IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WESLEY T. O'BRIEN, Plaintiff, v. IAC/INTERACTIVE CORP. f/k/a USA NETWORKS, INC., Defendant.	)	Civil Action No. 3892-VCP

MEMORANDUM OPINION

Submitted: May 26, 2010
Decided: August 27, 2010

Kurt M. Heyman, Esquire, Patricia L. Enerio, Esquire, PROCTOR HEYMAN LLP, Wilmington, Delaware; Mark S. Gregory, Esquire, MARTIN CHIOFFI, LLP, Stamford, Connecticut; Robert J. Hunt, Esquire, HUNT & GROSS, P.A., Boca Raton, Florida; *Attorneys for Plaintiff*

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PARSONS, Vice Chancellor.

At a previous stage in this dispute between Defendant, IAC/InterActive Corp. ("IAC"), and Plaintiff, Wesley T. O'Brien, its former COO and CEO, I held that O'Brien's claim for indemnification was not time-barred by the doctrine of laches and that he had the right to advancement of attorneys' fees and expenses in any further proceedings in this matter.[1] Now, in lieu of a trial, both parties have agreed to submit their remaining disputes to the Court for adjudication on the papers. The parties' primary dispute pertains to the amount of indemnification Plaintiff should receive—namely, whether it is reasonable to include premium fees in the amount to be indemnified, whether costs related to Plaintiff's affirmative claims should be deducted from the amount to be indemnified, and from what date prejudgment interest should be assessed. As to its statute of limitations defense, Defendant also has asked the Court to reconsider a portion of its previous decision and to determine specifically when Plaintiff's claim accrued.

For the reasons stated herein, I decline to revisit my previous decision on laches as it relates to the accrual date of Plaintiff's original claim. I also hold that the requested premium fees for two of Plaintiff's law firms are reasonable, but that the higher premium sought by a third firm was excessive; that the indemnification amounts sought by Plaintiff based on certain related actions must be reduced by a percentage in those actions to account for the expense of Plaintiff's affirmative claims; that prejudgment interest on fees and expenses incurred or paid before January 23, 2003 shall accrue as of that date

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[1] *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845 (Del. Ch. Aug. 14, 2009).

and prejudgment interest on all fees and expenses incurred after January 23, 2003 shall accrue as of the date they were paid, with interest on all fees and expenses accruing at the statutory rate compounded quarterly; and that Defendant is entitled to a set-off of fees Plaintiff may receive from a former affiliate of Defendant in a related bankruptcy proceeding.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, O'Brien, was chief executive officer and chief operating officer of Precision Response Corporation ("PRC") from October 20, 1998 to November 20, 2003.

Defendant, IAC, is a Delaware corporation with its principal place of business in New York, New York. PRC was purchased by and became a wholly-owned subsidiary of IAC in 2000. As a result of this transaction, IAC assumed certain obligations to indemnify O'Brien.

PRC merged into PRC, LLC on August 5, 2005 but PRC, LLC remained a subsidiary of IAC. In late 2006, IAC sold its 100% membership interest in PRC, LLC to Panther/DCP Acquisition, LLC ("Panther"), an entity unrelated to IAC. IAC is obligated to indemnify and hold harmless Panther from all losses in connection with O'Brien's claims.

B. The Background

Although I have recounted some of these facts before, I restate them briefly here because this Memorandum Opinion addresses several different issues. In October 1998,

O'Brien started employment with PRC as its president and COO.[2] In connection with his employment, O'Brien entered into an Indemnification Agreement with PRC that provided him with both mandatory advancement and indemnification, if he succeeded on the merits in the defense of any claim brought against him.[3] This agreement is governed by Florida law.

In 2000, IAC acquired PRC pursuant to a Merger Agreement in which IAC assumed PRC's indemnification obligations, including those owed to O'Brien.[4] In addition, the Merger Agreement provides that IAC "shall, and shall cause the Surviving Corporation to, advance all Costs to any Indemnitee incurred by enforcing the indemnity or other obligations provided for in this Section 5.8 . . . ."[5] The Merger Agreement is governed by Delaware law and contains a Delaware forum selection clause.

In August 2001, PRC acquired Avaltus, Inc. ("Avaltus") pursuant to an Acquisition and Merger Agreement (the "Avaltus Agreement"). The Avaltus Agreement contained a dispute resolution clause requiring arbitration through the American

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2 O'Brien became CEO of PRC after it acquired Avaltus, Inc. in August 2001. *See* Pl.'s Answering Br. ("PAB") 7. Similarly, I will refer to Defendant's Opening Brief, Defendant's Reply Brief, and Plaintiff's Sur-Reply Brief as "DOB," "DRB," and "PSB," respectively.

3 *See* Pl.'s App. Ex. 3 §§ 2(a), 3(a).

4 *See* Pl.'s App. Ex. 4 § 5.8(a).

5 *Id.* § 5.8(c). Schedule 5.8 of the Company Disclosure Schedule lists indemnification agreements between PRC and individuals, including O'Brien, that expressly were to be assumed and honored by IAC.

Arbitration Association.[6] In October 2002, the principal shareholder of Avaltus, New River Holding Limited Partnership, and various other affiliated entities (collectively, "New River") commenced an arbitration against PRC (the "PRC Arbitration") to recover certain funds placed in escrow in connection with PRC's acquisition of Avaltus. On November 20, 2002, PRC terminated O'Brien for cause. PRC then asserted counterclaims in the Arbitration against New River, O'Brien, and another former PRC executive. PRC brought five causes of action against O'Brien, including claims that he breached his fiduciary duties to PRC and fraudulently induced PRC to acquire Avaltus, which failed soon after the acquisition.[7] O'Brien denied PRC's allegations and also sought a declaratory judgment that he had committed no wrongdoing.

On January 9, 2003, before the arbitration hearing, O'Brien formally requested advancement of his attorneys' fees and expenses incurred in connection with the arbitration,[8] and starting on January 24, his attorneys sent PRC invoices for payment.[9] PRC, however, refused to advance O'Brien's fees and expenses during the arbitration.[10] On January 19, 2005, the arbitration panel found in relevant part that PRC was not entitled to recover on its claims against O'Brien and that O'Brien was not entitled to

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6 Pl.'s App. Ex. 5 § 8.11. Such arbitration is not appealable except for special circumstances, such as those involving fraud or perjury.

7 *See* Compl. Ex. E at 1.

8 *See* Compl. Ex. C.

9 *See* Pl.'s App. Ex. 9.

10 Compl. ¶ 14.

declaratory relief. In addition, the panel found that there was no prevailing party and, therefore, each party was responsible for its own attorneys' fees and expenses.[11]

On February 23, 2005, O'Brien again requested indemnification from PRC as to the arbitration on the basis that he successfully had defended against all of PRC's claims.[12] PRC refused, and O'Brien then sued PRC in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (the "Florida Trial Court" and the "Florida Trial Action") to enforce his indemnification rights and to assert a claim for breach of his employment contract.[13] On competing motions for summary judgment, the Florida Trial Court ruled in favor of PRC. The court rejected O'Brien's indemnification claim on alternative theories of waiver, inadequate support, and res judicata. O'Brien appealed that ruling to the Fourth District Court of Appeal of Florida (the "Florida Appeals Court" and the "Florida Appellate Action"), and on December 6, 2006, that court vacated the Florida Trial Court's decision and remanded the case for a determination of the amount of attorneys' fees and expenses owed to O'Brien. The Florida Trial Court then entered an order on May 29, 2007 finding that O'Brien was entitled to indemnification and directing the parties to determine the specific amount he was due.

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11 Compl. Ex. D.

12 Compl. Ex. E at 1-2.

13 Def.'s App. Ex. 11.

Proceedings to determine that amount, however, never occurred. PRC filed for Chapter 11 bankruptcy protection in the United States District Court for the Southern District of New York on January 23, 2008 (the "PRC Bankruptcy").[14] As a result, the Florida proceedings to determine the indemnification amount were stayed automatically. Nevertheless, O'Brien filed a proof of claim in the PRC Bankruptcy that included claims for breach of his employment agreement and indemnification.[15]

On June 20, 2008, the bankruptcy court approved PRC's Joint Plan of Reorganization under Chapter 11. As a consequence, O'Brien is permanently enjoined from proceeding against PRC in Florida, and any recovery against it likely will be limited to pennies on the dollar. On July 15, 2008, O'Brien filed a claim in this Court against IAC (the "Delaware Action") for indemnification and advancement for his attorneys' fees and expenses in the arbitration and in connection with pursuing those fees and expenses in Florida and now in Delaware.

The Delaware Action revolves around attorneys' fees. At various points throughout the nearly eight years of arbitration and litigation, O'Brien has retained a number of different attorneys and law firms. He also has entered into different contingency agreements with his counsel, which include the payment of base fees and

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[14] Compl. ¶ 21.

[15] PAB 14.

premium, or success, fees. Pursuant to a previous order of this Court,[16] IAC has advanced O'Brien his fees for certain portions of this Delaware Action.[17]

C. Procedural History of this Action

In the first phase of the Delaware Action, O'Brien set forth two counts against IAC.[18] Count I sought indemnification of his attorneys' fees and expenses from the PRC Arbitration, the Florida Trial and Appellate Actions, and the PRC Bankruptcy. Count II requested advancement of his attorneys' fees and expenses in the Delaware Action. O'Brien moved for partial summary judgment on Count II of his Complaint, and IAC cross-moved for summary judgment on both counts. For purposes of its motion for summary judgment, IAC admitted that it assumed the obligation to indemnify O'Brien and to cause PRC to indemnify O'Brien for any covered expenses, and that O'Brien's indemnification claim was viable.[19] IAC asserted, however, that O'Brien's claims were barred by a three-year statute of limitations.

In a Memorandum Opinion dated August 14, 2009, I agreed with IAC that the Delaware statute of limitations for indemnification was three years but declined to apply it to bar O'Brien's claims. Instead, I determined that the doctrine of laches controlled and O'Brien's claims were not time-barred under that doctrine. Therefore, I denied

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16 *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845 (Del. Ch. Aug. 14, 2009).

17 *See* PAB 17-18.

18 *O'Brien*, 2009 WL 2490845, at *4.

19 Def.'s Summ. J. Br. at 10 n.8.

IAC's motion for summary judgment. Furthermore, because the Merger Agreement explicitly required IAC to advance the costs of litigation to indemnitees and because O'Brien's request for advancement was not rendered stale by the analogous statute of limitations or laches, I granted him summary judgment on his advancement claim.[20]

On August 24, 2009, IAC filed a request for an interlocutory appeal pursuant to Supreme Court Rule 42.[21] This rule prohibits certification of an interlocutory appeal unless the order of the trial court to be appealed from (1) determines a substantial issue, (2) establishes a legal right, and (3) meets at least one of the criteria in Rule 42(b)(i)-(v). Because my August 14, 2009 Memorandum Opinion did not meet these requirements, I declined to certify the interlocutory appeal.[22] On September 18, 2009, the Delaware Supreme Court also refused to certify IAC's interlocutory appeal.[23]

Although I granted O'Brien advancement of his attorneys' fees and expenses in the Delaware Action, on October 30, 2009, I denied his demand for advancement of premium fees to Kelley Drye & Warren LLP ("Kelley Drye"), one of his law firms.[24]

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20 *O'Brien*, 2009 WL 2490845, at *10.

21 Docket Item ("D.I.") 43 at 1.

22 *See O'Brien v. IAC/Interactive Corp.*, 2009 WL 2998531 (Del. Ch. Sept. 14, 2009).

23 *See IAC/Interactive Corp. v. O'Brien*, 2009 WL 2985603 (Del. Sept. 18, 2009).

24 *O'Brien v. IAC/InterActive Corp.*, No. 3892-VCP (Del. Ch. Oct. 30, 2009) (order denying request for advancement of Kelley Drye premium). This order, however, was without prejudice to O'Brien's seeking to recover the premium in his claim for indemnification, as he is doing now.

Since then, the parties have identified by stipulation the issues remaining for adjudication and submitted evidence and argument on those issues to this Court "on the papers" in lieu of a trial. This Memorandum Opinion reflects my findings of fact and conclusions of law on the remaining issues.

D. Parties' Contentions

The parties agreed to present evidence and argument on the following five issues:

(1) Whether IAC is required to indemnify O'Brien for the "premium" or "success" portion of the legal fees sought by Kelley Drye and Hunt & Gross, P.A. ("Hunt & Gross");

(2) Whether and to what extent the legal fees and expenses requested by O'Brien in connection with the PRC Arbitration should be reduced by the amount of legal fees and expenses attributable to the affirmative claims O'Brien asserted in the PRC Arbitration;

(3) Whether and to what extent the legal fees and expenses requested by O'Brien in connection with the PRC Bankruptcy should be reduced by the amount of legal fees and expenses attributable to his assertion of a claim for wrongful termination of employment in the PRC Bankruptcy;

(4) Whether and to what extent O'Brien is entitled to prejudgment interest on any indemnification award and, if so, the dates from which interest should accrue and the applicable rate of interest; and

(5) Whether IAC is entitled to a set-off of any amounts O'Brien may recover from PRC in the PRC Bankruptcy on account of his indemnification claim against PRC.

In addition, for purposes of its appeal from the anticipated final judgment in this action, IAC has requested that the Court determine the date on which O'Brien's claim against it accrued. This would require the Court to assume that O'Brien's claim is governed not by the doctrine of laches, as I determined in my previous opinion, but by the statute of limitations.

II. ANALYSIS

A. Standard for Trial on the Papers

The relief sought by both IAC and O'Brien is based on a stipulated documentary record and deposition testimony. Where the parties seek resolution of their dispute on the basis of a stipulated record, the court does "not apply the summary judgment standard under Court of Chancery Rule 56."[25] Rather, the court will "draw findings of fact and make conclusions of law based on [the] record in the same manner and with the same binding effect as after a trial."[26]

B. Accrual Date

IAC has made clear that, once final judgment is entered in this matter, it intends to appeal the Court's summary judgment ruling on the applicability of the statute of limitations.[27] In that ruling, I did not decide when O'Brien's claim for indemnification

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25 *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *1 n.1 (Del. Ch. July 21, 2000).

26 *Id.*

27 DOB 3.

accrued for purposes of IAC's statute of limitations defense because I did not need to reach that issue in the context of my analysis under the doctrine of laches. IAC notes that the Supreme Court could rule that O'Brien's indemnification claim is governed by Delaware's three-year statute of limitations, as opposed to laches. If so, IAC further argues that the Supreme Court would not be able to decide whether O'Brien's claim is time-barred "because a factual question would remain as to the accrual date of the claim, thereby necessitating a remand to this Court."[28] Thus, IAC requests that I reexamine this issue in the name of judicial efficiency.

I decline IAC's request to rule on the accrual date of O'Brien's claim because it would be highly inefficient to do so. The facts surrounding the accrual of O'Brien's claim are a quagmire. To make a determination on this issue now would require the Court to expend a significant amount of time and resources retracing and digging through the record from my previous decision to decide something that has nothing to do with the issues presently before me. If the Supreme Court determines that the accrual issue must be decided and presents a question of fact requiring additional proceedings in this Court, such proceedings obviously will occur. To delve back into the accrual issue before an appeal and without good cause to believe such analysis is likely to be necessary, however, strikes me as a waste of judicial resources. Therefore, I deny IAC's request for a ruling as to the accrual date of O'Brien's claim for indemnification.

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[28] *Id.*

C. O'Brien is Entitled to Recover "Premium," or "Success," Fees

IAC contends that it should not have to pay the premium, or success, fees charged by Kelley Drye and Hunt & Gross because they are not reasonable.[29] IAC does not contest O'Brien's right to indemnification, but only the amount of his legal fees and expenses.[30]

Under Delaware law, an indemnitee may recover only those fees and legal expenses that are reasonably incurred.[31] In determining the reasonableness of fees in the indemnification context, Delaware courts look to *Delphi Easter Partners Ltd. P'ship v. Spectacular Partners, Inc.*,[32] which held that fees are reasonable if three inquiries are met:

> were the expenses actually paid or incurred; were the services that were rendered thought prudent and appropriate in the good faith professional judgment of competent counsel; and were charges for those services made at rates, or on a basis, charged to others for the same or comparable services under comparable circumstances.[33]

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29 DOB 26.

30 *See* D.I. 94.

31 *See* 8 *Del. C.* § 145(a).

32 1993 WL 328079 (Del. Ch. Aug. 6, 1993); *see Scharf v. Edgcomb Corp.*, 2004 WL 718923, at *5 n.12 (Del. Ch. Mar. 24, 2004), *rev'd on other grounds*, 864 A.2d 909 (Del. 2004).

33 *Id.* at *9.

When dealing with a mandatory indemnification provision such as the one here,[34] "the burden rests on the party from whom indemnification is sought to prove that indemnification is not required."[35] The party seeking indemnification, however, must prove that the amount of indemnification sought is reasonable.[36] Thus, O'Brien bears the burden of showing the fees of his counsel are reasonable under the three-part *Delphi* test.

1. The expenses were actually paid or incurred

O'Brien contends that the premium or success fees his counsel charged were actually incurred because he is responsible for paying all of his attorneys' fees, including all premiums associated with those fees, if his indemnification claim is ultimately successful, regardless of whether he receives the full amount of indemnification he seeks. According to IAC, however, "incurred" means "owed for work performed rather than a result obtained."[37] IAC claims that the contingency fees were not "incurred in the traditional sense" and merely were tacked on to regular hourly fees.[38] Besides *Delphi*,

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34 Indemnification is mandatory under O'Brien's Indemnification Agreement, which states that PRC "shall indemnify" an officer or director, as opposed to "may indemnify." Pl.'s App. Ex. 3 § 2(a).

35 *Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *13 (Del. Ch. July 14, 2009).

36 *Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249, at *5 (Del. Ch. Aug. 27, 2004), *rev'd on other grounds*, 884 A.2d 500 (Del. 2005); *May v. Bigmar, Inc.*, 838 A.2d 285, 289 (Del. Ch. 2003); *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992); *MCI Telecomms. Corp. v. Wanzer*, 1990 WL 91100, at *12 (Del. Super. June 19, 1990).

37 DRB 11.

38 May 26, 2010 Tr. 22.

IAC cites one other case from the Court of Chancery, *Scharf v. Edgcomb Corp.*, as supporting its position.

The *Scharf* case dealt with a plaintiff who sought indemnification from his company for attorneys' fees and expenses he incurred as the target of an investigation conducted by the Securities and Exchange Commission ("SEC"). The SEC was investigating both Scharf and his close friend, Steven Greenberg. Although the investigation primarily focused on Greenberg, he and Scharf decided for matters of efficiency jointly to retain a single law firm, Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank"). Each man paid one-half of Fried Frank's fees from sometime in late 1990 to February 1993, when Scharf stopped paying. By May 1991, it was clear that the SEC considered Greenberg a more important target and Fried Frank would need to devote considerably more resources to his, rather than Scharf's, defense. Greenberg eventually settled with the SEC on July 7, 1994.[39]

Of the many questions presented in *Scharf*, one is particularly relevant to this case: was the amount billed to both Scharf and Greenberg reasonable? In answering this question, Chancellor Allen applied the *Delphi* standard and determined that Fried Frank's billing practices were reasonable. Although the "reasonableness of the hourly rate [was] not questioned," the court noted that "Fried Frank's defense of Scharf and Greenberg took several years, was a difficult undertaking, and *achieved, for Scharf, remarkable*

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[39] *Scharf*, 2004 WL 718923, at *1-2.

success."[40] This observation seems inconsistent with IAC's assertion that "incurred" means only "owed for work performed rather than a result obtained." To the contrary, *Scharf* suggests that a court may consider the result obtained in determining whether fees are reasonable.[41]

Indeed, contingency agreements by their very nature are premised upon a result obtained: the success of the client. O'Brien became obliged to pay the premium fees in question after his counsel achieved the goals they promised to pursue under the agreements. O'Brien asserts that, even if this Court does not award premium fees, he still must pay those premiums to his counsel. IAC has not adduced any evidence to the contrary. Furthermore, the fact that O'Brien's counsel performed successfully fits IAC's definition of incurred. Although the contested premiums were charged in addition to or in lieu of normal hourly rates, they still represent expenses incurred in the sense that the

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40 *Id.* at *5 (emphasis added).

41 Unlike this case, however, *Scharf* did not involve contingency fees or premiums. Fried Frank only charged an hourly rate. There is no dispute here as to whether the actual hourly rates charged were reasonable, only whether the premium fees are reasonable. Unfortunately, the parties have not cited, and the Court is not aware of, any Delaware case law directly addressing the reasonableness of premium fees in an indemnification context. But, in other contexts Delaware courts have indicated that premium fees may be awarded on top of hourly fees if a material benefit was achieved. *See In re Instinet Gp., Inc. S'holders Litig.*, 2005 WL 3501708, at *3 (Del. Ch. Dec. 14, 2005) (holding that attorneys operating under a contingency fee agreement were not entitled to premium fees, especially since they did not secure a significant benefit in settlement negotiations). In O'Brien's case, his counsel undeniably achieved benefits for him by successfully defending against each of PRC's claims in the Arbitration, successfully appealing the Florida Trial Court's decision, and securing a $1.1M claim in the PRC Bankruptcy.

premiums or enhanced hourly rates simply represent the rate of pay per unit of time. The real issue is whether the rate is reasonable in the circumstances.

a. Hunt & Gross's expenses were actually incurred

IAC emphasizes that O'Brien "has paid no part of the success or premium fees he now requests on behalf of Hunt & Gross."[42] It also argues that O'Brien "has no obligation to pay Hunt & Gross any fees beyond those incurred in the PRC/Avaltus arbitration."[43]

For the arbitration, Hunt & Gross charged $1,203,812 in legal fees and expenses, inclusive of a 20% premium.[44] The original fee arrangement O'Brien entered into with Hunt & Gross in December 2002 called for a standard hourly arrangement with principal attorney, or partner, time charged at $350 per hour. In April 2004, Hunt & Gross agreed to deferred payments conditioned upon the addition of a premium or success fee of 20% of its hourly charges that would be due only if the firm successfully defeated all of PRC's claims in the Arbitration.[45] Hunt & Gross's eventual success entitled them to not only their hourly fees, but also the 20% success fee. Thus, I find that O'Brien actually incurred the full $1,203,812 because he was obliged to pay that amount to Hunt & Gross.

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42 DOB 27.

43 *Id.*

44 PAB 5.

45 Pl.'s App. Ex. 34.

For the Florida Trial Action, Hunt & Gross charged O'Brien $385,893, of which $74,901 was at the same standard hourly rate as the Arbitration. The remaining $297,695 reflects an oral agreement made in January 2005 between O'Brien and the firm to increase fees for principal attorneys to $475 per hour.[46] These increased fees, however, were entirely contingent upon success; thus, if O'Brien were to lose in the Florida Trial Action, he would not have to pay Hunt & Gross any of the fees associated with that Action. Although Hunt & Gross lost the trial, they successfully appealed that case, thereby satisfying the contingency requirement. Thus, I find that O'Brien actually incurred the entire amount of fees charged by Hunt & Gross for the Florida Trial Action.

The $77,728 O'Brien claims for the Florida Appellate Action was billed at the higher, contingent rate and was actually incurred because the action was successful.

Hunt & Gross did not take part in the PRC Bankruptcy and, accordingly, did not charge O'Brien for those proceedings. In the Delaware Action, Hunt & Gross has charged $233,977 in legal fees and expenses as of March 31, 2010, subject to the terms of the January 2005 oral agreement. If IAC ultimately succeeds on its anticipated appeal in the Delaware Action, O'Brien would not owe Hunt & Gross any of the fees associated

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[46] According to Robert J. Hunt, the partner at Hunt & Gross who has dealt with O'Brien since the Arbitration, the higher, contingent rate applies to all proceedings "from the arbitration forward." Hunt Dep. 70. All fees after the January 2005 oral agreement were contingent, but only Hunt's hourly rate was increased: "You will see that my billing rate went from . . . 375 . . . up to 475. I also notice that I neglected to raise the standard hourly rates for the other lawyers involved in the case [from $350 to $375 per hour]. My mistake. So O'Brien got the benefit of that." Hunt Dep. 70.

with this case because those fees are contingent. In that sense, O'Brien would not have actually incurred those expenses. IAC already has advanced $117,825.25 in fees and expenses in connection with this action which, pursuant to O'Brien's initial undertaking and the terms of the Indemnification Agreement, must be returned to IAC if he loses on the merits of this action.[47]

b. Kelley Drye's expenses were actually incurred

O'Brien retained Kelley Drye in February 2005 to assist Hunt & Gross in making a summary judgment motion in the Florida Trial Action.[48] The original fee arrangement involved a standard hourly rate and capped total fees for the motion at $20,000. After PRC responded to the summary judgment motion by filing an opposition and a cross-motion for summary judgment, however, Kelley Drye's role—and fees—in the Florida Trial Action increased substantially. On October 28, 2005, O'Brien agreed with Kelley Drye that he would be responsible for paying the original $20,000, but that all fees and expenses above $20,000 would be rolled into a "double or nothing" contingency arrangement.[49] Thus, if O'Brien lost the Florida Trial Action he would owe only $20,000, but if he won O'Brien would owe $20,000 plus twice the hourly fees Kelley Drye incurred at their normal hourly rate or a 100% premium over the normal rate.

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47 *See* Pl.'s App. Ex. 3 § 2(b).

48 PAB 16.

49 Pl.'s App. Ex. 35 at 1.

For the Florida Trial Action, Kelley Drye charged a total of $117,846, of which $20,000 is attributable to the original cap.[50] Half of the remaining $97,846 represents Kelley Drye's standard rate and the other half reflects the 100% premium. Similarly, half of Kelley Drye's charges of $109,825 in legal fees for the Florida Appellate Action and $56,119 in legal fees for the PRC Bankruptcy are based on the firm's standard rate, while the other half represents the premium.[51] Aside from the initial $20,000 for the summary judgment motion, O'Brien's obligation to pay legal fees and premiums to Kelley Drye was contingent upon success. Because Kelley Drye succeeded in all three actions, the contingency requirement was satisfied and its fees were actually incurred.

In the Delaware Action, Kelley Drye has charged $121,834.50 in legal fees, not including the premium, through February 4, 2010[52] and IAC has advanced payment of these fees as charged. Payment of the premium is conditioned upon success. Thus, if O'Brien is successful, he actually will incur twice the amount of fees charged for the Delaware Action.

c. The Martin Chioffi fees were actually incurred

O'Brien argues that IAC waived any objection to the fee arrangement O'Brien made with Martin Chioffi LLP ("Martin Chioffi") because IAC did not include that

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50 Gregory Dep. 44.

51 *Id.* at 46-47.

52 While this amount does not include any premium fees, Kelley Drye contends that the 100% premium fee does apply to fees incurred in connection with the Delaware Action per the terms of its agreement with O'Brien. Pl.'s App. Invoices Ex. M.

arrangement in the Trial Stipulation and Order.[53] While technically correct, IAC's objection is not persuasive. O'Brien only retained Martin Chioffi in the Delaware Action when Gregory, the attorney at Kelley Drye in charge of his case, left that firm and joined Martin Chioffi in February 2010.[54] Thus, I reject O'Brien's waiver argument and also will consider the reasonableness of the Martin Chioffi fee arrangement.

Gregory, who had been charging a standard rate of $630 per hour at Kelley Drye, lowered his standard hourly rate to $480 when he joined Martin Chioffi.[55] Martin Chioffi would not permit him to charge on a purely contingent basis, however, so "the billing arrangement [Martin Chioffi] made can be best described as a hybrid one."[56] This "hybrid" arrangement required O'Brien to pay a reduced rate of $380 per hour on a noncontingent basis and, if O'Brien won the expected IAC appeal to the Delaware Supreme Court and obtained and was paid a judgment for indemnification, guaranteed that Martin Chioffi also would receive a premium of $200 per hour billed. This effectively represents a reinstatement of the $480 hourly rate, plus a premium of approximately 20% of that rate.

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53 D.I. 94.

54 The last invoice from Kelley Drye to O'Brien, dated March 11, 2010, did not include any charge for legal fees. Pl.'s App. Invoices Ex. M, Mar. 11, 2010.

55 Pl.'s App. Ex. 36 at 1; *see also* Pl.'s App. Invoices Ex. M, Dec. 3, 2009 (showing that Gregory charged $5,670 for nine hours of work, which equals $630 per hour).

56 Pl.'s App. Ex. 36 at 1.

As of March 31, Gregory has billed on behalf of Martin Chioffi $9,462 in legal fees, not including the premium, and $508.44 in expenses. At a minimum, all noncontingent fees and expenses billed by Martin Chioffi have been actually incurred. Because O'Brien also would owe the contingency fees if he ultimately succeeds in the Delaware Action, I find that he actually would incur those fees as well.

2. The services rendered were thought prudent and appropriate

To the extent IAC addresses the second *Delphi* inquiry at all, it does so by challenging O'Brien's decision to retain multiple counsel. That is, IAC seems to assert that the services O'Brien received in the Florida Trial and Appellate Actions and the Delaware Action were not prudent and appropriate because he retained multiple law firms in each action.[57] In that regard, IAC seizes upon my prior characterization of this action as "an advancement case [that] is not that complicated."[58] Specifically, IAC contends that because this case is not that complicated, retaining multiple law firms was not justified under the circumstances.

O'Brien first objects to IAC's argument as being outside the scope of the Trial Stipulation and Order.[59] In fact, O'Brien asserts that IAC never addressed the second prong of the *Delphi* test in its opening or reply briefs and, therefore, has conceded this

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[57] DOB 29. IAC does not make this argument explicitly. Rather, the argument appears to be subsumed in IAC's challenge to the premium arrangements as unreasonable. *Id.*

[58] DOB 29 (quoting Oct. 30, 2009 Tr. 28).

[59] *See* PAB 43.

part of the test.[60] IAC certainly could have made its position clearer. Nevertheless, I find that IAC consistently challenged the reasonableness of O'Brien's use of multiple firms. Hence, I overrule O'Brien's objection and will address the merits of that argument.

O'Brien was represented by both Hunt & Gross and Kelley Drye in the Florida Actions; those firms then were joined by Proctor Heyman LLP ("Proctor Heyman") and Martin Chioffi in the Delaware Action.[61] The crux of IAC's argument is that hiring multiple firms necessarily results in duplicative work. IAC further asserts that, when conducting a reasonableness analysis, a court should "exclude costs which are excessive, redundant, duplicative, or otherwise unnecessary,"[62] especially because the costs in indemnification actions are ultimately borne by someone other than the plaintiff. As per the three-part *Delphi* test, however, the key consideration from the Court's perspective is whether O'Brien's counsel, in their good-faith professional judgment, believed that retaining multiple firms was prudent and appropriate.[63]

According to Hunt, his firm had little experience with Florida indemnification claims, which became the primary focus in the Florida Trial Action after O'Brien

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60 *See* PSB 8.

61 As discussed *supra* Part II.C.1.c, Martin Chioffi replaced Kelley Drye in the Delaware Action.

62 *Lillis v. AT&T Corp.*, 2009 WL 663946, at *2 (Del. Ch. Feb. 25, 2009) (citing *Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 245 (Del. 2007)); *see also* Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a) (listing a number of factors to be considered in determining reasonableness of a fee).

63 *Delphi Easter P'rs Ltd. P'ship v. Spectacular P'rs, Inc.*, 1993 WL 328079, at *736 (Del. Ch. Aug. 6, 1993).

obtained the January 2005 arbitration award.[64] Thus, Hunt welcomed the addition of co-counsel in that Action. Further, O'Brien asserts it was not excessive to have two attorneys from Hunt & Gross and one from Kelley Drye involved "in writing and arguing the most important outcome determinative brief" in the Florida Appellate Action.[65] Finally, O'Brien denies that there were any "excessive, duplicative, or otherwise unnecessary work and services" in the Delaware Action because tasks were assigned and allocated among the law firms.[66]

I find O'Brien's arguments persuasive. A party is not prohibited from retaining the most capable and experienced counsel because a case might be considered "uncomplicated." Similarly, merely because a case is relatively straightforward does not mean additional assistance or extra preparation is not justified for important or determinative matters within the case. In *Lillis*, for example, the court rejected the defendant's argument that additional fees incurred by the plaintiff's attorneys in preparing for an important oral argument were excessive.[67] The court found the fees reasonable because the argument was on *the* case-determinative matter.[68] The

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64 *See* Hunt Dep. 90.

65 PAB 44.

66 *Id.* O'Brien also credibly notes that "an equal or greater number of attorneys are performing similar work and services for IAC in [the Delaware Action]." *Id.*

67 *Lillis*, 2009 WL 663946, at *2.

68 As the court explained, "the plaintiffs face[d] an extremely heavy burden in convincing the [Delaware] Supreme Court to reverse itself, and anything less than outstanding briefs would be insufficient." *Id.* at *5.

complexity of the indemnification issues in this action may not equate to the issues in *Lillis*, but what is prudent and appropriate depends not only on the substantive issues involved, but also on the requirements at a particular procedural stage of the case. This action constitutes part of an eight-year saga involving arbitration, a trial, appeal, remand proceedings, bankruptcy, advancement, and now disputes about the amount of indemnification. I cannot say that having multiple law firms at different stages of this protracted process was imprudent or inappropriate, and there is no evidence that O'Brien's counsel provided any services in bad faith or that specific services resulted in excessive or duplicative fees. Therefore, O'Brien has satisfied the second aspect of the *Delphi* inquiry.

3. The charges were made at rates charged to others for comparable services under comparable circumstances

The last inquiry in the *Delphi* test is whether the charges were made at rates, or on a basis, charged to others for comparable services under comparable circumstances. In this context, it is appropriate to focus on what is customary for each specific law firm involved.

a. The fees O'Brien's counsel charged generally were comparable to those they charged to other clients

IAC complains that the fees, inclusive of premiums, charged by O'Brien's law firms were greater than those charged by law firms in the same geographic area. IAC compares Hunt & Gross's rates to those charged by other law firms located in the Boca Raton area and compares Kelley Drye's rates to those of the Delaware law firm IAC

retained.[69] O'Brien counters by arguing that the relevant geographic area for Hunt & Gross is Fort Lauderdale, not Boca Raton, because Fort Lauderdale was the venue for the PRC Arbitration.[70] Rates in Fort Lauderdale are approximately 20% higher than rates in Boca Raton.[71] O'Brien also notes that IAC's counsel—variously from Los Angeles, New York, Washington, D.C., and Miami—charged fees much higher than those of Hunt & Gross.[72]

Based on the evidence in the stipulated record, however, I find that the rates charged by O'Brien's counsel with the possible exception of the premium charged by Kelley Drye, discussed *infra* Part II.C.3.b, were comparable to the fees they charged to other clients under similar circumstances. Furthermore, neither of the cases IAC cites in its discussion of the third *Delphi* inquiry supports a contrary conclusion. Indeed, neither of those cases or *Delphi* even mentions geographic area as an important basis for comparison.[73]

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69 DOB 30-31.

70 PAB 45.

71 Hunt Dep. 72.

72 Sullivan & Cromwell LLP, for example, billed PRC $17.5 million for legal services and expenses in the PRC Arbitration and related matters. IAC approved these invoices for payment. Pl.'s App. Invoices Ex. Q.

73 *See generally Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. Super. 1974); *Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249 (Del. Ch. Aug. 27, 2004), *rev'd on other grounds*, 884 A.2d 500 (Del. 2005).

The *Merritt-Chapman* case dealt with a criminal proceeding.[74] The plaintiff corporation objected to indemnifying the defendants for flat fees a law firm charged for defending a number of the corporation's former officers, who had been charged with conspiracy. Specifically, the plaintiff claimed that the fees charged by this particular firm were substantially higher than those charged by the defendants' other firms and were therefore unreasonable.[75] The Delaware Superior Court, however, found that the fees were reasonable because the defendants faced significant criminal charges which presented "novel legal and complex factual problems."[76] During the many twists and turns of this long-running series of disputes, O'Brien has had to face complex legal and factual issues, as well. Nothing in the record suggests that the base rates his counsel charged for their services were unreasonable or inappropriate for the geographic area involved.

In *Kaung v. Cole National Corp.*, the court refused to advance remaining unpaid legal fees to the plaintiff's counsel because of the "extraordinary amount of fees" charged.[77] The court did not compare the plaintiff's law firm's hourly rate to those of other firms in the same geographic area. Rather, it noted that the plaintiff's firm's fees

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74 321 A.2d at 140.

75 The firm in question, Williams, Connolly & Califano, charged a flat fee in 1974 of $250,000 per trial. When converted to an hourly rate, this fee corresponded to an average rate of $190 per hour. *Id.* at 143.

76 *Id.*

77 2004 WL 1921249, at *5.

were excessive to the point of constituting bad faith when compared to those charged by the defendant's counsel: "For representing a single witness who appeared for a single day at the SEC, [the plaintiff's firm's] bills rival those of [the defendant's firm] for representing 15 witnesses and responding to 20 separate SEC document requests."[78] Thus, the reasonableness inquiry turned on the specific law firm's efficiency and not on what other firms in the same area were charging.

The third *Delphi* inquiry focuses on whether the firm has charged the party seeking indemnification what it would charge another client for the same or comparable services under comparable circumstances. IAC emphasizes that Hunt & Gross charged O'Brien 20% more than what a "peer firm in the Boca Raton area" would have charged,[79] or what Hunt & Gross would have charged another client.[80] To its point, IAC argues that, assuming "the firm's usual rates are reasonable, a 20% premium on those rates is per se unreasonable."[81] This position, however, has no merit. IAC ignores the possibility that a 20% or greater premium over a firm's standard rate might be appropriate in specific circumstances, such as in the case of a contingent fee agreement where the law firm might not recover any fees at all if it is not successful in the litigation. Here, there is no evidence, or even any allegation, that O'Brien's counsel acted in bad faith or charged

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78 *Id.*

79 DOB 30.

80 DRB 11.

81 *Id.*

O'Brien for obviously excessive hours in comparison to the fees incurred by his adversary as was the case in *Kaung*. Thus, the fees charged by O'Brien's counsel were not excessive in terms of the hours worked or the base rate they normally charge to other clients in circumstances comparable to O'Brien's. The dispute pertains to the reasonableness of the contingent basis for the fees.

b. The basis on which O'Brien's counsel charged fees was generally comparable to that for other clients

In its reply brief, IAC also contests the *basis* on which O'Brien's counsel charged fees. According to IAC, the record "does not support O'Brien's assertion that the 'uncontroverted evidence' proves he did not have the money to pay his attorneys on the standard pay-as-you-go basis."[82] O'Brien, who IAC asserts is "a person of considerable means,"[83] provided no evidence of his net worth and refused to answer an interrogatory seeking his income for the years 2006-2008. Thus, according to IAC, O'Brien entered into the contingency arrangements with his counsel not because of economic need, but on the basis of calculated risk allocation.

Even assuming that is true, however, and there is no showing of need, I am not persuaded that a contingency arrangement calling for a modest success premium is per se unreasonable in the case of officers or directors seeking indemnification from their corporations.

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82 *Id.*

83 *Id.*

In arguing for such a per se prohibition, IAC purports to distinguish two Florida cases cited by O'Brien as supporting the reasonableness of his indemnification claim.[84] In particular, IAC contends that the Florida Supreme Court did not hold in either of those cases "that a contingency arrangement entered into by a litigant and his attorney could be imposed on a third party payor."[85] Yet, those cases do not hold that contingency premiums may never be imposed on third parties; in fact, they appear to hold the opposite.[86]

Regardless, IAC raises a valid policy concern. While contingency arrangements allow litigants to assert and maintain meritorious claims and defenses that otherwise might not be pursued, contingency fees in successful indemnification actions are borne by third parties who typically would have had no voice in fee negotiations between the indemnified litigant and his or her counsel. In such circumstances, IAC suggests that there is a greater risk that counsel will request and the litigant may agree to an unreasonable contingency arrangement. This Court has held, however, that the right to

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84 *See Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985); *Bell v. U.S.B. Acq. Co.*, 734 So. 2d 403, 411-12 (Fla. 1999).

85 *Id.* at 16-17.

86 For instance, *Bell* states that "even without a [fee] multiplier, the court would be authorized to award a greater fee based on the contingent nature of the fee agreement." 734 So. 2d at 411. In that regard, *Rowe* states only that an award of attorneys' fees should not "exceed the fee agreement reached by the attorney and his client." 472 So. 2d at 1151.

indemnification "is not a blank check for corporate officials . . . ."[87] Thus, any threat of abuse is mitigated significantly by the Court's role as the final arbiter of the reasonableness of fees sought in an indemnification action.[88] In each case, as here, the court must determine whether the particular fee arrangement is reasonable under the circumstances; therefore, a court is not likely to uphold a contingency arrangement that takes advantage of third party payors.

In this case, the challenged contingency arrangements were entered into because PRC and then IAC refused to advance O'Brien his fees and expenses or to indemnify him pursuant to the Indemnification Agreement. As to the advancement, IAC could have paid those expenses with manageable risk, as the terms of the Indemnification Agreement required O'Brien to return the advanced amount if it turned out that he was not entitled to the money.[89] This case also involved a second contingency, however, that is more atypical. IAC refused to indemnify O'Brien at all regarding the PRC Arbitration based on what ultimately proved to be a misreading of the arbitration award. The fact that IAC's interpretation of that award initially prevailed in the Florida Trial Action complicated the situation in terms of the risks attendant to pursuing O'Brien's claim. In these circumstances, IAC is in no position to complain that the fee arrangements entered

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87 *May v. Bigmar*, 838 A.2d 285, 288 (Del. Ch. 2003).

88 *See id*. at 289 ("The touchstone for awarding fees in an indemnification action is reasonableness.").

89 Pl.'s App. Ex. 3 § 2(b); *see also* Pl.'s App. Ex. 8 (O'Brien's demand letter, which states he would repay PRC for expense advances to which he was not entitled).

into by O'Brien and his attorneys—arrangements precipitated by IAC's own actions—are per se unreasonable to the extent they include any contingency or success premium.

As previously discussed, O'Brien actually incurred the claimed legal fees and will be responsible for all of those fees, if he ultimately succeeds on the merits of his claim. The services O'Brien's counsel rendered were thought prudent and appropriate in their good faith professional judgment, and the firms involved charged at rates similar to those charged to other clients in comparable situations. I also find the fact that O'Brien's counsel agreed to make certain of these fees contingent on their success does not render them unreasonable. Thus, O'Brien is entitled to at least some portion of the premium fees charged by his law firms.

Hunt & Gross and Martin Chioffi both charged the equivalent of 20% success fees, while Kelley Drye charged a 100% premium. A generous contingency arrangement may be justified by the risk assumed by a particular law firm in a specific case. Here, however, O'Brien has not shown why one of his three firms should receive a premium five times larger than the other two. With the exception of the PRC Bankruptcy and a portion of the Delaware Action, for example, Hunt & Gross and Kelley Drye participated in the same matters and presumably were subject to the same risk. Moreover, O'Brien presented no evidence that Kelley Drye routinely charges premium fees of this magnitude.

I hold, therefore, that O'Brien is entitled to be indemnified for the entire success or premium portions of the Hunt & Gross and Martin Chioffi fees, which was 20% beyond the standard rate in the case of Hunt & Gross and a premium of $200 per hour in the case

of Martin Chioffi.[90] I consider the 20% premium effectively charged by these two firms commensurate with the risks of failure, the inability to recover any fee in the case of Hunt & Gross, and the loss of the time value of money in that the firms performed the work in question well before they could expect to be paid.

I also hold that O'Brien has failed to meet his burden of proof in demonstrating that a 100% premium is warranted in the case of Kelley Drye. I find, instead that a premium of 50% is reasonable. A premium greater than that obtained by the other two firms is appropriate in this case, because Kelley Drye apparently took the lead in attempting to secure O'Brien's vigorously contested indemnification rights, especially in the Florida Trial and Appellate Actions. That issue is critical to O'Brien's prospects for success in this matter. In addition, Kelley Drye undertook the risk of recovering no fee at all, and that attendant to deferring the date of payment until years after they performed the underlying services. Thus, as to the fees charged by Kelley Drye, I award O'Brien an amount equal to 150% of their standard fees and deny his request for 200% of that fee. In all cases, the premium is only on the actual legal fees incurred and not on expenses.

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[90] By the time Martin Chioffi entered the picture, IAC was advancing O'Brien their fees at the allegedly reduced rate of $380 per hour. Gregory asserts that O'Brien's arrangement with Martin Chioffi called for a premium of $200 per hour if he succeeded on his claim. This roughly equates to $100 per hour to get back to Gregory's normal hourly rate at Martin Chioffi and a premium of $100 per hour or 20.83%.

D. Fees Attributable to O'Brien's Affirmative Claims in the PRC Arbitration Should Be Cut From the Award

The next issue is whether and to what extent the legal fees and expenses requested by O'Brien in connection with the PRC Arbitration should be reduced to account for the fees and expenses attributable to the affirmative claims for relief he asserted in the PRC Arbitration. I hold that O'Brien is entitled to the amount he requested, less a 10% reduction based on his affirmative claims.

O'Brien's Indemnification Agreement provided that PRC, and, through its assumption of PRC's indemnification obligation, IAC, "shall indemnify [O'Brien] for Expenses to the fullest extent permitted by law if [O'Brien] was or is or becomes a party to . . . or is threatened to be made a party to . . . any Claim" related to the fact that O'Brien is or was an officer of PRC.[91] Delaware law grants corporations the power to indemnify any person who was or is a party to an action "*by reason of the fact* that the person is or was a director, officer, employee or agent of the corporation."[92] A lawsuit alleging that a director breached his fiduciary duty to his corporation, like the PRC Arbitration did, exemplifies an action for which a defendant is a party "by reason of the fact" he was a director of the corporation. In contrast to that situation, a plaintiff

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91 Pl.'s App. Ex. 3 § 2(a). The Indemnification Agreement defines Claim as "any threatened, pending or completed action, suit, proceeding or alternative dispute resolution mechanism, or any hearing, inquiry or investigation that Indemnitee in good faith believes might lead to the institution of any such action, suit, proceeding or alternative dispute resolution mechanism, whether civil, criminal, administrative, investigative or other." *Id.* at § 1(b).

92 8 *Del. C.* § 145(a) (emphasis added). *See also* Pl.'s App. Ex. 3 § 1(d).

litigating a claim for breach of his own employment contract generally is not a litigant "by reason of the fact" he was a director, officer, or even an employee of the corporation.[93]

O'Brien concedes that the declaratory claims he brought in the PRC Arbitration were related to his claim for breach of his employment contract and that he is not seeking indemnification for any fees incurred in pursuing these declaratory claims.[94] O'Brien contends, however, that only a miniscule amount of the time his counsel billed during the Arbitration was for the declaratory claims. Specifically, O'Brien asserts that the fees attributable to his declaratory claims are at most $1,735.[95] IAC, on the other hand, urges the Court to indemnify O'Brien for only 50% of all fees associated with the Arbitration, thereby implying that O'Brien devoted fully half his time and effort to his affirmative claims. Both positions are highly implausible.

According to O'Brien, his counsel spent a total of only five hours on his affirmative declaratory claim: two hours preparing eight requests for production and one interrogatory and three additional hours drafting his declaratory claim and researching issue preclusion.[96] As IAC notes, this amounts to a mere 0.127% of the total 3,944 hours

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93 *See, e.g.*, *Weaver v. Zenimax Media, Inc.*, 2004 WL 243163, at *3 (Del. Ch. Jan. 30, 2004) (observing that corporate officers signing employment contracts are "acting in a personal capacity in an adversarial, arms-length transaction").

94 PAB 28.

95 *Id.*

96 *Id.* at 31.

worked, or 0.14% of the $1.2 million O'Brien's counsel billed for the PRC Arbitration.[97] Based on the importance of O'Brien's declaratory claim and issue preclusion concerns, I find unreliable the assertion that his counsel spent only five hours on these matters combined. On the other hand, it is plausible that the vast majority of time related to the declaratory claim involved work that was useful in both O'Brien's indemnification and employment claims. In that regard, I give some, but not complete, credence to O'Brien's contention that "if [he] had not asserted his Declaratory Claim, Hunt & Gross would have still performed all of the services and work it did amounting to 3,939 hours . . . ."[98] Moreover, it is nearly impossible to determine from the three volumes of invoices provided by O'Brien the degree of overlap existing among the issues regarding his affirmative claims and the remainder of the PRC Arbitration.

In the end, O'Brien has the burden of establishing how much of his total fees qualify for indemnification. In *May v. Bigmar*, the court considered what a plaintiff would have to do "to meet her burden of submitting a 'good faith estimate' of her claim for indemnification."[99] As in this case, *May* dealt with determining how much of a total indemnification request was attributable to one issue. The plaintiff indemnitee's approach was to attribute time and expenses to matters qualifying for indemnification unless there was a specific basis to exclude them, whereas the defendant excluded time

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97 DRB 17.

98 PAB 32.

99 *May*, 838 A.2d at 290.

and expenses unless a specific reason existed to include them. The court lamented that the time records of plaintiff's counsel "were not kept in a way [permitting] easy segregation of time."[100] Still, the court stated that "[w]hile greater detail in contemporaneous record keeping is obviously helpful where a claim for partial indemnification is made, the court is not persuaded that the failure to keep better records should lead to the disallowance of the claim."[101] Thus, the court in *May* adopted the plaintiff's approach, but also exercised "its own judgment and discretion to apply a 30% discount to the total fees arrived at after elimination of time devoted exclusively to the [disputed issue], as opposed to the 15% discount suggested by [plaintiff's] counsel."[102]

Here, the piddling reduction of only $1,735 suggested by O'Brien is plainly inappropriate. By the same token, however, neither the record developed on the pending motion nor O'Brien's counsel's failure to keep better records supports the drastic 50% reduction sought by IAC.[103] In keeping with *May* and based on my review of the available evidence, therefore, I hold in the exercise of my informed discretion that the

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100 *Id.* at 290.

101 *Id.*

102 *Id.* at 291.

103 At argument on the pending motion, IAC's counsel stated that he sought some "recognition from the Court that [the amount attributable solely to the affirmative claims] can't be $5,000 [revised to $1,735]. It has to be some—I don't know whether it's 50 percent or 40 percent or 30 percent or 20 percent or 10 percent." May 26, 2010 Tr. 38.

indemnification amount requested by O'Brien for fees related to the PRC Arbitration should be reduced by 10% to account for the time devoted to his affirmative claims.

E. Fees Attributable to O'Brien's Affirmative Claims in the PRC Bankruptcy Should Be Cut From the Award

IAC also argues for a reduction of the indemnification amount O'Brien seeks for the PRC Bankruptcy to back out the fees attributable to his pursuit of affirmative claims in that action.[104] IAC contends that O'Brien's employment claim in the PRC Bankruptcy was of much greater value than his indemnification claim, and he, therefore, had more incentive to segregate those fees in that proceeding. O'Brien's counsel did not segregate the fees, however, and claim that virtually none of the time billed in connection with the Bankruptcy was spent pursuing O'Brien's affirmative claim.[105]

O'Brien avers that preparing the proof of claim in the PRC Bankruptcy "did not require much work on Kelley Drye's part inasmuch as it already knew, from its intimate involvement in the Florida proceedings, the nature and value of O'Brien's indemnification rights."[106] Of the total claimed for the PRC Bankruptcy, O'Brien asserts that, at most, a reduction of $2,500 (less than 4.4%) is appropriate and points to one paragraph in his Response to Debtor's Objection to Proof of Claim as all that should be attributed to his employment claim.[107] That paragraph indicates that O'Brien ultimately

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104 DOB 35.

105 Pl.'s App. Ex. 42, Gregory Dep. 48.

106 *Id.* at 34.

107 *See* PAB 36.

conceded that his employment-related claim in the PRC Bankruptcy was limited to one year's salary and benefits, a total of $570,000.[108]

This argument is undermined, however, by the admission of O'Brien's counsel Gregory that the $1.1 million allowed claim was derived through "back-and-forth negotiation."[109] I infer from this evidence that some portion of the negotiations related to the employment claim. I also note that O'Brien initially sought approximately $2 million in the PRC Bankruptcy based on his indemnification claims.[110] Thus, his total claim was in the range of $2.57 million of which $570,000 or just over 22% was attributable to his employment claim. Ultimately, O'Brien accepted $1.1 million for his PRC Bankruptcy claims. The record does not indicate, however, how much of that amount was attributable to the employment claim, but it could not have been more than $570,000 at the most. As with the fees and expenses associated with his affirmative claims in the PRC Arbitration, O'Brien has the burden of proving the amount of the fees related to the PRC Bankruptcy that qualify for indemnification. Based on the evidence presented, and especially the relative importance of the employment claim in relation to the

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[108] *See id*. The paragraph states: "The balance of the Claim relates to damages incurred as a consequence of the formation of O'Brien's employment and Debtor's wrongful deprivation of O'Brien's stock option rights. O'Brien concedes that these claims relate to the termination of the employment relationship and are subject to the cap under 11 U.S.C. § 502(b)(7), and thus are limited to one year's salary and benefits, a total of $570,000."

[109] Pl.'s App. Ex. 42, Gregory Dep. at 53.

[110] *See id*. at 49-55.

indemnification claim, I find that a reduction of 20% in the amount of indemnification O'Brien has claimed is in order. Accordingly, in the exercise of my informed discretion, I order that the indemnification amount claimed for the PRC Bankruptcy be reduced by 20% to account for the time and expense related to the pursuit of O'Brien's affirmative claims.

F. O'Brien is Entitled to Prejudgment Interest on His Indemnification Award

O'Brien next claims and IAC concedes[111] that O'Brien is entitled to prejudgment interest on the amount of indemnification awarded because in Delaware prejudgment interest is awarded as a matter of right.[112] The primary issue in dispute is when such interest starts to accrue. O'Brien contends that for expenses incurred before January 2003 interest should begin accruing on January 23, 2003, which is ten business days after he first demanded advancement from PRC pursuant to the Indemnification Agreement, and for expenses incurred thereafter on the dates they were paid.[113] IAC argues that interest should not begin to accrue until March 6, 2008, which is when O'Brien first made a demand on IAC, as opposed to PRC.[114]

According to IAC, prejudgment interest on § 145 claims does not begin to accrue until the plaintiff has requested indemnification and "the defendant has, without

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111 *See* PAB 45.

112 *Moskowitz v. Mayor & Council of Wilm.*, 391 A.2d 209, 211 (Del. 1978).

113 PAB 45.

114 DOB 36.

justification, refused to live up to its obligation to make payment."[115] That is, two separate conditions must be met: the plaintiff must have made a demand on the defendant *and* the defendant must have unjustifiably refused payment. IAC's argument is, effectively, that because O'Brien did not make demand on it until March 6, 2008, it could not have refused payment until that date, so prejudgment interest cannot have accrued before that time.

O'Brien emphasizes that the Merger Agreement provides that IAC "shall, and shall cause [PRC] to, expressly assume and honor in accordance with their terms all indemnity agreements,"[116] including O'Brien's. According to O'Brien, therefore, IAC unjustifiably refused to indemnify his attorneys' fees in January 2003 because it was required to cause PRC to honor O'Brien's Indemnification Agreement at that time. O'Brien further contends that IAC cannot now hide behind the corporate form because it was fully aware of O'Brien's request for indemnification in 2003 and, in fact, controlled PRC's attempts to avoid its indemnification obligations.

I agree with O'Brien on this point. The Merger Agreement obligated IAC to cause PRC to honor its indemnification obligations to O'Brien. When IAC caused PRC to refuse to indemnify O'Brien and, in fact, to challenge O'Brien's right to indemnification

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115 DOB 36 (quoting *Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1167 (Del. Ch. 2006)).

116 Pl.'s Ex. 4 § 5.8(c).

through several levels and years of court proceedings, IAC, in effect, unjustifiably refused to live up to its obligation to pay O'Brien's indemnification expenses.

The question still remains, however, whether a demand for indemnification directed to a subsidiary may qualify as a demand against a parent. IAC argues that "[i]n seeking interest dating from when *PRC* refused to make payment, O'Brien ignores the corporate form and conflates PRC with IAC based on IAC's status as the parent company of PRC."[117] I find, however, that the demand on PRC satisfies any requirement of a demand on IAC in the specific circumstances of this case. While this Court does not lightly ignore the corporate form, I consider it appropriate here because of the contractual obligations of IAC to cause PRC to meet its indemnification obligations and the harm O'Brien would suffer if I applied the law with mindless literalism.[118] Were O'Brien's claims here against PRC, instead of IAC, PRC clearly would owe him interest from January 23, 2003, ten business days after it received a demand for advancement and indemnification. The only reason O'Brien has not received this interest from PRC is because five years after O'Brien's demand for indemnification, O'Brien obtained a judgment against it, and shortly thereafter, PRC filed for Bankruptcy. During that five-year period, IAC controlled PRC and caused it to refuse to indemnify O'Brien and lodge a number of legal defenses against his claims for indemnification. IAC and PRC ultimately failed in their attempts to thwart those claims. O'Brien's success in proving

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[117] DRB 23.

[118] *See Citrin*, 922 A.2d at 1168.

his entitlement to indemnification from PRC also would have entitled him to prejudgment interest from the date of his demand on PRC, had PRC not filed for bankruptcy. Because IAC played an important role in delaying O'Brien's ability to obtain the indemnification to which he is entitled and prejudgment interest generally is awarded from the date of a demand for indemnification, I deem it appropriate in the exercise of my equitable powers under the specific circumstances of this case to grant O'Brien such interest from IAC from the date of his demand on PRC to avoid injustice. Accordingly, I find that O'Brien is entitled to prejudgment interest from January 23, 2003 on the fees and expenses incurred before that date.[119]

As per the holdings of *Citrin* and *Underbrink*,[120] a distinction must be drawn between expenses incurred by the indemnitee before and after a demand is made. Both these cases granted prejudgment interest on the expenses incurred before demand from the date demand was first made and on all later expenses from the date they were paid.[121] I follow these cases here and hold that O'Brien is entitled to prejudgment interest on

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[119] IAC also complains that O'Brien "is trying to have it both ways" by claiming that prejudgment interest is owed from January 23, 2003, but that its claim against IAC did not accrue until April 17, 2008. DRB 24. But, I do not consider my holding that interest is owed from January 2003 inconsistent with my finding that O'Brien did not unreasonably delay in bringing his claim against IAC. Therefore, I reject IAC's suggestion that it has been treated inequitably by either or both of the Court's rulings on laches and prejudgment interest.

[120] *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *19 (Del. Ch. May 30, 2008).

[121] *Citrin*, 922 A.2d at 1168; *Underbrink*, 2008 WL 2262316, at *19.

expenses incurred before he made demand on PRC from January 23, 2003 and on expenses incurred after he made demand from the date those expenses were paid.[122]

I turn next to the question of how the amount of prejudgment interest to which O'Brien is entitled should be calculated. At the outset, I note that O'Brien is not entitled to receive any prejudgment interest on the bulk of the fees he incurred after he made demand on PRC in January of 2003 because these fees were fully contingent. All fees incurred by Kelley Drye on O'Brien's behalf, for example, were contingent except for the initial $20,000 fee O'Brien paid for the work Kelley Drye did on O'Brien's summary judgment motion in the Florida Trial Action.[123] Likewise, O'Brien entered into an arrangement with Hunt & Gross in January 2005 whereby all of the fees he incurred thereafter would be contingent.[124] That these fees are contingent means O'Brien does not owe them unless and until he ultimately succeeds in this litigation. Consequently, O'Brien has not yet had to expend his own money to pay for such fees. To provide full relief, a court often must make an allowance for the detention of the compensation ultimately awarded by the court and "interest is used as a basis for measuring that

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122 O'Brien has provided a table listing the month of all payments he made to his attorneys after he made his demand for indemnification on PRC. *See* Pl.'s App. Invoices Ex. I. This table should be used to calculate post-demand interest. I also note that the percentage deductions I have authorized from the amount of attorneys' fees and expenses requested by O'Brien for the PRC Arbitration and the PRC Bankruptcy should be applied pro rata across all time periods involved for the purpose of calculating interest.

123 Gregory Dep. 36-37.

124 *See supra* note 46.

allowance."[125] Here, O'Brien's personal funds have not been detained during the pendency of this litigation with respect to his contingent fee obligations. Accordingly, he is entitled to prejudgment interest only on amounts he actually paid, and not on contingent fees and expenses.[126]

On the other hand, to the extent O'Brien has had to use his personal funds to cover fee or expense obligations, he is entitled to prejudgment interest running from the date he actually paid such obligations. But such interest is due only on the base amount of fees and expenses actually paid by O'Brien, and not on the premiums.

Finally, I hold that all prejudgment interest owed on all fees and expenses owed to all law firms, both pre- and post-demand, will accrue at the legal rate as defined in 6 *Del. C.* § 2301(a),[127] compounded quarterly.[128] O'Brien contends that because the Hunt & Gross retainer agreement calls for a 1% finance charge on all late invoices,[129] interest should accrue on all fees owed to Hunt & Gross at a rate of 12% per year.[130] In the

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125 *See Moskowitz*, 391 A.2d at 211.

126 In this regard, I hold that no interest is due on any fees or expenses of Martin Chioffi because by the time it entered its appearance, IAC was advancing the amounts charged at the firm's base rate of $380 per hour.

127 6 *Del. C.* § 2301(a) defines the legal rate of interest as "5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due."

128 *See Underbrink*, 2008 WL 2262316, at *19.

129 Pl.'s Ex. 33.

130 PSB 21. I note that a 1% monthly finance charge actually would yield a yearly interest rate of 12.68%.

absence of any evidence that O'Brien ever paid such a late fee or that Hunt & Gross routinely enforces those terms of its retainer agreements and charges their clients the specific late fee,[131] however, I decline his request to apply a 12% annual interest rate to any portion of the fees he is owed.

G. The Parties Agree that IAC is Entitled to Set-Off

Finally, IAC has requested a set-off of any amounts that O'Brien may recover from PRC in the PRC Bankruptcy. IAC argues that if O'Brien receives indemnification from IAC, then he will have been fully compensated for his claims; thus, if he were to receive indemnification from IAC *and* PRC, he will have recovered twice for the same claims. Allowing a plaintiff to recover twice on the same claim "would yield an unwarranted windfall recovery."[132] In his answering brief, O'Brien concedes this point.[133] Thus, I hold that, if he recovers any money from the PRC Bankruptcy, O'Brien must assign to IAC his right to that portion of the PRC Bankruptcy recovery attributable to his indemnification claim.[134]

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131 *See* May 26, 2010 Tr. 51.

132 *Segovia v. Equities First Hldgs., LLC*, 2008 WL 2251218, at *20 (Del. Super. May 30, 2008) (quoting *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 218 (3d Cir. 1992)).

133 PAB 35 n.30.

134 O'Brien and PRC entered into an agreement regarding the total amount owed by PRC to O'Brien in bankruptcy. *See* Pl.'s App. Ex. 31. Although O'Brien initially filed a proof of claim in the amount of over $9 million, the agreement reduced the amount owed to $1.1 million. *Id.* at 5. The agreement did not identify how much of that amount was attributable to O'Brien's indemnification claim, as opposed to

III. CONCLUSION

For the reasons set forth in this Memorandum Opinion, I hold that: (1) O'Brien is entitled to be indemnified for fees and expenses, including contingency premiums charged to Hunt & Gross, Martin Chioffi, and Kelley Drye, except that the premium for Kelley Drye shall be reduced from 100% to 50%; (2) the fees O'Brien receives related to the PRC Arbitration and the PRC Bankruptcy shall be reduced by 10% and 20%, respectively, of the amounts requested; (3) O'Brien is entitled to prejudgment interest as set forth in Part F above; and (4) IAC is entitled to a set-off of any amounts O'Brien may receive as a result of his indemnification claim against PRC in the PRC Bankruptcy.

Counsel for O'Brien shall prepare a proposed form of judgment or order reflecting these rulings, submit it to opposing counsel for comment, and file the proposed judgment or order within twenty days of the date of this Memorandum Opinion.

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his employment claim. As noted *supra* note 108, however, O'Brien has admitted that the maximum amount he could recover in bankruptcy on his employment-related claims was $570,000. Therefore, unless the documentation regarding any payments to O'Brien based on the PRC Bankruptcy indicate otherwise, any set-off to which IAC is entitled will be in proportion to the ratio between the amount O'Brien claimed in the bankruptcy based on his indemnification claim to the sum of that number and $570,000.