FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

FEB 22 1971

JAMES R. COONEY, CLERK
BY DEPUTY Margaret Stiver

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	§	

OBJECTION OF DEFENDANT, UNARCO INDUSTRIES, INC., TO THE DISMISSAL OF THE CROSS-ACTIONS FOR CONTRIBUTION AGAINST THE DEFENDANTS, OWENS-CORNING FIBERGLAS CORPORATION AND STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Unarco Industries, Inc., and files this, its objection to the motion of the plaintiff and defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company, requesting that the Court enter a proposed judgment disposing of all claims and causes of action, including all cross-actions and counterclaims, against the defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company, and it also files its objections to the judgment entered by the Court on February 3, 1971, in behalf of Owens-Corning Fiberglas Corporation and to the proposed judgment in behalf of Standard Asbestos Manufacturing and Insulating Company. The interlocutory judgment on file herein reflects that Owens-Corning Fiberglas Corporation has entered into a compromise with the plaintiff and thereby have asserted they are no longer necessary or proper parties to this suit or any counterclaim or cross-action herein.

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An interlocutory judgment has been entered by the Court decreeing that Owens-Corning Fiberglas Corporation should be in all things dismissed from this suit, both as to plaintiff's cause of action and the cause of action asserted by National Surety Corporation as intervener. It is the understanding of counsel for Unarco Industries, Inc. that a similar judgment has or will be entered in behalf of Standard Asbestos Manufacturing and Insulating Company. If the order or orders of the Court can be construed as dismissing Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company from this lawsuit for all purposes, including the dismissal of the cross-action of Unarco Industries, Inc. and the cross-action of other defendants, then Unarco Industries, Inc. objects to the dismissal of its cross-claim against the defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company, and as grounds therefor would show:

1.

Plaintiff's second amended original complaint on file herein alleges that the defendants, Fibreboard Corporation; Combustion Engineering, Inc.; Johns-Manville Products Corporation; Owens-Corning Fiberglas Corporation; Eagle-Picher Industries, Inc.; Pittsburgh Corning Corporation; Unarco Industries, Inc.; Philip Carey Corporation; Standard Asbestos Manufacturing and Insulating Company; Ruberoid Company; and Armstrong Cork Company, were jointly guilty of negligence and breach of warranties proximately causing damage to plaintiff's decedent which resulted in his death.

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Unarco Industries, Inc., as one of the alleged joint tort-feasors, filed a cross-action against each and all of the defendants for contribution. Each and all of the cross-defendants are before the Court on the cross-action of Unarco Industries, Inc. and each of said cross-defendants have filed answers to said cross-action.

The defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company, have entered into a compromise settlement agreement with plaintiff, where they have been dismissed from this suit; however, this defendant is not a party to such compromise settlement agreement and has in nowise entered into a compromise agreement with the co-defendants and does not agree that said cross-defendants may be dismissed.

2.

Plaintiff alleges that all of the defendants are jointly and severally liable, and if this be true, then this defendant will be entitled to contribution on its cross-action and is entitled to have the said cross-defendants remain as cross-defendants on its cross-action for contribution. Likewise, it is entitled to treat each of said co-defendants and cross-defendants as adverse parties on its cross-action. Under the law, in order for this defendant to be entitled to credit for the payments heretofore made by the co-defendants and cross-defendants, it is necessary to obtain a finding that said co-defendants caused or contributed to cause the plaintiff's damage, and since said co-defendants are also cross-defendants of Unarco Industries, Inc., and have answered said cross-action and are before this Court, this defendant would

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object to the dismissal of its cross-action, if such has in fact occurred, against the cross-defendants for contribution. Under Rule 41 of the Federal Rules of Civil Procedure, there is no authority in the Court to dismiss the cross-claim or third-party claim of this defendant against the co-defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company, and this defendant objects thereto and objects to the judgment or judgments heretofore entered without a hearing and without evidence being heard.

3.

This defendant would further show that this case has been pending on this docket for some period of time, numerous depositions have been taken of various witnesses, interrogatories have been propounded to and answers made by representatives of the cross-defendants dismissed, and it would be highly prejudicial to the rights of this defendant for the Court to enter the order and dismiss the cross-defendants from this suit.

WHEREFORE, this defendant prays that the Court consider the motion of the cross-defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company, and each of them, and that the Court decree that the dismissal of plaintiff's case against said defendants shall in nowise operate to prejudice the cross-claim of Unarco Industries, Inc.

Respectfully submitted,

VINSON, ELKINS, SEARLS & SMITH
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Houston, Texas 77002

By Gerald P. Coley
Gerald P. Coley
Attorneys for Defendant,
Unarco Industries, Inc.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served upon counsel for Plaintiff and counsel for the Defendants by mailing a copy of the same to the address shown below on each counsel of record by depositing the same in the United States Mail, properly addressed, with postage paid, on the 18th day of February, 1971.

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FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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ORDER

The motion of Unarco Industries, Inc. concerning the dismissal of Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company on joint motion of the plaintiff and said defendants, having been duly considered, and the Court being of the opinion that the motion of Unarco Industries, Inc. that such dismissal be without prejudice to any cross-claim of Unarco Industries, Inc. against said defendants should be sustained and that the entry of the interlocutory judgment shall in nowise affect said cross-claim but that said cross-defendants shall remain parties to this suit;

It is therefore ORDERED that the motion of Unarco Industries, Inc. requesting that the dismissal of Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing and Insulating Company shall be without prejudice to the rights of this defendant to assert its cross-action against said cross-defendants, is granted and said cross-defendants shall remain parties to this cause for the purposes of said cross-action or actions on file herein.

SIGNED and ENTERED this 20th day of ~~February,~~ September 1971.

CHIEF JUDGE, UNITED STATES DISTRICT COURT

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