LIU, J.

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S211645

IN THE SUPREME COURT OF CALIFORNIA

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

v.

HARTFORD CASUALTY INSURANCE COMPANY,
Cross-Complainant and Appellant.

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

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

IN THE
SUPREME COURT OF CALIFORNIA

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MOTION FOR JUDICIAL NOTICE

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

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

July 3, 2013

HORVITZ & LEVY LLP
DAVID M. AXELRAD
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By: _____
David M. Axelrad

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HARTFORD CASUALTY INSURANCE COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES

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

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

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

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

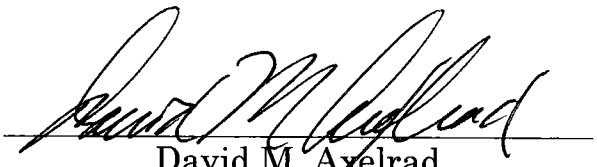
Capital Communications Services, Inc. (2000) 81 Cal.App.4th 81, 86 [appellate court may take judicial notice of the records of a California court]; *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914 [noting that a court may take judicial notice of the existence of documents in a court file].)

CONCLUSION

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

July 3, 2013

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

By: 
David M. Axelrad

Attorneys for Cross-Complainant and Appellant
HARTFORD CASUALTY INSURANCE COMPANY

DECLARATION OF DAVID M. AXELRAD

I, David M. Axelrad, declare as follows:

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

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

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

Executed July 3, 2013, at Encino, California.

David M. Axelrad

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

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

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

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

BACKGROUND

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

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

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

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

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

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

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

DISCUSSION

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

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

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Motion for Judgment

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

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

Motion to Strike

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

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

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

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

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

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

II. Trial Phase II Decision

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

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

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

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

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

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

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

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

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

1. Hartford's burden of proof

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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