

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.

Miscellaneous Proceeding

No. 22-303 (JCW)

(Transferred from the District of Delaware)

In re:

ALDRICH PUMP LLC, *et al.*,¹

Debtors.

Chapter 11

No. 20-30608 (JCW)

**THIRD-PARTY ASBESTOS TRUSTS' SUPPLEMENTAL FILING IN OPPOSITION TO
DEBTORS' MOTION FOR REHEARING CONCERNING THE ISSUE OF
SAMPLING ON DCPF'S SUBPOENA-RELATED MOTIONS**

The ten asbestos settlement trusts identified below² (the "DCPF Trusts"), by and through their undersigned counsel, respectfully submit this further response and opposition to Debtors Aldrich Pump LLC and Murray Boiler LLC's (together, "Aldrich" or "Debtors") Motion for

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.

² The ten DCPF Trusts are: Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust; The Babcock & Wilcox Company Asbestos PI Trust; Celotex Asbestos Settlement Trust; DII Industries, LLC Asbestos PI Trust; Federal-Mogul Asbestos Personal Injury Trust; Flintkote Asbestos Trust; Owens Corning / Fibreboard Asbestos Personal Injury Trust; Pittsburgh Corning Corporation Asbestos Personal Injury Settlement Trust; United States Gypsum Asbestos Personal Injury Settlement Trust; and WRG Asbestos PI Trust.



Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions [Dkt. 54] (the "Motion" or "Reconsideration Mot."). In support of their opposition, the DCPF Trusts incorporate their Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions [Dkt. 70], as well their Motion to Quash ("DCPF Trusts' MTQ") and subsequent reply brief ("DCPF Trusts' MTQ Reply")³, and further submit as follows:

INTRODUCTION

1. On November 30, 2022, this Court, acting as the compliance court, granted the DCPF Trusts' and Delaware Claims Processing Facility's ("DCPF") motions to quash [Dkts. 3-1 & 4-2], thereby limiting the production of DCPF Trust claimant data to a random 10% sample of the confidential claims data of the 12,000 mesothelioma victims (the "Trust Claimants") originally sought.

2. At that November 2022 hearing (and consistently throughout this litigation), the DCPF Trusts argued that the Aldrich Subpoenas were overbroad and failed to comply with Rule 45's proportionality requirement because Aldrich could discern the exact same patterns and conclusions from a random 10% sample as it could from data for the entire DCPF Trust Claimant population. Nov. 30, 2022 Tr. at 46-49 ("[T]he most important point here is that while the information may be relevant for the estimation proceedings, all of the information is not necessary . . . Aldrich has failed to show why they need unfettered access to claimants' sensitive information They've never argued that a sample would not work for them and they've never explained how it couldn't work for them."); *id.* 48 ("[S]ampling won't modify the substance or quality of the data that Aldrich receives. It only decreases the volume . . . Aldrich will be able to discern the

³ The DCPF Trusts further incorporate by reference: (i) DCPF's Response to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions, [Dkt. 72], and (ii) Verus Trusts' Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motion, [Dkt. 98].

exact same patterns from a sample as they would from reviewing all the data and a random sample of no more than 10 percent.”).

3. The DCPF Trusts also highlighted that Aldrich’s counsel and Bates White had previously praised the use of sampling for Trust Claimant discovery and estimation, representing that it “provide[s] an efficient mechanism by which th[e] [Bankruptcy] Court can address issues presented by the estimation proceeding,” “offers a practicable and fair way to proceed[, and] will save time and expense....” DCPF Trusts’ MTQ, Ex. G ¶ 24 (*Bestwall* Mot. to Approve Resolved Claim Sample); *id.*, Ex. H ¶ 11 (Decl. of Jorge Gallardo-Garcia).

4. At the November 2022 hearing, DCPF emphasized the burden of complying with the Aldrich Subpoenas, including that, while Aldrich sought the records of 12,000 Trust *Claimants*, this request implicated nearly 150,000 *claims*, with the potential for each claim to be associated with “multiple exposure records,” Nov. 30, 2022 Tr. at 51; that these requests captured personally identifying information (“PII”), including “Social Security numbers and names and other sensitive information”, *id.* at 50-51; and that DCPF employees would be required to engage in “very labor intensive” and “time consuming” “manual[] review[]” to “redact [PII in] up to four exposure fields for each of the hundreds of thousands of exposure records associated with the nearly 150,000 claims,” *id.* at 51.

5. The Court granted the motion to quash at that time, crediting and adopting both DCPF’s burden argument and the DCPF Trusts’ sampling argument. *See* DCPF Trusts’ Opp. at 8 (quoting Nov. 30, 2022 Tr. at 76-77) (“I understand [Aldrich] would like to have as much information as possible, but . . . I’m a little concerned about all of this is ballooning up . . . and I want to make sure that we are mindful of costs in these cases and of the privacy concerns and that we’re not getting any more than we need.”); *id.* at 9 (quoting Nov. 30, 2022 Tr. at 83) (Court states

that it “was thinking not only burden, but also of needless exposure of the possibility of a hack and, and having a lot of people’s data affected.”).

6. While the DCPF Trusts continue to rely on the arguments previously made in their briefing and at the November 2022 hearing and their joinder with the arguments made by DCPF, they understand that the Court’s focus for the proposed rehearing is the sufficiency of sampling for Aldrich’s reasonable needs. *See* March 30, 2023 Tr. at 179 [Dkt. 120] (“I want to know more about why sampling doesn’t work for the debtors’ side, why sampling wouldn’t reduce the risk of just even human error missing some of that stuff. And so I’m inclined to have a further hearing on that.”). To that end, the DCPF Trusts, together with DCPF, Verus, and the Verus Trusts, engaged an expert on sampling, Dr. Abraham J. Wyner. Dr. Wyner’s expert report (the “Wyner Report”) conclusively shows that the Court’s original ruling on the Motion to Quash ordering the use of a 10% sample was correct and proper, and that the Declaration of Charles Mullin [Dkt. 55] (the “Mullin Declaration”), relied upon by Aldrich in seeking a rehearing on the sampling issue, should not be credited by the Court. Therefore, Aldrich’s Motion should be denied, and the Court should reaffirm its November 30, 2022 Order.

ARGUMENT

A. The DCPF Trusts’ Expert, Dr. Abraham J. Wyner, Confirms That a 10% Sample of Trust Claimant Data Is Sufficient for Aldrich’s Needs⁴

7. The DCPF Trusts have consistently argued that Aldrich could undertake the same analysis and extract the same conclusions from a 10% sample of the Trust Claimants’ data as it

⁴ The Wyner Report also confirms that sampling helps to ensure the confidentiality and protection of the Trust Claimants’ data: “If the entire population of claimants is released then all the claimants private and confidential information is at risk. If a sample of 10% is released, then the size of the at-risk population is 10 times smaller. Since the damage in a confidentiality breach is measured in proportion to the size of the number of individuals that are exposed the potential damage to the individual claimants *is 10 times smaller.*” Moskow-Schnoll Decl., Ex. A. at ¶ 32 (emphasis in original).

could from unfettered access to all of the Trust Claimants' data. *See, e.g.*, DCPF Trusts' MTQ 14-16; DCPF Trusts' MTQ Reply 6-8; Nov. 30, 2022 Tr. 47-49; DCPF Trusts' Opp to Motion for Rehearing 16-17.

8. The expert report of Abraham J. Wyner, Ph.D., Tenured Full Professor of Statistics and Data Science at the University of Pennsylvania's Wharton School and Chair of the University of Pennsylvania's undergraduate statistics program⁵, conclusively supports the DCPF Trusts' position. The Wyner Report is attached as Exhibit A to the Declaration of Beth Moskow-Schnoll (the "Moskow-Schnoll Decl.") filed contemporaneously herewith.

9. The Debtors' expert, Charles Mullin, was deposed on May 8, 2023. A transcript of his deposition is attached as Exhibit B to the Moskow-Schnoll Declaration. Both in his declaration and during his deposition, Dr. Mullin contends that a sample *potentially* leads to reduced accuracy. Indeed, as stated in the Wyner Report, while Dr. Mullin purports to have engaged in a cost-benefit analysis of the value of sampling in which "a potential loss of accuracy" falls on the "cost" side, "[a]t no point does [he] quantify the potential loss of accuracy. He implies the loss is substantial enough to justify the costs without explanation, calculation, or quantification of any kind." Moskow-Schnoll Decl., Ex. A. at ¶ 8. Put more plainly, Dr. Mullin never explains why or how sampling would be less accurate; nor, despite being asked repeatedly, does he quantify any potential loss of accuracy. *See, e.g.*, Mullin Decl. at ¶ 25 (stating without elaboration that "[e]stimates that are calculated using a sample tend to differ from those calculated using the entire population, introducing error or uncertainty into the results"); Moskow-Schnoll Decl., Ex. B at

⁵ Dr. Wyner also co-directs the Wharton People Analytics Initiative and the Wharton Sports Analytics and Business Initiative. *Id.* at ¶ 1. He received a Ph.D. in Statistics from Stanford University, and has more than 25 years of professional and academic experience in the field of statistics and has published across many methods and applications including Applied Probability, Mathematical Analysis of Algorithms, Applied Statistical Analysis, and Bayesian Hierarchical Modeling. *Id.* at ¶ 3.

57:19-21, 58:2-17 (opining that a sample would render an opinion “a lot less precise,” but declining to quantify to what extent because “it’s very hard to quantify until you have the data[.]”)

10. While Dr. Mullin contends he performed a cost-benefit analysis, the only consideration he appears to have largely relied upon is whether the claims data at issue was in electronic form. As he stated, “We’re not saying let’s use a 10 percent sample of data already in electronic format. We’re saying no, we use all of it because it’s all already in electronic form. And that’s going to, on a cost-benefit analysis, make sense as opposed to sampling from the historical claims data.” Moskow-Schnoll Decl., Exhibit B at 31:3-8. In Dr. Mullin’s view, having to turn over paper files is an “expensive operation” involving “a large volume of manual labor and cost and time,” while producing electronic files is not. *Id.* at 31:12, 31:16-18. This so-called “analysis” completely negates the cost to DCPF – which amounted to \$86,000 in the DBMP matter⁶ – by simply hand waving it away, and it fails to properly take into account the considerable time and operational disruptions caused by the manual review necessitated by the subpoena. Having failed to properly consider the benefits of sampling, it is no surprise that Dr. Mullin concluded that the costs of sampling were greater than employing a full census of data.

11. In performing his “analysis”, Dr. Mullin also completely fails to explain what or how much additional benefit would be derived if he had data pertaining to 12,000 versus 1,200 claims. The only thing he offers is that a sample may not have enough of a certain subset of a “subpopulation of interest” (Moskow-Schnoll Decl., Exhibit B at 48:8-13), sorted by the industry in which the exposure occurred, the occupation of the claimant, the law firm representing the claimant and the jurisdiction of the case. *Id.* at 47:16-18.⁷ Dr. Mullin goes on to state he “need[s]

⁶ Transcript of Proceedings before the Honorable J. Craig Whitley, U.S. Bankruptcy Judge, *In re DBMP LLC*, No. 20-30080 (W.D.N.C. Feb. 9, 2023) at 56.

⁷ Dr. Mullin raised his need to study “subpopulations” for the first time at his deposition.

those subsets to also be big enough to give reliable opinions and accurately estimate the future.” *Id.* at 48:14-16. This might be true for the “subsets” of some claims data, but Dr. Mullin does not, and cannot, explain why it is or even could be an issue here. After all, he already *has* that information for the matching claimants, because they resolved cases with the Debtors.

12. In contrast, in his report, Dr. Wyner specifically addresses the accuracy and sufficiency of using a 10% sample of the Trust Claimants’ data, concluding that “a random 10% sample of 1,200 claimants would fulfill all of the Debtors’ reasonable needs[,]” Moskow-Schnoll Decl., Exhibit A at ¶ 6, and that “a random sample that is large (10%), weighted or stratified towards larger settlement values, would be **practically and materially no less accurate** than a full census of the approximately 12,000 claimants in the targeted population[,]” *id.* at ¶¶ 9, 33 (emphasis added).

13. In his report, Dr. Wyner also explains the basis for his opinion regarding the accuracy of a 10% sample (something Dr. Mullin fails to do). He states that the inaccuracy of a statistical sample can often be attributed, not to the size of the sample, but to “sampling bias” – a phenomenon that occurs when “subjects with different attributes have different and unknown chances of inclusion in the sample.” Moskow-Schnoll Decl., Ex. A at ¶ 13 and n.8. The Wyner Report emphasizes that sampling bias would *not* be an issue in this case, as “a trained statistician with access to an enumerated list of individuals in a targeted population can easily create a sample that makes optimal use of the data.” *Id.* at ¶ 14. Indeed, Dr. Wyner notes in his report that a sample of such design was proposed by Jorge Gallardo-Garcia, a partner at Bates White – the same firm at which Dr. Mullin is a partner – in the declaration Gallardo-Garcia submitted (the “Gallardo-Garcia Decl.”) to the Court in *In re Bestwall LLC* (“Bestwall”). *Id.*

14. Dr. Wyner explains that a stratified sample would in fact be very accurate for the parameters of interest specified in the Mullin Declaration:

[F]or purposes of testing the first parameter of interest, the proportion of claimants that failed to disclose alternative exposures, **a simple or stratified random sample would provide an exceedingly accurate result.** The very small uncertainty in the proportion that remains after sampling will have no practical impact on the claim evaluation process.

Moskow-Schnoll Decl., Ex. A at ¶ 22 (emphasis added);

If the settlements are not the same size, a stratified sample can be drawn that oversamples the claims with the highest variation. When this happens an additional ‘finite sample correction factor’ is added to the formula, which reduces the standard error. Applying this here, since we know that the settlement amounts are not the same size for each claimant, a properly stratified sample of 1,200 claimants’ data would allow Dr. Mullin and the Debtors **to calculate the average size of the impact of non-disclosure on settlement values with uncertainty that is extremely small.”**

Id. at ¶ 24 (emphasis added).

15. Dr. Wyner also explains that any benefit to doing a complete census versus a 10% sample would be “exceedingly minor.” For example, a full census would still require the creation of a statistical model and thus “introduce new uncertainty.” *See* Moskow-Schnoll Decl., Ex. A. at ¶¶ 29-30. In his deposition testimony, Dr. Mullin subsequently confirmed this point. *See infra* at ¶ 23.

16. By contrast, there are tangible benefits to using a sample in place of a full census. Dr. Wyner highlights that a sample is more easily screened for inaccuracies than a full census, which “is particularly important when some of the data fields consist of ‘narratives’ (like descriptions of exposure histories) that require human readers and curation.” Moskow-Schnoll Decl., Ex. A at ¶ 31. This is precisely the situation occurring with the review of the Trust Claimant data. *See supra* at ¶ 4 (addressing the need for DCPF employees to manually review and redact exposure fields of Trust Claimant data).

17. On accuracy, Dr. Wyner concludes that a 10% sample of the Trust Claimants' data "would be practically and materially no less accurate" than a full census. Moskow-Schnoll Decl., Ex. A at ¶ 33. On the nature of the information provided, Dr. Wyner concludes that "there would not be a practical or material difference in the information acquired from a large, targeted sample of 1,200" than from a full census. *Id.* at ¶ 34. Thus, the Wyner Report conclusively shows that a 10% sample is adequate for Aldrich's needs.

B. Dr. Wyner's Report is Consistent with the Gallardo-Garcia Declaration in *Bestwall*

18. As this Court is aware, Dr. Jorge Gallardo-Garcia, a partner at Dr. Mullin's firm, Bates White, provided a declaration in the *Bestwall* case (the "Gallardo-Garcia Declaration") which provided opinions substantively identical to those provided in the Wyner Report. DCPF Trusts' MTQ, Ex. H ¶ 11.

19. In *Bestwall*, Dr. Gallardo-Garcia and Bates White "designed and identified a stratified random sample of Bestwall's historical mesothelioma claims that were resolved through verdict, settlement, or that were dismissed by the claimants." Gallardo-Garcia Declaration at ¶ 16. That sample "was designed to be a **representative and efficient sample** that can provide a **reliable characterization** of Bestwall's resolution history[.]" *Id.* (emphasis added).

20. In his declaration, Dr. Gallardo-Garcia praised the use of sampling for Trust Claimant discovery and estimation, representing that "[t]he stratified sampling method Bates White used to construct its random sample **ensures [] representativeness and efficiency** by relying on well-established and commonly used statistical techniques," such as those described by Dr. Wyner in his Report. *Id.* (emphasis added).

C. Dr. Mullin Conceded at Multiple Points in His Deposition that Sampling is Effective

21. During the course of his May 8, 2023 deposition, Dr. Mullin acknowledged at several points that a 10% sample would be sufficient for the needs he articulated in his Declaration:

Q: Let's look at Paragraph 16 [of the Mullin Declaration] . . . where you say, This would enable us to quantify the proportion of alternative exposure disclosed to the Debtors at the time of settlement. You see that?

A: I do.

Q: Is it your testimony that the 1,200-Claimant sample is not sufficient for that purpose?

A: No.

Moskow-Schnoll Decl., Ex. B at 82:17-83:5;

Q: Paragraph 17, you talk about the variations in disclosure patterns would allow us to model the impact of the partial information on settlement amounts. Do you see that, Doctor?

A: I do.

Q: Is it your testimony that a 10 percent sample of 1,200 Claimants wouldn't be sufficient for that purpose?

A: It may be. And, initially, that's what I'm going to try to do it with . . . I may be able to do it with 1,200.

Moskow-Schnoll Decl., Ex. B at 83:19-84:7, 85:9-10.

22. Dr. Mullin also declined to say that a 10% sample of Trust Claimant data would be unreliable. When asked whether there was "some number short of 12,000 that you are comfortable opining to the judge would be sufficiently reliable for the purposes we discussed[,]” Dr. Mullin admitted that “[y]ou can do all the analysis with a sample of 1,200; you can do all the analyses with a sample of 6,000. You'll just have less precision[,]” demurring on the question of “ultimate reliability” as “a question for the Court[.]” Moskow-Schnoll Decl., Ex. B at 86:6-9, 18-22, 87:1-2. When subsequently asked whether he could “create the model you're envisioning with the

12,000 Claimants[.]” Dr. Mullin responded along the same lines: “You can do it mathematically. . . . You actually need to give sufficient precision for someone to rely on it. The Court ultimately decides what that level of precision is; I don’t.” *Id.* at 91:22-92:2, 92:12-13.

23. Dr. Mullin also conceded that Dr. Wyner is correct in saying that data analysis of a census versus a sample would not be “easier” as it would still involve creation of a statistical model which would “introduce new uncertainty.” Moskow-Schnoll Decl., Ex. B at 122:17-22 (“He is correct . . . He says, It’s not substantial – substantively easier, especially since there will be statistical challenges of all types that will arise, sampling or no sampling.”); *id.* at 123:10-15 (“He’s definitely correct at the end of the paragraph that he puts in bold. The sentence before defines the ‘these,’ but These will introduce new uncertainty, distinct and irreducible, and not due to sampling.”); *see also supra* at ¶ 15.

24. At no point in his deposition, despite ample opportunity to do so, did Dr. Mullin adequately address Dr. Wyner’s critiques by quantifying the relative levels of accuracy of a 10% sample versus a full census of the Trust Claimants’ data. Instead, he made vague but ominous statements about the “risk” of a sample:

Q: . . . [T]he 10 percent sample that is being discussed here, is there a way to design the sample size to address the stated purposes that you’re looking for?

A: You can mitigate, right – you can mitigate the risk. And that is what you do in sample design. Whenever you take a sample, you’re always taking a risk that you actually won’t have the information you need. It’s in – it’s intrinsic to sampling. . . . And so, in this context, yes, you can design things that mitigate that risk, but you can’t eliminate it. And the smaller you make the sample, the greater that risk becomes.

Q: And sitting here today, can you give me – **can you quantify what the risk is** if the Court were to order just the 10 percent sample, or 1,200 Claimants?

A: As I said, **I can’t give you a specific number** because that’s not known until after you have the data and you do the analysis.

Moskow-Schnoll Decl., Ex. B at 78:2-12, 17-22, 79:1-5 (emphases added).

25. Dr. Mullin's statements boil down to "a sample *might* not work as well –I can't tell you to what extent – but you'd better give me all the data, just to be sure." This cannot serve as a valid foundation for even his own purported cost-benefit analysis of sampling, let alone for this Court to reverse its prior ruling.

CONCLUSION

For the reasons set forth above and in their prior submissions to this Court, the DCPF Trusts respectfully renew their request that the Court enter an order denying Aldrich's Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions.

Date: May 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on May 15, 2023, I caused a true and correct of copy of the foregoing Third-Party Asbestos Trusts' Supplemental Filing in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions to be served by CM/ECF, electronically mail on the following:

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