

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

ARMSTRONG WORLD INDUSTRIES,
INC. ASBESTOS PERSONAL INJURY
SETTLEMENT TRUST *et al.*

Plaintiffs,

v.

ALDRICH PUMP LLC, *et al.*

Defendants.

In re

ALDRICH PUMP LLC, *et al.*,¹

Debtors.

Miscellaneous Proceeding

No. 22-00303 (JCW)

(Transferred from District of Delaware)

Chapter 11

Case No. 20-30608

**DEBTORS' OPPOSITION TO DELAWARE CLAIMS PROCESSING FACILITY'S
MOTION TO STRIKE, OR IN THE ALTERNATIVE, CONTINUE THE HEARING ON
DEBTORS' MOTION FOR RECONSIDERATION**

Delaware Claims Processing Facility (“DCPF”) filed a Motion to Strike, or in the Alternative, to Continue the Hearing (“Motion”), seeking to: (1) strike the declaration of Dr. Charles Mullin, filed in support of the Motion for Rehearing (Dkt. 54, the “Motion for Rehearing”) filed by Aldrich Pump LLC (“Aldrich”) and Murray Boiler LLC (“Murray”) (together, the “Debtors”); or (2) in the alternative, continue the hearing on the Motion for Rehearing from March 30, 2023 to April 27, 2023.

Both forms of relief should be denied.

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



There is no basis to strike Dr. Mullin's declaration. In its Motion, DCPF attempts to recast the Debtors' Motion for Rehearing as one for reconsideration. This is wrong. Indeed, it was this Court who suggested that the proper procedural posture for the Debtors' motion was one for rehearing, and not reconsideration. And as this Court has previously held, and the Fourth Circuit supports, the standard for a motion for rehearing is not the same as one the one for reconsideration of a final judgment that DCPF advances in its Motion.

Even if the standard was the same, Dr. Mullin's declaration and the Motion for Rehearing satisfy it. There is new evidence since the November 30 hearing that necessitates rehearing: DCPF's production of information, without sampling, in response to the identical subpoena served by DBMP at a relatively modest cost, combined with this Court's ruling in *DBMP* regarding efforts to impose a sampling requirement on the identical subpoena.

The remainder of DCPF's complaints about Dr. Mullin's declaration, even if they were valid (and they are not) go, at most, to the weight of the evidence, and are not a basis to strike his declaration. Given the amount of education the Court has received on these issues over the course of this case and *DBMP*, the Court has more than enough of a knowledge base about the relevant matters to assess the weight of Dr. Mullin's testimony.

Second, there is even less basis to continue the Motion for Rehearing. DCPF claims a continuance is necessary to allow them to depose Dr. Mullin on the statements made in his declaration. Of course, DCPF ignores the fact that: (1) it could have sought and taken Dr. Mullin's deposition at any time after the Debtors filed the Motion for Rehearing on March 9; and (2) it never so much as asked to take Dr. Mullin's deposition. DCPF's failure to depose Dr. Mullin is a

problem entirely of its own making and should not be used as a basis to accomplish what is clearly DCPF's real goal: further delaying this hearing.²

The Motion should be denied.

BACKGROUND

1. On July 5, 2022, the Debtors served the Subpoenas on DCPF and various trusts that DCPF processes claims for (the "Trusts"). In August 2022, DCPF and the Trusts filed motions to quash the Subpoenas. On November 30, 2022, this Court issued an oral ruling, granting in part and denying in part those motions to quash, and ordering the parties to meet and confer on a limitation of DCPF's response to the Debtors subpoena to a ten percent random sample. *See* Nov. 30, 2022 Aldrich Trans. at 74:15–18. No written order has ever been entered memorializing the Court's November 30, 2022 oral ruling.

2. Subsequent to the Court's November 30, 2022 oral ruling, a number of events relevant to the issue of sampling for trust discovery took place:

- On December 13, 2022, certain matching claimants in the *DBMP* case moved this Court to "alter or amend" its prior order denying their motions to quash. They argued that the Court should amend its prior order and order "a random sampling of no more than 10% of the data at issue," consistent with the Court's November 30, 2022 oral ruling in *Aldrich*.³ According to the *DBMP* matching claimants, the motions in *Aldrich* and *DBMP* "raised nearly identical arguments" related to the "very same privacy and economic considerations," as compliance with either subpoena would require disclosure of "a wealth of confidential, sensitive, and personal identifying information[.]" *Id.* at 6.
- On January 13, 2023, DCPF produced completed trust data in response to the subpoena issued by *DBMP*. The subpoena issued by *DBMP* is identical to the Subpoenas at issue in this case. The total cost to DCPF of producing the

² The Court will recall that DCPF has already sought to delay the hearing on the Motion for Rehearing until the April 27, 2023 omnibus. The Court denied that request. Feb. 24, 2023 Aldrich Trans. 28:14-29:24.

³ *The Armstrong World Indus. Inc. Asbestos Pers. Inj. Settlement Tr. v. DBMP LLC*, No. 22-00302 (Bankr W.D.N.C.) [Dkt. 33] at 4–5 (Dec. 13, 2022)

information responsive to the DBMP subpoenas was approximately \$86,000, and that cost is to be reimbursed by DBMP.

- On February 9, 2023, this Court denied the DBMP matching claimants' motion to reconsider.

3. In its oral ruling on February 9, 2023 denying the matching claimants motion to reconsider in *DBMP*, this Court made clear it did not err in denying a request for a sample in response to the subpoena issued by DBMP to DCPF in that case. Instead, the Court offered:

I'm not one to believe that I've never made an error, either, and I may have in because I don't recall, did not then recall all of the, the Footnote 2 and the efforts that we had made to scrub data. I was thinking, primarily, about my secondary concern, which was the need for sampling in these cases, generally, and it might not have been the appropriate thing to do then. I'm not going to decide that today.

See Hirst Decl. Ex. A., February 9, 2023 DBMP Trans. at 94. The Court went on to state:

So for better or worse, those two things were on my mind at the time and if there is an error that has been made, in my opinion it would be in the Aldrich case, not in this one because this one got very careful consideration and effectively, we dealt with that.

Id. at 96.

4. On February 14, 2023, five days after the Court's ruling denying the motion to reconsider in *DBMP*, the parties in this case appeared for an omnibus hearing. At that hearing, the Debtors informed the Court of its intent to file a motion asking the Court to reevaluate its November 30, 2022 oral ruling in light of its ruling in the *DBMP* case and their statements on the record. The Court indicated that it believed that the motion should be styled as one for "rehearing...since I announced a ruling, but nothing has been entered. So I, I would view it as a rehearing motion." Hirst Decl. Ex. B, February 14, 2023 DBMP Trans. at 29. The Court also set the hearing on that yet to be filed rehearing motion for March 30, 2023, and rejected DCPF's request to continue the hearing until April 27, 2023. *Id.*

5. Consistent with the Court's suggestion, on March 9, 2023, the Debtors filed their Motion for Rehearing, and set it for hearing on March 30, 2023. Also on March 9, 2023, the Debtors filed the Declaration of Charles H. Mullin in support of their Motion for Rehearing.

6. Although the Debtors did receive an inquiry about the Mullin declaration from the ACC, the Debtors heard nothing from DCPF until DCPF filed the instant motion on March 23, 2023.

ARGUMENT

I. THERE IS NO BASIS TO STRIKE MULLIN'S AFFIDAVIT.

7. DCPF argues that Dr. Mullin's declaration should be stricken because it does not satisfy the requirements of a motion for reconsideration under Rule 59. DCPF is wrong both factually and legally.

8. Here, the Court's November 30, 2022 oral ruling on sampling was never reduced to a written order, and was subject to additional meet and confer between the parties. Where there is no written order or final judgment, a motion seeking further evidence and argument is "one for rehearing and reopening the record" and "[p]ermitting additional evidence and argument in the cause when necessary to a just result is entirely consistent with the objectives of the Bankruptcy Code." *In re Meyers*, 483 B.R. 89, 95 (Bankr. W.D.N.C. 2012) (J. Whitley).

9. This standard is similar to the Fourth Circuit treatment of motions for reconsideration of interlocutory orders. A court may reconsider and modify an interlocutory order at any time prior to entry of final judgment. *See American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir, 2003) (finding district court abused its discretion by failing to reconsider its interlocutory order); Fed R. Civ. P. 54(b). "Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment" and instead are a matter 'committed to the discretion of the district court.' *Id.*

at 514-15. “This is because a district court retains the power to reconsider and modify its interlocutory” orders “at any time prior to final judgment when such is warranted.” *Id.* at 514-515.

10. Even if the factors identified by DCPF applied, they have been more than satisfied by the Motion for Rehearing and Dr. Mullin’s declaration in support. First, there has been new evidence that was not available at the November 30, 2022 hearing. In early January, DCPF produced data in response to DBMP’s identical subpoena, and did so without any sampling. The total cost of that production was \$86,000, which is a relatively modest cost given the hundreds of millions of dollars at issue in this bankruptcy. In addition, just as is the case here, DBMP reimbursed DCPF for all of these costs. Dr. Mullin testified concerning all of this new evidence in his declaration. Dr. Mullin also testified that given the potential for overlapping claimants between this case and *DBMP*, and because DCPF had already reviewed and redacted the information to respond to DBMP’s subpoena, the costs of responding to the Subpoenas in this case may be materially lower than in *DBMP*. Mullin Decl. at ¶ 24.

11. Second, as the Debtors have publicly stated to this Court numerous times, they do believe the November 30, 2022 oral ruling, limiting the Debtors’ subpoena to a ten percent sample, was an error by the Court. The Debtors’ belief was further reenforced when this Court denied the DCPF Matching Claimants Motion to Reconsider in the *DBMP* case, where the DCPF Matching Claimants sought to have this Court impose the exact same ten percent sample on DBMP’s identical subpoena to DCPF. The Court made clear its belief that it had not made an error in rejecting the request for sampling on DBMP’s subpoena to DCPF, and that “if there is an error that has been made, in my opinion it would be in the *Aldrich* case.” Hirst Decl. Ex. A, February 9, 2023 *DBMP* Trans. at 96.

12. To the extent the factors considered by courts in determining whether to reconsider their prior interlocutory orders apply, they have been more than satisfied.

13. DCPF's remaining arguments in favor of striking Dr. Mullin's deposition likewise fail. DCPF asks this Court to strike Dr. Mullin's declaration based on their unfounded claim that the testimony is improper speculation. Motion at ¶¶ 11-12. But DCPF fails to acknowledge that it is not speculative for Dr. Mullin's to apply his expertise to facts from the record. See *Textron, Inc. v. Barber-Colman Co.*, 903 F.Supp. 1570, 1577 (W.D.N.C. 1995) (“[I]t is certain that experts are allowed to premise their opinions on facts that find a basis in the record.”); *VS Techs., LLC v. Twitter*, No. 11-0043, 2011 WL 4744572, at *3 (E.D. Va. Oct. 5, 2011) (noting that an expert's testimony is sufficient when he “bases his opinion upon his experience as applied to the facts of the case.”).

14. Moreover, DCPF's arguments regarding Dr. Mullin's testimony are little more than attempts to attack the weight the this Court should give Dr. Mullin's testimony, not its admissibility. See *E. Tennessee Nat. Gas Co. v. 7.74 Acres in Wythe Cty., Virginia*, 228 F. App'x 323, 329 (4th Cir. 2007) (unpublished) (affirming the admission of expert testimony when it was “apparent that [the appellant] [wa]s really challenging the proper weight to be given the evidence presented at trial” not the basis for the expert opinions); *OmniSource Corp. v. Heat Wave Metal Processing, Inc.*, No. 5:13-CV-772-D, 2015 WL 3452918, at *8 (E.D.N.C. May 29, 2015) (denying motion to strike expert testimony when “concerns go to the weight of [the expert's] testimony and not to its admissibility”). Here, DCPF will have (and frankly, has had for the last two weeks) ample opportunity to cross examine Dr. Mullin on his testimony; it is that cross examination that allows DCPF to test Dr. Mullin's testimony, not a motion to strike. See *VS Techs., LLC*, 2011 WL 4744572, at *7 (“[The opposing party] will be able to cross-examine [an expert]

concerning his principles and methodologies at trial. It is for the jury to determine the appropriate weight to be accorded this testimony...”). “[The court] can weigh all relevant evidence, determine witness credibility, and decide how much weight, if any, to afford [Dr. Mullin’s] testimony.” *OmniSource Corp*, 2015 WL 3452918, at *8. Thus, DCPF’s arguments related to Dr. Mullin’s testimony are not a basis to strike his declaration.

II. DCPF’S REQUEST FOR A CONTINUANCE SHOULD BE DENIED.

15. DCPF asks, in the alternative, that this Court continue the hearing on the Motion for Rehearing until April 27, 2023 so it may take Dr. Mullin’s deposition. That request should also be denied.

16. DCPF has had ample chance since the filing of the Motion for Rehearing on March 9, 2023 to depose Dr. Mullin on the contents of his declaration. Dr. Mullin’s declaration is hardly a mystery—he has submitted declarations in support of other subpoenas the Debtors have served seeking trust discovery. DCPF has deposed Dr. Mullin’s partner, Charles Bates, concerning a declaration he provided concerning DBMP’s identical subpoenas to DCPF. DCPF is represented by able counsel who has prominent roles in several of these asbestos bankruptcy cases.

17. Yet, even as of this filing, DCPF has still not requested to take Dr. Mullin’s deposition. Any supposed prejudice suffered by DCPF is entirely of its own making.

18. From the actions taken by DCPF to date, one could argue that DCPF’s goal is not to take Dr. Mullin’s deposition, but, instead, is to further delay the Debtors’ receipt of the information requested by the Subpoenas. The Debtors’ Subpoena to DCPF was served on July 5, 2022. DCPF, its member Trusts, and the associated Matching Claimants, have fought a relentless, seemingly endless battle to quash or limit the Debtors’ Subpoenas, with more than two dozen filings and counting across multiple jurisdictions. Delay seems to be a vastly preferred outcome versus actual production of the requested information.

19. This Court has addressed the sampling question raised by the Debtors' Motion for Rehearing numerous times, across multiple cases. DCPF had ample opportunity to depose, or even request to depose, Dr. Mullin any time in the last three weeks. It is time that the issues raised by the Debtors' Motion for Rehearing be resolved, once and for all.

CONCLUSION

20. For the foregoing reasons, the Debtors respectfully request that this Court deny DCPF's Motion to Strike, or in the Alternative, to Continue the Hearing.

Dated: March 27, 2023
Charlotte, North Carolina

Respectfully submitted,

/s/ John R. Miller, Jr.

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