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IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

JUL 23 2013

Frank A. McGuire Clerk

Deputy

HARTFORD CASUALTY INSURANCE COMPANY,
Defendant, Cross-Complainant, and Appellant,

vs.

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

After a Decision By the Court of Appeal, First Appellate District, Division Three
Case No. A133750

RESPONDENTS' RESPONSE TO HARTFORD'S MOTION FOR JUDICIAL NOTICE; DECLARATION OF MICHELLE M. FULL

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LENORE DeMARTINIS, and GERMAIN DeMARTINIS
and Proposed Cross-Defendants and Respondents
SQUIRE SANDERS (US) LLP and SCOTT HARRINGTON

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IN THE SUPREME COURT OF CALIFORNIA

HARTFORD CASUALTY INSURANCE COMPANY,
Defendant, Cross-Complainant, and Appellant,

vs.

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

RESPONDENTS' RESPONSE TO HARTFORD'S MOTION FOR JUDICIAL NOTICE

Hartford moves the Court to take judicial notice of a Statement of Decision issued on June 24, 2013 by the trial court in this case (San Francisco Superior Court, Case No. CGC-06-449220). That Statement of Decision addresses Hartford's claim against its *insureds* for reimbursement of attorney's fees, which proceeded separately to a bench trial while Hartford prosecuted the instant appeal regarding the dismissal of its reimbursement claims against *Respondents*.

While the June 24th Statement of Decision has no bearing on Hartford's Petition, Respondents do not object to Hartford's request for judicial notice—provided that the Court also takes judicial notice of another filing in the trial court—the insureds' Objections to the June 24, 2013 "Statement of Decision" and/or Application to Reconsider, Modify or Revoke the June 24, 2013 "Statement of Decision," filed on July 9, 2013. (A true and correct copy of the insureds' July 9th filing is attached to the accompanying Declaration of Michelle M. Full as Exhibit 1.) The June

24th "Statement of Decision" is subject to further review by way of the objection process, post judgment motions and appeal.

Dated: July 23, 2013

Respectfully submitted,

Squire Sanders (US) LLP

By
Mark C. Dosker
Michelle M. Full

Attorneys for Plaintiffs, Cross-Defendants and Respondents

J.R. MARKETING, LLC, JANE E. RATTO, ROBERT E. RATTO, PENELOPE A. KANE, LENORE DeMARTINIS, and GERMAIN DeMARTINIS and

Proposed Cross-Defendants and Respondents
SQUIRE SANDERS (US) LLP and SCOTT HARRINGTON

DECLARATION OF MICHELLE M. FULL

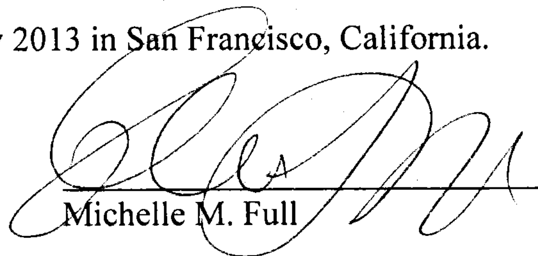
I, Michelle M. Full, declare:

1. I am a Senior Associate with Squire Sanders (US) LLP, counsel of record for Respondent and Proposed Cross-Defendant Squire Sanders (US) LLP in the above-captioned case. I make this declaration based upon my personal knowledge. If called on to do so, I could and would testify competently as to the matters set forth herein.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Plaintiffs' Objections to the June 24, 2013 "Statement of Decision" and/or Application to Reconsider, Modify or Revoke the June 24, 2013 "Statement of Decision," filed on July 9, 2013 in San Francisco Superior Court, Case No. CGC-06-449220.

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

Executed this 23rd day of July 2013 in San Francisco, California.



Michelle M. Full

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ENDORSED
FILED
Superior Court of California
County of San Francisco

JUL - 9 2013

CLERK OF THE COURT
BY: MARY ANN MORAN
Deputy Clerk

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J.R. MARKETING, LLC, JANE E. RATTO, ROBERT E. RATTO, PENELOPE A. KANE, LENORE DeMARTINIS and GERMAIN DeMARTINIS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

J.R. MARKETING, LLC, et al.

Plaintiffs,

vs.

HARTFORD CASUALTY INSURANCE COMPANY, et al.

Defendants.

HARTFORD CASUALTY INSURANCE COMPANY,

Cross-Complainant,

vs.

J.R. MARKETING, LLC, et al.

Cross-Defendants.

Case No. CGC 06449220

PLAINTIFFS' OBJECTIONS TO THE JUNE 24, 2013 "STATEMENT OF DECISION" AND/OR APPLICATION TO RECONSIDER, MODIFY OR REVOKE THE JUNE 24, 2013 "STATEMENT OF DECISION"

Date Action Filed: February 3, 2006
Trial Date (Phase II): February 28, 2013
Department: 611
Time: 9:00 a.m.

Hon. Judge Lynn O'Malley Taylor

I. INTRODUCTION

On June 24, 2013, the Court issued a "Statement of Decision" (the "Decision") that resolved several post-trial motions and set forth the Court's ruling on Hartford's reimbursement cross-claim. Declaration of Michelle M. Full ("Full Decl."), Ex. A. As discussed further below, the procedural status of the Decision is uncertain. Accordingly, Plaintiffs hereby present their objections to the Decision pursuant to Code of Civil Procedure Section 634, and for the same reasons underlying those objections, Plaintiffs alternatively move the Court to reconsider, modify, or revoke the Decision under Code of Civil Procedure Section 1008.

In the June 24 Decision, the Court made the following rulings: (1) it denied Plaintiffs' Renewed Motion for Judgment; (2) it denied Plaintiffs' Motion to Strike the improper materials that Hartford included in its post-trial memorandum; and (3) it determined that Hartford was entitled to $5,206,730.00 in reimbursement for allegedly unreasonable or unnecessary attorney's fees.

The Court's Decision was comprised of the following categories of fees:

- $4,690,236.50 for allegedly unreasonable staffing of the insureds' defense team;
- $63,416.00 for allegedly unnecessary coordination among the insureds' attorneys;
- $51,364.00 for allegedly unreasonable document review;
- $23,126.50 for allegedly unreasonable and unnecessary discovery tactics;
- $24,757.00 for allegedly unreasonable and unnecessary legal research; and
- $83,830.00 for allegedly unreasonable overhead expenses.

The Court held that Hartford was not entitled to reimbursement for any other allegedly unnecessary or unreasonable attorney's fees and that Hartford was not entitled to any reimbursement for fees allegedly incurred defending uncovered persons, claims, or lawsuits.

While Plaintiffs agree with the Court's rulings on the latter two issues, they object to the Court's Decision to award any reimbursement to Hartford. Plaintiffs respectfully submit that the Decision contains numerous errors, omissions, and ambiguities and that, as a result, the Court should reconsider, modify, and/or revoke the Decision.

First, the Decision misstates and misapplies California law, which does not permit Hartford to recover ***any*** reimbursement under these circumstances. The Court should have instead entered judgment in Plaintiffs' favor on Hartford's reimbursement claim.

Second, the Decision does not address the fact that Plaintiffs were denied their constitutional right to a jury trial. Thus, even assuming Hartford's reimbursement claim does not fail as a matter of law, the Court should have granted Plaintiffs a new trial on that claim.

Third, with respect to the specific categories of fees for which the Court ordered reimbursement, the Decision contains numerous flaws and fails to provide a meaningful explanation for the Court's ruling. Among other things, the Court reimbursed over $4.5 million in fees based on a legally and factually unsupported theory that Hartford never advanced and that Plaintiffs had no opportunity to rebut. Additionally, the Court did not identify the specific billing entries that it found unnecessary or unreasonable, which seriously impedes Plaintiffs' ability to assess the accuracy or legitimacy of the Court's findings. Yet even based on the limited information contained in the Decision, there are clear errors in the Court's calculation and analysis—including a ***$270,000 miscalculation*** in the total reimbursement award.

Accordingly, for the reasons set forth below Plaintiffs object to the Court's Decision and move the Court to reconsider, modify, or revoke the Decision.

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II. PROCEDURAL STATUS

In February 2006, Plaintiffs brought this lawsuit against Hartford for breach of contract and bad faith because of Hartford's refusal to defend them in an action in Marin County (the "Underlying Action") and refusal to provide and pay for independent counsel—Squire Sanders (US) LLP (also referred to as "Squire Sanders"). On July 15, 2011, after the resolution of the Underlying Action, Hartford amended its Cross-Complaint to seek (among other things) reimbursement of defense fees from Plaintiffs.

A jury trial, as demanded by the parties, on all claims was scheduled for November 2012. At the start of trial on November 5, 2012, however, Hartford asserted for the first time that its reimbursement claim should be tried to the Court and not to the jury. Full Decl., Exs. B (Hartford's prior Case Management Statements) and C (Rough Trial Tr. (Nov. 5, 2012)). Over Plaintiffs' objection, the Court held that Plaintiffs were not entitled to a trial by jury on Hartford's reimbursement claim. *Id.* at Exs. C and D (Rough Trial Trs. (Nov. 5, 2012 and Nov. 7, 2012)); and Ex. E (Plaintiffs' Bench Brief re Plaintiffs' Right to Have All Claims Tried in a Single Jury Trial (filed Nov. 5, 2012)). In light of the Court's ruling, Plaintiffs agreed to proceed with a bifurcated trial, but maintained their objection to the denial of their right to a trial by jury. *Id.*

Accordingly, from November 5, 2012 through December 12, 2012, Phase I of the trial proceeded to the jury for Plaintiffs' claims for breach of contract and bad faith against Hartford. The jury found in favor of Plaintiffs on their breach of contract claim and in favor of Hartford on Plaintiffs' claim of bad faith. *See* Jury Verdict (Dec. 12, 2012). The jury awarded damages in favor of Plaintiffs on their breach of contract claim for $262,926.20.

Phase II of trial on Hartford's cross-claim for reimbursement proceeded as a bench trial before this Court from February 28, 2013 through March 11, 2013. The sole issue before the Court was whether and to what extent Hartford was entitled to

reimbursement of defense fees from the Ratto Plaintiffs. Prior to the start of trial, Hartford orally dismissed Plaintiff Lenore DeMartinis as a cross-defendant to its cross-complaint and filed a written dismissal of its cross-claims against Plaintiff Germain DeMartinis, with prejudice. Full Decl., Exs. B (Rough Trial Tr. (Nov. 9, 2012)) and C (Hartford's Request for Dismissal). In lieu of closing arguments, the parties submitted post-trial briefing. In Plaintiffs' post-trial memorandum, Plaintiffs specifically requested that the Court issue a tentative decision pursuant to California Rules of Court Rule 3.1590. *See* Plaintiffs' May 23, 2013 Post-Trial Memorandum (Phase II). On June 24, 2013, the Court filed a "Statement of Decision" as opposed to a tentative decision or a proposed statement of decision. Full Decl. at Ex. A.

As of the date of this filing, no judgment has been entered with respect to either phase of this case. Plaintiffs expect that, upon resolution of all the objections and issues raised regarding the Court's Statement of Decision, the Court will enter a judgment memorializing both the jury verdict from Phase I of trial and the decision of the Court with respect to Phase II for Hartford's cross-claim for reimbursement. But it is unclear whether Plaintiffs should treat the Court's June 24, 2013 "Statement of Decision" as a tentative decision, a proposed statement of decision, proposed judgment, some other type of document as contemplated by Rule 3.1590—in response to which Plaintiffs should file objections—or an Order as described in Section 1003 of the Code of Civil Procedure—in response to which Plaintiffs should file a motion under Rule 1008 of the Code of Civil Procedure. In light of this uncertainty, Plaintiffs file these timely objections and/or request that the Court reconsider, modify or revoke the June 24, 2013 "Statement of Decision." Plaintiffs also request that the Court reflect the same in any final statement of decision or judgment.

III. OBJECTIONS AND ARGUMENT

The Court's decision to reimburse Hartford over $5.2 million in attorney's fees rests on numerous legal and factual errors, and the Court's explanation of its

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ruling in the Decision contains significant omissions and ambiguities. Accordingly, Plaintiffs present their objections to the Decision below, which should be corrected prior to any entry of judgment. Alternatively, because of the unique procedural posture of the Decision, Plaintiffs' objections constitute grounds for the Court to reconsider, modify, or revoke the Decision.

In addition to the objections contained herein, and contained in Plaintiffs' concurrent filing of objections regarding Plaintiffs Lenore DeMartinis and Germain DeMartinis, Plaintiffs expressly preserve any and all prior objections made either before or during trial, or in other post-trial briefing (submitted after the close of evidence).

A. Hartford's Reimbursement Claim Fails As A Matter Of Law.

Hartford's reimbursement claim suffers from several dispositive legal errors and the Court should have granted Plaintiffs judgment as a matter of law on Hartford's reimbursement claim. Plaintiffs therefore object to the Decision on the following grounds:

1. The Decision incorrectly finds that Hartford can seek reimbursement for attorney's fees on the ground that the fees were unreasonable or unnecessary to defend against claims that were covered by its insurance policy with the insureds. (Decision p. 6-7).

As Plaintiffs have previously argued, California law does not recognize such a claim, particularly for an insurer such as Hartford that breached its duty to defend. (Plaintiffs' Renewed Motion for Judgment p. 2-7.) Accordingly, Hartford's claim for reimbursement of allegedly unreasonable or unnecessary attorney's fees fails as a matter of law, and the Court should have granted Plaintiffs' Renewed Motion for Judgment.

2. The Decision incorrectly finds that Hartford satisfied its burden under California law to introduce evidence establishing that ***specific*** *attorney's fees are unreasonable or unnecessary, and fails to address the resulting violation of*

Plaintiffs' right to Due Process. (Decision p. 8-9).

Plaintiffs have previously set forth the law of California that (1) an insurer must identify the specific fees that it claims are unreasonable or unnecessary, (2) an insurer such as Hartford that breaches its duty to defend bears the burden to prove that the specific fees it seeks to recover are unnecessary or unreasonable, and (3) state and federal Due Process requires a litigant to be fully apprised of the evidence against it so that it can defend itself and submit evidence in rebuttal. (Plaintiffs' Post-trial Memorandum p. 31-36; Plaintiffs' Motion to Strike p. 14-16; Plaintiffs' Reply in Support of Motion to Strike p. 3-7; Plaintiffs' Renewed Motion for Judgment p. 7-13).

Here, Hartford failed to introduce any evidence during discovery or at trial identifying the specific fees that it sought to recover, and failed to introduce evidence establishing that those specific fees were unreasonable or unnecessary. The Court expressly acknowledged those failures in the Decision. (Decision p. 5:7-10 ("Hartford never disclosed any line-by-line challenges to Squire Sanders' billing entries during the discovery process or trial."); *id.* at 21 (finding Hartford's evidence was too general to support a claim for reimbursement for fees allegedly incurred on uncovered persons, claims, or lawsuits)).

As such, the Court's finding that Hartford satisfied its burdens at trial is unsupported by the record and conflicts with the Court's own conclusions about the deficiencies in Hartford's evidence at trial. Hartford failed to satisfy its burdens, and its reimbursement claim fails as a matter of law.

Instead of granting judgment against Hartford on its reimbursement claim, the Court violated Plaintiffs' right to Due Process by finding that the Plaintiffs should pay Hartford over $5.2 million on a claim that they were prohibited from defending against. Once again, the Court acknowledged, but then ignored, the impropriety of this situation.

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When Hartford attempted to challenge specific fees in its post-trial materials, the Court recognized that "considering such information would be prejudicial" because "this is the precise information that Hartford" had failed to provide during discovery and at trial. (Decision p. 5:9-10). Yet despite this acknowledgement, the Court proceeded to sift through the legal bills for itself and held that specific billing entries were unreasonable and/or unnecessary without offering Plaintiffs any opportunity to introduce rebuttal evidence. (Decision p. 12:23-13:24, 15:3-9, 15:25-16:7, 17:9-17, 18:11-20). This unprecedented and improper procedure is a clear violation of Plaintiffs' right to Due Process under the California and federal constitutions.

The Court evidently misunderstood the posture of Hartford's reimbursement claim and the scope of its role in adjudicating that claim. The Court's role was ***not*** to conduct its own independent review of the record and then identify the fees that it deemed reasonable and unreasonable, as it might do in an ordinary fee-shifting case. (*See* Decision p. 5:13-19). To the contrary, in a situation such as this where an insurer that breached its duty to defend seeks to recover attorney's fees paid to its insured, the Court's role is simply to determine whether ***Hartford*** satisfied ***its burden*** to identify the fees it sought to recover and offered sufficient evidence establishing that those fees were unreasonable or unnecessary.

For the Court to step in and order reimbursement based on theories that Hartford never advanced or supported with evidence at trial is not only contrary to clear California law; it raises troubling policy implications and will undoubtedly encourage insurers who breach their duty to defend and to seek reimbursement under broad, general theories—comfortable with the knowledge that the trial court can disregard its evidentiary failings and order whatever reimbursement it deems appropriate.

Here, Hartford breached its duty to defend and failed to satisfy its burden of proof at trial. The Court should therefore enter judgment in Plaintiffs' favor on

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1 Hartford's reimbursement claim.

2 *3. The Decision applies the wrong legal standard to determine whether*
3 *the insureds' attorney's fees were unnecessary or unreasonable, and Hartford*
4 *introduced no evidence under the proper standard. (Decision p. 11:1-7, 12:1-27,*
5 *13:1-25, 14:10-27, 15:1-9, 25-27, 16:1-7, 17:9-17, 18:6-20).*

6 The Court initially stated that Hartford bore the burden to establish that the
7 fees it sought to recover were unreasonable or unnecessary, and that to satisfy that
8 burden Hartford had to prove that a "reasonable insured" would not have incurred
9 the expenses under the same circumstances, citing *Aerojet-General Corp. v.*
10 *Transport Indemnity Co.* (1997) 17 Cal.4th 38. (Decision p. 6-7).

11 *Aerojet* did not actually address the standard for determining whether
12 attorney's fees incurred in defending against a covered claim are unnecessary or
13 unreasonable. Rather, in *Aerojet*, the California Supreme Court set forth the
14 standard for determining whether "***site investigation expenses*** may constitute
15 ***defense costs*** that the insurer must incur in fulfilling its duty to defend." 17 Cal.4th
16 at 60 (emphasis added). The Court emphasized that this standard is ***objective***, and
17 asks "whether the site investigation would be conducted against liability by a
18 reasonable insured under the same circumstances," and "whether the site
19 investigation expenses would be incurred against liability by a reasonable insured
20 under the same circumstances." *Id.* at 62-63.

21 In contrast to the site investigation expenses in *Aerojet*, the attorney's fees
22 that Hartford's insureds incurred in defending against the underlying litigation are
23 clearly "defense costs," which is reflected in the Court's prior orders and the jury's
24 finding in Phase I that Hartford breached its duty to defend by refusing to pay for
25 its insureds' attorney's fees. As such, the issue in Hartford's reimbursement claim
26 is not whether the attorney's fees are "defense costs" (the issue addressed in
27 *Aerojet*), but rather whether those attorney's fees are unreasonable or
28 unnecessary—an issue that *Aerojet* does not purport to address.

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Nevertheless, even if the *Aerojet* standard is the proper standard for determining whether the attorney's fees incurred in defending against a covered claim are unreasonable or unnecessary, the Court did not apply that standard in the Decision. In finding that various categories of fees were unnecessary or unreasonable, the Court never analyzed whether a ***reasonable insured*** would have incurred those fees. Indeed, Hartford never introduced any evidence at trial as to what fees a ***reasonable insured*** would have incurred, and as such there is no evidence in the record that could support a decision for Hartford under that standard. Hartford therefore failed to satisfy its burden of proof and its reimbursement claim fails as a matter of law.

B. Plaintiffs Were Entitled To A Jury Trial.

For the reasons stated in the objections above, Hartford's reimbursement claim fails as a matter of law and the Court should enter judgment in Plaintiffs' favor. But even assuming that Hartford's claim did not fail as a matter of law, Plaintiffs were nevertheless denied their right to a jury trial for the reasons set forth below.

4. The Decision fails to address the clear denial of Plaintiffs' right to a jury trial on Hartford's reimbursement claim.

On November 5, 2012, Plaintiffs filed a bench brief with the Court setting forth their right to have all of the parties' claims tried in a single jury trial. Full Decl., Ex. E. As set forth in that bench brief, the "gist of the action" here was legal rather than equitable and as such Plaintiffs had a constitutional right to a jury trial. The Court, however, bifurcated the parties' claims and conducted a bench trial on Hartford's reimbursement claim. *Id.*, Exs. C and D. The Decision does not address this clear error and deprivation of Plaintiffs' constitutional rights, which require a new trial to be conducted on Hartford's reimbursement claim before a jury.

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C. The Reimbursement Award Is Based On Numerous Errors, Omissions, And Ambiguities.

Even assuming that (a) Hartford's reimbursement claim does not fail as a matter of law in its entirety, and (b) Plaintiffs are not entitled to a new trial by jury, the Court's award of over $5.2 million in reimbursement is based on numerous legal and factual errors.

As noted above, the reimbursement Decision was comprised of six different categories of allegedly unreasonable or unnecessary attorney's fees, and Plaintiffs separately address their objections to each of those categories below. But before addressing those specific categories, there are several pervasive errors in the Decision to which Plaintiffs first object.

5. The Decision does not identify the specific billing entries that the Court deemed to be unreasonable or unnecessary. (Decision p. 12:23-27, 13:1-25, 15:3-9, 16:2-8, 17:12-18, 18:11-20).

As noted above, it was ***Hartford's*** burden to identify the specific billing entries for which it sought reimbursement and to introduce evidence establishing that those fees were unreasonable or unnecessary. Hartford failed to meet its burden, and that should have been the end of Hartford's claim.

The Court, however, improperly undertook Hartford's obligation to search through the record for allegedly unnecessary or unreasonable fees, and ultimately awarded Hartford over $5.2 million in reimbursement. Yet even in doing so, the Court still failed to identify any of the billing entries that it deemed to be unnecessary or unreasonable. This omission is greatly prejudicial to Plaintiffs in two respects.

First, unless the Court identifies the allegedly unreasonable or unnecessary billing entries, Plaintiffs cannot contest the legitimacy of the Court's determination that those billing entries were, in fact, unreasonable or unnecessary. In this respect, what the Court did in the Decision is no different than what Hartford did at trial—

both identified broad categories of fees and then jumped to conclusions about the total amount of fees for each category that should be reimbursed. By doing so, Hartford and the Court have stymied Plaintiffs' right and opportunity to introduce evidence supporting the reasonableness and necessity of the specific fees at issue, struck by the Court.

Second, the Court's failure to identify the billing entries it found to be unreasonable or unnecessary drastically limits Plaintiffs' ability to assess the accuracy of the Court's calculation of the reimbursement award. As discussed further below, there are significant mathematical and typographical errors on the face of the Decision, including a $270,000 error in the calculation of the total reimbursement award.

6. The Decision does not include any citations to the record to support its characterizations of the evidence at trial and appears to have misquoted or mischaracterized the testimony at trial.

In particular, the Decision frequently refers to alleged admissions and concessions by Ethan Miller that certain fees were unreasonable or unnecessary, but does not cite to any such testimony. (Decision p. 8:18-23, 11:14-16, 14:20-23, 15:19-27, 16:1-2, 17: 3-12, 18:1-11). As discussed further below, the Court's characterizations of Miller's testimony are directly contrary to his actual testimony at trial.

Likewise, the Decision frequently refers to the testimony of the parties' respective expert witnesses without any citations to the record, and the characterizations of their testimony are frequently inconsistent with the actual testimony at trial. In particular, the Decision states that both sides' experts agreed that the underlying case "could have been reasonably been [sic] litigated for less." (Decision p. 9:15-17). However, neither expert testified as such. Hartford's expert only testified regarding how much he would charge to defend—not the Underlying Action—but a "basic employee departure case." (Tr. 3/1/13 p. 262). Plaintiffs'

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1 expert testified that a reasonable fee for a case involving the amount in controversy
2 in the underlying litigation would be anywhere between $8 million and $20 million,
3 depending on the complexity of the case and the issues involved. (Tr. 3/11/13 p.
4 1349:5-18).

5 As such, the record does not support the Court's characterizations of the
6 evidence, and that error is obscured and compounded by the fact that the Decision
7 does not provide any citations to the evidence on which the Court was basing its
8 conclusions.

9 **I. Objections To The Court's Decision On Allegedly Unreasonable Staffing**
10

11 The Court found that Hartford was entitled to reimbursement in the amount
12 of $4,690,236.50 for allegedly unreasonable staffing of the insureds' defense team.
13 The Court's decision on this issue suffers from serious legal and factual errors, to
14 which Plaintiffs object below.

15 *7. The Decision improperly challenges the staffing of the insureds'*
16 *defense team. (Decision p. 12:1-10).*

17 The Court reimbursed over $4.5 million in attorney's fees by second-
18 guessing the staffing choices of Plaintiffs' defense counsel. The Court of Appeal
19 in this case, however, recently held that Hartford, as an insurer that breached its
20 duty to defend, is not permitted to challenge the litigation strategy of the attorneys
21 who stepped in to fill its breach. *J.R. Marketing, L.L.C. v. Hartford Cas. Ins. Co.*
22 (2013) 216 Cal. App. 4th 1444 ("[W]here, as here, the insurer breaches its duty to
23 defend the insured, the insurer loses all right to control the defense, including,
24 necessarily, the right to control financial decisions such as the rate paid to
25 independent counsel ***or the cost-effectiveness of any particular defense tactic or***
26 ***approach***."). ***(emphasis added)***

27 Here, the partner in charge of the underlying litigation, Ethan Miller, testified
28 at trial that he carefully assembled the insureds' core defense team based on the

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1 skill sets and specialties needed for this case, and ultimately selected a core team
2 consisting of two partners, one senior associate, two junior associates, and one
3 paralegal. (Trial Tr. 180:18-24, 550:22 - 551:8). While other attorneys and
4 paralegals assisted at times over the years in which the underlying litigation trudged
5 along, the core team assembled by Ethan Miller performed over 80% of all the
6 work in the underlying litigation. (*Id.* at 1304:19 – 1307:11).

7 The Court, however, disagreed with Mr. Miller as to the size and
8 composition of the core team—it held that the team should have had only one
9 associate, and should have included different members than those selected by Mr.
10 Miller. There is no legal or evidentiary basis for the Court (or Hartford) to second
11 guess Mr. Miller's decisions as to the appropriate team to defend the insureds
12 because Hartford breached its duty to defend.

13 Indeed, the case cited in the Decision as authority for second-guessing Mr.
14 Miller's staffing decisions offers no support. (Decision p. 12:5-10). The insurer in
15 *United Pacific Ins. Co. v. Hall* (1988) 199 Cal.App.3d 551, had not breached its
16 duty to defend. *Id.* at 556-557 ("In this case, United Pacific did not unilaterally
17 refuse to pay for Roggeveen's services; rather, it filed a declaratory relief action to
18 have the reasonableness of the services determined."). Moreover, as other courts
19 have recognized, *United Pacific* is "of questionable precedential value" because it
20 addresses the allocation of defense costs between covered and uncovered claims but
21 preceded the controlling decisions in *Buss* and *Aerojet* by nearly a decade. *See*
22 *NextG Networks, Inc. v. One Beacon Am. Ins. Co.*, 2012 U.S. Dist. LEXIS 16952,
23 *9-11 (N.D. Cal. Feb. 10, 2012).

24 As such, there is simply no basis to second-guess the staffing decisions of the
25 insureds' defense team, and the Court's award of $4,690,236.50 for allegedly
26 unreasonable staffing should be vacated.

27 *8. The Decision incorrectly states that the staffing on the underlying*
28 *litigation was unreasonable. (Decision p. 12:1-23).*

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Even if Hartford were permitted to challenge the staffing decisions of the attorneys who stepped in to defend the insureds that it abandoned, the Court incorrectly concluded that the staffing of the insureds' attorneys was unreasonable.

The evidence at trial was undisputed that the insureds' core defense team consisted of five attorneys (two partners, one senior associate, and two junior associates) and one paralegal. (Trial Tr. 180:18-24 (testimony by Mr. Miller regarding the core team)). That team performed over 80% of all the work on the entire case, which Plaintiffs' expert testified was far above average for a core team. (Trial Tr. at 1304:19 – 1307:11).

The Court nevertheless held that the underlying litigation was overstaffed and should have been limited to three to four attorneys and one paralegal per month. (Decision p. 12:12-14). That decision is completely unsupported by the record. Indeed, the size and composition of the team assembled by Ethan Miller was entirely consistent with the testimony of Hartford's expert, who testified to similar staffing of a case for which he sought attorney's fees. [343:18 – 350:16]. Accordingly, the Court's conclusion that the staffing of the insureds' defense team was unreasonable is wrong and the Court's order of reimbursement on that theory should be vacated.

9. *The Decision improperly reimbursed 100% of the fees billed by the non-primary staff. (Decision p. 12:15-17, 23-27, 13:1-8).*

In the course of second-guessing the staffing of the insureds' defense team, the Court designated a new group of "primary" attorneys and a paralegal. The Court then reimbursed 100% of the fees billed by all other, non-primary attorneys and paralegals each month. The Court's analysis on this issue is wrong in virtually every possible way—legally, logically, factually, and procedurally—and cannot stand.

First, Hartford never argued this theory of reimbursement at trial or in its post-trial memorandum. Although Hartford asserted that the defense team was

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overstaffed, Hartford merely sought reimbursement for several alleged categories of inefficient or duplicative work that resulted from the supposed overstaffing—even Hartford never claimed that 100% of the work done by "non-primary" team members was ***per se*** unreasonable or unnecessary. As a result, Plaintiffs never had any opportunity to rebut this theory of reimbursement at trial.

Second, there is no legal support for the Court's decision to reimburse 100% of the fees billed by the "non-primary" attorneys and paralegals. The cases cited by the Court simply recognize that overstaffing is inefficient and can lead to unnecessary work. (*See* Decision p. 11:1-7). Those cases do not, however, hold or even imply that 100% of the work done by non-primary attorneys or paralegals is ***per se*** unreasonable or unnecessary.

Third, the Court's reimbursement of 100% of the fees billed by the "non-primary" attorneys and paralegals is inconsistent with Hartford's burden of proof. As the Court elsewhere recognized, all of the insureds' attorney's fees are presumed to be reasonable and necessary because Hartford breached its duty to defend. (Decision p. 7:17-21). It was Hartford's burden to prove that the fees it sought to recover were unreasonable or unnecessary, and Hartford did not introduce evidence establishing that 100% of the work done by the "non-primary" team members was unreasonable or unnecessary, and that a "reasonable insured" would not have paid even $1 for the thousands of hours of legal work performed by those attorneys and paralegals.

Fourth, the Court's 100% reimbursement theory has no factual support and defies common sense. The Court struck over $4.5 million in legal fees without any reference to or consideration of (1) the actual work performed, as described in the bills, (2) how important that work was to the insureds' defense, (3) whether the specific work was actually inefficient or duplicative, and (4) whether—assuming the defense team was restricted to the "primary" individuals identified by the Court—the work would have simply been performed by a primary team member

instead.

In short, the Court reimbursed over $4.5 million in attorney's fees simply because of ***who*** performed the work rather than whether the work itself was unreasonable or unnecessary. There is no basis for such an award, and it should be vacated.

10. The Decision identifies the wrong "primary" team members. (Decision p. 12:14-23).

In addition to all of the above errors, the Court identified the wrong "primary" team members in calculating the reimbursement award. The testimony regarding the insureds' core defense team was uncontroverted—the core team included partners Ethan Miller and James Smith (later replaced by Rodney Patula), senior associate Jose Luis Martin, junior associates Barry Brown and Daniel Kubasak, and paralegal John Belfiore. (Trial Tr. 180:18-24; 1304:19 – 1307:11).

The Court, however, excluded Jose Luis Martin from the core team. There is absolutely no evidentiary support in the record for the Court's conclusion that Mr. Martin was not one of the "primary" attorneys in the underlying litigation, and had Hartford or the Court suggested as much at trial, Plaintiffs would have elicited testimony establishing that Mr. Martin actually worked more hours on the underlying litigation than any other person—including Ethan Miller. Likewise, there is no evidentiary support for the Court's selection of Catherine Randall as a "primary" team member, given that she only worked on the case for a total of 25.7 hours.

Simply put, the "primary" team designated by the Court has no basis in the record and bears little resemblance to the actual team that performed the bulk of the work that was central to the insureds' defense.

11. The Decision is silent, or at best ambiguous and inconsistent, as to how, when, and why the fees for certain "alternate" attorneys and paralegals were allowed. (Decision p. 12:16-23).

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The Court stated that it included the time of certain "alternate" timekeepers when a "primary" team member did not bill time in a given month. Yet the Court's inclusion of these alternates is inconsistent and arbitrary and is not given any meaningful explanation in the Decision.

For example, the Court stated that it treated partner James Smith as an alternative to Rodney Patula for months when Mr. Patula did not bill any time. (Decision p. 12:18-20). However, that approach leads to absurd results. For example, a review of the bills for February 2006 shows that Mr. Smith was clearly the primary team member as he billed $56,745, while Mr. Patula billed only $125. Yet according to the Court, it reimbursed all of Mr. Smith's time for that month because Mr. Patula was by definition the "primary" team member for any month in which he billed any time.

Likewise, for months when Catherine Randall did not bill time, the Court stated that it allowed fees for one of four alternate paralegals—Laura Beall, John Belfiore, Kathleen Doyle, or John Martin. (Decision p. 12:19-22). However, the Court provided no explanation or information, much less any record evidence, to support its decision as to which alternate paralegal's time should be included in a given month.

Finally, the Court stated that it allowed associate Ryan Polk's fees if only a "couple attorneys" billed time during that month. (Decision p. 12:22-23). Not only is that explanation ambiguous as to when Mr. Polk's fees were actually included, the Court offered no explanation as to why it chose to include Mr. Polk's fees as opposed to those of another associate. Moreover, a review of the bills does not reveal any significant variation in the number of timekeepers for the seven months during which Mr. Polk worked on the case.

As such, not only did the Court identify the wrong "primary" team members, its inclusion of "alternate" team members appears to be arbitrary and has no support in the evidentiary record.

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12. The Decision contains several mathematical and typographical errors in the reimbursement award for allegedly unreasonable staffing. (Decision p. 12:23-27, 13:1-8).

In addition to all of the legal and evidentiary errors described in the objections above, the Court also made several errors in its calculation of the reimbursement award for allegedly unreasonable staffing of the insureds' defense team.

First, the Court listed the total of the monthly cuts for alleged overstaffing as $4,690,236.50. (Decision p. 13:8). However, when the Court calculated the total reimbursement award for Hartford, it appears to have transposed the second and third digits of that number, and instead used the larger figure of $4,960,236.50. Specifically, the sub-total listed on Page 10:3 ($5,023,652.50) incorporates the incorrect, transposed figure, as does the grand reimbursement total listed on Page 2:2 ($5,206730.00). This error inflated the reimbursement amount by $270,000.

There also appear to be errors in the monthly sub-totals listed on Page 12:23-27 and Page 13:1-8. Although the Court did not identify the specific billing entries that it was allowing or reimbursing, Plaintiffs tried to reconcile the Court's monthly figures using the analysis described by the Court in the Decision. Based on those efforts, it appears the Court's figures are incorrect for the months of March 2006, September 2006, March 2007, April 2007, October 2007, March 2008, May 2008, August 2008, and November 2008. Again, one cannot verify those figures given the lack of information and ambiguity in the Court's descriptions about whose time was allowed in various months, but the discrepancies in those months do not have any apparent explanation other than error.

Finally, based on Plaintiffs' reconstruction of the monthly sub-totals, it appears the Court reimbursed $22,154.00 in August-September 2006 for the fees of A.J. Yolofsky, who was a mediator—not an attorney defending the insureds.

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1 The numerous clear errors on the face of the Decision simply highlight the
2 problem inherent in the Court's approach to reimbursement on this issue, which not
3 only awarded reimbursement on an entirely new theory that Hartford never
4 advanced, but also did not provide a clear explanation of which billing entries the
5 Court was allowing or denying and the basis on which it did so. As such, while
6 these errors are serious and must be corrected, the only proper way to root out the
7 source of these errors is to vacate the entire award of reimbursement for allegedly
8 unreasonable staffing of the insureds' defense team.

9 **2. Objections To The Court's Decision On Allegedly Unnecessary Coordination Among The Insureds' Attorneys**

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11 The next category for which the Court awarded Hartford reimbursement was
12 $63,416.00 for allegedly unnecessary coordination among the insureds' attorneys.
13 Plaintiffs object to this award on the grounds below.

14 *13. The Decision improperly challenges the insureds' defense strategy.*
15 *(Decision p. 10:5-14, 11:20-28, 13:8-25).*

16 As discussed above, a breaching insurer such as Hartford is not permitted to
17 challenge the litigation strategy of its insureds' attorneys, which includes the "cost-
18 effectiveness of any particular defense tactic or approach." *J.R. Marketing, L.L.C.*
19 *v. Hartford Cas. Ins. Co.* (2013) 216 Cal. App. 4th 1444. Here, the Court
20 improperly permitted to Hartford to challenge the decisions of the partner in charge
21 of the insureds' defense as to how many meetings to have among the core team and
22 which team members to include at the meetings. Those decisions were made with
23 an eye to the best way to defend the insureds, and Hartford cannot second-guess
24 those decisions after abandoning its insureds. As such, the reimbursement award
25 for allegedly unnecessary coordination should be vacated.

26 *14. The Decision incorrectly states that the insureds' attorneys billed for*
27 *unnecessary coordination. (Decision p. 10:13-14, 13:8-25).*

28

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Even if Hartford were permitted to challenge the amount of coordination among the insureds' attorneys, the Court erred in finding that the amount of coordination was unnecessary. Plaintiffs addressed Hartford's allegations about allegedly unnecessary coordination at length in their post-trial memorandum (p. 52-58). For the reasons set forth in that memorandum and in the evidence at trial, Hartford failed to prove that the coordination among the insureds' attorneys was unnecessary or unreasonable, and the reimbursement award on this issue should be vacated.

15. The Decision does not identify the specific billing entries that the Court deemed unnecessary or unreasonable, or the standards by which it made that determination. (Decision p. 12:8-25).

As noted above, the Court's failure to identify the specific billing entries that it deemed unreasonable or unnecessary prejudices Plaintiffs in two respects. First, in the absence of that information Plaintiffs cannot assess the legitimacy of the Court's findings, including (1) whether the billing entries reimbursed by the Court were, in fact, unreasonable or unnecessary, and (2) whether the billing entries reimbursed by the Court were for "coordination" rather than for substantive meetings. Second, without knowing which billing entries the Court reimbursed, Plaintiff's cannot challenge the accuracy of the Court's calculations, including (1) whether the Court made any mathematical or typographical errors in its calculations, (2) whether the Court reimbursed the full amount of billing entries when only part of the billing entry was for coordination, and (3) whether the Court reimbursed for billing entries by "non-primary" attorneys, which would constitute a double deduction.

3. Objections Regarding The Review Of The 26 Boxes

The Court next reimbursed Hartford $51,364.00 for allegedly unreasonable reviews of 26 boxes of client documents. (Decision p. 15:4). This award is based on the same errors presented in the objections above.

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16. The Decision improperly allows Hartford to challenge litigation strategy regarding document review. (Decision p. 14-15).

Hartford essentially argues that it would have been more cost-effective to bates label and scan 26 boxes of client documents rather than reviewing them by hand. As stated above, Hartford cannot challenge "the cost-effectiveness of any particular defense tactic or approach." *J.R. Marketing, L.L.C. v. Hartford Cas. Ins. Co.* (2013) 216 Cal. App. 4th 1444. Here, Ethan Miller testified as to the reasons why he decided not to bates label or scan the documents—including the fact that the insureds' financial resources were limited because Hartford had refused to pay their defense costs. Hartford cannot now turn around and challenge Mr. Miller's decisions about how to utilize the insureds' limited resources. Accordingly, the reimbursement award for review of the 26 boxes of client documents should be vacated.

17. The Decision incorrectly concludes that the fees for reviewing the 26 boxes of documents were unreasonable or unnecessary. (Decision p. 14:17-19).

Plaintiffs addressed the numerous errors in Hartford's arguments regarding the review of the 26 boxes in their post-trial memorandum (p. 75-82, 86-87), and the Court's decision on this issue suffers from all of the same errors. In addition, the Court's analysis does not even address the proper legal standard. Despite citing *Aerojet*, the Court never answered the critical question under *Aerojet*: whether a ***"reasonable insured"*** would incur the costs to minimize its potential liability. The Court instead focused on what steps a reasonable ***attorney*** might take to minimize the cost of discovery. But this was no ordinary case; Hartford had repeatedly refused to pay for the insureds' defense, forcing the insureds to have to pick and choose what expenses to incur. There was simply no evidence at trial as to whether a reasonable insured would have incurred the discovery costs that the Court deemed unnecessary or unreasonable, and as such Hartford failed to satisfy its burden of proof on this aspect of its reimbursement claim.

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1 *18. The Decision fails to identify the specific billing entries that the Court*
2 *found unnecessary or unreasonable. (Decision p. 15:3-9).*
3 As discussed above in Objections 5 and 15, the Court's failure to identify the
4 specific billing entries that it deemed unreasonable or unnecessary forecloses
5 Plaintiffs' ability to challenge the legitimacy or accuracy of the Court's
6 conclusions.
7 **4. Objections Regarding Discovery Tactics**
8 The Court next reimbursed $23,126.50 for allegedly unreasonable and
9 unnecessary discovery tactics, including depositions, written discovery, and
10 discovery motions. (Decision p. 16:4-7). Plaintiffs object to this finding for the
11 following reasons.
12 *19. The Decision improperly allows Hartford to challenge litigation*
13 *strategy regarding discovery tactics. (Decision p. 15-16).*
14 Hartford argued that Plaintiffs' attorneys engaged in more discovery than
15 they needed in order to win the underlying litigation. This is a blatant attempt to
16 second-guess the attorney's litigation strategy and the cost-effectiveness of the
17 challenged discovery efforts. Having breached its duty to defend, Hartford is not
18 permitted to raise such a challenge and thus this aspect of Hartford's reimbursement
19 claim fails as a matter of law. *J.R. Marketing, L.L.C. v. Hartford Cas. Ins. Co.*
20 (2013) 216 Cal. App. 4th 1444.
21 *20. The Decision incorrectly concludes that the fees for the challenged*
22 *discovery tactics were unreasonable or unnecessary. (Decision p. 15:25-27).*
23 Plaintiffs addressed the numerous errors in Hartford's arguments regarding
24 the challenged discovery tactics in their post-trial memorandum (p. 67-82), and the
25 Court's decision on this issue suffers from all of the same errors.
26 In addition, the Decision contains several unsupported references to the
27 record to support the Court's conclusions. First, the Court cites to supposed
28 testimony by Hartford's expert regarding the total amount of fees attributable to

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1 various discovery efforts. (Decision p. 15:14-18). However, the Court
2 unambiguously struck those figures at trial. (Trial Tr. at 426:25–427:2). Although
3 the Decision purports to "clarify" the scope of its ruling at trial to admit those
4 figures (Decision p. 8:26-28), that is not a clarification but rather a post-trial
5 evidentiary reversal. Needless to say, the Court cannot reverse an evidentiary
6 ruling when Plaintiffs no longer have any ability to cross-examine the previously-
7 stricken testimony, as that would violate Plaintiffs' right to Due Process.
8 Accordingly, the Court's reliance on the stricken expert testimony is improper.
9 Second, the Court refers, without citation, to supposed admissions by Ethan
10 Miller that he billed the insureds for unreasonable discovery efforts. (Decision p.
11 15:19-27, 16:1-2). Miller made no such admissions at trial. To the contrary, Miller
12 testified that the discovery efforts undertaken were proper, appropriate and
13 reasonable steps to be taken in defense of the insureds. (Trial Tr. 1244:10– 25).
14 *21. The Decision fails to identify the specific billing entries that the Court*
15 *found unnecessary or unreasonable. (Decision p. 16:3-7).*
16 As discussed above in Objections 5, 15, and 18 the Court's failure to identify
17 the specific billing entries that it deemed unreasonable or unnecessary forecloses
18 Plaintiffs' ability to challenge the legitimacy or accuracy of the Court's
19 conclusions.
20 **5. Objections Regarding Legal Research**
21 The Court next awarded $24,757.00 for allegedly unreasonable and
22 unnecessary legal research. Plaintiffs object to this aspect of the Decision for the
23 following reasons.
24 *22. The Decision improperly allows Hartford to challenge litigation*
25 *strategy regarding legal research. (Decision p. 16-17).*
26 The Court reimbursed nearly $25,000 in attorney's fees for legal research
27 that the Court deemed to be unnecessary or unreasonable. While the Court did not
28 identify the specific types of legal research for which it reimbursed fees (addressed

1 below), the Court's second-guessing is improper here. As the Court of Appeal
2 recognized, "insurers are barred from imposing on the insured's counsel discovery
3 or research limitations that would impede counsel's professional judgment or
4 otherwise unreasonably interfere with the insured's defense." *J.R. Marketing,*
5 *L.L.C. v. Hartford Cas. Ins. Co.* (2013) 216 Cal. App. 4th 1444. Accordingly,
6 Hartford should not have been permitted to challenge the legal research conducted
7 by the insureds' attorneys, and this aspect of the reimbursement award should be
8 vacated.

9 *23. The Decision incorrectly concludes that the fees for the challenged*
10 *legal research were unreasonable or unnecessary. (Decision p. 15:25-27).*

11 Plaintiffs addressed the numerous errors in Hartford's arguments regarding
12 the challenged legal research in their post-trial memorandum (p. 83-84), and the
13 Court's decision on this issue suffers from all of the same errors.

14 In addition, the Court again relies on the stricken testimony by Hartford's
15 expert regarding the amount of fees attributable to various types of research
16 (Decision p. 16:16-22), and again refers to supposed admissions by Ethan Miller
17 that he charged the insureds for unnecessary or unreasonable legal research.
18 (Decision p. 17:3-12). Miller made no such admissions. For example, the Court
19 identified as unreasonable and unnecessary fees attributable to legal research
20 regarding summary judgment standards, procedural issues, writs and the motion to
21 continue trial. The Court ignores Miller's testimony that he wrote off time related
22 to all such research. (*See, e.g.*, Trial Tr. 607:8–610:6 (fees for research of standards
23 for motion for summary adjudication written off); 624:1–21 (fees for research of
24 appellate rules and process for preserving objections written off); 638:7–639:12
25 (fees related to motion for reconsideration written off); 642:8–14 & 646:16–647:5
26 (fees for inefficient research written off); 618:3–619:19 (fees related to writ petition
27 written off); 637:7–638:6 (fees related to motion to continue trial written off)).
28 Furthermore, Miller testified that the remaining fees for research were all

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1 reasonable and necessary. (*Id.* at 1083:13–1084:15).

2 As apparent justification for further cuts, however, the Court relies on a
3 purported admission by Miller "that he may have missed other related billing
4 entries." (Decision p. 17:6–7). The Court's characterization of Miller's testimony,
5 however, is both unfair and improper. The only testimony by Miller regarding a
6 possible missed entry was as follows:

7

8 > Q. You had lawyers or paralegals performing secretarial tasks and billing them to Hartford, didn't you?
9 > A. It is possible that in these reams of bills, despite my best efforts, that a clerical task would slip through. It was my -- I made my strongest effort to weed that sort of thing out, and I think when you review the prebills you will see that I did pull out some of that.
10
11
12 > Q. There is time recorded and time billed to Hartford for travel arrangements?
13
14 > A. Again, Mr. Greenberg, ***it's possible that in tens of thousands of entries, I missed one or two.***

15

16 (Trial Tr. 213:2–14) (emphasis added). It was Hartford's burden to identify any
17 such entries and it did not. Accordingly, the Court improperly awarded
18 reimbursement for legal research.

19 *24. The Decision fails to identify the specific billing entries that the Court*
20 *found unnecessary or unreasonable. (Decision p. 16:3-7).*

21 As discussed above in Objections 5, 15, 18, and 21 the Court's failure to
22 identify the specific billing entries that it deemed unreasonable or unnecessary
23 forecloses Plaintiffs' ability to challenge the legitimacy or accuracy of the Court's
24 conclusions.

25 **6. Objections Regarding Overhead Expenses**

26 The final category for which the Court ordered reimbursement was
27 $83,830.00 for allegedly unreasonable overhead expenses, such as clerical tasks,
28 travel, and client updates. (Decision p. 17-18).

25. The Decision incorrectly concludes that the insureds were charged for unreasonable overhead expenses. (Decision p. 18:6-20).

Plaintiffs addressed the numerous errors in Hartford's arguments regarding the challenged overhead expenses in their post-trial memorandum (p. 89-90), and the Court's decision on this issue suffers from the same errors. But the Court appears to have also conducted its own review of the bills because the Decision refers to alleged overhead expenses that were never contested by Hartford. (Decision p. 18:12-16). It was ***Hartford*** that bore the burden to identify the fees for which it sought for reimbursement, and it is improper for the Court to step in and award fees that Hartford never challenged and for which Plaintiffs had no opportunity to introduce rebuttal evidence.

In addition, the Court again refers to supposed admissions by Ethan Miller that he charged the insureds for unnecessary or unreasonable overhead expenses. (Decision p. 18:1-10). Miller made no such admissions and his testimony was, in fact, to the contrary. (*See, e.g.*, Trial Tr. 475:19–476:1 (clerical and secretarial overtime written off); 477:15–478:1, 580:7–19, 620:11–20, 629:22–630:7 & 650:17–651:3 (overhead and travel time written off)).

26. The Decision fails to identify the specific billing entries that the Court found unnecessary or unreasonable. (Decision p. 18:12-20).

Although in this instance the Court appears to provide some general illustrations of overhead fees that it found unnecessary or unreasonable, the Court nevertheless failed to identify the specific billing entries relating to those fees, or to identify all of the billing entries that comprised its reimbursement award. Accordingly, for the same reasons discussed above in Objections 5, 15, 18, 21, and 24, the Court's failure to identify the specific billing entries that it deemed unreasonable or unnecessary forecloses Plaintiffs' ability to challenge the legitimacy or accuracy of the Court's conclusions.

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7. Objection Regarding Plaintiffs' Motion To Strike

Plaintiffs' final objection is to the Court's denial of their Motion to Strike the improper post-trial materials Hartford included in its post-trial memorandum and appendix. (Decision p. 4-5).

27. The Decision incorrectly denies Plaintiffs' Motion to Strike. (Decision p. 5:11-21).

The Court accurately summarized the arguments in Plaintiffs' Motion to Strike—namely that Hartford had never challenged specific billing entries as unreasonable or unnecessary during discovery or at trial, but attempted to do so in its post-trial memorandum and in additional materials in the appendix to its post-trial memorandum:

> 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.

(Decision p. 5:7-11). The Court therefore concluded that "[Plaintiffs'] contentions have merit," (Decision p. 5:6), and that "considering such information would be prejudicial to [Plaintiffs]" (Decision p. 5:24-25).

Despite that finding, the Court declined to strike Hartford's improper post-trial materials. The Court offered two reasons for its decision, but neither of them has any merit.

First, the Court stated that the improper post-trial materials were not technically "evidence," but rather new manipulations of evidence in the record. (Decision p. 5:13-18). That assertion misses the point: regardless of whether or not the improper materials are technically "new evidence," it is the timing and use of those materials that is improper and prejudicial to Plaintiffs, as the Court acknowledged.

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1 Second, the Court states that it requested that Hartford file these improper
2 post-trial materials. (Decision p. 5:19-21). The Court did at one point indicate that
3 it was going to ask Hartford to file a highlighted copy of the bills. (Trial Tr.
4 311:16–20). However, Hartford never filed any highlighted copy of the bills. More
5 importantly, Plaintiffs immediately objected to the Court's request and alerted it to
6 the serious prejudice that would result from allowing Hartford to challenge specific
7 fees, and the Court indicated that Plaintiffs could present their objections if and
8 when Hartford filed any additional materials. (*See id.* at 312:21–315:6,
9 424:2–425:25 & 511:5–512:15). As such, Plaintiffs have preserved their objection
10 to Hartford's improper materials.
11 Finally, the Court's refusal to strike Hartford's improper materials is
12 important to protect the record in the inevitable appeal. California law is clear that
13 "appellate review for sufficiency of the evidence extends to the ***entire*** record, and is
14 not limited to facts mentioned in a trial court's statement of decision." *In re*
15 *Shaputis*, 53 Cal. 4th 192, 214 n.11 (2011) (emphasis added). Thus, even though
16 the Court stated that it did not consider any of the improper materials that Plaintiffs
17 moved to strike (Decision p. 5:21-27), that will not prevent the Court of Appeal
18 from considering those materials if they are part of the record.
19 As such, to ensure that these improper and prejudicial materials are not part
20 of the record on appeal and that Hartford cannot later cite them to support its
21 claims, the Court should strike them from the record.
22 ///
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IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully object to the Court's July 24, 2013 "Statement of Decision," and also move the Court to reconsider, modify, or revoke that Decision.

Dated: July 9, 2013

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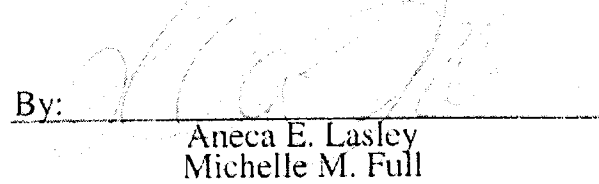

By: ______________________
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J.R. Marketing, LLC, et al. v. Hartford Casualty Insurance Company, et al.
San Francisco Superior Court, Case No. CGC 06449220

PROOF OF SERVICE

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 275 Battery Street, Suite 2600, San Francisco, California 94111.

On **July 9, 2013**, I served the foregoing document described as **PLAINTIFFS' OBJECTIONS TO THE JUNE 24, 2013 "STATEMENT OF DECISION" AND/OR APPLICATION TO RECONSIDER, MODIFY OR REVOKE THE JUNE 24, 2013 "STATEMENT OF DECISION"** on all other parties and/or their attorney(s) of record to this action by placing a true copy thereof in a sealed envelope as follows:

SEE ATTACHED SERVICE LIST

Service was accomplished as follows.

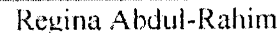
☒ **By E-mail.** By transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth on the service list attached.

AND/OR

☒ **By U.S. Mail, According to Normal Business Practices.** On the above date, at my place of business at the above address, I sealed the above document(s) in an envelope addressed to the above, and I placed that sealed envelope for collection and mailing following ordinary business practices, for deposit with the U.S. Postal Service. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for mailing with the U.S. Postal Service. Correspondence so collected and processed is deposited the U.S. Postal Service the same day in the ordinary course of business, 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 9, 2013**, at San Francisco, California.



Regina Abdul-Rahim

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Hartford Casualty Insurance Company v. J.R. Marketing, LLC, et al.
Supreme Court of the State of California
Supreme Court Case No. S211645

PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 275 Battery Street, Suite 2600, San Francisco, California 94111.

On July 23, 2013, a copy of the following document:

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was served on each of the following addressees:

☒ **By Regular Mail:** I placed with this firm at the above address for deposit with the United States Postal Service true and correct copies of the aforementioned document in sealed envelopes, postage fully paid, addressed as follows:

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Division Three
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Case No. A133750

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Civic Center Courthouse
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Case No. CGC-06449220

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on July 23, 2013, at San Francisco, California.

Tonette Danowski