fine is paid and when and, and under what terms.

22 So we think that's another reason why there's not a
23 final order and, and it's not appealable.

24 But putting that to the side, these issues because
25 they were not addressed by the Court's prior orders, they are

1 not encompassed by the matters that the nine claimants have
2 appealed. And, and I would emphasize that only nine claimants
3 have appealed. So there are a great many, hundreds of
4 claimants who, who have not appealed and, therefore, do not
5 have a pending appeal before the district court which also
6 affects the jurisdictional analysis.

7 But these are matters that, that were not encompassed
8 by the Court's previous order and, you know, if this
9 jurisdictional point were taken to, to, to its logical
10 conclusion, it would prevent the Court from deciding when the
11 fines stop, which the Court has the authority to do and, and
12 would have the authority to do, and I'm sure the claimants
13 would, would, would not want the Court to lack that authority
14 while their appeal is pending because appeals can take quite a
15 long time to be resolved.

16 So we don't think there is a jurisdictional issue.
17 We're, we're happy to brief this as part of the briefs we
18 contemplate.

19 And I also don't believe that Bestwall is admitting
20 any error because our, our position is entirely consistent. We
21 thought it made sense for the Court to defer this issue when no
22 fines had been incurred and it was still two weeks before any
23 fines would be incurred. We hoped that no fines would have to
24 be incurred and, and these issues would not have to be decided.
25 Unfortunately, they have been and so the issue now is ripe and

1 it does have to be decided. We think it is ripe and it should
2 be decided and should be decided, hopefully, at the next
3 omnibus hearing so the, the claimants and all the parties have
4 clarity on, on this issue as, as they move forward.

5 Thank you, your Honor.

6 THE COURT: Uh-huh. Thank you.

7 Anything further, Mr. Waldrep?

8 MR. WALDREP: Your Honor, I don't think today is the,
9 is the time or, or the, the procedure for, for deciding that
10 particular issue. I just raised it as a threshold issue.

11 THE COURT: Okay.

12 MR. WALDREP: I'm not advocating one way or another at
13 this time. I just think that it needs to be addressed.

14 And yes, there are -- there -- there will be arguments
15 made as to the logical extension of various positions if, for
16 instance, a court leaves out provisions and, therefore, makes
17 the order not final, then it cannot be appealed. And so there
18 are implications here.

19 So we need to, we need to think about that --

20 THE COURT: Okay.

21 MR. WALDREP: -- Judge. That's all I'm saying.

22 THE COURT: All right.

23 Let me take just a brief recess and then I'll come
24 back, okay?

25 Oh, Ms. Ramsey.

1 MR. WALDREP: Yes, ma'am.

2 THE COURT: I'll hear from you before I take that
3 brief recess. I'm sorry.

4 MS. RAMSEY: Thank you. I would appreciate it. Thank
5 you, your Honor.

6 I really only have two brief points to make. The
7 first is that based on even the statistic of the largest number
8 of claimants that remain noncompliant to a degree -- I think
9 Mr. Waldrep's calculation and mine is the same, which is 80.5
10 percent compliance, fully compliant -- again, we advocate that
11 we've now reached the place of substantial compliance for
12 purposes of estimation and that additional proceedings
13 regarding sanctions and further compliance, we do not believe
14 materially affect the estimation proceeding.

15 And the second is that to the extent that some of the
16 alleged non-compliant folks are people who are now saying they
17 don't have claims, understanding that, that it would have been
18 preferable to know that earlier, those individuals don't have
19 claims. And so it, it really is not affecting the estimation
20 process at all. We don't represent them. They're not going to
21 be considered as part of this case.

22 And so, again, we would propose that those individuals
23 be eliminated from sort of this consideration, altogether, and
24 that, that sanctions are not benefiting, are not achieving the,
25 the dual goals that the Court had in mind. They're certainly,

1 it's certainly not motivating (garbled).

2 Thank you your Honor. That's all I had.

3 THE COURT: Thank you.

4 And let me ask before I take that brief recess. Does
5 anybody else have anything to add?

6 (No response)

7 THE COURT: All right.

8 I'll be right back. Thank you.

9 (Recess from 10:00 a.m., to 10:05 a.m.)

10 AFTER RECESS

11 (Call to Order of the Court)

12 THE COURT: All right. Having considered the update
13 that Mr. Worf and Mr. Waldrep offered and considering the
14 comments of Ms. Ramsey, we will continue this, obviously, for a
15 further status on the -- at the hearing -- at the omnibus
16 hearing on June 23rd.

17 And I agree with the suggestion of Mr. Worf that we
18 brief the issue of when, to whom, the daily fine should be paid
19 as well as how to treat those claimants who did not identify
20 themselves as not having a pending claim until after the
21 sanctions order was entered.

22 And I do think that it makes sense -- and both of you
23 agree -- that we should also address the issue of whether or
24 not the pending appeal divests the Court of jurisdiction to
25 amend the order. And I would also like for you all to go ahead

1 and address the issue of substantial compliance and, you know,
2 apprise the Court of, of where, where you all think we stand
3 with respect to substantial compliance.

4 As Mr. Worf suggested, I think that it would make
5 sense for you all to submit simultaneous briefs by the end of
6 the business day on June 16th, which I believe is the week
7 before that June 23rd hearing.

8 So unless there are further questions, we will just
9 further continue the compliance hearing until June 23rd.

10 MR. WORF: Thank you, your Honor.

11 THE COURT: All right. And so I think with that --
12 and I'm trying to get my hands on the Notice of Agenda -- I
13 believe where that leaves us is with the Court's ruling on the
14 motion to strike and I suspect if I'm wrong about that,
15 somebody will turn their camera on and tell me otherwise. It's
16 easier to have you all in the courtroom than it is to do this
17 by Teams.

18 So I look forward to having you back here in June.

19 So with respect to the objection to and motion to
20 strike *subpoena* that was issued by the debtor to Aldrich Pump,
21 DBMP, Murray Boilers, and Paddock Enterprises or, in the
22 alternative, to determine that the debtor has waived privilege
23 to the case files of any matched claimant, having considered
24 the pleadings and the arguments of counsel at the April 21st
25 hearing I conclude that I should grant the motion in part and

1 deny the motion in part.

2 As you all know all too well, the motion to strike
3 relates to the *subpoena* that was issued by the debtor to
4 Aldrich Pump, DBMP, Murray Boilers, and Paddock Enterprises
5 seeking data on claims and exposure for approximately 30,000
6 resolved and pending mesothelioma claims against Bestwall. The
7 fields of data that were sought in the *subpoena* included the
8 law firm which represented the party against the debtor
9 defendant, jurisdiction, status of the claim against the debtor
10 from whom discovery is being sought, the date of resolution of
11 the claim, the date of payment, when exposure began and ended,
12 the manner of exposure, occupation and industry of the claimant
13 when exposed, and the products to which the claimant was
14 exposed.

15 Based on a review of the motion to strike itself,
16 while I had some pause about Bestwall seeking aggregate
17 discovery from another debtor, I was not inclined to grant the
18 motion primarily for the reasons articulated by the debtor in
19 its response. In short, the ACC did not identify valid reasons
20 under either the discovery rules or pursuant to case law
21 regarding why the discovery sought by the debtor should not
22 proceed.

23 And to address just a few of those points, the
24 *subpoenas* don't seek highly personal, sensitive, confidential,
25 or privileged data. Most of the information sought pursuant to

1 the *subpoenas* could be found in complaints and other public
2 court filings. Section 107 of the Code is not applicable
3 because it relates to the kind of information that can be
4 placed on the Court's public docket rather than the
5 discoverability of information. The *subpoenas* don't raise a
6 concern about identity theft because Bestwall already has the
7 personal identifying information about the claimants and they
8 don't seek any medical information. And finally, notice was
9 sufficient and was not required to be served on the claimants.

10 However, the ACC largely switched gears in its
11 argument at the hearing on the motion and I was initially
12 compelled by Ms. Ramsey's argument regarding proportionality
13 and the need to rein in rather than broaden the scope of
14 discovery at this point in order to stick with our estimation
15 hearing date of October 2023. That was until I learned about
16 the discovery the ACC served on four of the defense law firms a
17 few weeks ago, but more importantly, the discovery the ACC
18 served on the debtor the Friday before the hearing on the
19 motion to strike which consisted of 31 discovery requests
20 relating to 24,000 resolved mesothelioma claims, which is in
21 addition to the discovery already served pertaining to the 2700
22 claim sample.

23 I can't in good conscience grant the motion to strike,
24 given the magnitude of this recently served discovery,
25 particularly having concluded that there isn't anything

1 otherwise problematic about the discovery sought by the debtor.
2 I don't share the ACC's concerns about this discovery
3 unleashing the floodgates for aggregate discovery on debtors in
4 bankruptcy cases and that issue can be addressed on a case-by-
5 by case basis.

6 I'm also hard-pressed to feel sympathetic towards the
7 ACC in the face of the discovery that they just served on the
8 debtor. Their major complaint was that it would precipitate
9 discovery by them on those same debtors, but they didn't
10 clearly articulate exactly what that discovery will need to be.

11 And in addition, the discovery the debtor seeks is
12 consistent with the discovery the Court previously found was
13 relevant and ordered from the trusts and through the personal
14 injury questionnaires for purposes both of the debtor's
15 estimation case and rebuttal of the ACC and FCR's case. Three
16 of the four debtors upon whom the discovery was served did not
17 object to the discovery. DBMP did indicate at the hearing that
18 it was willing to condition production on Bestwall's agreement
19 to protect the responsive data pursuant to a protective order
20 and I will direct that the data be produced subject to such a
21 protective order.

22 And it appears that the discovery was largely
23 precipitated by the fact that the debtor has been entirely
24 unsuccessful in getting discovery from the trusts and
25 stonewalled in its efforts to get the PIQ discovery from the

1 non-compliant claimants.

2 And we don't hold a crystal ball regarding what the
3 Third Circuit may do on appeal, but my hope is that by getting
4 this information it may accelerate the debtor's discovery,
5 particularly in the event that the debtor does not succeed on
6 appeal in the Third Circuit.

7 Nevertheless, Ms. Ramsey was right when she said it
8 was time to start contracting the university of, the universe
9 of discovery rather than expanding it and in that regard the
10 debtor conceded at the hearing on the motion to strike that it
11 was really focused on the 2700 claim sample, plus the 6,000
12 pending mesothelioma claims, and offered that that was the
13 information the debtor really needs.

14 So in an effort to begin reining in discovery, that's
15 what I will allow and I'll grant the motion to strike as to the
16 balance of the approximately 21,300 claimants.

17 With respect to at-issue waiver, I'll deny that part
18 of the motion. I can't conclude there's been at-issue waiver
19 pursuant to the Rhône-Poulenc standard where the debtor is
20 seeking discovery from third, from a third party that is not,
21 that is non-privileged information. By seeking this discovery,
22 the debtor has not asserted a claim or a defense and attempted
23 to prove that claim or defense by disclosing an attorney-client
24 communication.

25 So that is the Court's ruling with respect to the

1 motion to strike.

2 And, Mr. Worf, I would ask you to draw the order
3 granting in part and denying in part the ACC's motion to
4 strike.

5 MR. WORF: Thank you, your Honor. I'll do that.

6 THE COURT: All right. Thank you.

7 And in reviewing the transcript from the hearing on
8 April 21st, there was a lot of talk about the, the mini 502(d)
9 order and the large 502(d) order.

10 So, Mr. Gordon, I didn't know if you all were planning
11 to provide the Court a status of those proposed 502(d) orders.

12 MR. GORDON: Your Honor, Greg Gordon on behalf of the,
13 the debtor.

14 We continue to have conversations with the other side
15 about those two orders. We've provided drafts, revised drafts
16 of those orders to the other side. The other side has agreed
17 to continue discussions with us on those issues and other
18 issues related to the estimation and I'm hoping in the next
19 week or two we're going to know exactly where we stand on those
20 orders and some other issues and then we can provide a more
21 definitive report to your Honor about where we are.

22 THE COURT: Okay. Thank you.

23 Anything to add to that, Ms. Ramsey, or anybody else?

24 MS. RAMSEY: No, your Honor. I think that's a, a fair
25 summary of where we are.

1 THE COURT: Okay.

2 Ms. Zieg?

3 MS. RAMSEY: Thank you.

4 THE COURT: I saw you pop into my screen for about a
5 minute there.

6 MS. ZIEG: I, I agree. I was going to say the same
7 thing as Ms. Ramsey. That's a fair summary of where we are.

8 THE COURT: All right.

9 I think with that, then, folks, we've got some things
10 to tackle on June 23rd or -- I didn't bring my calendar, but --
11 yeah, June 23rd.

12 Is there anything else that the Court needs to address
13 today before we recess?

14 (No response)

15 THE COURT: All right. Well --

16 Mr. Gordon?

17 MR. GORDON: I was just going to say, your Honor --
18 I'm sorry -- not from the debtor's perspective, your Honor.

19 And we very much appreciate you allowing us to appear
20 via Teams. We recognize that's not the best for you, but it
21 worked out well for us and we appreciate it.

22 THE COURT: Sure. And I -- and the Court will be
23 willing to entertain that, particularly if we're going to have,
24 you know, a short hearing like this where I may be offering a
25 ruling and, you know, we're otherwise just conducting a status

1 hearing. I'm not keen on arguments being offered by Teams, but
2 I, I think for these kinds of issues it's appropriate for us to
3 try to do it by Teams 'cause it saves you time and expense.

4 So we will consider that request going forward as
5 well, all right?

6 MR. GORDON: Thank you, your Honor.

7 THE COURT: Thank you.

8 And with that, we will recess and let y'all enjoy the
9 rest of your day.

10 Thank you.

11 MR. GORDON: Thank you.

12 MS. RAMSEY: Thank you, your Honor.

13 (Proceedings concluded at 10:17 a.m.)

14

15

16

17 CERTIFICATE

18 I, court approved transcriber, certify that the
19 foregoing is a correct transcript from the official electronic
20 sound recording of the proceedings in the above-entitled
21 matter.

22 /s/ Janice Russell

May 18, 2022

23 Janice Russell, Transcriber

Date

24

25

Exhibit 2

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

BESTWALL LLC,¹

Debtor.

Chapter 11

Case No. 17-31795 (LTB)

DECLARATION OF CHARLES E. BATES, PHD

Charles E. Bates, PhD, deposes and states as follows:

1. I am the Chairman of Bates White, LLC (“Bates White”), which maintains offices at 2001 K Street NW, North Building, Suite 500, Washington, DC 20006.

2. I am duly authorized to make this Declaration as a consultant for Bestwall LLC (“Bestwall” or the “Debtor”) in this case. I make this Declaration at the request of the Debtor’s counsel regarding the need and usefulness of the information requested in *Debtor’s Motion for Order Pursuant to Bankruptcy Rule 2004 Directing Submission of Personal Injury Questionnaires by Pending Mesothelioma Claimants* (the “PIQ Motion”) and in *Debtor’s Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts* (the “Trust Discovery Motion”). In particular, I explain the need for the requested information to prepare a reliable estimate of Bestwall’s legal liability for mesothelioma claims; assess whether Bestwall’s pre-petition settlements and resolutions of mesothelioma claims in the tort system represented its liability for such claims and can be extrapolated to estimate the Debtor’s liability for current and future claims; provide support to the Debtor in designing Trust Distribution Procedures (“TDPs”) that

¹ The last four digits of the Debtor’s taxpayer identification number are 5815. The Debtor’s address is 133 Peachtree Street, N.E., Atlanta, Georgia 30303.

will provide payments to claimants that cover Bestwall's share of any liability for current and future mesothelioma claims; and evaluate payments to claimants based on the distribution procedures that accompany the plan of reorganization proposed by the Asbestos Claimants' Committee ("ACC") and the Future Claimants' Representative ("FCR").

3. In my declaration filed on June 19, 2020 regarding Bestwall's estimation motion (Doc. No. 1207-1) (the Estimation Declaration), I discussed the information needed to prepare a reliable estimate of Bestwall's legal liability. Rather than repeating that testimony here, I have attached a copy of the Estimation Declaration (Exhibit A), and incorporate my statements in that declaration into this one.

4. In this Declaration, I first provide some basic background on a legal liability estimate for purposes of providing context with respect to the need for the information. Second, I describe certain additional information regarding the need for the information sought in the PIQ Motion. Finally, I describe certain additional information regarding the need for the information sought in the Trust Discovery Motion.

I. Qualifications

5. A detailed description of Bates White's and my experience and expertise is contained in my Estimation Declaration and November 2, 2017 Declaration, attached as Exhibit A to the Debtor's *Ex Parte Application of the Debtor for an Order Authorizing It to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date*.² In addition, a complete and updated copy of my *curriculum vitae* is attached to my Estimation Declaration as Exhibit 1.

² *Ex Parte Application of the Debtor for an Order Authorizing It to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date*, Nov. 2, 2017, Doc. 29, pp. 11–26.

6. This Court issued an *Ex Parte Order Authorizing the Debtor to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date*.³

II. Overview

7. In my Estimation Declaration, I included a chart (p. 3) depicting the components of a legal liability estimate, including the factors that bear on the estimate. I then described specific categories of information needed to prepare a reliable estimate (pp. 3-9). I will not repeat that testimony here, but will begin by describing some general principles that support using a legal liability estimate rather than an estimate based on a defendant's settlement history to determine a company's liability for asbestos claims.

8. There are multiple reasons why the amount paid to settle a disputed claim may not reflect or equate to a defendant's actual liability for such claim. A company like Bestwall may spend large amounts of money on settlements when it faces little actual liability. Fundamentally, such settlements are rooted in the economic differences between defending and prosecuting asbestos exposure-related lawsuits. It is a well-established principle in the Law and Economics literature that the amount that a defendant pays and a plaintiff accepts to settle a lawsuit is not a direct measure of the defendant's liability.⁴

³ *Ex Parte Order Authorizing the Debtor to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date*, Nov. 2, 2017, Doc. 40.

⁴ See, for instance:
Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies* 2, no. 2 (1973): 399–458;
Lucian A. Bebchuk, "Litigation and Settlement Under Imperfect Information," *RAND Journal of Economics* 15, no. 3 (1984): 404–15;
George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *Journal of Legal Studies* 13, no. 1 (1984): 1–55;
David Rosenberg and Steven Shavell, "A Model in which Suits Are Brought for Their Nuisance Value," *International Review of Law and Economics* 5 (1985): 3–13;
Lucian A. Bebchuk, "Suing Solely to Extract a Settlement Offer," *Journal of Legal Studies* 17 no. 2 (1988): 437–50;
Lucian A. Bebchuk, "A New Theory Concerning the Credibility and Success of Threats to Sue," *Journal of Legal Studies* 25, no. 1 (1996): 1–25.

9. Depending on the nature of the litigation, settlements can be lower or higher than liability. Some situations will lead the parties to settle for an amount less than liability (a windfall to the defendant and a loss for the plaintiff), while others will lead the parties to settle for an amount more than the actual liability (a windfall to the plaintiff and a loss for the defendant).

10. Factors that affect the amount that a defendant pays in settlement, other than its potential liability, include the direct costs of litigation, the potential impact on the defendant's reputation, the effect of litigation on the defendant's finances (stock price, ability to borrow, etc.), the time and resources that certain employees would have to spend on the process, and the distraction of management from the main business of the company. The amount that plaintiffs accept for releasing a defendant from the litigation is also affected by factors other than liability alone. Plaintiffs' litigation costs in personal injury claims also matter, though they are structured differently than defendants' costs.

11. In asbestos litigation, there is a large asymmetry in avoidable costs between the defendants and the plaintiffs. Mesothelioma plaintiffs typically name over 50 defendants in their complaints.⁵ Plaintiff depositions typically include many defense attorneys, but only one lawyer representing the plaintiff. Because each defendant pays its own costs and defense lawyers typically bill by the hour, a defendant can avoid all of its future costs by settling with the plaintiff and leaving the case. In contrast, a plaintiff can only avoid future costs if he settles with the last defendant standing because whether the case goes to trial against one or multiple defendants has little effect on the cost the plaintiff will incur from continuing to pursue a claim. This characteristic of asbestos cases means that defendants have more to save in costs than plaintiffs

⁵ Garlock Report, ¶ 123.

by settlement, which means plaintiffs can routinely extract a portion of the defendant's avoidable cost savings in settlement.

12. Further, there is an additional source of asymmetry between the total expense a defendant expects to incur and the net recovery a claimant expects to receive from that defendant. This is because the amounts that claimants recover are net of the contingency rate that plaintiff law firms charge over the amounts received from defendants. Plaintiff law firms charge a 30% to 40% contingency rate over recoveries. Therefore, for example, if the defendant and the claimant agree on a \$100 settlement and the plaintiff law firm charges a 40% contingency rate, the defendant pays \$100 for the settlement but the claimant only receives \$60. This means that any additional dollar that increases a settlement amount represents a higher cost to the defendant than the benefit for the claimant. Thus, for a net payment to the claimant to reach a certain amount, the defendant has to spend proportionally more. In other words, the claimant is less sensitive to changes in settlement amounts than the defendant due to the asymmetry in the structure of defendant payouts and claimant recoveries.

13. Another reason that settlement payments may not reflect actual liability is the effect of withholding plaintiff exposure information, which Bestwall believes it experienced in cases filed against it starting with the bankruptcy wave of the early 2000s. By withholding relevant alternative exposure information from a defendant in a particular case, a plaintiff can effectively increase the amount of the settlement the plaintiff can receive from the defendant. First, with fewer available co-defendants disclosed, the defendant's liability share appears higher than it would if the plaintiff disclosed all sources of exposure, even in jurisdictions in which several liability apportionment rules. Second, with the most likely contributors to a plaintiff's disease out of the case, the likelihood that a remaining defendant in the case will be found liable

appears higher than it would if all exposure sources were disclosed. Third, if a plaintiff does not willingly disclose all sources of the plaintiff's asbestos exposure, the defendant must spend more money trying to find such exposure information through indirect sources. Bestwall's resolution history is consistent with this effect, with the increase in the number of cases resolved for large payments to plaintiffs and the large increase in defense expenses observed after the bankruptcy wave of the early 2000s.

III. The information sought in the PIQ Motion

14. As explained above, Bestwall's expected liability is distinct from the settlements it paid historically or would have paid in the absence of bankruptcy. Reliable estimation of expected liability requires analysis of the various factors relevant to compensatory award share and likelihood of plaintiff success, as well as the number of claims that could go to trial. For the reliable estimation of Bestwall's liability with respect to current claims and for the valuation of current claims under other contexts such as an extrapolation of settlements or under TDPs, it is necessary to know the identity and characteristics of such pending claims.

15. Based on my experience of working with a large number of asbestos defendants since the 1990s, asbestos defendants generally do not possess complete and up-to-date information for most pending claims for several reasons. Discovery may not have been initiated or completed; information provided by plaintiffs in discovery may not be complete or correct; or defendants in some cases may not collect certain information about claims and claimants until such claims resolve. Moreover, as I explain in more detail below, Bestwall has no information at all for a number of claims that may exist but were not filed against Bestwall before it filed for bankruptcy protection.

16. In my Estimation Declaration, I described the importance of the PIQ information in determining the number of mesothelioma claims actually pending against Bestwall. The importance of this information is illustrated by *Garlock*. As of its petition date, Garlock’s claims database showed 5,813 “pending” mesothelioma claim records. The PIQ process in that case revealed that about 2,000 of those 5,813 claim records in fact did not represent pending mesothelioma claims against Garlock.⁶ The PIQs established that many claimants had already resolved their claims through dismissal or settlement; many did not have mesothelioma; many did not have Garlock exposure; and many had withdrawn or were no longer pursuing claims against Garlock. Further, of the approximately 3,800 PIQ claimants who still asserted a pending claim against Garlock, only about 54% described any direct, bystander, or secondary exposure to Garlock’s asbestos-containing products.⁷ Similarly, the PIQ process in the Bondex bankruptcy case revealed that about 1,500 of the 3,500 claims reflected as pending mesothelioma claims in the Bondex database in fact did not represent pending claims.⁸

17. Based on my experience and analysis of Bestwall’s claims and costs, Bestwall has incomplete information regarding most unresolved claims in its database. In particular, among the 5,700 unresolved mesothelioma records in the Bestwall claims database there are about 3,000 records associated with law firms with which Bestwall had agreements, under which Bestwall paid settlement amounts based on an agreed-upon matrix or resolved groups of claims for negotiated lump sums without examining individual claims. Historically, approximately 70% of

⁶ See Expert Report of Jorge Gallardo-García, PhD, *In re Garlock Sealing Technologies LLC, et al.*, No. 10-31607 (Bankr. W.D.N.C. Feb. 15, 2013) (Trial exhibit GST-8004) [hereinafter “Gallardo-García Garlock Report”], Exhibit 1 and ¶ 33.

⁷ Expert Report of Charles E. Bates, PhD, *In re Garlock Sealing Technologies LLC, et al.*, No. 10-31607 (Bankr. W.D.N.C. Feb. 15, 2013) (Trial exhibit GST-0996) [hereinafter “Garlock Report”], Exhibit 46.

⁸ Expert Report of Charles H. Mullin, PhD, *In re Specialty Products Holding Corp. et al.*, No. 10-11780 (Bankr. D. Del. Aug. 15, 2012), Doc 3473-5, pp. 22–23.

the mesothelioma claims Bestwall paid to settle after 2010 were resolved through these kinds of agreements. Bestwall entered into these arrangements to avoid the cost of going through discovery and gathering information to resolve the claims on a piecemeal basis. Instead, Bestwall incurred on average less than \$3,000 in defense costs in connection with mesothelioma claims brought against it by these firms before resolving them as part of such agreements. As a result, Bestwall likely has little information about those 3,000 claims. Further, there are more than 600 mesothelioma unresolved records in Bestwall's claims database filed within the six months prior to Bestwall's Petition Date. Bestwall likely has little information about those claims, as the litigation process for such claims had just begun when Bestwall filed for bankruptcy protection.

18. The second group of potentially pending mesothelioma claims are those not identified as such in Bestwall's claims database due to the lack of disease information. Bestwall currently has no practical way to identify whether these claims involve mesothelioma or some other disease. Because Bestwall did not participate in any additional tort discovery on these claims that continued after Bestwall's petition date (due to the automatic stay), and some of these claims may be dormant, Bestwall has no information on whether there are any unresolved mesothelioma claims within "unknown disease" records.⁹ There are more than 21,300 of such records in Bestwall's claims database that appear as unresolved, of which about 5,400 appear as "open." In my experience, the vast majority of these records either represent old claims alleging non-malignant conditions or are abandoned claims with no prospects against the defendant. This is likely the case with most of the 21,300 unresolved records with unknown disease information,

⁹ Further, although some unresolved records show a non-mesothelioma disease, the claimant may indeed have mesothelioma. This type of error is possible in databases with hundreds of thousands of records.

as about 21,000 of them were filed more than four years before Bestwall's Petition Date. However, there may be some active pending mesothelioma claims in this group of records, as almost 300 were filed within four years of the Petition Date, including about 150 filed within a year and about 70 filed in the six months prior to the Petition Date.

19. The Bestwall claims database also contains no information on mesothelioma claimants who may exist but have not filed a claim. Bestwall therefore has no information on these claims. This lack of information is particularly acute with respect to claimants with exposure profiles that Bestwall did not see in the tort system before its Petition Date. For instance, it is my understanding that the ACC and the FCR have argued that claimants alleging exposures to Bestwall products beyond Old GP's Gypsum Division based on alleged asbestos contamination may exist. The Debtor has stated that it has no history of receiving such claims in the tort system. Therefore, because those claims are not in Bestwall's claims database, there is no basis to estimate their number and evaluate any Bestwall liability with respect to them. If such claimants exist, information about them is needed to assess the extent of any liability Bestwall may have for them.

20. Based on my preliminary analysis of Bestwall's claims and resolutions history, I expect that discovery in this matter will show that the number of entities sharing liability with Bestwall in pending and future mesothelioma claims will be substantial. As part of that preliminary analysis, I have joined the publicly available Garlock Analytical Database¹⁰ and Bestwall's claims database to determine the overlap between the two claiming populations. The overlap is substantial: three out of four Bestwall/Old GP mesothelioma claims filed from 2002 to

¹⁰ This database is part of the Garlock Estimation Trial record that the *Garlock* Court made public. For a description of the Garlock Analytical Database, see Gallardo-García Garlock Report.

Garlock's petition date on June 5, 2010 were also claims filed against Garlock, and three-fourths of Bestwall's/Old GP's payments to mesothelioma claimants during this time period were to claimants who also pursued claims against Garlock. These data, however, do not provide sufficient information about Bestwall's and Old GP's historical claims, because about one-quarter of Bestwall's mesothelioma claims that were filed before Garlock's petition date were not asserted against Garlock (including many of Bestwall's highest-value claims) and because the Garlock data do not include claims filed after June 5, 2010 (Garlock's petition date and more than seven years before Bestwall commenced this case).

21. Finally, the information requested in the PIQ Motion will be essential for calculating and estimating the potential settlement offers that Bestwall claimants would receive from an eventual section 524(g) trust established in this case. For example, the PIQ information in *Garlock* was fundamental for this task. After the Garlock Estimation Trial, once Garlock, the asbestos committee in that case, and the future claimants' representative in that case reached a settlement regarding total trust funding, the data gathered through the Garlock PIQ was a key input in calculating the settlement offers that different types of claimants would receive from the Garlock trust's Claims Resolution Procedures (the "CRP"). Based on Bates White's analysis using the Garlock Analytical Database, of which the PIQ data was a principal component, the parties were able to determine the level of baseline settlement offer values for the Garlock trust. As these data were an important input for determining trust settlement offers, the PIQ data in *Garlock* also enabled my team at Bates White and me to evaluate whether the trust funding under the Garlock Plan would allow the Garlock Trust to provide substantially equivalent treatment to pending and future claimants. The PIQ data requested here in the PIQ Motion will play a similar role in allowing me to evaluate any proposed plan of reorganization, the design and evaluation of

TDPs and payments to claimants at levels that are substantially equivalent for present and future claimants.

IV. The information sought in the Trust Motion

22. The information Bestwall requests from asbestos trusts is fundamental for estimating Bestwall's legal liability. It is also critical to test whether claimants withheld exposure information from Bestwall while in the tort system and how its payments to claimants were impacted by such practices. This data is needed to assess contentions from the ACC and FCR that Bestwall's historical settlements reflect its liability and their contentions that Bestwall's historical settlements reveal amounts necessary to induce claimants to accept a plan of reorganization in this case. The proposed trust discovery will permit us to compare data from asbestos trusts that document claimants' exposures to the products of the reorganized entities with what those same claimants revealed about their asbestos exposures in their tort litigation against Bestwall and Old GP.

23. Having trust claims information on Bestwall claims resolved with payments within a wide range of values will permit me to evaluate the impact on historical settlement amounts caused by claimants delaying the filing of trust claims and failing to disclose to Old GP the exposure evidence supporting them. In addition, analysis of the settlements under the Law and Economics model will permit me to test how the non-disclosure of trust exposure evidence may have affected the likelihood of success factor under the model in historical cases.

24. The trusts and the trust processing facilities possess the requested information in readily available electronic form. The trusts' search can be performed electronically with simple computer code. Bestwall has Social Security Numbers ("SSNs") for most mesothelioma claims it resolved by settlement or verdict. Using SSNs to match Bestwall's settled and tried cases to

the trusts' databases will yield a reliable identification of claimants and will minimize the risk of false positives. In particular, the computer code required for identifying claims in the trusts' databases will be very simple, as it will only have to focus on SSN matches or matches of the last four digits of the SSN plus last name.

V. Data security.

25. In the ordinary course of business, Bates White routinely receives privileged and confidential information, often highly sensitive in nature. Bates White has data security protocols that implement industry best practices for data confidentiality and protection. Such protocols include, but are not limited to, the following safeguards: (a) each staff member has unique log-in credentials to access Bates White's systems; (b) data access in each matter is limited to staff based on "need to know" and "least privilege" principles, which includes time restrictions and other controls as necessary; (c) transmission of confidential or privileged information is done through encrypted file sharing systems that are password-protected (all media that leave Bates White are encrypted and password-protected); (d) physical external media with confidential information are secured in a locked safe or cabinet; (e) to comply with data destruction requirements, external media are destroyed, and external hard drives and laptops are wiped to ensure all data are removed; and (f) Bates White's network is protected by next-generation firewalls, web filtering, intrusion detection and prevention capabilities, and 24/7 monitoring by a third party. Bates White also deploys next-generation antivirus to all endpoints, two-factor authentication for external connections, and data loss protection designed to monitor and prevent theft and unauthorized uses of data. All Bates White employees must complete a cybersecurity training program.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 30, 2020



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Exhibit A

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

BESTWALL LLC,

Debtor.

Chapter 11

Case No. 17-31795 (LTB)

DECLARATION OF CHARLES E. BATES, PHD

Charles E. Bates, PhD, deposes and states as follows:

1. I am the Chairman of Bates White, LLC (“Bates White”), which maintains offices at 2001 K Street NW, North Building, Suite 500, Washington, DC 20006.

2. I am duly authorized to make this Declaration as a consultant for Bestwall LLC (“Bestwall” or the “Debtor”) in this case. I make this Declaration at the request of the Debtor’s counsel regarding (1) the data and claims-related information Bates White needs to (a) render a reliable estimate of Bestwall’s liability for present and future mesothelioma claims and (b) properly evaluate any estimation opinions or other opinions or positions related to the value of asbestos claims offered by the Asbestos Claimants Committee (“ACC”), the Future Claimants’ Representative (“FCR”), or their experts, and (2) the work Bates White has performed for the Debtor and its counsel to date in this chapter 11 case.

3. In this Declaration, I first describe the information necessary to perform a reliable estimation of Bestwall’s legal liability with respect to mesothelioma claims and to evaluate the settlement extrapolation analyses that, I understand, the ACC and FCR experts will render in this matter. Much of this information is unavailable to the Debtor, either in whole or in significant

part. Next, I provide a summary overview of the work Bates White has performed for the Debtor and its counsel since the start of this bankruptcy case.

I. Qualifications

4. I specialize in the application of statistics and computer modeling to economic and financial issues. I have more than 25 years of experience in a wide range of litigation and commercial consulting areas, including extensive experience working on asbestos-related claims and liability valuation issues. A detailed description of Bates White's and my expertise is contained in my November 2, 2017 Declaration, attached as Exhibit A to the Debtor's *Ex Parte Application of the Debtor for an Order Authorizing It to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date*.¹ In addition, a complete and updated copy of my curriculum vitae is attached to this Declaration as Exhibit 1.

5. This Court issued an *Ex Parte Order Authorizing the Debtor to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date*.²

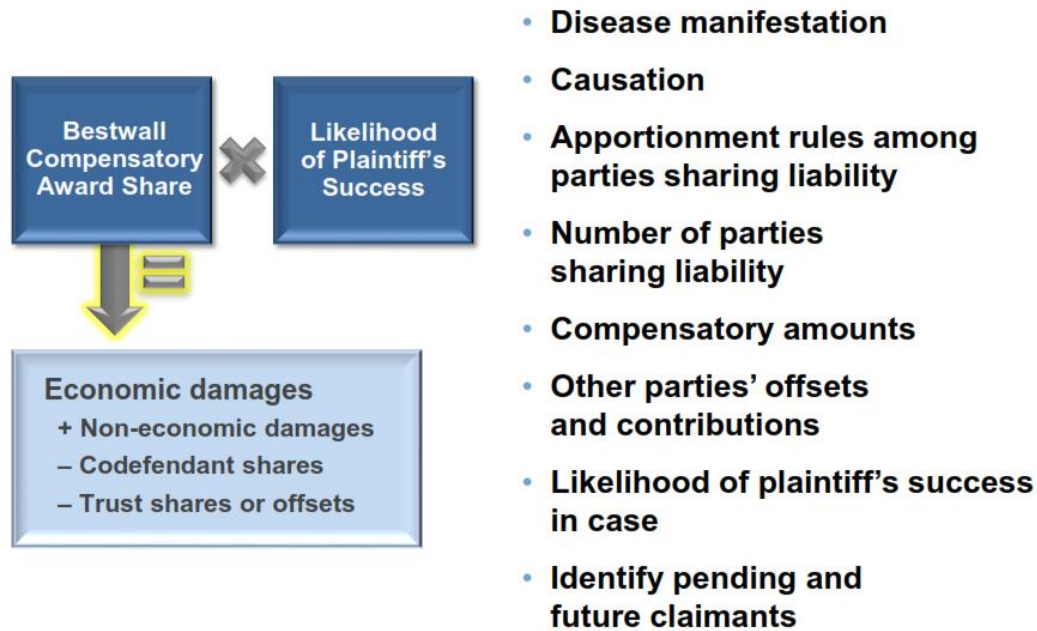
II. Data and claims-related information necessary to render a reliable estimate of Bestwall's liability for present and future mesothelioma claims.

6. Bestwall's counsel has requested that I estimate Bestwall's legal liability for mesothelioma claims, i.e., Bestwall's share of final judgments that would be obtained by current and future Bestwall mesothelioma claimants.

¹ Ex Parte Application of the Debtor for an Order Authorizing It to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date, Nov. 2, 2017, Doc. 29, pp. 11–26.

² Ex Parte Order Authorizing the Debtor to Retain and Employ Bates White, LLC as Asbestos Consultants as of the Petition Date, Nov. 2, 2017, Doc. 40.

Figure 1. Components of the estimate of Bestwall's Expected Legal Liability for current and future mesothelioma claims



7. As demonstrated in Figure 1, Bestwall's Expected Legal Liability with respect to a given present or future claimant has two principal components: (1) the expected Bestwall Compensatory Award Share with respect to such claimant and (2) the expected likelihood of such claimant's success at trial (the Likelihood of Plaintiff's Success). As further demonstrated in Figure 1, the extent of Bestwall's Expected Legal Liability is determined by consideration of the factors listed on the right.

8. Below, I explain the data and claims-related information the methodology requires to render an estimate of Bestwall's liability for present and future mesothelioma claims.

9. **Status of Bestwall claims.** It is first necessary to identify the number and characteristics of the mesothelioma claims that would currently be asserted against Bestwall. As of today, there are at least three groups of potential current mesothelioma claimants: (1) claimants who filed pre-petition mesothelioma claims against Bestwall or the former

Georgia-Pacific LLC (“Old GP”)³ and are reflected in Bestwall’s claims database as having an unresolved mesothelioma claim; (2) claimants who filed pre-petition mesothelioma claims but are not listed in the database as having an unresolved mesothelioma claim (e.g., because the database does not have information about the claimant’s alleged disease); and (3) claimants who developed mesothelioma and allege contact with Bestwall’s asbestos-containing products but did not file a pre-petition claim against Bestwall.

10. The Bestwall claims database contains more than 5,600 records identified as unresolved mesothelioma claims. However, the number of records that actually represent a pending mesothelioma claim against Bestwall is unknown, and information is necessary to determine which of the records that actually do represent pending mesothelioma claims. This is the case for several reasons. First, about 2,000 of those records appear to have been resolved before Bestwall’s petition date but were in different states of documentation.⁴ Of those, 1,800 are described as resolved without payment; thus, most, if not all, of those records likely represent dismissed claims. The remaining 200 of the 2,000 records appear as “settled but not documented,” which may or may not indicate that a settlement was reached. The remaining 3,600 of the 5,600 unresolved pending mesothelioma records are described as “open,” which appears to indicate they represent pending claims as of the petition date. But more than 800 had been filed more than four years before Bestwall’s petition date. It is necessary to determine which of these 800 records represent active claims against the Debtor.

³ When discussing historical matters preceding a 2017 corporate restructuring by Old GP, the term “Debtor” and “Bestwall” refer to the Debtor and the historical businesses that manufactured or marketed asbestos-containing products when they were part of Old GP or Bestwall Gypsum.

⁴ These claim records in the Bestwall claims database include those with the following statuses: “dismissed but not documented,” “inactive,” “resolved but not finalized,” and “settled but not documented.”

11. The fact that a substantial number of mesothelioma records shown as unresolved or pending in the Bestwall claims database are neither unresolved nor pending claims is typical. In my experience, asbestos claims databases consistently do not contain up-to-date information on abandoned or dismissed claims because keeping track of that information is costly and provides no benefit to the defendants in the tort system.

12. The Bestwall claims database includes unresolved records with no alleged disease information. Because no additional tort discovery on these claims continued after Bestwall's petition date (and any discovery relating to other defendants proceeded without Bestwall's participation due to the automatic stay), Bestwall has no information on whether there are any unresolved mesothelioma claims within "unknown disease" records.⁵

13. The Bestwall claims database also contains no information on mesothelioma claimants who may exist but have not filed a claim. Therefore, although claimants who have not filed claims may currently exist, Bestwall has no information on them.

14. Determining the actual number of pending mesothelioma claims against Bestwall is a critical starting point for any evaluation of Bestwall's liability. It is necessary to determine the extent of Bestwall's liability for the current claims and is also essential for estimating the number of future mesothelioma claims that could proceed to trial against Bestwall. To estimate Bestwall's liability for future mesothelioma claims, I will project the number of future claims that will be filed and the trial risk associated with each claim. This estimate will take into account differences in demographic characteristics and exposure profiles. However, I am currently unable to perform this estimate because of the lack of information on the number and

⁵ Further, although some unresolved records show a non-mesothelioma disease, the claimant may indeed have mesothelioma. This type of error is possible in databases with hundreds of thousands of records.

type of current claims alleging Bestwall exposure, and on other exposure allegations made by holders of Bestwall resolved and current claims in their claims submitted to asbestos trusts.

15. **Identifying information for the individual with mesothelioma and the individual pursuing the claim.** For the individual with mesothelioma, we need 9-digit Social Security Number (“SSN”), gender, birth date, life status, death date (if applicable), and state of residency. For the individual pursuing the claim, we need name and SSN. This information is essential for identifying claimants across the multiple sources of asbestos claims information available in this matter. In addition, this information is necessary to identify multiple claims that may have been generated by a single mesothelioma diagnosis, such as personal injury and wrongful death claims for the same person. This is important for valuation purposes, because these claims may appear twice in the claims database but represent a single mesothelioma diagnosis.

16. **Diagnosis information.** This information includes the date of diagnosis and the mesothelioma body site (e.g., pleural versus peritoneal). This information is necessary to assess the viability of the claim and to understand the potential economic loss for the claimant and, accordingly, the possible damage amount. Although Bestwall’s database includes general disease information for many claim records, as discussed above, there may be unidentified mesotheliomas in the database. Similarly, the database includes diagnosis dates for a number of records, but it lacks this information for a large number of unresolved records. The diagnosis date provides information about when the alleged disease manifested, so that it can be determined what portion of total diagnoses in a given year were pursued against Bestwall. Also, as described above, the database contains no information on claims that were not filed pre-

petition. Further, Bestwall's claims database does not include information on the mesothelioma body site.

17. **The injured party's alleged exposure to asbestos-containing products for which Bestwall is responsible.** The methodology requires information concerning the injured party's alleged exposure to Bestwall asbestos-containing products. We currently have little exposure information for current claims, including how many claimants will actually assert contact with a Bestwall asbestos-containing product.

18. If the claimant alleges Bestwall exposure, the methodology requires, for each alleged exposure, information regarding type of exposure (occupational, non-occupational, secondary), location where the exposure allegedly occurred, dates of alleged exposure, occupation/job type of individual while the alleged exposure occurred, and specific Bestwall products to which the individual alleges exposure. This information regarding the nature and extent of the plaintiff's exposure is fundamental for assessing the share of liability (if any) that Bestwall should cover for that claim.

19. **The injured party's alleged exposure to asbestos-containing products manufactured by or associated with other entities.** The methodology also requires information concerning allegations of exposure to non-Bestwall asbestos-containing products and, for each alleged exposure, basic exposure-related information, including type of such exposure (occupational, non-occupational, secondary), location where the exposure allegedly occurred, dates of alleged exposure, occupation/job type of the individual while the alleged exposure occurred, and specific products to which the individual alleges exposure.

20. In apportioning damages, it is first necessary to identify and quantify the number of entities and codefendants that would share in the liability with Bestwall, should Bestwall be

found liable. This determination requires sufficient information on claimants' work and alleged exposure histories so that the sources of asbestos exposure for claimants can be identified and accounted for.

21. Information on current and past claimants' job histories and exposure to other companies' asbestos-containing products is essential to identify alternative sources of exposure and assess the relative contribution of Bestwall asbestos-containing products (if any) to a claimant's alleged asbestos exposure. The exposure-related information will be supplemented and compared to the information we would obtain on the claimant's asbestos trusts filings and tort claims, to construct a full description of the exposure profiles of claimants with a pending mesothelioma claim against Bestwall. This information is central to liability apportionment and for the estimation of the likelihood of plaintiff's success against Bestwall, but it is unavailable in the Debtor's database.

22. **Injured party's economic loss.** Economic loss is another fundamental component of a liability estimate because it enables us to ascertain the expected award that a claimant may receive should he or she proceed to trial and prevail. Economic loss estimates are based on the claimant's demographic information, as well as on information related to lost income and expenses caused by the alleged disease. They require information about key claimant characteristics, including work/retirement status, current or last occupation, current or last annual income, medical expenses, dependent information, and funerary expenses (if applicable).

23. **Information about the claimants' lawsuits and claims against other entities.** Information about other parties' payments to claimants and the status of claims against other

entities is important for producing a reliable estimation of Bestwall's share of liability for a given claim.

24. To apply the liability apportionment rules described above, it is necessary to obtain information regarding claimants' settlements and recoveries from tort defendants and asbestos trusts. This information permits us to take into account offsets when estimating Bestwall's share of the liability, if any. Bestwall does not possess sufficient information that would enable it to evaluate amounts that claimants have recovered or will recover from other sources.

25. Basic information regarding the plaintiffs' claims against other entities, their status, and the amounts the claimants have recovered from those entities is not included in the Bestwall claims database. This is particularly the case for plaintiffs' trust claims for claims resolved by Bestwall in the tort system and for unresolved current claims.

III. Data and claims-related information necessary to evaluate opinions offered by the experts for the Asbestos Claimants Committee and the Future Claimants' Representative

26. I understand that the ACC and the FCR contend that Bestwall's settlement history reflects Bestwall's legal liability for settled claims and that Bestwall settlement payments should be used as proxies for Bestwall's liability for current and future claims. Additional data are needed to demonstrate and quantify to what extent this is the case.

27. Much of the information needed to quantify the impact of avoidable costs and the actual exposure profile of Bestwall claimants on Bestwall's settlements is not currently available to Bestwall.

28. I understand that Bestwall has little information on the exposure profile of claims dismissed without payment and what distinguishes them from other claims.

29. Bestwall has little or no information on the exposure profile or the other characteristics of group settlement claims that distinguish them from each other or from claims that the plaintiffs abandoned without payment, or explains why some claims were paid and not others.

30. The data I described in detail above are needed to quantify Bestwall's legal liability for claims individually litigated but not prepared for trial and claims prepared for trial but settled before trial started.

31. Although Bestwall has more robust information on claims settled during trial, information is still needed to assess the extent of alternative exposures.

32. Bestwall has substantial information on claims that proceeded to verdict. But, even for these cases, information on alternative exposures is necessary.

33. Information on trust claims filings will be essential. By comparing exposure allegations in the tort system to allegations in the plaintiffs' trust claims, I can determine whether settlement (and verdict) amounts can be properly extrapolated into the future.

34. Further, the information on current claims against Bestwall that I discussed above is also necessary for the opposing experts' settlement approach.

IV. Bates White's work to date in this case

35. In this section, I provide a summary of the work that Bates White has performed since the commencement of Bestwall's chapter 11 case.

36. The principal tasks that Bates White has undertaken are the following:

- a. Construction of the preliminary Bestwall Analytical Database
- b. Update of the model to estimate and forecast mesothelioma incidence

- c. Analysis of Bestwall's claims history and defense costs data for estimation of Bestwall's legal liability

37. Below I provide more detail on each of these tasks. At the direction of counsel, I am providing only a high-level overview to protect attorney-client-privileged and work product-protected information.

a. Construction of the preliminary Bestwall Analytical Database

38. The Bestwall Analytical Database is and will be the foundation for most of the analyses Bates White will perform in this case. In particular, this database will be the foundation for my estimate of Bestwall's legal liability.

39. Part of the work that Bates White has performed to date relates to the development of an updated analytical database using other sources of information available to us (such as the publicly available Garlock Analytical Database, limited data from the Social Security Administration, and a copy of the Manville Trust database as of 2002 purchased by Bates White, among others).

40. Although we have been able to add information to update the existing claims database, as described above, other fundamental information is necessary to construct a database of reliable information for Bestwall asbestos claims, as described in detail in Sections II and III above. None of the other sources of data we have been able to use has information collected specifically with respect to Bestwall mesothelioma claims. In the present matter, the work on the construction of the preliminary Bestwall Analytical Database has taken approximately 35% of Bates White's fees so far.

b. Update of model to estimate and forecast mesothelioma incidence

41. As I explained above, a central element of the estimate of Bestwall's legal liability is a forecast of the number of mesothelioma diagnoses that will arise in the future. For this purpose, Bates White has been developing an updated version of an incidence model.

42. This task involves a number of components. Those include researching the applicable literature and publicly available data and incorporating that research into the model by developing complex computer code to model and estimate incidence. This project has constituted approximately 30% of Bates White's fees in this matter so far.

c. Analysis of Bestwall's claims history and defense costs data for estimation of Bestwall's legal liability

43. Settlement payments, together with defense costs data, provide useful information to assess the extent to which claims are settled for trial risk or to avoid defense costs. Bates White has been engaged in a detailed and iterative analysis of the available data. Some of this analysis is reflected in Section III above and informs my opinions about the information necessary to assess the ACC's and FCR's proposed valuation approaches in this matter. In addition, this analysis was the basis for providing support to the Debtor and its counsel during the mediation proceedings the Court ordered early in 2020. This analysis has constituted approximately 25% of Bates White's fees in this matter so far.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 19, 2020



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Exhibit 1

Curriculum Vitae

CHARLES E. BATES, PHD

Chairman

AREA OF EXPERTISE

- Asbestos liabilities and expenditures estimation
- Economic analysis
- Statistical analysis
- Microsimulation modeling
- Econometrics



SUMMARY OF EXPERIENCE

Charles E. Bates has extensive experience in statistics, econometric modeling, and economic analysis. He specializes in the application of statistics and computer modeling to economic and financial issues. Dr. Bates has more than 25 years of experience and provides clients with a wide range of litigation and commercial consulting services, including expert testimony and guidance on economic and statistical issues.

Dr. Bates is a recognized expert in asbestos-related matters. He speaks in national and international forums on the asbestos litigation environment and estimation issues. Dr. Bates is frequently retained to serve as an expert on such matters in large litigations and has testified before the US Senate Judiciary Committee and Federal Bankruptcy Court.

EDUCATION

- Advanced Seminar in Pharmacoeconomics, Harvard School of Public Health
- PhD, Economics, University of Rochester
- MA, Economics, University of Rochester
- BA, Economics and Mathematics (high honors), University of California, San Diego

PROFESSIONAL EXPERIENCE

Prior to founding Bates White, Dr. Bates served as a Vice President of A.T. Kearney. Previously, he was the Partner in Charge of the Economic Analysis group at KPMG. Dr. Bates began his career on the faculty of Johns Hopkins University's Department of Economics, where he taught courses in advanced statistical economic analysis and trade theory.

SELECTED ASBESTOS AND PRODUCT LIABILITY EXPERIENCE

- Retained as an asbestos liability valuation expert on behalf of the debtor in the matter *In re DBMP LLC* pending in the US Bankruptcy Court for the Western District of North Carolina, Charlotte Division.
- Retained as an asbestos liability valuation expert on behalf of the debtor in the matter *In re Bestwall LLC* pending in the US Bankruptcy Court for the Western District of North Carolina, Charlotte Division.
- Retained as an asbestos liability valuation expert on behalf of Truck Insurance Exchange in the matter *In re Kaiser Gypsum Company, Inc., et al.* pending in the US Bankruptcy Court for the Western District of North Carolina, Charlotte Division.
- Served as an asbestos liability valuation expert on behalf of Garlock Sealing Technologies in its bankruptcy proceedings. Testified before the US Bankruptcy Court for the Western District of North Carolina both in preliminary case hearings and at trial.
- Served as an expert in asbestos claims valuation for financial reporting purposes in *Erica P. John Fund Inc. et al. v. Halliburton Company et al.* on behalf of certain Halliburton stockholders regarding Halliburton's financial disclosures of its asbestos liabilities after its acquisition of Dresser in 1998.
- Served as the Individual Claimant Representative on behalf of potential future No Notice Individual Creditors as part of the Amending Scheme of Arrangement for OIC Run-Off Limited (formerly the Orion Insurance Company plc).
- Authored expert reports and provided testimony in *United States Fid. & Guar. Co. v. American Re-Insurance Company* in asbestos claims valuation, estimation methodology, and asbestos reinsurance billing regarding the proper reinsurance bill associated with USF&G's reinsurance bill of its asbestos-related payments to Western MacArthur.
- Served as an asbestos liability valuation expert on behalf of Specialty Products Holding Corp./Bondex International in its bankruptcy proceedings.
- Retained as an asbestos liability valuation expert on behalf of the Official Committee of Unsecured Creditors of Motors Liquidation Company (f/k/a General Motors Corporation) in its bankruptcy proceedings.
- Authored expert report and provided deposition testimony regarding the value of diacetyl claims on behalf of the Official Committee of Equity Security Holders in the Chemtura Corporation bankruptcy proceedings.
- Testified in deposition on behalf of the ASARCO Unsecured Creditors Committee in the ASARCO bankruptcy proceedings regarding the valuation of past and future asbestos-related personal injury claims.
- Authored expert report and provided deposition testimony on behalf of the policyholder in the matter of *Imo Industries, Inc. v. Transamerica Corp.*
- Currently retained as an expert by Fortune 500 companies to produce asbestos expenditure estimates for annual and quarterly financial statements. Estimations aid clients with Sarbanes-Oxley compliance.
- Currently retained as an expert in asbestos estimation and insurance valuation, for numerous asbestos litigation matters, on behalf of insurance companies, corporations, and financial creditors' committees of federal bankruptcy proceedings.
- Testified before the Senate Judiciary Committee on the economic viability of the Trust Fund proposed under S.852, the Fairness in Asbestos Injury Resolution (FAIR) Act of 2005. Testimony clarified Bates White's independent analysis on the estimate of potential entitlements created by the administrative no-fault trust fund that uses medical criteria for claims-filing eligibility.

- Testified in deposition on behalf of Liberty Mutual Insurance Company in the Plibrico bankruptcy proceedings regarding the valuation of past and future asbestos personal injury claims and exposure criteria in plan proponents proposed trust distribution procedures.
- Testified at deposition on behalf of the joint insurers defense committee to address the fraction of expenditures associated with the company's asbestos installation operations in *Owens Corning v. Birmingham Fire Insurance Company of Pennsylvania*.
- Testified in the Babcock & Wilcox bankruptcy confirmation hearing on behalf of the Insurers Joint Defense Group to address asbestos liability. Developed claims criteria evaluation framework to assess asbestos liability forecasts and trust distribution procedures.
- Testified at deposition on behalf of Sealed Air in the fraudulent conveyance matter regarding the 1998 acquisition of Cryovac from W.R. Grace. Directed estimation of foreseeable asbestos liability for fraudulent conveyance matter to advise the debtor in the bankruptcy of a defendant with over \$200 million in annual asbestos payments. Developed asbestos liability forecasting model and software. Directed industry research and interviewed industry experts.
- Testified at deposition on behalf of Hartford Financial Services Group to address the asbestos liability of MacArthur Company and Western MacArthur Company. Estimated asbestos liability in the context of bankruptcy proceedings.
- Testified at deposition on behalf of the Center for Claims Resolution in arbitration proceedings of *GAF v. Center for Claims Resolution*.
- Served as testifying expert on behalf of CSX Transportation on the suitability of asbestos claim settlements for arbitration proceedings of *CSX Transportation, Inc. v. Lloyd's, London*.
- Developed an econometric model of property damage lawsuits for estimating the future liability of a former asbestos manufacturer arising from the presence of its asbestos products in buildings.

SELECTED LITIGATION AND CONSULTING EXPERIENCE

- Testified in US Tax Court on behalf of the taxpayers on the statistical basis and accuracy of shrinkage accruals in *Kroger v. Commissioner*.
- Served as consulting expert and performed statistical and quantitative analyses to assess the merits of a class action alleging payment of fees to mortgage brokers for referral of federally related mortgage loans.
- Testified in US Tax Court on behalf of the taxpayer analyzing the statistical prediction of bond ratings using company financial data in *Nestlé Holdings Inc. v. Commissioner*.
- Submitted written expert testimony on the statistical and financial analysis of option transactions and an analysis of alternative stock option hedges in *McMahon, Brafman, and Morgan v. Commissioner*.
- Testified in US Tax Court on behalf of the taxpayers of IRS experts on the statistical basis and accuracy of shrinkage accruals in *Wal-Mart v. Commissioner*.
- Served as consulting expert and analyzed the racial composition for a large manufacturing corporation using EEO data and employed sophisticated statistical analysis and modeling to determine the validity and strength of an employment discrimination claim.
- Testified on behalf of VNC in the arbitration hearing of *VNC v. MedPartners*.

- Provided expert testimony in California Superior Court on the validity of economic comparability adjustments for pipeline easement rents in *Southern Pacific Transportation Corp. v. Santa Fe Pacific Corp.*
- Served as statistical expert and developed detailed statistical analysis of customs trade data for use in criminal transfer-pricing litigation.
- Submitted written testimony in US Tax Court on the beneficial life of company credit card in a tax matter for a large retailer drawing on the company's point-of-sale data, credit card data, and customer demographic information.
- Developed state-of-the-art models to account for default correlation for underwriting credit insurance; models became the standard tools for the country's largest credit insurance firm.
- Led a team of economists that provided litigation-consulting services in one of the largest US price-fixing cases. Case involved the development of state-of-the-art economic models, damages' analyses, client presentations, pretrial discovery, industry research, preparation of evidence and testimony, depositions, and a critique of opposing expert analyses and reports.
- For a start-up global telecommunications enterprise, provided consulting services and developed a comprehensive computer model to evaluate the firm's financial plan. Model incorporated marketing, pricing, and communications traffic in a single modeling framework to facilitate sensitivity analysis by creditors and to evaluate the risk associated with the strategic business plan.
- Served as senior economic advisor on issues of analytical methodology for numerous pharmacoeconometric and health outcomes research projects. Provided expertise in the development of decision tools and the creative use of modeling applications for pharmacoeconomics and outcomes research.

PUBLICATIONS

- Bates, Charles E., Charles H. Mullin, and Marc C. Scarcella. "The Claiming Game." *Mealey's Litigation Report: Asbestos* 25, no. 1 (February 3, 2010).
- Bates, Charles E., Charles H. Mullin, and A. Rachel Marquardt. "The Naming Game." *Mealey's Litigation Report: Asbestos* 24, no. 15 (September 2, 2009).
- Bates, Charles E., and Charles H. Mullin. "State of the Asbestos Litigation Environment—October 2008." *Mealey's Litigation Report: Asbestos* 23, no. 19 (November 3, 2008).
- Bates, Charles E., and Charles H. Mullin. "Show Me The Money." *Mealey's Litigation Report: Asbestos* 22, no. 21 (December 3, 2007).
- Bates, Charles E., and Charles H. Mullin. "The Bankruptcy Wave of 2000—Companies Sunk By An Ocean Of Recruited Asbestos Claims." *Mealey's Litigation Report: Asbestos* 21, no. 24 (January 24, 2007).
- Bates, Charles E., and Charles H. Mullin. "Having Your Tort and Eating It Too?" *Mealey's Asbestos Bankruptcy Report* 6, no. 4 (November 2006).
- Bates, Charles E., and Halbert White. "Determination of Estimator with Minimum Asymptotic Covariance Matrices." *Econometric Theory* 9 (1993).
- Bates, Charles E., and Halbert White. "Efficient Instrumental Variables Estimation of Systems of Implicit Heterogeneous Nonlinear Dynamic Models with Nonspherical Errors." In *International Symposia in Economic Theory and Econometrics*, vol. 3, edited by W.A. Barnett, E.R. Berndt and H. White. New York: Cambridge University Press, 1988.

- Bates, Charles E. "Instrumental Variables." In *The New Palgrave: A Dictionary of Economics*, edited by John Eatwell, Murray Milgate, and Peter Newman. London: Macmillan, 1987.
- Bates, Charles E., and Halbert White. "An Asymptotic Theory of Consistent Estimation for Parametric Models." *Econometric Theory* 1 (1985).

SELECTED SPEAKING ENGAGEMENTS

- "The Top Emerging Trends in 2015 Asbestos Litigation." Perrin Conferences Cutting-Edge Issues in Asbestos Litigation Conference, March 15–17, 2015.
- "Asbestos Bankruptcy: A Discussion of the Top Trends in Today's Chapter 11 Cases." Perrin Conferences Asbestos Litigation Conference: A National Overview & Outlook, Sept. 8–10, 2014.
- "An Asbestos Defendant's Legal Liability—The Experience in Garlock's Bankruptcy Asbestos Estimation Trial." Bates White webinar, July 29, 2014.
- "Concussion Suits against the NFL, NCAA, and Uniform Equipment Manufacturers." Perrin Conferences' Legal Webinar Series, May 24, 2012.
- "An Update on US Mass Tort Claims." Perrin Conferences' Emerging Risks on Dual Frontiers: Perspectives on Potential Liabilities in the New Decade, April 12–13, 2012, London, United Kingdom.
- "The Next Chapter of Asbestos Bankruptcy: New Filings, Confirmations, & Estimations." Perrin Conferences' Asbestos Litigation Conference: A National Overview & Outlook, September 13–15, 2010, San Francisco, CA.
- "Trust Online: The Impact of Asbestos Bankruptcies on the Tort System." Perrin Conferences' Asbestos Bankruptcy Conference: Featuring a Judicial Roundtable on Asbestos Compensation, June 21, 2010, Chicago, IL.
- "Current Litigation Trends that are Impacting Asbestos Plaintiffs, Defendants, & Insurers." Perrin Conferences' Asbestos Litigation Mega Conference, September 14–16, 2009, San Francisco, CA.
- "Verdicts, Settlements, and the Future of Values: Where Are We Heading? A Roundtable Discussion." HB Litigation Conferences' Emerging Trends in Asbestos Litigation, March 9–11, 2009, Los Angeles, CA.
- "Role of Bankruptcy Trusts in Civil Asbestos." Mealey's Emerging Trends in Asbestos Litigation Conference, March 3–5, 2008, Los Angeles, CA.
- "The Intersection between Traditional Litigation & the New Bankruptcy Trusts." Mealey's Asbestos Bankruptcy Conference, June 7–8, 2007, Chicago, IL.
- ABA's Insurance Coverage Litigation Committee Conference, March 1–4, 2007, Tucson, AZ.
- Mealey's Asbestos Conference: The New Face of Asbestos Litigation, February 8–9, 2007, Washington, DC.
- Mealey's Asbestos Bankruptcy Conference, December 4–5, 2006, Philadelphia, PA.
- "Seeking Solutions to European Asbestos Claiming: Will it be FAIR?" Keynote address, Mealey's International Asbestos Conference, November 1–2, 2006, London, United Kingdom.
- Mealey's Asbestos Bankruptcy Conference, June 9, 2006, Chicago, IL.
- Harris Martin Publishing Asbestos Litigation Conference, March 2, 2006, Washington, DC.
- Mealey's Wall Street Forum: Asbestos Conference, February 8, 2006, New York, NY.
- Mealey's Asbestos Legislation Teleconference, February 7, 2006.

PROFESSIONAL ASSOCIATIONS

- National Association of Business Economists
- American Economic Association
- Econometric Society

Exhibit 3

From: [Ross, Valerie](#)
To: [C. Michael Evert, Jr.](#)
Cc: [Geise, Elizabeth](#); [Rao, Sony](#)
Subject: RE: DBMP - Subpoenas to Aldrich and Murray Boiler
Date: Thursday, March 21, 2024 10:41:35 AM
Attachments: [image001.jpg](#)
[Docket 2730.pdf](#)

Mike,

As I suspect you already know, last night the DBMP ACC filed the attached motion to strike DBMP's subpoenas to Aldrich/Murray (as well as its subpoena to Bestwall), which motion is set for hearing on 4/17/24. As we've previously discussed, DBMP agrees that no production pursuant to the DBMP subpoenas are necessary until after the attached motion is resolved.

Let me know if you wish to discuss.

Regards,

Valerie

Valerie E. Ross SHE/HER/HERS
PARTNER | **ARENTFOX SCHIFF LLP**
valerie.ross@afslaw.com | DIRECT 202.778.6453

From: Ross, Valerie
Sent: Thursday, February 29, 2024 10:42 AM
To: C. Michael Evert, Jr. <CMEvert@ewhlaw.com>
Cc: Geise, Elizabeth <elizabeth.geise@afslaw.com>; Rao, Sony <sonul.rao@afslaw.com>
Subject: DBMP - Subpoenas to Aldrich and Murray Boiler

Mike,

See attached. As you may have seen, DBMP filed a notice of service of these subpoenas yesterday. I will let you know when/if we hear anything from the DBMP Claimant Representatives about these.

Regards,

Valerie



Valerie E. Ross SHE/HER/HERS
PARTNER | **ARENTFOX SCHIFF LLP**
valerie.ross@afslaw.com | DIRECT 202.778.6453
[My Bio](#) | [LinkedIn](#) | [Subscribe](#)
1717 K Street NW, Washington, DC 20006

From: [Ross, Valerie](#)
To: [Doc Schneider](#)
Cc: [Mercer Jr, Joel J](#); [Baugher, Melissa Halstead](#); [Greg M. Gordon \(gmgordon@jonesday.com\)](#); [Jeff B. Ellman \(jbellman@jonesday.com\)](#); [Cassada, Garland](#); [Worf, Richard](#); [John Tucker](#); [Geise, Elizabeth](#); [Rao, Sony](#)
Subject: RE: Letter on DBMP Subpoena
Date: Thursday, March 21, 2024 10:39:14 AM
Attachments: [image001.png](#)
[Docket 2730.pdf](#)

Doc:

As I suspect you already know, last night the DBMP ACC filed the attached motion to strike DBMP's subpoena to Bestwall (as well as its subpoenas to Aldrich/Murray), which motion is set for hearing on 4/17/24. As we've previously discussed, DBMP agrees that no production pursuant to the DBMP subpoena is necessary until after the attached motion is resolved.

Let me know if you wish to discuss.

Regards,

Valerie

Valerie E. Ross SHE/HER/HERS
PARTNER | **ARENTFOX SCHIFF LLP**
valerie.ross@afslaw.com | DIRECT 202.778.6453

From: Doc Schneider <DSchneider@KSLAW.com>
Sent: Tuesday, March 12, 2024 12:07 PM
To: Ross, Valerie <valerie.ross@afslaw.com>
Cc: Mercer Jr, Joel J <joel.mercerjr@kochcc.com>; Baugher, Melissa Halstead <melissa.baugher@kochcc.com>; Greg M. Gordon (gmgordon@jonesday.com) <gmgordon@jonesday.com>; Jeff B. Ellman (jbellman@jonesday.com) <jbellman@jonesday.com>; Cassada, Garland <GCassada@robinsonbradshaw.com>; Worf, Richard <RWorf@robinsonbradshaw.com>; John Tucker <JTucker@KSLAW.com>
Subject: Letter on DBMP Subpoena

You don't often get email from dschneider@kslaw.com. [Learn why this is important](#)

Valerie:

I hope this finds you well.

Please see the attached letter that updates the current status of DBMP's subpoena to Bestwall and serves a formal alert under Rule 45 that we plan to file the same production process that DBMP followed with respect to the similar subpoena Bestwall served on DBMP last year.

With best regards,

Doc

Richard A. Schneider (Doc)

Partner

Cell [404 428 6135](tel:4044286135) Office [404 572 4889](tel:4045724889) | E: dschneider@kslaw.com | [Bio](#) | [vCard](#)

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