IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

REXNORD INDUSTRIES, LLC and INVENSYS, INC.**,**	)	
Plaintiffs,	)	
v.	)	
	)	C.A. No. 07C-10-057 RRC
RHI HOLDINGS, INC. and THE FAIRCHILD CORPORATION,	)	
Defendants.	)	

Submitted: December 2, 2008
Decided: February 13, 2009

Decision After Bench Trial.
Verdict for Plaintiffs.

MEMORANDUM OPINION

James L. Holzman, Esquire, and Gary F. Traynor, Esquire, Prickett, Jones & Elliot, P.A., Wilmington, Delaware, and, Steven P. Handler, Esquire, Mark A. Bilut, Esquire, and David J. Scriven-Young, Esquire, McDermott, Will & Emery, LLP, Chicago, Illinois (pro hac vice), Attorneys for Plaintiffs Rexnord Industries, LLC and Invensys, Inc.

Kevin G. Abrams, Esquire, and John M. Seaman, Esquire, Abrams & Laster LLP, Wilmington, Delaware, and Peter V. Baugher, Esquire, Patrick J. Heneghan, Esquire, and Joseph J. Siprut, Esquire, Schopf & Weiss, LLP, Chicago, Illinois (pro hac vice), Attorneys for Defendants RHI Holdings, Inc. and The Fairchild Corporation.

COOCH, J.

I. INTRODUCTION

This suit arises from Defendants' failure to indemnify Plaintiffs pursuant to the terms of an agreement between the parties. Plaintiffs brought suit in this Court for indemnification of attorneys' fees and costs incurred by Plaintiffs in defense of a multimillion dollar environmental lawsuit in Illinois. A bench trial was held on September 22, 2008. Prior to trial, this Court had granted Plaintiffs' "Motion for Partial Summary Judgment," and denied Defendants' "Motion for Summary Judgment as to Liability" and Defendants' "Motion for Summary Judgment as to Damages."[1] Thus, the only issue that remained for trial was the determination of the amount of damages and interest owed to Plaintiffs. At trial, Plaintiff offered the testimony of Todd Weiner, Rexnord's lead counsel in the underlying Lockformer cases, and Jay Ehle, in-house counsel for Invensys, Inc., who both testified that McDermott, Will & Emery's billing rates were reasonable. Defendants did not call any witnesses.

II. FACTS AND PROCEDURAL HISTORY

The facts and procedural history were set forth in the Court's memorandum opinion granting Plaintiffs' Motion for Partial Summary

[1] *Rexnord Indus., LLC and Invensys, Inc. v. RHI Holdings, Inc. and The Fairchild Corp.*, 2008 WL 4335871, *1-4 (Del. Super. 2008) (holding, in essence, that Plaintiffs were entitled to damages resulting from RHI/Fairchild's failure to provide indemnification).

Judgment and denying Defendants' Motion for Summary Judgment as to Liability, and Defendants' Motion for Partial Summary Judgment as to Damages. The facts and procedural history from that opinion are set forth herein to provide background. Other facts from the trial are set forth in the "Discussion" section, *infra.*

A. **Plaintiffs' Motion for Partial Summary Judgment**

The below facts have been stipulated to by the parties:[2]

The Parties

1. Rexnord Industries, LLC ("Rexnord") is a limited liability company organized under the laws of the State of Delaware.
2. Invesys, Inc. ("Invesys") is a corporation organized under the laws of the State of Delaware.
3. The Fairchild Corporation ("Fairchild") is a corporation organized under the laws of the State of Delaware.
4. RHI Holdings, Inc. ("RHI") is a corporation organized under the laws of the State of Delaware.

Agreements Concerning RHI/Fairchild's Indemnification Obligation

5. RHI owned and conducted bearing manufacturing operations at facilities located at 2324 and 2400 Curtiss Street, Downers Grove, Illinois in the Ellsworth Industrial Park (the "Property") from a period in the 1950s to August, 1988.
6. In 1988, RHI sold its Mechanical Power Division, which became Rexnord, and Rexnord continued to be minority owned by RHI until December 1993.
7. On December 2, 1993, RHI/Fairchild sold Rexnord's stock to BTR Dunlop Holdings, Inc. ("BTR"). The 1993 Purchase Agreement provided grounds for indemnification.
8. On November 9, 1994, Rexnord and RHI/Fairchild entered into a protocol (the "1994 Protocol").
9. In 1995, Rexnord and RHI/Fairchild agreed to a "Memorandum of Understanding."
10. Aaron Hardt, environmental consultant to Rexnord, and Michael Hodge, counsel for RHI/Fairchild, communicated on environmental issues frequently in person, by telephone, and in writing during the years 1993-2002.

[2] Stipulation as to Undisputed Facts Concerning Pls. Mot. for Partial Summ. J., Docket Item ("D.I.") 53.

Communications Between Rexnord and RHI/Fairchild Regarding the Lockformer Cases

11. Lockformer Company conducted a metal fabrication operation to the northwest of the Ellsworth Industrial Park. Two class action lawsuits, *LeClercq v. Lockformer* and *Mejdrech v. Met-Coil* (the "Lockformer cases"), were filed against Lockformer and its parent corporation, Met-Coil, by residents living to the south of Lockformer's facility.
12. On May 31, 2002, Lockformer and Met-Coil filed a Third-Party Complaint for Contribution against Rexnord and other companies in the Ellsworth Industrial Park in the *LeClerq* case.
13. On July 3, 2003, Met-Coil filed a Third-Party Complaint for Contribution against Rexnord and other companies in the Ellsworth Industrial Park in the *Mejdrech* case.
14. On or about April 16, 2002, RHI/Fairchild received a letter from Aaron Hardt summarizing the United States Environmental Protection Agency's (EPA) and the Illinois Environmental Protection Agency's (IEPA) investigation of soil and groundwater contamination at or near Rexnord's Downers Grove Illinois facility.
15. On or about June 11, 2002, RHI/Fairchild received a letter from Aaron Hardt identifying "a new claim against Rexnord which may be the responsibility of RHI Holdings under the 1988 Bill of Sale, Assignment and Assumption Agreement, and its subsequent interpretations."
16. On or about July 15, 2002, RHI/Fairchild received a letter from Aaron Hardt summarizing the status of the *LeClercq* case and providing RHI/Fairchild with a copy of Rexnord's Motion to Dismiss in the *LeClerq* case.
17. On or about August 10, 2002, RHI/Fairchild received a letter from Aaron Hardt notifying RHI/Fairchild of an upcoming meeting between Rexnord and the Environmental Protection Agency.
18. On or about September 19, 2002 RHI/Fairchild received a letter from Aaron Hardt summarizing a site assessment that reported significant findings of PCE and TCE at the Downers Grove facility.
19. On or about October 31, 2002, RHI/Fairchild received a letter from Todd Wiener, outside legal counsel for Rexnord, reiterating Rexnord's tender of defense and demand for indemnity.
20. Rexnord filed a fourth-party complaint against RHI/Fairchild on March 7, 2003 in *LeClercq*. RHI/Fairchild appeared in that case and moved to strike the fourth-party complaint on May 13, 2003. The Court denied RHI/Fairchild's motion to strike on August 14, 2003.
21. On or about July 18, 2003, RHI/Fairchild received a letter from McDermott, Will & Emery, on behalf of Rexnord, requesting immediate defense and indemnity, pursuant to the 1988 Bill of Sale, Assignment and Assumption Agreement and the 1993 Purchase Agreement.
22. None of the letters were sent to Weil, Gotshal & Manges [RHI/Fairchild's outside counsel] in New York.

23. The *LeClercq*and *Lockformer* cases were consolidated before U.S. District Judge Harry Leinenweber on December 17, 2003. That same day Judge Leinenweber stayed all fourth-party claims, including Rexnord's fourth-party complaint against RHI/Fairchild.

B. **Facts relating to Defendants' Motion for Summary Judgment as to Liability and Defendants' Motion for Partial Summary Judgment as to Damages**

The below facts have also been stipulated to by the parties:[3]

1. This lawsuit is based on a claim for indemnification under the 1993 Agreement, pursuant to which RHI/Fairchild sold the stock of Rexnord to BTR Dunlop Holdings, Inc.
2. The Lockformer cases were brought by two classes of plaintiffs who lived west of the Ellsworth Industrial Park in which the 2324 and 2400 Curtiss property is located.
3. The classes in both cases brought claims against several defendants, including Lockformer, located north of the class areas and outside the Ellsworth Industrial Park.
4. Although some of the first-party defendants eventually settled, third-party complaints for contribution were filed against a number of companies in the Ellsworth Industrial Park, including Rexnord.
5. The third-party plaintiffs' suits were voluntarily dismissed with prejudice in June 2005 after one of their experts was precluded by the Court from testifying under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Thereafter, on June 9, 2005 U.S. District Judge Harry Leinenweber entered an order of dismissal in response to third-party plaintiffs' motion.
6. Rexnord filed a Rule 11 Motion for Sanctions on August 8, 2003. Judge Leinenweber held the Rule 11 Motion for Sanctions in abeyance and never ruled on the motion.
7. In its Rule 11 Motion, Rexnord asserted that: "Lockformer has never had any evidentiary support for its Third party Complaint."
8. Rexnord also asserted in its Rule 11 Motion that: "The Third Party Complaint is contradicted by all of the new information developed by the United States Environmental Protection Agency and Lockformer."
9. Plaintiffs seek total damages of $857,352.04, plus prejudgment interest and costs.
10. Of that $857,352.04, Wasusau paid $476,956.58.
11. In connection with the Lockformer cases, Rexnord elected to hire McDermott, Will & Emery, and pay its hourly rates.
12. As of late 2002, Rexnord incurred fees and expenses of approximately $30,000 for the services of its counsel, McDermott, Will & Emery. Rexnord paid this amount directly to McDermott, Will & Emery.

[3] Joint Stipulation of Undisputed Facts in Connection with Defs. Mot. for Summ. J. as to Liability and Defs. Mot. for Partial Summ. J. as to Damages. D.I. 51.

13. In late 2002, Invensys began paying Rexnord's defense costs in the Lockformer litigation.
14. Plc had an indemnification obligation to Rexnord for defense costs incurred in the Lockformer cases.
15. Invensys made the payments on plc's behalf as plc's "agent in the United States."
16. Invensys consolidates its corporate accounting statements with those of its parent, plc. Plc is not a party to this lawsuit.

C. Additional Facts not in Dispute[4]

1. RHI/Fairchild did not respond in writing to the April 16, 2002 letter within 45 days of RHI/Fairchild's receipt of the April 16, 2002 letter.
2. RHI/Fairchild did not respond in writing to the June 11, 2002 letter within 45 days of RHI/Fairchild's receipt of the June 11, 2002 letter.
3. RHI/Fairchild did not respond in writing to the July 15, 2002 letter within 45 days of RHI/Fairchild's receipt of the July 15, 2002 letter.
4. RHI/Fairchild did not respond in writing to the August 10, 2002 letter within 45 days of RHI/Fairchild's receipt of the August 10, 2002 letter.
5. RHI/Fairchild did not respond in writing to the September 19, 2002 letter within 45 days of RHI/Fairchild's receipt of the September 19, 2002 letter.
6. RHI/Fairchild did not respond in writing to the October 31, 2002 letter within 45 days of RHI/Fairchild's receipt of the October 31, 2002 letter.
7. RHI/Fairchild did not respond in writing to the July 18, 2003 letter within 45 days of RHI/Fairchild's receipt of the July 18, 2003 letter.

III. CONTENTIONS OF THE PARTIES

Plaintiffs have five contentions.[5] First, Rexnord contends that Plaintiffs should be awarded $380,395.46 as reimbursement for defense fees and costs after reimbursement from insurance. In connection with this contention, Plaintiffs assert that a) the staffing of Rexnord's counsel was reasonable; b) Invensys, Inc.'s rejection of Sanchez, Daniels, and Hoffman, LLP, ("Sanchez Daniels") was reasonable; c) Plaintiffs are entitled to

[4] Additionally, Defendants admitted to the following facts in their Answers to Plaintiffs' Requests for Admission. D.I. 52.

[5] Pls.' Opening Post-Trial Brief, D.I. 86.

reimbursement of defense costs incurred prior to the time that Lockformer first filed suit against Rexnord; and d) Plaintiffs are entitled to reimbursement of attorneys' fees and costs relating to Rexnord's fourth-party action against RHI/Fairchild.

Second, Plaintiffs contend that they are entitled to declaratory relief with respect to the payments advanced by Wausau.

Third, Plaintiffs maintain that they are entitled to an award of prejudgment interest.

Fourth, Plaintiffs contend that RHI/Fairchild's "but for" argument (that "Rexnord would have been sued and would have incurred the same costs in the Lockformer litigation irrespective of any RHI/Fairchild conduct") should be rejected.[6]

Fifth, Plaintiffs assert that RHI/Fairchild's statute of limitations argument should be rejected because Defendants are barred from raising a statute of limitations defense since a) they failed to include it in the pretrial stipulation; b) RHI/Fairchild's argument is contrary to settled Delaware law regarding the accrual of a cause of action for contractual indemnification for losses resulting from liability to a third party; and c) the statute of limitations was tolled for 867 days by 28 U.S.C. § 1367(d), which suspends the period

[6] Defs.' Post-Trial Brief, at 9.

of limitations of a state law claim while a related claim is pending in federal court.

Defendants have seven contentions.[7] RHI/Fairchild's first contention is that Rexnord's claims are time-barred by 10 *Del. C.* § 8106, in that a) Rexnord's claims allegedly accrued at the time of breach and b) that the claims were not tolled by 28 U.S.C. § 1367(d).

Second, Defendants contend that Rexnord was sued and incurred costs in the *Lockformer* litigation for reasons unrelated to any RHI/Fairchild conduct. Defendants assert that Plaintiffs have not sustained their burden to demonstrate that they were damaged by RHI/Fairchild's conduct and that Arbitrator Manko's award does not collaterally estop RHI/Fairchild from raising an "absence of damages" argument.

Third, Defendants contend that Rexnord is not entitled to defense costs incurred prior to the time that Lockformer filed suit against Rexnord in 2002.

Fourth, Defendants maintain that Rexnord is not entitled to recover costs and fees related to its fourth party action against RHI/Fairchild in Lockformer.

[7] Defs.' Post-Trial Brief, D.I. 89.

Fifth, RHI/Fairchild contend that Rexnord failed to demonstrate that its attorney fees were reasonable because Rexnord rejected Sanchez Daniels, whose costs would have otherwise been fully borne by the insurer, and because the law firm of McDermott, Will & Emery, LLP's ("McDermott") staffing and billing were unreasonable.

Sixth, Defendants maintain that Plaintiffs' prejudgment interest calculations are incorrect because a) Rexnord is not entitled to prejudgment interest for the years it delayed filing this action; b) Rexnord erroneously calculates prejudgment interest prior to the date its cause of action accrued; c) Rexnord is not entitled to floating or compound interest; and d) Rexnord overstates the principal.

Seventh, RHI/Fairchild contend that Rexnord is not entitled to declaratory relief with respect to Wausau's payments.

IV. DISCUSSION

In this trial, the Court is the fact-finder and the plaintiff must prove each claim by a preponderance of the evidence. A preponderance of the evidence exists upon "the side on which the greater weight of the evidence is found."[8] The parties agree that Delaware law applies to the instant action.

[8] *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).

A. The Court will not consider Defendants' statute of limitations defense because Defendants failed to include it in the pretrial stipulation

The Pretrial Stipulation is "controlling on the parameters of the issues presented for the court's consideration."[9] In *Gannett Co. v. Board of Managers*, the Supreme Court vacated part of the Superior Court's judgment because one of the issues decided by the trial court was not raised by either party in the Pretrial Stipulation.[10]

In *Gates v. Texaco*, this Court noted, "the Superior Court puts great emphasis on pretrial stipulations as the universe in which legal issues should be identified; timely identification of legal issues is paramount in effective trial management."[11] In *Gates*, the defendant attempted to argue at trial that expert testimony was required to support the plaintiff's claim for lost wages.[12] This Court held that "Defendant is procedurally barred from doing so, since Defendant had failed to raise the issue in the pretrial stipulation."[13]

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[9] *Gannett Co. v. Bd. Of Managers,* 840 A.2d 1232, 1238 (Del. 2003).

[10] *Id.*

[11] *Gates v. Texaco, Inc.*, 2008 WL 1952165, at *8 (Del. Super.) ((citing *Jacob v. Harrison,* 2002 WL 31840890, at *5 (Del.Super.) (citing Supr. Ct. R. 8) (holding that the parties were limited to addressing only those issues presented in the pretrial stipulation)), *aff'd*, 962 A.2d 257 (Table); *see also Bradbury v. Adeleke*, 2008 WL 5048427, at *2 (Del. Super.).

[12] *Id.*

[13] *Id.*

The Court concluded that it "will not consider an argument regarding an issue of law not earlier identified in the pretrial stipulation."[14]

While statute of limitations was raised as an affirmative defense by RHI/Fairchild in their answer to the complaint, Defendants did not include statute of limitations in the pretrial stipulation.[15] Superior Court Civil Rule 16(e) deals with pretrial stipulations, and states:

> After any conference held pursuant to this Rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action taken unless modified by a subsequent order. This order following a final pretrial conference shall be modified only to prevent manifest injustice.

Thus, the pretrial stipulation is controlling and Defendants did not show that modification was necessary to prevent "manifest injustice." At trial and in their post-trial briefings, RHI/Fairchild explained their failure to include the statute of limitations defense was based on 1) this Court's summary judgment opinion; 2) receipt of Plaintiffs' exhibits 3 and 4 summarizing Plaintiffs' losses and prejudgment interest calculation; and 3) the Superior

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[14] *Id.*

[15] Trial Tr., D.I. 85 at pp. 9:22-10:2. The Court highlighted the difference between defenses raised in an answer and pretrial stipulation: "[C]ustomarily, parties add in every remotely conceivable affirmative defense in the original answer. Then the pretrial stipulation comes into being, that's when the . . . legal issues are supposed to be crystallized."

Court's decision in *LaPoint v. Amerisourcebergen Corp.*[16] However, neither this Court's summary judgment opinion nor Plaintiffs' exhibits, both of which became available to Defendants after the pretrial stipulation, impacted RHI/Fairchild's ability to raise the statute of limitations defense in the pretrial stipulation. In addition, the *LaPoint* decision was issued on July 25, 2008, nearly a month before the parties entered into the pretrial stipulation on August 22. Therefore, because RHI/Fairchild had the opportunity to raise a statute of limitations defense in the pretrial stipulation and failed to do so, Defendants are barred from raising the defense.[17]

B. Plaintiffs are awarded $380,395.46 as reimbursement for defense fees and costs, pursuant to Section 7(a) of the 1993 Agreement

At trial, Rexnord presented evidence that it incurred reimbursable losses within the meaning of meaning of Section 7(a) of the 1993 Agreement in the amount of $857,352.04.[18] Todd Weiner, Rexnord's lead counsel in

[16] *LaPoint v. Amerisourcebergen Corp.*, 2008 WL 2955511, *5 (Del. Super.) (applying 10 *Del. C.* § 8106 to an indemnification claim and holding that the claim accrued when the contract was first breached).

[17] For this reason, the Court need not reach RHI/Fairchild's other arguments pertaining to the statute of limitations defense. Thus, Defendants' Motion for Leave to File Sur-Reply Post-Trial Brief or, in the Alternative, for Oral Argument that would further argue this issue is denied as moot.

[18] Trial Tr., pp. 43:19-44:17; Pls. Dem. Ex. 3.

the Lockformer cases, testified that Rexnord's losses, after reimbursement from Wausau, totaled $380,395.46.[19]

To assess reasonableness of attorneys' fees, Delaware courts consider the following factors identified in Rule 1.5(a)(1) & (4) of the Delaware Lawyers' Rules of Professional Conduct: the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, and the amount involved and the results obtained.[20] Delaware courts also consider "whether the number of hours devoted to litigation was excessive, redundant, duplicative or otherwise unnecessary."[21]

Plaintiffs demonstrated at trial by a preponderance of the evidence that the defense fees and costs were reasonable, given the scale and complexity of the Lockformer cases. Mr. Weiner testified that the consolidated *LeClercq* and *Mejdrech* cases lasted three years, involved $26 million in potential damages, and were complex, involving extensive expert testimony.[22] Rexnord's counsel took a lead role among defense counsel in

[19] Trial Tr., pp. 44:18-48:13; Pls. Dem. Ex. 3.

[20] *Mahani v. EDIX Media Group, Inc.*, 935 A.2d 242, 247 (Del. 2007).

[21] *Id.* at 247-48; *see also Breece v. Pettinaro Constr. Co.*, 2002 WL 31105332, *3 (Del. Super.) (citing Rule 1.5).

[22] Trial Tr., pp. 33:14-40:4.

defending the *LeClercq* and *Mejdrech* cases.[23] Rexnord's counsel identified and prepared all of the joint defense group experts and worked extensively with these experts preparing their affirmative and rebuttal expert reports and defended their depositions.[24] Rexnord's counsel also took the lead in deposing Lockformer's primary hydrogeology and wastewater treatment expert, whose testimony was subsequently stricken under *Daubert* as a result of the deposition.[25]

In June 2005, after three years of litigation and the disqualification of one of its primary experts, Lockformer was forced to dismiss the *LeClercq* and *Mejdrech* cases.[26] As a result of Rexnord's defense efforts, these two cases, which claimed damages of $26 million in settlement payments plus water hook-up costs, were dismissed without any money paid to Lockformer in either case.[27]

At trial, Jay Ehle, in-house counsel for Invensys, Inc., testified that he found the defense fees and costs to be necessary and reasonable, and he paid

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[23] *Id.* at p. 40:5-41:8.

[24] *Id.* at p. 40:11-16; Def. Ex. 52 & 53.

[25] Trial Tr., pp. 41:15-42:1; Pls. Ex. 128 & 129.

[26] Trial Tr., pp. 42:4-8, 42:19-43:10; Pls. Ex. 58 & 59.

[27] Trial Tr., p. 42:16-18.

McDermott's fees and costs. Mr. Ehle testified that he was experienced in reviewing outside counsel's legal bills.[28] Using that experience, he set up a budget for legal fees anticipated to be incurred in connection with the defense of the Lockformer cases.[29] He reviewed the McDermott bills for the Lockformer defense, found them to be reasonable and in accord with expectations and the budgets, and approved them for payment.[30]

RHI/Fairchild presented no testimony on the reasonableness of the fees and costs. In their pre- and post-trial briefs, RHI/Fairchild have argued that Rexnord's attorneys' fees were unreasonable because: (1) Rexnord rejected qualified counsel whose costs would have been fully borne by Wausau, and (2) McDermott's staffing and billing were unreasonable.

First, Defendants have argued that McDermott's fees were unreasonable because Invensys, Inc. rejected Wausau's offer to pay the full amount of fees and costs for Sanchez Daniels to defend Rexnord in Lockformer. Defendants made a similar argument during the Manko

[28] *Id.* at p. 170:3-7.

[29] *Id.* at pp. 168:11-169:3.

[30] *Id.* at pp. 169:4-170:2.

arbitration.[31] Arbitrator Manko rejected RHI/Fairchild's similar argument, stating that:

> RHI/Fairchild objects to . . . the billable rates of the attorneys involved in light of Rexnords's refusal to accept less expensive representation offered by its insurance carrier . . . . Simply because another lawyer may have been willing to take the case at a lower rate do[es] not render McDermott's rates unreasonable. Similarly, Wausau's insistence in 2002 that it would only reimburse Rexnord at discounted rates . . . does not render McDermott's rates unreasonable.[32]

At trial, Mr. Ehle testified that he had researched Sanchez Daniels' environmental expertise and found them to be inappropriate for the potential liabilities and issues that might relate to the Downers Grove properties.[33] Mr. Ehle believed that there was no comparison between McDermott and Sanchez Daniels' environmental expertise.[34]

At trial, Defendants submitted a print-out of the September 20, 2008 version of Sanchez Daniels' website.[35] Defendants conceded that the 2008

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[31] Joseph M. Manko, Esquire, in his capacity as an arbitrator, issued an opinion after conducting a three-day hearing and reviewing the parties' exhibits and briefs in connection with the Lockformer cases. Pls.' Mot. for Partial Summ. J., D.I. 53, Ex. 2.

[32] Pls. Ex. 1, pp. 36-38. The Court need not reach the issue of whether Arbitrator Manko's decision collaterally estops this Court; rather the Court adopts Arbitrator Manko's reasoning as sound.

[33] Trial Tr., p. 176:12-22. "The last thing I wanted was to get embroiled in potentially multiple claims of litigation and be left flatfooted with a firm that just didn't know what they were doing."

[34] *Id.* at p. 173:9-11.

[35] Def. Ex. 60.

version of the website was not available to Mr. Ehle in 2002 when he made his decision to reject Wausau's offer to pay for Sanchez Daniels' legal bills in full. Nonetheless, even the 2008 version of Sanchez Daniels' website does not list "environmental litigation." Although "toxic tort" is listed as the thirteenth and last area of expertise, that expertise appeared to be limited to defense of claims involving asbestos. Mr. Ehle testified that expertise in asbestos defense is significantly different from environmental litigation expertise.[36] Mr. Ehle did not think that Sanchez Daniels had the depth and breadth of environmental litigation expertise that would be required.[37] Based on this testimony, given the size of the potential exposure, it was reasonable for Invensys, Inc., on behalf of Rexnord, to reject Sanchez Daniels based on lack of appropriate environmental expertise.

Second, RHI/Fairchild characterizes McDermott's staffing and billing as "unreasonable" and alleges that McDermott staffed the case almost entirely with partners, billing at premium rates. RHI/Fairchild made a similar argument to Arbitrator Manko. Arbitrator Manko rejected this argument:

> With regard to McDermott's staffing of these matters, RHI/Fairchild has not identified any particular entries to which it objects. RHI/Fairchild

[36] Trial Tr., pp. 173:12-174:7, 174:22-175:5.

[37] *Id.* at p. 180: 15-20.

> simply objects that Rexnord's representation in these matters relied too heavily on partners when associates and paralegals could have done much of the work for less. However, the staffing was satisfactory to the client. Furthermore, there is no evidence that different staffing would have ultimately resulted in lower legal bills. While RHI/Fairchild's counsel ably showed during this matter that associates can play an important and efficient role in such matters, it must also be noted that many corporate counsel, including those at Invensys, believe partners are more efficient and offer better representation for the money. I am not going to resolve this philosophical debate in this arbitration and will simply note that reasonable minds may differ regarding the better approach. I find that McDermott's staffing of these matters was reasonable.[38]

Furthermore, at trial Mr. Ehle testified that McDermott's staffing was appropriate in light of the experience level needed for the Lockformer cases.[39] It should also be noted that RHI/Fairchild did not present any testimony or other evidence to support their argument that McDermott's staffing was unreasonable. Therefore, this Court concludes that Rexnord's staffing was reasonable.

Defendants have argued that Rexnord is not entitled to recover costs and fees incurred prior to the time that Lockformer filed suit against Rexnord in 2002, arising from subpoenas and an information request from Lockformer and the State of Illinois. However, according to Section 7(a) of the 1993 Agreement, "Losses" include:

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[38] Pls. Ex. 1, p. 38 (citations omitted). The Court need not reach the issue of whether Arbitrator Manko's decision collaterally estops this Court; rather the Court adopts Arbitrator Manko's reasoning as sound.

[39] Trial Tr., p. 170:8-20.

> [C]osts and expenses (including the reasonable and necessary costs, expenses and fees of outside attorneys . . . for investigating, preparing or defending against any liability, commenced or threatened . . .) relating to Rexnord's or its predecessors' ownership, operation, possession or control of the MPD businesses, properties or facilities on or prior to August 19, 1988 . . . .

Rexnord presented testimony that through their subpoenas and information request, Lockformer and the State of Illinois were gathering information in advance of potential lawsuits against Rexnord relating to contamination in residential areas located south of Lockformer.[40] Furthermore, the subpoenas and information request pertained to operation and control of the Downers Grove facilities prior to August 19, 1998.[41] Therefore, this Court concludes that Rexnord is entitled to recover costs and fees incurred prior to the time Lockformer first filed suit against Rexnord.

Last, Defendants contend that the principal should be reduced by $36,057.00 for Rexnord's fees pursuing the fourth-party complaint in Lockformer against RHI/Fairchild. Notably, however, Arbitrator Manko specifically authorized fees and costs incurred as a result of Rexnord's

[40] *Id.* at pp. 99:1-4, 147:22-148:13, 160:23-163:21.

[41] Pls. Ex. 13, p. 2 (requesting "[a]ny and all documents relating to the purchase, transportation, use, storage, or disposal of any chlorinated hydrocarbons" dating back to 1970); Pls. Ex. 14, p. 3 (requesting specified environmental documents dating back to 1950); Pls. Ex. 209, p. 38:16-18 (seeking information concerning degreasing prior to 1989); Pls. Ex. 16, Attachment C, Request No. 19 (requesting records dating back to 1972 "showing how much chlorinated solvent/cleaner or other chlorinated materials were purchased for the Facility").

fourth-party actions against Defendants in the Lockformer cases. This Court agrees with the reasoning of Arbitrator Manko. Moreover, the Delaware Supreme Court has held:

> [W]here indemnification is required and the indemnitor has been given proper notice of the pending litigation and an adequate opportunity to undertake its duty to defend, the indemnitee is entitled to recover its costs and attorneys fees for the expenses incurred in its defense of the action giving rise to the claim to indemnification and in enforcing its right to indemnification.[42]

Based on all the testimony and the parties' submissions, the Court finds that Plaintiffs' attorneys' fees were reasonable with regard to "the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, and the amount involved and the results obtained."[43] Nor does it appear that "the number of hours devoted to litigation was excessive, redundant, duplicative or otherwise unnecessary."[44] Therefore, Plaintiffs are awarded $380,395.46 as reimbursement for defense fees and costs, pursuant to Section 7(a) of the 1993 Agreement.[45]

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[42] *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 423 (Del. 1994).

[43] *Mahani*, 935 A.2d at 247 (citing Delaware Rules of Professional Conduct Rule 1.5(a)(1) & (4)).

[44] *Id.* at 247-8; *Breece*, 2002 WL 31105332, at *3.

[45] RHI/Fairchild's argument that Rexnord has not sustained its burden to demonstrate that it was damages by Defendants' conduct is foreclosed by this Court's summary judgment opinion.

C. Plaintiffs are entitled to prejudgment interest, calculated beginning in 2002 as simple interest, in compliance with 6 *Del. C.* § 2301

According to Rexnord's amended complaint, "Rexnord and Invensys' cause of action against RHI/Fairchild did not accrue until June 9, 2005."[46] However, Rexnord maintains that prejudgment interest should be computed from the time the 1993 Agreement was breached, namely, 45 days after Rexnord's June 11, 2002 tender.[47] Thus, Rexnord's cause of action first accrued on July 26, 2002. Section 7(a) of the 1993 Agreement provides that the defendants are obligated to pay "as sums for such Losses become due and payable."[48] Delaware law provides that, looking at the contract between the parties, prejudgment interest "is to be computed from the date payment is due."[49] Therefore, prejudgment interest is to be calculated beginning at the time of the first breach on July 26, 2002.[50]

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[46] Am. Compl., D.I. 24 at ¶ 23.

[47] Pls. Pre-Trial Br., D.I. 75 at 8.

[48] Pls. Ex. 10, p. 16.

[49] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) (citing *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978)).

[50] *Citadel Holding Corp.*, 603 A.2d at 826 (noting, "[w]here, as here, the underlying obligation to make payment arises *ex contractu*, we look to the contract itself to determine when interest should begin to accrue") (citing *Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016 (Del. 1989)).

Delaware law provides that in breach of contract cases prejudgment interest is calculated using a rate that is fixed as of the time of the breach. When a suit involves a claim for damages based upon breach of contract, "[i]t falls squarely within the class of cases for which a suit is entertained in a court of law and does not involve the application of equitable principles."[51] In such circumstances, "the rate of interest is calculated according to the Federal Reserve discount rate as of the date of commencement of interest liability and it remains fixed at that rate."[52] Prejudgment interest on a pure contract claim is usually simple interest, not compound interest. In *Brandin v. Gotlieb*, the Court of Chancery noted that 6 *Del. C.* § 2301 has

> long been construed as providing for a simple interest calculation, [it] should not be reinterpreted by the judiciary as calling for compound interest. Any reinterpretation of the statute at this stage should come from the legitimate authority, the General Assembly. Even less desirable would be a judicial revision of the statute that would implicitly write into the Delaware Code a judicial right to determine on a case-by-case basis whether the statute should be interpreted as calling for simple or compound interest. Thus if the question before me were whether § 2301 provides for compound interest, I would answer no . . . .[53]

Therefore, while the Court of Chancery may deviate from 6 *Del. C.* § 2301 and award compound interest in order to serve equitable principles, simple

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[51] *Rollins Envtl. Servs., Inc. v. WSMW Indus.*, 426 A.2d 1363, 1367 (Del. Super. 1980).

[52] *Id.* at 1368; *see also Chaplake Holdings*, Ltd. v. Chrysler Corp., 2003 WL 22853462, *4 (Del. Super.).

[53] *Brandin v. Gottlieb*, 2000 WL 1005954, * 29 (Del. Ch.).

interest is appropriate for a pure contract claim, such as the one before this Court.[54]

D. The Court declines to award Plaintiffs declaratory relief with respect to payments advanced by Wausau

Plaintiffs contend they are entitled to declaratory relief with respect to payments advanced by Wausau pursuant to a Non Waiver Agreement between Rexnord and Wausau that reserved their "respective abilities to enforce all rights and obligations against the other" under the policies.[55] However, this dispute is apparently pending before the DuPage County Court in Illinois; this Court understands that the Illinois Court may determine the validity of the Non Waiver Agreement and order declaratory relief, should that court deem such relief appropriate.[56] Unlike the instant suit, Wausau is a party to the Illinois suit, in which they seek reimbursement for payments made to Rexnord. Although Mr. Weiner testified about the Non Waiver Agreement during trial, there has been no substantial development of that issue in this case. Also, Defendants' second argument

[54] *See Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, *31 (Del. Ch.).

[55] Pls.' Ex. 140.

[56] Trial Tr., pp. 67:1-5, 156:20-157:16.

on the declaratory judgment issue was set forth in their Post-Trial Brief, as follows:

> Wausau has no ability to recover these payments back from Rexnord in the first place. Rexnord cites no authority to suggest otherwise, except to refer to a "Non Waiver" Agreement in which Rexnord and Wausau reserved their "respective abilities to enforce all rights and obligations against the other" under the policies. This merely leaves the terms of the policies in place, and has nothing to do with Wausau's ability to recover defense payments previously made to Rexnord.[57]

However, Plaintiffs, in their Reply Brief, did not squarely address this argument of Defendants. Therefore, this Court finds it would be imprudent to grant declaratory relief when the issue will be more fully developed during the upcoming trial in Illinois.[58]

V. CONCLUSION

In conclusion, the Court holds: 1) Defendants' statute of limitations defense is barred because RHI/Fairchild failed to include it in the pretrial stipulation; 2) Plaintiffs are awarded $380,395.46 for defense fees and costs, pursuant to Section 7(a) of the 1993 Agreement because such fees and costs were reasonable; 3) Plaintiffs are entitled to simple, prejudgment interest beginning July 26, 2002; and 4) the Court declines to award declaratory judgment with respect to payments advanced by Wausau.

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[57] Defs.' Post-Trial Br. at 20.

[58] *Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755 (Del. Ch. 1995) (noting "[a] court will exercise its discretion to grant declaratory relief when the benefit outweighs the risk of premature judgment.").

This decision of this Court will not be final until it has formally entered judgment by a separate order of principal in the amount of $380,395.46 and prejudgment interest from July 26, 2002 to March 3, 2009, calculated by Plaintiffs and Defendants in compliance with the Court's decision. Plaintiffs and Defendants should confer and Plaintiffs shall submit a proposed Final Order on or before March 3, 2009.

IT IS SO ORDERED.

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oc: Prothonotary