IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN 11 1970
JAMES R. COONEY, CLERK
BY DEPUTY Imagene R. Jones

CLARENCE BOREL	§	
	§	
VS.	§	CIVIL ACTION NO. 6449
	§	
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL	§	

MOTION TO SUPPRESS DEPOSITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Standard Asbestos Manufacturing and Insulating Company, and files this, its motion to suppress the deposition of Clarence Borel, the plaintiff, taken by Edna LaBove, Notary Public, on May 28, 1970, and as grounds therefor would respectfully represent unto the Court the following:

I.

Prior to May 22, 1970, the oral deposition of Clarence Borel had been taken. In that deposition, he testified concerning occasions upon which he had been exposed to products manufactured by this defendant.

On May 22, 1970, the plaintiff's counsel prepared an additional interrogatory covering the same subject matter. On the same date, notice of taking deposition upon written interrogatory was prepared by plaintiff's counsel. A copy of the interrogatory, together with the original of the notice, as well as a letter of transmittal, was mailed by plaintiff's counsel to the undersigned attorney as counsel for said defendant on May 22, 1970. Such material was sent

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certified mail, under certification number 674129. For some reason not known to the undersigned attorney, the material contained in said envelope was not delivered to said attorney, but rather was returned unclaimed to plaintiff's counsel.

At some time subsequent to May 28, 1970, and on approximately June 5, 1970, the undersigned attorney received a copy of said deposition from the said Edna LaBove, Notary Public. This was the first notice that the undersigned attorney had had of the taking of any additional deposition of the said Clarence Borel.

Immediately thereafter, the undersigned attorney undertook to ascertain just what had transpired, not having received any notice of the taking of such deposition. After having ascertained that such deposition had in fact been taken, and on or about June 9, 1970, the undersigned attorney telephoned plaintiff's attorney to inquire as to how the deposition might have been taken without the giving of proper notice. At that time, plaintiff's counsel, Honorable Ward Stephenson, stated that he had in fact prepared and mailed a notice. This the undersigned attorney was willing to accept, although he was still unable to understand why the notice had not been received.

On the morning of June 10, 1970, the undersigned attorney received a letter from plaintiff's attorney dated June 9, 1970, enclosing his letter dated May 22, 1970, the original of the notice, and copy of the interrogatory, as well

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as the original envelope containing such documents, which envelope had been returned to the office of plaintiff's attorney. A copy of said envelope, a copy of said letter, a copy of said notice, and a copy of such interrogatory are attached hereto, marked exhibit A and made a part hereof.

II.

Clarence Borel died at approximately 12:50 a.m. on Wednesday, June 3, 1970. A certified copy of the death certificate of Clarence Borel is attached hereto, marked exhibit B and made a part hereof.

III.

It is apparent from the foregoing that timely notice of the taking of this deposition was not given, and that this defendant was deprived of its right of cross examination, in that this defendant did not have an opportunity to prepare cross interrogatories, or to take any other action permitted by the Federal Rules of Civil Procedure concerning the taking of such testimony.

IV.

This defendant is aware of the provisions of Rule 5(b) providing that service of such notice may be made by delivering a copy to the attorney for the adverse party by mailing it to him at his last known address. This defendant is further aware of the fact that the Rule provides that service by mail is complete upon mailing. This defendant further accepts without question the fact that the notice was indeed mailed on May 22, 1970. Thus, this defendant concedes that service was complete on said date, despite the

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fact that such notice was not actually received until June 10, 1970. This may be unfortunate from this defendant's point of view, but the Rules are clear, and this defendant must, then, accept the proposition that service was complete on the day the notice was mailed. Defendant will proceed from that point.

Under the Provisions of Rule 31(a), a party desiring to take the deposition of any person upon written interrogatories is required to serve such written interrogatories upon every other party with a notice stating the name and address of the person who is to answer the interrogatories and the name or descriptive title of the officer before whom the deposition is to be taken. This was done. The Rule further provides, however, that a party so served has ten (10) days within which to serve cross interrogatories. Further, Rule 32(c)(3) provides that such a party has a like period of time to object to the form of written interrogatories. It might be argued that under the provisions of Rule 30(a) The Court might have shortened the time, but this is beside the point, since no such motion was made.

V.

It would seem clear, therefore, that if the deposition had been taken prior to the time that this defendant was required to file cross interrogatories or to object in any way to the taking of the deposition, it was premature and should be quashed.

Since the notice was served on May 22, this defendant, under ordinary circumstances, and following the provisions

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of the Rule as referred to above, would have up to and including June 1 within which to prepare such cross interrogatories or to make such objections. Obviously, this defendant was deprived of that opportunity, since the deposition was actually taken on May 28, 1970, prior to the expiration of the time within which the defendant could file cross interrogatories.

VI.

The vice here, however, is even worse than indicated above. Actually, the ten (10) day period within which the defendant could file cross interrogatories, was extended by the provisions of Rule 6(e). That Rule provides as follows:

> "(e) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period of time after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three (3) days shall be added to the prescribed period."

Thus, assuming, as we must, that service here was complete upon the date of the mailing of the same, even though it was not received, the notice was served upon May 22, 1970. The defendant, by the provision of Rule 31(a), had ten (10) days within which to take action. That period of time was extended by Rule 6(e) to thirteen (13) days. Thus, the defendant had up to and including June 4, 1970 to file cross interrogatories or to take such other action permitted by the Rules. This would include, of course, filing a motion

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to require the taking of the deposition on written interrogatories or any of the other actions contemplated by the rule.

By this time, the witness had died.

VII.

Even assuming that the notice was effective on the date it was mailed, this defendant has forever been foreclosed from exercising its right of cross examination or of taking any of the other actions contemplated by law, since the witness died prior to the expiration of the time the defendant was required to take action. It is apparent, therefore, that the taking of this deposition was premature, and that the same must be suppressed.

WHEREFORE, premises considered, defendant, Standard Asbestos Manufacturing and Insulating Company, respectfully moves the Court to enter an Order suppressing the deposition of Clarence Borel taken on May 28, 1970.

Respectfully submitted,

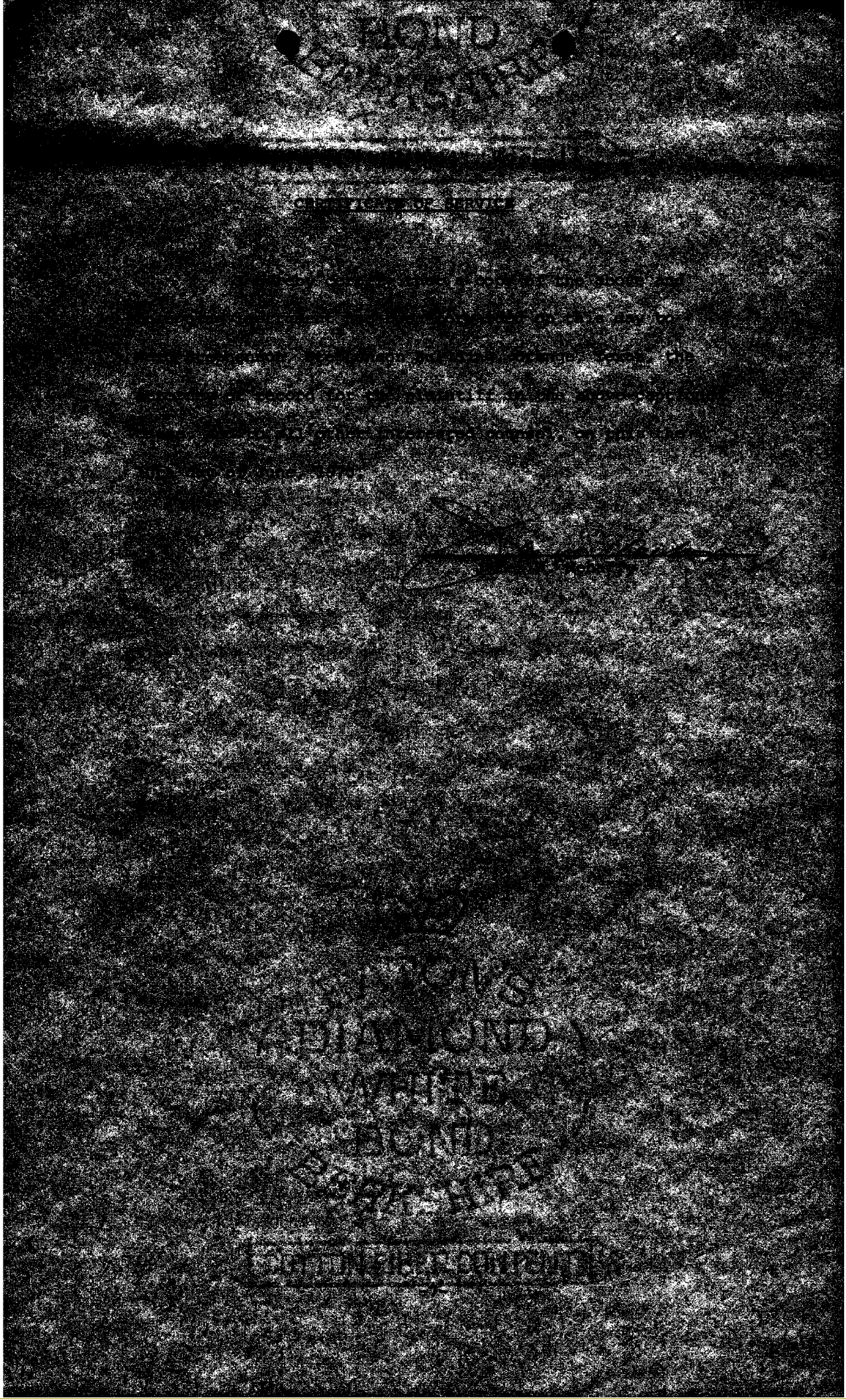
MEHAFFY, WEBER, KEITH & GONSOULIN
Attorneys for Standard Asbestos
Manufacturing and Insulating Co.

By _____
Of Counsel

1400 San Jacinto Building
Beaumont, Texas

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Exhibit A

Law offices of

STEPHENSON AND THOMPSON

P. O. BOX 68 / 712 DIVISION STREET
STEPHENSON BUILDING / ORANGE, TEXAS 77630

CERTIFIED MAIL, RETURN
RECEIPT REQUESTED

CERTIFIED
No. 674129
MAIL

Refused
Notified
5-28-70

JUN 3 1970

UNCLAIMED

RETURNED TO WRITER

REASON CHECKED
Unclaimed
Unknown
Insufficient Address
Moved, Left No Address
No such post office in state
Do not remain in this envelope

UNCLAIMED

Mr. James W. Mehaffy
Attorney at Law
San Jacinto Building
Beaumont, Texas 77701

BEAUMONT TEX. JUN 5 1970
MAY 22 '70
TEX.
P.B. METER P.O. 585613
.57

UNCLAIMED

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Exhibit A

KEMPER W. STEPHENSON, 1958
WARD STEPHENSON
MARLIN THOMPSON

Law offices of STEPHENSON AND THOMPSON

STEPHENSON BUILDING / 712 DIVISION STREET
ORANGE, TEXAS 77630 / 883-9396

May 22, 1970

Mr. James W. Mehaffy
Attorney at Law
San Jacinto Building
Beaumont, Texas 77701

Re: Clarence Borel vs. Fibreboard Paper Products Corporation, et al

Dear Jim:

Mr. Borel's condition has grown worse and he has been placed in Doctors Hospital in Groves. I am enclosing a short interrogatory and I am mailing this to Mrs. Edna LaBove and asking her to see Mr. Borel in the hospital and obtain his answer as soon as possible. I have asked that she contact him in five days, and therefore, if you have any cross-interrogatories, you should get them to her as soon as possible. I know that you are aware of his serious condition and will make any cross-interrogatories as short as possible.

Yours truly,

Ward Stephenson

Ward Stephenson

WS:jb
Encl.
CERTIFIED MAIL, RETURN
RECEIPT REQUESTED

Exhibit A

KEMPER W. STEPHENSON, 1958
WARD STEPHENSON
MARLIN THOMPSON

Law offices of STEPHENSON AND THOMPSON

STEPHENSON BUILDING / 712 DIVISION STREET
ORANGE, TEXAS 77630 / 883-9396

May 22, 1970

Mr. James R. Cooney
Clerk, U. S. District Court
Federal Building
Beaumont, Texas 77701

Re: Civil No. 6449, Clarence Borel vs. Fibreboard Paper Products Corporation, et al

Dear Mr. Cooney:

We are enclosing notice of taking deposition upon written interrogatories served with notice.

Please file this instrument among the papers in this action.

Yours truly,

Ward Stephenson

WS:jb
Encl.
cc:
Mr. George A. Weller
Mr. W. N. Arnold, Jr.
Mr. Dale Dowell
Mr. George E. Duncan
Mr. Robert E. Barnes
Mr. Gerald P. Coley
Mr. Ben L. Reynolds
Mr. James W. Mehaffy
Mr. Gordon R. Pate
Mr. Charles S. Pipkin
Mr. George E. Murphy
Mr. Frank Bean

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CLARENCE BOREL :

VS. : CIVIL ACTION NO. 6449

FIBREBOARD PAPER PRODUCTS :
CORPORATION, ET AL :

NOTICE OF TAKING DEPOSITION UPON
WRITTEN INTERROGATORIES SERVED WITH NOTICE

TO: FIBREBOARD PAPER PRODUCTS CORPORATION
COMBUSTION ENGINEERING, INC.
JOHNS-MANVILLE PRODUCTS CORPORATION
OWENS-CORNING FIBER GLASS CORPORATION
EAGLE-PICHER INDUSTRIES, INC.
PITTSBURGH CORNING CORPORATION
UNARCO INDUSTRIES, INC.
PHILIP CAREY CORPORATION
ARMSTRONG CONTRACTING AND SUPPLY CORPORATION
STANDARD ASBESTOS MANUFACTURING & INSULATING COMPANY
RUBEROID COMPANY
ARMSTRONG CORK COMPANY,

Defendants:

Please take notice that the deposition of Clarence Borel, of the City of Groves, Texas, will be taken on behalf of the plaintiff upon certain interrogatories, of which a copy is herewith served upon you, and such cross-interrogatories as may be served herein, before Mrs. Edna LaBove, Court Reporter, P. O. Box 232, Port Neches, Texas 77651.

STEPHENSON & THOMPSON

By Ward Stephenson
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

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Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CLARENCE BOREL	:	
VS.	:	CIVIL ACTION NO. 6449
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL	:	

INTERROGATORIES

Interrogatories to be propounded to Mr. Clarence Borel, c/o Doctors Hospital, Groves, Texas, who is to be sworn and examined on the part of plaintiff by Mrs. Edna LaBove, Court Reporter, P. O. Box 232, Port Neches, Texas.

No. 1 Mr. Borel, you have stated that you have worked with products manufactured by Standard Asbestos Manufacturing and Insulating Company. If you will, please state to the court reporter where you worked with these products, giving her the approximate dates, your employer, if you recall the name of your employer, and the job site.

STEPHENSON AND THOMPSON

By Ward Stephenson
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

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Exhibit A

CERTIFICATE OF SERVICE BY MAIL

I, Ward Stephenson, hereby certify that a copy of the foregoing instrument was on this the 22nd day of May, 1970, mailed to the following named attorneys for the defendants and intervenor:

Mr. George A. Weller
Attorney at Law
P. O. Box 350
Beaumont, Texas 77704
ATTORNEY FOR DEFENDANT
FIBREBOARD CORPORATION

Mr. W. N. Arnold, Jr.
Attorney at Law
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston, Texas 77002
ATTORNEY FOR DEFENDANT
ARMSTRONG CONTRACTING &
SUPPLY CORPORATION

Mr. W. N. Arnold, Jr.
Attorney at Law
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston, Texas 77002
ATTORNEY FOR DEFENDANT
PHILIP CAREY CORPORATION

Mr. W. N. Arnold, Jr.
Attorney at Law
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston, Texas 77002
ATTORNEY FOR DEFENDANT
ARMSTRONG CORK COMPANY

Mr. Dale Dowell
Attorney at Law
707 Beaumont Savings Bldg.
Beaumont, Texas 77701
ATTORNEY FOR DEFENDANT
OWENS-CORNING FIBERGLAS
CORPORATION

Mr. George E. Duncan
Attorney at Law
P. O. Box 3708
Beaumont, Texas 77704
ATTORNEY FOR DEFENDANT
PITTSBURGH CORNING CORPORATION

Mr. Robert E. Barnes
Attorney at Law
P. O. Box 3098
Beaumont, Texas 77706
ATTORNEY FOR DEFENDANT
RUBEROID COMPANY

Mr. Gerald P. Coley
Attorney at Law
Vinson, Elkins, Searls & Connally
First City National Bank Bldg.
Houston, Texas 77002
ATTORNEY FOR DEFENDANT
UNARCO INDUSTRIES, INC.

Mr. Ben L. Reynolds
Attorney at Law
Royston, Rayzor and Cook
877 San Jacinto Building
Houston, Texas 77002
ATTORNEY FOR DEFENDANT
EAGLE-PICHER INDUSTRIES, INC.

Mr. James W. Mehaffy
Attorney at Law
San Jacinto Building
Beaumont, Texas 77701
ATTORNEY FOR DEFENDANT
STANDARD ASBESTOS MANUFACTURING
AND INSULATING COMPANY

Mr. Gordon R. Pate
Attorney at Law
1119 Beaumont Savings Building
Beaumont, Texas 77701
ATTORNEY FOR DEFENDANT
JOHNS-MANVILLE PRODUCTS
CORPORATION

Mr. Charles S. Pipkin
Attorney at Law
P. O. Box 1632
Beaumont, Texas 77704
ATTORNEY FOR DEFENDANT
COMBUSTION ENGINEERING, INC.

Mr. George E. Murphy
Attorney at Law
615 San Jacinto Building
Beaumont, Texas 77701
ATTORNEY FOR INTERVENOR
NATIONAL SURETY CORPORATION

Mr. Frank Bean
Bean and Manning
500 Jefferson Building
Houston, Texas
ATTORNEY FOR DEFENDANT
EAGLE-PICHER INDUSTRIES, INC.

Ward Stephenson
WARD STEPHENSON

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EXHIBIT B

STATE OF TEXAS — CERTIFICATE OF DEATH — STATE [redacted] NO.

1. PLACE OF DEATH
a. COUNTY: Jefferson
b. CITY OR TOWN (If outside city limits, give precinct no.): Groves
c. LENGTH OF STAY in b.: 6 years
d. NAME OF HOSPITAL OR INSTITUTION (If not in hospital, give street address): 4500 Lawndale
e. IS PLACE OF DEATH INSIDE CITY LIMITS? YES ☒ NO ☐

2. USUAL RESIDENCE (Where deceased lived. If institution: residence before admission)
a. STATE: Texas
b. COUNTY: Jefferson
c. CITY OR TOWN (If outside city limits, give precinct no.): Groves
d. STREET ADDRESS (If rural, give location): 4500 Lawndale
e. IS RESIDENCE INSIDE CITY LIMITS? YES ☒ NO ☐
f. IS RESIDENCE ON A FARM? YES ☐ NO ☒

3. NAME OF DECEASED (Type or print): (a) First: Clarence (b) Middle: (c) Last: Borel
4. DATE OF DEATH: June 3, 1970
5. SEX: Male
6. COLOR OR RACE: White
7. Married ☒ Never Married ☐ Widowed ☐ Divorced ☐
8. DATE OF BIRTH: August 14, 1912
9. AGE (In years last birthday): 57
IF UNDER 1 YEAR — Months / Days; IF UNDER 24 HRS. — Hours / Minutes
10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Asbestos-Worker
10b. KIND OF BUSINESS OR INDUSTRY: Construction
11. BIRTHPLACE (State or foreign country): Louisiana
12. CITIZEN OF WHAT COUNTRY?: U.S.A.
13. FATHER'S NAME: Charles Borel
14. MOTHER'S MAIDEN NAME: Lucy Brown
15. WAS DECEASED EVER IN U.S. ARMED FORCES? (Yes, no, or unknown): No (If yes, give war or dates of service)
16. SOCIAL SECURITY NO.: 454-10-8007
17. INFORMANT: Mrs. Clarence Borel - Wife

MEDICAL CERTIFICATION

18. CAUSE OF DEATH [Enter only one cause per line for (a), (b), and (c).]
PART I. DEATH WAS CAUSED BY:
IMMEDIATE CAUSE (a): Medullary Failure — INTERVAL BETWEEN ONSET AND DEATH: min
Conditions, if any, which gave rise to above cause (a), stating the underlying cause last.
DUE TO (b): Overwhelming Toxiema — days
DUE TO (c): Generalized Carcinomatosis — 1 1/2 yrs
PART II. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE TERMINAL DISEASE CONDITION GIVEN IN PART I(a): Chronic Asbestosis of lung
19. WAS AUTOPSY PERFORMED? YES ☐ NO ☒

20a. ACCIDENT ☐ SUICIDE ☐ HOMICIDE ☐
20b. DESCRIBE HOW INJURY OCCURRED. (Enter nature of injury in Part I or Part II of Item 18.)
20c. TIME OF INJURY: Hour (a.m. / p.m.) Month Day Year
20d. INJURY OCCURRED: WHILE AT WORK ☐ NOT WHILE AT WORK ☐
20e. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office building, etc.)
20f. CITY, TOWN, OR LOCATION COUNTY STATE

21. I hereby certify that I attended the deceased from 1957 19__ to 6/3/70 19__ and last saw the deceased alive on 6/3/70 19__. Death occurred at 1235 m. on the date stated above, and to the best of my knowledge, from the causes stated.
22a. SIGNATURE: [signature] (Degree or title) DO
22b. ADDRESS: 6265-39th Groves, Tex.
22c. DATE SIGNED: 6/5/70

23a. BURIAL, CREMATION, REMOVAL (Specify): Burial
23b. DATE: June 4, 1970
23c. NAME OF CEMETERY OR CREMATORY: Oak Bluff Memorial Park
23d. LOCATION (City, town, or county) (State): Port Neches, Texas
24. FUNERAL DIRECTOR'S SIGNATURE: Levingston F. H. [signature] #5991 #4449
25a. REGISTRAR'S FILE NO.: 46
25b. DATE REC'D BY LOCAL REGISTRAR: June 5, 1970
25c. REGISTRAR'S SIGNATURE: C. R. Nash By Joyce S. Perkins

AFFIDAVIT

STATE OF TEXAS
COUNTY OF JEFFERSON

I hereby certify that the above and foregoing is a true and correct copy of the death of Clarence Borel as the same appears on file in the office of the City of Groves, Texas.

Sworn to and subscribed before me, this 10 day of June, 1970.

C. R. Nash
By Joyce S. Perkins
Local Registrar

Georgia Duplissey
Notary Public in and for
Jefferson County, Texas

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