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S211645

IN THE SUPREME COURT OF CALIFORNIA

J.R. MARKETING, LLC, et al.,
Cross-Defendants and Respondents,

v.

HARTFORD CASUALTY INSURANCE COMPANY,
Cross-Complainant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NO. A133750

MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID M. AXELRAD; [PROPOSED] ORDER

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MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452, subdivision (d)(2), and 459, and California Rules of Court, rule 8.252, Hartford Casualty Insurance Company (Hartford) hereby moves that this Court take judicial notice of a trial court document recently filed in this case (San Francisco Superior Court, Case No. CGC-06-449220). In particular, this motion seeks judicial notice of a trial court Statement of Decision that addresses the precise issue now before this court on Hartford's petition for review. A true and correct copy of the statement of decision is attached to the accompanying Declaration of David M. Axelrad as exhibit A.

This motion for judicial notice is based upon this motion, the attached memorandum of points and authorities, the attached Declaration of David M. Axelrad and exhibit thereto, and the petition for review on file with this Court.

July 3, 2013

HORVITZ & LEVY LLP
DAVID M. AXELRAD
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CATHERINE L. RIVARD

By: _____
David M. Axelrad

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HARTFORD CASUALTY INSURANCE COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES

Hartford appealed from a judgment of dismissal entered after the trial court sustained the demurrer of Squire Sanders & Dempsey (Squire Sanders) to Hartford's cross-complaint for reimbursement of attorneys' fees and costs. At issue is whether Hartford has a direct right of action against Squire Sanders for reimbursement of excessive attorney fees and costs it paid to Squire Sanders in the course of defending Hartford's insureds as independent (*Cumis*) counsel. The Court of Appeal held that where the provisions of Civil Code section 2860 regulating *Cumis* counsel do not apply and the insurer's only remedy for unreasonable or excessive attorney fees is an action for reimbursement brought after the close of the underlying litigation, the insurer may seek reimbursement *only from its insureds*. On June 26, 2013, Hartford filed a petition for review in this Court, seeking review of the Court of Appeal's decision.

While the appeal from the dismissal of Squire Sanders was pending, the underlying reimbursement action against the insureds went to trial, and the trial court has now issued a statement of decision, ordering the insureds to reimburse Hartford over $5 million. The statement of decision is directly relevant to the issues raised by Hartford's petition for review to this Court as it apprises this Court of the current status of the case, and addresses the issue presented by Hartford's petition–whether the insureds are the proper party to bear the cost of their *Cumis* counsel's excessive overbilling. (See Axelrad Decl. Exh. A, pp. 21-22 ["This Court is

concerned about the effect of the decision on the insured, who will be required to pay this judgment. The Court did not find the insured were sophisticated business professionals. They were operating a 'mom and pop' type of business, not a major corporation. Nor were the insured sophisticated users of attorney services. The Court is not sure that the insured had the ability or understood how to review the attorney fee bills they were receiving to determine if the fees and costs were reasonable or necessary. The Court doubts these bills were ever reviewed by the insured with the thought in mind that they actually might have to pay the bills. The testimony at trial clearly showed they did not have the financial ability to pay their own attorneys . . . [¶] . . . [¶] Without the financial ability to pay this Court's order to reimburse Hartford, the insured are being placed in the difficult position of having to ask their attorneys to pay the judgment or possibly filing for bankruptcy. [¶] However, the Court is bound by the Appellate Court ruling finding that it is the insured, not their counsel, who must reimburse Hartford for any fees found to be unreasonable or unnecessary. ([*J.R. Marketing, L.L.C. v. Hartford Casualty Insurance Company* (2013) 216 Cal.App.4th 1444.])"].)

The Evidence Code provides that this court may take judicial notice of the records of any court of this state or of any other state's court. (See Evid. Code, § 452, subd. (d) ["Judicial notice may be taken of the following . . . [¶] . . . [¶] (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States"].) The statement of decision qualifies as a court record and is subject to judicial notice. (See *Duggal v. G.E.*

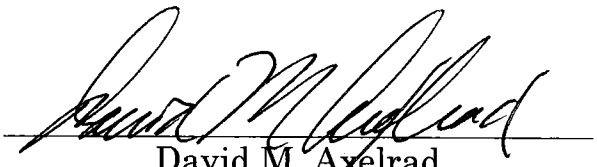
Capital Communications Services, Inc. (2000) 81 Cal.App.4th 81, 86 [appellate court may take judicial notice of the records of a California court]; *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914 [noting that a court may take judicial notice of the existence of documents in a court file].)

CONCLUSION

For the foregoing reasons, this Court should grant the motion for judicial notice.

July 3, 2013

HORVITZ & LEVY LLP
DAVID M. AXELRAD
ANDREA AMBROSE LOBATO
MENDES & MOUNT, LLP
DEAN B. HERMAN
CATHERINE L. RIVARD

By: 
David M. Axelrad

Attorneys for Cross-Complainant and Appellant
HARTFORD CASUALTY INSURANCE COMPANY

DECLARATION OF DAVID M. AXELRAD

I, David M. Axelrad, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Horvitz & Levy LLP, attorneys of record for Hartford Casualty Insurance Company. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Attached as Exhibit A is a true and correct copy of the Statement of Decision Following Phase II of Defendant and Cross-Complainant's Cross-Complaint for Reimbursement of Attorney Fees and Costs and Order on Plaintiffs and Cross-Defendants' Motion for Judgment and Motion to Strike.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed July 3, 2013, at Encino, California.

David M. Axelrad

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

J.R. MARKETING, LLC, et al., Plaintiffs, v. HARTFORD CASUALTY INSURANCE COMPANY, et al., Defendants.	Case No. CGC-06-449220 STATEMENT OF DECISION FOLLOWING TRIAL PHASE II ON DEFENDANT AND CROSS-COMPLAINANT'S CROSS-COMPLAINT FOR REIMBURSEMENT OF ATTORNEY FEES AND COSTS AND ORDER ON PLAINTIFFS AND CROSS-DEFENDANTS' MOTION FOR JUDGMENT AND MOTION TO STRIKE

The Court held a bench trial from February 28, 2013 to March 11, 2013 on Phase II of this matter, which concerns Defendant and Cross-Complainant Hartford Casualty Insurance Company's ("Hartford") cross-claim for reimbursement from Plaintiffs and Cross-Defendants J.R. Marketing, LLC, Jane E. Ratto, Robert E. Ratto, Penelope A. Kane, Lenore DeMartinis, and Germain

DeMartinis ("J.R. Marketing").[1] After considering the evidence, arguments, and applicable law, the Court holds that Hartford is entitled to reimbursement in the amount of $5,206,730.00 for J.R. Marketing's unreasonable and unnecessary fees. Hartford is not entitled to reimbursement for any allegedly uncovered claims. In making this determination, the Court denies J.R. Marketing's Motion for Judgment and Motion to Strike.

BACKGROUND

This case arises from Harford's duty to defend J.R. Marketing in a Marin County Superior Court action. The only remaining matter before this Court is Phase II of the action, which concerns Hartford's claim for reimbursement of the attorney fees that it was adjudicated to pay on behalf of J.R. Marketing in the Marin case.

Hartford issued a commercial general liability policy in 2005 to J.R. Marketing. Pursuant to this policy, Hartford promised to defend and indemnify claims—subject to various exclusions of coverage—against the named insured for certain business-related damages. In September 2005, several individuals, including Meir Avganim, sued J.R. Marketing for intentional misrepresentation, breach of fiduciary duty, unfair competition, restraint of trade, defamation, interference with business relationships, conversion, accounting, mismanagement and conspiracy in the Superior Court of California, County of Marin (the "Marin action"). Soon after, J.R. Marketing tendered the Marin action to Hartford. At the beginning of 2006, Hartford responded to the tender by denying coverage.

On February 3, 2006, J.R. Marketing consequently filed this lawsuit for breach of contract and bad faith against Hartford in light of the parties' insurance agreement. J.R. Marketing moved for summary adjudication on Hartford's duty to defend and J.R. Marketing's right to independent counsel. On July 26, 2006, this Court granted the motion in full. Hartford then began paying for some of J.R. Marketing's defense costs in the Marin action. However, Hartford did not pay for J.R. Marketing's full defense costs in the Marin action. As a result, J.R. Marketing petitioned this Court for enforcement of the duty to defend order, and the Court issued another order, reiterating

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[1] In referring to "J.R. Marketing," the Court would like to offer a point of clarification as from whom Hartford can actually seek reimbursement. Specifically, Hartford can seek reimbursement from J.R. Marketing, the Rattos, the DeMartinis, and Kane.

Hartford specifically filed its cross-claim for reimbursement against J.R. Marketing, the Rattos, the DeMartinis, Kane, Scott Harrington, and Squire Sanders LLP—Plaintiffs' counsel. Plaintiffs demurred, which the Court sustained, effectively dismissing Squire Sanders and Harrington from the cross-complaint. On May 17, 2013, the Court of Appeal affirmed this order dismissing the reimbursement claim against Squire Sanders and Harrington. (*J.R. Marketing, L.L.C. v. Hartford Cas. Ins. Co.* (May 17, 2013, A133750) _Cal.App.4th_ [2013 WL 2145094] [nonpub. op.].) Accordingly, Hartford's cross-complaint for reimbursement only lies against J.R. Marketing, the Rattos, the DeMartinis, and Kane.

Hartford's duty to defend. Specifically, the Court determined that Hartford must reimburse J.R. Marketing for all previous defense costs of the Marin action and must pay all future costs. The Court noted that Hartford could challenge the reasonableness of such attorney fees by way of reimbursement after the resolution of the Marin action. The Court of Appeal affirmed this decision on November 30, 2007.

In July 2011, Hartford filed its first amended cross-complaint seeking reimbursement of defense fees from J.R. Marketing. The cross-claim for reimbursement proceeded as the Phase II bench trial in this matter from February 28, 2013 to March 11, 2013. At trial, the following witnesses testified: (1) Ethan Miller ("Miller")—J.R. Marketing's lead counsel from Squire Sanders in the Marin action; (2) Teri Catterson—the Chief Financial Officer for Nossaman LLP, counsel for the opposing party in the Marin action; (3) William Norman ("Norman")—Hartford's expert witness, who assessed the reasonableness of Squire Sanders' attorney fees in the Marin action; (4) Robert Ratto—one of the Plaintiffs; and (5) John O'Connor ("O'Connor")—J.R. Marketing's expert witness, who also assessed the reasonableness of Squire Sanders' attorney fees in the Marin action. Following the conclusion of the case-in-chief, the Court instructed the parties to submit their closing arguments by written brief. Hartford filed its post-trial brief on April 18, 2013. J.R. Marketing submitted its post-trial brief on May 23, 2013. In addition to filing its closing argument, J.R. Marketing also filed two other motions: (1) Motion for Judgment Regarding Hartford's Cross-Claim for Reimbursement; and (2) Motion to Strike Hartford's Appendix and Related Portions of its Post-Trial Memorandum. After receiving the parties' closing arguments and J.R. Marketing's two motions, the Court now issues its judgment regarding Phase II of this case.

DISCUSSION

I. J.R. Marketing's Motion for Judgment and Motion to Strike

Before discussing its decision on Hartford's cross-complaint for reimbursement, the Court considers J.R. Marketing's Motion for Judgment and Motion to Strike as they may impact the Court's analysis in its ultimate decision on Hartford's claim. For the reasons set forth below, the Court denies these motions and directs the parties to its decision in the second section of this order regarding the Phase II trial as this decision addresses and resolves all of the parties' contentions.

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Motion for Judgment

A party may move for judgment in its favor as to a cross-complaint after the opposing party has completed presentation of evidence in a nonjury trial. (Code Civ. Proc., § 631.8(a).) The judge, sitting as the trier of fact, weighs the evidence. (*Id.*) The court must consider all evidence received. (*Id.*) In weighing the evidence, the trial court may exercise its prerogatives as a fact finder by evaluating credibility and by drawing conclusions at odds with expert opinion. (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 550.)

Here, J.R. Marketing argues that Hartford failed to sustain its burden in support of a cognizable claim for reimbursement. It is J.R. Marketing's position that Hartford has not shown that it is entitled to reimbursement—it has not challenged J.R. Marketing's attorney fees with sufficient specificity to overcome the presumption that the fees are reasonable and necessary. The Court disagrees. As discussed in great detail in the second section of this decision, Hartford did meet its burden in showing that some of J.R. Marketing's fees and costs were unreasonable or unnecessary. Further, the Court finds that in light of the posture of the case, it is more appropriate to substantively resolve Hartford's cross-complaint for reimbursement by issuing a thorough, substantive statement of decision regarding the Phase II trial rather than ruling on J.R. Marketing's motion. Accordingly, J.R. Marketing's Motion for Judgment is denied and the Court directs the parties to its decision below.

Motion to Strike

Any party may move to strike the pleading or any portion of it. (Code Civ. Proc., § 435; see also Lambden et al., Cal. Civil Practice Procedure (2013) Responsive Procedures, ch. 10, § 10:107.) The motion may be made to strike out any irrelevant, false, or improper matter inserted in the pleading, or to strike out all or any part of the pleading which is not drawn in conformity with the laws of California, a court rule, or an order of the court. (*Id.*) For example, a party can move to strike a filing as sanctions against a party for discovery abuses. (Code Civ. Proc., § 2023.030.)

Relying on the law regarding discovery sanctions, J.R. Marketing argues that the Court should strike portions of Hartford's post-trial memorandum as well as the appendix to its memorandum. Specifically, J.R. Marketing attacks Hartford's reference to particular billing entries and cost itemizations in support of its claim for reimbursement. J.R. Marketing argues that Hartford refused to identify during discovery and trial the specific billing entries that it now highlights and relies upon in its post-trial memorandum. Prior to this post-trial submission, J.R. Marketing contends

that Hartford simply attacked J.R. Marketing's attorney fees as generally unreasonable. But now, Hartford attacks specific billing entries. As a result, J.R. Marketing asks the Court to strike this information. J.R. Marketing believes that this information amounts to a new, post-trial expert report. And, to allow Hartford to essentially re-try its reimbursement claim on an entirely new theory and analysis after the close of evidence would be extremely prejudicial to J.R. Marketing.

After considering the parties' arguments and how discovery unfolded in this case, the Court finds that J.R. Marketing's contentions have merit. Nevertheless, the Court denies its Motion to Strike. The Court agrees that Hartford never disclosed any line-by-line challenges to Squire Sanders' billing entries during the discovery process or trial. In fact, Hartford attempted to elicit such information from Norman during trial, and the Court prevented Hartford from doing so because this information was not elicited during Norman's deposition. Yet, in its post-trial brief, this is the precise information that Hartford provides.

While it may seem appropriate to strike such information, doing so would be improper and irrelevant in this instance. There are two main reasons. First, during trial all of Squire Sanders' bills were in fact entered into evidence. Thus, contrary to what J.R. Marketing argues, this is not new evidence. It has simply been manipulated by Hartford in a new fashion. While Hartford's new evaluation may pose some issues, the Court further recognizes that it has the power and authority to consider all of the evidence presented at trial—including Squire Sanders' bills—in evaluating the reasonableness of Squire Sanders' charges and ultimately determining the amount of reimbursement to which Hartford is entitled. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [The "experienced trial judge is the best judge of the value of professional services rendered in his court."].) Second, the Court actually directed Hartford to submit this more thorough explanation of its challenge to provide the Court with a better backdrop of its claim. Thus, striking this information would fly in the face of a previous Court order.

Although the Court does not strike the information in Hartford's post-trial submission, the Court points out that it does not rely on the information in making its ultimate determination as to what amount of money, if any, to which Hartford is entitled to reimbursement. The Court is persuaded by J.R. Marketing's argument that considering such information would be prejudicial to J.R. Marketing. Accordingly, while the Court finds the information in Hartford's post-trial memorandum somewhat helpful, it ultimately limits itself to considering the evidence presented at trial.

II. Trial Phase II Decision

The legal standard in a case for an insurer's reimbursement claim when it has breached its duty to defend

The California Supreme Court has considered and made clear the scope of an insurer's duty to defend as well as the extent of its right to seek reimbursement when some, but not all, of the allegations made against an insured are potentially covered. (*State v. Pacific Indem. Co.* (1998) 63 Cal.App.4th 1535, 1545-46 [referencing *Buss v. Superior Court* (1997) 16 Cal.4th 35 and *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38].)

An insurance policy is a contract between an insurer and an insured—the insurer making promises, and the insured paying premiums, the one in consideration for the other, against the risk of loss. (*Id.* at 1546.) The insurer's promises require it both to indemnify and to defend its insured. (*Id.*) By definition, the duty entails the rendering of a service, viz., the mounting and funding of a defense (*Aerojet-General Corp.*, 17 Cal.4th at 58.) As such, it requires the undertaking of reasonable and necessary efforts for that purpose. (*Id.*) The duty to defend runs to claims "merely potentially covered." (*Pacific Indem. Co.*, 63 Cal.App.4th at 1546.) It arises when tender is made and obligates the insurer, unless no part of any claim is potentially covered, to fund a defense to minimize the insured's liability. (*Id.*) In a "mixed" action, in which some of the claims are at least potentially covered or in which parts of a claim are potentially covered, and others are not, the insurer has a duty to defend the entire action. (*Id.* at 1546-47.) The justification for this rule is prophylactic rather than contractual—to provide a meaningful defense, the insurer must defend entirely. (*Id.*)

Generally, the insured, as the party seeking relief, carries the burden of proving the amount of costs incurred in defense of an action. (*Id.* at 1548.) By contrast, in the exceptional case, wherein the insurer has breached its duty to defend, it is the insured that must carry the burden of proof on the existence and amount of the expenses, which are then presumed to be reasonable and necessary as defense costs, and it is the insurer that must carry the burden of proof that they are in fact unreasonable or unnecessary. (*Id.* at 1548-49.) The burden of proof by a preponderance of the evidence. (*Aerojet-General Corp.*, 17 Cal.4th at 64; see Evid. Code, § 115.) The "preponderance of the evidence" standard of proof requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. (*In re Michael G.* (1998) 63 Cal.App.4th 700.) Specifically, the insurer must show that the insured's defense costs are objectively unreasonable or unnecessary. (*Aerojet-General Corp.*, 17 Cal.4th at 62.) What matters is whether the expenses would be incurred

by a reasonable insured under the same circumstances. (*Id.* at 63.) Thus, the insured has the burden of proving the existence of the amount of the expense, and the insurer has the burden of showing that these costs are unreasonable. (*Pacific Indem. Co.*, 63 Cal.App.4th at 1549.)

An insurer may also seek reimbursement for claims that are "not even potentially covered." (*Buss*, 16 Cal.4th at 50.)[2] Specifically, an insurer may obtain reimbursement only for defense costs that can be allocated solely to the claims that are not even potentially covered. (*Id.* at 57.) To do that, it carries the burden of proof as to these costs by a preponderance of the evidence. (*Id.* See also *Aerojet-General Corp.*, 17 Cal.4th at 69.) And to do that, as the court said in *Hogan*, the insurer must satisfy a heavy burden:

> any precise allocation of expenses in this context would be extremely difficult and, if ever feasible, could be made only **if the insurer produces undeniable evidence of the allocability of specific expenses**; the insurer having breached its contract to defend should be charged with a heavy burden of proof of even partial freedom from liability for harm to the insured which ostensibly flowed from the breach.

(*Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 564 [emphasis added].) Thus, the insurer will probably pursue the matter only in apparently exceptional cases. (*Buss*, 16 Cal.4th at 58.)

Hartford is entitled to reimbursement in the amount of $5,206,730.00 for J.R. Marketing's unreasonable and unnecessary fees.

1. Hartford's burden of proof

The Court begins by identifying the posture of the case as doing so sheds light on Hartford's burden in seeking reimbursement for J.R. Marketing's defense costs in the Marin action. After Phase I of this matter, it was determined that Hartford breached its duty to defend J.R. Marketing in the Marin action but there was no finding of bad faith. As a result, the defense costs incurred by J.R. Marketing in that action are presumed to be reasonable and necessary, and Hartford carries the

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[2] The Court of Appeal decision issued on May 17, 2013, confirms that Hartford may seek reimbursement for both unreasonable fees and those claims not covered. The decision states in relevant part:

> Here, it is the insured cross defendants—rather than independent counsel—that the insurer should look to for reimbursement if it believes the fees were incurred to defend claims that were not covered by the insurer's policies or that the insured agreed to pay Squire more than was reasonable for the services that Squire performed.

(*J.R. Marketing, L.L.C.*, 2013 WL 2145094, *7.)

burden to demonstrate that they are in fact unreasonable or unnecessary. (*Pacific Indem. Co.*, 63 Cal.App.4th at 1548-49.)

Here, there is no dispute between the parties about the amount of costs incurred by J.R. Marketing in the Marin action. J.R. Marketing's monthly bills from the Marin action, stemming from February 2006 to February 2010 and totaling over $13 million, were entered into evidence. (J.R. Marketing, et al. v. Hartford Casualty Ins. Co., et al. [See Hartford's Trial Exhibits 81 and 192, Super Ct. S.F. City and County, 2013, No. 449220.].) Additionally, Miller testified about the work and that the costs all related to the Marin action. Accordingly, the Court presumes that J.R. Marketing's fees and costs were reasonable and necessary and the burden falls on Hartford to demonstrate that J.R. Marketing's Marin action costs were unreasonable or unnecessary. (*Id.* at 1549.)

2. The unreasonable and unnecessary fees and costs for which Hartford is entitled to be reimbursed.

After considering the evidence, testimony, and arguments presented at trial, the Court finds that Hartford met its burden in showing that some of J.R. Marketing's fees and costs were unreasonable or unnecessary. At the Phase II trial, Hartford called Miller as an adverse witness. Hartford questioned Miller at-length about the reasonableness of Squire Sanders' charges. In particular, Hartford examined him in regards to the staffing of the case, discovery, research, motions, trial, and other work related to the litigation. Hartford questioned Miller about specific expenses and categories of costs and also entered into evidence bills and other exhibits, confirming these expenses and breakdown of the expenses—particularly Exhibit 81. There were numerous instances in which Miller admitted that fees and costs may have been unreasonable or unnecessary, including but not limited to the staffing of the case, duplicative research and other work, clerical work, and travel. He noted that he considered such facts as if attorneys and staff billed hours for an entire day or block billed as such details may signify unreasonable billing. Ultimately, Miller wrote off two percent of the total bills charged, but he admitted that he may not have cut all of the expenses falling into areas that he believed should be cut. Additionally, the parties' experts—Norman[3] and O'Connor—both testified at trial. Their testimony further confirmed the range of the reasonable value of litigating the

[3] The Court uses this opportunity to clarify its decision on J.R. Marketing's Motion to Strike Norman's testimony that it raised during trial. Specifically, the Court granted in part and denied in part the motion. The Court struck Norman from testifying about a line-by-line analysis of Squire Sanders' bills as such information was never disclosed by Hartford during discovery or during Norman's testimony. The Court permitted Norman to testify about the range of reasonable fees for the case as well as the value of particular categories of work.

Marin action as well as the reasonableness and necessity of particular expenses and categories of expenses. J.R. Marketing's argument that Hartford failed to satisfy its burden overlooks all of this testimony and evidence that came in at trial. As a result, the Court finds J.R. Marketing's position unpersuasive. The Court moves on to examine Hartford's particular challenges to Squire Sanders' fees and costs to underscore the error in J.R. Marketing's position and to demonstrate that Hartford is in fact entitled to reimbursement in the amount of $5,206,730.00 for J.R. Marketing's unreasonable and unnecessary fees.

Before delving into the specific areas and categories of unreasonable and unnecessary fees, the Court takes note of the experts' valuation of reasonable attorney fees and costs for the Marin action. Norman, Hartford's expert on legal fees, testified that reasonable fees and disbursements for the Marin action were in the range of $1.8 to $3.3 million—not the over $13 million actually expended in this case. Norman is an attorney from the Bay Area, who has practiced for over forty years and has litigated close to thirty actions that are similar to the Marin action. He reviewed the case file for the Marin action in-depth: examining the discovery, pleadings, motions, research, other related actions, and Squire Sanders' actual bills. Norman concluded that many of the charges were unreasonable and unnecessary. O'Connor, J.R. Marketing's fee and cost expert who has comparable experience to Norman, likewise provided an opinion that the litigation could have been defended for about $8 million and that he had only billed $13 million in similar cases in rare situations. Thus, there is some agreement between the experts that the Marin action could have been reasonably been litigated for less. Furthermore, evidence about the fees and costs incurred by the opposing party in the Marin action was also offered into evidence. Although the opposing party's fee arrangement was unclear, it was apparent that Nossaman (which is notorious for overbilling in the community) charged the opposing party only $6 million—about half of the fees and costs incurred by Squire Sanders.[4] The Court finds all of this information very useful. Although it does not dictate that the Court must definitely order J.R. Marketing to reimburse Hartford for a particular sum, the experts' opinions and opposing party's costs reveal that Hartford's request for the reimbursement of unreasonable and unnecessary fees is substantiated.

[4] Although the Court highlights the opposing party's fees and costs in the Marin action, the Court does appreciate that comparing the parties' fees is not determinative of the reasonableness of one side's costs—even if J.R. Marketing incurred costs that were nearly double those of its opposing party (For reference, see *Edwards v. City of Colfax* (E.D. Cal., Feb. 15, 2011, CIV S 07-2153 GEB EF) 2011 WL 572151 [nonpub. op.].)

With this backdrop of the possible value of defending the Marin action, the Court now considers Hartford's specific challenges.

A. Hartford is entitled to $5,023,652.50 in reimbursement for the unreasonable number of Squire Sanders' attorneys and employees who worked on the Marin action, and the unnecessary time spent on the coordination of these individuals.

Hartford contends that Squire Sanders' staffing of the case was too great, making its defense of the Marin action inefficient and largely duplicative. It also argues that Squire Sanders spent an unnecessary amount of time on coordinating all of the attorneys and staff members, who worked on the case. The Court finds these arguments compelling and concludes that Hartford met its burden in demonstrating that the number of Squire Sanders' attorneys and employees, who worked on the Marin action, was far too great and therefore unnecessary. Likewise, an unreasonable amount of time was spent on coordinating all of these individuals. In light of these findings, the Court further holds that Hartford should be reimbursed for the costs it paid for the fees billed by these additional, unnecessary attorneys and staff. In particular, Hartford is entitled to reimbursement in the amount of $4,690,236.50.[5] Hartford is also entitled to be reimbursed in the amount of $63,416.00 for the unnecessary time that Squire Sanders spent coordinating all of these individuals.

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[5] In addition to arguing that too many people worked on the Marin action in the Squire Sanders' firm, Hartford also requests that the Court cut the amount of the rates charged by Squire Sanders. It is Hartford's position that Squire Sanders' rates were well in excess of the rates charged by comparable attorneys and firms in both Marin County as well as San Francisco generally. Thus, the Court should reduce the rates charged. Further, Hartford attacks Squire Sanders' rate increases—during its defense of the Marin action, Squire Sanders raised its rates from those outlined in its initial engagement letter to J.R. Marketing.

In light of the significant cuts that this Court is making to the number of people working on the Marin action, the Court is not also adjusting the rates that Squire Sanders charged. The Court finds that J.R. Marketing and Squire Sanders had the right to contract with each other for the defense of the Marin action at rates they deemed reasonable, and Hartford cannot challenge these rates at this juncture of the proceedings. (See *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196 [When an insurer wrongfully refuses to defend, the insured is relieved of its obligation to allow the insurer to manage the litigation and may proceed in whatever manner is deemed appropriate.]; *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1233 [An insurer that wrongfully refuses to defend the insured forfeits its right to control the defense, including its rights to select defense counsel and litigation strategy.].) In fact, Robert Ratto even testified at trial on behalf of J.R. Marketing regarding Squire Sanders' rates. He stated that he received and read Squire Sanders' engagement letters and found the rates reasonable, particularly because of the issues involved in the Marin action and how litigation proceeded.

Similarly, the Court is not going to order J.R. Marketing to reimburse Hartford for Squire Sanders' staffing at and work on the trial, hearings, or other work. Hartford argues that many of these activities and events were overstaffed. By cutting the number of people who generally worked on the case, the Court's decision necessarily encompasses these other challenges by Hartford. As a result, the Court finds it unnecessary and improper to make additional cuts to the costs incurred in the defense of the Marin action.

Several California cases discuss the effective and reasonable staffing of a case. Specifically, inefficient or duplicative efforts—also known as padding—are not subject to compensation. (*Ketchum*, 24 Cal.4th at 1132.) Inefficiency and duplicative efforts become more of an issue in a case that is overly staffed and poorly coordinated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1326.) In fact, in instances of overstaffing, law firms may unreasonably bill for coordination. (*Id.*) When too many attorneys and employees are working on a case, they expend more time telephoning, conferencing, and e-mailing each other than on identifiable legal research. (*Id.*)

Here, Hartford attacks the staffing of J.R. Marketing's defense in the Marin action in two ways. First, Hartford points out that simply far too many people worked on the litigation—over eighty attorneys and other support staff worked on the case through its lifetime. At trial, Norman testified that he would have staffed the case much differently, with far fewer attorneys and staff. In particular, he noted that he would have likely only assigned three to five attorneys to the case—one seasoned trial partner and a couple of associates. Additionally, one or two paralegals should have assisted. J.R. Marketing's trial testimony actually supports Norman's expert conclusions about staffing. Miller testified that he and partner Rodney Patula ("Patula") were the main partners and attorneys, who worked on the Marin action. Miller even admitted that at some points of the litigation, some associates may have been working on the same research and issues. J.R. Marketing's expert, O'Connor, offered similar testimony at trial. Specifically, he highlighted that Squire Sanders had five main people working on the Marin action. J.R. Marketing stressed this fact about the five-member "core team" in its post-trial brief—Squire Sanders could effectively defend the Marin action with two senior partners (Miller and Patula), some associate attorneys (including Barry Brown), and a paralegal (including John Belfiore ("Belfiore")).

Second, Hartford argues that because of the significant number of people working on the Marin action, Squire Sanders wasted a considerable amount of billed time strategizing about staffing and coordinating its staff. In fact, team meetings—whether by telephone or in person—were frequent. Norman's trial testimony confirms these arguments. Norman pointed out that Squire Sanders charged nearly $300,000 for about forty-five meetings at which three to seven people strategized about staffing. Norman opined that this was very inefficient and that Squire Sanders should have billed a much smaller percentage of fees. Norman further commented that the lead counsel on the case—Miller—should have better commanded the case. Even, O'Connor testified that Miller had less experience than Patula.

The Court concludes that both of Hartford's attacks have merit and justify significant reimbursement. The Court finds that Squire Sanders' staffing and coordination of its staff in the Marin action was unreasonable. The Court appreciates that the law limits an insurer's ability to manage litigation when it breaches it duty to defend. (*Eigner*, 57 Cal.App.4th at 196; *Stalberg*, 230 Cal.App.3d at 1223 [An insurer that wrongfully refuses to defend the insured forfeits its right to control the defense, including its right to select defense counsel and litigation strategy.].) However, the Court also recognizes that "[w]hile *Cumis* may prohibit an insurer from dictating the tactics of litigation, it does not delegate to *Cumis* counsel a meal ticket immunized from judicial review for reasonableness." (*United Pacific Ins. Co. v. Hall* (1988) 199 Cal.App.3d 551, 557.) Here, Hartford has clearly met its burden in demonstrating that Squire Sanders is not immune from judicial review in the staffing and coordination of the Marin action.

Accordingly, the Court finds that Hartford is entitled to the following reimbursements. First, the Court cuts the number of people who worked on the Marin action. Relying on the experts' testimony, Squire Sanders' own admissions, and the Court's expertise of litigation staffing, the Court concludes that Squire Sanders' team should have been limited to four or five people per month—two partners, one or two associates, and one paralegal. The Court further finds that the following people were the primary attorneys and staff members, who worked on the litigation: Miller, Patula, Brown, and Catherine Randall ("Randall"). Thus, the Court holds that Squire Sanders should have limited its fees and costs to those charges by these individuals. However, the Court recognizes that all of these attorneys and paralegal may not have worked on the case every month from February 2006 through February 2010. Accordingly, the Court accounts for their absences and considers the costs billed by other individuals in similarly situated positions. For example, during the months that Patula was not working on the case, the Court includes the fees billed by Partner James Smith. For the months in which Randall did not work on the case, the Court includes the fees billed by Laura Beall, John Martin, Belfiore, or Kathleen Doyle. For the months in which only a couple of attorneys were working, the Court also includes Associate Ryan Polk's billed time.

Based on these considerations, the monthly cuts are as follows: February 2006-$101,295.50; March 2006-$102,542.00; April 2006-$43,593.00; May 2006-$32,370.50; June 2006-$12,808.50; July 2006-$7,982.50; August 2006-$42,749.50; September 2006-$104,232.00; October 2006-$71,678.00; November 2006-$100,387.50; December 2006-$93,114.50; January 2007-$137,101.50; February 2007-$113,850.50; March 2007-$79,328.50; April 2007-$118,689.50; May 2007-

$159,404.00; June 2007-$186,332.50; July 2007-$161,326.00; August 2007-$196,902.00; September 2007-none; October 2007-$340,896.50; November 2007-$83,890.50; December 2007-$24,119.00; January 2008-$89,811.50; February 2008-$115,951.00; March 2008-$291,113.50; April 2008-$326,276.00; May 2008-$321,249.00; June 2008-$292,710.00; July 2008-$297,727.50; August 2008-$36,542.00; September 2008-$66,538.50; October 2008-$5,520.00; November 2008-$13,446.50; December 2008-$50,340.00; January 2009-$52,661.50; February 2009-$99,988.50; March 2009-$160,901.00; April 2009-$64,491.50; May 2009-$33,296.50; June 2009-$35,402.00; July 2009-$16,995.50; August 2009-$3,900.00; September 2009-$780.00; and none for October 2009 through February 2010. The cuts total $4,690,236.50 in reimbursements for Hartford.

Next, the Court cuts the following costs associated with Squire Sanders' coordination efforts. In making the cuts, the Court considers the testimony of the witnesses who appeared at trial, particularly Miller, Norman, and O'Connor. The Court also evaluates the monthly bills that Squire Sanders submitted to Hartford, taking into account the exclusion of all of those individuals not named above. In other words, the Court limits any reimbursement to coordination efforts between the five individuals, who should have reasonably worked on the case as determined earlier. The Court pays particular attention to billing entries for conferences at which Squire Sanders' core team met and strategized about the Marin action. In light of all of these considerations, the monthly cuts are as follows: April 2006-$291.00; June 2006-$270.00; July 2006-$265.00; August 2006-$1,620.00; September 2006-$1,305.00; October 2006-$315.00; November 2006-$270.00; December 2006-$1,621.00; January 2007-$1,392.00; February 2007-$624.00; May 2007-$120.00; October 2007-$1,584.00; November 2007-$4,984.00; December 2007-$1,992.00; January 2008-$257.50; February 2008-$4,200.00; March 2008-$3,178.00; April 2008-$4,329.00; May 2008-$1,852.50; June 2008-$4,422.50; July 2008-$3,797.00; August 2008-$566.00; September 2008-$1,512.00; December 2008-$716.00; January 2009-$1,896.00; February 2009-$2,555.00; March 2009-$5,056.00; April 2009-$4,470.00; May 2009-$1,276.00; June 2009-$1,276.00; July 2009-$2,136.00; August 2009-$2,030.00; September 2009-$88.00; October 2009-$176.00; November 2009-$484.00; and January 201-$650.00. For the months not listed between February 2006 and 2010, the Court finds that Squire Sanders reasonably charged for staffing and coordination. Thus, the total reimbursement for unreasonable coordination to which Hartford is $63,416.00.

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B. Hartford is entitled to $51,364.00 in reimbursement for the unreasonable discovery and document review related to the twenty-six boxes.

Another argument that the Court finds compelling as a grounds for reimbursement is Hartford's contention that Squire Sanders conducted unreasonable and unnecessary discovery and document review as related to the twenty-six boxes it received from its client, J.R. Marketing. Hartford's position is fairly straightforward: Squire Sanders expended significant, unreasonable duplicative efforts reviewing twenty-six boxes of documents. The unnecessary work was the result of Squire Sanders' failure to scan or bate-stamp the documents. In light of this failure, any time Squire Sanders needed any information in support of its motion of other filings or needed to do any other sort of discovery work, its attorneys and other staff members needed to review all of the boxes by hand.

To determine whether the fees and costs that Hartford challenges are unreasonable or unnecessary, the Court first considers the "reasonable and necessary" test laid out by California courts that is used to evaluate reimbursement claims made by insurance companies. To satisfy the "reasonable and necessary" test, fees and costs of an insured must meet three requirements. (*Barratt American, Inc. v. Transcontinental Ins. Co.* (2002) 102 Cal.App.4th 848, 858.) First, the expenses must relate to an action conducted within the temporal limits of an insurer's duty to defend. (*Id.*) Second, the challenged fees must relate to a reasonable and necessary effort to avoid or minimize liability. (*Id.*) And third, the challenged fees must be reasonable and necessary for that purpose. (*Id.*)

After reviewing the evidence presented at trial, the Court finds that Hartford met its burden in demonstrating that Squire Sanders charged unreasonable and unnecessary fees for the discovery related to the twenty-six boxes of documents. At trial, Hartford's expert as well as J.R. Marketing's witnesses testified that the review of and work associated with the twenty-six boxes was unreasonable. Norman, O'Connor, and Miller all testified that it is common, reasonable practice to bates-stamp and scan documents. Further, Miller even stated that he recognized how essential the twenty-six boxes were to the Marin action. Nevertheless, the documents were never scanned, let alone prepared for optical character recognition, which would have simplified their review. In fact, a review of Squire Sanders' bills reveals entries that even comment on how discovery could have been made easier had the documents been better organized. Accordingly, the evidence demonstrates that the third prong of the "reasonable and necessary" test is not satisfied. Here, although the fees relate to limiting liability for J.R. Marketing, they were not reasonable and necessary for that purpose.

Squire Sanders could have bate-stamped and scanned the documents to reduce significant costs by reaching the same end goal.

For all these reasons, the Court believes that only a couple of thorough reviews of the twenty-six boxes were justified in this case. All other costs should be reimbursed. Specifically, the Court determines that the following amount of fees should be reimbursed: $51,364.50. The Court determines this amount after reviewing all of the time Squire Sanders spent conducting document review and discovery. The Court finds that Squire Sanders spent a considerable amount of time reviewing the documents each year of the litigation. In particular, Hartford is entitled to reimbursement as follows per year: $16,995.00 for 2006; $10,590.00 for 2007; $16,744.50 for the end of 2007 and 2008; and $7,035.00 for the remainder of the litigation.

C. Hartford is entitled to $23,126.50 in reimbursement for unreasonable and unnecessary discovery tactics.

A third category for which Hartford is entitled to reimbursement is discovery issues outside of those related to the twenty-six boxes discussed earlier—specifically written discovery and depositions.

Hartford contends that Squire Sanders engaged in inefficient discovery strategies. Hartford attacks Squire Sanders' written discovery devices, depositions, and discovery motions. At trial, Norman specifically testified about the discovery related to the patent and tax issues involved in the litigation. Norman noted that Squire Sanders charged $600,000.00 and $820,000.00 for discovery related to these matters. He further opined that more reasonable charges would have totaled $22,000.00 and $560,000.00.

While the Court finds Hartford's evidence useful, it believes that Miller's testimony is actually more valuable in guiding the Court's reimbursement determination on this issue. During trial, Miller made several clear and bold statements about the unreasonableness of some discovery in which Squire Sanders engaged. In particular, Miller discussed the letter that he wrote to the discovery referee, in which he noted that the lawsuit involved three unsophisticated business people and an international businessman with a dubious character. The letter specifically stated that Miller did not believe that the case warranted thirty-five depositions and extensive written discovery.

All of this evidence demonstrates that Hartford showed by a preponderance of the evidence that Squire Sanders charged unreasonable and unnecessary fees for depositions and written discovery. Again, the third prong of the "reasonable and necessary" test remains unsatisfied. Miller

expressly admitted that these discovery tactics were unnecessary in light of the nature and issues involved in the Marin action. As a result, the Court finds that a portion of Squire Sanders' charges for such discovery should be cut. After considering all of the trial evidence and giving particular attention to Squire Sanders' bills, the Court determines that the following amount of fees should be reimbursed: $23,162.50. As one may assume, most of Squire Sanders' charges for written discovery and depositions appear early on the litigation. Accordingly, the Court primarily focuses its review of the charges on the first two years of the litigation, ultimately cutting $16,835.00 from the discovery charges incurred in 2006 and $6,291.50 for similar charges in 2007.

D. Hartford is entitled to $24,757.00 in reimbursement for unreasonable and unnecessary legal research.

The next group of charges that Hartford challenges is supposed unnecessary legal research. The Court understands that there were several legal issues swirling around in the Marin action, and thus that it is appropriate to defer and sustain many of Squire Sanders' charges. Nevertheless, the testimony and evidence offered at trial confirm that some of the legal research was unreasonable and unnecessary—Miller and Patula are experienced trial attorneys and it was unreasonable for them to charge for very basic procedural and substantive legal issues.

Hartford argues that Squire Sanders billed for unreasonable legal research. At trial, Hartford largely focused on Squire Sanders' work on two motions—the motion for summary judgment and the disqualification motion brought by Nossaman.[6] Norman testified about both of these issues. As to the summary judgment motion, he stated that J.R. Marketing moved for summary judgment on all the causes of action on the grounds that the opposing party was a tax cheat and had unclean hands. Norman found the motion and subsequent legal work to be very unnecessary. He recommended that some of the $292,000.00 that Squire Sanders billed for this work should be reimbursed. Likewise, Norman offered testimony about the disqualification motion. In total, Squire Sanders charged $387,000.00 for its work on this motion. However, Norman appreciated that Squire Sanders' costs were driven up by the fact that it did not bate-stamp or properly organize its discovery. Had it done so, it could have more quickly reviewed the discovery in order to locate the documents at issue in the

[6] Hartford also challenges other legal research that Squire Sanders conducted. The Court does not focus on these other challenges, however, because they are largely resolved by the Court's order cutting the number of attorneys and staff who worked on the Marin action. The Court finds that it would be inequitable to make additional cuts based on these grounds. Hartford is only entitled to reimbursement for unreasonable and unnecessary fees—it is not entitled to double recovery.

disqualification motion. As a result, Hartford is entitled to reimbursement of some of the fees that Squire Sanders charged for this work.

In addition to Norman, Miller also testified about the reasonableness of the charges of Squire Sanders' legal research. Miller admitted that he and Patula are both very experienced trial attorneys and quite familiar and knowledgeable about straightforward legal issues, like the summary judgment standard and other procedural issues. Thus, Squire Sanders should not have billed very much for the work associated with such issues. Miller further admitted that he made some cuts for this research, but that he may have missed other related billing entries. Miller also offered testimony about the reasonableness of a few other areas of legal research. In particular, he stated that Squire Sanders spent too much time researching writs and the motion to continue trial.

Together all of this evidence supports the Court's findings that Hartford met its burden in showing that Squire Sanders charged unreasonable and unnecessary fees for some of its legal research. The Court cannot overlook Miller's express admissions that this work did not reasonably help Squire Sanders work towards J.R. Marketing's defense. Accordingly, the Court finds that some of Squire Sanders' charges for this legal research should be cut. The Court focuses on the legal research highlighted at trial—the motion for summary judgment, the disqualification motion, procedural issues, the writs, and the motion to continue—most of which was billed during the earlier years of the litigation. The Court specifically finds that Hartford should be reimbursed in the amount of $24,757.00. This sum represents the unreasonable fees charged by Squire Sanders for spending too much time on basic legal research as well as inefficiently handling its motion practice.

E. Hartford is entitled to $83,830.00 in reimbursement for unreasonable overhead expenses, including clerical tasks, travel, and client updates.

The final category of expenses for which the Court finds that Hartford can collect reimbursement is overhead expenses, including costs for such matters as clerical tasks, travel, and client updates. [7]

It is Hartford's position that Squire Sanders billed for unreasonable administrative matters—some of which could not be charged at all and others which amounted to total busywork. In

[7] The Court finds that any other specific area of unreasonable fees and disbursements challenged by Hartford either at trial or in its post-trial brief not addressed by this decision do not warrant reimbursement. Hartford, as the insured seeking reimbursement in this action, has failed to carry its burden of proof. (*Aerojet-General Corp.*, 17 Cal.4th at 64; see Evid. Code, § 115.) The Court, as the trier of fact at the bench trial of Phase II of the litigation, cannot find that the other fees are more likely unreasonable than fairly charged. (*In re Michael G.*, 63 Cal.App.4th 700.) Hartford has not sufficiently demonstrated the probability of the fees' unreasonableness.

its post-trial brief, Hartford highlights that Miller testified at trial that Squire Sanders should not have billed for overhead costs like clerical tasks and travel. Specifically, Miller stated the attorneys and staff should not have billed for clerical tasks and some travel. He specifically discussed how some of the time Squire Sanders spent on preparing for trial (like putting together binders) and refilling documents were unreasonable charges. In fact, Miller even scoured the bills in attempts to cut such costs. However, he admitted at trial that he may have missed some of these charges.

The law is in line with Hartford's attack. California case law recognizes that some overhead costs can reasonably be incorporated into an attorney's charges. (*City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65, 69.) However, like any cost charged, overhead charges are subject to a reasonableness evaluation. (*Barratt American, Inc.*, 102 Cal.App.4th at 858.) Thus, Miller's admission that some overhead costs were unreasonably charged plays a powerful role in the Court's evaluation of Squire Sanders' bills. Some fees must clearly be reimbursed to Hartford.

To determine what amount of costs should be reimbursed, the Court considers the testimony of the trial witnesses as well as the documentary evidence submitted at trial. The Court holds that some of Squire Sanders' charges for clerical tasks, like filing and other document organization, as well as travel costs can appropriately be cut. The Court specifically notes that Squire Sanders unreasonably includes several charges for administrative tasks like fixing computers and copiers as well as organizing and tearing down its document storage area. In light of these and other unreasonable overhead expenses, the Court determines that Hartford should be reimbursed in the amount of $83,830.00. This sum represents only a small percentage deduction of Squire Sanders' overhead costs—nevertheless, it is a reasonable cut—and it is broken down by year as follows: $5,534.00 for 2006; $12,701.50 for 2007; $35,726.50 for the end of 2007 and most of 2008; $29,868.00 for the remainder of 2008 through the end of the litigation.[8]

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[8] The Court also notes that by not downwardly adjusting Squire Sanders' rates to make them more comparable to rates charged by firms in the Bay Area, the Court's ultimate award of reimbursement significantly defers to Squire Sanders' determination of what overhead costs were reasonably charged.

Additionally, by reducing the number of people who should have worked on the case, the Court recognizes that it does not need to cut many of the expenses. By cutting the duplicative efforts, the Court necessarily cuts much of the overhead expenses.

Hartford is not entitled to reimbursement for claims that are allegedly not covered by the insurance policy it issued to J.R. Marketing.

1. Hartford's burden of proof

As it did with Hartford's claim for reimbursement of unreasonable fees, the Court starts its analysis by identifying Hartford's burden of proof in seeking reimbursement for J.R. Marketing's allegedly uncovered services and disbursements. In this case, it has been adjudged that Hartford had a duty to defend J.R. Marketing in the Marin action and that it breached this defense duty. While Hartford admits that it had a duty to defend J.R. Marketing in some of that case, Hartford now argues that it is entitled to reimbursement for all of the costs associated with uninsured claims and expenses. In light of the scope and posture of the case, the law makes clear that Hartford carries a heavy burden. Specifically, Hartford can only seek reimbursement for claims that are "not even potentially covered" by the insurance that it provided to J.R. Marketing. (*Buss*, 16 Cal.4th at 50.) To successfully do so, Hartford must prove by a preponderance of the evidence that the challenged costs are solely allocated to claims that are not potentially covered by the insurance. (*Id.* at 53-54.) In other words, it essentially must produce "undeniable evidence of the allocability of [the] specific [uncovered] expenses." (*Hogan*, 3 Cal.3d at 564.) If the fees at issue "can be allocated jointly to the claims that are least potentially covered and to those that are not," they are not subject to reimbursement. (*Buss*, 16 Cal.4th at 53.)

2. Hartford failed to meet its burden and is not entitled to reimbursement for any allegedly uncovered claims.

After considering the evidence, testimony, and arguments presented at trial, the Court finds that Hartford failed to meet its burden in showing that it is entitled to reimbursement for allegedly uncovered claims and costs. In its post-trial brief, Hartford challenges seven categories of costs, arguing that they are uncovered services and disbursements for which it is entitled to reimbursement. These categories include the following: (1) equitable claims and the equitable trial; (2) post-trial proceedings; (3) claims for money damages that did not involve defamation or disparagement; (4) work on costs, sanctions, attorney fees, and punitive damages; (5) the cross-complaints in the Marin action; (6) other actions like the action against Hartford, interpleader actions, actions in other jurisdictions, and the defense of tax deficiencies; and (7) uninsureds. While Hartford brings up a valiant point that the costs associated with these issues may not be covered, it has failed to make a

sufficient showing that it is in fact entitled to reimbursement for the costs associated with these issues. Thus, the Court does not award Hartford any reimbursement for allegedly uncovered claims and issues.

Hartford only vaguely touches on the coverage of these costs under the insurance policy it issued to J.R. Marketing—it has not proved by a preponderance of the evidence that the challenged costs are solely allocated to uncovered claims and issues. In its post-trial brief, Hartford notes that it may be entitled to reimbursement for costs not covered by insurance based on the law. Hartford presents general legal statements of what claims may be uncovered and cites to cases in support of these propositions. For example, in regards to equitable claims, it argues that "equitable claims by definition do not seek money damages and are thus not covered by the policy". (See *Jaffe v. Cranford Ins. Co.* (1985) 168 Cal.App.3d 930, 934, which Hartford argues stands for the proposition that only claims for money damages are covered by liability policies.) This summary of the law is only a partial understanding of its potential entitlement and burden. Hartford fails to underscore or address an important requirement—that it must produce evidence of the allocability of the specific uncovered expenses. (*Hogan*, 3 Cal.3d at 564.)

It is worth noting that Hartford attempts to outline in its post-trial brief how much J.R. Marketing spent on defending such allegedly uncovered claims—in other words, it attempts to address the issue of allocation. This presentation is problematic and insufficient for several reasons, however. First, as discussed earlier in regards to J.R. Marketing's Motion to Strike, the information in its post-trial brief is essentially new evaluations that Hartford offers, and the Court cannot consider these new calculations. J.R. Marketing correctly points out that at no time during discovery or trial did Hartford provide a breakdown of costs of the uncovered claims.

Second, even if the Court considers such evidence, it is actually at odds with the evidence that Hartford presented at trial. The only valuations that Hartford presented at trial were those prepared by Norman. However, Norman did not discuss in-depth the costs of the uncovered claims and issues. The only time he discussed potentially uncovered claims was when he talked about Squire Sanders' work on out-of-state cases. He testified that Squire Sanders charged $127,000.00 for out-of-state cases. Norman further noted that while Squire Sanders needed to be aware of these other actions and how they related to the Marin action, it should have reasonably only charged $6,000.00. This testimony is not relevant to the issue of allocation. Norman actually claims that the out-of-state actions may be related to the covered claims; his opinion concerns the reasonableness of the charges.

Thus, this evidence actually undermines Hartford's assertions that it is entitled to reimbursement for the actions in other jurisdictions. It can only seek reimbursement for uncovered claims. Norman's testimony as well as the other witnesses' testimony clouds the issue of reimbursement for all potentially uncovered claims. Norman testified about the reasonable relationship of fees, and Miller constantly affirmed that all of the costs were related to covered actions. Thus, the Court, as the trier of fact, is unconvinced that the covered issues can clearly be separated from the uncovered claims.

Finally, the reimbursement that Hartford seeks actually highlights that it has failed to allocate the costs associated solely to the uncovered claims as required by the law. In its post-trial brief, Hartford outlines all of the allegedly uncovered claims and issues and requests that the Court order J.R. Marketing to reimburse Hartford for all of the costs associated with these claims. This is not the sort of reimbursement that the law permits, however. The law requires an insurance company seeking reimbursement to allocate and request only those costs associated with the uncovered claims. In this case, a great deal of evidence came out during discovery and was presented during trial that the covered claims and potentially uncovered claims were significantly related. On numerous occasions, Miller objected to Hartford's suggestions that the matters were completely unrelated. Miller reiterated time and again while on the stand that the covered and uncovered claims were highly related. Accordingly, Hartford bears the burden of separating out those costs only solely attributable to the uncovered claims and issues. Hartford has not attempted to make this showing. In fact, Hartford attempts to convince this Court that it is entitled to reimbursement of all the costs that Squire Sanders incurred for the potentially uncovered claims in the face of contrary evidence. The Court will not award reimbursement based on these contentions—Hartford's request based on these arguments is denied.

EFFECT OF THIS DECISION ON THE INSURED

The Court is concerned about the effect of this decision on the insured, who will be required to pay this judgment. The Court did not find that the insured were sophisticated business professionals. They were operating a "mom and pop" type business, not a major corporation. Nor were the insured sophisticated users of attorney services. The Court is not sure that the insured had the ability or understood how to review the attorney fee bills they were receiving to determine if the fees and costs were reasonable or necessary. The Court doubts that the bills were ever reviewed by the insured with the thought in mind that they actually might have to pay the bills. The testimony at trial clearly showed that they did not have the financial ability to pay their own attorneys fees. They

knew that this Court had ordered that all the fees were to be paid in full and the issue of their reasonableness and necessity deferred until the within action was tried. They undoubtedly were totally focused on being well defended in the Marin case.

The Court notes that in American Law Institute, Principles of the Law of Liability Insurance: Management of Potentially Insured Liability Claims, (May 2013 Tentative Draft) Chapter 2, Topic 1, Defense, Page 120, b. Reasonable Fees: "In the event of a dispute during the course of the defense about the reasonableness of fees, the insured must pay the disputed fees and may bring an action against the independent defense counsel seeking return of the disputed fees after the duty to defend has ended and any coverage defenses have been adjudicated or settled, so as not to invade the attorney-client privilege or work-product immunity. If the fees are later found to be unreasonable, **the insurer's sole recourse is from defense counsel, not the insured.**" (Emphasis added).

Without the financial ability the pay this Court's order to reimburse Hartford, the insured are being placed in the difficult position of having to ask their attorneys to pay the judgment or possibly filing for bankruptcy.

However, the Court is bound by the Appellate Court ruling finding that it is the insured, not their counsel, who must reimburse Hartford for any fees found to be unreasonable or unnecessary. (*J.R. Marketing, L.L.C.*, 2013 WL 2145094.)

CONCLUSION

For these reasons, the Court ORDERS Hartford to be reimbursed by Plaintiffs in the amount of $5,206,730.00 for J.R. Marketing's unreasonable and unnecessary fees. J.R. Marketing's Motion for Judgment and Motion to Strike are DENIED.

IT IS SO ORDERED.

DATE: June 19, 2013

The Honorable Lynn O'Malley-Taylor
Judge of the Superior Court of California

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

J.R. MARKETING, LLC, et al., Plaintiffs, vs. HARTFORD CASUALTY INSURANCE COMPANY et al., Defendants.	Case Number: CGC-06-449220 **CERTIFICATE OF MAILING** (CCP 1013a (4))

I, Clark Banayad, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On June 24, 2013, I served the attached **STATEMENT OF DECISION FOLLOWING TRIAL PHASE II ON DEFENDANT AND CROSS-COMPLAINANT'S CROSS-COMPLAINT FOR REIMBURSEMENT OF ATTORNEY FEES AND COSTS AND ORDER ON PLAINTIFFS AND CROSS-DEFENDANTS' MOTION FOR JUDGMENT AND MOTION TO STRIKE** filed on June 24, 2013 by placing a copy thereof in a sealed envelope, addressed as follows:

Allan L. Briggs, Esq.
Aneca Lasley, Esq.,
Michelle Full, Esq.
SQUIRE SANDERS, LLP
275 Battery Street, Suite 2600
San Francisco, CA 94111

Ira G. Greenberg, Esq.
Erin L. Pfaff, Esq.
EDWARDS WILDMAN PALMER, LLP
750 Lexington Avenue, 8th Floor
New York, NY 10022

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: June 24, 2013

MICHAEL YUEN, Clerk

By: Clark Banayad
Clark Banayad, Deputy Clerk

S211645

IN THE SUPREME COURT OF CALIFORNIA

J.R. MARKETING, LLC, et al.,
Cross-Defendants and Respondents,

v.

HARTFORD CASUALTY INSURANCE COMPANY,
Cross-Complainant and Appellant.

[PROPOSED] ORDER

It is hereby ordered that, pursuant to Evidence Code sections 452, subdivision (d)(2), 453, and 459, subdivision (a), and California Rules of Court, rule 8.252, judicial notice is taken of the trial court's Statement of Decision Following Phase II of Defendant and Cross-Complainant's Cross-Complaint for Reimbursement of Attorney Fees and Costs and Order on Plaintiffs and Cross-Defendants' Motion for Judgment and Motion to Strike, attached as an exhibit to the Motion for Judicial Notice filed in this proceeding.

DATED:_____

_____
JUSTICE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

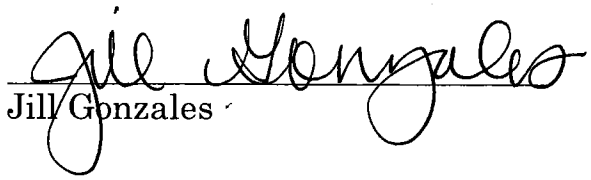
On July 3, 2013, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID M. AXELRAD; [PROPOSED] ORDER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 3, 2013, at Encino, California.



Jill Gonzales

SERVICE LIST
J.R. Marketing, LLC, et al., v. Hartford Casualty Ins. Co.
Case No. S211645

Counsel / Individual Served	Party Represented
Ethan A. Miller Barry D. Brown, Jr. Michelle M. Full Squire Sanders (US) LLP 275 Battery Street, Suite 2600 San Francisco, CA 94111	Attorneys for Cross-Defendants and Respondents **J.R. MARKETING, LLC;** **JANE E. RATTO;** **ROBERT E. RATTO;** **PENELOPE A. KANE;** **LENORE DeMARTINIS;** **GERMAIN DeMARTINIS;** **SQUIRE SANDERS (US) LLP;** **SCOTT HARRINGTON**
Clerk, Court of Appeal First Appellate District Division Three 350 McAllister Street San Francisco, CA 94102-7421	[Case No. A133750]
Clerk to the Honorable Loretta Giorgi San Francisco County Superior Court Civic Center Courthouse 400 McAllister Street, Dept. 302 San Francisco, CA 94102	[Case No. CGC-06449220]