IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	Misc. No. 1:22-mc-00080-TJK-RMM
	)	
ALDRICH PUMP, LLC, et al.	)	Underlying Case: 20-BK-30608 (JCW)
	)	(U.S. Bankr. W.D.N.C.)
Debtor.	)	

MOVANTS THE MANVILLE TRUST MATCHING CLAIMANTS' MEMORANDUM IN OPPOSITION TO MOTION TO TRANSFER THIS ACTION TO THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Movants The Manville Trust Matching Claimants, by counsel, submit this Memorandum in Opposition to Aldrich LLC's Motion to Transfer This Action to the United States Bankruptcy Court for the Western District of North Carolina ("Motion to Transfer").

Aldrich's argument is straightforward: Movants' Motion to Quash should be transferred back to the Bankruptcy Court because the Bankruptcy Court has already ruled on the same issues that the Motion to Quash raises. This circular reasoning would of course obviate the purpose of Rule 45.

Federal Rule of Civil Procedure 45(d)(3)(A) *requires* a subpoenaed party to move to quash or modify the subpoena in the district where compliance is required, not in the court that issued the subpoena (unless the two are the same). Rule 45(f) provides that the compliance court *may* transfer a motion to quash or modify only "if the person subject to the subpoena consents or if the court finds exceptional circumstances." The Manville Trust has not consented to transfer. Therefore, the Court may only exercise its discretion to transfer the Motion to Quash if "exceptional circumstances" exist.

Rule 45(f) does not define "exceptional circumstances," but the Rule 45(f) Advisory Committee Note makes clear that the party requesting transfer bears the burden of showing such circumstances are present. Fed. R. Civ. P. 45(f), Advisory Committee Note (2013 amendments).

HISTORY OF THE ACTION

The history of litigation giving rise to the instant action is detailed in Movant's Memorandum in Support of its Motion to Quash. Dkt. 6-1, pp. 2-9. Aldrich, as a debtor in the United States Bankruptcy Court for the Western District of North Carolina ("the Bankruptcy Court"), has issued and served a subpoena on the Manville Trust, ten Delaware asbestos bankruptcy trusts, a New Jersey asbestos bankruptcy trust, and another debtor, Paddock Enterprises ("Subpoena"). That Subpoena seeks confidential information from the various Trusts concerning thousands of Matching Claimants who resolved claims against Aldrich and its predecessor. Specifically, Aldrich seeks information from these Trusts about the settlement of each of the Trusts' liabilities with the Matching Claimants to support its theory that its estimated liability for present and future asbestos personal injury claims is lower than the amounts it paid on account of asbestos personal injury claims in settlements prior to its bankruptcy.

Affected Matching Claimants have moved to quash the Subpoena, both in this case and in Delaware and New Jersey.

GROUNDS AND AUTHORITIES

I. The Motion to Quash is Properly Before this Court

Once again, Aldrich tries to paint the Motion to Quash as an improper collateral attack on the Bankruptcy Court's March 24 Order authorizing the Subpoena.

Rule 45(d)(3)(A) provides that only "the court for the district where compliance is required" has the initial power to quash or modify a subpoena. Fed. R. Civ. P. 45(d)(3)(A). Any

motion seeking to quash or modify a subpoena must therefore be brought in the district of compliance. Courts routinely dismiss motions to quash that are not filed in the district of compliance. *See, e.g., Arrowhead Cap. Fin., Ltd v. Seven Arts Entm't, Inc*., 2021 U.S. Dist. LEXIS 23058, at *7-8 (S.D.N.Y. Feb. 5, 2021) (dismissing motion to quash without prejudice as to reassertion in the district where compliance is required); *In re 3M Combat Arms Earplug Prods. Liab. Litig*., 2020 U.S. Dist. LEXIS 250805, at *6-7 (N.D. Fla. Nov. 18, 2020) (dismissing motion to compel that was not filed in the district of compliance). Rule 45 required the Movants to file the Motion to Quash here.

See, e.g., *Carlson v. N. Am. Specialty*, 2021 U.S. Dist. LEXIS 64981, at *9 (W.D. Pa. Apr. 2, 2021) ("[T]his Court finds that Carlson, by filing his motion to quash in the [district of compliance], is not forum-shopping….By law, Carlson was required to file his motion to quash here….").

Aldrich repeats its incorrect argument that the doctrine of issue preclusion bars the Motion to Quash. Aldrich Mem. at 4 (Dkt. 7-2). As pointed out in Movants' Reply Brief on the Motion to Quash, for issue preclusion to apply, among other things, the prior ruling must be final and valid. And the Bankruptcy Court's March 24 Order authorizing the Subpoena is not a final and valid ruling, as Aldrich's counsel well knows. Indeed, Aldrich's counsel argued strenuously, and correctly, in the *Bestwall* bankruptcy case that discovery orders are not final and not appealable. In Bestwall's "Objection to the Motion of the Official Committee of Asbestos Claimants of Bestwall LLC for a Stay Pending Appeal of the PIQ Order" in *In re Bestwall*, Case No 17-31795 (Bankr. W.D.N.C.) Dkt. 1735, ¶¶ 25-27, Aldrich's counsel in this case argued at length that discovery orders issued by a bankruptcy court under Bankruptcy Rule 2004 are not final orders:

> The Supreme Court has made clear that discovery rulings are "clearly interlocutory." FirsTier Mortg. Co. v. Invs. Mortg. Ins. Co., 498 U.S. 269, 276 (1991); see also In re Bryson, 406 F.3d 284, 288 (4th Cir. 2005) (acknowledging the holding in FirsTier). Numerous bankruptcy and circuit courts have adhered to this view, both generally and in the specific context of Bankruptcy Rule 2004 orders. [string cite omitted.]
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> The PIQ Order is, categorically, not a final order giving the ACC the automatic right to appeal. See In re Diamond Trucking, Inc., 2019 WL 316711, at *2 (N.D. Ind. Jan. 24, 2019) ("[O]rders granting motions for Rule 2004 examinations, like discovery orders, do not resolve discrete disputes . . . [and] are interlocutory as a categorical matter."). The PIQ Order is simply a discovery order that allows the parties to obtain basic information from asbestos claimants about their claims against Bestwall and is not appealable as of right.

Id., attached as Ex. A. Despite citing to the Bankruptcy Court nearly a dozen cases that hold that discovery orders are not final, Aldrich's counsel oddly fails to bring a single one of these cases—cases that destroy its argument—to this Court in any of its pleadings. Aldrich's counsel is estopped from arguing the contrary here. There is no issue preclusion; the Motion to Quash is properly before this Court.

II. Aldrich has Failed to Carry its Burden to Show that Exceptional Circumstances Exist

Aldrich bears the burden of showing that exceptional circumstances exist.

Aldrich next contends that the Bankruptcy Court's greater familiarity with the issues involved in the Motion to Quash create "exceptional circumstances." As noted in *Isola USA Corp. v. Taiwan Union Tech. Corp.*, No. 12-CV-01361-SLG, 2015 U.S. Dist. LEXIS 140416, 2015 WL 5934760, at *3 (D. Mass. June 18, 2015), *adopted,* No. 15-mc-94003, 2015 U.S. Dist. LEXIS 142797, 2015 WL 5944286 (D. Mass. Aug. 27, 2015), such a view would eviscerate Rule 45:

> [T]here is no question that the [issuing court] is more familiar with the procedural and substantive aspects of the underlying patent litigation. However, that cannot

> be what Congress meant when it required a finding of exceptional circumstances, otherwise the exception would swallow the rule. As a general matter, a Rule 45 subpoena-related motion will always be resolved by a court less familiar with the underlying litigation.

See also Sorrento Therapeutics, Inc v. Roger Williams Med. Ctr., 2018 U.S. Dist. LEXIS 21225 *6-7 (S.D. Cal. February 8, 2018) (issuing court's greater familiarity with case "is a concern that exists in almost every such motion and cannot alone be sufficient to constitute an 'extraordinary circumstance.'"); *CMB Expert, LLC v. Atteberry*, 2014 U.S. Dist. LEXIS 72029, at *4 (N.D. Tex. May 27, 2014) (same).

Aldrich's next argument is that the Motion to Transfer should be granted to avoid inconsistent rulings between courts, or to avoid disrupting the Bankruptcy Court's management of the estimation proceeding. Aldrich Mem. at 17-20 (Dkt. 7-2). As Aldrich notes, there are several simultaneous proceeding going forward in various courts regarding the same Subpoena. Oddly, Aldrich contends that the rulings in other bankruptcy cases are of significance here.

These other courts have not all seemed concerned with "inconsistent rulings." At least one other court has already issued a ruling regarding a motion to quash this Subpoena brought by Paddock, another asbestos company debtor. Paddock filed a Motion to Quash this same Subpoena in its own bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware, joined by the Owens-Illinois Asbestos Personal Injury Trust ("O-I Trust"), the Owens-Illinois Asbestos Trust Committee ("O-I Committee") and the Future Claims Representative ("FCR"). On September 23, 2022, Judge Silverstein of that court ruled that the bankruptcy court had jurisdiction to hear Paddock's Motion to Quash, and that the O-I Trust, the O-I Committee, and the FCR all had standing to challenge the subpoena as well. Ex. b. While she declined to quash the subpoenas, she did require that Paddock be reimbursed by Aldrich for the reasonable expense of production, which would be determined by the court.

It is the Court's obligation to deny transfer in the absence of "exceptional circumstances." In *FDIC v. Galan-Alvarez*, No. 1:15-mc-00752 (CRC), 2015 U.S. Dist. LEXIS 130545 *8-11 (D.D.C. Sep. 4, 2015), this Court denied a motion to transfer a motion to quash. The Court first discussed the factors to be considered as "exceptional circumstances" required for transfer, including those mentioned by Aldrich in its Memorandum: highly complex litigation, the interests of judicial economy, and avoiding inconsistent results. Nonetheless, the Court found that because the motion to quash before it presented a distinct legal question – whether high-ranking government officials must testify – severable from the merits of the actual litigation, transfer to the issuing jurisdiction was unnecessary and inappropriate. The Court then granted the Motion to Quash.

Likewise, here, the Motion to Quash before the Court presents a distinct legal question separate from the merits of Aldrich's bankruptcy. That question is whether Movant's personal information is worthy of additional protections not afforded them by the Subpoena. In this case, Aldrich's expert, Bates White, has admitted that a 10% sample of Movants' data is more than sufficient for its estimation proceeding.[1] Given Aldrich's expert's testimony that the limit of the production to a 10% sample will not affect the validity of its estimation proceeding, it is clear that granting the Motion to Quash and requiring sampling will not in any way affect Aldrich's underlying bankruptcy proceeding. Accordingly, the Motion to Transfer should be denied, and this Court should rule on, and grant, the Motion to Quash.

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[1] In *Bestwall*, the debtor, represented by Aldrich's counsel, admitted that using a 10% sample would "provide an efficient mechanism by which the parties and th[e] [Bankruptcy] Court can address issues presented by the estimation proceeding" and argued that approving the 10% sample "offers a practicable and fair way to proceed [and] will save time and expense …."(Dkt. 4-6) ¶ 24 (Bestwall Mot. to Approve Resolved Claim Sample). Aldrich's own consultant, Bates White, further opined that a 10% sample was "reliable" "for performing analyses related to … liability estimation." (Dkt. 4-7) ¶ 11 (Decl. of Jorge Gallardo-Garcia).

CONCLUSION

For the reasons stated herein, Movants pray that the Motion to Transfer be denied, and for such other relief as to the Court seems proper.

Dated: September 27, 2022

Respectfully submitted,

/s/ David I. Bledsoe----------

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CERTIFICATE OF SERVICE

I certify that on September 27, 2022, I filed the foregoing with the Clerk of Court via ECF, who will serve notice by email to all parties registered for service of pleadings in this matter.

/s/David I. Bledsoe
David I. Bledsoe

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re BESTWALL LLC,[1] Debtor.	Chapter 11 Case No. 17-31795 (LTB)

DEBTOR'S OBJECTION TO THE MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF BESTWALL LLC FOR A STAY PENDING APPEAL OF THE PIQ ORDER

Bestwall LLC ("**Bestwall**" or the "**Debtor**") hereby objects to the *Motion of the Official Committee of Asbestos Claimants of Bestwall LLC for a Stay Pending Appeal of the PIQ Order* (Dkt. 1711) ("**Stay Motion**"), and its supporting *Memorandum of Law in Support of the Official Committee of Asbestos Claimants' Motion for Stay Pending Appeal of the PIQ Order* (Dkt. 1712) ("**ACC Br.**").[2] Through the Stay Motion, the Official Committee of Asbestos Personal Injury Claimants (the "**ACC**") seeks a stay of the Court's *Order Pursuant to Bankruptcy Rule 2004 Directing Submission of Personal Injury Questionnaires by Pending Mesothelioma Claimants and Governing the Confidentiality of Responses* (the "**PIQ Order**"), while the ACC pursues an interlocutory appeal of the PIQ Order to the District Court.

Introduction

The Court should deny the Stay Motion because the ACC cannot satisfy the standard it must meet to obtain the extraordinary remedy of a stay pending appeal. The requested stay would

[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. Capitalized terms not defined herein have the meanings set forth in the PIQ Motion.

[2] Certain claimant law firms joined in the Stay Motion. *Joinder to Motion of the Official Committee of Asbestos Claimants of Bestwall LLC for Stay Pending Appeal* (Dkt. 1713). References to the arguments of the "ACC" in this objection also refer to the claimant law firms that filed the joinder, and the Debtor likewise objects to the joinder.

cause substantial harm to the Debtor by depriving it of information it needs to prepare its estimation case and that its experts (including its claims expert Dr. Charles E. Bates) need to submit their expert reports in connection with estimation. The deadline for Questionnaire responses was fundamental to the construction and negotiation of the *Case Management Order for Estimation of the Debtor's Liability for Mesothelioma Claims* (Dkt. 1685) (the "**Estimation CMO**"), which the Court entered on March 23 with the consent of all parties, including the ACC.

The stay now requested by the ACC would render the Estimation CMO unworkable, would be highly prejudicial to the Debtor, and would very likely delay both the estimation proceeding and the Debtor's effort to reorganize and fund a section 524(g) trust (in service of which this Court ordered estimation in October of last year). The ACC's proposal that its discovery proceed as planned, while the Debtor's critical discovery is indefinitely stayed, ACC Br. ¶ 32, would be one-sided and unfair. The ACC's proposed stay also would interrupt a Questionnaire process that has already begun at considerable expense to the estate and with significant effort by the parties.

The PIQ Order imposes no harm on the claimants, much less the irreparable harm the ACC must show to obtain a stay pending appeal. The order simply requires claimants to answer relevant discovery about the most basic facts concerning their claims asserted against the bankruptcy estate, in a manner that minimizes burden. Answering discovery does not constitute irreparable harm as a matter of law—especially because the ACC admits the Debtor could obtain the same discovery by other (more burdensome and expensive) means. Further, the ACC's appeal of the PIQ Order has no likelihood of success. The PIQ Order is not a final order, and the ACC's appeal does not meet the standards for interlocutory appeal. Even if it did, however, the

appeal has no prospect for success given the appropriately deferential standard the District Court must apply to a discovery order. The Stay Motion should be denied.

Relevant Background

1. The Debtor filed its *Motion for Order Pursuant to Bankruptcy Rule 2004 Directing Submission of Personal Injury Questionnaires by Pending Mesothelioma Claimants* (Dkt. 1236) (the "**PIQ Motion**") on July 30, 2020. The PIQ Motion explained the Debtor's need for the information sought through the Questionnaire, including to establish "a critical factual foundation for the negotiation, formulation, solicitation, and confirmation of" a plan of reorganization "establishing an asbestos trust" under 11 U.S.C. § 524(g). PIQ Motion at 1-2. The PIQ Motion attached in support (a) the Declaration of Charles E. Bates, PhD (the "**Bates Discovery Declaration**"), in which Dr. Bates described his need for the information sought through the Questionnaire, (b) orders and questionnaires from numerous previous mass tort cases (Exs. E to K, M); and (c) a chart showing how each of the topics included in Bestwall's proposed questionnaire had been included in precedent questionnaires (Ex. O). The Bates Discovery Declaration incorporated a previous declaration submitted in connection with the *Motion of the Debtor for Estimation of Current and Future Mesothelioma Claims* (Dkt. 875) (the "**Estimation Motion**"), also summarizing the information Dr. Bates needs to perform his work (the "**Bates Estimation Declaration**").

2. On October 22, 2020, the Court granted the Estimation Motion, concluding that "the only way forward for the case at this point is estimation." 10/22/20 Tr. at 17.

3. In its *Order Authorizing Estimation of Current and Future Mesothelioma Claims* (Dkt. 1577) (the "**Estimation Order**"), the Court cited the Bates Estimation Declaration, recognized that the Debtor and its expert needed significant information in connection with

estimation, and concluded "the Debtor would be denied due process if it were required to move forward with this chapter 11 case without the information it contends it needs and which the Court determines is necessary." Estimation Order ¶ 11; see also id. ¶ 10 ("The Bates [Estimation] Declaration, introduced by the Debtor, describes the information Dr. Bates needs for a variety of reasons . . . The Bates Declaration is undisputed and no evidence to the contrary was introduced."). The Debtor's Questionnaire was designed to obtain the information the Debtor and Dr. Bates need and that he described in his declaration.

4. The PIQ Motion was the subject of extensive briefing, in multiple rounds over almost six months. See PIQ Order at 1 n.3. The ACC and the FCR also took document and deposition discovery with respect to the PIQ Motion. The Court then heard oral argument on the PIQ Motion on January 21, 2021.

5. On March 4, 2021, the Court granted the PIQ Motion. In its bench ruling, the Court held "that questionnaires have been used in mass tort bankruptcy cases across the country, including in this Circuit, over the course of many years . . . because courts and parties in those cases have acknowledged that the questionnaires will be helpful to all parties and efficient for purposes of an estimation proceeding." 3/4/21 Tr. at 8-9. The Court further found that "the personal injury questionnaire discovery [was] relevant to a determination of the asbestos liability of [Bestwall], the administration of [Bestwall's] estate, plan formulation, and plan confirmation," and was the "most efficient way to proceed and avoid undue burden." Id. at 8. The Court also recognized that Bestwall's Questionnaire was "consistent with [the] questionnaires [used in prior cases], if not more finely well[-]tuned in light of experience gained from prior cases." Id. at 12. And, the Court adopted the Debtor's suggestion for a four-month period for claimants to

complete responses to the Questionnaire, finding it was consistent with prior questionnaire processes in precedent cases. Id. at 12.

6. Over the following two weeks, the ACC and the Debtor met and conferred numerous times concerning the form of the PIQ Order and the deadlines for completing and serving the Questionnaire. The Debtor also invited and implemented comments from claimant law firms, including firms representing claimants on the ACC, as well as other interested law firms.

7. On March 18, 2021, the Court heard a status update with respect to the PIQ Order, and ruled concerning one unresolved aspect of the order (the use restriction). The parties resolved all remaining issues with respect to the PIQ Order on March 19, 2021 and jointly submitted a proposed order. The Court entered it on March 23, 2021.

8. The Debtor continued to work closely with the ACC as the Debtor implemented the PIQ Order. The Debtor made available to the ACC, the FCR, and their experts the fillable PDF form of the Questionnaire and the portion of the online portal that allows claimants and counsel to upload responses to the Questionnaire completed offline and upload other required documents (the "**Upload Option**").

9. On March 26, 2021, as required by the PIQ Order, the claims agent served the Questionnaire and PIQ Order on more than 800 law firms that either represent known Pending Mesothelioma Claimants (as defined in the PIQ Order) or sued Old GP or Bestwall on an asbestos claim in the past. See Dkt. 1678.

10. The Debtor met and conferred with the ACC and its experts on March 29, 2021 concerning the fillable PDF form and the Upload Option, and implemented certain suggestions received from the ACC and its experts. The Debtor informed the ACC that the "fillable form"

portion of the portal, which guides claimants through the Questionnaire in a question-by-question format (the "**Fillable Form Option**"), was still being completed but would be ready in the coming weeks. The Upload Option was made available to claimants and counsel on March 29, 2021.

11. Also on March 29, 2021, the parties (including the ACC) presented an agreed Estimation CMO to the Court, which the parties had negotiated over a period of several weeks after the March 4, 2021 rulings. As stated by Mr. Wright, counsel for the ACC: "We are fine with the dates that have been proposed and appreciate everybody's willingness to work on that." 3/29/21 Tr. at 17. The Court entered the Estimation CMO on March 31, 2021.

12. The Estimation CMO memorializes what the ACC and the FCR agree is an "aggressive" pretrial schedule ahead of a trial in May 2022. See 3/24/21 Tr. at 27 (statement of Mr. Gordon); id. at 31 (statement of Ms. Zieg); id. at 33 (statement of Ms. Ramsey); 3/29/21 Tr. at 25 (statement of Ms. Zieg). The Estimation CMO imposes strict deadlines on all parties, and in particular imposes on the Debtor substantial discovery obligations, including initial disclosures, the production of documents relating to over 2,000 resolved mesothelioma claims, and other fact and expert discovery obligations. Estimation CMO ¶ 3 *et seq.*

13. The Debtor had been clear for many months that the information requested in the Questionnaire is crucial to the Debtor's ability to prepare its case and is a critical gating item as the parties prepare for the estimation hearing. See, e.g., 10/22/20 Tr. at 22 (statement of Mr. Cassada) (urging hearing on PIQ Motion and trust discovery motion because "they're the first step to get the basic information we need and to engage in an orderly, efficient discovery process that will lead us to estimation"); 11/13/20 Tr. at 38-39 (statement of Mr. Gordon) (noting that if hearing on PIQ Motion were delayed "we're going to have further delay with the estimation

timeline"); 3/18/21 Tr. at 10 (statement of Mr. Worf) (Questionnaire is "a critical item to maintain progress in the case" and noting "we want to make sure to get the questionnaire served on, on law firms as soon as we possibly can so that period for returning the questionnaires can start to run and, and we can get the responses back and the experts can use them in a, in a timely fashion").

14. The deadline for submitting initial expert reports under the Estimation CMO (November 24, 2021) is a mere four months after the Questionnaire return date (July 26, 2021). The Debtor views those four months as the minimum necessary to process and analyze the Questionnaire responses. See 3/29/21 Tr. at 10-11 (statement of Mr. Gordon) (noting that "one of the reasons for picking [the November 24] date is that's about four months after the deadline for the submission of responses to personal injury questionnaires and that was pretty much, at least by our side—and I think probably by, by both sides—viewed as the minimum period of time the experts would need to review and analyze the data coming in from the PIQs").

15. Although the parties negotiated the terms of the Estimation CMO over a multiple-week period, at no time during those negotiations or prior to the hearing at which the Estimation CMO was presented to the Court did the ACC inform the Debtor that it intended to appeal the PIQ Order and seek a stay of the order pending the outcome of the appeal. In fact, the Debtor did not learn of the appeal until counsel for the ACC informed counsel for the Debtor about it approximately two hours before the appeal was filed. The Debtor did not learn about the ACC's intention to seek a stay pending appeal until after the Stay Motion was filed.

16. On April 6, 2021 (the last day of the appeal period under Rule 8002 of the Federal Rules of Bankruptcy Procedure), the ACC filed its notice of appeal of the PIQ Order, a motion

for leave to appeal the PIQ Order, and the Stay Motion. Certain claimant law firms also filed a notice of appeal and joined in the motion for leave to appeal and the Stay Motion.

17. On April 9, 2021, the Debtor made available a test version of the Fillable Form Option to the ACC, the FCR, and their experts. After the Debtor implemented certain changes requested by ACC counsel, the Fillable Form Option was activated online on April 16, 2021 and is now available to all claimants and their counsel who wish to use it in responding to the Questionnaire.

18. Almost one month of the four-month response period for the Questionnaire is now past and the claims agent has begun receiving Questionnaire responses. The claims agent also has been responding to questions concerning the PIQ Order, including the various options for completing the Questionnaire, through a call line established by the claims agent to handle queries from counsel or claimants.

Argument

19. "The decision whether to grant a stay pending appeal lies within the sound discretion of the court, and the burden on the movant seeking the extraordinary relief of a stay is a heavy one." In re Franklin, 2020 WL 603900, at *3 (Bankr. M.D.N.C. Feb. 6, 2020) (quoting In re Sabine Oil & Gas Corp., 551 B.R. 132, 143 (Bankr. S.D.N.Y. 2016), punctuation omitted). Courts in the Fourth Circuit consider four factors when ruling on requests for stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Allen v. Fitzgerald, 590 B.R. 352, 356 (W.D. Va. 2018) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

20. The movant must show that all four of these requirements weigh in favor of a stay pending appeal. BDC Capital, Inc. v. Thoburn Ltd. P'ship, 508 B.R. 633, 636-37 (E.D. Va. 2014) ("All four requirements must be satisfied."); see also In re Foster, 2019 WL 7841547, at *12 (Bankr. M.D.N.C. Feb. 8, 2019).[3] Moreover, the applicant for a stay has the burden of proof on each of the four elements. Schweiger, 578 B.R. at 736-37. Thus, a stay pending appeal "is not a matter of right even if irreparable injury might otherwise result to the Petitioners, as the parties and the public are also entitled to the prompt execution of orders . . . ." Allen, 590 B.R. at 360 (quotation omitted).

21. The ACC cannot show that it meets any of the four factors, much less all of them, and thus is not entitled to a stay pending appeal.

I. The ACC is unlikely to succeed on the merits on appeal

22. First, the ACC must make a "strong showing" that it is "likely to succeed" on appeal. Id. at 356. It is not sufficient for the ACC to show a "substantial possibility" of success, Schweiger, 578 B.R. at 737, or that it is "just as likely as the other parties to succeed on appeal," BDC Capital, 508 B.R. at 637-38. To the contrary, the "requirement that the plaintiff clearly demonstrate that it will *likely succeed* on the merits is far stricter than the [abrogated] Blackwelder requirement that the plaintiff demonstrate only a grave or serious *question* for

[3] The ACC argues that all four requirements need not be satisfied, and that the Court can engage in balancing if some of the factors are met but others are not. See ACC Br. ¶ 14. Although this issue has not been addressed directly in this district or by the Fourth Circuit, the decisions in other courts within the Fourth Circuit holding that all four factors must be met are better reasoned and should be followed. See, e.g., BDC Capital, 508 B.R. at 636-37; Franklin, 2020 WL 603900, at *3; Foster, 2019 WL 7841547, at *12; see also In re Schweiger, 578 B.R. 734, 736-37 (Bankr. D. Md. 2017) (citing additional cases requiring that all four factors be met). Moreover, the Fourth Circuit has held that all four factors must be met to obtain a preliminary injunction. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342 (4th Cir. 2009), vacated on other grounds and remanded, 559 U.S. 1089 (2010), reaffirmed in relevant part 607 F.3d 355 (4th Cir. 2010). Because "courts in the Fourth Circuit have held . . . that the preliminary injunction standard applies to issuance of a stay pending appeal," Schweiger, 578 B.R. at 736, the Real Truth reasoning applies equally to stays pending appeal. In any event, because the ACC cannot carry its burden with respect to any of the factors, it would not be entitled to a stay pending appeal even if a balancing approach were appropriate.

litigation." Real Truth, 575 F.3d at 346-47 (emphasis in original, holding with respect to related preliminary injunction standard).

23. The ACC is unlikely to obtain review of an interlocutory discovery order and, even if it could, the ACC is unlikely to succeed in overturning the PIQ Order, which was decidedly within this Court's discretion. The ACC, therefore, cannot make the likelihood of success showing required to support a stay.

A. The PIQ Order is not a final order and the ACC cannot meet the criteria for interlocutory appeal

24. To meet its burden on the likelihood of success factor, the ACC first must show that it will succeed in obtaining appellate review of the PIQ Order. See In re Frascella Enters., Inc., 388 B.R. 619, 623 (Bankr. E.D. Pa. 2008) (likelihood of success analysis must include "whether the District Court will grant the Defendants' leave to file an interlocutory appeal") (quotation omitted); In re Smith, 397 B.R. 134, 137 (Bankr. D. Nev. 2008) ("procedural infirmities" in appeal must be considered in analyzing likelihood of success on appeal). The ACC does not address this issue in its Stay Motion or brief, and the ACC cannot demonstrate a likelihood of obtaining review because the PIQ Order is not a final order and does not meet the standard for an interlocutory appeal.

1. The PIQ Order is not a final order

25. First, the PIQ Order is not a final order entitling the ACC to appeal as of right. The Supreme Court has made clear that discovery rulings are "clearly interlocutory." FirsTier Mortg. Co. v. Invs. Mortg. Ins. Co., 498 U.S. 269, 276 (1991); see also In re Bryson, 406 F.3d 284, 288 (4th Cir. 2005) (acknowledging the holding in FirsTier). Numerous bankruptcy and circuit courts have adhered to this view, both generally and in the specific context of Bankruptcy Rule 2004 orders. W.S. Badcock Corp. v. Beaman, 2015 WL 575422, at *1 (E.D.N.C. Feb. 11,

2015) (listing authority); In re Coleman Craten, LLC, 15 F. App'x 184 (4th Cir. 2001) (unpublished) (affirming dismissal of appeal of Rule 2004 order as interlocutory); McCoy v. Ace Motor Acceptance Corp., 2019 WL 7000088, at *2-3 (W.D.N.C. Dec. 20, 2019) (court lacked jurisdiction to hear appeal of bankruptcy court's order on discovery dispute); Lynch v. Barnard, 2020 WL 1812504, at *5 (E.D.N.Y. Apr. 9, 2020) (stating that "[s]everal courts have found that bankruptcy court orders in regards to discovery, including Rule 2004 orders, are not final orders for purposes of appeals to district court" and listing cases); In re Royce Homes LP, 466 B.R. 81, 89 (S.D. Tex. 2012) (noting "extensive case law holding bankruptcy discovery orders to be interlocutory"); Decker v. Scott, 2019 WL 4491332, at *3 (W.D. Va. Sept. 18, 2019) (similar, listing cases); In re Kaiser Grp. Int'l, Inc., 400 B.R. 140, 144 (D. Del. 2009) (noting that "[g]enerally, pretrial discovery decisions [by a bankruptcy court] are not considered to be final decisions subject to immediate appeal"). Litigation would quickly become unmanageable if discovery orders (including Rule 2004 orders) were routinely appealable as of right.

26. There is no question that the PIQ Order is a discovery ruling. PIQ Order at 2 (characterizing relief as "discovery"). The ACC argues that the PIQ Order warrants treatment different from all other "clearly interlocutory" discovery orders because it resolves a "discrete" issue in this proceeding. *Memorandum of Law in Support of the Official Committee of Asbestos Claimants of Bestwall LLC's Motion for Leave to Appeal the PIQ Order* (Dkt. 1708) at 9 ("**Motion for Leave Memorandum**"). But the ACC cites no authority, in this jurisdiction or any other, holding that a Rule 2004 discovery order presents a "discrete issue" that renders it a final judgment. The ACC relies on Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013), which held that an order denying confirmation of a chapter 13 plan without prejudice is a final order. Id. at 246. That holding has no relevance here and, moreover, is no longer good law after the Supreme

Court's decision in Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1691-94 (2015) (holding that denial of confirmation of a chapter 13 plan is not final).

27. The PIQ Order is, categorically, not a final order giving the ACC the automatic right to appeal. See In re Diamond Trucking, Inc., 2019 WL 316711, at *2 (N.D. Ind. Jan. 24, 2019) ("[O]rders granting motions for Rule 2004 examinations, like discovery orders, do not resolve discrete disputes . . . [and] are interlocutory as a categorical matter."). The PIQ Order is simply a discovery order that allows the parties to obtain basic information from asbestos claimants about their claims against Bestwall and is not appealable as of right.

2. The ACC cannot meet the standards for interlocutory review

28. Because the PIQ Order is not final, the ACC must obtain leave to appeal. District courts grant leave to appeal interlocutory bankruptcy court orders only upon finding that (1) the order to be appealed involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. In re Biltmore Investments, Ltd., 538 B.R. 706, 710 (W.D.N.C. 2015) (also noting that "appellant must demonstrate that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment"). The ACC must prove all three prongs to obtain leave to appeal. Id. None are met here. Indeed, federal district courts "have routinely declined to . . . allow immediate appeal of a bankruptcy court's discovery orders." Badcock, 2015 WL 575422, at *2 (internal quotation marks omitted).

29. *First*, the PIQ Order involves no controlling question of law. The Fourth Circuit has defined a controlling question of law as "a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it

goes." Fannin v. CSX Transp., Inc., 873 F.2d 1438 (4th Cir.1989) (unpublished). "Whether or not [an] appellant should be subject to a Rule 2004 examination fails to satisfy this test." Badcock, 2015 WL 575422, at *2 (citation omitted). To the contrary, whether to order a Rule 2004 examination is a question of discretion, involving a determination of what is advisable under the particular facts and circumstances. See In re Braxton, 516 B.R. 787, 794 (E.D.N.C. 2014) (noting that "Rule 2004 'commits to the sound *discretion* of the bankruptcy court the decision whether to require examination of a party.'") (emphasis added; quoting McLaughlin v. McPhail, 707 F.2d 800, 804 (4th Cir. 1983)); see also 3/4/21 Tr. at 10 ("[T]he Court holds the ultimate discretion"). In this case, appellate review of this Court's PIQ Order will not "be completely dispositive" of anything—not estimation, not plan negotiation and confirmation, and not this bankruptcy case.

30. The ACC cites no cases holding that a bankruptcy court's Rule 2004 order raises a controlling question of law. Nor does the ACC distinguish or even address any of the extensive authority to the contrary. See Badcock, 2015 WL 575422, at *2; Decker, 2019 WL 4491332, at *4 n.5 (Rule 2004 order does not meet the three-factor test); Lynch, 2020 WL 1812504, at *6 (similar); McCann v. Commc'ns Design Corp., 775 F. Supp. 1506, 1534 (D. Conn. 1991) (holding that an order granting or denying discovery "is ordinarily a non-appealable interlocutory order . . . and in the circumstances presented does not involve [] a controlling question of law"). Matters such as the PIQ Order that involve judicial discretion concerning the appropriate scope of discovery are left to the sound discretion of the bankruptcy judge most familiar with the proceeding. See Lynch, 2020 WL 1812504, at *6; In re Pawlak, 520 B.R. 177, 183-4 (D. Md. 2014) (and noting that the "Fourth Circuit has previously stated that the rule against review of interlocutory orders applies with particular force in the discovery context, as allowing immediate

appeal of orders resolving discovery disputes would only disrupt court proceedings and clog the appellate courts with matters more properly managed by the court familiar with the parties and their controversy").

31. *Second*, there is no "substantial ground for difference of opinion." The ACC acknowledges that this prong typically requires "a difference of opinion [] between courts on a given controlling question of law, creating the need for an interlocutory appeal to resolve the split or clarify the law."[4] The ACC apparently concedes that no such difference of opinion exists. Id. Instead, they argue that this is a matter of first impression, so the District Court must determine whether there is "'substantial ground' for dispute." Id. But, as the Court observed in its ruling, courts have for decades routinely ordered questionnaires in mass tort bankruptcy cases. 3/4/21 Tr. at 8-9 ("[T]he reality is that questionnaires have been used in mass tort bankruptcy cases across the country, including in this Circuit, over the course of many years."). The ACC has not cited *a single example* of a court that has denied a request for a Questionnaire to gather basic information in a mass tort bankruptcy case. And although the ACC claims to raise numerous issues of "first impression," as described below, the ACC's positions are utterly meritless.

32. *Third*, an immediate appeal will not materially advance the termination of the estimation proceeding or this bankruptcy case. Appellate review of the PIQ Order would not resolve the estimation proceeding or any other substantive matter. It would at most resolve a discovery dispute that, while important, would not materially advance the substantive tasks in this case, including estimation and negotiation, formulation, and confirmation of a plan of reorganization. To the contrary, by depriving the Debtor of discovery it needs to engage in those

[4] Motion for Leave Memorandum at 19 (quoting KPMG Peat Marwick, L.L.P. v. Estate of Nelco, Ltd., 250 B.R. 74, 82 (E.D. Va. 2000)).

substantive tasks, or potentially forcing the Debtor to resort to more burdensome and costly means of obtaining the information, appellate review threatens to prolong the estimation proceeding and delay resolution of the bankruptcy case.

B. The District Court is unlikely to reverse the Court's PIQ Order on appeal

33. Even if the ACC succeeded in gaining appellate review, it would be unlikely to succeed in reversing the PIQ Order on appeal. The ACC seeks to appeal a number of discretionary discovery rulings relating to the Questionnaire that would be reviewed under a deferential standard and that were, in any event, clearly correct.

34. The ACC's principal argument on appeal seems to be that the "pending proceeding rule" prevents the Court from issuing the Questionnaire under Bankruptcy Rule 2004 because the Questionnaire relates to the estimation proceeding ordered by the Court. See ACC Br. ¶¶ 18-19. But as the Court correctly held, "applying the pending proceeding rule is discretionary and not mandatory," In re Camferdam, 597 B.R. 170, 174 (Bankr. N.D. Fla. 2018), and bankruptcy courts have discretion to proceed under Bankruptcy Rule 2004 instead of the Federal Rules of Civil Procedure (the "**Civil Rules**"). See, e.g., In re Int'l Fibercom, Inc., 283 B.R. 290, 292 (Bankr. D. Ariz. 2002) ("[T]he court holds the ultimate discretion whether to permit the use of Rule 2004, and courts have for various reasons done so despite the existence of other pending litigation."). Bankruptcy Rule 9014(c) expressly permits such a result, noting that the Civil Rules apply to contested matters "unless the court directs otherwise." See In re M4 Enters., Inc., 190 B.R. 471, 475-76 (Bankr. N.D. Ga. 1995) (allowing Rule 2004 examination despite pending contested matter because topic was relevant to broader issues). Thus, the Court had discretion to use Rule 2004 rather than the contested matter rules, and the ACC would have to show that the Court abused its discretion to succeed on appeal, which it cannot do. Notably, in

one case the ACC repeatedly cites, the district court refused to grant a stay during the pendency of an appeal that presented a "pending proceeding rule" issue. Braxton, 516 B.R. at 794-96.

35. The ACC also continues to press its procedural objections to the use of Rule 2004 as the authority for issuing the Questionnaire, arguing that subpoenas must be issued to each of the thousands of Pending Mesothelioma Claimants. See, e.g., ACC Br. ¶¶ 21-22. The Court rejected this argument, correctly holding that questionnaires are a time-tested and appropriate means for obtaining basic information about the claims against the estate in a mass tort bankruptcy case. 3/4/21 Tr. at 8-9 (noting the widespread use of questionnaires in mass tort bankruptcy cases, "and I think that's because courts and parties in those cases have acknowledged that the questionnaires will be helpful to all parties and efficient for purposes of an estimation proceeding"). The Court also correctly observed that two previous courts issued questionnaires under the authority of Rule 2004. Id. As the Court recognized, any alternative to the Questionnaire would be impractical and would cause more burden and delay in this case. Id. at 9. The ACC's proposal to issue subpoenas to thousands of Pending Mesothelioma Claimants "is neither practical nor feasible" and "would likely just create confusion and delay." Id. at 9-10.

36. These decisions too would be reviewed under a deferential standard on appeal. The Fourth Circuit has consistently recognized that a trial court has "wide latitude in controlling discovery" and, for that reason, discovery rulings are not overturned on appeal "absent a showing of clear abuse of discretion." United States v. Ancient Coin Collectors Guild, 899 F.3d 295, 323 (4th Cir. 2018); Rowland v. Am. Gen. Fin., Inc., 340 F.3d 187, 195 (4th Cir. 2003). Rule 2004, in particular, "commits to the sound discretion of the bankruptcy court the decision whether to require examination of a party," and such a decision "may only be reversed on appeal for 'abuse of discretion.'" Braxton, 516 B.R. at 794 (quoting McLaughlin v. McPhail, 707 F.2d 800, 804

(4th Cir.1983) and In re ASI Reactivation, Inc., 934 F.2d 1315, 1324 (4th Cir. 1991)); see also In re Ramadan, 2012 WL 1230272, at *2 (Bankr. E.D.N.C. Apr. 12, 2012) ("Because Rule 2004(a) provides that the court *may* order the examination of any entity, its plain meaning grants to bankruptcy courts complete discretion in determining whether a Rule 2004 examination is appropriate.") (emphasis in original). Orders regarding Rule 2004 examinations, therefore, are likewise reviewed under an abuse of discretion standard. See Braxton, 516 B.R. at 794.

37. The case for deference to this Court's ruling is all the stronger because the PIQ Order is integrally related to the estimation proceeding, which the Court unquestionably has broad discretion to conduct using "whatever method is best suited to the circumstances." Addison v. Langston (In re Brints Cotton Mktg., Inc.), 737 F.2d 1338, 1341 (5th Cir. 1984); see also KCH Servs., Inc. v. Nordam Grp., Inc., 345 B.R. 542, 548 (W.D.N.C. 2006) ("'In estimating a claim, the bankruptcy court should use whatever method is best suited to the particular circumstances.'") (quoting 4 COLLIER ON BANKRUPTCY § 502.04[2] (Lawrence P. King, ed., 15th ed. rev. 2005)). The District Court is highly unlikely to overturn the Court's discretionary discovery rulings in connection with the estimation proceeding.

38. All of the other issues the ACC attempts to raise on appeal likewise involve discovery rulings that will be reviewed under the same deferential standard. See, e.g., ACC Br. ¶ 23 (erroneously characterizing the Questionnaire as a "mandatory injunction"); id. ¶ 25 (repeating ACC arguments about undue burden and requirement to disclose aggregate settlement amounts). The Court's rulings on each of these matters were, in any event, correct.[5]

[5] The ACC argues that "claimants may have legitimate challenges [to] the PIQ Order." ACC Br. ¶ 30; see also id. ¶ 28. But all Pending Mesothelioma Claimants known to the Debtor were served with the PIQ Motion through their counsel (as permitted by the Court's noticing order, Dkt. 65) in July 2020, and had ample opportunity to appear and object to the PIQ Motion and Questionnaire. See Dkt. 1251 (affidavit of service with respect to PIQ Motion). Many law firms did appear and object, and even had the opportunity to submit a second round of briefs with respect to the PIQ Motion. All of their objections were denied. In particular, the Court noted that they raised only generalized

II. The ACC has not provided any evidence of irreparable harm

39. The ACC also cannot meet its burden of showing that it "will be irreparably injured absent a stay." Allen, 590 B.R. at 356. The ACC's principal allegation of irreparable harm appears to be the time that claimants and counsel will spend in answering the PIQ. ACC Br. ¶¶ 29-31.

40. The ACC's position is unfounded. The cost or burden of litigation does not constitute irreparable harm, as a matter of law. See Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); Hayden v. New York Stock Exch., Inc., 4 F. Supp. 2d 335, 340 (S.D.N.Y. 1998) ("[A]ny injury arising . . . from the delay and cost of litigation are legally insufficient to establish irreparable harm."); F.T.C. v. Standard Oil Co. of California, 449 U.S. 232, 244 (1980) (rejecting defendant's reliance on "the expense and disruption of defending itself in protracted adjudicatory proceedings" as irreparable injury); Long v. Robinson, 432 F.2d 977, 980 (4th Cir. 1970) ("[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.") (citation omitted).

41. If the cost and burden of litigation were irreparable harm, then every disappointed litigant in a discovery dispute would be able to satisfy this element, because virtually every discovery order entails some burden or expense for some party. Numerous courts, in denying motions to stay pending appeal, have rejected arguments that the costs and burdens of litigation or discovery constitute irreparable harm in the context of stays pending appeal. See, e.g., Picone v. Shire, LLC, 2020 WL 3051871, at *2 (D. Mass. June 8, 2020) (rejecting contention that litigation costs pending consideration of interlocutory appeal of denial of class certification

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allegations of burden, and that the Questionnaire is "consistent with [the] questionnaires [used in prior cases], if not more finely well[-]tuned in light of experience gained from prior cases." 3/4/21 Tr. at 12.

constituted irreparable harm); Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., 423 F. Supp. 3d 1066, 1074 (D. Colo. 2019) (rejecting argument that burdens of litigation pending appeal of remand to state court, including "burdensome discovery," constituted irreparable harm); Eshelman v. Puma Biotechnology, Inc., 2017 WL 9440363, at *4 (E.D.N.C. May 24, 2017) (rejecting contention that "burden of continued litigation" pending appeal was irreparable harm); In re Calabria, 407 B.R. 671, 680 (Bankr. W.D. Pa. 2009) (cost of litigation pending the completion of interlocutory appeal of dismissal ruling was not irreparable harm); In re Young, 2006 WL 3690678, at *2 (Bankr. M.D.N.C. Dec. 12, 2006) (rejecting argument that cost of state court litigation as a result of order granting relief from automatic stay was irreparable injury).

42. Nor does the ACC substantiate its allegations of harm with actual evidence, as it must to obtain a stay pending appeal. See Schweiger, 578 B.R. at 738 (faulting movant for failing to provide evidence with respect to irreparable harm); Braxton, 516 B.R. at 798 (refusing to find irreparable harm where allegations were "speculative"); In re Deluxe Cleaners of Durham, Inc., 2010 WL 4810822, at *2 (Bankr. M.D.N.C. 2010) (refusing to find irreparable harm when movant "provided no evidence"); Allen, 590 B.R. at 356 (not sufficient for movant to allege "some possibility of irreparable injury") (punctuation and citation omitted).

43. Rather, the ACC relies on the same generalized and speculative allegations of burden (supported by no declaration or other competent evidence) that the Court rejected in granting the PIQ Motion. See ACC Br. ¶ 31; 3/4/21 Tr. at 12 (finding that Questionnaire is "consistent with [prior] questionnaires, if not more finely well[-]tuned in light of experience gained from prior cases" and noting that Debtor took steps to minimize burden by allowing responses by attaching documents and establishing online portal and a fillable PDF). After the

Court's ruling, the Debtor further decreased the burden of the Questionnaire by implementing numerous changes proposed by the very parties—the ACC and certain law firms—that now seek a stay.

44. The lack of irreparable harm here is especially clear because the ACC admits the Debtor could obtain the discovery sought in the Questionnaire by other means. See ACC Br. ¶ 32 ("[T]he Debtor is in no way precluded from obtaining the information from other sources."). Although all of these alternative means (for example, a bar date or a Lone Pine order) would cause undue burden, expense, and delay—and the Court correctly held that the Questionnaire is preferable and proper—the possibility of other pathways to this discovery confirms that the PIQ Order does not subject claimants to extraordinary burdens or impose irreparable harm. See Bd. of Cty. Commissioners, 423 F. Supp. 3d at 1074 (rejecting claim of irreparable harm from discovery on remand to state court, in part because "Defendants would be subject to similar discovery if they were proceeding in federal court"). Rather, claimants are simply being asked to provide the basic information about their claims—information of indisputable importance to this bankruptcy case—in an efficient way that will cause a minimum of delay and thus will serve the best interests of all constituencies. And, even if the PIQ Order were somehow overturned, the claimants would have to answer the same discovery, albeit by more burdensome means. There is not and cannot be irreparable harm.

III. Granting a stay will substantially injure the Debtor

45. In contrast to the speculative harms upon which the ACC relies, a stay of the PIQ Order pending appeal "will substantially injure" the Debtor, Allen, 590 B.R. at 356, by depriving it of the discovery it and its experts need for numerous purposes, including estimation, and without which the Debtor would be denied due process. Estimation Order ¶¶ 10, 11.

46. The ACC argues there will be no substantial injury to the Debtor because "[a] stay would not necessarily halt other preparations related to the estimation proceeding, and parties could continue to prepare pending resolution by the District Court." ACC Br. ¶ 32.

47. But the ACC fails to address the practical consequences a stay would have for the overall schedule established by the Estimation CMO. Even a brief stay of the PIQ Order would seriously prejudice the Debtor's ability to prepare and present its estimation case. As the Debtor stated at the March 29 hearing, the four months between the receipt of Questionnaires and the current expert report deadline is "the minimum period of time the experts would need to review and analyze the data coming in from the PIQs." 3/29/21 Tr. at 10-11 (statement of Mr. Gordon). In part, this is because claimants may answer the substantive parts of the Questionnaire by attaching documents (an important feature of the Questionnaire that minimizes the burden on claimants and counsel), and the Debtor's experts will need time to process and analyze those documents. Thus, the ACC's requested stay, in light of the deadlines in the Estimation CMO, would prejudice the Debtor's ability to prepare and present its case and would deny the Debtor due process. See 3/4/21 Tr. at 15 (holding "all parties are entitled to due process in this and any proceeding in this court").

48. A stay of the PIQ Order coupled with the ACC's proposal that the estimation process nonetheless continue would amount to a *de facto* overturning of the PIQ Order. Indeed, the ACC appears to contemplate exactly that, reviving the proposal it made during the briefing and argument that instead of a Questionnaire, "the parties and their respective experts evaluate the available information—including the Debtor's multitude of claims files from approximately 40 years of defending in the tort system—without the Questionnaires." ACC Br. ¶ 32. The Court determined that requiring Bestwall to consult these files before being permitted to seek complete

and up-to-date information from claimants and their counsel was not "practical, feasible or efficient." 3/4/21 Tr. at 11.

49. If a stay of the PIQ Order were entered, basic fairness would demand a delay in the estimation proceeding and its associated deadlines, including the fact discovery and expert report deadlines, to ensure that the Debtor and its experts have the needed information in time to analyze it and use it in the estimation proceeding. Otherwise, the Debtor would be forced to proceed without the basic information the Court determined it needs to present its case. The schedule the Court approved just a few weeks ago with the consent of all parties would be dramatically altered. The Estimation Proceeding, which the Court authorized six months ago, would be delayed for as long as it takes the ACC to prosecute its interlocutory appeal of the PIQ Order. And, any further progress in the case would likely also be delayed. 10/22/20 Tr. at 17-18 (Court concluding that "the only way forward for the case at this point is estimation").

50. If the Debtor sought to "obtain[] the information from other sources" while a stay is in place, as the ACC suggests, ACC Br. ¶ 32, this too would cause delay in the estimation schedule. The Court recognized that the Questionnaire was the "most efficient way to proceed and avoid undue burden." 3/4/21 Tr. at 8. Other alternatives—such as a bar date and proofs of claim, or a Lone Pine order—would entail more delay and burden than the Questionnaire.[6]

51. Finally, a stay pending appeal would cause substantial harm by interrupting a Questionnaire process that is already underway and for which the Debtor has incurred significant expense. As required by the PIQ Order, the claims agent served the Questionnaire and PIQ Order

[6] As the Debtor has noted, the Court could authorize entry of a Lone Pine order as a "special procedure[]" under Rule 16(c) of the Federal Rules of Civil Procedure, requiring claimants to provide basic facts about their claims, a common practice in mass tort cases, including asbestos cases. See Dkt. 1565, at 16-17 n.17 (summarizing law). The Court also could impose a bar date requiring all claimants to file a proof of claim; mandate a specialized proof of claim form; and also permit interrogatories pursuant to Civil Rule 33. Both of these options would take more time than the Questionnaire process already in place.

on more than 800 law firms more than two weeks ago. The claims agent and other professionals have incurred substantial time and expense developing the fillable PDF, the Upload Option, and the Fillable Form Option, all of which are now operational. The claims agent has already received Questionnaire responses, and given that almost one month of the four-month response time has elapsed, law firms and/or claimants have undoubtedly already begun the work necessary to respond to the Questionnaire.

52. Entering a stay at this point, after firms and claimants have already been told to respond and begun responding, would cause only needless confusion due to the starting and stopping of the Questionnaire process. It would further likely result in additional time and expense for the Debtor and the claims agent (as they respond to inquiries from law firms and claimants) and also law firms and claimants (as they cease their information-gathering efforts only to recommence them once the process inevitably restarts).

53. The ACC cannot carry its burden of showing a lack of substantial harm to other parties.

IV. A stay is not in the public interest

54. Finally, the public interest weighs against staying discovery that is necessary to the efficient and expeditious administration of this bankruptcy case. “The public interest favors . . . the expeditious administration of bankruptcy estates.” In re Brown, 354 B.R. 100, 113 (Bankr. N.D.W. Va. 2006).

55. The ACC identifies no public interest factors that weigh in favor of a stay, but merely repeats its arguments against the PIQ Order and couches them as implicating the public interest. ACC Br. ¶¶ 35-39. This is legally insufficient to meet its burden on this factor. See

Braxton, 516 B.R. at 799 (disregarding alleged public interest factors that simply "go to the merits of [movant's] arguments on appeal").

V. The Court should not suspend proceedings with respect to the PIQ Order or estimation more generally

56. In the alternative, the ACC requests that the Court suspend proceedings pursuant to Bankruptcy Rule 8007(e) with respect to "the implementation and enforcement of orders based on or related to the PIQ Order." ACC Br. ¶ 40. "In considering a motion to suspend other proceedings in the case under Rule 8007(e), courts have applied the same standards as those for imposing a stay pending appeal." Franklin, 2020 WL 603900, at *4-5. Thus, this request fails for the same reasons the ACC's request for a stay fails. Notably, suspending the PIQ Order would have the same harmful effects as a stay pending appeal, depriving the Debtor of discovery it needs and effectively requiring an indefinite postponement of the estimation proceeding that the Court has ordered to advance this chapter 11 case.

Conclusion

57. For all of these reasons, the Debtor respectfully requests that the Court deny the ACC's Stay Motion.

Dated: April 20, 2021
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

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EXHIBIT B

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

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September 22, 2022

VIA CM/ECF Notification

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Re: Paddock Enterprises, LLC (Case No. 20-10028)
Letter Ruling Re: ECF 1518, 1543

Before me are two motions regarding three separate debtors in bankruptcy proceedings in North Carolina—Bestwall LLC,[1] Aldrich Pump LLC[2] and DBMP LLC.[3] Each of these three North Carolina debtors seek documents from Paddock Enterprises, LLC (or its agent), currently, a reorganized debtor in a case before me. Paddock as well as the Owens-Illinois Asbestos Personal Injury Trust ("O-I Trust"), the Owens-Illinois Asbestos Trust Committee ("O-I Committee") and the Future Claims Representative ("FCR") oppose the document requests.

Background[4]

Bestwall and Aldrich Pump separately seek electronic information and data contained in any claims database within Paddock's possession, custody or control "whose purpose is or was to track mesothelioma claims asserted against Paddock or Owens-Illinois before the Petition Date."[5] Both Bestwall and Aldrich Pump seek this information by way of subpoenas and after certain proceedings in their respective bankruptcy cases. While the circumstances of their separate bankruptcy cases differ, the differences do not affect this ruling.

Separately, Bestwall and DBMP seek production of ballots that were submitted in the Paddock bankruptcy case in connection with confirmation of Paddock's Plan.[6]

On July 27, 2022, Paddock filed Reorganized Debtor Paddock Enterprises, LLC's Motion for a Protective Order in Connection with Subpoenas and Requests for Claims-Related Information, or, in the Alternative, Motion to Quash [ECF 1518]. On August 5, 2022, the O-I Trust, O-I Committee and the FCR filed their own Joinder and Joint Motion of the Owens-Illinois Asbestos Personal Injury Trust, the Owens-Illinois Trust Advisory Committee and the Court-Appointed Future Claimants' Representative for a Protective Order or to Quash

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[1] *In re Bestwall LLC* (Bankr. W.D.N.C. Case No. 17-31795) (LTB).
[2] *In re Aldrich Pump LLC, et al.* (Bankr. W.D.N.C. Case No. 20-30608) (JCW).
[3] *In re DBMP LLC* (Bankr. W.D.N.C. Case No. 20-30080) (JCW).
[4] I am writing for the parties and assume familiarity with the greater background and legal arguments made in the filings.
[5] Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding) in Bestwall bankruptcy case, Exh. A, definition of "Claims Data;" *see also* Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding) in Aldrich Pump bankruptcy case seeking documents regarding "individuals in the 'Matching Key' . . . identifying individuals whose mesothelioma claims the Debtors or their predecessors resolved. . ."
[6] Third Amended Plan of Reorganization for Paddock Enterprises, LLC Under Chapter 11 of the Bankruptcy Code [ECF 1400].

Subpoenas [ECF 1543], which, together with the Reorganized Debtor's motion is referred to herein as the "Motion to Quash."

Paddock's self-titled designation as a Reorganized Debtor is correct. Paddock emerged from bankruptcy on July 8, 2022, when the Plan went effective. Notwithstanding, this saga did not begin post-bankruptcy. For Bestwall, it began at least in March 2022 when Bestwall served a subpoena on Paddock. For Aldrich Pump, it began in April 2022 when Aldrich Pump filed a motion in its bankruptcy case seeking permission to serve subpoenas. Notwithstanding, neither Paddock, the Paddock asbestos claimant committee or the Paddock FCR took action in this case prior to filing the Motion to Quash.

A. The Subpoenas

Jurisdiction and Standing

Before getting to the substance of the Motion to Quash, I must determine whether I have jurisdiction to hear it. Bestwall and Aldrich Pump argue that I do not have jurisdiction over the Motion to Quash because only the compliance court, as that term is used in Rule 45, has jurisdiction to rule on any motions seeking to quash or otherwise impact a subpoena. Paddock argues that I have jurisdiction because the Motion to Quash is related to its bankruptcy case as I must interpret the Plan and/or Plan documents, specifically, the Asbestos Records Cooperation Agreement [ECF 1295-2]. The O-I Trust, the O-I Committee and the FCR also argue that under the Barton Doctrine,[7] only this court can authorize discovery against Paddock, which they argue is an estate fiduciary.

On August 31, I held an oral argument during which the jurisdictional issues were discussed at length. I continue to believe, as I expressed then, that Rule 45 is not jurisdictional in nature. Rules do not confer jurisdiction. As the Supreme Court noted (albeit in a different context), Bankruptcy Rule 9030 and Civil Rule 82 both provide that the rules do not extend or limit the jurisdiction of the courts.[8] Instead, rules prescribe the method by which jurisdiction is to be exercised. Notwithstanding, rules can be relaxed when the ends of justice so require, but it appears relaxing the rules should be done sparingly.[9] I say "apparently" because no one briefed this topic.

Under Rule 45, the compliance court is the court charged with addressing a motion to quash. Again, while I had no briefing on the specific point, it does appear that the party issuing the subpoena unilaterally determines (certainly in the first instance) the court of compliance within the guardrails set in subsection (c). For a document request, a subpoena may command a production of documents, including electronically stored documents, within 100 miles of where

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[7] *Barton v. Barbour*, 104 U.S. 126 (1881); *see e.g. In re: Eagan Avenatti, LLP*, 637 B.R. 502 (Bankr. C.D. Cal. 2022).

[8] *Kontrick v. Ryan*, 440 U.S. 443, 124 S. Ct. 906, 914 (2004).

[9] *Schacht v. United States*, 398 U.S. 58, 90 S. Ct. 1555 (1970); *Kontrick*, 124 S. Ct. at 916.

the person resides, is employed or regularly transacts business. The place of service specified in the subpoenas issued by counsel for both Bestwall and Aldrich Pump lies within the Eastern District of Michigan.[10]

None of the cases cited by Paddock convince me that I, as the court sitting in Delaware and not the compliance court under Rule 45, can rule on the motion to quash if I were relying solely on Rule 45 for authority. In *SBN Fog*, Judge McNamara does state: "this Court, as the 'issuing court' simply is not authorized by any statute or rule of civil or bankruptcy procedure to interject itself into a discovery dispute involving the production of documents where the 'place of compliance' is not within Colorado *and the respondents are not the Debtors*."[11] But, the highlighted part of that sentence is, at best, *dicta*, as the party serving the subpoena was the committee in the case before him and the subpoenaed parties were "non-parties" to the bankruptcy case. He, too, rejects, the idea that Rule 45 is jurisdictional, and frames the issues as one of authority. I agree with Judge McNamara in that respect and conclude that Rule 45 does not provide me with authority to adjudicate the Motion to Quash.

Paddock alternatively argues that its motion is really one for a protective order under Rule 26. But Paddock does not state how that rule provides authority for me to entertain the subpoenas. Rule 26 governs discovery *among parties* and subsection (c), not surprisingly, provides that a *party* from whom discovery is sought may seek a protective order in the court where the action is pending. But, this is not discovery among parties and the Bestwall and Aldrich Pump bankruptcy cases are not pending here.

Perhaps recognizing this, Paddock also argues that jurisdiction lies in this court as the subpoena is "related to" its own bankruptcy case. In its reply,[12] Paddock argues that this is not a routine discovery dispute unrelated to the chapter 11 case, but the discovery seeks information of the claims that were the very reason Paddock filed its case such that the "close nexus" required by *Resorts International*[13] is the information itself. Paddock further argues that the "interplay" of the subpoenas with the Plan, confirmation order and Asbestos Cooperation Agreement provides the court with subject matter jurisdiction. The O-I Trust, the O-I Committee and the FCR join and adopt these arguments. They also argue that the Barton Doctrine required the North Carolina debtors to come to this court to seek permission to serve the subpoenas on Paddock. The North Carolina debtors assert this is a simple third-party discovery dispute.

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[10] While this is somewhat gameplaying because Paddock's headquarters are in Ohio, it is not disputed that Paddock's headquarters is within 100 miles of the court. So, while perhaps not living up to the spirit of the rule, the subpoenas appear to be in technical compliance with the letter of the rule. Whether a court in Ohio would believe it could rule on the Motion to Quash, I make no comment.

[11] *In re SBN Fog Cap II, LLC*, 562 B.R. 771, 776 (Bankr. D. Colo. 2016) (emphasis supplied).

[12] Reorganized Debtor Paddock Enterprises, LLC's Reply in Support of Motion for a Protective Order in Connection with Subpoenas and Requests for Claims-Related Information, or, in the Alternative, Motion to Quash.

[13] *In re: Resorts Intern., Inc.*, 372 F.3d 154, 167 (3d Cir. 2004).

I'm not prepared to find in this case that the Barton Doctrine applies as I need not do so. While it's a close call, I conclude that I have subject matter jurisdiction to hear the Motion to Quash. No one argued that there is not jurisdiction over third party discovery if a subpoena is served on a debtor during the course of the case.[14] But, since the Motion to Quash was served post-confirmation, I need to explore that as well. In *Resorts International*, the Third Circuit states:

> whether a matter has a close nexus to a bankruptcy plan or proceeding is particularly relevant to situations involving continuing trusts, like litigation trusts, where the plan has been confirmed, but former creditors are relegated to the trust res for payment on account of their claims. To a certain extent, litigation trusts by their nature maintain a connection to the bankruptcy even after a plan has been confirmed. Matters that affect the interpretation, *implementation*, consummation, execution, or *administration* of the confirmed plan will typically have the requisite close nexus.[15]

The Court further states:

> where there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, *implementation*, consummation, execution or *administration* of a confirmed plan or incorporated litigation trust agreement, retention of post-confirmation bankruptcy court jurisdiction is normally appropriate.[16]

Looking only at the subpoenas themselves, one could argue that these are garden variety discovery disputes, which affect neither the implementation nor administration of a confirmed plan or incorporated trust agreement. But, that is not the case. The timing of the subpoenas, the

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[14] Judge Whitley seems to take this position. In the DMBP bankruptcy case, Judge Whitley ruled (over objection) that he was the appropriate court to hear the DMBP asbestos committee's motion to quash Bestwall's subpoena issued to DMBP. Counsel for DMBP explained that while the bankruptcy court for the Western District of North Carolina (through Judge Beyer) was the issuing court, this district (through Judge Whitley) was not the compliance court. *In re DMBP, LLC*, May 26, 2020 Hr'g Tr. 104:13-22. Yet, Judge Whitley ruled:

> All right. Split decision on this one. I generally agree with the ACC when it comes to the, the preliminary arguments that you, are addressed in the joint reply that they filed here. I think this is an appropriate court to hear this motion. I think it is somewhat akin to what we're seeing in the other motions where the first shot comes to the bankruptcy court that has the case and the second goes to the compliance court. In this circumstance, Judge Beyer's got her issues and I've got mine and we have to decide them both, but the bottom line is if you are asking for relief that involves tasking the principals of a company and its professional and its data, then I think it's appropriate to put it here. So I agree with that [the Committee position].

Id. at 112:20-113:7. He also went on to find that the asbestos claimant's committee in the DMBP case had standing to be heard on subpoenas issued to DMBP. *Id.* at 112:8-21.

[15] *Resorts*, 372 F.3d at 167 (emphasis supplied).

[16] *Id.* at 168-69 (emphasis supplied).

subject matter of the subpoenas, the confidentiality and privilege issues raised by the subpoenas, and even the issue of standing regarding who can oppose the production of documents show that the subpoenas affect the implementation and administration of the recently-confirmed Plan which is in its nascent stages.

Having reviewed the Asbestos Records Cooperation Agreement and heard the testimony, I find the following. The Reorganized Debtor is required to provide the Trust with Access to the Asbestos Records (as both capitalized terms are defined in the agreement). The database that is the subject of the subpoenas is part of the Asbestos Records. For electronic records, such as the database, the Asbestos Records are to be provided by electronic media, electronic transfer or by direct access to a database. There are only three persons currently at O-I Glass who have a working knowledge of the database, each of whom are high level employees within the organization. The Reorganized Debtor is several weeks into the Access process under the Asbestos Records Cooperation Agreement, and it will take at least a few more weeks to complete the process. At this point in time, with respect to time devoted to Paddock, those persons are best focused on the transition of the records to the Trust, not third-party subpoenas. I conclude that the requests in the subpoena affect the implementation and administration of the Plan and the related litigation trust agreement.

I also conclude that the O-I Trust, the O-I Committee and/or the FCR have standing to object to the subpoenas. While the Reorganized Debtor still possesses the database (and may still possess and/or maintain the database in the future), per paragraph 5(a) of the Asbestos Records Cooperation Agreement, on the Effective Date, the Trust took ownership of all privileges belonging to the Debtor in the Asbestos Records. The uncontroverted testimony is that some of the contents of the database were covered by work product and many of the settlement agreements reached between Paddock and claimants contained confidentiality provisions. So, the protection of the database is not an academic exercise vis-à-vis the O-I Trust.[17]

Burden

The discovery requests now seek more stream-lined information on fewer claimants than originally requested. As I understand it, the information requested is:

Fields in the data base, to the extent they exist, of:

- Law firm or firms representing the Injured Party or Related Party
- Jurisdiction and state of filing
- Claim status (e.g. settled, dismissed, verdict, settlement pending payment)
- Date of Resolution
- Date on which settlement paid

[17] It may not have been necessary for the O-I Committee and the FCR to join with the O-I Trust in objecting to the subpoenas, but I find no harm in this instance in permitting them to be heard.

- Date exposure began
- Date exposure ended
- Manner of Exposure
- Occupation and industry when exposed
- Products to which Injured Party was exposed

Judge Beyer and Judge Whitley have already determined in their respective cases that the requested discovery is relevant. I will not second guess those determinations. The question before me is the burden of production and whether that either outweighs the relevancy determination or justifies imposition of expenses on the party issuing the subpoena. Both Bestwall and DMBP have already offered to pay the reasonable costs of the discovery.

Paddock argues that the burden of production is so significant that the discovery should be quashed in its entirety. While I do agree based on the testimony that there is a significant burden, I do not believe that it outweighs the relevance determinations. My conclusion that the burden is significant is based on Mr. Burns's testimony that the only three knowledgeable persons have major responsibilities for O-I Glass, and that in his experience using the database as the person in charge of Paddock's legacy liabilities, it takes five minutes to manually match claimants. My math shows that if a manual match is necessary for all 18,000 claimants, that time commitment is 900 hours.

Michelle Potter of KCIC testified that the discovery is not burdensome at all. She stated that she and her firm have handled these types of claimant searches and matches for many asbestos defendants over the years and that KCIC's knowledge of databases and ability to write programs to minimize manual matching significantly limits any burden. The North Carolina debtors suggest that Paddock should outsource the search and so costs should be minimal.

Ms. Potter was offered by Bestwall as an expert on how defendants in asbestos litigation typically access and store data on claims. Paddock objected to this testimony coming in as not relevant because Ms. Potter admittedly has no personal knowledge regarding Paddock or how it stores or maintains its database (other than what she has learned from listening to Mr. Burns's testimony). I heard Ms. Potter's testimony, but reserved on whether I would accept it. I declined to hear testimony offered by Aldrich Pump on its own experience responding to a nearly identical subpoena.[18] Having reviewed Ms. Potter's testimony I agree with Paddock that it is irrelevant as she has no knowledge of Paddock's database or practices. But, even if I were to accept her testimony, it would not change the result.

Mr. Burns's testimony was unrefuted. Except with respect to the task it is currently undergoing pursuant to the Asbestos Records Cooperation Agreement, Paddock has never exported the entire contents of the database to any person, including a third-party vendor. He

[18] Bestwall and DMBP are represented by the same law firm. They apparently served subpoenas on each other and had no objection to responding.

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testified that Paddock has never shared claimant level data that wasn't anonymized or aggregated with vendors or even experts. Mr. Burns also testified to the potential risk of such endeavors given Paddock's contractual confidentiality obligations and the nature of the data. I find this testimony significant to the dispute before me.

Bestwall and Aldrich Pump suggest that Paddock should be forced to outsource the matching exercise, or, at least, the reasonable cost should be determined or capped by what a vendor would charge to do it. The North Carolina debtors also emphasize that the information they want is not confidential. But, the database itself unquestionably contains personally identifiable information—social security numbers, names, birthdates, addresses as well as perhaps some medical information. In the circumstances here, where Paddock has not permitted access to that information by persons outside of its company, I would neither compel Paddock to outsource its response to discovery (even assuming I could) nor cap any expense of responding to the cost of retaining a third-party vendor. While some asbestos defendants may use the services of firms like KCIC, the evidence is that Paddock did not. Further, the North Carolina debtors suggest that five minutes per claimant to do a manual review is akin to the Cadillac of manual review. But, when asked, the North Carolina debtors confirmed that they are not content with a simple social security match. Rather, Bestwall and Aldrich Pump require further review and, perhaps, a meet and confer with Paddock in circumstances where there is not a perfect social security match. Mr. Burns also testified that certain of the information sought is not found in one field or the field may contain additional information. So, there is no question that a manual review will be necessary. I find credible Mr. Burns's testimony that a manual match will take five minutes per claimant.

On the other hand, responding to third-party discovery is a cost of doing business in the United States, so, I will not quash the subpoenas. Paddock will, however, be entitled to the reasonable expense necessary to respond to them. I will be the judge who determines what that reimbursement will be. No one has briefed me on how that should be determined, particularly in a situation where the time to respond to the subpoena diverts a high-level employee from otherwise necessary duties.[19]

As for the confidentiality of the information, I conclude that does not prevent discovery. Instead, procedures need to be put in place to ensure that the information is kept confidential and used only for legitimate purposes. It appears that procedures have already been put in place in the Bestwall and Aldrich Pump bankruptcy cases as modified following Chief Judge Connolly's *Bestwall* ruling. As such, there are at least three judges that have reviewed confidentiality protections. Unless Paddock the O-I Trust, the O-I Committee or the FCR brings me a specific objection to the existing protections in those cases, I will deem those protections sufficient.

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[19] If Paddock or O-I makes a business decision to engage a third-party vendor to do the matching exercise, of course it may do so.

B. The Ballots

The parties did not spend as much time on this issue in their papers and it was not the main focus of argument. Both Bestwall and DMBP conceded jurisdiction in this court.

The parties briefed this issue on the premise that ballots are public records. The authority for this position is found in transcripts in certain asbestos cases cited in the filings. The judges in those cases base their statements on the proposition that the balloting firm is an agent of the clerk's office, collecting ballots in its stead.

Having given some though to this reasoning, I believe this premise is incorrect as a general matter, but it certainly is in this case. As is typical, on the first day of the Paddock case, Debtors filed a motion to retain Prime Clerk LLC as claims and noticing agent.[20] That request was brought pursuant to 28 U.S.C. §156(c), which permits the Clerk of the Court to utilize facilities or services for the provision of notices, dockets and other administrative information to parties in bankruptcy cases at the expense of the estate. Our Local Rule 2002-1(f) requires the retention of a claims and noticing agent in certain circumstances and specifies the duties that can be delegated to a claims agent. As is not atypical, within the first few weeks of the case, Paddock also sought to retain Prime Clerk as its administrative agent. That request was brought under § 327 and related sections of the Code.[21]

Duties as a solicitation agent, tabulation of votes and preparing reports to be filed with the court in connection with confirmation fall in this second engagement, under § 327, in which Prime Clerk is the debtor's agent. The services to be provided per that application are specifically delineated as soliciting, balloting and tabulation of votes, among other things.[22] This conclusion is consistent with my experience in smaller cases in which ballots are mailed to the debtor and the debtor provides a certification regarding the outcome of the vote. The clerk plays no role in these cases.

Given my conclusion, I do not have the benefit of the parties' respective thoughts with respect to the discoverability of ballots or how to properly address personally identifiable

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[20] Application of Debtor for Appointment of Prime Clerk as Claims and Noticing Agent [ECF 5].

[21] Application of Debtor for Entry of Order Authorizing Employment and Retention of Prime Clerk LLC as Administrative Advisor Effective as of the Petition Date [ECF 55].

[22] Per the application, the engagement also includes "providing such other processing, solicitation, balloting and other administrative services described in the Engagement Agreement, but not included in the Section 156(a) Application as may be requested by the Debtor, the Court or the Office of the Clerk of the Court." The Court certainly did not request any such services and there is no indication that the Office of the Clerk of the Court did either. It is not clear to me whether this provision is appropriate in a § 327 retention application.

information that is contained therein.[23] The parties should confer regarding a consensual resolution or a schedule for further short submissions addressing this topic.

Very truly yours,

Laurie Selber Silverstein

LSS/cmb

[23] Having reviewed the form of ballot approved in connection with solicitation [ECF 1216-2], it requires name, address, birth date and the last four digits of a social security number. It also contains an indication of disease level.