

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

|  |   |                   |
|--|---|-------------------|
| In re:                                   | § |                   |
|  | § |                   |
| UNITED STATES BRASS CORP.,               | § | Case No. 94-40823 |
|  | § |                   |
| Debtor.                                  | § |                   |
|  | § |                   |
| <hr/>                                    | § |                   |
| E.I. DUPONT DE NEMOURS, INC.,            | § |                   |
|  | § |                   |
| Plaintiff,                               | § |                   |
|  | § |                   |
| v.                                       | § | Adv. No. 01-04247 |
|  | § |                   |
| THE BRASS TRUST and PAUL M.              | § |                   |
| O’CONNOR, HUGH M. SAUM, PETER            | § |                   |
| A. DEMMA, MICHAEL A. CADDELL,            | § |                   |
| JOHN W. (DON) BARRETT, DAVID             | § |                   |
| H. WEINSTEIN, TIMOTHY J.                 | § |                   |
| CROWLEY and RAY T. COLLINS, in           | § |                   |
| their capacities as Trustees of the U.S. | § |                   |
| BRASS TRUST,                             | § |                   |
|  | § |                   |
| Defendants.                              | § |                   |

**MEMORANDUM OPINION REGARDING THE DEFENDANTS’ MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Came on for consideration the DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT (Adversary Docket #50) (the “Motion”). Having considered the Motion, the memoranda supporting and opposing the Motion, the arguments of counsel, the evidence presented, and the applicable law, the Court makes the following findings of fact and conclusions of law:

**Jurisdiction**

The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§1334(a) and 157(a), and the United States District Court for the Eastern District of Texas’ Order of

Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc*. This is a core proceeding pursuant to 28 U.S.C. §§157(b)(2)(A), (B), (I) and (O).

### **Procedural Background**

On May 23, 1994, United States Brass Corporation, Inc. (“US Brass”) commenced the bankruptcy case associated with this adversary proceeding by filing a petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §1101, et seq. (the “Bankruptcy Code”).

On February 24, 1998, the Court confirmed the Fourth Amended Plan of Reorganization Proposed by US Brass and its parent companies, Eljer Industries, Inc. (“EII”) and Eljer Manufacturing, Inc. (“EMI”), as modified, dated January 13, 1998 (the “Plan”).

E.I. DuPont de Nemours, Inc. (“DuPont”) initiated this adversary proceeding on October 12, 2001 by filing a complaint (the “Complaint”) against the Brass Trust and Paul M. O’Connor, Hugh H. Saum, Peter A. Demma, Michael A. Caddell, John W. (Don) Barrett, David H. Weinstein, Timothy J. Crowley and Ray T. Collins in their capacities as trustees of the Brass Trust (the “Trustees,” together with the Brass Trust, the “Movants”). DuPont seeks \$15,669,533.55 from the Brass Trust. This is the amount DuPont alleges it paid from 1991 to 1998 to repair 43,699 defective polybutylene plumbing systems (“PB System(s)”).<sup>1</sup>

DuPont brings claims against the Brass Trust as assignees of the owners of repaired PB Systems (the “Assigned Claims”). DuPont also brings claims against the

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<sup>1</sup> The amount stated in the original Complaint was \$17,551,714.00 paid to repair 49,350 PB Systems. After filing the Complaint, DuPont adjusted its demand to \$15,669,533.55 paid to repair 43,699 PB Systems.

Brass Trust in DuPont's own capacity and not merely as an assignee (the "Independent Claims"). DuPont seeks a Declaratory Judgment that its Assigned Claims are allowed as Plumbing Claims (defined *infra*) payable by the Brass Trust pursuant to the Plan. DuPont asserts Independent Claims against the Brass Trust based on contractual indemnity, implied indemnity, breach of contract, and quantum meruit.<sup>2</sup> Finally, DuPont seeks removal of the eight Trustees, alleging bias and conflict of interest.

On October 15, 2004, the Movants filed the Motion seeking partial summary judgment on certain causes of action brought in the Complaint. Specifically, the Movants seek summary judgment (i) declaring that DuPont's Assigned Claims are Cox Plaintiffs Claims (defined *infra*) which are barred from being asserted against the Brass Trust pursuant to the Plan, (ii) disallowing DuPont's Assigned Claims against the Brass Trust because the Assigned Claims are not supported by evidence of a Qualifying Leak as defined in the Alternative Dispute Resolution Procedure ("ADR") incorporated into the Plan, and (iii) disallowing DuPont's Independent Claims for contractual indemnity, implied indemnity, breach of contract, and quantum meruit.

Following detailed briefing by the parties, the Court commenced a hearing on the Motion on April 14, 2005. The Court continued the hearing so that the parties could file supplemental briefs regarding the issues raised at the hearing. The parties submitted supplemental briefs, and the Court concluded the hearing on July 12, 2006. At the conclusion of the hearing, the Court took the matter under advisement.

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<sup>2</sup> Although DuPont has asserted a variety of claims against the Brass Trust, DuPont only seeks one recovery of \$15,669,533.55 for the amount it paid to repair defective PB Systems.

## General Factual Background

### 1. The PB Systems

From approximately the mid-1970s through the mid-1990s, PB Systems were installed in homes and other buildings throughout the United States. As DuPont noted in its Response to Defendants' Motion for Partial Summary Judgment and Brief in Support (the "MSJ Response"), "[a PB System] is made up of polybutylene ("PB") pipe and either acetal (plastic) or metal insert fittings." Widespread allegations of leaking in the PB Systems eventually gave way to a great many consumer claims asserted against the PB Systems' manufacturers.

US Brass was the country's largest PB Systems manufacturer. Shell Oil Company ("Shell"), Hoechst Celanese Corp. ("Celanese"), and DuPont supplied raw materials to PB Systems manufacturers. Shell and Celanese supplied raw materials to US Brass. DuPont never supplied any material directly to US Brass.

In March of 1989, US Brass, Shell and Celanese formed the Plastic Plumbing Sharing Agreement ("PPSA"). The PPSA's purpose was to fund repairs for PB Systems that US Brass manufactured. DuPont, Shell and Celanese established a similar group to fund repairs to PB Systems that the PPSA did not cover.

In 1991, US Brass' parent company lost certain insurance coverage litigation relating to the PB Systems. Insurers stopped funding repairs, and US Brass dropped out of the PPSA. Shell and Celanese continued to operate the PPSA.

In October of 1991, Shell and Celanese joined with DuPont to form the Plumbing Claims Group ("PCG"). The PCG replaced the PPSA and funded repairs for defective PB Systems no matter who the manufacturer was. Once a claim was reported, the PCG

would send its adjusting company to physically inspect the particular plumbing system to verify the occurrence of a PB System leak. If it was a PB System with insert fittings and had experienced leaks, the PCG would pay a contractor to replumb the system. In exchange, the owner of the PB System would (i) execute an assignment of its claims against the manufacturer related to the PB System jointly to Shell, Celanese, and DuPont, and (ii) release these companies from any liability in connection with the defective PB System. DuPont's claims against the Brass Trust in this adversary proceeding are based on the payments it made to these owners and the assignments it received in return.

For the first three years of the PCG, each member of the PCG paid a percentage of each repair based on whether that member's product was or could have been involved in the leak. Because DuPont did not supply materials directly to US Brass, its share of the PCG's payments was relatively small – around 2.7%. Beginning in November of 1994, however, Shell, Celanese and DuPont agreed to pay a fixed percentage for all repairs, regardless of whose product may have caused the leaks. DuPont paid 10% of all PCG repair costs under this agreement.

## 2. The Cox Action

On July 13, 1995, a class action lawsuit (*Cox et al. v Shell Oil Co. et al.*, Civil Action No. 18,844) (the "Cox Action") was filed against Shell and Celanese in the Chancery Court for Obion County, Tennessee (the "Cox Court"). The plaintiffs in that action (the "Cox Plaintiffs") sought to recover on behalf of a nationwide class of plaintiffs that had allegedly been harmed by defective PB Systems.

On July 13, 1995, the Cox Court certified a nationwide class of PB Systems owners who had or may have claims against the defendants in the Cox Action. The

parties to the Cox Action eventually reached a settlement agreement (the “Cox Settlement”). The Cox Action would be settled by, *inter alia*, Shell and Celanese providing \$950,000,000 to establish and fund the Consumer Plumbing Recovery Center (“CPRC”). The CPRC would fund repairs for Cox class members’ PB Systems. In exchange, the Cox Action would be dismissed against Shell and Celanese with prejudice.

On November 17, 1995, following an opt-out period for plaintiffs and potential plaintiffs, the Cox Court approved the Cox Settlement and certified the final Cox Class in that case. The Cox Court defined the Cox Class as:

[a]ll persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The Cox Court excluded from the Cox Class:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Co., et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

### 3. The Bankruptcy

Due to the massive amount of PB Systems claims still being asserted against US Brass, US Brass filed for bankruptcy protection on May 23, 1994. US Brass ultimately

confirmed a plan of reorganization pursuant to which the Brass Trust was created. The Plan provides for the liquidation and payment of certain Plumbing Claims (other than Cox Plaintiffs Claims)<sup>3</sup> through an ADR process by the Brass Trust and the channeling of all Cox Plaintiffs Claims to the CPRC rather than to the Brass Trust.<sup>4</sup> Article 1.1(kkkk) of the Plan defines Plumbing Claim as:

any claim, debt, right to payment, obligation or liability (under any theory of common or statutory law or equity) against the Debtor, EMI and EII and any of their respective Affiliates, whether or not in existence, known, or arising prior to or after the Effective Date, and whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, disputed, undisputed, legal, equitable, secured, or unsecured for injuries or damages, including compensatory damages (such as proximate, consequential, general and special damages) and punitive damages, relating, directly or indirectly, to a Brass Polybutylene System and arising or allegedly arising, directly or indirectly, in whole or in part, from acts or omissions of US Brass or any other Person prior to the Effective Date, including, but not limited to any such claim, debt, right to payment, obligation or liability that is (i) held by any past, present, or future owner, occupant or user of real or personal property (including mobile homes and recreational vehicles) in which a Brass Polybutylene System is or was installed; or (ii) based in contract or tort, for reimbursement, contribution or indemnification, as those terms are defined by the non-bankruptcy law of the relevant jurisdiction, that is (A) held by (I) any Person who has been, is or may be a defendant in an action seeking damages or equitable relief for a Plumbing Claim (II) any assignee or transferee of such Person, or (III) an insurer of any Person identified in (I) or (II) hereof; and (B) is asserted for indemnification of any damages and costs such person has or may suffer as a result of such action (including interim payments made under a reservation of rights); provided, that “Plumbing Claims” shall not include any claim, debt, or right to payment against EMI or EII that (x) was tried and reduced to judgment prior to the Petition Date (whether or not judgment was also entered against other parties by the trial court), and (y) is the subject of an appeal pending as of the date of this Disclosure Statement.

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<sup>3</sup> The Plan defines Cox Plaintiffs Claims as all of the Plumbing Claims of the Cox Plaintiffs and all of the members of the Cox Class.

<sup>4</sup> US Brass incorporated the terms of the Cox Settlement into the Plan and contributed funds to the CPRC through a series of separate settlement agreements with the Brass Trust, the Cox Plaintiffs (on behalf of the Cox Class, defined *infra*), and Shell and Celonese. US Brass sought the Court’s approval of these agreements as part of the Plan. The Court approved these agreements as part of the Plan’s confirmation.

Article 1.1(ee) of the Plan defines the Cox Class, in pertinent part, as “the class of plaintiffs and all members of such class as certified by the Cox Court in the Cox Action ....” Article 4.1(e)(i) of the Plan expressly precludes members of the Cox Class from seeking payment of their Plumbing Claims from the Brass Trust. Article 14.2 of the Plan provides, in pertinent part, that “the Cox Plaintiffs, on their own behalf and on behalf of the members of the Cox Class shall (A) release the Debtor, the Brass Trust, the Brass Trustees, EII and EMI and their past and present directors, officers, employees, agents, sales representatives and Affiliates from any and all Cox Plaintiffs Claims ....”

#### 4. ADR and the Adversary Proceeding

Following Plan confirmation, DuPont submitted its Assigned Claims to the Brass Trust for payment. DuPont asserted that these were valid Plumbing Claims that should be compensated by the Brass Trust pursuant to the Plan. The Brass Trust asserted that these claims were Cox Plaintiffs Claims that would have to be asserted against the CPRC.

The parties went through the offer-exchange and mediation phases of the ADR to resolve the claims pursuant to the Plan. These phases were unsuccessful in resolving DuPont’s claims. Following completion of these phases, and pursuant to the Plan, DuPont brought its claims before this Court to be determined through this adversary proceeding.

#### **Summary Judgment Standard**

Motions for summary judgment are authorized by Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). If a summary judgment motion is properly supported, a party opposing the motion may not merely rest upon the contents of its pleadings, but must demonstrate the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (citing FED. R. CIV. P. 56(e)).

Local District Court Rule CV-56 (made applicable to this proceeding by Local Rule of Bankruptcy Procedure 7056) provides that the party moving for summary judgment must include in its motion a “Statement of Material Facts” in a specified format. A party opposing a motion for summary judgment must file a “Statement of Genuine Issues” in response to the movant’s statement of material facts, with specific references to proper summary judgment evidence indicating that a genuine issue of material fact exists.<sup>5</sup> In resolving a summary judgment motion, any material facts claimed by the moving party and supported by admissible evidence are admitted by the non-movant, unless the non-movant timely controverts such material facts with proper summary judgment evidence of its own. The Court will not engage in a comprehensive search for the existence of an undesignated genuine issue of material fact.

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<sup>5</sup> The purpose of this rule is to streamline the resolution of summary judgment motions and to make explicit the parties’ respective obligations with regard to such motions. *See generally, Walldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7<sup>th</sup> Cir. 1994).

## Discussion

### 1. The Movants are not entitled to Summary Judgment Disallowing DuPont's Assigned Claims.

The Movants seek summary judgment that DuPont's Assigned Claims are Cox Plaintiffs Claims which are barred from being asserted against the Brass Trust pursuant to the Plan. The Movants argue that DuPont's Assigned Claims are explicitly included in the Plan's definition of Cox Plaintiffs Claims and that DuPont has failed to provide evidence of a "Qualifying Leak" as defined in the ADR to entitle DuPont to compensation from the Brass Trust. In its opposition to the Motion, DuPont argues that its Assigned Claims should be allowed against the Brass Trust because, *inter alia*, DuPont is explicitly excluded from the Plan's definition of the Cox Class, and DuPont has proven that its Assigned Claims qualify for payment from the Brass Trust.

(i) The Cox Class definition is ambiguous as to whether DuPont's Assigned Claims are Cox Plaintiffs Claims.

The Plan incorporates the Cox Court's definition of the Cox Class. DuPont, by virtue of being a party to the Cioe Litigation, was explicitly defined out of the Cox Class. It is clear from the plain language of the relevant documents that DuPont's Independent Claims are not Cox Plaintiffs Claims. However, inasmuch as the Cox Class definition does not specify whether all claims held by DuPont at the time of class certification are excluded, the definition could reasonably be interpreted to exclude *all* claims held by DuPont (*i.e.*, the Assigned Claims as well as the Independent Claims) or only DuPont's Independent Claims.

If the wording of a contract is clear, but the meaning is reasonably susceptible to more than one interpretation, the language in question is rendered legally ambiguous.

See *Heritage Res., Inc. v. Nationsbank*, 939 S.W.2d 118, 121 (Tex. 1996, reh'g overruled) (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).<sup>6</sup> “When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.” *Coker*, 650 S.W.2d at 394 (citing *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1980)). Here, the Plan’s definition of the Cox Class is ambiguous as to whether DuPont’s Assigned Claims are Cox Plaintiffs Claims. The Court, therefore, will look to the parties’ intent and any other extrinsic evidence necessary to determine whether DuPont’s assigned claims are, by definition, Cox Plaintiffs Claims. See *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 22 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2006, reh'g overruled) (court may consider parties’ interpretations of the contract through extrinsic evidence after determining the contract is ambiguous) (citing *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 283 (Tex. 1996) (per curiam)).

(ii) Genuine issues of material fact exist as to whether DuPont’s Assigned Claims qualify for payment from the Brass Trust.

Appendix I to the Plan sets forth the ADR procedure for the treatment of Plumbing Claims brought against the Brass Trust. Pursuant to Section B(6)(b) of the ADR, “no Plumbing Claim shall become an Allowed Claim pursuant to the ADR ... unless after completion or waiver of the offer-exchange and mediation phases of the ADR, if arbitration is not agreed to by the Claimant and the Trustees, the Bankruptcy

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<sup>6</sup> The Plan functions as a contract between the debtor and the other entities that the Plan affects. *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass)*, 301 F.3d 296, 307 (5<sup>th</sup> Cir. 2002) (citing 8 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, note 14, ¶1142.04[2], at 1142-8 (15<sup>th</sup> ed. rev. 2001)). Plan Article 16.19 explicitly states that Texas state law governs “the construction and implementation of the Plan and any agreements, documents, and instruments executed in connection with the Plan ....” The Court, therefore, looks to Texas law to interpret the substantive issues relating to the Plan’s interpretation. *Camacho v. Texas Workforce Commission*, 445 F.3d 407, 409 (5<sup>th</sup> Cir. 2006) (citation omitted). The Court looks to federal law to determine procedural matters. *Id.*

Court ... enters a Final Order awarding the Claimant an Allowed Claim in such amount as the Claimant may be entitled to under applicable non-bankruptcy law and Section 502 of the Bankruptcy Code.” Section F(5) of the ADR states, in pertinent part, that

[b]ased on its review of the Notice and Demand, the Objections, and the Response, any evidence admitted into the record, and applicable non-bankruptcy law, the Bankruptcy Court may dispose of the Plumbing Claim in whatever manner the Bankruptcy Court determines to be appropriate under the circumstances. In that regard, the Court may (a) conduct a trial on the merits with respect to some or all of the issues raised by the papers, (b) decide the matter exclusively on the basis of the papers filed by the parties, or (c) decline to hear the matter and permit the Claim to be decided in any other forum or tribunal with jurisdiction.

Here, the ADR’s offer-exchange and mediation phases are complete. The parties did not reach an agreement to arbitrate DuPont’s claims. Therefore, pursuant to the ADR, the parties seek a decision from the Court as to whether DuPont’s claims are allowed against the Brass Trust “under applicable non-bankruptcy law and Section 502 of the Bankruptcy Code.” However, the Movants have failed to establish that they are entitled, as a matter of law, to a judgment disallowing DuPont’s Assigned Claims. There are genuine issues of material fact that must be resolved to determine whether DuPont’s Assigned Claims are Cox Plaintiffs Claims that must be asserted against the CPRC, or whether these claims qualify for payment from the Brass Trust.

## 2. DuPont’s Independent Claims

The Movants seek summary judgment disallowing DuPont’s Independent Claims for contractual and implied indemnity. DuPont argues that the Plan creates a contractual right of indemnity for its payment for repairs to PB Systems. DuPont argues, alternatively, that its payment for these repairs gives rise to a common law right of implied indemnity. The Movant denies that the Plan creates a contractual right of

indemnity or that DuPont can prove the elements necessary to recover under a theory of implied indemnity.

The Movants also seek summary judgment disallowing DuPont's Independent Claim for breach of contract. DuPont argues that the Plan is a contract obligating the Movants to pay its claims. The Movants argue that they are in compliance with the Plan's terms and that they have not breached a contract with DuPont simply because they have not paid DuPont's claims.

Finally, the Movants seek summary judgment disallowing DuPont's Independent quantum meruit Claim. DuPont argues that US Brass (and now the Brass Trust) was obligated to reimburse DuPont for a benefit conferred in paying claims to reduce US Brass' legal exposure for failed PB Systems. The Movants argue that it was unaware of the extent of the payments DuPont was making and that any payments were made to reduce DuPont's own exposure.

(i) The Movants are entitled to summary judgment disallowing DuPont's claim for breach of contract.

As noted *supra*, the Plan functions as a contract between the debtor and the other entities that the Plan affects. *In re U.S. Brass*, 301 F.3d at 307 (citation omitted). Also, as noted *supra*, the Plan's construction and interpretation are governed by Texas law. *See* Plan Article 16.9. The Court, therefore, looks to Texas law to interpret the substantive issues relating to the Plan's interpretation. *Camacho*, 445 F.3d at 409. The Court looks to federal law to determine procedural matters. *Id.*

DuPont argues that because the Brass Trust has not paid its claims, the Brass Trust has breached the contract, *i.e.* the Plan. However, the Plan does not simply require the Brass Trust to pay all Plumbing Claims. Rather, the Plan provides a process for the

allowance or disallowance of alleged Plumbing Claims against the Brass Trust. The Plan provides that if the ADR is not successful in resolving a claim, the Court may finally determine whether the claim is allowed against the Brass Trust. The parties are now before this Court as the Plan contemplates. The mere fact that the Movants have not allowed and paid DuPont's claims does not constitute a breach of contract. Summary judgment in favor of the Movants disallowing DuPont's claim for breach of contract against the Brass Trust is, therefore, appropriate.

(ii) The Movants are entitled to summary judgment disallowing DuPont's claim for contractual indemnity.

DuPont argues that the Plan creates a contractual right of indemnity in DuPont's favor. DuPont argues that the Plan's inclusion of certain types of indemnity claims in the definition of Plumbing Claim creates a contractual right of indemnification for it against the Brass Trust.

The Plan's definition of the term "Plumbing Claim" simply identifies the types of claims that qualify as Plumbing Claims. Certain claims for indemnification that exist independent of the Plan may qualify as Plumbing Claims. The claimants holding these indemnification claims may then assert them against the Brass Trust. The Plan, however, does not create a new and separate contractual indemnity obligation on the Brass Trust's part. The Court reaches this conclusion as a matter of law based on a plain reading of the Plan. Summary judgment in favor of the Movants disallowing DuPont's claim for contractual indemnity against the Brass Trust is, therefore, appropriate.

(iii) The Movants are entitled to summary judgment disallowing DuPont's claim for implied indemnity.

DuPont argues that it has an implied common law right of indemnity against the Brass Trust even if the Court finds that there is no contractual right of indemnity. "Under the common law, a person is entitled to indemnity for products liability only if his liability is entirely vicarious<sup>8</sup> and he is not himself independently culpable."<sup>9</sup> "The indemnitor must be liable or potentially liable for the product defect,<sup>10</sup> and his liability must be adjudicated or admitted."<sup>11</sup>

It is undisputed that DuPont did not supply material to US Brass. DuPont was not a retailer or distributor of US Brass' PB Systems. There is no vicarious liability as there would be in the case of an innocent retailer of US Brass' manufactured goods. There has been no adjudication of any liability against DuPont with regard to its claim against the Movants. The claim is not based on any amount paid to satisfy a judgment based on tortious conduct by US Brass.

DuPont chose to pay a percentage of the amounts the PCG paid to repair damage from PB System leaks. DuPont chose to do this regardless of whether DuPont's product caused the damage. DuPont was not compelled to do this. In fact, DuPont was originally only paying a percentage of these amounts based on whether its product could reasonably have been the cause of the damage involved. As DuPont's counsel stated at the hearing on the Motion, "DuPont was paying claims it did not have to pay." The Court finds, as a matter of law, that DuPont does not have an implied right of indemnity. Summary judgment in favor of the Movants disallowing DuPont's claim for implied indemnity against the Brass Trust is, therefore, appropriate.

(iv) The Movants are not entitled to summary judgment disallowing DuPont's quantum meruit claim.

The Plan's definition of the term "Plumbing Claim" is very broad and includes any cause of action "relating, directly or indirectly, to a Brass Polybutylene System and arising or allegedly arising, directly or indirectly, in whole or in part, from acts or omissions of US Brass or any other Person prior to the Effective Date ...." DuPont's quantum meruit claim falls within this broad definition. Therefore, DuPont may assert its quantum meruit claim against the Brass Trust.

To recover under a theory of quantum meruit, DuPont must prove that 1) valuable services were rendered or material furnished; 2) for the person sought to be charged; 3) which services or materials were accepted by the person sought to be charged; and 4) under circumstances which would have normally notified such person that the plaintiff was expecting to be paid. *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990) (citations omitted).<sup>7</sup>

DuPont obtained releases for itself and covenants not to sue US Brass (among other parties) from tens of thousands of PB Systems owners in exchange for funding repairs to these owners' defective PB Systems. DuPont argues that these payments were valuable and made for US Brass' benefit. DuPont argues that these purchasers would have causes of action against US Brass and that US Brass would have been exposed to extensive additional liability if DuPont had not paid for the repairs in advance of any litigation. Finally, DuPont argues that US Brass accepted the benefit of these payments and was fully aware that DuPont expected to be reimbursed.

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<sup>7</sup> As noted *supra*, Plan Article 16.19 provides that Texas law shall govern the implementation of the Plan and any agreements, documents or instruments executed in connection with the Plan. This extends to the allowance and disallowance of claims under the Plan. Therefore, the Court will apply Texas law to DuPont's quantum meruit claim for payment from the Brass Trust pursuant to the Plan.

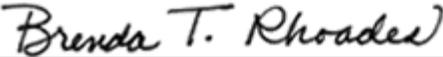
In response, the Movants argue that the payments were made for DuPont's benefit to shield DuPont from its own potential liability. The Movants also argue that there was no benefit conferred because the Brass Trust would have ended up paying the same amount(s) pursuant to the Plan that it would have if the payments had not been made. Finally, the Movants argue that US Brass was unaware of the extent of the payments or that DuPont expected to be reimbursed.

The Court concludes that the Movants have failed to establish that they are entitled to judgment as a matter of law regarding DuPont's quantum meruit claim. Genuine issues of material fact exist regarding such issues as (i) whether the payments in question were made for or on behalf of US Brass, (ii) whether, and how much, US Brass benefited from DuPont's payments, (iii) whether US Brass accepted any benefit from these payments, and (iv) whether US Brass knew or should have known that DuPont expected to be reimbursed for these payments. Summary judgment in favor of the Movants on DuPont's quantum meruit claim is, therefore, inappropriate.

### **Conclusion**

The Movants are entitled to summary judgment disallowing DuPont's Independent Claims against the Brass Trust for breach of contract, contractual indemnity, and implied indemnity. The Movants are not entitled to summary judgment disallowing the DuPont's Assigned Claims or disallowing DuPont's Independent Claim based on quantum meruit. An Order consistent with this Memorandum Opinion will be entered separately.

Signed on 3/30/2007

 SR  
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HONORABLE BRENDA T. RHOADES,  
UNITED STATES BANKRUPTCY JUDGE