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IN THE  
SUPREME COURT OF CALIFORNIA

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

*v.*

HARTFORD CASUALTY INSURANCE COMPANY,  
*Cross-Complainant and Appellant.*

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

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SUPREME COURT  
FILED

JAN - 8 2014

Frank A. McGuire Clerk

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Deputy

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

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**IN THE  
SUPREME COURT OF CALIFORNIA**

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

v.

**HARTFORD CASUALTY INSURANCE COMPANY,**  
*Cross-Complainant and Appellant.*

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**FURTHER SUPPLEMENTAL  
MOTION FOR JUDICIAL NOTICE**

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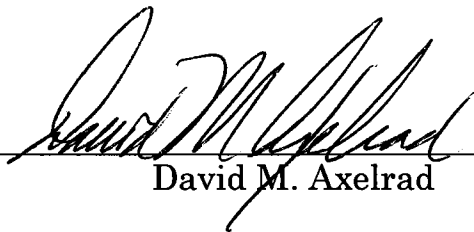
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Pursuant to Evidence Code sections 452, subdivision (d)(2), and 459, and California Rules of Court, rule 8.252, Hartford Casualty Insurance Company (Hartford) hereby moves that this Court take judicial notice of a trial court document recently filed in this case (Super. Ct. S.F. City and County, 2013, No. CGC-06-449220). In particular, this motion seeks judicial notice of the trial court's final 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 final statement of decision is attached to the accompanying Declaration of David M. Axelrad as exhibit A.

This further 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, Hartford's supplemental motion for judicial notice and supporting documents filed on November 19, 2013, and Hartford's opening brief on the merits filed on November 19, 2013.

January 7, 2014

**HORVITZ & LEVY LLP**  
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By:   
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**HARTFORD CASUALTY**  
**INSURANCE COMPANY**

## MEMORANDUM OF POINTS AND AUTHORITIES

Hartford appealed from a judgment of dismissal entered after the trial court sustained the demurrer of Squire Sanders & Dempsey (Squire Sanders) to Hartford's cross-complaint for reimbursement of attorney 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 when Squire Sanders was 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.)

After considering the parties' filings in response to the initial statement of decision, including plaintiffs' July 9 filing, the trial court then issued an amended tentative statement of decision. (Supp. MJN 4.) Hartford requested that this Court take judicial notice of this amended tentative statement of decision on November 19, 2013. (Supp. MJN 4-5.)

Plaintiffs filed objections to the amended tentative statement of decision on November 14, 2013. (Declaration of David M. Axelrad, exh. A, p. 2, fn. 3.) After reviewing those objections and considering the parties' filings in response to the amended tentative statement of decision, the trial court issued a further statement of decision on December 9, 2013. (*Ibid.*) Although the trial court intended for the December 9, 2013 statement of decision to be the final decision, plaintiffs filed further objections, which the court considered. (*Ibid.*) On December 26, 2013, the court issued its final statement of decision. (Axelrad Decl., exh. A.)

The trial court's final statement of decision orders the insureds to reimburse Hartford nearly \$5 million. The final 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 Axelrad Decl., exh. A, pp. 26-27 ["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.”]; Axelrad Decl., exh. A, p. 27, fn. 15 [“The Court is bothered by the fact that, before the trial in this case, Squire Sanders moved to be dismissed as a Cross-Defendant. Squire Sanders knew that the Cross-complaint placed their billing practices in issue. Squire Sanders knew that, should they be dismissed as a Cross-Defendant, they would be leaving their clients solely responsible for any fees found by the court not to be reasonable or necessary.”].)

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].)

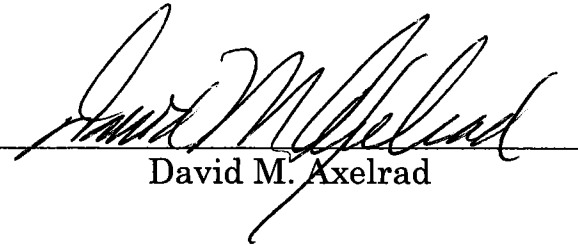


**CONCLUSION**

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

January 7, 2014

**HORVITZ & LEVY LLP**  
DAVID M. AXELRAD  
EMILY V. CUATTO  
**EDWARDS WILDMAN PALMER LLP**  
IRA G. GREENBERG

By:   
David M. Axelrad

Attorneys for Cross-  
Complainant and Appellant  
**HARTFORD CASUALTY**  
**INSURANCE COMPANY**

## DECLARATION OF DAVID M. AXELRAD

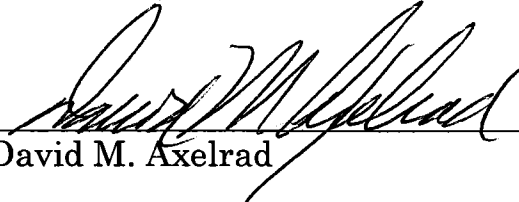
I, David M. Axelrad, declare as follows:

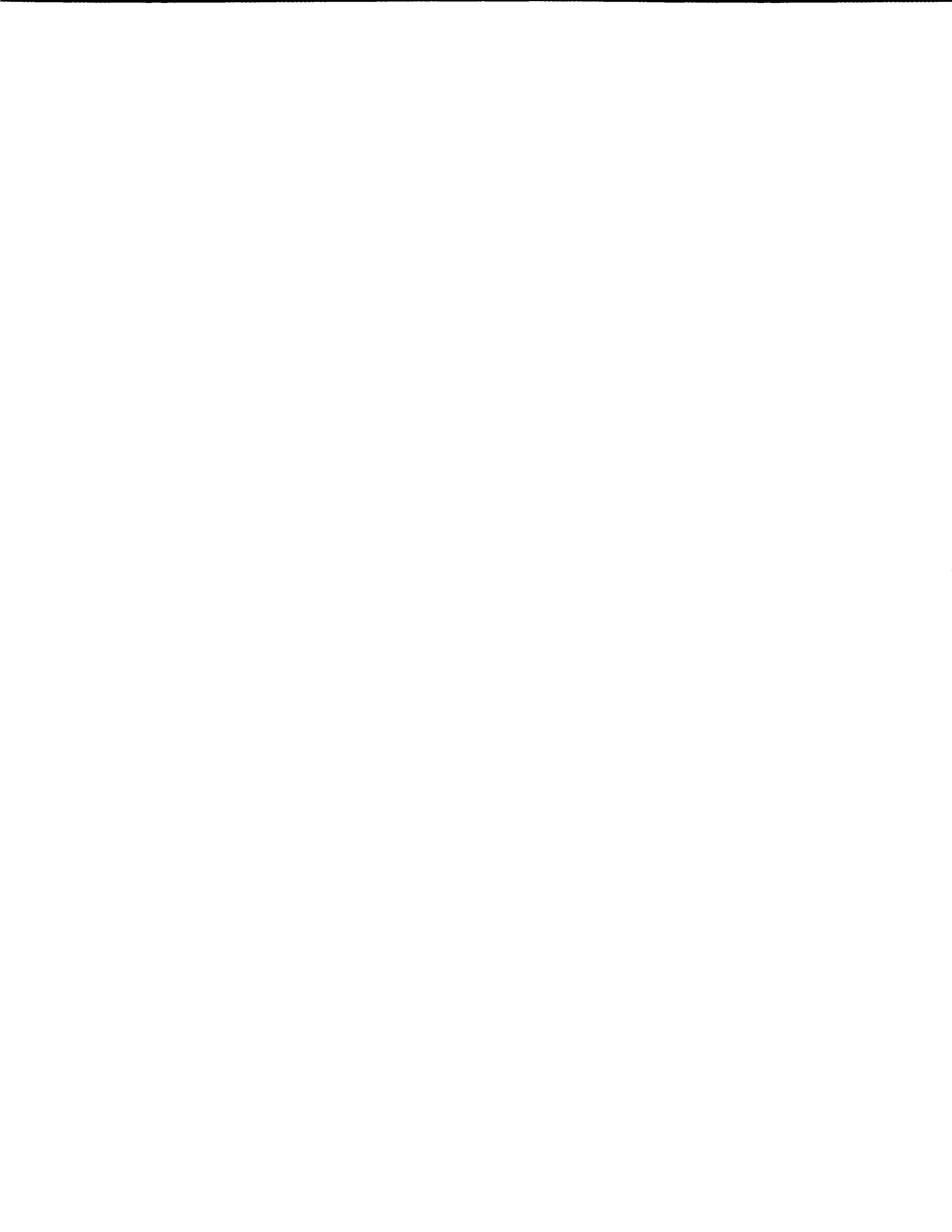
1. I am an attorney duly admitted to practice before this Court. I am a partner with Horvitz & Levy LLP, attorneys of record for Hartford Casualty Insurance Company. I have personal knowledge of the facts set forth herein and if called as a witness, I could and would competently testify to them.

2. Attached as exhibit A is a true and correct copy of the final 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 December 26, 2013.

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

Executed January 7, 2014, at Encino, California.

  
David M. Axelrad



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**ENDORSED  
FILED**  
Superior Court of California  
County of San Francisco

DEC 26 2013

**CLERK OF THE COURT**  
BY: ROSALLIE GUMPAL  
Deputy Clerk

CALIFORNIA SUPERIOR COURT  
CITY AND COUNTY OF SAN FRANCISCO  
UNLIMITED JURISDICTION

J.R. MARKETING, LLC, et al.,	)	Case No. CGC-06-449220
	)	
Plaintiffs,	)	
	)	FINAL STATEMENT OF DECISION
v.	)	FOLLOWING TRIAL PHASE II ON
	)	DEFENDANT AND CROSS-
HARTFORD CASUALTY INSURANCE	)	COMPLAINANT'S CROSS-
COMPANY, et al.,	)	COMPLAINT FOR REIMBURSEMENT
	)	OF ATTORNEY FEES AND COSTS
Defendants.	)	AND ORDER ON PLAINTIFFS AND
	)	CROSS-DEFENDANTS' MOTION FOR
	)	JUDGMENT, MOTION TO STRIKE,
	)	AND MOTION FOR JURY TRIAL <sup>1</sup>

<sup>1</sup> The Court issued a tentative 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 did not make its tentative nature clear, however. Additionally, as reflected in their July 9, 2013 and July 17, 2013 briefs, the parties were also unclear about the tentative nature of the Court's June 24, 2013 decision. To rectify this confusion, the Court issued an amended tentative decision on October 25, 2013. The Court issued another decision on December 9, 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, Motion to strike, and Motion for jury trial." By removing "Amended Tentative" from the title, the Court intended to have the December 9, 2013 decision serve as its final decision. Again, however, there was confusion. Thus, the Court issues this "Final Statement of Decision" to clarify the confusion and expressly inform the parties that this is the Court's final order in the case. (*Bay World Trading, Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135, 141 [The court may amend its statement of decision so long as judgment has not been entered.] )

1 The Court held a bench trial from February 28, 2013 to March 11, 2013 on Phase II of this  
2 matter, which concerns Defendant and Cross-Complainant Hartford Casualty Insurance Company's  
3 ("Hartford") cross-claim for reimbursement from Plaintiffs and Cross-Defendants J.R. Marketing,  
4 LLC, Jane E. Ratto, Robert E. Ratto, and Penelope A. Kane ("J.R. Marketing").<sup>2</sup> The Court has  
5 considered the evidence, applicable law, and arguments,<sup>3</sup> including those submitted by the parties in  
6 their July 9, 2013 and July 17, 2013 filings.<sup>4</sup> The Court now issues this statement of decision,  
7 holding that Hartford is entitled to reimbursement in the amount of \$4,857,832.00 for J.R.

8  
9 <sup>2</sup> 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.

10 Hartford specifically filed its cross-claim for reimbursement against J.R. Marketing, the Rattos, the DeMartinis, Kane,  
11 Scott Harrington, and Squire Sanders LLP—Plaintiffs' counsel. Plaintiffs demurred, which the Court sustained,  
12 effectively dismissing Squire Sanders and Harrington from the cross-complaint. On May 17, 2013, the Court of Appeal  
13 affirmed this order dismissing the reimbursement claim against Squire Sanders and Harrington. (*J.R. Marketing, L.L.C. v.*  
14 *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.

15 <sup>3</sup> The Court specifically considered all of the pleadings filed by the parties after it issued its tentative decision on October  
16 25, 2013 and final decision on December 9, 2013: Hartford's November 8, 2013 Objection to Amended Tentative  
17 Statement of Decision; J.R. Marketing's November 14, 2013 Objections to the October 25, 2013 Tentative Statement of  
18 Decision; Hartford's November 21, 2013 Notice of Plaintiffs' Noncompliance with Time Limits Prescribed for Filing of  
19 Objection to Amended Statement of Decision and Request for Clarification; J.R. Marketing's November 25, 2013  
Response to Hartford's Notice of Plaintiffs' Noncompliance with Time Limits Prescribed for Filing of Objection to  
Amended Statement of Decision and Request for Clarification; J.R. Marketing's December 3, 2013 Response to  
Hartford's Objection to Amended Statement of Decision; J.R. Marketing's December 18, 2013 Plaintiffs' Objections to  
the December 9, 2013 Statement of Decision; and Hartford's December 20, 2013 Notice of Plaintiffs' Noncompliance  
RE Filing of Objections to December 9, 2013 Statement of Decision.

20 Of note, the Court read the objections to the tentative decision before reading the objection for untimeliness. The  
21 objections were untimely and could have been entirely disregarded. But having read them, it is hard to "unring the bell."  
The objections were substantially repetitious of objections already made. However, the objections regarding errors in the  
activity and time entries were new errors and the Court has corrected the errors that were made.

22 The Court has also accounted for pre-judgment interest, awarding Hartford pre-judgment interest at the rate of seven  
23 percent annum simple interest and overruling J.R. Marketing's objection on this issue. (*Evanston Ins. Co. v. OEA, Inc.*  
24 (9th Cir. 2009) 566 F.3d 915, 921 [applying California law].) Hartford is entitled to pre-judgment interest at the rate of  
seven percent because the claims asserts in the Cross-Complaint arise from equitable theories. (*MGA Entertainment, Inc.*  
*v. Hartford Ins. Group* (C.D. Cal. 2012) 869 F.Supp.2d 1117, 1136.)

25 <sup>4</sup> The Court also notes that Hartford admittedly did not go through Squire Sanders' bills line by line to identify specific  
26 entries that set forth fees for which it is entitled to reimbursement. However, Squire Sander's bills were admitted into  
27 evidence. The Court is obligated to consider and evaluate all the evidence. (*United Pacific Ins. Co. v. Hall* (1988) 199  
28 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."].)

1 Marketing's unreasonable and unnecessary fees and those claims and individuals clearly not covered  
2 by the insurance policy. Hartford is not entitled to reimbursement for any allegedly uncovered  
3 claims. In making this determination, the Court denies J.R. Marketing's request for a jury trial on  
4 Hartford's claim for reimbursement as well as its Motion for Judgment and Motion to Strike.

### 5 **BACKGROUND**

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

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

18 On February 3, 2006, J.R. Marketing consequently filed this lawsuit for breach of contract  
19 and bad faith against Hartford in light of the parties' insurance agreement. J.R. Marketing moved for  
20 summary adjudication on Hartford's duty to defend and J.R. Marketing's right to independent  
21 counsel. On July 26, 2006, this Court granted the motion in full. Hartford then began paying for  
22 some of J.R. Marketing's defense costs in the Marin action. However, Hartford did not pay for J.R.  
23 Marketing's full defense costs in the Marin action. As a result, J.R. Marketing petitioned this Court  
24 for enforcement of the duty to defend order, and the Court issued another order, reiterating  
25 Hartford's duty to defend. Specifically, the Court determined that Hartford must reimburse J.R.  
26 Marketing for all previous defense costs of the Marin action and must pay all future costs. The Court  
27 noted that Hartford could challenge the reasonableness of such attorney fees by way of  
28 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.

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

10 Hartford's cross-claim for reimbursement proceeded as the Phase II bench trial in this  
11 matter from February 28, 2013 to March 11, 2013. At trial, the following witnesses testified: (1)  
12 Ethan Miller ("Miller")—J.R. Marketing's lead counsel from Squire Sanders in the Marin action; (2)  
13 Teri Catterson—the Chief Financial Officer for Nossaman LLP, counsel for the opposing party in the  
14 Marin action; (3) William Norman ("Norman")—Hartford's expert witness, who assessed the  
15 reasonableness of Squire Sanders' attorney fees in the Marin action; (4) Robert Ratto—one of the  
16 Plaintiffs; and (5) John O'Connor ("O'Connor")—J.R. Marketing's expert witness, who also  
17 assessed the reasonableness of Squire Sanders' attorney fees in the Marin action. Following the  
18 conclusion of the case-in-chief, the Court instructed the parties to submit their closing arguments by  
19 written brief. Hartford filed its post-trial brief on April 18, 2013. J.R. Marketing submitted its post-  
20 trial brief on May 23, 2013. In addition to filing its closing argument, J.R. Marketing also filed three  
21 other requests: (1) Motion for Judgment Regarding Hartford's Cross-Claim for Reimbursement; (2)  
22 Motion to Strike Hartford's Appendix and Related Portions of its Post-Trial Memorandum; and (3)  
23 request for a new jury trial on Hartford's claim for reimbursement. The Court now issues its decision  
24 regarding Phase II of this case as well as all of these other matters.

## 25 DISCUSSION

### 26 I. J.R. Marketing's Request for a Jury Trial on 27 Hartford's Cross-Claim for Reimbursement

28 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

1 not entitled to a new jury trial on this claim.

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

9 The Court does not find J.R. Marketing's argument compelling in light of the relevant law  
10 and upholds its decision to bifurcate this matter and have Hartford's cross-claim for reimbursement  
11 proceed by a court trial. California law is clear about whether an insurer's reimbursement claim must  
12 proceed by way of a jury trial. It does not—a reimbursement claim is tried to a court. (*American  
13 Motorists Ins. Co. v. Superior Court* (1998) 68 Cal.App.4th 864, 874.) In *American Motorists Ins.  
14 Co.*, the Court of Appeal addressed the very question at issue in this case. It determined that in a case  
15 where a court has ordered the insurer to defend the action on a motion for summary judgment, the  
16 insurer's subsequent claim to recover allegedly excessive or unnecessary fees is treated as a claim for  
17 equitable restitution, not a claim for damages, and hence is triable by the trial judge alone, not a jury.  
18 (*Id.* at 867, 873-74.)

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

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

27 The Court also addresses J.R. Marketing's Motion for Judgment and Motion to Strike. The  
28 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.



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***Motion for Judgment***

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

Here, J.R. Marketing argues that Hartford failed to sustain its burden in support of a cognizable claim for reimbursement. It is J.R. Marketing's position that Hartford has not shown that it is entitled to reimbursement—it has not challenged J.R. Marketing's attorney fees with sufficient specificity to overcome the presumption that the fees are reasonable and necessary. The Court disagrees. As discussed in great detail in the 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

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

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

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

25 Although the Court does not strike the information in Hartford's post-trial submission, the  
26 Court points out that it does not rely on the information in making its ultimate determination as to  
27 what amount of money, if any, to which Hartford is entitled to reimbursement. The Court is  
28 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.

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### 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

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

4 An insurer may also seek reimbursement for claims that are “not even potentially covered.”  
5 (*Buss*, 16 Cal.4th at 50.)<sup>5</sup> Specifically, an insurer may obtain reimbursement only for defense costs  
6 that can be allocated solely to the claims that are not even potentially covered. (*Id.* at 57.) To do that,  
7 it carries the burden of proof as to these costs by a preponderance of the evidence. (*Id.* See also  
8 *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:

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

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

15 ***Hartford is entitled to reimbursement in the amount of \$4,770,112.50***  
16 ***for J.R. Marketing’s unreasonable and unnecessary fees.***

17 ***1. Hartford’s burden of proof***

18 The Court begins by identifying the posture of the case because doing so sheds light on  
19 Hartford’s burden in seeking reimbursement for J.R. Marketing’s defense costs in the Marin action.  
20 After Phase I of this matter, the jury determined that Hartford breached its duty to defend J.R.  
21 Marketing in the Marin action but did not find that Hartford acted in bad faith. As a result, the  
22 defense costs incurred by J.R. Marketing in that action are presumed to be reasonable and necessary,

23 <sup>5</sup> The Court of Appeal decision issued on May 17, 2013, confirms that Hartford may seek reimbursement for both  
24 unreasonable fees and those claims not covered. The decision states in relevant part:

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

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

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

3 Here, there is no dispute between the parties about the amount of costs incurred by J.R.  
4 Marketing in the Marin action. J.R. Marketing's monthly bills from the Marin action, stemming from  
5 February 2006 to February 2010 and totaling over \$13 million, were entered into evidence. (J.R.  
6 Marketing, et al. v. Hartford Casualty Ins. Co., et al. [See Hartford's Trial Exhibits 81 and 192,  
7 Super Ct. S.F. City and County, 2013, No. 449220.]) Additionally, Miller testified about the work  
8 and that the costs all related to the Marin action. Accordingly, the Court presumes that J.R.  
9 Marketing's fees and costs were reasonable and necessary and the burden falls on Hartford to  
10 demonstrate that J.R. Marketing's Marin action costs were unreasonable or unnecessary. (*Id.* at  
11 1549.)

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

14 After considering the evidence, testimony, and arguments presented, the Court finds that  
15 Hartford met its burden in showing that some of J.R. Marketing's fees and costs were unreasonable  
16 or unnecessary. At the Phase II trial, Hartford called Miller as an adverse witness. Hartford  
17 questioned Miller at-length about the reasonableness of Squire Sanders' charges. In particular,  
18 Hartford examined him in regards to the staffing of the case, discovery, research, motions, trial, and  
19 other work related to the litigation. Hartford questioned Miller about specific expenses and  
20 categories of costs and also entered into evidence bills and other exhibits, confirming these expenses  
21 and breakdown of the expenses—particularly Exhibit 81. There were numerous instances in which  
22 Miller admitted that fees and costs may have been unreasonable or unnecessary, including but not  
23 limited to the staffing of the case, duplicative research and other work, clerical work, and travel. He  
24 noted that he considered such facts like if attorneys and staff billed hours for an entire day or block  
25 billed as such details may signify unreasonable billing. Ultimately, Miller wrote off two percent of  
26 the total bills charged, but he admitted that he may not have cut all of the expenses falling into areas  
27 that he believed should be cut. Additionally, the parties' experts—Norman<sup>6</sup> and O'Connor—both  
28 testified at trial. Their testimony further confirmed the range of the reasonable value of litigating the

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<sup>6</sup> 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.

1 Marin action as well as the reasonableness and necessity of particular expenses and categories of  
2 expenses. J.R. Marketing's argument that Hartford failed to satisfy its burden overlooks all of this  
3 testimony and evidence that came in at trial. As a result, the Court finds J.R. Marketing's position  
4 unpersuasive. The Court moves on to examine Hartford's particular challenges to Squire Sanders'  
5 fees and costs to underscore the error in J.R. Marketing's position and to demonstrate that Hartford is  
6 in fact entitled to reimbursement in the amount of \$4,770,112.50 for J.R. Marketing's unreasonable  
and unnecessary fees.

7 Before delving into the specific areas of unreasonable and unnecessary fees, the Court takes  
8 note of the experts' valuation of reasonable attorney fees and costs for the Marin action. Norman,  
9 Hartford's expert on legal fees, testified that reasonable fees and disbursements for the Marin action  
10 were in the range of \$1.8 to \$3.3 million—not the over \$13 million actually expended in this case.  
11 Norman is an attorney from the Bay Area, who has practiced for over forty years and has litigated  
12 close to thirty actions that are similar to the Marin action. He reviewed the case file for the Marin  
13 action in-depth: examining the discovery, pleadings, motions, research, other related actions, and  
14 Squire Sanders' actual bills. Norman concluded that many of the charges were unreasonable and  
15 unnecessary. O'Connor, J.R. Marketing's fee and cost expert who has comparable experience to  
16 Norman, likewise provided an opinion that the litigation could have been defended for about \$8  
17 million and that he had only billed \$13 million in similar cases in rare situations. Thus, there is some  
18 agreement between the experts that the Marin action could have been reasonably been litigated for  
19 less. Furthermore, evidence about the fees and costs incurred by the opposing party in the Marin  
20 action was also offered into evidence. Although the opposing party's fee arrangement was  
21 unclear, it was apparent that Nossaman (which is notorious in the community for overbilling)  
22 charged the opposing party only \$6 million—about half of the fees and costs incurred by Squire  
23 Sanders.<sup>7</sup> The Court finds all of this information very useful. Although it does not dictate that the  
24 Court must definitely order J.R. Marketing to reimburse Hartford for a particular sum, the experts'  
25 opinions and opposing party's costs reveal that Hartford's request for the reimbursement of  
26 unreasonable and unnecessary fees is substantiated.

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26 <sup>7</sup> Although the Court highlights the opposing party's fees and costs in the Marin action, the Court does appreciate that  
27 comparing the parties' fees is not determinative of the reasonableness of one side's costs—even if J.R. Marketing  
28 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.] )

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

3 **A. Hartford is entitled to \$4,611,175.00 in reimbursement for the unreasonable number  
4 of Squire Sanders' attorneys and employees who worked on the Marin action.**

5 Hartford contends that Squire Sanders' staffing of the case was too great, making its  
6 defense of the Marin action inefficient and largely duplicative.<sup>8</sup> The Court finds this argument  
7 compelling and concludes that Hartford met its burden in demonstrating that the number of Squire  
8 Sanders' attorneys and employees, who worked on the Marin action, was far too great and much of  
9 these additional employees' work was unnecessary.<sup>9</sup> In light of these findings, the Court further  
10 holds that Hartford should be reimbursed for the costs it paid for the fees billed by these additional,  
11 unnecessary attorneys and staff. In particular, Hartford is entitled to reimbursement in the amount of  
12 \$4,611,175.00.

13 Several California cases discuss the effective and reasonable staffing of a case. Specifically,  
14 inefficient or duplicative efforts—also known as padding—are not subject to compensation.  
15 (*Ketchum*, 24 Cal.4th at 1132.) Inefficiency and duplicative efforts become more of an issue in a case

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16 <sup>8</sup> In addition to arguing that too many people worked on the Marin action in the Squire Sanders' firm, Hartford also  
17 requests that the Court cut the amount of the rates charged by Squire Sanders. It is Hartford's position that Squire  
18 Sanders' rates were well in excess of the rates charged by comparable attorneys and firms in both Marin County as well  
19 as San Francisco Bay Area generally. Thus, the Court should reduce the rates charged. Further, Hartford attacks Squire  
20 Sanders' rate increases—during its defense of the Marin action, Squire Sanders raised its rates from those outlined in its  
21 initial engagement letter to J.R. Marketing.

22 In light of the significant cuts that this Court is making to the number of people working on the Marin action, the Court is  
23 not also adjusting the rates that Squire Sanders charged. The Court finds that J.R. Marketing and Squire Sanders had the  
24 right to contract with each other for the defense of the Marin action at rates they deemed reasonable, and Hartford cannot  
25 challenge these rates at this juncture of the proceedings. (See *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196  
26 [When an insurer wrongfully refuses to defend, the insured is relieved of its obligation to allow the insurer to manage the  
27 litigation and may proceed in whatever manner is deemed appropriate.]; *Stalberg v. Western Title Ins. Co.* (1991) 230  
28 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  
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  
additional cuts to the costs incurred in the defense of the Marin action. Hartford is only entitled to reimbursement for  
unreasonable and unnecessary fees—it is not entitled to double recovery.

1 that is overly staffed and poorly coordinated. (*Christian Research Institute v. Alnor* (2008) 165  
2 Cal.App.4th 1315, 1326.) In fact, in instances of overstaffing, law firms may unreasonably bill for  
3 coordination. (*Id.*) When too many attorneys and employees are working on a case, they expend  
4 more time telephoning, conferencing, and e-mailing each other than on identifiable legal research.  
(*Id.*)

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

20 The Court concludes that Hartford's attack has merit and justifies significant  
21 reimbursement. The Court finds that Squire Sanders' staffing in the Marin action was unreasonable  
22 and thus that much of the work done by these additional staff members was unnecessary. The Court  
23 appreciates that the law limits an insurer's ability to manage litigation when it breaches its duty to  
24 defend. (*Eigner*, 57 Cal.App.4th at 196; *Stalberg*, 230 Cal.App.3d at 1223 [An insurer that  
25 wrongfully refuses to defend the insured forfeits its right to control the defense, including its right to  
26 select defense counsel and litigation strategy.]) However, the Court also recognizes that "[w]hile  
27 *Cumis* may prohibit an insurer from dictating the tactics of litigation, it does not delegate to *Cumis*  
28 counsel a meal ticket immunized from judicial review for reasonableness." (*United Pacific Ins. Co.*

<sup>9</sup> The duplicate efforts of the attorneys were appalling. Multiple attorneys did the same task and the same attorneys billed multiple times for of the same activity.



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 \$4,611,175.00 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 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: \$102,542.50	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: \$4,536.50; 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

1	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
2	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
3	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
4	September 2006: \$100,232.00	Mark Ettershank: \$900.00; Victor Grindle: \$1,150.00; Shirley Heringer: \$817.00; Amy Ita: \$12,627.00; Raul Manon: \$319.00; Maria Moncada: \$24,838.00; 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
5	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
6	November 2006: \$100,387.50	John Burlingame: \$174.00; Mark Ettershank: \$180.00; Mark Goodman: \$4,005.00; Victor Grindle: \$1,425.00; Shirley Heringer: \$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
7	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 Heringer: \$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
8	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
9	February 2007: \$113,850.50	Peter Barto: \$1,334.00; 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: \$3,895.50; Daniel Kubasak: \$7,665.00; Jose Martin: \$78,002.00; Michael Purleski: \$8,442.00; Gregory Wald: \$440.00
10	March 2007: \$79,329.00	Paul Bailiff: \$562.50; 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
11	April 2007: \$118,640.00	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: \$5,722.50
12	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
13	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
14	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
15	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
16	September 2007: None	

1	October 2007: \$340,946.50	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
2		
3	November 2007: \$83,890.50	Daniel Balmat: \$10,116.00; Nancy Castor: \$104.00; Kelley Guthleben: \$553.50; Daniel Kubasak: \$ 29,340.00; Jose Martin: \$ 40,139.00; Jason Richardson: \$2,448.00; Mark Ziemba: \$1,190.00
4		
5	December 2007: \$24,119.00	Daniel Balmat: \$1, 476.00; Shirley Heringer: \$23.00; Daniel Kubasak: \$4,464.00; Jose Martin: \$ 18,156.00
6	January 2008: \$89,811.50	Daniel Balmat: \$320.00; Kelley Guthleben: \$1,330.00; Daniel Kubasak: \$27,920.00; Jose Martin: \$ 60,241.50
7	February 2008: \$41,206.00	John Burlingame: \$412.00; Mark Goodman: \$2,987.00; Kelly Guthleben: \$672.00; Daniel Kubasak: \$36,280.00; Amy Rose: \$855.00
8	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
9		
10	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
11		
12		
13	May 2008: \$320,949.50	Daniel Balmat: \$16,960.00; Peter Barto: \$624.00; Michelle Full: \$8,365.00; Kelley Guthleben: \$616.00; Nicole Joseph-Goteiner: \$2,832.50; Daniel Kubasak: \$99,360.00; Yvette Mannion: \$13,728.00; Jose Martin: \$159,637.50; Angela O'Rourke: \$552.00; Terrence Perris: \$2,142.00; John Stearns: \$16,132.50
14		
15	June 2008: \$292,710.00	Daniel Balmat: \$1,600.00; Peter Barto: \$572.00; Laura Beall: \$1,963.00; Erinn Contreras: \$3,324.50; 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
16		
17	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
18		
19	August 2008: \$36,524.00	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
20	September 2008: \$66,538.50	Peter Barto: \$728.00; Daniel Kubasak: \$28,240.00; Jose Martin: \$37,570.50
21	October 2008: \$5,520.00	Daniel Balmat: \$40.00; Daniel Kubasak: \$5,480.00
22	November 2008: \$13,446.50	Daniel Kubasak: \$11,120.00; Jose Martin: \$2,326.50
23	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
24	January 2009: \$52,661.50	Nicole Joseph-Goteiner: \$832.00; Daniel Kubasak: \$32,537.50; Jose Martin: \$19,292.00
25	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
26	March 2009: \$160,901.00	Erinn Contreras: \$6,241.50; Nicole Joseph-Goteiner: \$2,144.00; 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
27		
28		

1	April 2009: \$64,491.50	Peter Barto: \$1,265.00; Shirley Heringer: \$189.00; Daniel Kubasak: \$24,557.50; Jose Martin: \$38,480.00
2	May 2009: \$33,296.50	Daniel Kubasak: \$11,352.50; Jose Martin: \$21,944.00
3	June 2009: \$35,402.00	Xavier Brandwajn: \$3,942.00; Jose Martin: \$31,460.00
4	July 2009: \$16,995.50	Peter Barto: \$412.50; Xavier Brandwajn: \$3,723.00; Mark Goodman: \$3,944.00; Joseph Grasser: \$128.00; Jose Martin: \$8,788.00
5	August 2009: \$3,900.00	Jose Martin: \$3,900.00
6	September 2009: \$780.00	Jose Martin: \$780.00
7	October 2009 through February 2010: None	

8 **B. Hartford is entitled to \$95,146.00 in reimbursement for Squire Sanders' unreasonable work on summary judgment motions and writs.**

9 Other areas of work for which the Court finds there is compelling reason to award  
10 reimbursement are Squire Sanders' work on summary judgment motions<sup>10</sup> and writs. Hartford  
11 argues that Squire Sanders expended far too much effort on motions and writs that it acknowledged  
12 would likely be unsuccessful. The Court agrees.

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

21 After reviewing the evidence presented at trial, the Court finds that Hartford met its burden  
22 in demonstrating that Squire Sanders charged unreasonable and unnecessary fees for the work  
23 conducted on summary judgment motions and writs.<sup>11</sup> At trial, Hartford's expert as well as J.R.  
24 Marketing's witnesses testified that the work associated with the motions for summary judgment and  
25 writs was unreasonable. Norman testified that J.R. Marketing moved for summary judgment on all of  
26 the causes of action on the grounds that Meir Avganin was a tax cheat and had unclean hands even

26 <sup>10</sup> In this section, the Court only orders reimbursement for Squire Sanders' general work on summary judgment motions,  
27 not its work on Harrington's motion for summary judgment. As discussed later in this decision, the Court separately  
28 awards reimbursement for Squire Sanders' defense of Harrington since the parties agree that he is not an insured under  
the insurance policy.

<sup>11</sup> See also footnote 3.

1 though it was aware that the motion would be unsuccessful. The motion was really aimed at  
 2 instructing the court on the relevant law, and ultimately the court denied the motion. Norman  
 3 accordingly found the work on the motion to be unreasonable, triggering reimbursement. Further,  
 4 Miller admitted that Squire Sanders may have charged too much for legal research and other work  
 5 done on straightforward matters, particularly for writs. Together this evidence demonstrates that the  
 6 third prong of the "reasonable and necessary" test is not satisfied. Here, although the fees relate to  
 7 limiting liability for J.R. Marketing, they were not reasonable and necessary for that purpose. Squire  
 8 Sanders could have reduced significant costs by reaching the same end goal by eliminating some  
 9 work on the motions for summary judgment and writs.

10 For all these reasons, the Court finds that some costs should be reimbursed for Squire  
 11 Sanders' work. Specifically, the Court orders reimbursement in the following amount: \$95,146.00.  
 12 This figure is based on the experts' testimony as well as the Court's review of the bills that were  
 13 admitted into evidence. (*Ketchum*, 24 Cal.4th at 1132.) The reimbursement award is further broken  
 14 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: \$62,450.50	Patula: \$45,016.00 (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); 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: \$15,165.50	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)

1                   **C. Hartford is entitled to \$63,791.50 in reimbursement for Squire Sanders'**  
2                   **unreasonable work on the disqualification motion.**

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

15                   To determine whether the fees and costs that Hartford challenges are unreasonable or  
16 unnecessary, the Court again first considers the "reasonable and necessary" test laid out by California  
17 courts that is used to evaluate reimbursement claims made by insurance companies. (*Barratt*  
18 *American, Inc.*, 102 Cal.App.4th at 858.) And after reviewing the evidence presented at trial, the  
19 Court finds that Hartford met its burden in demonstrating that Squire Sanders charged unreasonable  
20 and unnecessary fees for its work on the disqualification motion. The primary ground on which the  
21 Court rests its reimbursement award is Squire Sanders' failure to organize and label the twenty-six  
22 boxes of documents. At trial, Hartford's expert as well as J.R. Marketing's witnesses testified that  
23 the review of and work associated with the twenty-six boxes was unreasonable. Norman, O'Connor,  
24 and Miller all testified that it is common, reasonable practice to bates-stamp and scan documents.  
25 Further, Miller even stated that he recognized how essential the twenty-six boxes were to the Marin  
26 action, including the disqualification motion. Nevertheless, the documents were never scanned, let  
27 alone prepared for optical character recognition, which would have simplified Squire Sanders'  
28 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,

1 they were not reasonable and necessary for that purpose. Squire Sanders could have bate-stamped  
2 and scanned the documents to reduce significant costs by reaching the same end goal. Additionally,  
3 Squire Sanders' other work on the motion was generally unreasonable. The motion hearing was quite  
4 lengthy, lasting about six days, and there were significant duplicative efforts.

5 For all these reasons, the Court believes that Hartford is entitled to significant  
6 reimbursement for Squire Sanders' work on the disqualification motion. In particular, the Court  
7 awards \$63,791.50. This figure represents cuts from the month of April 2008, when Squire Sanders  
8 conducted most of its work on the disqualification motion. The reimbursement award is specifically  
9 broken down as follows:

Monthly Amount Cut	Further Breakdown by Individuals Cut
April 2008: \$63,791.50	Miller: \$23,535.50 (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: \$33,150.00 (April 9, 2008 for 1.4 hours, April 23, 2008 for 12.2, 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)

14 ***Hartford is entitled to reimbursement in the amount of \$87,719.50 for the claims  
15 and individuals not covered by the insurance policy it issued to J.R. Marketing.***

16 ***1. Hartford's burden of proof***

17 The duty to defend runs to claims and individuals "merely potentially covered." (*Pacific*  
18 *Indem. Co.*, 63 Cal.App.4th at 1546.) While an insurer has an obligation to defend an entire action  
19 that is "mixed," or in which some of the claims and individuals are clearly covered and others are  
20 merely potentially covered, this principle does not prohibit an insurer from seeking reimbursement  
21 for those claims or individuals clearly not covered by the insurance policy. (*Jaffe v. Cranford Ins.*  
22 *Co.* (1985) 168 Cal.App.3d 930, 934 ["[W]here there is *no potential* for coverage, there is no duty to  
23 defend."] ) Thus, Hartford may be entitled to reimbursement for such claims and individuals.  
24 Hartford, however, is faced with a heavy burden. Because this case stems from allegations of  
25 Hartford's bad faith in breaching the duty to defend an insured, the Court begins with the  
26 presumption that all of the defense costs are reasonable and necessary. It is Hartford's burden to  
27 demonstrate which claims and individuals are clearly not covered the by insurance policy.  
28

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

3                   The Court finds that Hartford has met its burden in demonstrating that certain individuals  
4 and claims undoubtedly do not fall within the scope of coverage provided by the insurance policy  
5 that Hartford issued to J.R. Marketing.<sup>12</sup> As a result, Hartford is entitled to an award of  
6 reimbursement for these individuals and claims clearly not covered by the insurance policy in the  
7 amount of \$87,719.50.<sup>13</sup>

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

15                   In light of this evidence, the Court concludes that Hartford is entitled to reimbursement.  
16 Specifically, Hartford is entitled to reimbursement in the amount of: \$46,324.50. In ordering this  
17 award, the Court appreciates that it was reasonable for Squire Sanders to conduct some work in  
18 regards to these individuals in light of their relationship to the litigation. Accordingly, the Court does  
19 not award total reimbursement for all of the work that Squire Sanders conducted in regards to these  
20

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21 <sup>12</sup> See also footnote 3.

22 <sup>13</sup> The Squire Sanders attorneys indicated on their bills the date, time, activity, and cost of their services. (Exhibit 81.)  
23 Hartford satisfied its burden of proof by identifying those parties who were not insured under the policy and attorney  
24 activities that were not necessary to the defense of the insured in the Marin action. Specifically, Scott Harrington and  
25 Germaine DiMartinis were not insureds under the Hartford policy. While some of the work involved issues of personal  
26 and business concerns to J.R. Marketing, criminal law issues, bankruptcy issues, the Wells Fargo interpleader action,  
27 equitable issues, and tax issues were not necessary to the defense of the Marin action. Nevertheless, Squire Sanders  
28 wrongfully billed Hartford for time spent on uninsured parties and issues. The Court deleted only the time that  
specifically stated an activity or party not covered. Examples: “Draft motion for summary judgment for claims alleged  
against Scott Harrington;” “research Tax Code re: right to amend a tax return, including t/c with J. Nagasi (SS&D tax  
attorney);” “prepare for and conduct witness preparation for upcoming trial with Germaine DiMartinis;” “telephone  
conference with D Volgelstein (criminal law attorney in Marin county);” “extensive conference with P. Butler re  
bankruptcy options and recommendation for separate Chapter 7 and 11 counsel.”



1 individuals. In large part, this includes the time that Squire Sanders spent working on Harrington's  
 2 motion for summary judgment. The reimbursement award is specifically broken down as follows:<sup>14</sup>

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: \$4,550.00	Brown: \$4,550.00 (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: \$7,133.00	Brown: \$5,018.00 (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: \$806.00	Brown: \$806.00 (May 1, 2006 for 1.4 hours, May 10, 2006 for 1.7 hours)
June 2006: \$5,333.00	Smith: \$315.00 (June 5, 2006 for 0.6 hours, June 19, 2006 for 0.1 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 27, 2006 for 6.9 hours)
August 2006: \$5,894.00	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: \$27.00 (August 22, 2006 for 0.3 hours) Miller: \$180.00 (August 22, 2006 for 0.4 hours)
December 2006: \$270.00	Miller: \$180.00 (December 28, 2006 for 0.4 hours) Smith: \$90.00 (December 28, 2006 for 0.2 hours)
February 2007: \$35.00	Polk: \$35.00 (February 5, 2007 for 0.1 hours)
March 2007: \$16,743.00	Brown: \$15,616.00 (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 6.1 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: \$420.00 (March 12, 2007 for 0.5 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: \$330.00	Brown: \$330.00 (July 18, 2007 for 1.0 hours)
August 2007: \$768.00	Brown: \$528.00 (August 20, 2007 for 0.9 hours, August 22, 2007 for 0.7 hours) Miller: \$240.00 (August 27, 2007 for 0.5 hours)
March 2008: \$154.50	Miller: \$154.50 (March 12, 2008 for 0.3 hours)

23 Next, the Court discusses those claims that are clearly not covered by the insurance policy.  
 24 After considering the different evidence and arguments presented at trial—particularly the insurance  
 25 policy itself, the Court holds that Hartford is also entitled to reimbursement for those claims that are  
 26

27 <sup>14</sup> In listing the time spent on uninsured parties and issues not covered by the policy or not reasonable and necessary to  
 28 the defense of the Marin action, the Court considered – but has not listed – the specific activities of each attorney. To do

1 obviously not covered by, or excluded under, the insurance policy. Specifically, there are five matters  
 2 that, while perhaps related to the action, are explicitly excluded from coverage under the policy.  
 3 They include: (1) criminal issues; (2) bankruptcy issues; (3) the Wells Fargo interpleader action; (4)  
 4 equitable defenses; and (5) tax issues. The policy only required Hartford to defend a suit, defined as  
 5 one limited to money damages, for personal and advertising injuries. All other claims are  
 6 consequently not covered by the policy. At trial, Miller even admitted that the verdict resolved all  
 7 claims for money damages, not those relates to equitable defenses. As a result, Hartford is entitled to  
 8 reimbursement for these five claims in the amount of \$41,395.00.

9 The Court notes that as with the individuals who are not insureds, it was reasonable for  
 10 Squire Sanders to conduct some work in regards to these matters in light of their relationship to the  
 11 litigation. Thus, the Court does not award total reimbursement for all of the work that Squire Sanders  
 12 conducted in regards to these issues.

13 In making this award, the Court further highlights that the law supports its reimbursement  
 14 for these uncovered claims. (See *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*  
 15 (1994) 9 Cal.4th 27, 43-44 [An insurer has no duty to defend an uncovered action simply because the  
 16 issues litigated in the covered action may affect the outcome in a suit that the insurer has a duty to  
 17 defend.]; *Jaffe*, 168 Cal.App.3d at 933 [An insurer does not have a duty to defend criminal matters  
 18 that are clearly excluded under an insurance policy. Further, where only money damages are sought  
 19 pursuant to an insurance policy, equitable claims are not covered by the insurance policy.] )

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

21 Monthly Amount Cut	22 Further Breakdown by Individuals Cut
23 February 2006: \$1,890.00	24 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)
25 March 2006: \$2,649.00	26 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)
27 April 2006: \$900.00	28 Miller: \$900.00 (April 18, 2006 for 2.0 hours)
29 May 2006: \$1,575.00	30 Miller: \$1,530.00 (May 10, 2006 for 1.7 hours, May 11, 2006 for 0.3 hours, May 23, 2006 for 1.4 hours) Smith: \$45.00 (May 15, 2006 for 0.1 hours)
31 June 2006: \$180.00	32 Miller: \$135.00 (June 13, 2006 for 0.3 hours) Smith: \$45.00 (June 22, 2006 for 0.1 hours)
33 December 2006: \$315.00	34 Miller: \$180.00 (December 18, 2006 for 0.40 hours) Smith: \$135.00 (December 18, 2006 for 0.3 hours)

35 so would require the unnecessary listing of over sixty pages of specific entries.

1	January 2007: \$384.00	Miller: \$384.00 (January 2, 2007 for 0.8 hours)
2	March 2007: \$32.00	Brown: \$32.00 (March 29, 2007 for 0.1 hours)
3	August 2007: \$1,510.50	Belifore: \$184.50 (August 7, 2007 for 0.9 hours) Patula: \$1,326.00 (August 21, 2007 for 0.9 hours, August 23, 2007 for 1.05 hours, August 29, 2007 for 1.10 hours)
4	November 2007: \$4,237.00	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: \$165.00 (November 30, 2007 for 0.5 hours)
5	December 2007: \$5,256.00	Miller: \$768.00 (December 3, 2007 for 0.3 hours, December 4, 2007 for 1.3 hours) Patula: \$4,488.00 (December 3, 2007 for 0.8 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)
6	January 2008: \$150.00	Patula: \$150.00 (January 14, 2008 for 0.2 hours)
7	February 2008: \$300.00	Patula: \$300.00 (February 5, 2008 for 0.4 hours)
8	July 2008: \$22,016.50	Patula: \$17,400.00 (July 23, 2008 for 5.9 hours, July 24, 2008 for 1.3 hours, July 25, 2008 for 7.2 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)

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

15 ***1. Hartford's burden of proof***

16 It has been adjudged that Hartford had a duty to defend J.R. Marketing in the Marin action  
17 and that it breached this defense duty. While Hartford admits that it had a duty to defend J.R.  
18 Marketing in some of that case, Hartford argues that it is entitled to reimbursement for all of the  
19 costs associated with allegedly uninsured claims and expenses. In light of the scope and posture of  
20 the case, the law makes clear that Hartford carries a heavy burden. Specifically, Hartford can only  
21 seek reimbursement for claims that are "not even potentially covered" by the insurance that it  
22 provided to J.R. Marketing. (*Buss*, 16 Cal.4th at 50.) To successfully do so, Hartford must prove by a  
23 preponderance of the evidence that the challenged costs are solely allocated to claims that are not  
24 potentially covered by the insurance. (*Id.* at 53-54.) In other words, it essentially must produce  
25 "undeniable evidence of the allocability of [the] specific [uncovered] expenses." (*Hogan*, 3 Cal.3d at  
26 564.) If the fees at issue "can be allocated jointly to the claims that are least potentially covered and  
27 to those that are not," they are not subject to reimbursement. (*Buss*, 16 Cal.4th at 53.)  
28

1                   **2. Hartford failed to meet its burden and is not entitled to reimbursement**  
2                   **for any other challenged costs allocated to uncovered claims.**

3                   After considering the evidence, testimony, and arguments presented at trial, the Court finds  
4 that Hartford failed to meet its burden in showing that it is entitled to reimbursement for other  
5 uncovered claims and costs—all of the remaining fees for which it seeks reimbursement. Hartford  
6 challenges several categories of costs, arguing that they are uncovered services and disbursements for  
7 which it is entitled to reimbursement.

8                   Hartford only vaguely touches on the coverage of these costs under the insurance policy it  
9 issued to J.R. Marketing—it has not proved by a preponderance of the evidence that the challenged  
10 costs are solely allocated to potentially uncovered claims and issues. In its post-trial brief, Hartford  
11 notes that it may be entitled to reimbursement for costs not covered by insurance based on the law.  
12 Hartford presents general legal statements of what claims may be uncovered and cites to cases in  
13 support of these propositions. Hartford fails to underscore or address an important requirement—that  
14 it must produce evidence of the allocability of the specific uncovered expenses. (*Hogan*, 3 Cal.3d at  
15 564.)

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

23                   Second, even if the Court considers such evidence, it is actually at odds with the evidence  
24 that Hartford presented at trial. The only valuations that Hartford presented at trial were those  
25 prepared by Norman. However, Norman did not discuss in-depth the costs of the allegedly uncovered  
26 claims and issues. The only time he discussed potentially uncovered claims was when he talked  
27 about Squire Sanders' work on out-of-state cases. He testified that Squire Sanders charged  
28 \$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

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

8 Finally, the reimbursement that Hartford seeks actually highlights that it has failed to  
9 allocate the costs associated solely to the potentially uncovered claims as required by the law. In its  
10 post-trial brief, Hartford outlines all of the potentially uncovered claims and issues and requests that  
11 the Court order J.R. Marketing to reimburse Hartford for all of the costs associated with these  
12 claims. This is not the sort of reimbursement that the law permits, however. The law requires an  
13 insurance company seeking reimbursement to allocate and request only those costs associated with  
14 the potentially uncovered claims. In this case, a great deal of evidence came out during discovery and  
15 was presented during trial that the covered claims and potentially uncovered claims were  
16 significantly related. On numerous occasions, Miller objected to Hartford's suggestions that the  
17 matters were completely unrelated. Miller reiterated time and again while on the stand that the  
18 covered and uncovered claims were highly related. Accordingly, Hartford bears the burden of  
19 separating out those costs only solely attributable to the allegedly uncovered claims and issues.  
20 Hartford has not attempted to make this showing.

#### 21 **EFFECT OF THIS DECISION ON THE INSURED**

22 The Court is concerned about the effect of this decision on the insured, who will be required  
23 to pay this judgment. The Court did not find that the insured were sophisticated business  
24 professionals. They were operating a "mom and pop" type business, not a major corporation. Nor  
25 were the insured sophisticated users of attorney services. The Court is not sure that the insured had  
26 the ability or understood how to review the attorney fee bills they were receiving to determine if the  
27 fees and costs were reasonable or necessary. The Court doubts that the bills were ever reviewed by  
28 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

1 reasonably and necessity deferred until the within action was tried. They undoubtedly were  
2 totally focused on being well defended in the Marin case.

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

11 Without the financial ability to pay this Court's order to reimburse Hartford, the insured  
12 are being placed in the difficult position of having to ask their attorneys to pay the judgment or  
13 possibly filing for bankruptcy. However, unless and until such time as the California Supreme Court  
14 rules differently, this Court is bound by the Court of Appeal's ruling, finding that it is the insured,  
15 not their counsel,<sup>15</sup> who must reimburse Hartford for any fees found to be unreasonable or  
16 unnecessary. (*J.R. Marketing, L.L.C.*, 2013 WL 2145094.)

### 17 CONCLUSION

18 For these reasons, the Court issues this decision, ORDERING Hartford to be reimbursed by  
19 Plaintiffs in the amount of \$4,857,832.00 plus pre-judgment interest at the rate of seven percent  
20 annum simple interest<sup>16</sup> for J.R. Marketing's unreasonable and unnecessary fees and DENYING J.R.  
21 Marketing's Motion for Judgment, Motion to Strike, and request for a new jury trial.

22 Hartford is ordered to compute the pre-judgment interest. Interest should be calculated on a  
23 month-to-month basis from the date that bills became due. Hartford should determine the month  
24 overpaid each month and then calculate the corresponding interest per month.

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25 <sup>15</sup> The Court is bothered by the fact that, before the trial in this case, Squire Sanders moved to be dismissed as a Cross-  
26 Defendant. Squire Sanders knew that the Cross-complaint placed their billing practices in issue. Squire Sanders knew  
27 that, should they be dismissed as a Cross-Defendant, they would be leaving their clients solely responsible for any fees  
28 found by the court not to be reasonable or necessary.

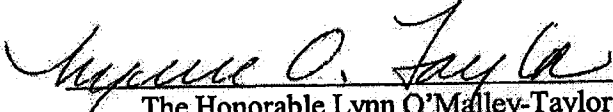
<sup>16</sup> See footnote 3.

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After calculating the amount of pre-judgment interest owing, Hartford is further ordered to prepare and submit a proposed judgment. The proposed judgment should be submitted thirty dates from the date that this decision is filed.

IT IS SO ORDERED.

DATE: December 26, 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, Rosallie Gumpal, 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 December 26, 2013, I served the attached FINAL 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, 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.  
EDWARDS WILDMAN PALMER LLP  
750 LEXINGTON AVENUE, 8<sup>TH</sup> FLOOR  
NEW YORK, NY 10022

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

Dated: December 26, 2013

T. MICHAEL YUEN, Clerk

By:



Rosallie Gumpal, 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.

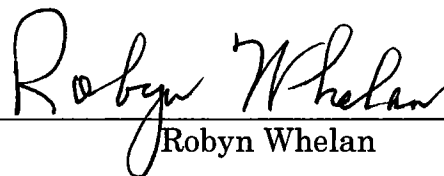
On January 7, 2014, I served true copies of the following document(s) described as **FURTHER SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID M. AXELRAD** on the interested parties in this action as follows:

**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 January 7, 2014, at Encino, California.

  
\_\_\_\_\_  
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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Theodore J. Boutrous Jr. Julian W. Poon Gibson, Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, California 90071-3197	Attorneys for Cross-Defendant and Respondent <i>Squire Sanders (US) LLP</i>
Catherine L. Rivard Mendes & Mount, LLP 601 South Figueroa Street, Suite 4676 Los Angeles, California 90017	Attorneys for Cross-Complainant and Appellant <i>Hartford Casualty Insurance Company</i>
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]