IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 14-cv-00638-CMA-NYW

ARKANSAS RIVER POWER AUTHORITY,

Plaintiff/Counter Defendant,

v.

THE BABCOCK & WILCOX COMPANY,
f/k/a BABCOCK & WILCOX POWER GENERATION GROUP, INC.,

Defendant/Counter Claimant.

ORDER ON POST TRIAL MOTIONS ## 302, 303, 324

This matter is before the Court on three post trial motions, two filed by Defendant The Babcock & Wilcox Company ("B&W") — (1) Renewed Motion for Judgment as a Matter of Law (Doc. # 303) and (2) Objection to Taxation of Costs (Doc. # 324) — and one filed by Plaintiff Arkansas River Power Authority ("ARPA") — Motion to Amend Judgment for Pre- and Post-Judgment Interest (Doc. # 302). The Court addresses each motion in turn.

I. PROCEDURAL BACKGROUND

In April 2005, ARPA and B&W entered into a contract pursuant to which B&W was to provide to ARPA a coal-fired steam boiler for an electric generation project owned by ARPA, known as the Lamar Repowering Project (the "LRP"). B&W delivered the boiler in November 2007 but the boiler was unable to meet performance and emissions standards in the contract. B&W implemented modifications in an attempt to

rectify the issues with the boiler, but none were successful. As a result of the boiler's deficiencies, ARPA claims to have incurred substantial financial loss.

In February 2014, ARPA initiated this suit, alleging, among other claims, that B&W breached the parties' contract by supplying a deficient boiler. The Court held a nine-day jury trial on November 7–18, 2016. At the close of ARPA's case, B&W moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), which the Court granted in part and denied in part. (Doc. # 300.)[1]

On November 21, 2016, the jury returned a verdict in favor of ARPA on its breach of contract claim. (Doc. ## 279, 285.) The jury specifically found three separate breaches: (1) B&W failed to engineer and deliver a boiler capable of meeting the blue gas emissions guarantees in Section 40.9 of Exhibit A to the Contract ("First Breach"); (2) B&W failed to prepare and implement a Corrective Action Plan fully addressing the deficiencies with the boiler after receiving a Notice of Non-Achievement pursuant to Section 29.2 of the Contract ("Second Breach"); and (3) B&W failed to meet the auxiliary power guaranty of Section 40.12 of Exhibit A to the Contract ("Third Breach"). (Doc. # 279 at 4.) The jury awarded Plaintiff $2.19 million for the First Breach, $1.0 million for the Second Breach, and $1.0 million for the Third Breach. *Id*.

On November 21, 2016, the Court entered final judgment in favor of ARPA and against B&W (Doc. # 285), and on January 12, 2017, the Clerk of Court taxed B&W with $56,080 in costs (Doc. # 315).

[1]The Court granted B&W's motion on ARPA's Claim One (fraud in the inducement); Claim Two (negligent misrepresentation), and Claim Three (fraudulent concealment). The Court also dismissed ARPA's claim for breach of contract based on its contention that B&W failed to furnish a boiler that would meet the one point per megawatt hour limit on NOx emissions set forth in the Federal Clean Air Act. The Court denied B&W's motion on all other grounds.

II. B&W'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

The Court first addresses B&W's Renewed Rule 50 Motion for Judgment as a Matter of Law, filed on December 19, 2016, and fully briefed by January 23, 2017. Therein, B&W argues that it is entitled to judgment as a matter of law as to all three bases on which the jury found that it breached the contract. B&W specifically contends (1) ARPA failed to conduct contractually-required performance tests and is thereby prohibited from attributing any breach of contract to B&W; (2) ARPA's auxiliary power guarantee claim fails as a matter of law because ARPA did not prove any recoverable damages; and (3) the jury impermissibly awarded duplicative damages.

A. LEGAL STANDARD

Under Rule 50(b), a party may make a renewed motion for judgment as a matter of law within 28 days of the entry of judgment. *See* Fed. R. Civ. Proc. 50(b). In evaluating a motion brought under Rule 50(b), the Court examines all the evidence admitted at trial, construes that evidence and the inferences from it in the light most favorable to the non-moving party, and refrains from making its own credibility determinations, re-weighing the evidence, or substituting its conclusions for those of the jury. *See Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000); *see also Thunder Basin Coal Co. v. Sw. Pub. Serv. Co*., 104 F.3d 1205, 1212 (10th Cir. 1997) ("The jury . . . has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact."). Instead, the Court has the very narrow task of determining only whether the jury verdict is

supported by substantial evidence when the record is viewed most favorably to the prevailing party. *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002). Substantial evidence is "something less than the weight of the evidence, and is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence." *Id.* Judgment as a matter of law is appropriate "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Finley v. United States*, 82 F.3d 966, 968 (10th Cir. 1996).

To preserve issues under Rule 50(b), a party must have moved for judgment as a matter of law under Rule 50(a) at trial. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000). Motions under Rule 50(a) must "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. R. Civ. P. 50(a)(2). A party may not circumvent Rule 50(a) by raising for the first time in a post-trial motion issues not raised in an earlier motion for directed verdict. *United Int'l Holdings*, 210 F.3d at 1228.

B. PERFORMANCE TESTING

B&W first argues that ARPA's failure to conduct performance tests on the boiler precludes ARPA from now claiming that B&W breached the contract, thereby warranting judgment as a matter of law on ARPA's breach of contract claims. ARPA responds that performance tests were not contractually required and, even if they were, B&W waived its right to enforce that contractual obligation. The Court finds that, viewing the record in

the light most favorable to the prevailing party, substantial evidence supports ARPA's position and the jury's verdict. *See Webco Indus., Inc.*, 278 F.3d at 1128.

The parties' contract provides, in pertinent part:

> Performance tests, **if required**, shall be run by the Owner within 60 days after the Owner shall have received notice from the Seller that the equipment furnished is ready for testing, it being understood that the Seller **may** require preliminary tests.
>
> . . .
>
> The Equipment shall be considered as accepted if tests show that the guarantees have been fulfilled, or if Owner shall fall to have said Equipment tested within the 60 day period referenced above or within 30 months from receipt of the Equipment at the Site as defined in Paragraph 2.2.1 of the General Condition of Purchase, whichever occurs first.
>
> …
>
> The results of these tests will establish the unit's performance of steam generation, stack emissions, etc. as defined herein and will be used to determine compliance with performance guarantees defined herein. The Supplier may be present during these tests.

(Doc. # 303-2, p. 2.)

The plain language in the first paragraph does not state that "performance tests are required"; rather, it says, quite clearly, "performance tests, **if required"** and contains no subsequent language expressly stating that they were required in this instance. Defendant's reference to the final paragraph as definitive proof that performance tests were required is unavailing. Any reasonable juror could read that paragraph, coupled with the first one, and just as readily assume that the final paragraph applied only **IF** performance tests were required. Although B&W presented testimony that performance

tests were required; ARPA presented contrary argument, and the jury merely weighed these competing positions with its own contract interpretation in reaching its conclusion. This Court will not re-weigh the evidence or substitute its conclusions for those of the jury.

Moreover, even if the jury had concluded that performance tests were required, the evidence also supports a jury finding that B&W waived its right to enforce this contractual requirement. *See Venderbeek v. VernonCorp.*, 25 P.3d 1242, 1248 (Colo. App. 2000) (waiver is the intentional relinquishment of a known right).

Regarding waiver, the jury was instructed as follows:

> In the event that you find that ARPA was obligated under the contract to conduct performance testing, Plaintiff ARPA is not legally responsible to Defendant B&W for substantially performing its obligations under the contract if ARPA proves that B&W waived those obligations. A waiver is proved if you find all of the following:
>
> 1. B&W knew that ARPA was required to conduct performance testing under the contract;
> 2. B&W knew that the failure of ARPA to perform this contractual promise gave B&W the right to insist that ARPA conduct performance testing before submitting its Corrective Action Plan pursuant to section 29.2;
> 3. B&W intended to give up this right; and
> 4. B&W voluntarily gave up this right in a document signed by B&W.

(Doc. # 282, p. 28.)

Section 29.2 of the Contract required B&W to submit a Corrective Action Plan (CAP) to ARPA in the event that the boiler did not meet its performance guarantees.[2]

[2]Section 29.2 states, "In the event the specific Performance Guarantees are shown by the performance tests not to have been achieved and such non-achievement is the result of equipment deficiencies, the Seller shall, within ten (10) Business Days after the date of Owner's

B&W argues that ARPA's performance test obligation preceded and triggered B&W's CAP obligation. Nonetheless, ARPA presented evidence at trial that B&W knowingly declined to enforce the performance test requirement. Specifically, ARPA presented the following evidence of waiver:

- A letter from ARPA's General Manager to B&W detailing various issues with the boiler and requesting B&W bring the boiler into compliance. The letter concluded: "ARPA hereby submits this letter as its notice of non-achievement pursuant to Section 29.2 of its contract with B&W and requests that B&W submit a corrective action plan to bring the LRP into full compliance with its permit and the performance guarantees of the contract."
- A responsive, signed letter from B&W to ARPA, wherein B&W acknowledged boiler issues and stated, "As requested in your letter, B&W is working on a corrective action plan and we hope to submit this plan within the next couple of weeks once we have vetted some of the suggested solutions."
- Testimony from a B&W representative that, after receiving ARPA's letter regarding performance guarantee failures, B&W did not require ARPA to submit the boiler to performance tests.
- Testimony from a B&W representative that B&W designed and implemented a CAP, notwithstanding ARPA's failure to submit the boiler to performance tests.

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notice of non-achievement, submit to Owner a plan of corrective action specifying in reasonable detail the actions Seller proposes to take to cause the Equipment to achieve the Performance Guarantees, and the period of time in which it proposes to complete the corrective action Corrective Action Plan."

This evidence is sufficient to support a jury determination that B&W waived its right to enforce any performance test obligation. Judgment as a matter of law on these grounds is therefore unwarranted.

C. AUXILIARY POWER CLAIM

B&W next argues that the jury verdict on ARPA's auxiliary power claim is unsupported because ARPA failed to prove "any recoverable damages caused by B&W" on that claim. (Doc. # 303, p. 8). The Court disagrees that ARPA failed to present "any" evidence of recoverable damages. The Court instead finds that there was substantial evidence in the record to support the jury's verdict, including:[3]

- the Contract, Section 40.12, entitled Auxiliary Power Guarantee, which guaranteed that the boiler's average total power consumption would not exceed 2340 KW;
- email evidence and testimony by ARPA representatives reflecting that the boiler's average total power consumption greatly exceeded 2340 KW;
- evidence that B&W knew about and may have considered this increase in power consumption during early settlement negotiations; and

[3]As relevant here, the jury was instructed as follows:

> You may award damages to ARPA for loss, resulting in the ordinary course of events, from B&W's breach. You may determine this amount in any manner which you find is reasonable. Unless special circumstances show that B&W caused damages of a different amount, generally the measure of damages is the difference, at the time and place of acceptance, between the value of the boiler actually delivered by B&W and the value it would have had, had it been as warranted.

(Doc. # 282, p. 34.)

- testimony by ARPA representatives that, as a result of the increased power consumption, the value of the boiler as delivered to ARPA was greatly diminished from the promised value.

(Doc. ## 312-19; 312-6, pp. 35–36; 312-20.)

Because this and other record evidence is sufficient to support the jury's verdict and damage award, the Court denies B&W's request for judgment as a matter of law on ARPA's auxiliary power claim.

D. DUPLICATIVE DAMAGES

B&W also argues that the jury's damage award on each of ARPA's breach of contract claims was impermissibly duplicative and requests that the Court vacate each award as a matter of law. The Court denies B&W's request for two reasons: (1) B&W waived this issue at trial; and (2) the damages award was not duplicative.

First, the Court is not convinced that B&W preserved this contention in its oral Rule 50(a) motion. During that motion, B&W mentioned damages related to breach of contract in two short paragraphs, arguing:

> Then, the last point about breach of contract is damages. The contract bars all of the damages ARPA has claimed. And it did not, in its trial brief, other than referring to the damages it associates with the total loss of the LRP, it did not refer to any other damages in its trial brief that it was seeking in connection with the breach of contract claim.
>
> It gave up last month any claims for operating costs as damages, so any costs for operation of the SNCR or operation with auxiliary power being in excess of a guarantee. So although I am not quite certain what damages ARPA might try and claim here, given that the original damages' claims were excluded, the contract is very clear about what damages are excluded. And I have so far yet to see one ARPA is requesting that is not specifically excluded

> by the contract or not in excess of the 19.1 limit on the contract price.

(Doc. # 299, p 35–36.)

B&W did not once mention the possibility of duplicative damages being awarded. B&W argues that they could not have raised this issue because "B&W had no way to know at a Rule 50(a) stage that the jury would make the duplicative and unsupported damages award that it did." (Doc. # 322, p. 8.) Even if B&W could not have predicted the jury's ultimate award, B&W was put on notice that duplication might be an issue when B&W specifically requested that the special interrogatory verdict form be modified to set out separate questions identifying a separate award of damages for each of ARPA's breach of contract claims, rather than one lump sum for breach of contract generally. ARPA's counsel responded that separating the award by claim might create an "overlap in damages," and B&W disagreed, stating "question No 16 addresses the possibility of duplicative damages."[4] (Doc. # 275-76.) In other words, B&W affirmatively requested that the jury be permitted to parse damages in the manner to which it now objects. The Court is inclined to consider this argument waived.

In any event, the damages award was not duplicative. As it was instructed to do, the jury awarded damages based on the boiler's value loss due to its inability to meet emissions guarantees ($2.19 million) and its inability to meet auxiliary power guarantees ($1.0 million). These two awards do not overlap; they are for different boiler failures that

[4]Question Number 16 stated, "ARPA is not allowed to be compensated more than once for the same damages. Please indicate below whether your damage awards in Questions No. 2, 8, and 13 above, are duplicate awards for the same damages and, if so, what amount9s0 is/are duplicative." (Doc. # 279, p. 5.) The Jurors indicated that they had not awarded duplicate damages.

lowered the value of the boiler for different reasons. These awards also do not overlap with the jury's award of $1.0 million for B&W's failure to prepare and implement a CAP that addressed the boiler's deficiencies. ARPA presented sufficient evidence at trial that it suffered losses based on this failure that are not the same as the losses suffered from the boiler's failure to meet performance guarantees, including the costs to implement and modify the plan numerous times. (Doc. # 312-6, p. 225–29; Doc. # 312-23.)

Accordingly, the Court denies B&W's request for judgment as a matter of law on grounds that the jury award was duplicative.

III. B&W'S OBJECTION TO TAXATION OF COSTS

B&W also requests that the Court review and overturn the Clerk of Court's taxation of Costs. The Court denies the request.

A. LAW

The Court reviews de novo the Clerk's determination of costs. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 233 (1964). ("On review of the clerk's assessment, it was [the district judge]'s responsibility to decide the cost question himself . . . .").

Federal Rule of Civil Procedure 54(d)(1) provides that costs "should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). For purposes of Rule 54(d), a prevailing party is a party in whose favor final judgment is rendered, regardless of the amount of damages awarded. *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1234 (10th Cir. 2001); *see also Shelton v. MRIGlobal*, No. 11-cv-02891-PAB-MJW, 2013 WL 3381270 (D. Colo. July 8, 2013). The Court retains discretion to limit or deny otherwise taxable costs to the prevailing party. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–45 (1987). The Tenth Circuit has held that Rule 54(d) creates a

presumption that the prevailing party shall recover costs. *Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995). Accordingly, the burden is on the non-prevailing party to overcome the presumption that costs will be awarded to the prevailing party. *Rodriquez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004).

A district court denying costs to a prevailing party must "provide a valid reason" for doing so. *In re Williams Sec. Litigation—WCG Subclass*, 558 F.3d 1144, 1147 (10th Cir. 2009). "Circumstances in which a district court may properly deny costs to a prevailing party include when (1) the prevailing party is 'only partially successful,' (2) the prevailing party was 'obstructive and acted in bad faith during the course of the litigation,' (3) damages are 'only nominal,' (4) the nonprevailing party is indigent, (5) costs are 'unreasonably high or unnecessary,' or (6) the issues are 'close and difficult.'" *Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642, 659–60 (10th Cir. 2013) (quoting *Cantrell v. Int'l Bhd. of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456, 458 (10th Cir. 1995)).

B. ANALYSIS

1. Plaintiff was more than partially successful

B&W objects to the Clerk's taxation of costs, in part, because it claims ARPA was only partially successful. B&W argues that because ARPA recovered only 2.46 percent of the damages it sought, the Court should deny ARPA's costs entirely or limit them to the same percentage. Plaintiff would then recover no more than $1,382.21.

It is within the Court's discretion to refuse to award costs to a party which was only partially successful. *Howell Petroleum Corp. v. Samson Resources Co.*, 903 F.2d 778, 783 (10th Cir. 1990). "[I]n cases in which the prevailing party has been only

partially successful, some courts have chosen to apportion costs among the parties or to reduce the size of the prevailing party's award to reflect the partial success." *Barber*, 254 F.3d at 1234–35.

"Although a district court may reduce a lodestar calculation on the grounds that a prevailing party has achieved only partial success, when a lawsuit involves multiple claims based on 'a common core of facts or … related legal theories,' it is inappropriate for a district court to evaluate the individual claims as though they were discrete and severable for the purpose of awarding attorney fees." *U.S. ex rel. Sun Const. Co., Inc. v. Troix General Contractors, LLC*, No. 07-cv-01355-LTB-MJW, 2011 WL 3648287, *3 (D. Colo. Aug. 18, 2011). Additionally, a plaintiff need not succeed on all or even most of its claims to be awarded costs. *See, e.g., Klein v. Grynberg,* 44 F.3d 1497, 1506–07 (10th Cir. 1995) (concluding trial court abused discretion in denying costs where plaintiffs were successful on major issues of case); *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990); *U.S. ex rel. Sun Const. Co.*, No. 07-cv-01355-LTB-MJW, 2011 WL 3648287, at *3 (concluding that a party was more than partially successful despite failing to recover full amount of damages sought).

Although ARPA prevailed on only three of its fourteen claims against B&W, this is not such a minute victory as to warrant the "severe penalty" of denying costs. *See Marx v. Gen. Revenue Corp.*, 668 F.3d 1174, 1182 (10th Cir. 2011) ("To deny a prevailing party its costs is in the nature of a severe penalty, such that there must be some apparent reason to penalize the prevailing party if costs are to be denied"). ARPA succeeded on its breach of contract claims, overcame B&W's counterclaims, and was ultimately declared the prevailing party by the jury. (Docs. ## 279, 326.) The Court

refuses to find ARPA partially successful simply because it "did not recover the full amount of damages initially sought." *U.S. ex rel. Sun Const. Co.*, 2011 WL 3648287, at *3; *see Klein,* 44 F.3d at 1506–07 (concluding trial court abused discretion in denying costs where plaintiffs were successful on major issues of case). Indeed, it would be improper for the Court to penalize ARPA for bringing meritorious claims that ultimately failed at trial, *see Robinson v. City of Edmond,* 160 F.3d 1275, 1283 (10th Cir. 1998), and to reduce costs when ARPA's claims stemmed from a common core of facts — the parties' contract to design, manufacture, and deliver a coal-fired boiler. (Docs. ## 80, 324); *see U.S. ex rel. Sun Const. Co.*, 2011 WL 3648287, at *3.

2. ARPA was not obstructive nor did it act in bad faith during the course of litigation

B&W further objects to taxation of costs because, it claims, ARPA was obstructive and acted in bad faith during the course of litigation. (Doc. # 324 at 7–8.) In support of this argument, B&W raises two discovery issues: (1) Plaintiff concealed the prior expert report written by Richard Gendreau triggering a second deposition, and (2) Plaintiff failed to produce documents it claimed were privileged but that were not. (*Id.*)

Although a district court may refuse to award damages to the prevailing party where that party was obstructive and acted in bad faith in the course of the litigation, the Court sees no reason to do so here. *Debord*, 737 F.3d at 659–60. Plaintiff's actions during discovery do not rise to the level of obstruction that would warrant refusing an award of costs. Indeed, discovery disputes are common in cases wrought with this much complexity and disagreement. *Compare Dillon v. Twin Peaks Charter Academy,* No. 99-cv-CMA-BNB, 2009 WL 3698519 (D. Colo. Nov. 3, 2009) (finding defendant's

change in argument after years of litigation was neither obstructive nor in bad faith); *and A.D. v. Deere & Co.*, 229 F.R.D. 189, (D. N.M. 2004) (finding defendant's conduct did not rise to level of egregiousness warranting denial of award of costs where alleged obstructiveness and actions in bad faith were simply discovery disputes); *with TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 736 (10th Cir. 1993) (affirming district court decision to not award costs where prevailing party attempted to circumvent a court order — "an attempt which the court characterized as 'both professional and unconscionable"); *and Sheets v. Yamaha Motors Corp., U.S.A.,* 891 F.2d 533, 539 (5th Cir. 1990) (upholding district court's decision not to award costs to prevailing party where it was "forced to endure defendants' repeated and abusive hardball tactics" including unjustifiable refusal to produce documents, violating an order to compel, repeatedly making false representations to the court, and more).

Accordingly, the Court denies B&W's request that the Court overturn the Clerk's cost award and deny costs to ARPA.

IV. ARPA'S RULE 59 (e) MOTION TO AMEND JUDGMENT TO AWARD PREJUDGMENT AND POST JUDGMENT INTEREST

Finally, the Court addresses ARPA's Rule 59(e) motion, wherein ARPA contends that it is entitled to prejudgment and post judgment interest on each of its damage awards. The Court agrees that ARPA is so entitled and grants ARPA's request.

A. RULE 59(e)

"Rule [59(e)] was adopted to make clear that the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 450 (1982) (internal

quotation marks omitted). The Court may amend the judgment in its discretion where there has been an intervening change in the controlling law, new evidence that was previously unavailable has come to light, or the Court sees a need to correct clear error or prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

B. PREJUDGMENT INTEREST

ARPA contends that, under Colorado Revised Statute § 5-12-102, it is entitled to prejudgment interest on each of its damage awards, commencing on the date when each breach of contract occurred. In total, ARPA requests over $4 million in prejudgment interest.

1. Waiver

B&W objects to this request, first arguing that ARPA waived any claim to prejudgment interest pursuant to Section 20.1 in of the Contract, which provides,

> 20.1 CONSEQUENTIAL DAMAGE DISCLAIMER
>
> Notwithstanding any other provisions of the Contract Documents, neither [B&W] nor its subcontractors shall be liable, whether arising out of contract, tort (including negligence), strict liability, or any other cause of or form of action whatsoever, for loss of anticipated profits, loss by reason of plant or other facility shutdown, non-operation or increased expense of operation, service interruption, cost of purchased or replacement power, claims of ARPA's customers, subcontractors, vendors or suppliers, cost of money, loss of use of capital or revenue, fines or penalties assessed or levied against ARPA by any governmental agency based on the operation, non-operation, or use of the [Boiler] or for any special, incidental or consequential loss or damage of any nature, whether similar or dissimilar to those enumerated above, arising at any time or from any cause whatsoever.

(Doc. # 317-1, p. 1.)

B&W primarily argues that this section unambiguously precludes ARPA from obtaining compensatory damages in the form of prejudgment interest. B&W specifically highlights the following language as including prejudgment interest: "cost of money, loss of use of capital or revenue." (*Id.*) The Court does not read this language so broadly. The Court instead reads it as disclaiming only consequential, not compensatory, losses. Indeed, all of the other disclaimed damages in this paragraph reference consequential damages, including the final catch-all sentence referencing any other "special, incidental, or consequential loss." *See SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 839 (10th Cir. 2016) ("[D]irect damages flow directly from the breach of the contract with the breaching party, while consequential lost profits flow from losses beyond the scope of that contract.) And although B&W would have this Court ignore the title of this section — "Consequential Damage Disclaimer" — the Court finds that it is indicative of the parties' understanding and contractual intent, even if not considered part of the contract or binding in its application. *See Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 801 (Colo. 2007) ("Courts are to give effect to the intent and reasonable expectations of the parties and to enforce [a contract's] plain language unless it is ambiguous.").

Because prejudgment interest is a form of compensatory, not consequential damages, Section 20.1 does not bar ARPA's request. *See Cook v. Rockwell Int'l Corp.*, 564 F. Supp. 2d 1189, 1220 (D. Colo. 2008), *rev'd on other grounds*, 618 F.3d 1127 (10th Cir. 2010) ("Colorado courts have repeatedly held that prejudgment interest is an element of compensatory damages. . . . The Tenth Circuit and other courts are in

accord with this view."); *see also, e.g.*, *Seaward Const. Co. v. Bradley*, 817 P.2d 971, 976 (Colo. 1991); *Allstate Ins. Co. v. Starke*, 797 P.2d 14, 19 (Colo. 1990); *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1134 (10th Cir. 2002); *Johnson v. Cont'l Airlines Corp.* 964 F.2d 1059, 1062 (10th Cir. 1992) (collecting cases).

2. Colorado Revised Statute § 5-12-102(1)

In diversity actions the federal court looks to state law to determine whether prejudgment interest is allowed on its damages. *Casto v. Arkansas–Louisiana Gas Co.*, 562 F.2d 622, 625 (10th Cir. 1977). In Colorado, in cases other than in "actions brought to recover damages for personal injuries," a prevailing party may recover prejudgment interest under § 5-12-102. The function of prejudgment interest awarded at a statutory rate is to compensate for the time value of money without proof of the actual loss. *Goodyear Tire & Rubber Co.*, 193 P.3d at 827–28.

As pertinent here, § 5-12-102(1)(b) provides:

> Interest shall be at the rate of eight percent per annum compounded annually for all moneys or the value of all property after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs.

Whether the "withholder" recognizes a "gain or benefit" is irrelevant under this section, and the prevailing party is not required to establish tortious conduct on the part of the withholding party to recover prejudgment interest. *Mesa Sand & Gravel Co. v. Landfill*, 776 P.2d 362, 364 (Colo. 1989). Indeed, prejudgment interest is recoverable on a "mere breach of contract," with the eight percent annual rate commencing "from the time of the breach." *Id.* at 365–65 (interest recoverable on a breach of contract regardless of the prevailing party's actions because the breach, in and of itself, makes

the nonprevailing party's conduct "wrongful" in the sense contemplated by § 5-12-102); *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 826 (Colo. 2008); *see also Vento v. Colorado Nat. Bank-Pueblo*, 907 P.2d 642, 647–48 (Colo. App. 1995) (Plaintiff "entitled to prejudgment interest from the date defendant breached its fiduciary duty, thus causing the harm that ultimately occurred"); *Smith v. Mehaffy*, 30 P.3d 727, 732 (Colo. App. 2000) ("In breach of contract cases, non-breaching parties have been permitted to recover prejudgment interest from the time of the breach [because t]he theory is that the breach itself makes the conduct wrongful.").

The jury in this case did not specify the date of B&W's breach, nor was it asked to do so. Citing *Ripple Resort Media, Inc. v. Skyview Corp.*, No. 06-CV-01856-WDB-BNB, 2009 WL 485172, at *2-3 (D. Colo. Feb. 29, 2009), B&W argues that because the jury did not so specify and because ARPA's request is unsupported by the evidence, this Court should only award ARPA $1.00 in prejudgment interest. The Court disagrees. "Difficulty in computation, as opposed to impossibility of determination, does not weigh against an award of prejudgment interest." *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1207–08 (Colo. App. 2009); *S. Park Aggregates, Inc. v. NW. Nat'l Ins. Co.,* 847 P.2d 218, 226 (Colo. App. 1992) (entitlement to prejudgment interest is a statutory right); 1 Dan B. Dobbs, Dobbs Law of Remedies: Damages, Equity, Restitution § 3.6(1), at 336 (2d ed. 1993) ("Prejudgment interest is allowable where the amount of damages is definitely ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount . . . ."). Moreover, in *Ripple*, the defendant failed to provide with "any" dates from which to calculate interest or evidence

to support the court's date determination; here, ARPA has provided this Court with breach dates and evidence from trial to support them.

The Court also rejects B&W's arguments that the Court should award prejudgment interest beginning on the date this lawsuit was filed, rather than the date of B&W's breach. In support of that request, B&W cites to legal authority that predates the Colorado Supreme Court's decision in *Mesa Sand & Gravel Co.*, 776 P.2d at 364, which clearly states that prejudgment interest should be calculated from the date of breach, not the date of filing.

Accordingly, the Court next assesses the date of each breach. *See Ireland v. Dodson*, 704 F. Supp. 2d 1128, 1147 (D. Kan. 2010) ("When prejudgment interest should commence is a matter to be determined by the trial court in the exercise of sound discretion, upon consideration of all the attendant facts and equities.").

a. First Breach

The First Breach states "B&W failed to engineer and deliver a boiler capable of meeting blue gas emissions guarantees in Section 40.9 of Exhibit A to the Contract." ARPA asserts that this breach occurred in November 2007, when B&W completed delivery of the noncompliant boiler, which ultimately became the subject of this litigation. (Doc. # 302-1.) B&W has not provided the Court with an alternate date for this breach. After reviewing the evidence submitted at trial, the Court agrees with ARPA that the breach occurred upon completion of the boiler delivery — a boiler that the jury found never met the emissions guarantees in the contract. Although neither provides this Court with a specific date, the parties agree that delivery took place in November 2007.

The Court, therefore, calculates prejudgment interest from the last possible day of that month, November 30, 2007.

The Court therefore awards ARPA prejudgment interest on damages related to the First Breach ($2.19 million), beginning on November 30, 2007 and ending on the date of Final Judgment in this case — November 21, 2016.

b. Second Breach

The Second Breach states that B&W failed to prepare and implement a CAP fully addressing the deficiencies with the boiler after receiving a Notice of Non-Achievement pursuant to Section 29.2 of the Contract.[5] After receiving said notice from ARPA, B&W designed a CAP, which it completed and implemented in June 2011. (Doc. # 80, p. 23; 84, p. 11.) Ultimately the jury found that this CAP did not adequately address the boiler issues and that B&W thereby breached the contract. ARPA requests that this Court calculate prejudgment interest on this breach beginning on August 9, 2011 — the date when ARPA fired the boiler and realized that the CAP failed to address the boiler's contractual deficiencies. B&W does not provide this Court with a different breach date. Having thoroughly considered the issue, the Court grants ARPA's request.[6]

[5] The Court acknowledges B&W's argument that it should not be punished for time spent attempting to remedy the issues with the boiler, i.e. for delays due to modification attempts. But nor should ARPA suffer for attempting to work with B&W to mitigate the damage and avoid litigation. Ultimately, the jury determined that B&W's attempts did not cure its breach; the Court will not re-visit that issue. The Court is merely assessing prejudgment interest based on the jury verdict before it.

[6] The Court believes that the breach could actually be assessed sooner — as early as June 2011 when the CAP was first implemented — but nonetheless accepts ARPA's request to use the August 9, 2011, date.

The Court therefore awards ARPA prejudgment interest on damages related to the Second Breach ($1.0 million), beginning on August 9, 2011, and ending on the date of Judgment — November 21, 2016.

c. Third Breach

The Third Breach states, "B&W failed to meet the auxiliary power guarantee of Section 40.12 of Exhibit A to the Contract." ARPA asserts that this breach occurred on April 4, 2005, when the parties' executed the contract because B&W's calculations of power consumption, as provided for in the contract, were wrong as originally designed. ARPA's argument, however, focuses on the date of an alleged misrepresentation by B&W, not the date of breach, as contemplated by the jury. The jury determined that the breach occurred when B&W failed to meet a guarantee in the contract; it would defy logic to state that B&W failed to satisfy a provision of the contract before B&W even had an opportunity to perform on the contract. Based on the evidence presented at trial, the Court instead views the Third Breach as similar to the First Breach — occurring when B&W delivered the noncompliant boiler to ARPA.

Accordingly, the Court awards ARPA prejudgment interest on damages related to the Third Breach ($1.0 million), beginning on November 30, 2007 and ending on the date of Judgment — November 21, 2016.

C. POST JUDGMENT INTEREST

B&W does not oppose ARPA's request for post judgment interest, and the Court grants the request. Indeed, post judgment interest is required on any money judgment in a civil case recovered in district court. 28 U.S.C. § 1961(a).

V. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Defendant B&W's Renewed Motion for Judgment as a Matter of Law (Doc. # 303) is DENIED.
2. Defendant's Objection to Taxation of Costs (Doc. # 324) is OVERRULED.
3. Plaintiff ARPA's Motion to Amend Judgment for Pre- and Post-Judgment Interest (Doc. # 302) is GRANTED.
4. The Clerk of Court is directed to award prejudgment interest, at a rate of 8 percent per annum, as follows:
    a. commencing on November 30, 2007, and ending on November 21, 2016, for the $2.19 million award (First Breach);
    b. commencing on November 30, 2007, and ending on November 21, 2016, for the $1.0 million award (Third Breach); and
    c. commencing on August 9, 2011, and ending on November 21, 2016, for the $1.0 million award (Second Breach).
5. Post judgment interest should be awarded at the prevailing federal rate, beginning on November 21, 2016.

DATED: July 21, 2017

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge