IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED 1970

S. R. POTTER

V.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL.

CIVIL ACTION NO. 6329

MEMORANDUM BRIEF OF DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION, IN SUPPORT OF ITS MOTION TO LIMIT AND RESTRICT PLAINTIFF'S MOTION FOR DISCOVERY

Unlike the other discovery procedures of the Federal Rules of Civil Procedure, Rule 34 requires a showing of good cause. Rule 34 reads in part:

> "Upon motion of any party showing good cause therefor * * * * * * *."
> (Emphasis supplied)

The cases have clearly held that the language of Rule 34 means exactly what it says and that discovery thereunder may be allowed only to a party showing good cause therefor. VOLKENBURG V. NEDERLAND-AMERIK. STOOM V. MAATS, 336 F. 2d 480 (1st Cir. 1964); U.S. V. ROSS, 278 F. Supp. 915 (D.C. Wisc. 1968); BARTAL V. ISTHMIAN LINES, INC., 32 F.R.D. 387 (D.C. Md. 1963); BUSHER V. UNITED SHOE MACHINERY CO., 23 F.R.D. 183 (D.C. N.Y. 1958); ROCKAWAY PIX THEATRE, INC. V. METRO-GOLDWYN-MAYER, INC., 36 F.R.D. 15 (D.C. N.Y. 1964);

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GORDON V. PENNSYLVANIA R. CO., 5 F.R.D. 510 (D.C. Pa. 1946); COMPAIGNE CONTINENTALE D'IMPORTATION V. PACIFIC ARGENTINE BRAZIL LINE, 1 F.R.D. 388 (D.C. N.Y. 1940); HARRIS V. MARINE TRANSPORT LINES, INC., 22 F.R.D. 484 (D.C. N.Y. 1958). "Good cause" is not an idle phrase, as Rule 34 does not contemplate the automatic granting of a motion. SHUPE V. PENNSYLVANIA R. CO., 19 F.R.D. 144 (D.C. Pa. 1956). Neither is it a mere formality. FLICKINGER V. AETNA CASUALTY & SURETY CO., 37 F.R.D. 533 (D.C. Pa. 1965). And sympathetic, humanitarian impulses are no substitute for a cogent showing of "good cause" necessary under Rule 34. STOVALL V. GULF & SOUTH AM. S.S. CO., 30 F.R.D. 152 (D.C. Tex. 1961).

Relevance and necessity appear both to be elements of this "good cause" requirement. U.S. v. R. J. REYNOLDS TOBACCO CO., 268 F. Supp. 769 (D.C. N.J. 1966); CHITTY V. STATE FARM MUT. AUTO. INS. CO., 36 F.R.D. 37 (D.C. S.C. 1964); CANNON V. AETNA FREIGHT LINES, 11 F.R.D. 93 (D.C. Ohio 1950). Also, the courts should consider the facts of the individual case, practical convenience, fairness to the parties, nature of the items requested and reasons given showing that a demand for production is proper. FASTENER CORP. V. SPOTNAILS, INC. 43 F.R.D. 204 (D.C. Ill. 1967); SERVICE LIQUOR DISTRIBUTORS V. CALVERT DISTILLERS CORP., 16 F.R.D. 344 (D.C. N.Y. 1954).

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The above and foregoing authorities together with the general propositions for which they stand are cited here in order that the court might more readily understand the inadequacies of Plaintiff's Motion for Discovery, which inadequacies stand out in high relief.

Turning then to Plaintiff's Motion, where are the allegations of any "good cause," the sine qua non of Rule 34 discovery? The Motion speaks in terms of "a full and complete, yet speedy trial," "that it is necessary that defendants produce," and "it will also be necessary" ad infinitum ad nauseam. The "affidavit" of Plaintiff's counsel upon which the Motion is apparently bottomed likewise contains only broad conclusions. Mindful of the teachings of such as SONKEN-GALAMBA CORP. V. ATCHISON, T. & S.F. RY. CO., 30 F. Supp. 936 (D.C. Mo. 1939), DURKIN V. PET MILK CO., 14 F.R.D. 385 (D.C. Ark. 1953) and BENTZ V. CITIES SERVICE TANKERS CORP., 41 F.R.D. 294 (D.C. N.Y. 1966), it must be pointed out that the requirements of showing "good cause" so as to entitle one to discovery here are not met by mere conclusory allegations. "Good cause" must be shown by statements of fact. It is submitted that Plaintiff's Motion fails to pass "good cause" muster because of the

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absolute paucity of any factual allegations in support thereof.

Nowhere in Plaintiff's Motion is there any indication that he cannot obtain the asbestos insulating products (samples) sought, the sales literature sought or the breathing apparatus, device or other safeguard sought from a source or sources other than this Defendant. The obvious reason for this is because that which is sought is obtainable by Plaintiff without recourse to the discovery process. And GEBHARD V. ISBRANDTSEN CO., 10 F.R.D. 119 (D.C. N.Y. 1950) said that mere convenience of counsel is not "good cause" under Rule 34.

In fact, it appears to be the law that a Rule 34 motion is not sufficient to show "good cause" where that which is sought by the movant is available from other sources. UNCLE BEN'S, INC. V. UNCLE BEN'S PANCAKE HOUSES, INC., 30 F.R.D. 506 (D.C. Tex. 1962); REID V. HARPER & BROS., 17 F.R.D. 281 (D.C. N.Y. 1955); ENDTE V. HERMES EXPORT CO., 20 F.R.D. 162 (D.C. N.Y. 1957); GUILFORD NAT. BANK OF GREENSBORO V. SOUTHERN RY. CO., 297 F. 2d 921 (4th Cir. 1962); UNION CARBIDE CORP. V. FILTRAL CORP., 278 F. Supp. 553 (D.C. Cal. 1967); McDONALD V. PROWDLEY, 38 F.R.D. 1 (D.C. Mich. 1965); HANSON V. GARTLAND S.S. CO., 34 F.R.D. 493 (D.C. Ohio 1964); SCUDERI V. BOSTON INS. CO., 34 F.R.D. 463 (D.C. Del. 1964).

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No cases in point have been found concerning that phase of Plaintiff's Motion requesting that the products "be identified at the time they are produced." But the general drift of the decisions interpreting the phrase "good cause" seem, under the facts of this action, to negate any such procedure. For over 25 years the Plaintiff worked in the insulation trade, and in this action he attempts to fix liability upon the manufacturers of all the asbestos insulation products he is supposed to have worked with over a quarter of a century. It therefore becomes of prime importance that the Plaintiff himself identify the various products as to whether or not he used them over this long span of years. To require the Defendants to identify the products would simply obviate the necessity for Plaintiff to prove this essential phase of his lawsuit. Such would not only be unfair to the parties Defendant, but would be in derogation of the longstanding rule at common law that when a party brings an action at law, he is required to prove his case ____ it is not incumbent upon the Defendants to disprove Plaintiff's allegations.

Plaintiff's Motion further prays that Defendants be ordered "to produce all engineering scientific and research

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data concerning such products, its suggested use and adaptability, method of applying and any safety controls suggested." Again, no allegations of fact are made by Plaintiff in support of that which he seeks. This is all the more important because "all engineering, scientific and research data" patently comes within the limitations of Rule 30(b), Federal Rules of Civil Procedure, as to "secret processes, developments or research," embodied in Rule 34.

Admittedly, a party has no absolute right to refuse information upon the sole basis that it involves disclosing trade secrets. CITIES SERVICE OIL CO. V. CELANESE CORP., 10 F.R.D. 458 (D.C. Del. 1950). The problem is one of weighing the need for discovery against the desirability of maintenance of secrecy of processes. UNITED STATES V. NATIONAL STEEL CORP., 26 F.R.D. (D.C. Tex. 1960). But again, the Plaintiff has not alleged any fact to allow the court to weigh these competing considerations. "Good cause," materiality and relevancy should be shown. COMMUNIST PARTY OF U.S. V. SUBVERSIVE ACTIVITIES CONTROL BOARD, 254 F.2d 314 (D.C. App. 1958).

Concerning "its suggested use and adaptability, method of applying and any safety controls suggested,"

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Plaintiff has been an expert in the insulation trade for a quarter of a century and certainly is as cognizant of these matters as are any of the Defendants. Therefore, this matter is not appropriate for discovery under Rule 34.

Finally, this Defendant will deal with the attempt by way of Rule 34 to elicit the name and address of the person in charge of any medical or research department with Defendant; also, the attempt to elicit under Rule 34 the name and address of the company representative who will appear at the time of the trial of this case.

It is Defendant's position that Rule 34 does not require that this information be divulged. A close reading of Rule 34 discloses that it allows a court to enter only two types of orders:

1) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things;

2) Order any party to permit entry upon designated land or other property in his possession or control for the

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purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon.

Neither type of order set forth above encompasses the information sought by Plaintiff as to either the medical or scientific research department question, or the query concerning this Defendant's representative who will be in attendance at the time of trial.

In addition to the above and foregoing argument and authorities, this Defendant also incorporates herein as argument the grounds set forth in its Motion To Limit And Restrict Plaintiff's Motion For Discovery.

Respectfully submitted,

KING, SHARFSTEIN & RIENSTRA

BY: _____

707 Beaumont Savings Building
Beaumont, Texas 77701

ATTORNEYS FOR DEFENDANT,
OWENS-CORNING FIBERGLAS
CORPORATION.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Brief filed by the Defendant, Owens-Corning Fiberglas Corporation, was served on Mr. Ward Stephenson, Stephenson Building, Orange, Texas, attorney for Plaintiff, by mailing a copy to said address on the 7th day of January, 1970, and a copy was likewise served on all other attorneys of record by mailing a copy to their respective addresses by regular United States Mail on the 7th day of January, 1970.

Hale Harrell

ATTORNEY FOR OWENS-CORNING FIBERGLAS CORPORATION.

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