2015 WL 409525
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United States District Court,
S.D. New York.

DANAHER CORPORATION, Plaintiff,
v.
The TRAVELERS INDEMNITY COMPANY, et al., Defendants.
The Travelers Indemnity Company, et al., Third Party Plaintiffs,
v.
Atlas Copco North America, Inc., et al., Third Party Defendants.

No. 10 Civ. 0121(JPO)(JCF).
|
Signed Jan. 16, 2015.

REPORT AND RECOMMENDATION

JAMES C. FRANCIS IV, United States Magistrate Judge.

***1** TO THE HONORABLE J. PAUL OETKEN, U.S.D.J.:
As I explained in a prior order, two motions are before me. *Danaher Corp. v. Travelers Indemnity Co.,* No. 10 Civ. 0121, 2014 WL 4898754, at * 1 (S.D.N.Y. Sept. 30, 2014) (*"Danaher* IV"). First, third-party defendant Atlas Copco North America, LLC ("Atlas Copco")—sued as Atlas Copco North America, Inc.—and plaintiff Danaher Corporation (for the purposes of their joint application, collectively "Danaher") seek an order calculating attorneys' fees and costs that defendants and third-party plaintiffs The Travelers Indemnity Company and Travelers Casualty and Surety Co. (collectively, "Travelers") owe for the defense of certain underlying actions filed in courts around the country regarding asbestos and silica exposure (the "underlying claims"). Second, Atlas Copco seeks an order setting the attorneys' fees and costs that Travelers must pay for expenses Atlas Copco incurred in connection with a September 2012 ruling by the Honorable J. Paul Oetken, U.S.D.J., that Travelers has a duty to defend those underlying claims.

Background
Several prior opinions set out the factual background of this case. *See Danaher Corp. v. Travelers Indemnity Co.,* No. 10 Civ. 0121, 2014 WL 1133472, at *1 (S.D.N.Y. March 21, 2014) (*"Danaher III"*); *Danaher Corp. v. Travelers Indemnity Co.,* No. 10 Civ. 0121, 2013 WL 364734, at *1 (S.D.N.Y. Jan. 31, 2013) (*"Danaher I"*); *Danaher Corp. v. Travelers Indemnity Co.,* No. 10 Civ. 0121, 2013 WL 150027, at *1 (S.D.N.Y. Jan. 10, 2013). Although *Danaher IV* recites the relevant procedural history, *see* 2014 WL 4898754, at *1–2, I repeat it here for the sake of clarity.

In September 2012, Judge Oetken granted a motion for partial summary judgment brought by Atlas Copco and Danaher, ruling that Travelers had a duty to defend Atlas Copco in the underlying claims. (Order dated Sept. 6, 2012 ("September 6 Order"); Excerpts from Transcript of Oral Argument dated Sept. 6, 2012, attached as Exh. D to Certification of Paul E. Breene dated Oct. 26, 2012, at 57–59). Judge Oetken then referred to me Atlas Copco's motion arguing that, under the rule explicated in *Mighty Midgets, Inc. v. Centennial Insurance Co.,* 47 N.Y.2d 12, 416 N.Y.S.2d 559, 389 N.E.2d 1080 (1979), and *U.S. Underwriters Insurance Co. v. City Club Hotel, LLC,* 3 N.Y.3d 592, 789 N.Y.S.2d 470, 822 N.E.2d 777 (2004), Travelers was obligated to reimburse Atlas Copco for attorneys' fees and expenses incurred in securing that favorable decision. *Danaher I,* 2013 WL 364734, at *2. I recommended granting Atlas Copco's motion, *id.* at *6, and Judge Oetken agreed, holding that "Atlas Copco is entitled to the attorneys' fees it has incurred in procuring the ruling that Travelers had a duty to defend," *Danaher Corp. v. Travelers Indemnity Co.,* No. 10 Civ. 0121, 2013 WL 1387017, at *3 (S.D.N.Y. April 5, 2013) (*"Danaher II"*).

Meanwhile, Danaher and Atlas Copco filed a motion to hold Travelers in contempt for violating the September 6 Order by failing to pay all of the verified defense costs in the underlying claims, including pre-judgment interest. Atlas Copco later filed a motion to hold Travelers in contempt for violating *Danaher II* by failing to pay the attorneys' fees Atlas Copco expended in litigating the duty-to-defend issue. Judge Oetken denied both contempt motions, noting that neither prior opinion addressed the reasonableness of any claimed costs and attorneys' fees, and that the September 6 Order had not addressed whether pre-judgment interest should be awarded. *Danaher III,* 2014 WL 1133472, at *7–9.

***2** After Judge Oetken referred those unresolved issues to me, in an attempt to streamline the fee applications-especially the fee application to be made in connection with the (voluminous) underlying claims—I ordered Danaher to

provide updated ledgers of its claimed attorneys fees to Travelers and ordered Travelers to identify "any disputes it has" with Danaher's claims for fees and costs. (Order dated April 8, 2014 ("April 8 Order"), ¶¶ 1–2). Thereafter the parties were to submit briefs addressing those disputes. (April 8 Order, ¶¶ 3–5). Because the original briefing on the applications was deficient, I ordered supplemental briefing, *Danaher IV,* 2014 WL 4898754, at *7, which is now complete.

Discussion

A. *Legal Standard*

"Where, as here, an insured is forced to defend an action because the insurer wrongfully refused to provide a defense, the insured is entitled to recover its reasonable defense costs, including attorney's fees." *U.S. Underwriters Insurance Co. v. Weatherization, Inc.,* 21 F.Supp.2d 318, 326 (S.D.N.Y.1998) (collecting cases). The fee applicant must "adequately document [ ] the request" so that the court can fulfill its "duty to determine the reasonableness of the amount." *Id.*

The award should be based on the court's determination of a "presumptively reasonable fee." *Sandoval v. Materia Bros. Inc.,* No. 11 Civ. 4250, 2013 WL 1767748, at *3 (S.D.N.Y. March 5, 2013) (quoting *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany,* 522 F.3d 182, 189–90 (2d Cir.2008)). This fee is calculated by multiplying "a reasonable hourly rate by the reasonable number of hours expended on the case." *Sandoval,* 2013 WL 1767748, at *3; *see* *Millea v. Metro–North Railroad Co.,* 658 F.3d 154, 166 (2d Cir.2011).

Determining a reasonable hourly rate involves "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel" which may include "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district." *Farbotko v. Clinton County,* 433 F.3d 204, 209 (2d Cir.2005). The hourly rates must be "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Reiter v. MTA New York City Transit Authority,* 457 F.3d 224, 232 (2d Cir.2006) (alteration in original) (internal quotation marks omitted); *see also* *Simmons v. New York City Transit Authority,* 575 F.3d 170, 174 (2d Cir.2009). There is a presumption that "the appropriate hourly fee to be applied in calculating an award of attorneys' fees is the prevailing rate in the district in which the suit is litigated .... " *Atlantic States Legal Foundation, Inc. v. Onondaga Department of Drainage and Sanitation,* 899 F.Supp. 84, 90 (N.D.N.Y.1995). The party requesting fees must "produc[e] satisfactory evidence that the requested rates are in line with those prevailing in the community." *Reiter v. Metropolitan Transportation Authority of New York,* No. 01 Civ. 2762, 2004 WL 2072369, at *4 (S.D.N.Y. Sept. 10, 2004). While the court has some responsibility to "disciplin[e] the market," especially in cases subject to statutory or contractual fee-shifting, *see* *Arbor Hill,* 522 F.3d at 184, "an attorney's customary rate is a significant factor in determining a reasonable rate. Indeed, as a logical matter, the amount actually paid to counsel by paying clients is compelling evidence of a reasonable market rate." *Reiter,* 2004 WL 2072369, at *5 (internal citations omitted). As the Seventh Circuit has observed, where an insurer denies its duty to defend, the insured who is paying attorneys' fees has an "incentive to minimize its legal expenses." *Taco Bell Corp. v. Continental Casualty Co.,* 388 F.3d 1069, 1075–76 (7th Cir.2004).

***3** After establishing the appropriate hourly rate, a court must determine how much time was reasonably expended in order to arrive at the presumptively reasonable fee. "The relevant issue [ ] is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez,* 973 F.2d 96, 99 (2d Cir.1992); *accord* *Mugavero v. Arms Acres, Inc.,* No. 03 Civ. 5724, 2010 WL 451045, at *6 (S.D.N.Y. Feb.9, 2010). A court should exclude from the lodestar calculation "excessive, redundant or otherwise unnecessary hours." *Quaratino v. Tiffany & Co.,* 166 F.3d 422, 425 (2d Cir.1997); *accord* *Luciano v. Olsten Corp.,* 109 F.3d 111, 116 (2d Cir.1997) ("If the district court concludes that any expenditure of time was unreasonable, it should exclude these hours from the lodestar calculation."). It can do so by making specific deductions or "by making an across-the-board reduction in the amount of hours." *Luciano,* 109 F.3d at 117; *accord* *Vorcom Internet Services, Inc. v. L & H Engineering & Design LLC,* No. 12 Civ.2049, 2014 WL 116130, at *5 (S.D.N.Y. Jan. 13, 2014).

B. *Fees for Duty–to–Defend Ruling*

Atlas Copco claims that it is entitled to "fees and costs incurred in defense of the declaratory judgment action through September 6, 2012, in the amount of $234,490.45, plus interest." (Atlas Copco Reply at 10 & n. 4).

1. *Reasonable Hourly Rates*

Atlas Copco claims the following hourly rates for seven attorneys from the law firm Reed Smith LLP:

Paul Breene, a partner—$550/hour for worked billed between March 1, 2010, and March 20, 2012, and $500/hour for work billed between April 10, 2012, and October 21, 2012;

Jean Farrell, a partner—$610/hour for work billed on March 20, 2012, and $400/hour for work billed between April 10, 2012, and October 21, 2012;

John Berringer, a partner—$670/hour for work billed on March 20, 2012;

Ann Kramer, a partner—$730/hour for work billed on December 8, 2011;

Michael DiCanio, an associate—$440/hour for work billed on November 14, 2011;

Whitney Clymer, an associate—$385/hour for work billed on January 19, 2012, $470/hour for work billed on February 21, 2012, and $400 for work billed between April 10, 2012, and May 16, 2012;

Ruth Thomas, an associate—$340/hour for work billed on October 13, 2011.

(Reed Smith Invoices, attached to letter of Paul E. Breene dated May 31, 2013 ("Breene 5/31/13 Letter"), attached as Exh. A to Affirmation of Paul E. Breene dated August 1, 2014 ("Breene 8/1/14 Aff.")). Rates for three paralegals ranged between $200/hour and $275/hour, and rates for three members of the support staff ranged between $125/hour and $140/hour. (Reed Smith Invoices; Brief of the Travelers Indemnity Company and Travelers Casualty and Surety Company in Opposition to Atlas Copco North America Inc.'s Motion for Reimbursement of All Legal Fees and Costs Incurred in This Action ("Travelers Duty to Defend Memo.") at 15).

***4** In response to *Danaher IV,* Atlas Copco has now provided information about the experience of these attorneys, all of whom specialize in insurance recovery, as well as for the listed support staff. Mr. Breene, the senior partner primarily responsible for representing Atlas Copco in this action, is a graduate of Columbia Law School who has been practicing law for 30 years, focusing on insurance recovery for over 25 years. (Atlas Copco North America Inc.'s Supplemental Memorandum of Law in Further Support of its Motion for Reimbursement of Legal Fees and Costs Incurred to Defend the Declaratory Judgment Action Brought Against Atlas Copco by Travelers Indemnity Company and Travelers Casualty and Surety Company ("Atlas Copco Supp. Memo.") at 10; Biography of Paul E. Breene, attached as part of Exh. C to Affirmation of Paul E. Breene dated Oct. 30, 2014 ("Breene 10/30/14 Aff."), at 19). [1] Ms. Farrell was a partner at Reed Smith during the relevant period (she is now of counsel to the firm). (Atlas Copco Supp. Memo. at 12; Biography of Jean M. Farrell, attached as part of Exh. C to Breene 10/30/14 Aff., at 22). She graduated from New York University Law School in 1988 and has been practicing in the area of insurance recovery since 1992. (Atlas Copco Supp. Memo. at 12). Mr. Berringer graduated from the University of Chicago Law School and has been practicing law for over 30 years. (Atlas Copco Supp. Memo. at 11; Biography of John B. Berringer, attached as part of Exh. C to Breene 10/30/14 Aff., at 15). Ms. Kramer graduated from the University of Michigan School of Law and has been practicing in the area of insurance recovery for over 20 years. (Atlas Copco Supp. Memo. at 11; Biography of Ann V. Kramer, attached as part of Exh. C to Breene 10/30/14 Aff., at 25). Mr. DiCanio graduated from Brooklyn Law School in 2007 and practiced law with Reed Smith from 2008 to 2012, when he left to join another large firm with a significant insurance recovery practice. (Atlas Copco Supp. Memo. at 13). Ms. Clymer (now known as Whitney Ross) has been practicing in the area of insurance recovery since she graduated from Villanova University School of Law in 2007. (Atlas Copco Supp. Memo. at 12–13; Biography of Whitney D. Ross, attached as part of Exh. C to Breene 10/31/14 Aff., at 28). Ms. Thomas, the most junior member of the team, graduated from Columbia University Law School in 2008, and was a third-year associate when she worked on this case. (Atlas Copco Supp. Memo. at 13; Biography of Ruth M. Thomas, attached as part of Exh. C to Breene 10/30/14 Aff., at 30).

In addition to this information, Atlas Copco has submitted evidence—in the form of a survey of billing rates at the largest U.S. law firms conducted by the National Law Journal

and compiled by American Lawyer Media Legal Intelligence —showing that the rates charged by these attorneys are comparable to rates charged by similarly experienced counsel at other firms of "roughly comparable size and reputation." (Atlas Copco Supp. Memo. at 16–17; 2012 NLJ Billing Survey ("NLJ Billing Survey"), attached as Exh. E to Breene 10/30/14 Aff., at 2–3, 5–6). It has also provided similar evidence for support staff. (Annual Compensation Survey for Paralegals/Legal Assistants and Managers 2012 Edition, attached as part of Exh. F to Breene 10/31/14 Aff., at 22, 25; Annual Compensation Survey for Paralegals and Managers 2013 Edition, attached as part of Exh. F to Breene 10/30/14 Aff., at 14, 19). My research has confirmed that the rates charged by Reed Smith are not unreasonable in this market. *See, e.g.,* *Asare v. Change Group New York, Inc.,* No. 12 Civ. 3371, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) (approving as reasonable hourly rates between $300 and $500 for associates); *Source Vagabond Systems Ltd. v. Hydrpak, Inc.,* No. 11 Civ. 5379, 2013 WL 136180, at *9–10 (S.D.N.Y. Jan. 11, 2013) (collecting cases approving rates of over $700/hour for senior partners in complex cases), *report and recommendation adopted in relevant part,* 2013 WL 634510 (S.D.N.Y. Feb.21, 2013); *Lucky Brand Dungarees, Inc. v. Ally Apparel Resources LLC,* No. 05 Civ. 6757, 2009 WL 466136, at *6 (S.D.N.Y. Feb. 25, 2009) (approving rates of $205/hour to $235/hour for paralegals).

***5** Travelers objects to some of the rates charged, arguing that it should be responsible for paying only the lowest hourly rate for each of the timekeepers. (Travelers Duty to Defend Memo. at 16–17; Supplemental Brief of the Travelers Indemnity Company and Travelers Casualty and Surety Company in Further Opposition to Atlas Copco North America Inc.'s Motion for Reimbursement of All Legal Fees and Costs Incurred in This Action ("Travelers Supp. Duty to Defend Memo ."), at 4). It contends that it "should not be required to reimburse Atlas Copco at the higher billing rates initially charged by Reed Smith but rejected by Atlas Copco and instead should only be required to pay for the lower billing rates ultimately agreed upon." (Travelers Supp. Duty to Defend Memo. at 4). This argument is flawed, not least because its premise is false. It has been clear from the outset of this dispute over attorneys' fees that Atlas Copco did not reject any billing rates; rather, it *paid* all of the fees charged by Reed Smith. (Atlas Copco North America Inc.'s Memorandum of Law in Support of it Motion for Reimbursement of Legal Fees and Costs Incurred to Defend the Declaratory Judgment Action Brought Against Atlas Copco by Travelers Indemnity Company and Travelers Casualty and Surety Company ("Atlas Copco Opening Memo.") at 12–13; Breene 5/31/13 Letter (requesting "reimbursement ... of the fees Atlas Copco incurred); Reed Smith Invoices; Affirmation of John J. Henschel dated Oct. 29, 2014, attached as Exh. B to Breene 10/30/14 Aff., ¶ 10; Atlas Copco Supp. Memo. at 78; Atlas Copco North America Inc.'s Reply Memorandum of Law in Further Support of it Motion for Reimbursement of Legal Fees and Costs Incurred to Defend the Declaratory Judgment Action Brought Against Atlas Copco by Travelers Indemnity Company and Travelers Casualty and Surety Company ("Atlas Copco Supp. Reply") at 4). Moreover, the fact that counsel and client agreed to reduce certain rates does not necessarily mean, as Travelers argues, that the original rates were outside the realm of reasonableness in the relevant market for the work performed. Indeed, as discussed above, Atlas Copco has provided evidence showing that Reed Smith's rates, including the higher rates paid, were comparable to those charged by other similar firms. In light of these facts, I will not accept Travelers' invitation to decrease each timekeeper's hourly rates to the lowest rate that timekeeper charged.

2. *Reasonable Time Expenditure*

In *Danaher IV,* I resolved a dispute between the parties regarding the time period for which attorneys' fees and costs are at issue in this motion, finding that *Danaher II* limited that span to fees incurred "up to and including September 6, 2012." *Danaher IV,* 2014 WL 4898754, at *4. Danaher IV also ordered the parties to brief "[t]he relevant inquiry[, which] is whether an insurer that honored its duty to defend would be responsible for paying for time expended performing a particular task."[2] *Id* . at *5 (citing *Chase Manhattan Bank v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005,* 258 A.D.2d 1, 5, 690 N.Y.S.2d 570, 573 (1st Dep't 1999) ("[D]efense expenses are recoverable by the insured, even if incurred in defending against an insurer seeking to avoid coverage for a particular claim. Recovery of attorneys' fees in such a case ... is incidental to the insurer's duty to defend, and the right to such recovery arises from that contractual duty.")). Atlas Copco's ultimate position has not changed; it continues to argue that all of the fees it incurred through September 6, 2012, meet this test. (Atlas Copco Supp. Memo. at 2–4).

***6** Travelers disagrees. It first objects that Atlas Copco is not entitled to fees expended on its counterclaims against Travelers or the cross-claims against other insurers, relying

on *Johnson v. General Mutual Insurance Co.,* 24 N.Y.2d 42, 298 N.Y.S.2d 937, 246 N.E.2d 713 (1969), and cases following it. (Travelers Supp. Duty to Defend Memo. at 6–8). In *Johnson,* the subrogee of victims of an auto accident brought declaratory judgment actions against the alleged tortfeasor's insurer, seeking to compel it to "defend separate tort actions which [the subrogee] had [ ] brought on behalf of the injured [ ] against the insured." 24 N.Y.2d at 47, 298 N.Y.S.2d at 939–40, 246 N.E.2d 713. The insured, who was joined as a defendant, "cross-claimed against the insurer to require the insurer to defend the pending tort actions and also for damages sustained by him in all the still pending actions brought by [the subrogee], for prosecuting his cross claims, and for damages consequent to the wrongful cancellation of insurance." *Id.,* 298 N.Y.S.2d at 940, 246 N.E.2d 713. The trial court granted summary judgment against the insurer in the declaratory judgment action, finding that the it was required to defend and indemnify the insured in the tort actions, and also granted summary judgment for the insured on his cross-claims. *Id.* at 48, 298 N.Y.S.2d at 940, 246 N.E.2d 713. The Court of Appeals held that "the expense of defending the declaratory judgment actions arose as a direct consequence of the insurer's breach of its duty to defend the tort actions[, and is therefore] a compensable damage sustained by [the] insured"; however, the "insured's cross claim to recover expenses in prosecuting the cross claim itself, either to obtain a declaration or to recover legal expenses, does not give rise to actionable damages." *Id.* at 49–50, 298 N.Y.S.2d at 942, 246 N.E.2d 713; *see also Commercial Union Insurance Co. v. International Flavors & Fragrances, Inc.,* 639 F.Supp. 1401, 1402 (S.D.N.Y.1986) ("[Defendant] cannot recover its legal expenses for prosecuting its counterclaim against [insurer]."); *National Casualty Insurance Co. v. City of Mount Vernon,* 128 A.D.2d 332, 335 n. *, 515N.Y.S.2d 267, 269 n. * (2d Dep't 1987) (citing *Johnson,* 24 N.Y.2d at 50, 298 N.Y.S.2d 937, 246 N.E.2d 713, and *Commercial Union,* 639 F.Supp. at 1402); *Allstate Insurance Co. v. Aetna Casualty & Surety Co.,* 123 Misc.2d 932, 934, 475 N.Y.S.2d 219, 222 (Sullivan County Sup.Ct.1984) (citing *Johnson,* 24 N.Y.2d at 49–50, 298 N.Y.S.2d 937, 246 N.E.2d 713).

There is a contrary line of authority, however. The court in *Commercial Union,* for example, indicates that, in a declaratory judgment action brought by an insurer seeking to disclaim coverage, expenses incurred in pressing a counterclaim seeking a declaration of coverage (but not damages) are compensable. *See Commercial Union,* 639 F.Supp. at 1402 (discussing *American Home Assurance Co. v. Diamond Tours & Travel,* 103 Misc.2d 733, 426 N.Y.S.2d 897 (New York County Sup.Ct.1979), *rev'd on other grounds* 78 A.D.2d 801, 433 N.Y.S.2d 116 (1st Dep't 1980)). In *Admiral Insurance Co. v. Weitz & Luxenberg, P.C.,* No. 02 Civ. 2195, 2002 WL 31409450, at *3 (S.D.N.Y. Oct. 24, 2002), the insurer sued the insured for a declaration of non-coverage and the insured sought a declaration of coverage as well as judgment in the amount of incurred attorneys' fees and defense costs. The court held that the insurer had a duty to defend and that "where a policyholder sued by its insurer files a counterclaim for coverage, the successful policyholder is not required to pro-rate its costs and expenses between the defense of the declaratory judgment and the counterclaim ." *Id.* at *5; *see also Lancer Insurance Co. v. Saravia,* 40 Misc.3d, 171, 177, 967 N.Y.S.2d 593, 599 (Kings County Sup.Ct.2013) (permitting defendant in action seeking declaration of non-coverage to file counterclaim for attorneys' fees, which "would [ ] be awarded in the event [the defendant] defeats the declaratory judgment action"). The court in *Smart Style Industries, Inc. v. Pennsylvania General Insurance Co.,* 930 F.Supp. 159, 165 (S.D.N.Y.1996), asserts that an insurer who unsuccessfully seeks to disclaim coverage must reimburse its policyholder for all costs "that were or would have been incurred in any event in connection with its defense" of the insurer's claims, even if technically the expenses are traceable to the policyholder's affirmative claims.[3] *See New York v. Blank,* 745 F.Supp. 841, 852 (N.D.N.Y.1990) (insurer with duty to defend must pay "for all defense costs [that the insured] incur[s] for services rendered which are useful in defending" against complaint, because such expenses benefit insurer by attempting to "reduce any potential assessment of damages"), *aff'd,* 27 F.3d 783 (2d Cir.1994); *Colonial Tanning Corp. v. Home Indemnity Co.,* 780 F.Supp. 906, 927 (N.D.N.Y.1991) (following *Blank*).

***7** Here, Travelers argues generally that expenses traceable to counterclaims and cross-claims are not recoverable, but it has not identified any time entries that would not "have been incurred in any event in connection with [Atlas Copco's] defense." *Smart Style,* 930 F.Supp. at 165. Indeed, Travelers does not even identify any time entries that would be excluded (because connected exclusively with

counterclaims or cross-claims) if I were to apply the rule that it urges from *Johnson.* And, because Travelers has the burden to show that claimed defense costs are unreasonable or unnecessary since it breached its duty to defend, *see, e.g.,* 14 Couch on Insurance § 205:76 (3d ed.) ("[A]mbiguities and uncertainties in time sheets of the attorney for the insureds must be resolved against the liability insurer that breaches its duty to defend."), Travelers' objection on this ground fails.

Next, Travelers contends that Atlas Copco is not entitled to reimbursement of fees expended "for document production and other work performed by Reed Smith *after* the filing of the duty to defend motion." (Travelers Supp. Duty to Defend Memo. at 8–10). Again, its argument is undermined by its apparent misunderstanding of *Danaher IV.* I noted there that "[t]here is no support in logic or law" for the proposition that Atlas Copco is entitled only to fees expended in producing the motion for partial summary judgment on the duty to defend, and explained that the proper inquiry is whether the "an insurer that honored its duty to defend would be responsible for paying for time expended performing a particular task." *Danaher IV,* 2014 WL 4898754, at *5. Yet Travelers still insists that Atlas Copco is entitled to fees only for work that "relate[s] to the duty to defend motion."[4] (Travelers Supp. Duty to Defend Memo. at 8). Travelers' supplemental submission is therefore of limited value.

Travelers makes some specific objections. It argues that fees related to Atlas Copco's post–1987 insurance coverage should be excluded because they "appear to relate to Travelers[']claim for contribution of defense and indemnity costs against Danaher and [ ]Atlas Copco's other insurers," such as Industria Insurance Company, a third-party defendant also represented by Reed Smith. (Travelers Duty to Defend Memo. at 8). But Atlas Copco points out that Travelers asked Atlas Copco to produce all insurance policies under which it sought coverage for the underlying claims and all policies in effect after 1986, and that Travelers sought deposition testimony on those policies. (Atlas Copco Supp. Reply at 5–6; Requests for Production of Documents Directed to Atlas Copco North America, Inc., attached as Exh. A to Reply Affirmation of Paul E. Breene dated Nov. 21, 2014 ("Breene 11/21/14 Aff."), Request No. 5; Notice to Take Oral Deposition of Atlas Copco's Corporate Designee Pursuant to Fed.R.Civ.P. 30(b)(6), attached as Exh. B to Breene 11/21/14 Aff., ¶¶ 8–9). Travelers has not explained why responding to discovery requests promulgated to Atlas Copco by Travelers should be excluded from compensable expenses. *See Danaher IV,* 2014 WL 4898754, at *5 (noting that participation in discovery was necessary to Atlas Copco's defense).

***8** Travelers also argues that, because "Atlas Copco did not rely upon any expert opinions in support of its claim that Travelers has a duty to defend," legal fees related to expert discovery should be excluded.[5] (Travelers Supp. Duty to Defend Memo. at 10). Travelers' Third–Party Complaint against Atlas Copco alleges that coverage is "barred by the terms, conditions or exclusions contained in the Travelers Policies." (Answer, Separate Defenses, Counterclaim and Crossclaim to Complaint and Third Party Complaint dated Feb. 26, 2010, at 18). Travelers identified an expert who produced a report regarding asbestos exclusions in liability coverage. (Report of Donald S. Malecki dated June 2012, attached as part of Exh. D to Breene 11/21/14 Aff., at 2). In response, Atlas Copco "worked with its expert to rebut Travelers' expert witness, and provide its own expert opinion." (Atlas Copco Reply at 7). The fees were thus directly incurred in defending against Travelers' claim.

3. *Costs*

Travelers has challenged only costs incident to work it asserts is not compensable. (Supplemental Affirmation of Robert W. Mauriello, Jr., dated Nov. 13, 2014, ¶¶ 4–19). I have already rejected those arguments. The invoices show charges for duplicating, travel and related expenses, couriers, postage, documentation, transcripts, and legal research. All were paid by the client. The costs are compensable.

4. *Pre–Judgment Interest*

Atlas Copco seeks pre-judgment interest on the attorneys' fees and costs awarded at New York's statutory rate of nine percent, N.Y. C.P.L.R. ("CPLR") § 5004, from the date the fees and costs were incurred. (Atlas Copco Opening Memo. at 14; Reply at 9). Travelers does not address this issue in the context of this motion.

Under New York law, "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract." CPLR § 5001(a). The award of interest "is non-discretionary." *Turner Construction Co. v. American Manufacturers Mutual Insurance Co.,* 485 F.Supp.2d 480, 490 (S.D.N.Y.2007) (collecting cases). Failure to fulfill a duty to defend is a breach of contract and entitles the insured to "damages in the form of attorneys' fees and litigation expenses reasonably incurred by the insured in

defending the underlying action." *United Parcel Service v. Lexington Insurance Group,* 983 F.Supp.2d 258, 267–68 (S.D.N.Y.2013); *see* also Turner Construction, 485 F.Supp.2d at 490. Moreover, because, as noted above, "an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action," U.S. Underwriters Insurance, 3 N.Y.3d at 597–98, 789 N.Y.S.2d at 473, 822 N.E.2d 777, Atlas Copco is entitled to its fees and expenses in this action as damages for Travelers' breach of its duty to defend. Interest is therefore required.

Where, as here, damages for breach of contract are incurred at various times after the date of the breach, "interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." CPLR § 5001(b). I recommend awarding interest on the damages from the date they were incurred, as requested by Atlas Copco. [6]

***9** I therefore recommend that Atlas Copco be awarded $234,490.45 in attorneys' fees and costs, plus statutory pre-judgment interest calculated as noted above.

C. *Fees and Prejudgment Interest for Defense of Underlying Claims*

Danaher and Atlas Copco seek $8,840,391.31 in defense fees and costs incurred in the defense of the underlying claims, plus prejudgment interest. (Brief in Support of Danaher Corporation's and Atlas Copco North America LLC's Motion for Reimbursement of Legal Fees and Costs Incurred as a Result of Travelers' Breach of its Duty to Defend and for Pre–Judgment Interest ("Danaher Opening Memo."), at 1–2). In support of the application, they submitted, among other things, a ledger of almost 9,000 entries reflecting invoices issued in connection with attorneys' fees and costs in each of the underlying claims. [7] In *Danaher IV,* I ordered supplemental briefing to address two issues that I found insufficiently addressed in the original submissions: whether "the rates charged [by counsel in the underlying claims] are in line with rates charged in similar cases in the forums in which they were litigated," and whether, if counsel based outside the district in which their cases were litigated charged higher rates than in-district counsel would have, the higher rates were reasonable. 2014 WL 4898754, at *6 (emphasis omitted). That briefing is now complete. [8]

1. *Reasonable Hourly Rates*

Travelers complains that rates charged by certain firms defending Danaher against the underlying claims are unreasonably high. It identifies fourteen firms, litigating in eleven states, whose hourly rates purportedly "exceed Travelers['] approved rates for those specific firms and/or the rates charged by similar firms defending bodily injury claims within their respective legal communities." [9] (Travelers Underlying Claims Memo. at 6; Mauriello 6/12/14 Letter at 2–4). According to Travelers, its approved rates are reasonable because they "are consistent with and, in some cases, exceed the hourly rates awarded by courts for cases involving bodily injury claims and non-bodily injury claims." (Travelers Supp. Underlying Claims Memo. at 6). It further points out that certain firms litigating the underlying claims on behalf of Danaher charge hourly rates that are consistent with Travelers' approved rates, which Travelers asserts shows that Danaher "certainly had the opportunity and ability to obtain counsel at more reasonable billing rates." (Travelers Underlying Claims Memo. at 8).

Travelers appears to misunderstand the standard here. A "presumptively reasonable fee" must be based on "a reasonable hourly rate." *Sandoval,* 2013 WL 1767748, at *3. It need not be the lowest possible rate, but, rather, must merely fall within a range of reasonableness. *See, e.g., Carter v. City of Yonkers,* 345 F. App'x 605, 608 (2d Cir.2009) (noting district court awarding attorneys' fees should "consider[ ] the *range* of approved rates for attorneys doing comparable work" (emphasis added); *Gonzalez v. Bratton,* 147 F.Supp.2d 180, 212 (S.D.N.Y.2001) ("After examining recent fee awards in ... cases in this District, the Court finds that these rates fall within the *range of reason* ...." (emphasis added)), *aff'd* 48 F. App'x 363 (2d Cir.2002). Thus, contrary to the thrust of Travelers' argument, the fact that certain counsel charged more than Travelers' approved rates is not dispositive.

***10** Danaher has produced sufficient support-including examples from case law, billing survey data, evidence that the challenged rates were actually paid by the defendants in the underlying claims, and even, in some cases, evidence that Travelers itself has paid or has approved the rates charged-for me to determine that each of the challenged rates is within the range of reasonableness.

a. *Alabama*

Starnes & Atchison, LLP, defended the *Garner* and *Nespor* claims in Alabama. (Declaration of W. Christian Hines, III, dated Oct. 27, 2014 ("Hines Decl."), ¶ ¶ 3, 5; Mauriello 6/12/14 Letter at 2). The firm has extensive experience defending asbestos claims. (Hines Decl., ¶ 4). It charges between $290/hour and $275/hour for partners, $220/hour for associates, and $125/hour for paralegals. (Hines Decl., ¶ 5; Mauriello 6/12/14 Letter at 2). Danaher cites case law from Alabama courts approving similar hourly rates for litigation far less complex than mass tort defense work. *See, e.g., Campbell v. Bradley Financial Group,* Civil Action No. 13–604, 2013 WL 3350054, at *1, 5 (S.D.Ala. July 9, 2014)*See, e.g., Campbell v. Bradley Financial Group,* Civil Action No. 13–604, 2013 WL 3350054, at *1, 5 (S.D.Ala. July 9, 2014) (approving hourly rate of $250 for work on default judgment in Fair Debt Collection Practices Act case); *Transmontaigne Product Services v. Clark,* Civil Action No. 09–23, 2010 WL 3171656, at *1–2 & n. 1 (S.D.Ala. Aug. 10, 2010) (approving hourly rate of $275 for partner, $170 for associate, and $120–130 for paralegal for work on default judgment).

Travelers complains that the cases cited by Danaher do not relate to "the defense of asbestos or silica bodily injury claims," (Travelers Supp. Underlying Claims Memo. at 5–6), and points to *Brown v. Boeing Co.,* Civil Action No. 12–414, 2012 WL 6045924 (S .D.Ala. Dec. 4, 2012), an asbestos case in which the court found a partner's rate of $255/hour reasonable, discounted an associate's rate of $210/hour to $150/hour, and cut a paralegal's rate of $125/hour to $75/hour. *Id.* at *3–4. While this may indicate that the hourly rates charged by Starnes and Atchison are on the high side for the jurisdiction, in light of the cases cited by Danaher, it does not establish that those rates are unreasonable, especially in light of the fact that Danaher actually paid the rates, as have other clients of the firm. (Hines Decl., ¶¶ 6–7).

b. *California*

Travelers has challenged the hourly rates of lawyers at five firms that have defended Danaher or its predecessors in litigation in California.

DLA Piper U.S. functioned as national counsel and as local defense counsel in the *Pelley* and *Ogan* claims in California. (Declaration of Joel A. Dewey dated Oct. 28, 2014 ("Dewey Decl."), ¶ 5; Mauriello 6/12/14 Letter at 2). Although the firm's hourly rates ranged between $390 and $525.20 for partners and between $350 and $500 for counsel, and was set at $240 for associates, an agreement limited Danaher's monthly payment of fees to $33,333, which sometimes resulted in discounted billing rates. (Dewey Decl., ¶¶ 6–7; Danaher Legal Billings from DLA Piper for February 07, attached as Exh. to Dewey Decl.; Invoice of DLA Piper U.S. dated Nov. 26, 2007, attached as Exh. to Dewey Decl.).

***11** Sidley Austin has defended a number of asbestos claims for clients, and functioned as co-defense counsel in the *Kimberling* action in California. (Declaration of Debra E. Pole dated Oct. 30, 2014 ("Pole Decl."), ¶¶ 4–5; Mauriello 6/12/14 Letter at 2). Partners charged $400/hour and paralegals charged $285/hour, rates that Danaher actually paid. (Pole Decl., ¶¶ 6–7; Mauriello 6/12/14 Letter at 2).

Nixon Peabody defended against the *Olson, Peoples,* and *Wallstrom* claims in California. (Mauriello 6/12/14 Letter at 2). Partners at the firm charged between $295/hour and $375/hour; counsel charged $390/hour; and associates charged $240/hour to $330/hour. [10] (Mauriello 6/12/14 Letter at 2; Danaher Supp. Memo. at 9).

Gordon & Rees routinely defends clients against asbestos claims, and defended against the *Levene* claim. (Declaration of Steven A. Sobel dated Oct. 21, 2014 ("Sobel Decl."), ¶¶ 4–5; Mauriello 6/12/14 Letter at 2). Danaher paid the following hourly rates: $240 for partners, $210 for associates, and $125 for paralegals (Sobel Decl., ¶¶ 6–7).

Prindle, Decker and Amaro—now apparently known as Prindle, Amaro, Goetz, Hillyard, Barnes & Reinholtz LLP—is also a firm experienced in representing defendants in asbestos claims (Declaration of Andy J. Goetz dated Oct. 28, 2014 ("Goetz Decl."), ¶¶ 2–3). Before Travelers agreed to defend the underlying *Pelley* claim, the firm charged $210/hour for partners and $185/hour for counsel. (Mauriello 6/12/14 Letter at 3; Danaher Supp. Memo. at 9; Goetz Decl., ¶¶ 5–6). Because the firm is on Travelers' panel counsel list, the rates were lowered after Travelers began to honor its duty to defend; non-panel-counsel work is generally charged at a higher rate "because of the risk involved in defending uninsured clients." (Goetz Decl., ¶¶ 6–7).

Danaher has cited cases approving partner rates between $500/hour and over $700/hour, associate rates between $325/hour and over $500/hour, and paralegal rates of over $300/hour. *See, e.g., Rose v. Bank of America Corp.,* No. 5:11–CV–2390, 2014 U.S. Dist. LEXIS 121641, at *20–21, 2014 WL 4273358 (N.D.Cal. Aug. 29, 2014); *Building a Better Redondo, Inc. v. City of Redondo Beach,* 203 Cal.App.4th

852, 137 Cal.Rptr.3d 622, 637–38 (Cal.Ct.App.2012). In addition, the four California firms included on a 2012 sampling of law firm billing rates from the NLJ Billing Survey show hourly rates of up to $760 for partners and up to $425 for associates. (A Nationwide Sampling of Law Firm Billing Rates, National Law Journal, Dec. 17, 2012 ("NLJ Billing Chart"), attached as Exh. 2 to Declaration of Brian J. Osias dated Oct. 29, 2014; Danaher Supp. Memo. at 12). In light of this evidence, I find that the rates charged by five firms are within the range of reasonableness for attorneys in California.

c. *Delaware*

McCarter & English has significant experience defending against asbestos claims. (Declaration of James J. Freebery dated Oct. 24, 2014 ("Freebery Decl."), ¶ 4). For the underlying *Mashin* claim venued in Delaware, partners charged $270/hour, associates charged $245/hour, and paralegals charged $140/hour, all of which Danaher paid. (Freebery Decl., ¶¶ 6–7; Mauriello 6/12/14 Letter at 2). Other clients defending against asbestos claims also paid those rates, as did some insurers. (Freebery Decl., ¶ 8). These rates are not out of line with rates approved by other courts for attorneys litigating in Delaware. *See, e.g.,* *Knight v. International Longshoremen's Association,* C.A. No. 01–5, 2012 WL 1132761, at *6 (D.Del. March 29, 2012) (approving rates of $250/hour and $300/hour); *Tobin v. Gordon,* 614 F.Supp.2d 514, 525 (D.Del.2009) (approving rates of $450/hour and $250/hour).

d. *Illinois*

***12** Johnson & Bell, a law firm that routinely defends clients against asbestos claims, served as defense counsel in connection with the *Haynes* claim in Illinois. (Declaration of Dennis C. Cusack dated Oct. 21, 2014 ("Cusack Decl."), ¶¶ 4–5; Mauriello 6/12/14 Letter at 3). Shareholders of the firm charged hourly rates between $210 and $220, associates charged rates between $165 and $185, and paralegals charged rates of $100. (Cusack Decl., ¶ 6). Danaher paid these rates, and other clients of the firm paid the same or higher rates in similar litigation. (Cusack Decl., ¶¶ 7–8). The associate rates are within or below the range of Travelers' approved hourly rates for associates of $170 to $200; the shareholder rates are within $20 dollars of the approved hourly rate of $200; and the paralegal rate is within $10 of the approved hourly rate of $100. (Mauriello 6/12/12 Letter at 4). Moreover, there is case law approving similar or higher hourly rates, *see, e.g.,* *Wells v. City of Chicago,* 925 F.Supp.2d 1036, 1042 (N.D.Ill.2013) (approving rates between $200 and $400 for attorneys), and the NLJ Billing Chart shows partner rates as high as $835/hour and associate rates up to $465/hour in the community (NLJ Billing Chart).

e. *Missouri*

The firm of Polsinelli Shughart regularly defends clients in asbestos litigation and served in this capacity in the *Lomire* claim in Missouri. (Declaration of Dennis J. Dobbels dated Oct. 28, 2014 ("Dobbels Decl."), ¶¶ 4–5; Mauriello 6/12/14 Letter at 2). Partners at the firm charged between $275/hour and $300/hour, associates charged $210/hour, and paralegals charged $110/hour. (Mauriello 12/12/14 Letter at 2; Dobbels Decl., ¶ 6). Not only did Danaher pay these rates, but Travelers has also agreed to pay rates equal to or higher than these for defense against the relevant underlying claim. (Dobbels Decl., ¶¶ 7–8; Letter of Elizabeth Wisniewski dated Sept. 25, 2014, attached as Exh. A to Dobbels Decl., at 1). Even without the supportive case law and survey evidence cited by Danaher (Danaher Supp. Memo. at 17–18), that is sufficient for me to determine that these hourly rates are reasonable.

f. *New Hampshire*

Nixon Peabody defended against the *Joyce* claim venued in New Hampshire. (Danaher Supp. Memo. at 18; Mauriello 6/12/14 Letter at 2). It appears to have charged rates similar to those charged for the claims it litigated in California-between $295/hour and $375/hour for partners and $270/hour for an associate. (Danaher Supp. Memo. at 18). These rates are not outside the range of rates approved as reasonable in New Hampshire courts. *See* *Carter v. Toumpas,* No. 07–cv–23, 2009 WL 903743, at *6 (D.N.H. March 31, 2009) (awarding hourly rates of $225 and $300); *In re Robotic Vision Systems, Inc.,* Nos 04–14151, 04–14152, 2009 WL 1664582, at *7 (Bankr.D.N.H. June 12, 2009) (approving average hourly rate of $396.87).

g. *New York*

Hardin, Kundla, McKeon & Poletto is a firm based in New Jersey that regularly litigates asbestos actions and defended against the *McCollum* claim in New York. [11] (D'Annunzio Decl., ¶¶ 3–5; Mauriello 6/12/14 Letter at 3). Danaher paid its rates of $180/hour for partners, $155/hour for associates, and $75/hour for paralegals. (D'Annunzio Decl., ¶¶ 6–7). These

rates are significantly *lower* than the rates Travelers routinely pays attorneys and staff litigating in New York. (Mauriello 6/12/14 Letter at 4).

h. *Pennsylvania*

***13** White & Williams represented Danaher in the *Ciarlante* action in Pennsylvania, charging $240/hour for partners, $205/hour for associates, and $115/hour for paralegals. (Mauriello 6/12/14 Letter at 2). Danaher has cited cases showing that similar rates have been approved in the jurisdiction. *See, e.g., Holliday v. Cabrera & Associates, P.C.,* Civil Action No. 05–971, 2007 WL 30291, at *4 (E .D. Pa. Jan. 4, 2007) (approving attorney rates of $380/hour and $275/hour and paralegal rates of $115/hour). It has also provided evidence that these billing rates are similar to those charged by other Philadelphia firms. (NLJ Billing Chart).

i. *South Carolina*

Nelson, Mullins, Riley & Scarborough defended against the *Lenz* claim in South Carolina. (Mauriello 6/12/14 Letter at 2; Declaration of Robert O. Meriwether dated Oct. 23, 2014 ("Meriwether Decl."), ¶ 5). The firm regularly defends against this kind of claim. (Meriwether Decl., ¶ 4). The firm charged partner rates ranging from $275/hour to $285/hour, and an associate rate of $205/hour. (Meriwether Decl., ¶ 6). Danaher paid these rates, as have other clients and some insurers. (Meriwether Decl., ¶¶ 7–8). Cases cited by Danaher establish that these rates are not unreasonable in the jurisdiction. *See, e.g., Uhlig, LLC v. Shirley,* 895 F.Supp.2d 707, 717 (D.S.C.2012) (stating rates of $320/hour for senior partners and $220/hour for junior partners and associates are "well within the range of what attorneys in this market reasonably charge").

j. *Virginia*

In Virginia, Willcox & Savage defended against the *Brunson* and *Parsons* claims, two of many asbestos claims the firm has litigated. (Mauriello 6/12/14 Letter at 3; Declaration of Bruce T. Bishop dated Oct. 23, 2014 ("Bishop Decl."), ¶¶ 3–5). Partners of the firm charged between $294/hour and $340/hour, associates charged between $180/hour and $215/hour, and paralegals charged between $120/hour and $131/hour. (Bishop Decl., ¶ 7). Most of the work on the claim was performed by associates and paralegals; Mr. Bishop, the partner with the highest billing rate, billed less than one hour to the cases. (Bishop Decl., ¶ 8). Other clients and insurance companies, including Travelers, have paid the firm similar rates in similar cases. (Bishop Decl., ¶ 9). Cases confirm that these rates are reasonable for the community. *See, e.g., Shammas v. Focarino,* 990 F.Supp.2d 587, 593 & n. 8 (E.D.Va.2014) (approving rate of $380/hour for senior attorney and over $118/hour for paralegal); *Jones v. SouthPeak Interactive Corp. .,* Civil Action No. 3:12cv443, 2014 WL 2993443, at *7–8 (E.D.Va. July 2, 2014) (approving as reasonable rates of $420/hour for partner and $250/hour for associate).

k. *Washington*

Both Schwabe Williamson & Wyatt ("Schwabe") and national counsel DLA Piper U.S. defended against the *Yankee* claim in Washington.[12] (Mauriello 6/12/14 Letter at 2; Declaration of Bert W. Markovich, undated ("Markovich Decl."), ¶ 5; Dewey Decl., ¶ 5). Both firms regularly defend clients in asbestos litigation. (Markovich Decl., ¶ 4; Dewey Decl., ¶ 4). Schwabe charged hourly partner rates of $250 to $275, associate rates of $195 to $210, and paralegal rates of $95 to $115, all of which were paid by Danaher and have been paid in similar litigation by other clients. (Markovich Decl., ¶¶ 6–8). As noted above, in an effort to minimize legal fees, DLA Piper U.S. charged a flat fee of $33,333 per month, which Danaher paid. (Dewey Decl., ¶ 6). These fees are not out of line for the community. *See, e.g., Knickerbocker v. Corinthian Colleges,* No. C12–1142, 2014 WL 3927227, at *2 (W.D.Wash. Aug.12, 2014) (approving as reasonable $450/hour partner rate, $375/hour counsel rate, and $300/hour associate rate).

2. *Reasonable Time Expenditure*

***14** Travelers makes two arguments regarding time expenditure in the underlying cases. First, it contends that attorneys and staff from Sidley Austin excessively "block-billed"—that is, used a single time entry to encompass a number of distinct tasks—in the *Kimberling* litigation. (Travelers Underlying Claims Memo. at 1718; Mauriello 6/12/14 Letter at 5–6). It seeks a 0.5% reduction in defense costs, totaling $40,000. (Travelers Underlying Claims Memo. at 19). Travelers also contends that firms such as Prindle, Decker and Amaro overstaffed the cases on which they worked, which warrants a 1% reduction in total defense costs. (Travelers Underlying Claims Memo. at 19; Mauriello 6/12/14 Letter at 5).

a. *Block Billing*

Although "block billing can make it more difficult to determine precisely how much time was spent on [a discrete] task," the practice is not prohibited. *Rahman v. Smith & Wollensky Restaurant Group, Inc.,* No. 06 Civ. 6198, 2009 WL 72441, at *6 (S.D.N.Y. Jan. 7, 2009). Indeed, courts have held that, "[s]o long as an attorney's records specify 'the date, the hours expended, and the nature of the work done,' they are sufficient." *Hnot v. Willis Group Holdings Ltd.,* No. 01 Civ. 6558, 2008 WL 1166309, at *6 (S.D.N.Y. April 7, 2008) (citation omitted) (quoting *New York State Association for Retarded Children v. Carey,* 711 F.2d 1136, 1148 (2d Cir.1983)). Courts have limited across-the-board reductions to situations where "there [is] evidence that the hours billed [are] independently unreasonable or that the block-billing was mixing together tasks that were not all compensable, or not all compensable at the same rate." *Id.; see also Oleg Cassini, Inc. v. Electrolux Home Products,* No. 11 Civ. 1237, 2013 WL 3871394, at *3 (S.D.N.Y. July 26, 2013) (quoting *Adusumelli v. Steiner,* Nos. 08 Civ. 6932, 09 Civ. 4902, 10 Civ. 4549, 2013 WL 1285260, at *4 (S.D.N.Y. March 28, 2013).

Travelers identifies five block-billed entries that contain "multiple telephone and office conferences with co-counsel and time spent reviewing and responding to electronic mail, among other tasks ." (Travelers Underlying Claims Memo. at 17–18). However, those "other tasks" include such things as reviewing deposition transcripts, reviewing documents, working on medical chronologies, preparing for expert discovery, and preparing for depositions. (Travelers Underlying Claims Memo. at 17–18). These tasks are all compensable and likely to consume significant amounts of time. Travelers has presented no evidence, then, that block-billing "obscured [ ] unreasonable billing," and I will "not impose an across-the-board penalty simply because a law firm has engaged in a generally accepted billing practice." *Hnot,* 2008 WL 1166309, at *6; *see also G.B. ex rel. N.B. v. Tuxedo Union Free School District,* 894 F.Supp.2d 415, 441 (S.D.N.Y.2012) ("Defendant has identified no entries where the hours billed are unreasonable, or where block billing has combined activities compensable at different rates. Therefore, the Court does not find any reduction warranted.").

b. *Overstaffing*

***15** Travelers points to two invoices from Prindle, Decker & Amaro that purportedly show that the firm overstaffed the *Pelley* and Kimberling cases. (Travelers Underlying Claims Memo. at 19; Invoice of Prindle, Amaro, Goetz, Hillyard, Barnes & Reinholtz LLP dated Dec. 30, 2009 ("December 2009 Invoice"), attached as Exh. E to Affirmation of Robert W. Mauriello dated Aug. 22, 2014 ("Mauriello 8/22/14 Aff."); Invoice of Prindle, Decker & Amaro, LLP dated Oct. 9, 2007 ("October 2007 Invoice"), attached as Exh. F to Mauriello 8/22/14 Aff.). Travelers objects to the fact that, as evidenced by the December 2009 Invoice, "four or more attorneys from the same office [ ] routinely participate [d] in the same hearings or conferences," and, as shown in the October 2007 Invoice, twenty attorneys and paralegals billed to the same matter in one month. (Travelers Underlying Claims Memo. at 19). Danaher points out that these were long and complex litigations requiring multiple attorneys and staff members, all of whom needed to familiarize themselves with the cases. (Danaher Opening Memo. at 10–11). As to the October 2007 Invoice, in particular, Danaher explains that the vast majority of the hours reflected on that invoice were expended by seven timekeepers during "an active period in the case, which included written discovery, depositions, expert retention and discovery, research, summary judgment and *in limine* motions." (Danaher Opening Memo. at 11). Danaher also emphasizes that it reviewed the invoices, found them reasonable, and paid them, notwithstanding the fact that Travelers denied its duty to defend and there was therefore no guarantee that Danaher would be reimbursed. (Danaher Opening Memo. at 9–10). In light of these facts, I decline to reduce the claimed fees on account of overstaffing. [13] *See Telenor Mobile Communications AS v. Storm LLC,* No. 07 Civ. 6929, 2009 WL 585968, at *4 (S.D.N.Y. March 9, 2009) (refusing to impose "meat-ax reductions" in case where "bills charged [ ] were originally charged to a sophisticated business client, which ultimately paid them, presumably after careful review ..., without any expectation of reimbursement").

3. *Costs*

Prior to the briefing on this dispute Travelers identified one instance of duplicate billing. (Mauriello 6/12/14 Letter at 5). Danaher "agrees to forego that charge" of approximately $1,000. (Danaher Opening Memo. at 16). Travelers has not objected to any other costs requested and I therefore find that they are compensable.

4. *Pre–Judgment Interest*

Travelers originally asserted that "pre-judgment interest is unwarranted in this action." (Mauriello 6/12/14 Letter at 7–8). They repeat this position in two sentences of their original brief, although they offer no support for it. (Travelers Underlying Claims Memo. at 22, 25). The argument-such as

it is-is frivolous, and I deem it waived. Travelers' remaining argument contends that pre-judgment interest should not begin to accrue on the date the fees and costs were incurred, but rather on the date that Travelers received the bills. (Travelers Underlying Claims Memo. at 22).

***16** As referred to above, New York law mandates calculation of interest "from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." CPLR § 5001(b). The statute is clear, and it clearly supports Danaher's position. There is no basis in the language of the statute to hold, in this case, that interest should run from the date Travelers received invoices for the amounts expended on defense of the underlying claims.

The cases Travelers cites do not undermine this conclusion. In *Paddington Partners v. Bouchard,* for example, a contractual indemnity provision stated that attorneys' fees were not payable "until some time after [the] presentation of an invoice." 34 F.3d 1132, 1141 (2d Cir.1994). The Second Circuit therefore held that "interest would not begin to run until that time." *Id.* That is, because the indemnified's right to payment did not arise until after the invoice was presented, the "damages" were not "incurred" until that time. Travelers has not pointed to any language in the underlying insurance contracts at issue here that would support a similar interpretation. In *Precision Stone, Inc. v. Arch Insurance Co.,* the issue is slightly different. In that case, the defendant sureties had issued a bond in connection with a municipal building project that allowed subcontractors on the project to sue the sureties if they were not paid within 90 days after their labor was completed. 472 F.Supp.2d 577, 578 (S.D.N.Y.2007). The court found that the plaintiff was entitled to payment under the bond for certain as-yet-unpaid work on the project. *Id.* at 581–82. When the plaintiff sought pre-judgment interest on its damages award, the court noted that the sureties received official notice of the plaintiff's claim against the bond on December 24, 2004, and held that interest ran from that date. *Precision Stone, Inc. v. Arch Insurance Co.,* No. 04 Civ. 9996, 2007 WL 1975487, at *2 (S.D.N.Y. July 6, 2007). Thus, the case merely applies the rule that interest runs from the date the cause of action comes into existence. CPLR § 5001(b). Other cited cases are inapposite because they deal with equitable claims, for which determination of the accrual date is left to the court's discretion. CPLR § 5001(a); *see also* *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff,* 638 F.Supp. 714, 721 (S.D.N.Y.1986) (finding on equitable claims that pre-judgment interest ran from date plaintiff demanded payment of overdue legal fees); *Pioneer Food Stores Cooperative, Inc. v. Brokerage Surplus Corp.,* 70 A.D.2d 542, 54243, 416 N.Y.S.2d 274, 274 (1st Dep't 1979) (finding on equitable claim that interest should run from date insurer had notice plaintiff claimed right to insurance proceeds although owner of insured property submitted contractually-required notice of claim earlier).

As in Atlas Copco's application above, then, pre-judgment interest (at nine percent per annum) runs from the date the attorneys' fees and costs were incurred. CPLR §§ 5001, 5004.

Conclusion

***17** For the foregoing reasons, I recommend that Atlas Copco North America's Motion for Reimbursement of Legal Fees and Costs Incurred to Defend the Declaratory Judgment Action Brought Against Atlas Copco by Travelers Indemnity Company and Travelers Casualty and Surety Company (Docket no. 230) be granted and Atlas Copco be awarded $234,490.45 plus statutory pre-judgment interest, and also that Danaher Corporation's and Atlas Copco North America LLC's Motion for Reimbursement of Legal Fees and Costs Incurred as a Result of Travelers' Breach of its Duty to Defend and for Pre–Judgment Interest (Docket no. 225) be granted and they be awarded $8,840,391.31 plus statutory pre-judgment interest. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of Court, with extra copies delivered to the chambers of the Honorable J. Paul Oetken, U.S.D.J., Room 2101, 40 Foley Square, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Filed Jan. 16, 2015.

All Citations

Not Reported in F.Supp.3d, 2015 WL 409525

Footnotes

1 For the exhibits to this affirmation, I will use the pagination assigned by the court's Electronic Case Filing system.

2 To the extent that Atlas Copco implies that *Danaher IV* resolved anything else on this question, such as that Travelers must *pay* all fees incurred up to September 6, 2012 (Atlas Copco Supp. Reply at 5), it is mistaken. More troubling, however, is Travelers' assertion that I have "already recognized" that "Atlas Copco is not entitled to recover any legal fees which relate to Atlas Copco's counterclaims or cross-claims or Travelers[']claims for contribution of defense and indemnity costs against Danaher and other insurers." (Travelers Supp. Duty to Defend Memo. at 6). This statement is plainly incorrect.

3 Travelers points out that, in *Smart Style,* the claim and counterclaim were "identical." (Travelers Supp. Duty to Defend Memo. at 7). While that may have made it easier for the court to decide the attorneys' fees issue—because the costs incurred by the insured in prosecuting its claims were obviously "necessary to its defense" against other claims, *Smart Style,* 930 F.Supp. at 165—nothing in the opinion indicates that a similar situation is a necessary precondition to determining that costs incurred in prosecuting claims can be compensable in a case where the insured is put in a defensive position by its insurer in a dispute over coverage.

4 Travelers' submission is rife with similar statements. (Travelers Supp. Duty to Defend Memo. at 9 ("[N]umerous [ ] entries [ ] have nothing to do with the duty to defend motion ...."), 910 ("[T]hese types of billing entries cannot plausibly relate to Atlas Copco's motion for partial summary judgment regarding Travelers[']duty to defend ...."), 11 (arguing for exclusion of "work unrelated to the duty to defend motion" and suggesting a limit to Atlas Copco's "award ... in connection with the duty to defend motion").

5 I believe, based on Travelers' position on this dispute, that it means to argue that these fees should be excluded because Atlas Copco did not rely on expert opinions in its *defense to Travelers' claim* that there is no duty to defend. The fact that even Travelers finds it difficult to distinguish between the defense against its own anti-coverage claim and prosecution of Atlas Copco's pro-coverage claim further undermines its position that no fees related to any counterclaim are compensable.

6 Travelers has not argued that interest should be calculated in a different manner.

7 The underlying invoices were provided to Travelers. *Danaher IV,* 2014 WL 4898754, at *6.

8 Danaher begins its supplemental briefing by arguing that *Danaher IV* places an undue burden upon it by requiring additional support for its fee application. (Supplemental Brief in Further Support of Danaher Corporation's and Atlas Copco North America LLC's Motion for Reimbursement of Legal Fees and Costs Incurred as a Result of Travelers' Breach of its Duty to Defend and for Pre–Judgment Interest ("Danaher Supp. Memo.") at 2–4). The procedure outlined in the April 8 Order was designed to minimize the burden of this fee application by requiring Travelers to identify, in advance of briefing, "any disputes it has" with Danaher's request for fees and costs. (April 8 Order, ¶ 2). Travelers did so in its letter of June 12, 2014, limiting the universe of disputed charges. (Letter of Robert W. Mauriello dated June 12, 2014 ("Mauriello 6/12/14 Letter"), attached as Exh. B to Breene 8/1/14 Aff., at 26). It does not, therefore, seem excessively burdensome to require Danaher to provide adequate support for its application. Moreover, if Danaher believed that the Court overlooked controlling law or important data in the offending order, the proper procedure would have been to ask for reconsideration pursuant to Rule 6.3 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York. *See, e.g., Freedman v. Weatherford International Ltd.,* No. 12 Civ. 2121, 2014 WL 4097639, at *1 (S.D.N.Y. Aug. 14, 2014). No such motion was filed, and

nothing in the supplemental briefing indicates that *Danaher IV* was clearly erroneous or manifestly unjust. *See Freedman,* 2014 WL 4097639, at *1 (quoting *Capitol Records, Inc. v. MP3tunes, LLC,* No. 07 Civ. 9931, 2013 WL 1987225, at *1 (S.D.N.Y. May 14, 2013)).

9 Travelers does not object that any specific attorney's rate was too high based on that attorney's experience, work-product, or similar criteria, but argues instead that these firms' billing rates exceeded Travelers' approved reasonable rates. (Mauriello 6/12/14 Letter at 2–4; Brief of the Travelers Indemnity Company and Travelers Casualty and Surety Company in Opposition to Danaher Corporation's and Atlas Copco North America, LLC's Motion for Legal Fees and Costs Incurred in the Defense of the Underlying Claims ("Travelers Underlying Claims Memo.") at 6–9, 16; Supplemental Brief of the Travelers Indemnity Company and Travelers Casualty and Surety Company in Further Opposition to Danaher Corporation's and Atlas Copco North America, LLC's Motion for Legal Fees and Costs Incurred in the Defense of the Underlying Claims ("Travelers Supp. Underlying Claims Memo.") at 1–2, 5–12).

10 Because of conflict issues, Danaher was unable to procure a declaration from the relevant cases' billing partner at Nixon Peabody. (Danaher Supp. Memo. at 11 n. 3).

11 The firm defended Danaher in 15 other cases in New York and five cases in New Jersey. (Declaration of Nicea J. D'Annunzio dated Oct. 28, 2014 ("D'Annunzio Decl."), ¶ 5). However, Mr. Mauriello's letter of June 12, 2014, and Travelers' original opposition to Danaher's fee application identify only the *McCollum* case—a New York case—as the basis for its dispute of the firm's fees. (Mauriello 6/12/14 Letter at 3; Travelers Underlying Claims Memo. at 7).

12 In its supplemental opposition to Danaher's fee request, Travelers notes that two other firms billed time in the Yankee matter. Travelers did not raise this as one of the "disputes it has" with Danaher in response to the April 8 Order. (Mauriello 6/12/14 Letter at 2–3). It did not raise it in its original opposition to the fee application. (Travelers Underlying Claims Memo. at 7). In any case, even if it had, the records Travelers points to show that the rates charged by these firms are similarly reasonable for the jurisdiction. (Invoice of Godwin Pappas Langley Ronquillo dated Feb. 19, 2007, attached as Exh. E to Supplemental Affirmation of Robert W. Mauriello dated Nov. 13, 2014, ("Mauriello 11/13/14 Aff.") (showing associate rate of $150/hour); Invoice of Prindle, Decker & Amaro dated March 6, 2007, attached as Exh. F to Mauriello 11/13/14 Aff. (showing rates of $210/hour and $100/hour).

13 In making these determinations on Danaher's right to attorneys' fees, I have not taken into account the two expert reports of Teresa Bohne–Huddleston. (Declaration of Teresa Bohne–Huddleston in Support of Danaher Corporation's and Atlas Copco North America LLC's Motion for Reimbursement of Legal Fees and Costs Incurred as a Result of Travelers' Breach of its Duty to Defend and for Pre–Judgment Interest dated July 31, 2014 ("First Bohne–Huddleston Decl."); Declaration of Teresa Bohne–Huddleston in Further Support of Danaher Corporation's and Atlas Copco North America LLC's Motion for Reimbursement of Legal Fees and Costs Incurred as a Result of Travelers' Breach of its Duty to Defend and for Pre–Judgment Interest dated Sept. 8, 2014). I have ignored them not because they are inadmissible, as urged by Travelers; I make no decision on that issue. Rather, I decline to credit them because they are largely unhelpful. For example, Ms. BohneHuddleston opines that the hourly rates identified in the Mauriello 6/12/14 letter "are reasonable based on [her] experience and the custom and practice in the industry." (First Bohne–Huddleston Decl., ¶ 12). But there is no indication that she took into account the jurisdiction in which those rates were charged. *See Danaher IV,* 2014 WL 4898754, at *6 (ordering supplemental briefing to address whether rates charged were reasonable for jurisdictions in which cases were litigated). She further asserts that paying fees for multiple timekeepers is not unreasonable if it is necessary to a defense and that block billing is not always unreasonable. (First Bohne–Huddleston Decl., ¶ 12). These are uncontroversial general opinions that are reflected in the case law and for which, in my view, an expert is unnecessary.

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