Docket #0059 Date Filed: 5/15/2023

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

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Respondents,

VERUS CLAIM SERVICES, LLC,

Interested Party,

NON-PARTY CERTAIN MATCHING CLAIMANTS,

Interested Party.

NON-PARTY VERUS TRUSTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEBTORS' MOTION FOR REHEARING CONCERNING THE ISSUE OF SAMPLING ON DCPF'S SUBPOENA-RELATED MOTION

The eight non-party asbestos settlement trusts identified below[1] (collectively, the "**Verus Trusts**") hereby submit this supplemental opposition to Aldrich Pump LLC and Murray Boiler LLC's (together, the "**Debtors**") Motion for Rehearing Concerning the Issue of Sampling ***only*** with respect to DCPF's Subpoena-Related Motions (the "**Rehearing Motion**").[2] (Dkt. No. 54.) The Verus Trusts incorporate by reference those pleadings already filed in opposition to the Rehearing Motion[3] and join those being filed by Verus Claim Services, LLC ("**Verus**"), the

[1] The eight trusts are: (i) ACandS Asbestos Settlement Trust; (ii) Combustion Engineering 524(g) Asbestos PI Trust; (iii) G-I Holdings Inc. Asbestos Personal Injury Settlement Trust; (iv) GST Settlement Facility; (v) Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust; (vi) Quigley Company, Inc. Asbestos PI Trust; (vii) T H Agriculture & Nutrition, L.L.C. Asbestos Personal Injury Trust; and (viii) Yarway Asbestos Personal Injury Trust.

[2] The Verus Trusts are parties to an associated matter captioned *AC&S Asbestos Settlement Trust v. Aldrich Pump LLC* (the "**Trust Matter**") (Case No. 23-00300) but were not named, or otherwise identified, in the Rehearing Motion for reasons that raise serious concerns about due process and fairness. The Verus Trusts are constrained to file this supplemental limited objection to the Rehearing Motion so that their interests in a pending motion to quash in the Trust Matter are not unfairly prejudiced or circumvented by the Debtors' litigation tactics.

[3] Specifically, the Verus Trusts incorporate by reference: (i) Verus Trusts' Motion for Adjournment and Related Relief, (Dkt. No. 58); (ii) Verus's Motion for Adjournment and Related Relief, (Dkt. No. 61); (iii) DCPF Trusts' Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions, (Dkt. No. 70); (iv) DCPF's Response to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions, (Dkt. No. 72); (v) Verus Trusts' Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motion, (Dkt. No. 98); and (vi) Verus's Response in Support of its Motion for Adjournment and Related Relief, (Dkt. No. 99).

Delaware Claims Processing Facility, LLC ("**DCPF**") and the asbestos trusts that process their claims using DCPF (the "**DCPF Trusts**").[4]

PRELIMINARY STATEMENT

1. There are two salient questions for the June 6, 2023 hearing: (i) why the proposed 10% sample is not sufficient for the Debtors' stated purposes; and (ii) why that sample would not, even marginally, decrease the risk that personally identifiable information ("**PII**") is exposed. In the intervening months since the March 30, 2023 hearing, the Verus Trusts have focused their efforts on answering those two questions. To that end, the Verus Trusts jointly retained Abraham J. Wyner, Ph.D. to respond to the ***sole*** declaration of Charles H. Mullin, Ph.D. filed in connection with the Rehearing Motion. (*See* Dkt. No. 55.) Unlike Dr. Mullin, whose declaration does not address the sufficiency of the 10% sample, Dr. Wyner answers the Court's inquiry directly, opining that "[b]ecause there is no practical loss in accuracy created by sampling, there is no need for, or material benefit from, taking a full census of the claimants' data, especially when balanced against the significant privacy benefits that sampling provides." (Declaration of Michael A. Kaplan, Esq., dated May 15, 2023 ("**Kaplan Decl.**"), Ex. A, ¶ 32.)

2. Faced with compelling expert testimony to the contrary, the Debtors, once again, moved the proverbial goalpost. First, by having Dr. Mullin testify at his deposition to issues that were not addressed in his declaration; and second, by objecting to any modification to the

[4] The "DCPF Trusts" are the Armstrong World Industries Asbestos Personal Injury Settlement Trust ("Armstrong"); Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust ("B&W"); Celotex Asbestos Settlement Trust ("Celotex"); DII Industries, LLC Asbestos PI Trust (Halliburton, Harbison-Walker Subfunds) ("DII"); Federal Mogul U.S. Asbestos Personal Injury Trust (T&N, FMP, Flexitallic, Ferodo) ("Federal Mogul"); Flintkote Asbestos Trust ("Flintkote"); Owens Corning Fibreboard Asbestos Personal Injurty Trust (FB and OC Subfunds) ("Owens Corning"); Pittsburgh Corning Corporation Asbestos PI Trust ("Pittsburgh Corning"); United States Gypsum Asbestos Personal Injury Settlement Trust ("United States Gypsum"); and WRG Asbestos PI Trust ("WRG", and collectively with DCPF, Armstrong, B&W, Celotex, DII, Federal Mogul, Flintkote, Owens Corning, Pittsburgh Corning, and United States Gypsum.

schedule that would give the Verus Trusts a full and fair opportunity to respond to the new issues raised by the Debtors. This conduct should not be countenanced. But gamesmanship aside, there are serious deficiencies in Dr. Mullin's declaration. First, it does not contain "a complete statement of all opinions [Dr. Mullin] will express and the basis and reasons for them" in violation of Federal Rule of Civil Procedure 26(a)(2)(i). Second, Dr. Mullin has no specialized training or knowledge in the field of data privacy, and thus, he cannot render an expert opinion on issues related thereto. Given these shortcomings, Dr. Mullin's declaration should be stricken and he should be barred from testifying at the June 6, 2023 hearing.

3. Assuming he is permitted to testify on the lone issue within his expertise, sampling, Dr. Mullin's opinion on the sufficiency of the 10% sample amounts to no opinion at all. Stated differently, Dr. Mullin would not (or could not) answer why 10% was not sufficient. Rather, in claiming ***for the first time at his deposition*** that he needed to study "subpopulations"—the majority of which are not even mentioned in his declaration, (*see* Kaplan Decl., Ex. B, at 128:10–130:20)—Dr. Mullin testified that he believed the 10% sample was inappropriate because there was minimal cost, in his view, to producing the entire census. Though he acknowledged the utility in sampling in some respects, Dr. Mullin would not directly answer why the 10% sample was not sufficient. ((*Id.* at 87:20–88:12) (stating "[a]gain, 'sufficient' I -- I don't think is the right term, which is why I struggle with answering that question. I think you are taking unnecessary risks relative to the cost of data production to reduce it further. And I would advise against it.").)[5] Moreover, his testimony on the exposure of PII was speculative at best, as Dr. Mullin offered only conjecture on his view of the risk of PII being exposed. (*See id.* at 95:14–96:9.)

[5] The transcript from the deposition of Dr. Mullin is attached as Exhibit B to the Declaration of Michael A. Kaplan, Esq., submitted herewith.

4. At bottom, no basis exists to reconsider the Court's prior ruling. The Debtors already proposed a sampling protocol, and cannot cite law, fact or opinion as to why that protocol is not sufficient. The fact that a different outcome was reached in another matter, with different facts and parties, is irrelevant. The Rehearing Motion should be denied and the Court's prior ruling restricting production for the DCPF Subpoenas to a 10% sampling of asbestos claimant information (the "**Sampling Ruling**") should stand.

ARGUMENT

5. Two questions need to be answered, and only one side in the upcoming hearing will answer them directly. The Verus Trusts, along with Verus, DCPF and the DCPF Trusts (collectively, the "**Trust Parties**"), engaged Dr. Wyner, who answers the Court's question on the sufficiency of a 10% sample head on, and further opines on the reduced risk that sampling provides with respect to the exposure of PII. The Debtors, on the other hand, refuse to answer the sufficiency question, because (i) they know sampling is sufficient for their stated purposes, and/or (ii) the reason they truly want the information sought in the subpoenas has not been disclosed.

6. Addressing the prevailing question on the sufficiency of the 10% sample first, the Trust Parties retained Dr. Abraham Wyner to respond to the declaration of Dr. Mullin. Dr. Wyner is a Tenured Full Professor of Statistics and Data Science at The Wharton School of the University of Pennsylvania.[6] He has a Ph.D. in Statistics from Stanford University, and has more than twenty-five years of experience in the relevant field of statistics.

7. According to Dr. Wyner, "a random sample that is large (10%), weighted or stratified towards larger settlement values, would be practically and materially no less

[6] Dr. Wyner's full qualifications and experience are outlined in his Expert Report, which is attached as Exhibit A to the Declaration of Michael A. Kaplan, Esq., submitted herewith.

accurate than a full census of the approximately 12,000 claimants in the targeted population." (Kaplan Decl., Ex. A, ¶ 9.) Dr. Wyner further opines:

> [T]here would be no practical or material benefit to requiring the production of the full population. In addition, there is a risk of an inadvertent dissemination of highly confidential data. The likelihood of such breach may be small, but the damage would be large if it occurred. If only 10% of the target population is produced, the damage in the resulting data breach to the individual claimants can be expected to be 10 times smaller because it would involve 10 times fewer claimants.

(*Id.*, ¶ 10.)

8. Dr. Wyner's report addresses each of the assertions (actually) raised in Dr. Mullin's report with respect to sampling—namely, (i) the accuracy of a sample versus a full census; (ii) that a random 10% sample fulfills all of the Debtors' reasonable needs; and, (iii) that a full census provides no material benefit.

9. While Dr. Mullin rests on the adage that a smaller sample ***can be*** less accurate than a larger sample, Dr. Wyner explains that practically speaking, the 10% sample "is just as good as a full census for the purposes described by Dr. Mullin" because "the population is enumerable and identifiable." (*Id.*, ¶¶ 12–13.) In fact, according to Dr. Wyner, "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," such as the sample previously proposed by the Debtors here or in *Bestwall*. (*Id.*, ¶ 14.)

10. Turning to the accuracy of the proposed sample, Dr. Wyner outlines the mathematical calculation of the standard error for the sample of 1,200 claimants drawn from a population of 12,000—or the 10% ordered here. (*Id.*, ¶ 18.) The standard error, using a formula that Dr. Mullin agreed with, is less than 1.5%. (*Id.*; Kaplan Decl., Ex. B, at 114:5–115:5.) And, utilizing a stratified sample, as was proposed by the Debtors here, "can be even

more efficient . . . [as] it makes optimal use of each data point" and lowers the standard error, over, for instance, a simple random sample. (Kaplan Decl., Ex. A, ¶¶ 20–21.)

11. Applying these principals to the Debtors' first parameter of interest—estimating the ***proportion*** of claimants that failed to disclose alternative exposure—Dr. Wyner opines that "a simple or stratified random sample would provide an exceedingly accurate result" and the "very small uncertainty in the proportion that remains after sampling will have no practical impact on the claim evaluation process." (*Id.*, ¶ 22.)

12. With respect to Dr. Mullin's second, disclosed parameter of interest—***modeling*** the impact of non-disclosure on settlement amounts—Dr. Wyner opines that "since . . . 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.*, ¶ 24) (emphasis added).)

13. Dr. Wyner discusses Dr. Mullin's failure to "specify precisely or intimate any other parameters of interest . . . [or] any need that cannot be fulfilled by a sample and that would require a full census." (*Id.*, ¶ 25.) Beyond the lack of specificity in terms of need, Dr. Mullin further failed to quantify, even approximately, how much less accurate a sample would be." (*Id.*, ¶ 33.) Conversely, Dr. Wyner, using the information available to him at the time, concluded "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.* (emphasis added).)

14. Addressing the Court's second question on privacy concerns, Dr. Wyner opined:

> If the entire population of claimants is released than 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.

(*Id.*, ¶ 32.)

15. While not surprising that the Debtors, and Dr. Mullin, took exception with Dr. Wyner's critique, Dr. Mullin's testimony at his deposition—which all agreed would be his rebuttal to Dr. Wyner—went far beyond the scope of the initial report, and, indeed, violates the Federal Rules of Civil Procedure.

16. An expert witness's report must contain, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them," and "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B). Additionally, a party must supplement an expert report "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete . . . ." Fed. R. Civ. P. 26(e)(1). This "duty to supplement extends both to information included in the report and to information given during the expert's deposition." Fed. R. Civ. P. 26(e)(2). A party's failure to supplement an expert report may even require the exclusion of that expert's testimony. *See S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 593, 599 (4th Cir. 2003) (affirming the trial court's exclusion of expert testimony in a case in which the expert formed a "new" opinion that was not disclosed prior to trial); *Gomez v. Haystax Tech., Inc.*, 761 F. App'x. 220, 229 (4th Cir. 2019) ("When a party fails to make a disclosure 'as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.'" (quoting Fed. R. Civ. P. 37(c)(1))). "The purpose of Rule 37 is to prevent surprise and prejudice to the opposing party." *Browder v. State Farm Fire & Cas. Co.*, 1:20-

CV-26-MOC-WCM, 2021 WL 2964253, at *3 (W.D.N.C. July 14, 2021) (citing *Sherwin-Williams Co*., 318 F.3d at 596).

17. Dr. Mullin's declaration falls short of these disclosure requirements, as he not only expanded on his declaration for the first time during his deposition, but also articulated completely new arguments against the sufficiency of sampling. For example, Dr. Mullin testified that he intends to use the confidential claimant information held by Verus and DCPF to study subpopulations of claimants, such as by law firm representing them, jurisdiction, and gender. (*See* Kaplan Decl., Ex. B, at 105:18–106:2.) However, Dr. Mullin omitted this reasoning from his declaration, which prejudiced the Trust Parties insofar as Dr. Wyner was forced to essentially *guess* how the Debtors would use the data they are requesting. (*See* Kaplan Decl., Ex. A, ¶ 19) (stating that "if there is a practical purpose for this data that requires more accuracy than this, it has never been disclosed or argued, certainly not by Dr. Mullin.") As of the date of this submission, the Trust Parties have been unable to address the subpopulation issue that Dr. Mullin omitted from his declaration, as Dr. Wyner's deposition, the only logical mechanism available, has not yet occurred.

18. In addition to the new subpopulation purpose, Dr. Mullin testified that the confidential information on the 12,000 claimants he is seeking is only a portion of the historical claims available—i.e., that he already allegedly sampled the census population. (*See id.* at 40:8–21.) Put differently, because Dr. Mullin was unable to refute Dr. Wyner's opinion on the sufficiency of a 10% sample, he tried to change the denominator of available claims to make the proposed sample of 1,200 claimants appear smaller, and thus less representative, when compared to the more than 400,000 historical claims filed against the Debtors. (*See id.*) Besides being misleading at best—given that the 400,000 claimant figure

includes, among other things, non-mesothelioma claimant information, (*id.* at 66:9–18)—this line of reasoning is not mentioned anywhere in Dr. Mullin's declaration. From this, Dr. Mullin now contends that the 10% sample that this Court *already ordered* is actually a much smaller sample than 10%. (*Id.* at 40:14–21.) Again, because Dr. Mullin did not include this argument in his declaration, Dr. Wyner has not had the opportunity to respond to it.

19. To remedy the Debtors' material omissions, the Trust Parties proposed a modification to the briefing schedule or adjournment of the hearing. The Debtors opposed these requests and the Court declined to modify the schedule. As such, remedial action of some form is required to address the Debtors' conduct. At minimum, this Court should bar Dr. Mullin from testifying about issues not contained in his declaration at the June 6, 2023 hearing, and strike any portions of the Debtors' supplemental submission that rely on or reference the issues Dr. Mullin failed to disclose.[7] *See Browder*, 2021 WL 2964253, at *6 (sustaining the defendant's objection to a portion of an expert's supplemental affidavit, filed after he submitted an expert report and sat for a deposition, that "meaningfully depart[ed]" from his deposition testimony on the topic).

20. Material omissions and manufactured justifications aside, Dr. Mullin's deposition revealed four other key facts the Court should consider. First, Dr. Mullin admitted that he would still be able to conduct his desired estimation of future asbestos liabilities using a 10% sample if the Court denied the Rehearing Motion. When asked, "with respect to the estimation of the Debtors' asbestos liability – is it your opinion that a 10 percent sample would not be sufficient for that?" Dr. Mullin conceded, "'[s]ufficient' is probably not the

[7] Contrary to the assertions made at Dr. Mullin's deposition and in the Debtors' opposition to the adjournment motion, there is no mention, incorporation or reference of any prior filing in Dr. Mullin's declaration on the Rehearing Motion. The Verus Trusts expressly reserve the right to supplement Dr. Wyner's report and/or its submission following Dr. Wyner's deposition.

term I would use. Could I perform an estimate with a 10 percent sample if constrained? Yes." (Kaplan Decl., Ex. B, at 57:3–10.)

21. Second, despite being repeatedly asked why the 10% sample was insufficient, Dr. Mullin refused to give a direct answer, pivoting to his fallback reasoning of cost-benefit analysis. ((*See, e.g.*, *id.* at 38:15–22) ("Q. Okay. And is it your opinion that a 10 percent sample is not sufficient for the purposes? A. So it's my opinion that on a cost-benefit assessment, which is how you decide whether you should sample or not, the benefits greatly outweigh the costs here . . . .").)

22. Third, Dr. Mullin admitted that even with a population census, he would not be able to actually quantify the precision of his estimates until after he reviews the data. ((*Id.* at 57:22–60:8) (stating that "I don't have the data, so I don't know exactly what it's going to move it. That's something you can't know until after the fact.").) Thus, Dr. Mullin cannot opine on how much more precise a census would be over the proposed sample.

23. Finally, Dr. Mullin conceded he is not an expert on data privacy (or the law), and had no firsthand knowledge of the way in which data was stored at Verus or DCPF. (*See id.* at 35:11–36:22, 186:22–187:18.) Given the lack of knowledge, he could not competently testify about the risk of exposure of PII, again attempting to talk about the risk mitigation measures and not the risk itself. (*See id.* at 98:21–99:6.)

24. In sum, Dr. Mullin cannot answer the narrow question posed by the Court on why the 10% sample it previously ordered is not sufficient for the Debtors' stated purposes. Absent such evidence, the Debtors cannot meet their high burden to prevail on the Rehearing Motion. Moreover, as explained in Dr. Wyner's report, the 10% sample is sufficient, and not

only provides the Debtors with the information they need for their estimation, but also reduces the risk of PII being exposed.

CONCLUSION

25. For the foregoing reasons, the Verus Trusts respectfully request that this Court deny the Rehearing Motion and confirm that the Verus Subpoenas will be subject to a 10% sampling production in full compliance with those subpoenas.

May 15, 2023

Respectfully submitted,

/s/ Lynda A. Bennett

Lynda A. Bennett, Esq. (admitted *pro hac vice*)
Michael A. Kaplan, Esq. (*pro hac vice* pending)
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, NJ 07068
973.597.2500
lbennett@lowenstein.com
mkaplan@lowenstein.com

-and-

Andrew T. Houston
Moon Wright & Houston, PLLC
212 N. McDowell Street
Suite 200
Charlotte, NC 28204
Telephone: main 704.944.6560
ahouston@mwhattorneys.com

Attorneys for the Verus Trusts