S211645

IN THE SUPREME COURT OF CALIFORNIA

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

v.

HARTFORD CASUALTY INSURANCE COMPANY,
Cross-Complainant and Appellant.

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

SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID M. AXELRAD

[Opening Brief on the Merits filed concurrently herewith.]

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SUPPLEMENTAL 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 the trial court's amended tentative statement of decision following 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, motion to strike, and motion for jury trial. A true and correct copy of the amended tentative statement of decision is attached to the accompanying Declaration of David M. Axelrad as exhibit A.

This supplemental motion for judicial notice is based upon this request, the attached memorandum of points and authorities, the attached Declaration of David M. Axelrad and exhibit attached thereto, the petition for review on file with this Court, Hartford's motion for judicial notice and supporting documents filed on July 12, 2013, and the opening brief on the merits filed concurrently herewith.

November 18, 2013

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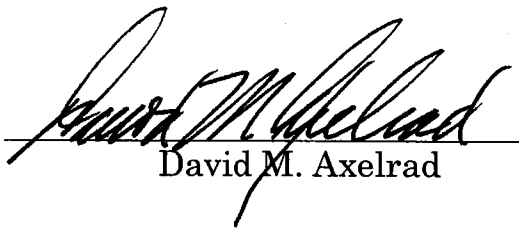
By: 
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MEMORANDUM OF POINTS AND AUTHORITIES

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 September 18, 2013, this Court granted review of the Court of Appeal's decision.

While Hartford's appeal from the dismissal of Squire Sanders was pending, Hartford's reimbursement action against the insureds went to trial. The trial court issued an initial statement of decision, and Hartford requested that this Court take judicial notice of that statement of decision in connection with Hartford's petition for review in this Court. (MJN.) Squire Sanders had no objection to this Court's taking judicial notice, so long as this Court would also take judicial notice of 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 in the trial court on July 9, 2013. (Response to MJN 1.)

The trial court has now issued its amended tentative statement of decision after considering the parties' filings in response to the initial statement of decision, including plaintiffs' July 9 filing.

The trial court's amended tentative statement of decision orders the insureds to reimburse Hartford nearly $5 million. The amended tentative statement of decision is therefore directly relevant to the issues raised by Hartford's appeal to this Court as it apprises this Court of the current status of the case, and addresses the issue of whether the insureds are the proper party to bear the cost of their *Cumis* counsel's excessive overbilling. (See Declaration of David M. Axelrad, Exh. A, p. 26 ["The Court is concerned about the effect of this decision on the insured, who will be required to pay this judgment. . . . [¶] . . . [¶] 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."].)

The Evidence Code expressly contemplates 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 supplemental motion for judicial notice.

November 18, 2013

HORVITZ & LEVY LLP
DAVID M. AXELRAD
EMILY V. CUATTO
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IRA G. GREENBERG

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 amended tentative statement of decision following 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, motion to strike, and motion for jury trial, filed on October 25, 2013.

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

Executed November 18, 2013, at Encino, California.

David M. Axelrad

ENDORSED
FILED
San Francisco County Superior Court

OCT 25 2013

CLERK OF THE COURT
BY: JACQUELINE ALAMEDA
Deputy Clerk

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

AMENDED TENATIVE STATEMENT OF DECISION[1] 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, MOTION TO STRIKE, AND MOTION FOR JURY TRIAL

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,

[1] The Court issued a decision on June 24, 2013, entitled "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 intended this decision to be a tentative ruling. The decision does not make its tentative nature clear, however. Additionally, as reflected in their July 9, 2013 and July 17, 2013 briefs, the parties are also unclear about the tentative nature of the Court's June 24, 2013 decision. To rectify this confusion, the Court now issues this amended tentative decision, which makes clear that the June 24, 2013 decision is a tentative order. Pursuant to California Rules of Court, Rule 3.1950(b), the Court has the power to make this modification.

LLC, Jane E. Ratto, Robert E. Ratto, and Penelope A. Kane ("J.R. Marketing").[2] The Court has considered the evidence, applicable law, and arguments, including those submitted by the parties in their July 9, 2013 and July 17, 2013 filings.[3] The Court now issues this tentative statement of decision, holding that Hartford is entitled to reimbursement in the amount of $4,997,395.00 for J.R. Marketing's unreasonable and unnecessary fees and those claims and individuals clearly not covered by the insurance policy. Hartford is not entitled to reimbursement for any allegedly uncovered claims. In making this determination, the Court denies J.R. Marketing's request for a jury trial on Hartford's claim for reimbursement as well as its 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

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[2]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, 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.].) Hartford also orally dismissed with prejudice its cross-complaint against Lenore DeMartinis after the jury was impaneled in preparation for the Phase I trial on November 9, 2012. Similarly, Hartford filed a request for dismissal with prejudice its cross-complaint against Germain DeMartinis on January 31, 2013. Accordingly, Hartford's cross-complaint for reimbursement only lies against J.R. Marketing, the Rattos, and Kane.

[3] The Court also notes that Hartford admittedly did not go through Squire Sanders' bills line by line to identify specific entries that set forth fees for which it is entitled to reimbursement. The Court, however, is obligated to do so in evaluating Hartford's claim for reimbursement. (*United Pacific Ins. Co. v. Hall* (1988) 199 Cal.App.3d 551, 557 [While *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.]; *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."].) And the Court did review every line of all of the statements submitted to Hartford for payment.

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 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.

A jury trial on all claims was scheduled for November 2012. At the start of trial on November 5, 2012, Hartford asserted that its cross-claim for reimbursement should proceed as a court trial. J.R. Marketing objected. Over J.R. Marketing's objection, the Court concluded that J.R. Marketing was not entitled to a jury trial on Hartford's cross-claim for reimbursement. Accordingly, the Court bifurcated the matter. From November 5, 2012 through December 12, 2012, the Phase I jury trial proceeded on J.R. Marketing's claims for breach of contract and bad faith against Hartford. The jury found in favor of J.R. Marketing on its breach of contract claim and awarded damages in the amount of $262,926.00. As to J.R. Marketing's bad faith claim, the jury found in favor of Hartford.

Hartford's 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 three other requests: (1) Motion for Judgment Regarding Hartford's Cross-Claim for Reimbursement; (2) Motion to Strike Hartford's Appendix and Related Portions of its Post-Trial Memorandum; and (3) request for a new jury trial on Hartford's claim for reimbursement. The Court now issues its decision regarding Phase II of this case as well as all of these other matters.

DISCUSSION

I. J.R. Marketing's Request for a Jury Trial on Hartford's Cross-Claim for Reimbursement

The Court considers J.R. Marketing's argument that the Court denied its right to a jury trial on Hartford's reimbursement claim. As discussed below, the Court affirms its decision to bifurcate the case and allow Hartford's claim for reimbursement to proceed as a court trial. J.R. Marketing is not entitled to a new jury trial on this claim.

Before the Phase I jury trial, Hartford requested that its claim for reimbursement proceed as a court trial. J.R. Marketing objected. J.R. Marketing argued that it had a right to have all of the parties' claims tried in a single jury trial. J.R. Marketing's primary contention was that since the "gist of the action" is legal rather than equitable, J.R. Marketing had a constitutional right to a jury trial. J.R. Marketing maintained this objection throughout both the Phase I and Phase II trials. It now again asserts that the Court violated its right to a jury trial and requests that the Court conduct a new trial on Hartford's reimbursement claim before a jury.

The Court does not find J.R. Marketing's argument compelling in light of the relevant law and upholds its decision to bifurcate this matter and have Hartford's cross-claim for reimbursement proceed by a court trial. California law is clear about whether an insurer's reimbursement claim must proceed by way of a jury trial. It does not—a reimbursement claim is tried to a court. (*American Motorists Ins. Co. v. Superior Court* (1998) 68 Cal.App.4th 864, 874.) In *American Motorists Ins. Co.*, the Court of Appeal addressed the very question at issue in this case. It determined that in a case where a court has ordered the insurer to defend the action on a motion for summary judgment, the insurer's subsequent claim to recover allegedly excessive or unnecessary fees is treated as a claim for equitable restitution, not a claim for damages, and hence is triable by the trial judge alone, not a jury.

(*Id.* at 867, 873-74.)

In this case, on July 26, 2006, the Court granted J.R. Marketing's motion for summary adjudication regarding Hartford's duty to defend. The Court then orally denied J.R. Marketing's request for a jury trial on Hartford's reimbursement claim in November 2012 before either the Phase I or Phase II trials. The November 2012 ruling comports with the law. Even if there were mixed questions of law and fact, the Court clearly carved out the reimbursement claim and left it as the only issue to be resolved at the Phase II court trial. Accordingly, the Court denies J.R. Marketing's request for a new jury trial on Hartford's cross-claim for reimbursement.

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

The Court also addresses J.R. Marketing's Motion for Judgment and Motion to Strike. The Court denies these motions as well and directs the parties to its decision in the third section of this order regarding the Phase II trial because this discussion addresses and resolves all of the parties' contentions.

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 third 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.

III. 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.) It requires the undertaking of reasonable and necessary efforts for that purpose. (*Id.*) Specifically, 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 is 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.)[4] 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

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[4] 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.)

> 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 $4,892,678.00 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 because 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, the jury determined that Hartford breached its duty to defend J.R. Marketing in the Marin action but did not find that Hartford acted in 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 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, 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 like 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[5] and O'Connor—both testified at trial. Their testimony further confirmed the range of the reasonable value of litigating the 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 $4,892,678.00 for J.R. Marketing's unreasonable and unnecessary fees.

Before delving into the specific areas 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

[5] 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.

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 in the community for overbilling) charged the opposing party only $6 million—about half of the fees and costs incurred by Squire Sanders.[6] 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.

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 $4,690,236.50 in reimbursement for the unreasonable number of Squire Sanders' attorneys and employees who worked on the Marin action.

Hartford contends that Squire Sanders' staffing of the case was too great, making its defense of the Marin action inefficient and largely duplicative.[7] The Court finds this argument

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[6] 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.].)

[7] 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 Bay Area 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.

Hartford presents some additional challenges as well, including: (1) Squire Sanders spent an unnecessary amount of time on coordinating all of the attorneys and staff members, who worked on the case; (2) Squire Sanders generally engaged in inefficient discovery strategies; (3) Squire Sanders billed for unreasonable legal research; and (4) Squire Sanders billed

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 much of these additional employees' work was unnecessary. 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.

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. 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 ("Brown")), and a paralegal (including John Belfiore ("Belfiore")).

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for unreasonable administrative matters. 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 to make

The Court concludes that Hartford's attack has merit and justifies significant reimbursement. The Court finds that Squire Sanders' staffing in the Marin action was unreasonable and thus that much of the work done by these additional staff members was unnecessary. 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 of the Marin action.

Accordingly, the Court finds that Hartford is entitled to the following reimbursements. 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 ("Smith"). For the months in which Randall did not work on the case, the Court includes the fees billed by Laura Beall ("Beall"), John Martin ("Martin"), Belfiore, or Kathleen Doyle ("Doyle"). For the months in which only a couple of attorneys were working, the Court also includes Associate Ryan Polk's ("Polk") billed time.

Based on these considerations, the Court orders that J.R. Marketing reimburse Hartford in the amount of $4,690,236.50 for unreasonable staffing. The Court's calculations of this amount are presented in the following chart. The chart indicates the total amount cut for each month and also

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additional cuts to the costs incurred in the defense of the Marin actionHartford is only entitled to reimbursement for

provides a further breakdown of the monthly amount cut by listing the individuals cut as well as the amount they billed that was cut.

Monthly Amount Cut	Further Breakdown by Individuals Cut
February 2006: $101,295.50	Daniel Balmat: $840.00; Peter Barto: $5,187.00; Mark Goodman: $1,395.00; Amy Ita: $29,835.00; Faith Plock: $5,928.00; Lan Quatch: $1,008.00; Amy Rose: $357.50; James Smith: $56,745.00
March 2006: $102,542.00	Peter Barto: $8,064.00; Laura Beall: $117.00; John Burlingame: $13,876.50; Anthony Dipietra: $22,380.00; Mark Goodman: $1,440.00; Annie Choi Goodwin: $10,217.50; Shirley Heringer: $3,010.00; Amy Ita: $29,812.50; Juliana Keaton: $12,255.00; Faith Plock: $390.00; Amy Rose: $942.50; Katherine Sheehan: $37.50
April 2006: $43,593.00	Peter Barto: $3,423.00; Laura Beall: $99.00; John Burlingame: $8,352.00; Anthony Di Pietra: $22,710.00; Shirley Heringer: $4,356.50; Amy Ita: $1,912.50; Juliana Keaton: $427.50; Allison Pitigoi: $1,840.00; Amy Rose: $292.50
May 2006: $32,370.50	Peter Barto: $4,263.00; John Burlingame: $478.50; Anthony Di Pietra: $26,370.00; Shirley Heringer: $1,096.50; Amy Rose: $162.50
June 2006: $12,808.50	Peter Barto: $84.00; John Burlingame: $1,044.00; Anthony Di Pietra: $9,810.00; Shirley Heringer: $1,870.50
July 2006: $7,982.50	Daniel Balmat: $690.00; Peter Barto: $945.00; John Burlingame: $435.00; Anthony Di Pietra: $1,890.00; Shirley Heringer: $3,332.50; Amy Ita: $690.00
August 2006: $42,749.50	Victor Grindle: $300.00; Amy Ita: $7,153.00; Raul Manon: $3,538.00; Maria Moncada: $7,480.00; Christy Valdes: $980.50; Catherine Whitfield: $8,580.00; Stacie Yee: $6,160.00; A.J. Yolofsky: $8,558.00
September 2006: $104,232.00	Mark Ettershank:$900.00; Victor Grindle: $1,150.00; Shirley Heringer: $817.00; Amy Ita: $12,627.00; Raul Manon: $319.00; Maria Moncada: $28,838.00; Elizabeth Seals: $4,340.00; Enrique Tobar: $3,987.50; Christy Valdes: $555.00; Philippe Weyland: $450.00; Catherine Whitfield: $34,645.00; Stacie Yee: $2,007.50; A.J. Yolofsky: $13,596.00
October 2006: $71,678.00	John Burlingame: $1,609.50; Mark Ettershank: $1,545.00; Mark Goodman: $810.00; Victor Grindle: $700.00; Chris Hubbard: $3,750.00; Amy Ita: $5,704.00; John Martin: $279.00; Jose Martin: $49,087.50; Maria Moncada: $4,268.00; Errin Patridge: $1,147.50; Christy Valdes: $277.50; Catherine Whitfield: $2,307.50; Stacie Yee: $192.50
November 2006: $100,387.50	John Burlingame: $174.00; Mark Ettershank: $180.00; Mark Goodman: $4,005.00; Victor Grindle: $1,425.00; Shirley Herringer: $645.00; Chris Hubbard: $2,950.00; Amy Ita: $6,693.00; John Martin: $14,926.50; Jose Martin: $66,374.00; Ryan Polk: $2,430.00; Amy Rose: $585.00
December 2006: $93,114.50	John Burlingame: $130.50; Nancy Castor: $150.00; Mark Ettershank: $45.00; Mark Goodman: $1,215.00; Chris Hubbard: $700.00; Shirley Herringer: $64.50; Amy Ita: $2,599.00; Jose Martin: $47,470.50; Ryan Polk: $40,320.00; Elizabeth Seals: $300.00; Nicholas Unkovic: $120.00
January 2007: $137,101.50	Peter Barto: $1,495.00; Kenneth Bond: $757.50; Penn Butler: $3,050.00; Nancy Castor: $260.00; Bezawit Dilgassa: $149.50; Mark Goodman: $1,344.00; Chris Hubbard: $267.50; Amy Ita: $6,519.00; Jose Martin: $66,349.00; Ryan Polk: $56,910.00
February 2007: $113,850.50	Peter Barto: $1,344.00; Laura Beall: $617.50; Rupert Blake: $280.00; Kenneth Bond: $2,020.00; Bezawit Dilgassa: $1,904.50; Susana Garcia: $550.00; Victor Grindle: $600.00; Helen Huang: $8,100.00; Amy Ita: $3,895.00; Daniel Kubasak: $7,665.00; Jose Martin: $78,002.00; Michael Purleski: $8,442.00; Gregory Wald: $440.00
March 2007: $79,328.50	Paul Bailiff: $562.00; Daniel Balmat: $1,225.00; Peter Barto: $1,840.00; Raina Bayas: $4,018.50; Laura Beall: $2,565.00; Susana Garcia: $1,738.00; Mark Goodman: $2,112.00; Shirley Heringer: $4,692.00; Amy Ita: $3,127.00; Daniel Kubasak: $11,795.00; Jose Martin: $38,485.00; Michael Purleski: $7,169.00

unreasonable and unnecessary fees—it is not entitled to double recovery.

April 2007: $118,689.50	Paul Bailiff: $630.00; Peter Barto: $7,774.00; Laura Beall: $598.00; Shirley Heringer: $7,797.00; Daniel Kubasak: $15,840.00; Jose Martin: $80,278.00; James Smith: $5,772.50
May 2007: $159,404.00	Daniel Balmat: $25,668.00; Peter Barto: $7,291.00; Laura Beall: $4,400.00; Bezawit Dilgassa: $1,254.50; David Fromm: $10,153.00; Shirley Heringer: $1,495.00; Daniel Kubasak: $29,124.00; D. Alan Lindsey: $493.50; Jose Martin: $73,959.00; Sara Quinto: $5,566.00
June 2007: $186,332.50	Daniel Balmat: $36,540.00; Peter Barto: $6,762.00; Laura Beall: $880.00; Nancy Castor: $390.00; David Kenny: $488.00; Daniel Kubasak: $66,996.00; Jose Martin: $72,668.50; Sara Quinto: $1,100.00; Nicholas Unkovic: $508.00
July 2007: $161,326.00	Marek Adamo: $637.50; Daniel Balmat: $26,928.00; Peter Barto: $552.00; Daniel Kubasak: $52,560.00; Jose Martin: $75,961.50; Jennifer Pierson: $375.00; Julie Schwartz: $4,312.00
August 2007: $196,902.00	Daniel Balmat: $45,504.00; Peter Barto: $1,955.00; Mark Goodman: $336.00; Kelly Guthleben: $375.00; Daniel Kubasak: $73,656.00; Ann Lee: $4,617.00; Jose Martin: $68,752.50; Jennifer Pierson: $887.50; Amy Rose: $819.00
September 2007: None	
October 2007: $340,896.50	Daniel Balmat: $63,180.00; Peter Barto: $1,104.00; Laura Beall: $638.00; Nancy Castor: $260.00; Kelly Guthleben: $621.00; Daniel Kubasak: $98,424.00; Yvette Mannion: $4,230.00; Jose Martin: $139,685.50; Kirk Miller: $7,744.00; Jason Richardson: $3,748.50; Anne Rosenthal: $18,812.50; Mark Ziemba: $2,499.00
November 2007: $83,890.50	Daniel Balmat: $10,116.00; Nancy Castor: $104.00; Kelley Guthleben: $553.00; Daniel Kubasak: $ 29,340.00; Jose Martin: $ 40,139.00; Jason Richardson: $2,448.00; Mark Ziemba: $1,190.00
December 2007: $24,119.00	Daniel Balmat: $1, 476.00; Shirley Heringer: $23.00; Daniel Kubasak: $4,464.00; Jose Martin: $ 18,156.00
January 2008: $89,811.50	Daniel Balmat: $320.00; Kelley Guthleben: $1,330.00; Daniel Kubasak: $27,920.00; Jose Martin: $ 60,241.50
February 2008: $115,951.00	Daniel Balmat: $320.00; Kelley Guthleben: $1,330.00; Daniel Kubasak: $27,920.00; Jose Martin: $ 60,241.50
March 2008: $291,113.50	Daniel Balmat: $1,720.00; Peter Barto: $1,768.00; John Burlingame: $721.00; Nancy Castor: $159.00; Andrew Chang: $6,118.00; Robert Guite: $ 2,279.50; Kelley Guthleben: $882.00; Nicole Joepsh-Goteiner: $18,507.50; Daniel Kubasak: $73,760.00; Yvette Mannion: $21,970.00; Jose Martin: $117,067.50; Arturo Sandoval: $29,736.00; John Stearns: $16,425.00
April 2008: $326,276.00	Daniel Balmat: $27,680.00; Peter Barto: $3,198.00; Laura Beall: $195.00; Nancy Castor: $132.50; Joseph Grasser: $4,290.00; Kelley Guthleben: $868.00; Nicole Joseph-Goteiner: $6,215.00; Daniel Kubasak: $88,920.00; Yvette Mannion: $20,072.00; Jose Martin: $145,134.00; Arturo Sandoval: $7,644.00; Ethan Seibert: $3,150.00; James Smith: $4,200.00; Christina Spontoni: $560.00; John Stearns: $14,017.50
May 2008; $321,249.00	Daniel Balmat: $16,960.00; Peter Barto: $624.00; Michelle Full: $8,365.00; Kelley Guthleben: $616.00; Nicole Joseph-Goteiner: $2,832.00; Daniel Kubasak: $99,360.00; Yvette Mannion: $13,728.00; Jose Martin: $159,637.00; Angela O'Rourke: $552.00; Terrence Perris: $2,142.00; John Stearns: $16,132.00
June 2008: $292,710.00	Daniel Balmat: $1,600.00; Peter Barto: $572.00; Laura Beall: $1,963.00; Erinn Contreras: $3,324.00; Kelley Guthleben: $1,232.00; Daniel Kubasak: $96,600.00; Jessica Leal: $6,216.00; Yvette Mannion: $5,824.00; Jose Martin: $155,479.50; Christopher Mays: $3,024.00; Terrence Perris: $1,530.00; John Stearns: $15,345.00
July 2008: $297,727.50	Michelle Alborzfar: $5,472.00; Daniel Balmat: $3,320.00; Laura Beall: $1,872.00; Erinn Contreras: $4,971.50; Joseph Grasser: $1,815.00; Kelley Guthleben: $182.00; John Hutchison: $2,025.00; Daniel Kubasak: $114,080.00; Jessica Leal: $3,336.00; Jose Martin: $142,758.00; Christopher Mays: $2,016.00; Terrence Perris: $3,825.00; Catherine Randall: $720.00; Jason Richardson: $6,655.00; John Stearns: $4,680.00

August 2008: $36,542.00	Daniel Kubasak: $15,640.00; Yvette Mannion: $1,462.00; Jose Martin: $13,909.50; Jason Richardson: $2,475.00; John Stearns: $3,037.50
September 2008: $66,538.50	Peter Barto: $728.00; Daniel Kubasak: $28,240.00; Jose Martin: $37,570.50
October 2008: $5,520.00	Daniel Balmat: $40.00; Daniel Kubasak: $5,480.00
November 2008: $13,446.50	Daniel Kubasak: $11,120.00; Jose Martin: $2,326.50
December 2008: $50,340.00	Peter Barto: $546.00; Mark Goodman: $824.00; Kelley Guthleben: $252.00; Daniel Kubasak: $12,880.00; Jose Martin: $35,838.00
January 2009: $52,661.50	Nicole Joseph-Goteiner: $832.00; Daniel Kubasak: $32,537.50; Jose Martin: $19,292.00
February 2009: $99,988.50	Daniel Kubasak: $43,747.50; Yvette Mannion: $6,615.00; Jose Martin: $47,944.00; Julie Schwartz: $1,682.00
March 2009: $160,901.00	Erinn Contreras: $6,241.50; Nicole Joseph-Goteiner: $5,144.00; Daniel Kubasak: $53,247.50; Yvette Mannion: $4,770.00; Jose Martin: $87,256.00; Jason Richardson: $3,520.00; Julie Schwartz: $3,393.00; John Stearns: $329.00
April 2009: $64,491.50	Peter Barto: $1,265.00; Shirley Heringer: $189.00; Daniel Kubasak: $24,557.50; Jose Martin: $38,480.00
May 2009: $33,296.50	Daniel Kubasak: $11,352.50; Jose Martin: $21,944.50
June 2009: $35,402.00	Xavier Brandwajn: $3,942.00; Jose Martin: $31,460.00
July 2009: $16,995.50	Peter Barto: $412.50; Xavier Brandwajn: $3,723.00; Mark Goodman: $3,944.00; Jospeh Grasser: $120.00; Jose Martin: $8,788.00
August 2009: $3,900.00	Jose Martin: $3,900.00
September 2009: $780.00	Jose Martin: $780.00
October 2009 through February 2010: None	

B. Hartford is entitled to $102,667.00 in reimbursement for Squire Sanders' unreasonable work on summary judgment motions and writs.

Other areas of work for which the Court finds there is compelling reason to award reimbursement are Squire Sanders' work on summary judgment motions[8] and writs. Hartford argues that Squire Sanders expended far too much effort on motions and writs that it acknowledged would likely be unsuccessful. The Court agrees.

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

[8] In this section, the Court only orders reimbursement for Squire Sanders' general work on summary judgment motions, not its work on Harrington's motion for summary judgment. As discussed later in this decision, the Court separately awards reimbursement for Squire Sanders' defense of Harrington since the parties agree that he is not an insured under the insurance policy.

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 work conducted on summary judgment motions and writs.[9] At trial, Hartford's expert as well as J.R. Marketing's witnesses testified that the work associated with the motions for summary judgment and writs was unreasonable. Norman testified that J.R. Marketing moved for summary judgment on all of the causes of action on the grounds that Meir Avganim was a tax cheat and had unclean hands even though it was aware that the motion would be unsuccessful. The motion was really aimed at instructing the court on the relevant law, and ultimately the court denied the motion. Norman accordingly found the work on the motion to be unreasonable, triggering reimbursement. Further, Miller admitted that Squire Sanders may have charged too much for legal research and other work done on straightforward matters, particularly for writs. Together this 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 reduced significant costs by reaching the same end goal by eliminating some work on the motions for summary judgment and writs.

For all these reasons, the Court finds that some costs should be reimbursed for Squire Sanders' work. Specifically, the Court orders reimbursement in the following amount: $102,667.00. This figure is based on the experts' testimony as well as the Court's review of the bills that were admitted into evidence. (*Ketchum*, 24 Cal.4th at 1132.) The reimbursement award is further broken down by the following cuts:

Monthly Amount Cut	Further Breakdown by Individuals Cut
February 2006: $1,508.00	Brown: $1,508.00 (February 21, 2006 for 5.8 hours)
May 2007: $850.00	Patula: $850.00 (May 23, 2007 for 1.25 hours)
June 2007: $69,974.50	Patula: $52,540.00(June 11, 2007 for 2.7 hours, June 23, 2007 for 6.50 hours, June 24, 2007 for 7.50 hours, June 25, 2007 for 12.20 hours, June 26, 2007 for 12.60 hours, June 27, 2007 for 15.40, June 28, 2007 for 9.30 hours); Brown: $8,382.00 (June 20, 2007 for 2.6 hours, June 25, 2007 for 4 hours, June 27, 2007 for 9 hours, June 28, 2007 for 9.40 hours) ; Miller: $7,392.00 (June 8, 2007 for 7.3 hours, June 17, 2007 for 5.5 hours, June 26, 2007 for 0.30, June 27, 2007 for 2.30);

[9] See also footnote 3.

	Belifore: $1,660.5 (June 27, 2009 for 799.50, June 28, 2009 for 225.50, June 29, 2007 for 3.10)
July 2007: $5,874.50	Brown: $4,752.00 (July 2, 2007 for 9.10 hours, July 3, 2007) Patula: $1,020.00 (July 21, 2007 for 1.50 hours) Belifore: $102.50 (July 31, 2007 for 0.50 hours)
August 2007: $9,297.50	Belifore: $389.50 (August 1, 2009 for 1.2 hours, August 3, 2007 for 0.30 hours, August 6, 2007 for 0.40 hours) Patula: $8,908.00 (August 10, 2007 for 3.00 hours, August 13, 2007 for 2.30 hours, August 22, 2007 for 3.50 hours, August 29, 2009 for 2.60 hours, August 30, 2007 for 1.70 hours)
October 2007: $15,162.50	Patula: $13,260.00 (October 2, 2007 for 9.60 hours, October 6, 2007 for 1.70 hours, October 7, 20067 for 5.40 hours, October 8, 2007 for 2.20 hours, October 18, 2007 for 0.60 hours) Belifore: $225.50 (October 4, 2007 for 0.30 hours, October 5, 2007 for 0.20, October 6, 2007 for 0.60 hours)) Miller: $1,680.00 (October 3, 2007 for 3.30 hours, October 19, 2007 for 0.20)

C. Hartford is entitled to $99,774.50 in reimbursement for Squire Sanders' unreasonable work on the disqualification motion.

Another argument that the Court finds compelling as a grounds for reimbursement is Hartford's contention that Squire Sanders conducted unreasonable work on Nossaman's disqualification motion. The motion arose from a letter written by a patent attorney for Avganim, David Friedman (the "Friedman letter"). There was uncertainty about how Squire Sanders came into possession of the Friedman letter. It was believed to be in a shipment of twenty-six boxes of documents from its client, J.R. Marketing, to Squire Sanders. Hartford's position is fairly straightforward: Squire Sanders' work on the motion was unnecessary for several reasons. First, Hartford should not have to pay all costs associated with the motion because while it was required to pay for independent counsel, it was not obligated to pay for a particular law firm – especially one that created a potential disqualification issue. Furthermore, Squire Sanders expended significant, duplicative efforts reviewing the twenty-six boxes of documents to locate the Friedman letter. And, the unnecessary work was the result of Squire Sanders' failure to scan or bate-stamp the documents.

To determine whether the fees and costs that Hartford challenges are unreasonable or unnecessary, the Court again first considers the "reasonable and necessary" test laid out by California courts that is used to evaluate reimbursement claims made by insurance companies. (*Barratt American, Inc.*, 102 Cal.App.4th at 858.) And 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 its work on the disqualification motion. The primary ground on which the Court rests its reimbursement award is Squire Sanders' failure to organize and label 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, including the disqualification motion. Nevertheless, the documents were never scanned, let alone prepared for optical character recognition, which would have simplified Squire Sanders' review of the boxes to locate the Friedman letter. 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. Additionally, Squire Sanders' other work on the motion was generally unreasonable. The motion hearing was quite lengthy, lasting about six days, and there were significant duplicative efforts.

For all these reasons, the Court believes that Hartford is entitled to significant reimbursement for Squire Sanders' work on the disqualification motion. In particular, the Court awards $99,774.50. This figure represents cuts from the month of April 2008, when Squire Sanders conducted most of its work on the disqualification motion. The reimbursement award is specifically broken down as follows:

Monthly Amount Cut	Further Breakdown by Individuals Cut
April 2008: $99,774.50	Martin: $31,086.00 (April 8, 2008 for 1.0 hours, April 9, 2008 for 7.8 hours, April 11, 2008 for 10.0 hours, April 12, 2008 for 8.1 hours, April 22, 2008 for 12.7 hours, April 23, 2008 for 12.8 hours, April 24, 2008 for 9.9 hours, April 28, 2008 for 10.2 hours, April 29, 2008 for 11.0 hours) Miller: $23,482.50 (April 8, 2008 for 2.1 hours, April 9, 2008 for 2.7 hours, April 11, 2008 for 1.0 hours, April 12, 2008 for 0.3 hours, April 22, 2008 for 11.6 hours, April 23, 2008 for 12.7 hours, April 24, 2008 for 10.2 hours, April 28, 2008 for 5.1 hours, Patula: $38,100.00 (April 9, 2008 for 1.4 hours, April 23, 2008 for 19.3, April 24, 2008 for 9.1 hours, April 26, 2008 for 5.5 hours, April 28, 2008 for 11.7 hours, April 29, 2008 for 4.3 hours) Brown: $7,106.00 (April 23, 2008 for 9.2 hours, April 24, 2008 for 7.2 hours, April 28, 2008 for 2.3 hours)

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Hartford is entitled to reimbursement in the amount of $104,717.00 for the claims and individuals not covered by the insurance policy it issued to J.R. Marketing.

1. Hartford's burden of proof

The duty to defend runs to claims and individuals "merely potentially covered." (*Pacific Indem. Co.*, 63 Cal.App.4th at 1546.) While an insurer has an obligation to defend an entire action that is "mixed," or in which some of the claims and individuals are clearly covered and others are merely potentially covered, this principle does not prohibit an insurer from seeking reimbursement for those claims or individuals clearly not covered by the insurance policy. (*Jaffe v. Cranford Ins. Co.* (1985) 168 Cal.App.3d 930, 934 ["[W]here there is *no potential* for coverage, there is no duty to defend."].) Thus, Hartford may be entitled to reimbursement for such claims and individuals. Hartford, however, is faced with a heavy burden. Because this case stems from allegations of Hartford's bad faith in breaching the duty to defend an insured, the Court begins with the presumption that all of the defense costs are reasonable and necessary. It is Hartford's burden to demonstrate which claims and individuals are clearly not covered the by insurance policy.

2. The individuals and claims that are not covered by the insurance policy for which Hartford is entitled to be reimbursed.

The Court finds that Hartford has met its burden in demonstrating that certain individuals and claims undoubtedly do not fall within the scope of coverage provided by the insurance policy that Hartford issued to J.R. Marketing.[10] As a result, Hartford is entitled to an award of reimbursement for these individuals and claims clearly not covered by the insurance policy in the amount of $104,717.00.

The Court first addresses those individuals who are clearly not covered by the insurance policy. The two individuals who are not insured by the policy include Scott Harrington ("Harrington") and Germaine DiMartinis ("Germaine"). Harrington is an independent sales representative who worked for his sister, Jane Ratto—one of the Plaintiffs in this matter. The Rattos never claimed that Harrington was an insured under the policy. Furthermore, the parties agree that Harrington was not an insured. Likewise, Germaine is not an insured under the policy that Hartford issued to J.R. Marketing. The Court even found that Germaine was not an insured as a matter of law.

In light of this evidence, the Court concludes that Hartford is entitled to reimbursement. Specifically, Hartford is entitled to reimbursement in the amount of: $54,019.00. In ordering this

award, the Court appreciates that it was reasonable for Squire Sanders to conduct some work in regards to these individuals in light of their relationship to the litigation. Accordingly, the Court does not award total reimbursement for all of the work that Squire Sanders conducted in regards to these individuals. Instead, the Court awards reimbursement to Hartford for Squire Sanders' unreasonable and unnecessary efforts on Harrington and Germain. In large part, this includes the time that Squire Sanders spent working on Harrington's motion for summary judgment. The reimbursement award is specifically broken down as follows:

Monthly Amount Cut	Further Breakdown by Individuals Cut
February 2006: $2,505.00	Brown: $1,560.00 (February 27, 2006 for 1.0 hours, February 28, 2006 for 5.0 hours) Miller: $945.00 (February 27, 2006 for 2.1 hours)
March 2006: $4,472.00	Brown: $4,472.00 (March 1, 2006 for 2.3 hours, March 2, 2006 for 2.9, March 7, 2006 for 3.0 hours, March 8, 2006 for 2.6 hours, March 13, 2006 for 2.0 hours, March 14, 2006 for 4.7 hours)
April 2006: $9,178.00	Brown: $7,063.00 (April 10, 2006 for 5.6 hours, April 11, 2006 for 5.2 hours, April 12, 2006 for 3.9 hours, April 13, 2006 for 4.0 hours, April 26, 2006 for 0.6 hours) Miller: $2,115.00 (April 12, 2006 for 0.7 hours, April 14, 2006 for 2.0 hours, April 27, 2006 for 2.0 hours)
May 2006: $949.00	Brown: $949.00 (May 1, 2006 for 1.4 hours, May 10, 2006 for 1.7 hours)
June 2006: $5,288.00	Smith: $270.00 (June 5, 2006 for 0.6 hours, June 19, 2006 for 0.9 hours) Brown: $5,018.00 (June 13, 2006 for 3.1 hours, June 14, 2006 for 0.4 hours, June 29, 2006 for 6.4 hours, June 30, 2006 for 9.4)
July 2006: $1,803.00	Beall: $9.00 (July 12, 2006 for 0.1 hours) Brown: $1,794.00 (July 17, 2006 for 6.9 hours)
August 2006: $6,272.00	Brown: $962.00(August 21, 2006 for 0.3 hours, August 22, 2006 for 3.4 hours) Smith: $4,725.00 (August 21, 2006 for 1.5 hours, August 22, 2006 for 9.0 hours) Beall: $405.00 (August 22, 2006 for 4.5 hours) Miller: $180.00 (August 22, 2006 for 0.4 hours)
December 2006: $1,215.00	Miller: $180.00 (December 28, 2006 for 0.4 hours) Smith: $1,035.00 (December 28, 2006 for 2.3 hours)
February 2007: $35.00	Polk: $35.00 (February 5, 2007 for 0.1 hours)
March 2007: $19,961.00	Brown: $17,469.50 (March 7, 2007 for 2.3 hours) March 9, 2007 for 6.2 hours, March 13, 2007 for 6.5, March 14, 2007 for 6.7, March 15, 2007 for 6.5 hours, March 16, 2007 for 5.7 hours, March 19, 2007 for 6.4 hours, March 20, 2007 for 1.8 hours, March 21, 2007 for 0.3 hours, March 26, 2007 for 4.1 hours, March 28, 2007 for 2.6 hours) Smith: 1,784.50 (March 12, 2007 for 3.30 hours, March 21, 2007 for 0.3 hours) Polk: $35.00 (March 19, 2007 for 0.1 hours) Miller: $672.00 (March 27, 2007 for 1.0 hour, March 28, 2007 for 0.4 hours)
July 2007: $1,188.00	Brown: $1,188.00 (July 18, 2007 for 3.6 hours)
August 2007: $999.00	Brown: $759.00 (August 20, 2007 for 1.6 hours, August 22, 2007 for 0.7 hours) Miller: $240.00 (August 27, 2007 for 0.5 hours)

[10] See also footnote 3.

March 2008: $154.50	Miller: $154.50 (March 12, 2008 for 0.3 hours)

Next, the Court discusses those claims that are clearly not covered by the insurance policy. After considering the different evidence and arguments presented at trial—particularly the insurance policy itself, the Court holds that Hartford is also entitled to reimbursement for those claims that are obviously not covered by, or excluded under, the insurance policy. Specifically, there are five matters that, while perhaps related to the action, are explicitly excluded from coverage under the policy. They include: (1) criminal issues; (2) bankruptcy issues; (3) the Wells Fargo interpleader action; (4) equitable defenses; and (5) tax issues. The policy only required Hartford to defend a suit, defined as one limited to money damages, for personal and advertising injuries. All other claims are consequently not covered by the policy. At trial, Miller even admitted that the verdict resolved all claims for money damages, not those relates to equitable defenses. As a result, Hartford is entitled to reimbursement for these five claims in the amount of $50,698.00.

The Court notes that as with the individuals who are not insureds, it was reasonable for Squire Sanders to conduct some work in regards to these matters in light of their relationship to the litigation. Thus, the Court does not award total reimbursement for all of the work that Squire Sanders conducted in regards to these issues. Instead, the Court awards reimbursement to Hartford for Squire Sanders' unreasonable and unnecessary efforts on these uncovered claims.

In making this award, the Court further highlights that the law supports its reimbursement for these uncovered claims. (See *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 43-44 [An insurer has no duty to defend an uncovered action simply because the issues litigated in the covered action may affect the outcome in a suit that the insurer has a duty to defend.]; *Jaffe*, 168 Cal.App.3d at 933 [An insurer does not have a duty to defend criminal matters that are clearly excluded under an insurance policy. Further, where only money damages are sought pursuant to an insurance policy, equitable claims are not covered by the insurance policy.].)

The Court's reimbursement award is broken down as follows:

Monthly Amount Cut	Further Breakdown by Individuals Cut
February 2006: $1,890.00	Miller: $1,890.00 (February 6, 2006 for 0.6 hours, February 7, 2006 for 1.4 hours, February 15, 2006 for 1.2 hours, February 21, 2006 for 0.6 hours, February 22, 2006 for 0.4 hours)
March 2006: $2,649.00	Miller: $855.00 (March 1, 2006 for 0.3 hours, March 8, 2006 for 0.7 hours, March 11, 2006 for 0.3 hours, March 24, 2006 for 0.6 hours) Brown: $1,794.00 (March 16, 2006 for 3.7 hours, March 28, 2006 for 2.6 hours, March 29, 2006 for 0.3 hours, March 30, 2006 for 0.3 hours)

April 2006: $900.00	Miller: $900.00 (April 18, 2006 for 2.0 hours)
May 2006: $2,205.00	Miller: $1,665.00 (May 10, 2006 for 1.7 hours, May 11, 2006 for 0.3 hours, May 17, 2006 for 0.3 hours, May 23, 2006 for 1.4 hours) Smith: $540.00 (May 15, 2006 for 1.2 hours)
June 2006: $585.00	Miller: $135.00 (June 13, 2006 for 0.3 hours) Smith: $450.00 (June 19, 2006 for 0.9 hours, June 22, 2006 for 0.9 hours
December 2006: $2,115.00	Miller: $180.00 (December 18, 2006 for 0.40 hours) Smith: $1,935.00 (December 18, 2006 for 4.3 hours)
January 2007: $384.00	Miller: $384.00 (January 2, 2007 for 0.8 hours)
March 2007: $32.00	Brown: $32.00 (March 29, 2007 for 0.1 hours)
August 2007: $2,972.50	Belifore: $184.50 (August 7, 2007 for 0.9 hours) Patula: $2,788.00 (August 21, 2007 for 0.9 hours, August 23, 2007 for 2.10 hours, August 29, 2007 for 1.10 hours)
November 2007: $4,336.00	Miller: $672.00 (November 28, 2007 for 1.4 hours) Patula: $3,400.00 (November 28, 2007 for 3.8 hours, November 29, 2007 for 1.2 hours) Brown: $264.00 (November 30, 2007 for 0.8 hours)
December 2007: $6,488.00	Miller: $912.00 (December 3, 2007 for 0.6 hours, December 4, 2007 for 1.3 hours) Patula: $5,576.00 (December 3, 2007 for 2.4 hours, December 5, 2007 for 0.5 hours, December 6, 2007 for 0.4 hours, December 7, 2007 for 0.4 hours, December 11, 2007 for 2.6 hours, December 12, 2007 for 1.9 hours)
January 2008: $150.00	Patula: $150.00 (January 14, 2008 for 0.2 hours)
February 2008: $300.00	Patula: $300.00 (February 5, 2008 for 0.4 hours)
July 2008: 25,691.50	Patula: $21,075.00 (July 23, 2008 for 5.9 hours, July 24, 2008 for 1.3 hours, July 25, 2008 for 12.1 hours, July 27, 2008 for 3.5 hours, July 29, 2008 for 5.3 hours) Miller:$4,274.50 (July 24, 2008 for 1.8 hours, July 27, 2008 for 6.5 hours) Brown: $342.00 (July 25, 2008 for 0.9 hours)

Hartford did not produce undeniable evidence of the allocability of specific uncovered expenses and is not entitled to reimbursement for such expenses.

1. Hartford's burden of proof

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 argues that it is entitled to reimbursement for all of the costs associated with allegedly 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—all of the remaining fees for which it seeks reimbursement. Hartford challenges several categories of costs, arguing that they are uncovered services and disbursements for which it is entitled to reimbursement. 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 potentially 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. 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 allegedly 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 potentially uncovered claims as required by the law. In its post-trial brief, Hartford outlines all of the potentially 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 potentially 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 allegedly 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 attorney 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 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 states: "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, unless and until such time as the California Supreme Court rules differently, this Court is bound by the Court of Appeal's 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 issues this tentative decision, ORDERING Hartford to be reimbursed by Plaintiffs in the amount of $4,997,395.00 for J.R. Marketing's unreasonable and unnecessary fees and DENYING J.R. Marketing's Motion for Judgment, Motion to Strike, and request for a new jury trial.

This tentative decision will be the Court's statement of decision, subject to any objections that the parties make within fifteen days after the proposed decision has been served. (Cal. Rules of Court, Rule 3.1950(c)(1), (g).)

DATE: October 25, 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., A CALIFORNIA LIMITED et al Plaintiff(s) vs. HARTFORD CASUALTY INSURANCE COMPANY et al., Defendant(s)	Case Number: CGC-06-449220 **CERTIFICATE OF MAILING** (CCP 1013a (4))

I, Jacqueline Alameda, 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 October 25, 2013 I served the attached AMENDED TENTATIVE STATEMENT OF DECISION[1] FOLLOWING TRIAL PHASE II ON DEFENDANT AND CROSS-COMPLAINTANT'S CROSS-COMPLAINT FOR REIMBURSEMENT OF ATTORNEY FEES AND COSTS AND ORDER ON PLAINTIFFS AND CROSS-DEFENDANTS' MOTION FOR JUDGMENT, MOTION TO STRIKE, AND MOTION FOR JURY TRIAL by placing a copy thereof in a sealed envelope, addressed as follows:

ALAN L. BRIGGS, ESQ.
ANECA LASLEY, ESQ.
MICHELLE FULL, ESQ.
SQUIRE SANDERS (US) LLP
275 BATTERY STREET, SUITE 2600
SAN FRANCISCO, CA 94111

IRA G. GREENBERG, ESQ.
ERIN L. PFAFF, ESQ.
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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: October 25, 2013

T. MICHAEL YUEN, Clerk

By: Jacqueline Alameda
Jacqueline Alameda, Deputy Clerk

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 November 18, 2013, I served true copies of the following document(s) described as **SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID M. AXELRAD** 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 November 18, 2013, at Encino, California.

Robyn Whelan

Robyn Whelan

SERVICE LIST

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

Counsel / Individual Served	Party Represented
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Clerk to the Honorable Loretta Giorgi San Francisco County Superior Court Civic Center Courthouse 400 McAllister Street, Dept. 302 San Francisco, California 94102	[Case No. CGC-06449220]