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Elvira S. Ortiz
DISTRICT COURT OF CAMERON COUNTY, TEXAS
DEPUTY

CAUSE NO. 2000-05-1962-C

ROBERT HENRY VILLARREAL, Individually and as Personal Representative of the Heirs and Estate of JOHN HENRY VILLARREAL	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
vs.	§	CAMERON COUNTY, TEXAS
GAF CORPORATION HOLDINGS, INC.), ET AL.	§	
Defendants.	§	197TH JUDICIAL DISTRICT

PLAINTIFF'S EXHIBIT
USG-556

MEMORANDUM OF LAW IN SUPPORT OF MOTION *IN LIMINE* OF DEFENDANT UNITED STATES GYPSUM COMPANY TO EXCLUDE ALL EVIDENCE OF PRIOR DISCOVERY ANSWERS IN OTHER CASES

I. INTRODUCTION

Defendant U.S. Gypsum Company ("U.S. Gypsum") respectfully submits this memorandum of law in support of its motion *in limine* to exclude all argument and evidence relating to prior discovery responses in other cases. Plaintiff may attempt to introduce discovery responses served by U.S. Gypsum more than a decade ago in prior, unrelated cases. Such prior answers should not be admitted.

II. ARGUMENT

Texas Rule of Civil Procedure 193.5 imposes on a party a duty to amend or supplement incomplete or incorrect discovery responses in the course of the litigation. The reason for the rule is that opposing parties have a right to the correct information sought through discovery. U.S. Gypsum has responded to discovery in this case.

Recognizing the potential problems caused by allowing parties to use prior discovery responses as evidence against the responding party, three separate Texas Rules of Civil Procedure specifically preclude the admission of discovery responses that are later amended or supplemented:

> Rule 194.6 Certain Responses Not Admissible. *A response* to requests under Rule 194.2(c) and (d) *that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.*
>
> Rule 197.3 Use. Answers to interrogatories may be used only against the responding party. *An answer* to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) *that has been amended or supplemented is not admissible and may not be used for impeachment.*
>
> Rule 198.3 Effect of Admissions; Withdrawal or Amendment. Any admission made by a party under this rule *may be used solely in the pending action and not in any other proceeding. . . .*

Each of these rules preclude presentation to the jury of outdated discovery answers *even in the same case in which those responses were given.* Similarly, the new Texas rule governing disclosures by parties expressly precludes the admission of prior discovery responses regarding, *inter alia*, the factual bases for a defense. Tex. R. Civ. P. 194.2.

The same policies which prevent a party's original discovery responses from being presented later in the same case militate even more strongly against permitting plaintiff from presenting to the jury discovery responses served by U.S. Gypsum a decade or more ago in unrelated cases from different jurisdictions. Plaintiff in this case has not in any way relied upon such responses, and can suffer absolutely no prejudice by having such documents precluded.

U.S. Gypsum, on the other hand, is faced with the prospect of extreme prejudice from the admission of discovery responses served in cases spanning nearly twenty years. U.S. Gypsum has been involved in asbestos litigation over that time in nearly every jurisdiction in the country. It has

responded to thousands of sets of discovery requests based upon the information available to it at a particular point in time and in the context of cases alleging a myriad of exposure scenarios, products and diseases. U.S. Gypsum has repeatedly updated both its document respository and the substance of its written discovery responses. Plaintiff should not be permitted to create the misimpression of inconsistency in U.S. Gypsum's discovery responses by cherry-picking individual snippets from among the thousands of outstanding sets of discovery responses. To do so punishes U.S. Gypsum for updating its responses, in the same way as allowing superseded discovery responses in the same case to be read to the jury.

As one simple example, U.S. Gypsum has from time to time learned that some of its early discovery responses for the dates of manufacture of certain products were inaccurate, and that such products were actually made during shorter periods of time than were reflected in those responses. It would be grossly unfair to U.S. Gypsum if its earlier, inaccurate responses, once properly amended, could, decades later, be used as an admission that U.S. Gypsum made a certain product during a certain time period even though the truth (as reflected in more recent discovery responses) was that it did not.

Even more egregiously, plaintiff may offer the prior discovery responses not to contend that the previous answers reflected the correct information, but to try to suggest that U.S. Gypsum is a "bad company" that should be presumed to be untruthful in denying, in this case, that the products at issue were defective or that U.S. Gypsum acted negligently. The admission old discovery responses for this purpose threatens U.S. Gypsum with extreme prejudice. Moreover, such evidence would constitute improper "bad character" evidence.

III. CONCLUSION

For the foregoing reasons, defendant U.S. Gypsum respectfully requests that this Court enter an order excluding all argument and evidence relating to prior discovery answers in other cases.

Respectfully submitted.

POWERS & FROST, L.L.P.

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ATTORNEYS FOR DEFENDANT UNITED STATES GYPSUM COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of Defendant United States Gypsum Company's Memorandum in Support of Motion in Limine has been forwarded to Plaintiffs' counsel of record either by first class mail, return receipt requested, delivery or facsimile on this the 24 day of January, 2001.