IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 27 1971
JAMES R. COONEY, CLERK
BY DEPUTY

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449

SECOND SUPPLEMENTAL ANSWER OF DEFENDANT, FIBREBOARD CORPORATION, AMENDING ITS SECOND AMENDED ANSWER TO PLAINTIFFS' SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Corporation, and with express permission of the Court files this, its second supplemental answer, such being filed as a supplement to this defendant's second amended answer to plaintiffs' second amended original complaint on file herein, and this pleading to be considered as an addition to said second amended answer, and for such supplemental answer this defendant would show the Court:

Twentieth Affirmative Defense

Further answering, defendant shows unto the Court that the plaintiff, Thelma Freida Borel, instituted this suit against various defendants, including Eagle-Picher Industries, Inc. and Unarco Industries, Inc., and the other named defendants, seeking recovery against such defendants for damages alleged to have been in the sum of $500,000. Your defendant, Fibreboard Corporation, has filed cross-actions against said Eagle-Picher Industries, Inc. and Unarco Industries, Inc., asserting that if plaintiff's decedent sustained any injury as a result of any act or omission on the part of Fibreboard Corporation, which this defendant denies, then such was caused and proximately caused and contributed to by the acts

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and omissions of the remaining defendants, including Eagle-Picher Industries, Inc. and Unarco Industries, Inc., and that this defendant was entitled to full indemnity, or in the alternative, contribution. Thereafter, on or about the 20th day of September, 1971, for a valuable consideration, to-wit, $6,225.55, paid by Eagle-Picher Industries, Inc., to the said Thelma Freida Borel and intervener, National Surety Corporation, in "final compromise and settlement of all claims and causes of action asserted by the said Thelma Freida Borel," and the sum of $6,225.55 paid by Unarco Industries, Inc., to Thelma Freida Borel and intervener, she "fully and finally released and discharged Eagle-Picher Industries, Inc., and Unarco Industries, Inc., of any and all claims which were or might be asserted against it"; and the said Thelma Freida Borel, in her own right and as surviving widow of Clarence Borel, for said consideration fully and finally released the said Eagle-Picher Industries, Inc., from this suit and also released "any and every character of claim, demand, damage, cause of action and expense that she now had or might have against such concer, and acknowledged that said suit, as well as all claims, demands, damages, causes of action and expense, already accrued or which might accrue in the future were in all things fully and finally compromised, settled and released." Thelma Freida Borel likewise, for the same consideration, executed a similar release to Unarco Industries, Inc. Defendant show unto the Court that having received and accepted such sums and fully and finally released said defendants, that such constitutes a final and complete payment and discharge of all claims and causes of action of the said Thelma Freida Borel in her own right and as surviving widow of Clarence

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Borel, and by virtue of the receipt and acceptance of such payments all claims for damages of the said Thelma Freida Borel have been fully and finally paid, satisfied and extinguished.

Twenty-First Affirmative Defense

In the alternative, defendant shows unto the Court that if the payment and receipt by plaintiff and intervener of said sum of $6,225.55 paid by each of said defendants above named, and the execution of such releases of all claims already accrued or which might accrue in the future does not constitute full payment and satisfaction of all claims for all of plaintiffs' damages, that since Eagle-Picher Industries, Inc., and Unarco Industries, Inc., were guilty of negligence, breach of express and breach of implied warranty, and responsible for the injury and death of the said Clarence Borel and the damages sued for by plaintiffs, that such payment constitutes a partial discharge and acquittance of plaintiffs' damages, and any damages, if any, awarded plaintiffs on trial hereof should be reduced by one-half (1/2) or such other proportion as may be just and proper under the evidence and verdict.

Further answering, defendant shows unto the Court that in connection with the final disposition and payment by Eagle-Picher Industries, Inc., and Unarco Industries, Inc., to Thelma Freida Borel, that the said Thelma Freida Borel and her attorney, Ward Stephenson, agreed to forever indemnify and save harmless the said Eagle-Picher Industries, Inc., and Unarco Industries, Inc., from any and all claims, demands, damages, causes of action or liability, which they or their successors, receivers and assigns, might have or which might be asserted against them by the various defendants named herein, including your defendant, Fibreboard Corporation. Your defendant being entitled to judgment for indemnity

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over and against Eagle-Picher Industries, Inc., and Unarco Industries, Inc.; or, in the alternative, for judgment for contribution, asserts such releases and indemnity agreements in full and final release of all claims herein asserted; or, in the alternative, partial release thereof, which releases and indemnity agreements your defendant is entitled to assert in order to avoid circuity of actions.

Your defendant further shows unto the Court that by virtue of such compromise, settlement, release and indemnity agreement there has been entered an interlocutory judgment in this cause providing that Eagle-Picher Industries, Inc., and Unarco Industries, Inc., have finally discharged any and all claims which were or might be asserted against them "including claims asserted by way of intervention and cross-action," and which interlocutory judgment further recites that the Court determine that the said defendants, Eagle-Picher Industries, Inc., and Unarco Industries, Inc., should be in all things dismissed from this suit. Should such interlocutory judgment be construed as a dismissal of the cross-actions asserted by Fibreboard Corporation against Eagle-Picher Industries, Inc., and Unarco Industries, Inc., then defendant asserts the same as a full and complete bar of any and all claims herein asserted by or in behalf of the said Thelma Freida Borel, individually and as the heir of Clarence Borel, Deceased, because by virtue of such action your defendant and cross-plaintiff has been deprived of the right of indemnity or contribution asserted against the said Eagle-Picher Industries, Inc., and Unarco Industries, Inc., by way of cross-action.

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WHEREFORE, premises considered, this defendant prays that this second supplemental answer be regarded as an addition to the second amended answer of the defendant, Fibreboard Corporation, to plaintiffs' second amended complaint, all of which are on file herein, and if necessary said pleading is adopted by reference, and that upon trial that plaintiffs take nothing against this defendant and that it recover its costs; in the alternative, that it have judgment for indemnity, or in the alternative, contribution, against the cross-defendants as above set out.

Respectfully submitted;

WELLER, WHEELUS, GREEN & BROCATO
P. O. BOX 350
BEAUMONT, TEXAS 77704

BY _____
GEO. A. WELLER,
ATTORNEY FOR DEFENDANT,
FIBREBOARD CORPORATION.

ORDER

Upon motion of the defendant, Fibreboard Corporation, it is ORDERED that this pleading entitled second supplemental answer of defendant, Fibreboard Corporation, is to be considered as a supplement to the second amended answer of Fibreboard Corporation to plaintiffs' second amended complaint on file herein. This pleading is filed within the time heretofore directed by the Court.

DATED this _____ day of September, 1971.

_____
CHIEF JUDGE, UNITED STATES
DISTRICT COURT

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing second supplemental answer was served on Mr. Ward Stephenson, attorney for plaintiffs, by delivering a copy to him in person on the 21st day of September, 1971; and a copy was delivered in person to Mr. George E. Duncan, Mr. Gordon R. Pate, Mr. John G. Tucker, Mr. W. N. Arnold, Jr. Mr. Charles S. Pipkin and Mr. Robert E. Barnes, Jr., attorneys for defendants, on the 21st day of September, 1971, and a copy was mailed by regular mail to Mr. Ben L. Reynolds, Suite 3710, One Shell Plaza, Houston, Texas, 77002, attorney for Eagle-Picher Industries, Inc., and Mr. Frank Bean, 500 Jefferson Building, Houston, Texas, co-counsel for Eagle-Picher Industries, Inc., and a copy was mailed by regular mail to Mr. Gerald P. Coley, First City National Bank Building, Houston, Texas, 77002, attorney for Unarco Industries, Inc., on the 21st day of September, 1971.

Geo A. Weller

OF COUNSEL

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