Docket #0502 Date Filed: 1/14/2021

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re: ALDRICH PUMP LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 20-30608 (JCW)

OBJECTION OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS TO THE JOINT MOTION OF THE DEBTORS AND THE FUTURE CLAIMANTS' REPRESENTATIVE FOR AN ORDER (I) ESTABLISHING A BAR DATE FOR CERTAIN KNOWN ASBESTOS CLAIMS, (II) APPROVING PROOF OF CLAIM FORM, (III) APPROVING PERSONAL INJURY QUESTIONNAIRE, (IV) APPROVING NOTICE TO CLAIMANTS, AND (V) GRANTING RELATED RELIEF

The Official Committee of Asbestos Personal Injury Claimants of Aldrich Pump LLC and Murray Boiler LLC (the "Committee") hereby objects (the "Objection") to the *Joint Motion of the Debtors and the Future Claimants' Representative for an Order (I) Establishing a Bar Date for Certain Known Asbestos Claims, (II) Approving Proof of Claim Form, (III) Approving Personal Injury Questionnaire, (IV) Approving Notice to Claimants, and (V) Granting Related Relief* [Dkt. No. 471] (the "Bar Date/PIQ Motion"). In support of the Motion, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors and the Future Claimants' Representative (together, the "Movants") seek to impose massive and improper discovery burdens on current asbestos claimants for ill-defined and illegitimate purposes. First, they seek a bar date that would require at least 16,500 asbestos claimants—whose identities and claims are almost all already known to the Debtors—to file their

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

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asbestos claims, even though no one contemplates that such claims will ever be—or even legally could be—adjudicated in this Court. They ask this Court to force those claimants to do so through a non-standard proof of claim form containing wholly inappropriate and alien requirements specifically designed to prevent asbestos plaintiffs with valid claims from completing the form and complying with the bar date. And they further ask this Court to require any claimants who successfully navigate this procedural gauntlet to produce potentially hundreds of answers and documents in response to a "questionnaire" regarding the merits of their claims, which this Court will never adjudicate, while denying such claimants due process and discovery rights to which they would otherwise be entitled.

The Movants offer no legitimate purpose for all this. Indeed, while the Movants assert that the requested relief will provide "basic information" about pending asbestos claims and "greater certainty" about the Debtors' asbestos liability, this appears to be little more than pretext. The Debtors already have information about pending asbestos claims and have demonstrated that they have developed a keen understanding of their asbestos liability from their more than 35 years in the tort system. And the Movants do not provide any facts to support that these Cases cannot proceed toward resolution unless their requested relief is granted.

Whether it is the Movants' intention or not, the only purpose that the requested relief would serve is to unfairly burden, bar, disenfranchise, and harass holders of valid, pending asbestos claims. Indeed, much of their requested relief violates plain Bankruptcy Rules and precedent designed to avoid unduly prejudicing claimants. The Court is under no obligation to set a bar date or provide the Movants with any of their requested relief when doing so would serve no purpose, much less when doing so would unduly prejudice asbestos claimants. To grant the requested relief would lead to increased litigation over discovery, stifle the asbestos claimants' due process rights

and—as even the Movants' recognize—require the establishment of additional bar dates and bar date procedures. The Court should decline the Movants' invitation to establish a bar date or questionnaire process, particularly at this stage of the case.

RELEVANT BACKGROUND

1. On August 28, 2020, the Debtors filed a motion [Dkt. No. 297] seeking entry of an order directing all persons with mesothelioma or lung cancer claims against one or both of the Debtors to complete and submit a comprehensive and onerous questionnaire about their underlying asbestos-related claims. Rather than respond to discovery issued by the Committee on this motion, the Debtors chose to withdraw the pleading on October 7, 2020, without prejudice.

2. On December 14, 2020, the Debtors and Joseph W. Grier, III, as the Future Claimants' Representative (the "FCR"), filed the instant Motion, including as exhibits a proposed claim form (the "Modified Claim Form") and a questionnaire relating to the claimed personal injury (the "PIQ"). The intent is for the bar date to be noticed to the Pre-Petition Asbestos Creditors,[2] and for these creditors to file the Modified Claim Form and PIQ to maintain any hope of recovery from any future asbestos trust in this allegedly full-pay case.

3. The PIQ is particularly onerous and represents an improper extension of Bankruptcy Rule 2004 as it seeks to avoid the protections provided to discovery counterparties by the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.

[2] Any capitalized term used in this Objection that is not defined shall have the meaning attributed to it in the Bar Date/PIQ Motion.

ARGUMENT

I. THE COURT IS NOT REQUIRED TO ESTABLISH, AND THE DEBTORS HAVE NOT DEMONSTRATED A SUFFICIENT REASON FOR ESTABLISHING, A BAR DATE IN THESE BANKRUPTCY CASES

A. The Court Is Not Required to Set a Bar Date in These Cases

4. There is no requirement—under Bankruptcy Rule 3003(c)(3) or otherwise—for a bankruptcy court to establish a bar date for all claims in every case. *See, e.g.*, *In re Congoleum Corp.*, No. 03-51524, 2008 WL 314699, at *4 (Bankr. D.N.J. Feb. 4, 2008) (holding that Rule 3003(c)(3) is not mandatory and denying motion for bar date for asbestos claims); *In re Eagle-Picher Indus., Inc.*, 137 B.R. 679, 680 (holding Rule 3003(c)(3) is not mandatory and that "the court may dispense with [a bar date] in a given case"). While bar dates may be a routine feature of most bankruptcy cases (and the Movants certainly rely on Bankruptcy Rule 3003(c)(3) to argue that bar dates are mandatory in all cases[3]), bar dates are not routine in asbestos-related bankruptcies.[4]

5. Asbestos bankruptcies present different considerations. Specifically, asbestos-related claims will be channeled to and resolved by a post-confirmation trust in a successful section 524(g) bankruptcy case. There is no need for a bar date because gathering specific information about individual claims takes shape following the bankruptcy case itself and is generally left to the post-confirmation trust. In recognition of this, bankruptcy courts administering asbestos bankruptcy cases have routinely—indeed, almost exclusively—declined to establish bar dates for asbestos claims. In *In re Keene Corporation*, a pre–section 524(g) asbestos bankruptcy case that

[3] Bar Date/PIQ Motion, ¶ 13.

[4] It should likewise be noted that the Movants are requesting that the Court set the bar date 46 days after entering its order approving a bar date. The Movants provide no justification—especially at such an early stage of this case—for such a short period of time. The short filing period appears designed to artificially limit the ability of asbestos claimants to pursue their claims.

Movants cite for the proposition that a bar date is "an integral part of a bankruptcy case,"[5] the court set a bar date that did not apply to asbestos personal injury claims. 188 B.R. 903, 906 (Bankr. S.D.N.Y. 1995).[6]

6. Bankruptcy Rule 3003(c)(3) itself supports a determination that a bar date is not required in asbestos personal injury bankruptcy cases, including the Debtors' cases. While Bankruptcy Rule 3003(c)(3) states that "[t]he court shall fix . . . the time within which proofs of claim or interest may be filed," it also states that the court "may extend [such] time." The Rule, which imposes no limitation on how long a court may extend such time, would permit a court to extend a bar date indefinitely.[7] Therefore, if the Rule allows the Court to effectively nullify a bar date by extending it indefinitely, then the Rule, as a practical matter, also allows the Court to decline to set a bar date at all. *See Congoleum*, 2008 WL 314699, at *3 ("[T]his Court is satisfied that it has the discretion to either set or decline to set a bar date for proofs of claim.").

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[5] Bar Date/PIQ Motion, ¶ 12.

[6] *See also* Order (I) Establishing Bar Dates and Related Procedures for Filing Proofs of Claim Other Than with Respect to Talc Personal Injury Claims and (II) Approving Form and Manner of Notice Thereof, *In re Imerys Talc Am.*, No. 19-10289 (Bankr. Del. July 25, 2019) [Dkt. No. 881] (exempting asbestos-related personal injury claims from bar date); Order (I) Establishing Bar Dates and Related Procedures For Filing Proofs of Claim Other Than With Respect to Asbestos Personal Injury Claims and (II) Approving Form And Manner of Notice Thereof, *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C. Oct. 30, 2018) [Dkt. No. 661] (exempting asbestos personal injury claims from bar date process); Order Exempting Asbestos Claims and Demands from the January 8, 2019 Claims Bar Date, *In re Duro Dyne Corp.*, No. 18-27963 (Bankr. D.N.J. Dec. 12, 2018) [Dkt. No. 331] (exempting asbestos claims from bar date); Order Granting Debtor's Motion for Reconsideration of Order Entered on December 3, 2015, *In re Geo. V. Hamilton, Inc.*, No. 15-23704 (Bankr. W.D. Pa. Jan. 12, 2016) [Dkt. No. 216] (same); Order Pursuant to Section 501 of the Bankruptcy Code, Bankruptcy Rules 2002(a), 3002, and 3003(c)(3), and Local Rule 2002-l(e) Establishing Bar Date for Filing Proofs of Claim and Approving Form and Manner of Notice Thereof, *In re Yarway Corp.*, No. 13-11025 (Bankr. D. Del. Jan. 12, 2015) [Dkt. No. 720] (same); *In re Armstrong World Indus., Inc.*, No. 00-4471 (D. Del.) (no asbestos claims bar date); *In re Leslie Controls, Inc.*, No. 10-12199 (Bankr. D. Del.) (same); *In re Durabla Mfg. Co.*, No. 09-14415 (Bankr. D. Del.) (same); *see also* Order (A) Establishing Bar Dates and Related Procedures for Filing Proofs of Claim and (B) Approving Form and Manner of Notice Thereof, *In re Mallinckrodt plc, et al.*, No. 20-12522 (Bankr. D. Del. Nov. 30, 2020) [Dkt. No. 667] (exempting mass tort opioid claims from bar date in non-524(g) case).

[7] Courts within the Fourth Circuit have done just that to accommodate mass tort claims arising from personal injuries that, like asbestos injuries, have long latency periods. *Order Granting Emergency Motion of the Committee of Unsecured Creditors to Postpone the January 7, 2014 Deadline for Filing Personal Injury and Wrongful Death Proofs of Claim, In re City Homes III LLC*, No. 13-25370 (Bankr. D. Md. Jan. 6, 2014) [Dkt. No. 236] (extending bar date for lead paint–related claims indefinitely).

7. The Movants cite no authority to the contrary. Instead, the Movants misconstrue the rulings in a number of mass-tort bankruptcies. Among them, the Movants rely upon *In re A.H. Robins Co.*, 862 F.2d 1092 (4th Cir. 1988), asserting that the Fourth Circuit held that a bar date is mandatory.[8] But the *Robins* court only held that, after a bar date had been set, certain claimants were required to file their claims by such date. *Id.* at 1095. Whether a bar date was required to be set in the first place was not an issue that the Fourth Circuit addressed, or was even asked to address, in that opinion.

8. The Movants also point to this Court's decision to set a bar date in *Garlock*.[9] But in *Garlock*, after stating that "bankruptcy law *generally* requires a bar date," the court only set a bar date for a subset of asbestos claims,[10] illustrating that a bar date is not mandatory for all claims in every case.

9. The Movants cite several other cases, some of them asbestos bankruptcies, claiming that the courts there approved of bar dates for mass tort claims because, as the Movants' characterize it, the courts "underst[ood] they are not discretionary."[11] But these cases, at best, stand merely for the unremarkable proposition that a court *may* set a bar date for mass tort claims. Not one of them holds or even suggests that bar dates are not discretionary. For example, the Movants cite the confirmation order in *In re Celotex Corporation*, which states that the court imposed a bar date on asbestos claims in that case, but nowhere even suggests that it was required to do so. *See In re Celotex Corp.*, 204 B.R. 586 (Bankr. M.D. Fla. 1996).

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[8] Bar Date/PIQ Motion, ¶ 14.

[9] Bar Date/PIQ Motion, ¶ 15.

[10] *In re Garlock Sealing Techs., LLC*, No. 10-31607 (JCW), Hr'g Tr. at 6:20-7:15 [Dkt. No. 4347] (Bankr. W.D.N.C. Jan. 26, 2015) (emphasis added); *In re Garlock Sealing Techs., LLC*, No. 10-31607 (JCW) [Dkt. No. 4542] (Bankr. W.D.N.C. Apr. 10, 2015) (only fixing filing date for asbestos-related injuries diagnosed on or before a certain date).

[11] Bar Date/PIQ Motion, ¶ 16.

10. The Movants also rely on *In re Eagle-Picher*, a pre–section 524(g) asbestos bankruptcy case. Interestingly, while the court in *Eagle-Picher* set a bar date for asbestos claims, it concluded a bar date was discretionary and firmly rejected any argument that it was required to set a bar date: 137 B.R. at 680 ("After careful consideration, we have reached the conclusion that while such bar dates are commonly set in Chapter 11 cases, upon good cause shown the court may dispense with one in a given case.").

11. The Movants also rely on *In re Specialty Products Holding Corporation* as support. However, while the *Specialty Products* court was "inclined"[12] to enter an order establishing a bar date that would include asbestos claimants, the court never entered such an order or implemented a bar date for asbestos claims because the debtors put forth a consensual section 524(g) plan and abandoned the bar date effort.[13] In fact, the only bar date ultimately ordered in *Specialty Products* excluded asbestos personal injury claims.[14] Thus, *Specialty Products* also illustrates that a court is not under any mandate to set a bar date for asbestos claims.

12. In other of the Movants' cited asbestos bankruptcies, *W.R. Grace* and *Babcock & Wilcox*, courts initially set bar dates for asbestos claims, but the bar dates were ultimately abandoned or never enforced.

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[12] Hr'g Tr. 40:8-11, *In re Specialty Products Holding Corp.*, Case No. 10-11780 [Dkt. No. 4286] (Bankr. D. Del. Nov. 5, 2013) (excerpt annexed hereto as Exhibit A).

[13] Order Confirming the Joint Plan of Reorganization of Specialty Products Holding Corp, Bondex International, Inc., Republic Powdered Metals, Inc. and NMBFiL, Inc., as Modified, *In re Specialty Products Holding Corp.*, No. 10-11780 (Bankr. D. Del. Dec. 10, 2014) [Dkt. No. 5261]; Findings of Fact and Conclusions of Law Regarding Confirmation of the Joint Plan of Reorganization of Specialty Products Holding Corp., Bondex International, Inc., Republic Powdered Metals, Inc. and NMBFiL, Inc., as Modified, *In re Specialty Products Holding Corp.*, No. 10-11780 (Bankr. D. Del. Dec. 11, 2014) [Dkt. No. 5262].

[14] Order Establishing Bar Dates for Filing Proofs of Claim, Other Than Asbestos Personal Injury Claims, and Approving Related Relief, *In re Specialty Products Holding Corp.*, No. 10-11780 (Bankr. D. Del. Sept. 26, 2014) [Dkt. No. 5021] (entered four years after petition date and following an estimation proceeding on the debtors' asbestos-related liabilities).

- In *Babcock & Wilcox*, the district court initially decreed a bar date in contemplation of pre-confirmation allowance proceedings but eventually recognized that the many thousands of claims submitted would have to be adjudicated individually—an impossible task that the court ultimately refused to undertake.[15] In the face of that reality, the establishment of a bar date was ultimately abandoned.[16]
- In *W.R. Grace*, a bar date was imposed as a means of implementing, for estimation purposes, a questionnaire process as to personal injury claimants who had lawsuits pending as of the petition date. Ultimately, however, the bar date was never enforced. Rather, the debtors and the asbestos claimants committee in *Grace* agreed on a section 524(g) plan that allowed asbestos personal injury claimants to receive a distribution from the section 524(g) trust regardless of whether they filed proofs of claim during the bankruptcy.[17]

13. The Movants do not cite a single authority, much less any binding authority, holding that this Court must set a bar date in these Cases. Rather, the Movants' authorities—along with the overwhelming majority of asbestos bankruptcies—either hold or illustrate that the Court has discretion on whether to set a bar date for asbestos claims in these Cases. *See, e.g.*, *Congoleum*, 2008 WL 314699, at *3 ("[T]his Court is satisfied that it has the discretion to either set or decline to set a bar date for proofs of claim.").

[15] Hr'g Tr. 14:8-16, *In re Babcock & Wilcox Co.*, No. 00-cv-558 (E.D. La. Jan. 25, 2002) (excerpt annexed hereto as Exhibit B); *see also id.* 7:11-11:19.

[16] *See In re Babcock & Wilcox Co.*, 2004 WL 4945985 (Bankr. E.D. La. Nov. 9, 2004), *vacated by* 2005 WL 4982364 (E.D. La. Dec. 28, 2005).

[17] *See In re W.R. Grace & Co.*, 446 B.R. 96, 110 (Bankr. D. Del. 2011), *amended by* 2011 WL 832940 (Bankr. D. Del. Mar. 4, 2011).

B. Setting a Bar Date in These Cases Serves No Legitimate Purpose and the Court Should Decline to Set a Bar Date Here

14. The Court should not require claimants to file proofs of claim by a bar date when doing so would serve no purpose, except to harass asbestos claimants. *See In re Simmons*, 765 F.2d 547, 551 (5th Cir. 1985) ("A proof of claim should be filed only when some purpose would be served."); 4 Collier on Bankruptcy ¶ 501.01[1], at 501-4 (16th 2020) (quoting *Simmons*). And no legitimate purpose would be served by doing so here.

15. In ordinary bankruptcy reorganizations, "[e]stablishment of a claims bar date serves the dual interests of finality and debtor rehabilitation. Without a bar date, it would be impossible to determine with any finality the obligations of the debtor."[18] Setting a bar date generally serves these purposes by allowing "parties to a bankruptcy case to identify . . . those making claims against the bankruptcy estate and the general amount of the claims . . . so that the claims-allowance process may begin . . . ." *In re Hooker Invs., Inc.*, 937 F.2d 833, 840 (2d Cir. 1991).

16. These purposes are out of place in an asbestos bankruptcy, where the claims to be addressed are not a fixed set, but an ongoing stream,[19] and no party is suggesting the impossible task of reducing that stream of claims to finality through allowance proceedings before a plan is confirmed. Moreover, in cases like these where the Debtors claim they have adequate resources to pay all asbestos claims in full, there is no reason to cap the limit of that ongoing stream, especially where the real beneficiary of the bankruptcy is not a debtor subject to any disclosures or transparency, and where there is no business reorganization purpose to be achieved ***for these Debtors***.

[18] 9 Collier on Bankruptcy ¶ 3003.03[4], at 3003–7-8 (16th 2020).

[19] *Informational Brief of Aldrich Pump LLC and Murray Boiler LLC* [Dkt. No. 5], at 7 (noting that approximately forty new mesothelioma claims arise against the Debtors on a weekly basis) (the "Informational Brief").

17. Rather, the Debtors intend to resolve these Cases by channeling all asbestos claimants to a trust pursuant to section 524(g).[20] Thus, asbestos claims will only be finally determined post-effective date as a trust evaluates and pays such claims as they are submitted to the trust. Accordingly, courts have found that a bar date serves no purpose in a section 524(g) bankruptcy and, as to asbestos claims, there is good cause to dispense with it. *See, e.g.*, *Congoleum*, 2008 WL 314699, at *4 (finding concerns generally addressed by bar date "alleviated by channeling asbestos-related claims to a personal injury trust"); *In re Quigley Co.*, 346 B.R. 647, 653 (Bankr. S.D.N.Y. 2006) (noting that requiring asbestos claimants to file claims on Form 10 "is not helpful" and more detailed claim forms are "best postponed for submission to the post-confirmation trust").[21]

18. Indeed, as noted above, in virtually every section 524(g) asbestos bankruptcy, courts have dispensed with setting a bar date for asbestos claims. Where courts have set bar dates for asbestos claimants in section 524(g) cases, they have generally done so only in connection with estimation hearings (*W.R. Grace*), with proposed pre-confirmation allowance proceedings (*Babcock & Wilcox*), or with voting and confirming a proposed plan (*e.g.*, *Garlock*). Even in such cases, however, the utility of a bar date has proved to be doubtful. But here, no estimation proceeding has been ordered, no allowance proceedings have been scheduled, and the Debtors have no plan on file.

C. The Court Should Decline to Set a Bar Date, and Should Certainly Decline to Set a Bar Date at Such an Early Stage of the Case

19. The Court maintains discretion as to *when* (or *if*, as discussed *supra*) to set a bar date; nothing in the Bankruptcy Code, the Bankruptcy Rules, or the *Rules of Practice and*

[20] *See* Bar Date/PIQ Motion at p. 2 ("To achieve prompt creation of such an asbestos trust, the Debtors and the Future Claimants' Representative are committed to commencing negotiations . . . .")

[21] *See, supra*, at n.6 (listing asbestos bankruptcies with no bar date for asbestos claims).

Procedure of the United States Bankruptcy Court for the Western District of North Carolina ("Local Rules") requires a specific deadline by which to set a bar date.

20. Nonetheless, the Movants maintain that a bar date is necessary to provide "greater certainty and further information regarding the Debtors' asbestos claims pool" before any "informed" plan negotiations can commence.[22] The Movants do not, however, offer a single fact to support that they need any more information about their asbestos liability to begin plan negotiations or that a bar date is necessary to obtain such information. All evidence points to the contrary. Therefore, it appears that the real purpose of the Bar Date/PIQ Motion is to introduce additional hurdles that will make it as difficult as possible for claimants to recover for the injurious conduct of the Debtors, the Debtors' predecessors, and their affiliates.

21. The Movants argue that the bar date will allow them to obtain "basic information concerning known mesothelioma and lung cancer claims that were asserted against the Debtors or their predecessors prior to the Petition Date."[23] Accordingly, the proposed bar date targets only "Pre-Petition Asbestos Claims," which the Movants define to include those asbestos claimants suffering from mesothelioma or lung cancer who, pre-petition, either (i) filed a suit against one of the Debtors that remains unresolved or (ii) filed a claim—or could have filed a claim—against the Debtor under a settlement agreement that provided for resolution of such claims without the need for filing a complaint in the tort system.[24]

22. But no bar date is necessary to identify the nature and scope of such Pre-Petition Asbestos Claims, as all—or virtually all—such claims have already been filed in some form against the Debtors or their predecessors. The information and filings available to the Debtors are

[22] *Id.*

[23] *Id.*

[24] Bar Date/PIQ Motion, ¶ 10 n.4.

not stale. On May 1, 2020, the Debtors (as well as the Debtors' predecessors) participated in a corporate restructuring, pursuant to which the Debtors would have analyzed the total pending asbestos-related personal injury liabilities assigned to them as part of the transaction. Less than two months later, on June 18, 2020, the Debtors filed for bankruptcy protection. Six months after filing, the Movants filed this motion.

23. The Debtors should have a firm grasp of the current claims pending against the Debtors because the Debtors claim to have scheduled each Pre-Petition Asbestos Claim and the name of, and counsel for, its holder.[25] The Movants also concede that the Debtors' records already reflect which of those claims are attributable to mesothelioma and which to lung cancer.[26]

24. Further, it is absurd for the Movants to suggest that collecting proofs of claim from holders of Pre-Petition Asbestos Claims is necessary for them to gain certainty about their asbestos liability. The Debtors and their predecessors have more than 35 years of experience in the asbestos tort system.[27] On the Petition Date, the Debtors filed a nearly 40-page Informational Brief that not only detailed the Debtors' view of that history, but also extrapolated therefrom:

- the average settlement payments paid to mesothelioma payments;
- the settlement amounts paid on "roughly 99%" of mesothelioma claims;
- the dismissal rate for mesothelioma claims;
- the average indemnity and defense payments for all asbestos-related claims; and

[25] *See* Bar Date/PIQ Motion, ¶ 13 n.5 ("The Debtors' Schedules listed all Prepetition Asbestos Claims as disputed, contingent, and unliquidated."); *see also* Debtors' Schedules (Aldrich Dkt. No. 207, Murray Dkt. No. 19) (listing names and counsel of thousands of pre-petition asbestos claimants).

[26] Bar Date/PIQ Motion, ¶ 8 ("As of the Petition Date, the Debtors' records list approximately 8,100 pending mesothelioma claims and 8,400 pending lung cancer claims against them.").

[27] *See* Declaration of Ray Pittard in Support of First Day Pleadings [Dkt. No. 27], at ¶ 11 ("Aldrich and Murray were served with their first asbestos complaints in 1983 and 1986, respectively.") (filed June 18, 2020).

- the rate at which new mesothelioma claims have arisen against the Debtors.[28]

25. According to the Bar Date/PIQ Motion, the Debtors and their predecessors had pre-petition agreements under which they were able to value and resolve asbestos claims without the claimant even filing a complaint in the tort system.[29] Moreover, they planned and executed a pre-petition transaction that allegedly separated the predecessors' assets from the asbestos liabilities now housed with the Debtors. That these Debtors now require a subset of known asbestos claimants to submit proofs of claim to understand their asbestos liabilities sufficiently enough to start plan negotiations is preposterous.

26. Further, setting a bar date now would do little to provide any greater certainty into the Debtors' asbestos liabilities. As the Debtors state in their Information Brief, an average of 40 or more mesothelioma claims arise against them each week "like clockwork."[30] At that rate, between the Petition Date and the Movants' requested bar date of March 22, 2021, over 1600 mesothelioma claims—a number equaling 20% of Pre-Petition Asbestos Claims attributable to mesothelioma—will have arisen against the Debtors. These claims would not be subject to the bar date. And, as such, the bar date would not provide any certainty as to the Debtors' actual current asbestos liability as of the bar date.

27. Indeed, the Movants admit that, "as time passes and new, unknown, claims manifest," any measurement of "the pool of [Pre-Petition Asbestos Claims] [becomes] an increasingly unreliable gauge for current claims."[31] The Movants suggest that this is reason for

[28] Informational Brief at 7-8.

[29] Bar Date/PIQ Motion, at ¶ 10 n.4 (noting existence of "agreement[s] permitting either Debtor, Old IRNJ, or Old Trane to resolve claims against them without being named as a defendant in a lawsuit in the tort system . . .").

[30] Informational Brief at 7 (stating a new mesothelioma case arises against the Debtors for every hour in every work-day "like clockwork").

[31] Bar Date/PIQ Motion, at ¶ 17.

the Court to set a bar date quickly in these Cases, but in reality it demonstrates precisely why setting a bar date at any time in these Cases would serve little purpose.

28. In addition, the Movants state that the "overwhelming majority of [the Debtors' asbestos] claimants are future claimants,"[32] that is, those exposed to the Debtors' asbestos products, but who have not yet manifested an asbestos injury. If true, any bar date set in these Cases would be useless for achieving certainty as to the Debtors' asbestos liabilities because no bar date could capture the "overwhelming majority" of the Debtors' asbestos liabilities.

29. Generally speaking, bar date orders in other asbestos bankruptcies *for asbestos claims* were entered—in the limited cases in which they were entered—in the later stages of the proceeding. For example, *Garlock*, which was commenced in 2010, did not have a bar date order until four years later (April 2015, with a bar date set in October 2015) and two years before its May 2017 confirmation hearing. Similarly, in *Celotex*, commenced in October 1990, the court waited almost six years before entering an asbestos claims bar date, with plan confirmation in December 1996 (less than nine months after the asbestos bar date).

30. The Movants recognize the inherent inefficiency in seeking a bar date, noting that the Movants envision requesting a second bar date "for all other asbestos claimants."[33] Setting multiple rounds of bar dates is both wasteful and unnecessary. The Bar Date/PIQ Motion is premature, and the Court should decline to order a bar date that the Movants acknowledge would not provide the information necessary to confirm a section 524(g) plan in this case. Movants should not be allowed to force asbestos claimants to clear onerous procedural hurdles in order to

[32] Bar Date/PIQ Motion at 2.

[33] Bar Date/PIQ Motion, at ¶ 3 n.3.

maintain their valid claims. To allow otherwise permits the Movants to artificially shrink the Debtors' asbestos liability through attrition.

II. THE MOVANTS' MODIFIED CLAIM FORM IS DESIGNED TO BE IMPOSSIBLE FOR MANY CLAIMANTS TO COMPLETE AND IS IMPERMISSIBLE UNDER THE BANKRUPTCY RULES

A. The Movants' Modified Claim Form Is Designed to Preclude Holders of Valid Asbestos Claims from Complying with the Proposed Bar Date

31. While setting a bar date in these Cases would not serve any legitimate purpose, the Movants' Modified Claim Form evidences an improper intent for setting one: unfairly extinguishing valid asbestos claims. The Movants ask this Court to require asbestos claimants to file the Modified Claim Form, which appears specifically designed to unfairly thwart asbestos claimants from completing it and complying with the proposed bar date. Indeed, for many asbestos claimants, it would be impossible to meet the Movants' proposed additional certification requirements[34] despite holding valid claims against the Debtors.

32. For instance, the Modified Claim Form requires claimants to certify that they have admissible evidence of their exposure to one or both Debtors' asbestos products.[35] But a claimant

[34] The Debtors' Form adds four sub-certifications in Part 3 of the Modified Claim Form:

> (a) "the claimant is the holder of a Prepetition Asbestos Claim that has not been dismissed with prejudice or settled and paid, and is not known to be time-barred";
>
> (b) "the person upon whose injury the Prepetition Asbestos Claim is based (the 'Injured Party') was diagnosed with pleural or peritoneal or other mesothelioma or lung cancer, based on, or as evidenced in, medical records or similar documentation in the possession of the claimant, his or her attorney, or the physician of the claimant or Injured Party";
>
> (c) "the Injured Party was exposed to asbestos fibers released from asbestos-containing products for which the Debtors or their predecessors-in-interest, including the former Ingersoll-Rand Company, a New Jersey corporation ('Old IRNJ') and Trane U.S. Inc. ('Old Trane'), are alleged to be responsible ('Asbestos Exposure')"; and
>
> (d) "if these certifications are made by the holder's attorney, the attorney is authorized by such holder to represent that the Injured Party has (or, if deceased, had) the disease noted in Question 7 and Asbestos Exposure."

[35] Bar Date/PIQ Motion, ¶ 19.

is not required to have admissible evidence to file a claim in bankruptcy.[36] Official Form 410 requires only that claimants certify they "have examined the information . . . and have a reasonable belief that the information is true and correct." Official Form 410, Part 3.

33. The Movants' proposed manipulation of the claiming standard is material—many asbestos claimants who filed valid complaints against the Debtors in the tort system may not yet hold admissible evidence of their exposures, especially those who have not completed discovery against the Debtors.[37] In fact, neither federal nor state law required such claimants to have admissible evidence to file a complaint.[38] Such claimants would be unable to complete the Modified Claim Form and comply with the Movants' proposed bar date. And, as a result, the Movants would have those claimants' claims forever barred.[39] Whether intended or not, this result is draconian and inequitable to asbestos claimants. This Court should not countenance any process that would lead to such a result.

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[36] The filing of Official Form 410 is itself *prima facie* evidence of the amount and validity of the filed claim. *Stancill v. Harford Sands Inc, (In re Harford Sands Inc.)*, 372 F.3d 637, 640 (4th Cir. 2004) ("The creditor's filing of a proof of claim constitutes prima facie evidence of the amount and validity of the claim.").

[37] The Movants recognize that "certain Prepetition Asbestos Claims were filed in the months leading up to the Petition Date [and in] that timeframe, discovery as to those suits had not meaningfully progressed." Bar Date/PIQ Motion, at ¶ 30. And, of course the automatic stay barred any further discovery efforts against the Debtors.

[38] *See, e.g.*, Fed. R. Civ. P. 11 (stating that a party filing a complaint must certify that "the factual contentions have evidentiary support or . . . *will likely have evidentiary support after a reasonable opportunity for further investigation or discovery*") (emphasis added); *Nguyen v. FXCM Inc.*, 364 F. Supp. 3d 227, 236 (S.D.N.Y. 2019) ("At the pleading stage, Plaintiffs need only allege facts that, upon their information and belief, will likely lead to admissible evidence in discovery."); *Addison v. Distinctive Homes, Ltd.*, 836 N.E.2d 88, 92 (Ill. App. 2005) ("The plaintiff is not required to set out his or her evidence, but only allege the ultimate facts to be proved."); *Meyer v. Strahan*, 578 S.W.3d 165, 172 (Tex. App.—Tyler 2019), rev. denied. ("At this [motion to dismiss] stage we do not require a claimant to marshal all his proof or present evidence . . . as if he were actually litigating the merits.").

[39] Bar Date/PIQ Motion, Ex. A ("Proposed Bar Date Order"), at ¶ 9 ("[A]ny claimant who fails to complete and submit a Prepetition Asbestos Claim Form on account of a Prepetition Asbestos Claim by the Prepetition Asbestos Claims Bar Date shall be forever barred, estopped, and enjoined from: (a) asserting such claim against the Debtors or any subsequent asbestos trust funded by the Debtors and their affiliates; (b) voting upon, or receiving distributions under, any plan or plans of reorganization in these Chapter 11 Cases in respect of such claim; and (c) receiving further notices related to these Chapter 11 Cases.").

B. The Bankruptcy Rules Prohibit the Modified Claim Form

34. In any case, the recently changed Rule 9009 flatly prohibits the use of a modified claim form like the one the Movants seek. "The Official Forms . . . ***shall be used without alteration***." Fed. R. Bankr. P. 9009(a) (emphasis added); *see also In re Diocese of Buffalo, N.Y.*, 620 B.R. 445, 454 (Bankr. W.D.N.Y. 2020) ("The Judicial Conference of the United States has prescribed Official Forms for use in bankruptcy proceedings. These include Form 410, which serves as the generally acceptable format for a proof of claim. Its use is then mandated by Bankruptcy Rule 9009(a)"). Under the current version of Rule 9009, the only allowable alterations to the Official Forms are (i) "minor changes not affecting wording or the order of presenting information" such as expanding or deleting the physical space for responses in the form as necessary and (ii) those specifically provided for by the Bankruptcy Rules, an Official Form, or the national instructions for such Official Form. Neither exception applies to the Movants' effort to require a claimant to (i) provide additional personal identifying information; (ii) specify the alleged asbestos disease type; and (iii) certify that the basis of their claim is, among other things, supported by admissible evidence.[40]

35. The proposed changes clearly affect the wording of Official Form 410. And neither Official Form 410, its instructions, nor any Bankruptcy Rule provides for such changes. Indeed, Rule 3001—the "definitive authority concerning the contents [of a proof of claim form]"[41]—states that "[a] proof of claim shall conform substantially to the appropriate Official Form." Fed. R. Bankr. P. 3001(a).

[40] Bar Date/PIQ Motion, ¶ 19.

[41] 9 Collier on Bankruptcy ¶ 3001.01 (16th 2020).

36. Rather than substantially conforming to Official Form 410, the Modified Claim Form adds severely heightened requirements for filing a proof of claim. Specifically, in addition to the requirements of Official Form 410, the Modified Claim Form would require claimants to certify

> under penalty of perjury, that [they have] performed the due diligence necessary to investigate [their] claim[s], said due diligence has been documented and preserved, and said due diligence obtained admissible evidence that, to the best of [their] knowledge, information, and reasonable belief, the . . . [allegations of, among other things, an asbestos disease and exposure to the Debtors' asbestos products] are true and correct.[42]

37. Nowhere do such requirements for filing a claim appear in the Bankruptcy Rules, which alone "specify the form, content, and filing requirements for a valid proof of claim." *In re Dubois*, 834 F.3d 522, 528 (4th Cir. 2016). The Rules only require claimants to complete Official Form 410 to properly file a claim and, thereby, provide *prima facie* evidence as to its amount and validity. Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."); 11 U.S.C. 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."); *see also Stancill v. Harford Sands Inc*, (*In re Harford Sands Inc.*), 372 F.3d 637, 640 (4th Cir. 2004) ("The creditor's filing of a proof of claim constitutes prima facie evidence of the amount and validity of the claim.); *In re Prot. Sys. Techs., Inc.*, No. 13-31778, 2014 WL 7359020, at *4 (Bankr. W.D.N.C. Dec. 24, 2014); *In re Terry*, 262 B.R. 657, 662 (Bankr. E.D. Va. 2001).

38. Nor do the Movants provide any precedent for requiring such certifications to submit a proof of claim. The Debtors erroneously claim that their additional certifications are

[42] Bar Date/PIQ Motion, at ¶ 19.

"substantively identical to the certifications approved by this Court" in *Garlock*.[43] However, this Court in *Garlock* never approved of any requirement that asbestos claimants certify that they "performed the due diligence necessary to investigate [their] claim[s]" or have admissible evidence supporting same.[44]

39. In support of their assertion that "various courts . . . have approved modified proof of claim forms in mass tort cases," the Movants cite only to opinions issued under previous versions of Bankruptcy Rule 9009.[45] However, the Movants ignore the recent amendments to Bankruptcy Rule 9009, which eliminated language that permitted "such alterations as may be appropriate to suit the circumstances."[46] Consequently, the Modified Claim Form is prohibited under Bankruptcy Rule 9009(a).

III. THE MOVANTS' PROPOSED QUESTIONNAIRE IS INAPPROPRIATE

40. The Movants request that every person who files a claim pursuant to the proposed bar date also be required to answer a questionnaire regarding the merits of their claims. Accordingly, if the Movants' request for a bar date is rejected, as it should be, then their request for such a questionnaire is moot. Even if the Movants' requested bar date is set, however, the Court should not approve the Movants' questionnaire.

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[43] Bar Date/PIQ Motion, at ¶ 20.

[44] *See In re Garlock Sealing Techs., LLC*, No. 10-31607 (JCW) [Dkt. 4542] (Bankr. W.D.N.C. Apr. 10, 2015), Ex. 2 (combined ballot/proof of claims form requiring certifications of, among other things, asbestos exposure and asbestos disease to be made under penalty of perjury without any requirement to certify any investigation into or admissible evidence of same).

[45] Bar Date/PIQ Motion, at ¶ 18 (citing only to pre-2017 decisions to modify claim form).

[46] *See* Fed. R. Bankr. P. 9009(a) (2016); *see also* Adv. Comm. Notes to Rule 9009 (noting 2017 amendments deleted "language generally permitting alterations").

A. The Questionnaire Is Also Impermissible Under Rule 9009

41. As the Movants seek to require each person who files a Pre-Petition Asbestos Claim to also answer the expansive and arduous PIQ, they have essentially made answering the PIQ part and parcel of filing a proof of claim form. As such, the PIQ is, itself, an impermissible modification of Official Form 410 under Rule 9009(a).

42. Recently, a court specifically rejected a debtor's attempts to require mass tort claimants to provide more information than Official Form 410 requires in order to file their claims. In the sexual abuse bankruptcy of the Diocese of Buffalo, the debtor moved to require sexual abuse claimants filing proofs of claim to also provide "responses to specific questions regarding the alleged injury." *Diocese of Buffalo*, 620 B.R. at 453-54. The court there denied the motion because Rule 9009 did not allow the court to modify Official Form 410 to require additional disclosures from claimants and, moreover, requiring such disclosures would "have a chilling effect" on claimants' willingness to file a claim at all:

> Such disclosures may be necessary at some appropriate time, but not in the context of filing a simple proof of claim. As stated in Bankruptcy Rule 3001(a), "[a] proof of claim is a written statement setting forth a creditor's claim." For this purpose, it suffices to respond briefly to question 8 of Official Form 410, which asks the claimant merely to state the basis of the claim. For some, a mandate to disclose more particular details may have a chilling effect on their willingness even to file a claim.

Id at 454.

43. So too here, the PIQ not only is an impermissible modification of Official Form 410, but also appears intended to intimidate and frustrate asbestos claimants out of filing their valid claims in these Cases.

B. The Questionnaire Is Not Permissible Discovery Under Rule 2004

44. The Movants' proposed use of Rule 2004 to propound its questionnaire is an abuse of that Rule. The PIQ is an inappropriate effort to circumvent the procedures, restrictions and

protections that must be afforded to the targets of the questionnaire. Those targets are the holders of filed Pre-Petition Asbestos Claims, virtually all of whom have pending state or federal actions against the Debtors or their predecessors. It is well established that, where an adversary proceeding, a contested matter, or litigation is pending in another forum, a litigant cannot use Rule 2004 but instead should seek discovery pursuant to the Federal Rules of Civil Procedure or the rules of that other forum. *In re SunEdison, Inc.*, 572 B.R. 482, 490 (Bankr. S.D.N.Y. 2017); *accord In re Ramadan*, No. 11-02734-8-SWH, 2012 WL 1230272, at *2 (Bankr. E.D.N.C. Apr. 12, 2012); *see also In re Enron Corp.*, 281 B.R. 836, 842 (Bankr. S.D.N.Y. 2002) (recognizing that Rule 2004 examinations are inappropriate "where the party requesting the Rule 2004 examination could benefit the pending litigation outside of the bankruptcy court against the proposed Rule 2004 examinee"); *In re Braxton*, 516 B.R. 787, 797 (Bankr. E.D.N.C. 2014) (same).

45. This limitation on the otherwise broad scope of Rule 2004—known as the "pending proceeding rule"—"reflects a concern that a party to litigation could circumvent an adversary's rights by using Rule 2004 rather than civil discovery to obtain documents or information relevant to the other proceeding." *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012). That concern is born from the fact that Rule 2004 discovery does not provide the target with the same procedural safeguards as he or she would have in discovery in a contested matter or adversary proceeding, or in state court. *In re Oklahoma Automatic Door, Co., Inc.*, 599 B.R. 167, 171 (Bankr. W.D. Okla. 2019); *accord In re Dinubilo*, 177 B.R. 932, 939-40 (E.D. Cal. 1993) (contrasting the substantive differences between Rule 2004 examinations and discovery under the Federal Rules).

46. That is, the Movants cannot use Rule 2004 as an end-run around the discovery rules that would adhere in ongoing litigation were it still in its original forum or if the contest were

moved to this Court. Accordingly, to the extent that the Movants' contend that they require discovery in connection with Pre-Petition Asbestos Claims, they can either lift the stay to allow the underlying personal injury cases to continue or attempt to commence allowance proceedings before this Court.

47. As noted above, the questionnaire is clearly targeted toward contesting the merits of individual asbestos claims. The Bankruptcy Code already contemplates that if the Debtors wish to contest the value or validity of a filed proof of claim, they must commence allowance proceedings by filing formal objections pursuant to Bankruptcy Rule 3007. Upon doing so, discovery would be allowed and governed by Bankruptcy Rule 9014—not Rule 2004. As such, both the claimants and the Debtors would be entitled to discovery and would be entitled to have the Court determine the permissible scope of that discovery. *See, e.g.*, Fed. R. Bankr. P. 9014, 7026.

48. Here, the Debtors do not propose allowance proceedings for disputed asbestos claims; and any such proposal would be unrealistic and impractical in any event. The Debtors' contend there were more than 16,000 mesothelioma and lung cancer asbestos claims pending against them as of the Petition Date:[47] far too many claims for a court to resolve without infinitely delaying resolution of these Cases.

49. Further, in any allowance proceedings, each individual asbestos personal injury claimant would be entitled to certain due process rights, including the constitutional right to a jury trial. *See* 28 U.S.C. § 1411(a) ("[T]his chapter and title 11 do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim"). And Congress has mandated that such trials be conducted in the

[47] Bar Date/PIQ Motion, at ¶ 8.

district court that presides over the bankruptcy or, if that court so orders, in the district where the claim arose. 28 U.S.C. § 157(b)(5). In the same vein, Section 157(b)(2)(B) expressly excludes "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims for purposes of distribution against the estate . . ." from the definition of core proceedings. 28 U.S.C. § 157(b)(2)(B).

50. Here, the Movants propose that the Court allow them to use Rule 2004 to completely sidestep this normal allowance process and the substantive and procedural rights asbestos claimants would be entitled to therein without reason, but nonetheless force asbestos claimants to provide extensive, burdensome discovery concerning the merits of their claims. Indeed, the Movants admit that the Debtors "could serve discovery on each of the claimants who timely files a proof of claim," but instead would prefer this Court to bless their proposed questionnaire "to avoid the need for potentially thousands of claimants to provide individual discovery responses."[48] Since the Movants seek to require such claimants to provide individual answers to the questionnaire, it is clear that the Movants only wish to avoid having thousands of claimants object to the requested discovery.

51. That is, the Movants ask this Court to allow them to abuse Rule 2004 to obtain discovery normally reserved for allowance proceedings without having to provide asbestos claimants with any of the protections and rights that allowance proceedings would afford them. The Court should not entertain such a request.

[48] Bar Date/PIQ Motion, at ¶ 28.

C. The PIQ Seeks Discovery in the Form of Sworn Written Testimony and the Creation of a New Document, Which is not Permitted Under Rule 2004

52. Rule 2004 does not permit discovery in the form of sworn written responses to questions, whether formatted as a questionnaire or as interrogatories. Instead, Rule 2004 allows only for the examination of an entity or the production of documents from an entity in connection with an examination. *See* Fed. R. Bankr. P. 2004; *see also* Local Rule 2004-1 (discussing only "depositions and examinations"). What the Movants seek through the PIQ, however, is neither deposition attendance nor document production in connection with attendance.

53. Pursuant to Rule 2004(c), "the attendance of an entity *for examination* and *for the production of documents* . . . may be compelled as provided in Rule 9016." Fed. R. Bankr. P. 2004(c) (emphasis added). Rule 9016, in turn, applies Rule 45 of the Federal Rules of Civil Procedure (the "Federal Rules"). *See* Fed. R. Bankr. P. 9016. Federal Rule 45 authorizes the issuance of subpoenas to "command[] attendance at a deposition" and "to produce documents, electronically stored information, or tangible things or to permit the inspection of premises." Fed. R. Civ. P. 45. However, the discovery the Movants seek in the Bar Date/PIQ Motion is akin to interrogatories, a form of discovery that is outside the scope of Rule 45. Rule 2004 thus shares the limitations of Federal Rule 45, which does not permit compelling sworn written testimony. Yet sworn written testimony is precisely what the Movants seek through the Bar Date/PIQ Motion.

54. The Movants have not pointed to any text in Rule 2004 or Federal Rule 45 that authorizes parties to compel sworn written testimony, nor has the Debtor cited a single case where a court authorized such discovery under Federal Rule 45.[49] Numerous courts have recognized that

[49] The Movants points to *Garlock* and *Bondex* for the proposition that personal injury questionnaires have been authorized by courts in the past. However, the respective orders granting in part and denying in part the claimant questionnaire motions in *Garlock* and *Bondex* were predicated on Rule 2004 alone, and the Court did not address the significance of Federal Rule 45. *See In re Specialty Prods. Holding Corp.*, Case No. 10-11780 (Bankr. D. Del. July 20, 2011) [Dkt. No. 1466]; *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. June 21, 2011), [Dkt. No. 1390]. Further, the claimant questionnaire motions in *Garlock* and *Bondex* each made only a single passing

Federal Rule 45 cannot be used to compel written testimony, the creation of documents, or the presentation of information in a new format—all of which are sought by the Debtor. *See, e.g.*, *Hicks v. Houston Baptist Univ.*, 2019 WL 7599887, at *3–4 (E.D.N.C. Nov. 12, 2019) (distinguishing Federal Rule 45, which "permits a party to issue a subpoena to a nonparty to attend a deposition and produce documents," from Federal Rule 33, which "governs interrogatories"); *McGlone v. Centrus Energy Corp.*, 2020 WL 4462305, at *3 (S.D. Ohio Aug. 4, 2020) (granting a motion to quash under Federal Rule 45 because "the information Plaintiffs seek does not currently exist in the format requested [and t]here also is no question that [the respondent] cannot be required to produce a document that does not exist"); *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 319 F.R.D. 220, 227 (N.D. Tex. 2016) (recognizing that Federal Rule 45 "does not contemplate that a non-party will be forced to create documents that do not exist") (internal quotation marks omitted); *TS Roseberry v. Wal-Mart Stores E., LP*, 2010 WL 11597130, at *6 (N.D. Ga. Oct. 5, 2010) (granting motion to quash discovery requests under Federal Rule 45 seeking documents that did not exist and that the respondent would be forced to create); *Insituform Techs., Inc. v. Cat Contracting, Inc.*, 168 F.R.D. 630, 633 (N.D. Ill. 1996) ("Rule 45 appears to contemplate that a non-party may be required to produce records that already exist and are under the non-party's control, but does not contemplate that a non-party will be forced to create documents that do not exist.").

55. Moreover, under the interpretive cannon *expressio unius est exclusio alterius*, ("expressing one item of an associated group or series excludes another left unmentioned"),

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reference to Federal Rule 45, noting without further analysis that "Bankruptcy Rule 9016 makes Rule 45 of the Federal Rules of Civil Procedure (governing subpoenas) applicable in cases under the Bankruptcy Code." *Motion of the Debtors Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure for an Order Directing Submission of Information by Current Asbestos Claimants* ¶ 17, *In re Specialty Prods. Holding Corp.*, Case No. 10-11780 (Bankr. D. Del. Oct. 11, 2010) [Dkt. No. 436]; *Motion of the Debtors for an Order Pursuant to Rule 2004 Directing Submission of Information by Current Asbestos Mesothelioma Claimants* ¶ 10, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C. Jan 5, 2011) [Dkt No. 1006] (using the same language).

Congress did not intend either Rule 2004 or Federal Rule 45 to expand the scope of an examination to sworn written responses to questions. Rule 2004 incorporates only Federal Rule 45 and leaves all other discovery devices and their corresponding rules unmentioned. Congress's express incorporation of Federal Rule 45 into the Rule 2004 framework thus "support[s] a sensible inference that the term[s] left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 74 (2002).

56. Accordingly, the Court should deny the Movants' request for sworn written testimony via the PIQ. The Bar Date/PIQ Motion seeks not just the production of documents (which is only permissible in relation to the attendance of an entity at an examination), but the *creation* of documents, which lies beyond the scope of Rule 2004.

D. Requiring Asbestos Claimants to Provide Discovery on Their Claims in a Case Where No Litigation of Asbestos Liability Is Contemplated Is Without Precedent

57. The only purpose the Movants offer for requesting the questionnaire is to contest the validity and amount of individual filed asbestos claims. The Movants argue that they are requesting the questionnaire:

- to force claimants to support their ultimate "burden of showing exposure to [the Debtors'] products and that such exposure was a contributing cause of his or her disease";
- to "inform[] the extent of the Debtors' . . . share of any potential liability" to the claimant; and
- to discover information the Movants believe is relevant "when the final valuation of [a] claim is being considered."[50]

[50] Bar Date/PIQ Motion, at ¶¶ 28-29.

Here, however, there is no proceeding underway, or even contemplated, where the values and validity of asbestos claims will be litigated, such as allowance proceedings.[51] And the Movants offer no authority where a court required asbestos claimants to answer a questionnaire regarding their individual claims where no such proceeding is contemplated.[52]

E. The PIQ Is Unduly Burdensome and Harassing

58. "Even if the information sought [in discovery] is relevant, discovery is not allowed . . . where compliance is unduly burdensome." *Insulate Am. v. Masco Corp.*, 227 F.R.D. 427, 432 (W.D.N.C. 2005). Compliance with the PIQ would be unduly burdensome. Essentially a set of dozens of interrogatories,[53] the questionnaire would require each claimant to produce potentially hundreds of detailed responses and reams of supporting documentation.

59. For example, the proposed PIQ requires claimants to detail every site at which they were exposed to any asbestos-containing products manufactured by the Debtors, the name and address of each such site, and the specific date of exposure. They would also be required to provide, for each of the Debtors' asbestos-containing products to which they were exposed, a description of the activity that resulted in the asbestos exposure from such product and the

[51] The Committee does not concede that any of the information requested in the questionnaire would be discoverable in or relevant to any such proceeding and reserves all rights to object to the use of the questionnaire in the specific context of any such proceeding.

[52] Instead, the Movants cite to a number of cases where courts approved questionnaires for asbestos claimants that were requested or ordered either in contemplation of or in connection with an estimation hearing. *See, e.g.*, *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 698-99 (4th Cir. 1989) (noting questionnaires required of claimants were used in estimation of Dalkon Shield liability); Order Authorizing the Debtors to Issue Questionnaire to Holders of Pending Mesothelioma Claims and Governing the Confidentiality of Information Provided in Responses, *In re Garlock Sealing Techs. LLC*, Case No. 10-31607 (Bankr. W.D.N.C. June 21, 2011) (Dkt. No. 1390) (approving of questionnaire for use in estimation); *In re Specialty Prods. Holding Corp.*, No. 10-11780 (JKF) [Dkt. No. 436] (Bankr. D. Del. Oct. 11, 2010) (requesting permission to propound questionnaire in contemplation of a contested estimation hearing). No estimation is sought here.

[53] Indeed, the proposed questionnaire violates the presumptive limit of 25 interrogatories, including sub-parts, under Fed. R. Civ. P. 33.

frequency of that activity.[54] These requests are cumbersome on their face, but would prove especially cumbersome for claimants who have not completed discovery against the Debtors in their underlying tort cases.

60. Further, the proposed questionnaire also requires claimants to provide the same detailed information with respect to any exposures they had to asbestos-containing products manufactured by other entities, as well as information about any lawsuits against other defendants, and depositions conducted in connection with such suits.[55] Requiring such information is extremely burdensome, as mesothelioma and other asbestos-related illnesses have long latency periods and asbestos claimants often do not know or remember the names of products to which they were exposed decades earlier. They therefore must rely on third-party depositions and other sources, including invoices and other records of asbestos manufacturers and distributors. While that information may have already been gathered for claimants whose cases are in an advanced state of preparation, it is likely that little information will have been gathered with respect to others. And the claimants would be expected to provide this information within the few short months provided for in the Proposed Bar Date Order and without the benefit of any discovery from the Debtors.[56]

61. Further, the questionnaire demands information regarding litigation and settlements with non-Debtor defendants and trusts, including attaching confidential trust claim forms and

[54] *See* Motion Ex. A-3 (Questionnaire Form) at Parts 6A & 6B.

[55] *See id.* at Parts 6C & 11.

[56] The Movants' assert that "[b]y the time that the Questionnaires will be due, claimants will have had a full year since the Petition Date to engage in claim investigation in the tort system into which the Debtors will have no visibility." Bar Date/PIQ Motion ¶ 30. This statement simply misapprehends reality. *The underlying state court cases are stayed*. The asbestos claimants are unable to seek the necessary discovery from the Debtors to fully develop their own cases. Therefore, it is unrealistic for the Movants to assert that asbestos claimants have developed their own cases during the pendency of these bankruptcy cases.

myriad documents from other pending litigation.[57] This burden of providing such information, and the information requested about exposures to other entities' asbestos products, is particularly acute because it has no bearing on the validity or amount of a claimants' claim against the Debtors. Asbestos victims typically have been exposed to asbestos from the products of numerous defendants, and each defendant will be liable if its products are shown to be a substantial contributing factor to a claimant's injury, regardless of the liability of the other defendants. *See, e.g.*, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973) (because the effect of exposure to asbestos is cumulative, such that each exposure causes additional injury, the evidence of exposure to each of the defendants' products was sufficient evidence for the jury to find that "each defendant was the cause in fact of some injury" to the plaintiff, and that the defendants could be held jointly and severally liable); *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1206-07, 1214 (Cal. 1997) (plaintiff may meet the burden of proving exposure to defendant's product caused illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer; a plaintiff "is free to further establish that his particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' that contributed to his risk of injury." (citation omitted)).

62. Even for those individuals who have sought legal assistance, the opportunity to have identified all possible products and exposures in such a short period is another effort to artificially limit the ability to respond. This premature inquiry cannot result in the provision of accurate information, but instead will spawn a huge volume of individual discovery disputes as

[57] *See id.* at Parts 7-8A & 10. The questionnaire also provides the claimant with the option to instead waive all rights to contest the Debtors' discovering such claim forms from any relevant trusts. *Id.* at Part 10.

the claimants seek the information they need to accurately and completely fill out their PIQs. Due process will require that these discovery disputes be permitted to go forward, and it will be impossible to proceed with the orderly administration of this case. Basic fairness and a proper use of the discovery process mandates that the Debtors should be required to pull information from their own files before it seeks discovery of information from anyone else. In addition, the PIQ will impose an extraordinary time and cost burden on tort counsel. Smaller firms will literally be required to devote all of their staff and attention to completion of this mammoth amount of information, abandoning their ability to obtain recovery for claims in the tort system. Larger firms will similarly be required to devote significant resources.

63. Even if the PIQ is within the scope of Rule 2004 (it is not), the Movants are also required to establish that good cause exists to warrant the requested Rule 2004 discovery. *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 627–28 (Bankr. D. Del. 2016) ("The party seeking to conduct a 2004 examination has the burden of showing good cause for the examination which it seeks."); *In re Eagle-Picher Indus. Inc.*, 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994); *In re Orion Healthcorp, Inc.*, 596 B.R. 228, 235 (Bankr. E.D.N.Y. 2019). Good cause is required because Rule 2004 "may not be used as a device to launch into a wholesale investigation of a non-debtor's private . . . affairs." *Matter of Wilcher*, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985). The Movants have not and cannot establish that good cause exists for this Court to authorize discovery under Rule 2004 that requires holders of Pre-Petition Asbestos Claims to disclose the information requested in the PIQ. Further, much of the information sought by the Movants is already available to the Debtors. The Movants have failed to identify any basis for initiating a burdensome discovery process against holders of Pre-Petition Asbestos Claims.

64. The PIQ is also unduly burdensome because it seeks confidential settlement information that would have only been used in the court system *if a claim had actually been litigated through judgment*. For example, section 8 seeks aggregate recoveries from other sources. While a non-settling defendant may receive a credit against a plaintiff's prior settlements with joint tortfeasors,[58] courts only permit the setoff "against ***any judgment*** . . . ."[59] Thus, the information about aggregate settlement amounts that the Movants seek is especially irrelevant here where the claims at issue will never go to judgment.

65. The burdensome nature of the questionnaire cuts a sharp contrast against the usefulness of the responses. Indeed, the questionnaire serves no real purpose, as the Debtors do not contemplate ever actually litigating the Pre-Petition Asbestos Claims before this Court. It is clear that one of the Debtors' primary purposes for pursuing the Bar Date/PIQ Motion is to gain an improper advantage over its asbestos personal injury claimants. At a minimum, the Debtors will attempt to utilize the bar date and questionnaire process to significantly reduce the number and size of asbestos-related claims through claimant confusion or frustration.

66. Requiring such enormous effort to be put into discovery on claims that this Court will never adjudicate suggests harassment rather than legitimate discovery. This is especially true when Debtors likely have much of the requested information already from their litigation of Pre-Petition Asbestos Claims in the tort system.[60] As such, independent of its burdensome nature, the questionnaire should be denied on that account as well. *Oppenheimer Fund, Inc. v. Sanders*, 437

[58] *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208 (1994).

[59] *Lewin v. Am. Exp. Lines, Inc.*, 224 F.R.D. 389, 396 (N.D. Ohio 2004) (emphasis added) (also noting that "[t]he setoff will include any payments that [a plaintiff] may have received for the asbestos-type injuries . . . include[ing] settlements and payments from any bankruptcy trusts").

[60] Bar Date/PIQ Motion ¶ 30 ("For claims subject to lawsuits that have been pending for some time, the Debtors sometimes have more information as to the alleged basis by a claimant of a Debtor's liability.").

U.S. 340, 353, n. 17 (1978) ("[D]iscovery should be denied when a party's aim is to delay bringing a case to trial, or embarrass or harass the person from whom he seeks discovery."); *see also Amick v. Ohio Power Co.*, 2014 WL 468891, *2 (S.D. W.Va. Feb. 5. 2014) ("Discovery that seeks relevant information may nevertheless be restricted or prohibited if necessary to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense").

67. Finally, the bar date and questionnaire process is harassing because the Bar Date/PIQ Motion seeks permission to provide the claim and questionnaire information gathered from the asbestos personal injury claimants to any "Intervenor"—any party of interest who comes before the Court. The Movants, thus, seek preemptive approval to broadly disclose personal, private information gathered by the Modified Claim Form or PIQ (if approved). However, this information should only be provided to those parties that actually need the information, and not even the Movants fall into that category. There is no guarantee that this information would remain private; the asbestos personal injury claimants know this. More importantly, the Movants know this and are likely counting on this as another basis for minimizing the number of filed Pre-Petition Asbestos Claims.

RESERVATION OF RIGHTS

68. Although the Committee advocates for the denial of the Bar Date/PIQ Motion in its entirety, the Committee reserves its right to serve its own discovery if the Bar Date/PIQ Motion is granted. The issues raised in the Bar Date/PIQ Motion, and the Debtors' effort to invalidate and eviscerate decades' of its settlement and litigation history, directly place at issue the Debtors' process for settling cases. If necessary, and at the appropriate time, the Committee would seek such discovery necessary to counter the information sought by the PIQ.

CONCLUSION

WHEREFORE, the Committee respectfully requests the Court deny the Bar Date/PIQ Motion in its entirety and provide such other and further relief as the Court deems just and proper.

Dated: Charlotte, North Carolina
January 14, 2021

HAMILTON STEPHENS STEELE
+ MARTIN, PLLC

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
SPECIALTY PRODUCTS	)	Case No. 10-11780
HOLDING CORP., *et al.*,	)	(PJW)
	)	
Debtors.	)	(Jointly Administered)

Wilmington, Delaware
November 5, 2013
11:05 a.m.

TRANSCRIPT OF AN ELECTRONIC RECORDING
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors	DANIEL J. DeFRANCESCHI, ESQ. ZACHARY I. SHAPIRO, ESQ. RICHARDS LAYTON & FINGER, P.A. -and- GREGORY M. GORDON, ESQ. DAN B. PRIETO, ESQ. THOMAS R. JACKSON, ESQ. JONES DAY -and- C. MICHAEL EVERT, JR., ESQ. EVERT WEATHERSBY & HOUFF
For the Asbestos Claimants Committee	NATALIE D. RAMSEY, ESQ. MARK B. SHEPPARD, ESQ. DAVIS LEE WRIGHT, ESQ. MARK A. FINK, ESQ. MONTGOMERY McCRACKEN WALKER & RHOADS, LLP

what our plan is saying to everyone is we're prepared to live with lesser protection and, more importantly, and again contrary to her statements, we're willing to put our money behind our position on the litigation. If we lose the litigation, we're saying we'll pay. And we're also saying we'll address the issue of delay, that we'll put up a substantial amount of money up front.

But I think bottom line, that's the primary difference. Are we in a consensual 524(g) scenario? Unfortunately, we're not. If we were, I would, I would agree completely with Ms. Ramsey. We just don't know where we are.

Now, I suppose it's possible the issue could be put off and we could revisit it later. If, if Your Honor is of a view that the plan shouldn't go forward until the estimation decision or the estimation appeal is completed or goes further along, I suppose the issue could be put off because maybe an agreement will break out. I don't know, but at this point in time, we have a motion by the other side for a bar date, and it just seemed to us that given the uncertainty in the case, it just made sense to expand it to include asbestos claims if we were going to do a bar date, particularly again given that the number of claims is relatively small, we're not asking to duplicate the questionnaire

process. Our proposal is clear that anyone who's already submitted a questionnaire doesn't have to submit a claim. If they want to submit a claim because they want to update, I suppose they could. But we're not requiring people to do busywork here, to do duplicate work. We're just asking for the information from people who otherwise the information hasn't been provided.

THE COURT: Okay. Well, I'm inclined to direct that a bar date be established, including asbestos claims. And I view this as competing plans, and therefore my suggestion is that the Committee has an opportunity to object to your plan. You have a disclosure statement also?

MR. GORDON: No, but we'll have that within a couple of weeks, Your Honor.

THE COURT: Well, okay. Then, then we can have time to respond to the plan and the disclosure statement.

MR. GORDON: Understood.

THE COURT: And we'll have a hearing on the disclosure statement for each plan.

MR. GORDON: Understood, Your Honor.

THE COURT: And I think that we can easily resolve this, I think, before the end of the year.

MR. GORDON: Resolve the disclosure

statement --

THE COURT: Yes.

MR. GORDON: -- issues? Okay.

MR. HARRON: Your Honor, may I be heard on behalf of the Future Claimants' Representative?

THE COURT: Yes.

MR. HARRON: Thank you. A couple of points to respond to Your Honor's comments.

One, the last time we appeared before Your Honor, there was a claim that our plan wasn't sufficiently complete to move forward with the disclosure statement hearing. If you recall, the Court was concerned that there were no trust documents filed. And we agreed to a tight deadline to file supporting documents so we could move forward. We had asked that the Court condition the debtors' efforts to move forward on them to filing a disclosure statement within the very short term.

As Ms. Ramsey noted, the estimation decision came out last spring. Our disclosure statement has been on file for some time. It's not unreasonable for the debtors to promptly file a disclosure statement. I submit that the rules required that they file one with their plan, which they did not. So that's the first thing, Your Honor.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE:	*	Docket 00-CV-558-R
	*	
THE BABCOCK & WILCOX COMPANY	*	January 25, 2002
	*	10:00 a.m.
* * * * * * * * * * * * * * * * * *		

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Debtors:	Kirkland & Ellis BY: DAVID M. BERNICK, ESQ. 200 E. Randolph Drive Chicago, Illinois 60601
For the Asbestos Claimants Committee:	Caplin & Drysdale BY: ELIHU INSELBUCH, ESQ. 399 Park Avenue, 27th Floor New York, New York 10022
Official Court Reporter:	Toni Doyle Tusa, CCR 501 Magazine Street, Room 406 New Orleans, Louisiana 70130 (504) 589-7778

Proceedings recorded by mechanical stenography, transcript produced by computer.

APPEARANCES, (Continued):

For the Unofficial Committee of Select Claimants:	ELIZABETH W. MAGNER, ESQ. 228 St. Charles Avenue Suite 1110 New Orleans, Louisiana 70130
For the Futures Representative:	Young, Conaway, Stargatt & Taylor BY: JAMES L. PATTON, JR., ESQ. 1000 West Street, 17th Floor Wilmington, Delaware 19801
For the Futures Representative:	Session, Fishman & Nathan BY: J. DAVID FORSYTH, ESQ. 201 St. Charles Avenue, 35th Floor New Orleans, Louisiana 70170

I N D E X

rules do not change in Chapter 11. The next question, is it simply an --

THE COURT: Let me get to what's on my mind about this. I've read all of your materials and a number of questions leap out at me. You have 221,000 proofs of claim.

MR. BERNICK: That's correct.

THE COURT: How much are the company's assets and insurance?

MR. BERNICK: The face value of the insurance is $1.3 billion. That requires also a plugging of insolvency holes of about $150 million, which would have to be supplied by the company. Beyond the insurance, the company's net assets as of the time of the insolvency hearing -- I would have to find out for Your Honor.

THE COURT: Can you give me sort of a ballpark?

MR. BERNICK: Oh, I don't know -- somebody want to help me out? $500 million or $600 million.

THE COURT: How much debt do you have that's nonasbestos-related?

MR. BERNICK: I believe the number we gave you is the net assets number.

THE COURT: That was net?

MR. BERNICK: Yes.

THE COURT: Now, the process that you're talking about, essentially of these 221,000 claims you contend that

only about 22,000 of them are arguably viable?

MR. BERNICK: 22,000, I take it Your Honor has gone through and kind of marked out categories that we put numbers on and done the subtraction?

THE COURT: Right.

MR. BERNICK: I'm not sure that's correct because there's overlap between some of those categories.

THE COURT: Well, what I looked at was you had these categories that you say are claims that are nonviable. There were like 22,000 left that are arguably viable, to which you say you have other defenses as to the 22,000.

MR. BERNICK: I don't know what exactly the math was that Your Honor followed. As I indicated, some of these categories that we put numbers on are overlapping, so you would have to see how they net out.

THE COURT: I think I was following what you put in your surreply brief because the original brief that you submitted didn't do that. Your supplemental brief basically listed that there were: 50,000 claims that were challengeable on the basis of duplication, that were paid already, they were employees, or they lacked some sort of documentation; another 160,000 had no exposure; 40,000 that had arguable exposure, had no impairment; and that there were 22,000 left after.

MR. BERNICK: That's fair enough.

THE COURT: If what you are saying is true, that

still would mean that before we got to the 22,000 that are arguably viable I would have to make 200,000 discrete determinations that these claims were not sufficient to proceed, is that right?

MR. BERNICK: You would have to make a determination with regard to those claims. The word "discrete" suggests it would be individualized.

THE COURT: How else?

MR. BERNICK: That's the whole purpose of Rule 42. It enables the Court to aggregate claims for purposes of addressing a common issue.

THE COURT: But the issues are still individual issues. If you are going to lump them all together and say, okay, these 160,000 may have an issue involving exposure -- each one of those people has an issue as to exposure that has to be determined. Simply putting them together for Rule 42 doesn't make the individual issue go away.

MR. BERNICK: It depends upon the nature of the issue and the nature of the proof. Obviously, in order to make a determination binding with regard to an individual claimant, that claimant's particular claim has to be before the Court. But in the same fashion, if you were to say we had 100,000 people all of whom got a certain disease from exposure to a pharmaceutical drug --

THE COURT: That doesn't have anything to do with

this. You are saying that you have 160,000 people who weren't exposed to your boilers.

MR. BERNICK: Right.

THE COURT: Now, how can I do that except one at a time?

MR. BERNICK: Because you take the proof of claim forms, and where they say by their own proof of claim forms they were exposed to Babcock & Wilcox asbestos, it's right in their claim forms. You compare what their claim forms say was the site of that exposure to the Babcock & Wilcox boiler sites which are documented and recorded. A boiler is not something that floats in and out. They are huge facilities. You see if there's an overlap between those 95,000 --

THE COURT: That's not the end of the story. We don't know the validity of your data. There has to be a determination. The fact they say, "I was exposed to a boiler at X, Y, Z location," and you say, "No, you weren't," is not the end of the story.

MR. BERNICK: I could see there might be a necessity of some discovery to verify the accuracy of our documentation, and that verification I believe would be fairly straightforward. We would establish it was a business practice to create files for each and every boiler that was manufactured and supplied, that they had been kept in the ordinary course of business, they had been maintained and what work done on those

boilers recorded, these are the boiler files, and they are what they are.

Now, if somebody is going to say, "No, it turns out that you really had another boiler that you didn't even know about that's not in your files, not in your records, nobody ever heard about it, but I swear it was a Babcock & Wilcox boiler," then you could argue there's an issue of fact. The question is whether it's a credible issue of fact given what the proofs would be.

THE COURT: Well, we would have to get into 160,000 of those possibilities.

MR. BERNICK: There's that possibility, or the Court could determine based upon the evidence that's been provided about how these boilers were set up, how they were certified, how they were tracked, and how they were logged. That oral testimony saying, "I saw what I thought to be a Babcock & Wilcox boiler," does not present a reasonable issue of fact. It is not an issue of fact in which reasonable minds could differ and shouldn't go to the jury.

THE COURT: We still would have to get to that as to each one.

MR. BERNICK: I would disagree with that, Your Honor. You get to that on the basis of the nature of the proof that's offered by the company about what the documentation means. So, in other words, we say if the documentation is solid, reliable

documentation that's been properly kept, had to be kept, and that all that's on the other side, therefore, is somebody who says, "I was there and I saw a different thing," you don't have to make that determination 160,000 times. The question is whether the oral testimony in some fashion has enough credibility as against the documented history of record-keeping to create a reasonable issue of fact. It's the whole question of the summary judgment standard of proof. It's not just a disagreement between two people saying something.

THE COURT: It's your contention there are 160,000 people who have said they were exposed to your boilers who were not at any place where there was --

MR. BERNICK: There are 93,000 people who already in their claim forms say, "I was exposed to Babcock & Wilcox asbestos," and they fill in the blank with the site where there was never a Babcock & Wilcox boiler. There are 95,000 of those people. There are an additional 65,000 where we think that's what they have done, but we are not quite sure, so we create a 45-day window, or thereabouts, for them to clarify what was the particular site where they say a boiler existed. These can be done on an aggregated basis.

It's really a question of whether summary judgment means anything. If all that it takes to defeat summary judgment is somebody to say, "I disagree. I saw it," then we won't have summary judgment, but that's not the

standard. The standard is it has to be sufficient evidence to clear a directed verdict motion. It must be evidence sufficient to give rise to a reasonable difference of view about what the facts were.

THE COURT: All right. Let me ask you something else. Even if you lose on these 200,000, before we get to the 22,000 there are additional grounds you can challenge any one of those people in the first 200,000. There are multiple grounds that you could keep coming back. If you lost, say, on the boiler issue, you would come back later on a sophisticated user or some other motion later, right?

MR. BERNICK: Right. Well, in the case of the boiler issue, if the boiler wasn't there, it's going to be difficult for us --

THE COURT: Suppose there's an issue of fact and you lose that summary judgment motion. That's not the end of it because you have a backup summary judgment motion down the road because you have about 644,000 possible objections that could be made to these claims if I add all this stuff up.

MR. BERNICK: I understand what you say. If we lose on summary judgment as to whether the boiler is there, will we have other backup defenses, and the answer is there are medical defenses. Some of the other defenses are not really backup defenses because you have to know what the boiler was and when it was put in place to make them. For example, the statute of

repose assumes that you can identify a boiler and know when it was finished, so that's a defense that can't be a backup defense. By contrast, the defense that says that there's a medical condition that has not been proven by reliable evidence, yes, that would be a second wave of defenses not focused on our conduct or on product identification, that are focused on the medicine, and the reason we put them second is because we believe they are going to be a little more difficult to deal with because they will require some expert testimony.

THE COURT: How long do you envision this process taking?

MR. BERNICK: I think this process is really almost purely a question of paperwork, with some limited discovery. I think the first wave of this process could be before Your Honor in a matter of months.

THE COURT: I'm talking about the total lifetime of this process.

MR. BERNICK: The total lifetime?

THE COURT: Getting it before me -- I'm not a claims adjustor. I was trained as a lawyer and as a judge, and if I get motions it takes me time to look at things. It's not going to be months for me to decide 200,000 discrete questions. I know that. It takes months to get your arms around the 200,000 that you even have in the Court.

MR. BERNICK: I think realistically what Your Honor

would get is a brief from us -- let's take the boilers as an example. We would take the 93,000 and we would file an omnibus objection and move for summary judgment, and we would attach to the motion for summary judgment affidavits of documentation of where our boilers were.

That is one of the most perverse issues, that somehow there's a big boiler there and nobody really knew about it except this person saw it. So we would submit that documentation. They would be entitled to conduct some discovery, obviously, to verify what the accuracy of that documentation is.

THE COURT: You would give them 30 days to do that?

MR. BERNICK: I would give them 30 days on the discovery, probably, yes. It's really relatively simple discovery. All it is is taking the depositions of the people who maintained the records and finding out what records they have. This is not rocket science. It's not that complex. We take the discovery, then --

THE COURT: You don't want to depose them? You don't want to depose the plaintiffs on that issue?

MR. BERNICK: Well, on the issue of what they saw, no. I think that, in fact, the claim form is probably enough for us to pose the issue; that is, that we would rest upon the reliability of our documentation in order to establish, in fact, the boiler was not there.

THE COURT: If the plaintiff came in and said, "I saw something different," you would be content not to cross-examine the plaintiff?

MR. BERNICK: It might be interesting to take a few depositions and develop some feel for the Court on what kind of testimony is offered, but we are not going to sit there and take 95,000 depositions.

THE COURT: Tell me how long this first 95,000 is going to take to dispose of.

MR. BERNICK: That, I think, could be done in three months. Again, because --

THE COURT: Who is doing what? Your part or my part?

MR. BERNICK: It depends on how fast you read the papers. Your Honor I think is justifiably and understandably -- I'll use the word I think it's --

THE COURT: Try awe-struck.

MR. BERNICK: Awe-struck, intimidated, disconcerted by the numbers, but the numbers are not what drive the equation. What's going to drive the equation is our ability to pick out common predicate facts that can be adjudicated, and it has to be a small number of common predicate facts. If we can't do that, it will take a very long time, and that's not our concept. Our concept is to pick out what counts and put it before Your Honor, what counts here. What counts here is the accuracy of our records in convincing you that there was a