

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

(Jointly Administered)

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

Plaintiffs,

v.

ALDRICH PUMP LLC, *et al.*

Defendants.

Miscellaneous Proceeding

No. 22-00303 (JCW)

(Transferred from
District of Delaware)

AC&S ASBESTOS SETTLEMENT TRUST,
COMBUSTION ENGINEERING 524(G) ASBESTOS PI
TRUST, GI HOLDINGS INC. ASBESTOS PERSONAL
INJURY SETTLEMENT TRUST, GST SETTLEMENT
FACILITY, KAISER ALUMINUM & CHEMICAL
CORPORATION ASBESTOS PERSONAL INJURY
TRUST, QUIGLEY COMPANY, INC. ASBESTOS PI
TRUST, T H AGRICULTURE & NUTRITION, L.L.C.
ASBESTOS PERSONAL INJURY TRUST, and
YARWAY ASBESTOS PERSONAL INJURY TRUST,

Petitioners,

v.

ALDRICH PUMP LLC, *et al.*

Respondents,

VERUS CLAIM SERVICES, LLC,

Interested Party,

NON-PARTY CERTAIN MATCHING CLAIMANTS,

Interested Party.

Miscellaneous Proceeding

No. 23-00300 (JCW)

(Transferred from
District of New Jersey)



**THE FUTURE ASBESTOS CLAIMANTS' REPRESENTATIVE'S
RESPONSE TO VARIOUS OPPOSITIONS TO THE
DEBTORS' MOTION FOR REHEARING**

Joseph W. Grier, III, the representative for future asbestos claimants in the above-captioned cases (the "FCR"), through counsel, submits this response to the oppositions filed by: (1) the Delaware Claims Processing Facility ("DCPF");¹ (2) DCPF's Third-Party Asbestos Trusts ("DCPF Trusts");² (3) Verus Claims Services, LLC ("Verus" and together with DCPF, the "Claims Processors");³ and (4) Verus's Third-Party Asbestos Trusts ("Verus Trusts," and together with the DCPF Trusts, the "Trusts"),⁴ to the *Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions* (the "Motion") [Misc. No. 22-00303, Dkt. 54]. The FCR previously filed a limited response to earlier oppositions to the Motion. [Misc. No. 22-00303, Dkt. 60].

The Claims Processors maintain asbestos claim information for the Trusts in readily searchable electronic databases. They are experts with decades of experience in processing claims quickly, fairly, and efficiently. Their expertise extends to protecting personal identifiable information ("PII"). The Claims Processors commonly encrypt social security numbers and hold them in protected files separate from other claim information. Furthermore, the Claims Processors employ the requisite resources, including highly sophisticated, state-of-the-art artificial intelligence tools, to easily extract and isolate PII from claim documents and their own databases.

¹ *Joinder of the Delaware Claims Processing Facility, LLC to the Third-Party Asbestos Trusts' Supplemental Filing in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions* [Misc. No. 22-00303, Dkt. 143].

² *Third-Party Asbestos Trusts' Supplemental Filing in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motions* [Misc. No. 22-00303, Dkt. 141].

³ *Verus Claim Services, LLC's Supplemental Brief in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on Verus' Subpoena-Related Motion* [Misc. No. 22-00303, Dkt. 136].

⁴ *Non-Party Verus Trusts' Supplemental Brief in Opposition to Debtors' Motion for Rehearing Concerning the Issue of Sampling on DCPF's Subpoena-Related Motion* [Misc. No. 22-00303, Dkt. 138; Misc. No. 23-00300, Dkt. 59].

Additionally, as they have demonstrated on various occasions, the Claims Processors can respond promptly to valid subpoenas while at the same time fully protecting PII, *e.g.*, *Garlock*, *Bestwall*, and *DBMP*.

The Trusts' and the Claims Processors' duties and obligations are governed by their applicable trust/claim distribution procedures. For example, Verus is the claims processor for the Garlock Trust. Given that, the FCR is familiar with Verus's professionalism, competence, and capabilities. DCPF shares the same qualities. The Garlock Claim Distribution Procedures (the "CRP")⁵ require the Garlock Trust, and relatedly Verus, to treat claim information as confidential. That highly appropriate provision is standard among asbestos trusts. Additionally, as is also standard, the CRP provides for the situation where the Garlock Trust must respond to a request or subpoena to produce claim information. To that end, the confidentiality section of the CRP, Section 12.3, provides that the Trustee "shall disclose" claim information 1) with permission of a claimant, 2) in connection with an insurance document request, or 3) "in response to a valid subpoena."⁶

Relevant here, Section 2.3 of the CRP also provides that the Trustee, in determining settlement values, shall have access to and may rely upon, not only the Garlock/Coltec's claims database, the information provided in response to the claims bar date, and Garlock's PIQs, but also the forecasting models and estimates of Garlock, the ACC, and the FCR.⁷ Simply put, the more information available to trustees faced with asbestos encapsulated product liabilities, particularly data around claimants' occupations, the better their ability to fix settlement values to ensure that

⁵ The most current version of Garlock's Claim Distribution Procedures is available at <http://garlocksettlementfacility.com/assets/uploadedFiles/8eedc7d3-3283-4663-b851-3a929d102e94.pdf>.

⁶ Garlock CRP at 41 (emphasis added).

⁷ Garlock CRP at 8-11.

valid claims are paid fairly. If the forecast proves to be an overestimate, top-up payments can be made. Conversely, an underestimate guarantees the futures' ox is gored. Once money in the trust has been distributed to thousands of claimants it is not possible to claw it back.

The Garlock Trust is a perfect example of the wisdom of using the most claim data available, not a limited sample (assuming the parties could agree on one without more litigation), and the benefits that approach provides for valid asbestos claims. The Garlock Trust, in a departure from prior asbestos trusts, set fair, 100% claim values by reference to easily identifiable objective factors: occupation, disease, age, economic loss, dependents, and duration of exposure. The occupation factor was key given the findings made by this Court concerning the likelihood of exposure to asbestos fibers from working around encapsulated asbestos products such as gaskets, the same source of liabilities in this case. The Court and all parties, including the ACC, approved the CRP as being fair to all claimants.

The CRP has been a success for valid claimants. On May 1, 2023, the Garlock Trust filed its Annual Report for the year ended December 31, 2022.⁸ Exhibit 1.B of that Annual Report shows that, in 2022 alone, the Garlock Trust paid a total of \$38,604,720 in approved claims. Critically, however, the Trustee, Lewis Sifford, also made supplemental, top-up payments of \$2,227,305 because the Trustee increased claim values on November 11, 2021. The current maximum settlement value for a *Garlock/Coltec* mesothelioma claimant, as set forth in Appendix I of the CRP,⁹ is now \$298,200, up from \$149,100, reflecting a 100% increase. The Garlock Trust now provides for double the recovery initially contemplated and agreed to by all parties. The

⁸ *In re Garlock Sealing Techs. LLC, et al.*, Case No. 10-31607, *GST Settlement Facility's Notice of Filing of Annual Report for the Year Ended December 31, 2022*, filed May 1, 2023, Dkt. 6326.

⁹ Appendix I of the CRP begins at page 49 of the pdf available online.

Debtors' proposed plan of reorganization in these cases contemplate a similar CRP model and identifies Lewis Sifford as a potential trustee for any *Aldrich/Murray* trust.

The Garlock Trust, the Trustee, and his professionals, armed with fulsome claim information, were able to avoid the fate suffered by many other trusts: faulty trust estimates, with future claims receiving far less than current claims and, sometimes, nothing at all. All the parties involved in *Garlock*, including, of course, the Court, can be proud of that result. *Garlock* is a prime example of how Section 524(g) works best. The vagaries of the tort system have been replaced by the fairness and predictability of a fully funded asbestos trust.

The success of the Garlock CRP can be seen in part as a reflection of the fulsome information provided in that case. Indeed, the results seen in the Trusts listed in the caption of this matter, other than the Garlock Trust (GST Settlement Facility), tell a sorry tale. Armstrong, AC&S, Combustion, GI Holdings, Kaiser Aluminum, Quigley, and THAN all reduced their payment percentages from 2008 to 2022. For example, Combustion went from payments of 48.33% to 18.50%;¹⁰ Kaiser distributions went from 39.50% to 18.10%;¹¹ and Quigley distributions decreased from 7.50% to 3.60%.¹² THAN is at the bottom of the pack, decreasing from a full pay, 100% case, to a dismal 15% distribution on claims.¹³ We understand that Yarway is the only trust that did not reduce its payment percentage over the same period, maintaining a

¹⁰ Notice of Combustion Engineering 524(g) Asbestos PI Trust Regarding Payment Percentage, effective as of November 1, 2020, <http://www.cetrust.org/assets/documents/Notice-Re-CE-TRUST-Payment-Percentage.pdf> (last visited May 26, 2023).

¹¹ Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Settlement Trust Payment Percentage Adjustment, effective as of November 1, 2020, <http://www.kaiserasbestostrust.com/assets/documents/resources/Trust-Notice-of-Payment-Percentage-Change-11-01-2020.pdf> (last visited May 26, 2023).

¹² Quigley Company, Inc. Asbestos PI Trust, Notice, effective as of October 14, 2015, <http://www.quigleytrust.com/index.html> (last visited May 26, 2023).

¹³ Notice of T H Agriculture & Nutrition, L.L.C. Asbestos Personal Injury Trust Regarding Payment Percentage, dated April 22, 2020, <http://www.thanasbestostrust.com/assets/documents/THAN-Payment-Percentage-Notice-4-22-20.pdf> (last visited May 26, 2023).

steady 25%.¹⁴ The decline in distribution percentages over time reflects a pattern that is repeated across most trusts. Indeed, the UNR trust ran out money completely and was shuttered in 2020.¹⁵

All the trusts that did not start with a 100% recovery or that later reduced their initial partial payment percentages failed the classes of current claimants, and especially future claimants. The ACC and others say repeatedly in these and other cases that the tort system is fair, that everyone is treated equally because they can bring their claim, in the first instance, in the court of their choice. Unfortunately, that system is neither fair, nor equal. Recoveries can take years, and when a claimant is finally paid, there is a massive disparity in payments across the country despite similar diseases and claimant profiles.

Compounding this problem is the notion that only insolvent companies can access Section 524(g) and create an asbestos trust. What that means is that pre-petition asbestos victims are paid 100 cents on their claims, but post-petition current claimants are guaranteed a lower recovery, often pennies on the dollar. To make matters worse, many trusts allow too much money to go out the door from the limited funds available to them, ensuring that future claimants are discriminated against. The far better option is the creation of a trust where a fully solvent debtor pays claimants 100% of claim values calculated by reference to what it was paying in its prepetition settlements.

Delaying creation of the trust is not prudent. A fully solvent company today, with no financial distress and a market capitalization of billions of dollars, could be foundering tomorrow for any number of unexpected reasons. Lehman Brothers had a market cap of \$31.6 billion the year before it filed for bankruptcy. Worldcom's was \$40.7 billion; Enron's \$48.4 billion, and

¹⁴ Yarway Asbestos Personal Injury Trust, <http://www.yarwaytrust.com/index.html> (last visited May 26, 2023) (we understand that Yarway is currently reviewing its payment percentage, which is required, pursuant to section 4.2 of the Yarway trust distribution procedures, no less frequently than once every three years).

¹⁵ The public websites for the trusts identify payment percentages. The FCR is happy to provide the links for these if needed by the Court.

GM's \$9.7 billion. Five years before its bankruptcy Kodak's market cap was \$5.4 billion. Blackberry's market cap was \$63.4 billion five years before its sale that staved off bankruptcy.¹⁶ The FCR does not wish that fate on the Debtors' or their affiliates. But the point is that he is not willing to run the risk that there will be no money or limited funds in the future to pay the class of future claimants, who may well assert claims through 2050.

Claimants rarely go to trial, debunking the myth of stolen rights to jury trials. The FCR is only aware of one jury trial verdict out of the thousands of settlements in the Debtors' claims database. Critically, the asbestos trusts expressly preserve jury trial rights. The Garlock CRP provides in Section 9.6 that if a claimant disagrees with the Garlock Trust's settlement offer, the holder may, following non-binding arbitration, file a lawsuit in the tort system.¹⁷ Indeed, the Garlock CRP, in making settlement offers to claimants, operates in a similar manner as to what companies do in the tort system, with the notable exception that similarly situated claimants are paid fairly and equally. Across all trusts, claimants rarely exercise their jury trial rights because the trusts present a better option for a prompt recovery. That option is within the easy reach of the classes of current and future claimants in these cases, provided the parties can get past litigation that is ancillary to estimation and confirmation.

Here, the Debtors, by valid subpoenas, have sought extensive trust claim information from the Trusts and the Claims Processors. The FCR does not repeat the Debtors' arguments concerning the wisdom of sampling trust data or wish to wade into the battle of experts. Rather, the FCR is focused on getting as much claimant data as possible to an *Aldrich/Murray* trust as proved so effective in *Garlock*.

¹⁶ This financial data was compiled by the FCR's financial advisors, Ankura, using CapitalIQ as the source.

¹⁷ Garlock CRP at 34-35.

The Trusts and Claims Processors are right to focus on protecting claimant PII. But the *Garlock*, *Bestwall*, and *DBMP* courts already approved stringent procedures to protect PII in those cases. Despite this, other parties, the Trusts, and the Claims Processors have, *seriatim*, filed multiple objections to the subpoenas in multiple courts. This, in turn, has caused further delays in these bankruptcy cases, directly harming the interests of the classes of both current claimants and future claimants. Indeed, because the Debtors have been stymied in getting the trust discovery they are seeking, they have been unable to provide the ACC with a listing of the claim files that they intend to rely upon at estimation. Nor have the ACC identified and received the broader claim file discovery they want. That has had the knock-on effect of the ACC requesting, the Debtors reluctantly agreeing, and the FCR even more reluctantly agreeing, to a one-year extension of written discovery in the Estimation Case Management Order to August 2, 2024.¹⁸ The Debtors filed for bankruptcy in June 2020. Four years in and valid asbestos claimants are dying by the thousands, with no compensation in their lifetimes.

The question begged by all this ancillary trust litigation, which will not end with a sample (we are months in on the FCR's simple request for a sample on claim files with no progress), is whose interests does it really serve? Most assuredly, it is not the interests of the classes of valid current and future claimants in these cases, their fiduciaries—the ACC and the FCR—or their counsel. To the contrary, those classes are hurt the most by the years of unnecessary delay in the creation of an asbestos trust. This stands in stark contrast to the *Paddock* case, where, with many of the same professionals, an asbestos trust was created in a matter of months following good-faith

¹⁸ *Agreed Motion to Amend Case Management Order for Estimation of Asbestos Claims*, filed May 18, 2023, Exh. A ¶ 1 (Case No. 20-30608, Dkt. 1766).

mediation. That trust—the Owens-Illinois Asbestos Personal Injury Trust—was up and running and accepting claims eight months ago, in October 2022.

Paddock, a full pay case with a solvent parent to the tune of billions of dollars, followed a pre-petition restructuring. That restructuring is substantively identical to the one that the claimant fiduciaries consider to be illegal and the proper subject of various motions to dismiss in *Bestwall*, *DBMP*, and *Aldrich/Murray*. It is impossible to reconcile Judge Silverstein being asked in *Paddock* to confirm a prompt consensual plan of reorganization on the one hand with, on the other hand, Judge Beyer and Judge Whitley facing demands from many of the same professionals and fiduciaries, under substantively identical facts, to dismiss *Bestwall*, *DBMP*, and *Aldrich/Murray* for lack of subject matter jurisdiction. Relatedly, the FCR understands that there is 100% insurance coverage for asbestos claimants in the *Kaiser Gypsum* case; no party suggested the Court did not have subject matter jurisdiction to determine that full pay bankruptcy case.

The endless trust litigation also does not serve the interests of the Trusts and the Claims Processors. They have been served with valid subpoenas, the PII can be readily extracted with minimal burden, and the PII is fully protected by carefully considered procedures vetted and approved by this Court, not just once, but on multiple occasions. To be sure, the Debtors have made no secret of the fact that they intend to look to the Trust information to determine if there is, in fact, widespread misrepresentation of exposure evidence. But, having protected the confidentiality of their claim information, neither the Trusts nor the Claims Processors have a legitimate interest in not seeing that question answered. And knowing the professionalism and integrity of many trustees and the Claims Processors, the FCR does not believe they would want to do so in any event.

Whose interests then are served in limiting trust discovery or shutting it down completely by the repeated attempts, through any means possible however fanciful, to dismiss these and the other North Carolina asbestos bankruptcy cases? We know the answer because counsel for the ACC have candidly told us. At the January 26, 2023, hearing, in response to the Court's question as to why precision is needed for an estimation number, a number the FCR and the ACC rejected (rightly) in *Garlock*, Ms. Ramsey said the following:

The, the difficulty from the claimant perspective . . . and I, I want to be very transparent about this – is that in addition to reaching a low number, Judge Hodges made some very critical determinations about the, the, the way that the plaintiffs and the tort lawyers behaved in the tort system And that is the responsibility that we bear, is to not let that happen again on our watch.

Case No. 20-30608, Jan. 26, 2023 Hr'g Tr., at 38:25, 39:1-10, Dkt. 1599.

This statement is to be admired for its candor but challenged for what is truly being said. The individual asbestos claimants who sit on the ACC have a fiduciary duty that is no different from that of creditors on any other creditors' committee. That duty is to ensure that their class of creditors is treated fairly and equally under a plan of reorganization. If a certain creditor's interests conflict with the interests of the class, they must withdraw from the committee. Likewise, it is the duty, indeed obligation, of counsel for creditors' committees to achieve a result that is best for the class, as promptly as possible, particularly when a 100% plan is on the table. That the creditors on the ACC have their own counsel, who have represented prior asbestos creditors in these and other cases, should not make any difference to this analysis.

Ms. Ramsey talks about "difficulty from a claimant perspective" but there is no such difficulty for *Aldrich/Murray* claimants. Not a single current or future claimant in these cases has misrepresented their exposure evidence for purposes of payment from either *Aldrich* or *Murray*. That is because not one of them has been paid on their claims. Hence, the great irony. The only

party standing in the way of payment to valid asbestos claims is the ACC, which is, quixotically, preoccupied with challenging trust discovery of claimants who have already been paid. It is to that constituency that the ACC believes it owes a fiduciary duty to ensure this Court does not again make “critical determinations about the, the, the way that the plaintiffs and the tort lawyers behaved in the tort system.”¹⁹ And that extends to not only not agreeing to a full pay asbestos trust for current claimants as they did in *Paddock*,²⁰ but also doing all they can, directly and indirectly, to frustrate trust discovery, whether limiting it in some manner or defeating it entirely by obtaining dismissal of these cases. Critically then, it appears that is what is truly driving litigation over the subpoenas and sampling, not burden or concerns about PII.

The “critical determinations” made by Judge Hodges in 2014 in *Garlock* have direct bearing on the scope of current trust discovery in these cases today. In *Garlock*, Judge Hodges found that the “limited discovery allowed by the court demonstrated that almost *half* . . . [of the 161 cases where *Garlock* paid \$250,000 or more] involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse.”²¹ It is unknown whether the “abuse” identified by Judge Hodges ended in 2014. The FCR, for his

¹⁹ Jan. 26, 2023 Hr. Tr., at 39:5-7 (emphasis added).

²⁰ The *Paddock* Confirmation Order includes various findings of facts. As previously noted for the Court, in language that was likely presented to Judge Silverstein (there is no cite to a declaration), the Order states that a critical component of the successful settlement was that “the Debtors and its Affiliates did not engage in aggressive litigation tactics.” *In re Paddock Enters., LLC*, Case No. 20-10028 (Bankr. D. Del.), *Findings of Fact, Conclusions of Law, and Order Confirming the Third Amended Plan of Reorganization for Paddock Enterprises, LLC Under Chapter 11 of the Bankruptcy Code*, entered May 26, 2022, Dkt. No. 1406 ¶ 37. It is reasonable to surmise that “aggressive litigation tactics” refers to a debtor’s efforts to obtain trust discovery concerning misrepresentation of exposure evidence. But the *Paddock* case magically settled before either the debtor sought a bar date, PIQs, trust discovery, or even an estimation trial. The ACC could easily settle these cases right now, just as they did in *Paddock*. We are now another year away, plus more, for an estimation trial. To date, however, the ACC have pointedly refused to engage the Debtors or the FCR on a consensual plan, nor even provided what they believe is a fair estimate of the Debtors’ asbestos liabilities despite having had their experts do that work in 2022. The same experts looking at similar asbestos product lines estimated 100% of *Garlock*’s liabilities to be between \$1 billion and \$1.3 billion. Instead, all their actions point to delay or dismissal. The plaintiff firms that control the ACC in *Paddock* settled there and refuse to do so here for strategic reasons, not the presence or absence of “aggressive litigation tactics.”

²¹ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 86 (Bankr. W.D.N.C. 2014) (emphasis in original).

part, knows many of the plaintiff lawyers well and holds them in high regard. To be sure, however, if the “abuse” ended or was limited to just a few cases, the Trust discovery will show that, undermining the Debtors’ legal liability model. That is something the ACC should be incentivized to see, not avoid, while at the same time not imperiling access to data that will assist in fixing accurate claim values.

The FCR is laser focused on getting these bankruptcy cases back on track to confirmation, finally receiving the ACC’s estimate of the Debtors’ asbestos liabilities, just as was done in *Garlock*, and avoiding ancillary litigation that does not truly serve the interests of the classes of asbestos claims. Sampling trust claims will just spur more litigation for no valid gain. The FCR respectfully requests that the Court end this litigation by applying the same carefully considered rules governing the production of Trust data that the Court applied in *DBMP*.

[SIGNATURE FOLLOWS ON NEXT PAGE]

Dated: May 26, 2023
Charlotte, North Carolina

Respectfully submitted,

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