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September 17, 2013

Via E-Filing
Blake A. Hawthorne
Clerk of the Court
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: *Susan Bostic, et al. v. Georgia-Pacific Corporation*;
Case No. 10-0775

Dear Mr. Hawthorne:

Petitioners Susan Elaine Bostic, *et al*, file this post-submission letter brief in response to Georgia-Pacific Corporation's September 17, 2013 post-submission letter brief. Please distribute this letter to the members of the Court.

Georgia-Pacific argues that:

1. Petitioners did not submit scientifically reliable causation evidence (G-P Br. at 1-3); and

2. Petitioners' counsel was incorrect to state at oral argument that *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013) declined to follow *Borg-Warner* in a mesothelioma case, because the *Boomer* causation test is consistent with the *Borg-Warner* test. G-P Br. at 4.

With respect to argument number one, Petitioners will submit to the Court within 7 days a response detailing the record evidence showing that Timothy Bostic's exposure to Georgia-Pacific's asbestos joint compound was sufficient to cause his mesothelioma.

In the interim, Petitioners write immediately with respect to argument number two—Georgia-Pacific's out of context quotation of Petitioners' counsel's oral argument, and Georgia-Pacific's concession that the *Boomer* causation

standard is consistent with *Borg-Warner* and is the appropriate causation standard in a mesothelioma case. Georgia-Pacific's concession goes to the heart of the principal legal question in this case: is the "but for" test required in mesothelioma cases?

Other jurisdictions have rejected *Borg-Warner's* dose requirements for mesothelioma cases.

At oral argument, Petitioners' counsel stated that *Borg-Warner* has not been adopted by other jurisdictions for mesothelioma cases. *See* Oral Argument Minutes 24:10-24:31, referencing *Boomer*, 736 S.E.2d at 734 ("While it may be the case that this dose-related approach to causation is indeed appropriate for some cancers or diseases, we do not find it to be necessarily appropriate for mesothelioma, in light of the current state of medical knowledge. This comment assumes an identifiable threshold level of exposure triggering a disease."); *Holcomb v. Georgia-Pacific, LLC*, 289 P.3d 188, 195 (Nev. 2012)("We conclude that in protecting the manufacturer, the *Flores* causation test swings too far beyond *Rutherford* to the point where it overburdens the claimant, who might not be able to sufficiently demonstrate not only the dosage quantity of exposure to a particular defendant's product but also the total asbestos dosage to which he was exposed. We conclude that the *Flores* application of the 'substantial factor' test is too stringent.").

***Boomer's* substitution of the "sufficient to cause" test for the "but for" test accords with *Borg-Warner*.**

While *Boomer* does not follow *Borg-Warner's* dose requirements in mesothelioma cases, *Boomer's* articulation that the "but for" test is a "difficult if not impossible task" in mesothelioma cases (736 S.E.2d at 729) and its holding that a mesothelioma plaintiff need only prove that "exposure to the defendant's product alone must have been sufficient to have caused the harm" (736 S.E.2d at 729), is consistent with *Borg-Warner's* holding that the substantial factor test applies in asbestos cases, 232 S.W.3d at 770, and its explanation that, to satisfy that test, plaintiff must prove that the "asbestos fibers from [defendant's product] were released in an amount sufficient to cause [plaintiff's disease]" 232 S.W.3d at 772.

Therefore, with respect to the issue of whether the "but for" test applies in concurrent causation cases, there is no daylight between *Boomer* and *Borg-Warner*: both cases hold that the "but for" test does not apply.

Georgia-Pacific embraces the causation test in *Boomer* as "entirely consistent" with *Borg-Warner*.

Georgia-Pacific quotes, with approval, *Boomer's* causation test for concurrent causation cases: plaintiff must prove that "exposure to the defendant's product alone must have been sufficient to cause the harm." G-P Br. at 4, *citing Boomer*, 736 S.E.2d at 731.

Petitioners agree.

Thus, if, as appears to be the case, Georgia-Pacific, in embracing the Virginia Supreme Court's holding in *Boomer*, is also embracing its unequivocal rejection of the "but for" test in mesothelioma cases, then there is no disagreement among the parties as to the standard to be applied in Texas as to mesothelioma cases: the substantial factor test (*i.e.* the plaintiff must prove that "exposure to the defendant's product alone must have been sufficient to have caused the harm," *Boomer*, 736 S.E.2d at 731), and not the "but for" test, is the appropriate causation standard. This is directly contrary to the Court of Appeals' erroneous holding in this case that the "but for" test is required for a plaintiff to establish causation in an asbestos case, even when it is not possible to identify the event "without which" the harm would not have occurred. *Georgia-Pacific v. Bostic*, 320 S.W.3d 588, 596 (Tex. App.—Dallas 2010).

Respectfully submitted,

/s/ Denyse Clancy
Denyse Clancy

DC/rv
cc: Deborah Hankinson (*Via E-Filing*)