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**IN THE
SUPREME COURT OF CALIFORNIA**

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

**SUPREME COURT
FILED**

vs.

JUL 23 2013

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

Frank A. McGuire Clerk

Deputy

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

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

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J.R. MARKETING, LLC, JANE E. RATTO,
ROBERT E. RATTO, PENELOPE A. KANE,
LENORE DeMARTINIS, and GERMAIN DeMARTINIS
and Proposed Cross-Defendants and Respondents
SQUIRE SANDERS (US) LLP and SCOTT HARRINGTON

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JUL 23 2013

CLERK SUPREME COURT

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**IN THE
SUPREME COURT OF CALIFORNIA**

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

vs.

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

**RESPONDENTS' RESPONSE TO
HARTFORD'S MOTION FOR JUDICIAL NOTICE**

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

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

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

Dated: July 23, 2013

Respectfully submitted,

Squire Sanders (US) LLP

By



Mark C. Dosker
Michelle M. Full

Attorneys for Plaintiffs, Cross-Defendants
and Respondents

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

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

DECLARATION OF MICHELLE M. FULL

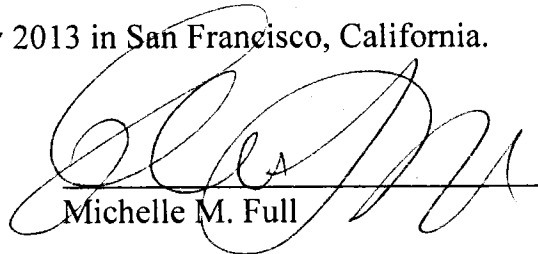
I, Michelle M. Full, declare:

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

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

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

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



Michelle M. Full

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ENDORSED
FILED
Superior Court of California
County of San Francisco

JUL 9 2013

CLERK OF THE COURT
BY: MARY ANN MORAN
Deputy Clerk

Attorneys for Plaintiffs and Cross-Defendants
J.R. MARKETING, LLC, JANE E. RATTO,
ROBERT E. RATTO, PENELOPE A. KANE,
LENORE DeMARTINIS and GERMAIN
DeMARTINIS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

J.R. MARKETING, LLC, et al.

Plaintiffs,

vs.

HARTFORD CASUALTY
INSURANCE COMPANY, et al.

Defendants.

Case No. CGC 06449220

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

HARTFORD CASUALTY
INSURANCE COMPANY,

Cross-Complainant,

vs.

J.R. MARKETING, LLC, et al.

Cross-Defendants.

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

Hon. Judge Lynn O'Malley Taylor

1 **I. INTRODUCTION**

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

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

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

- 16
- 17 • \$4,690,236.50 for allegedly unreasonable staffing of the insureds' defense
18 team;
 - 19 • \$63,416.00 for allegedly unnecessary coordination among the insureds'
20 attorneys;
 - 21 • \$51,364.00 for allegedly unreasonable document review;
 - 22 • \$23,126.50 for allegedly unreasonable and unnecessary discovery tactics;
 - 23 • \$24,757.00 for allegedly unreasonable and unnecessary legal research;
24 and
 - 25 • \$83,830.00 for allegedly unreasonable overhead expenses.

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

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

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

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

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

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

27
28

1 **II. PROCEDURAL STATUS**

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

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

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

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

1 reimbursement of defense fees from the Ratto Plaintiffs. Prior to the start of trial,
2 Hartford orally dismissed Plaintiff Lenore DeMartinis as a cross-defendant to its
3 cross-complaint and filed a written dismissal of its cross-claims against Plaintiff
4 Germain DeMartinis, with prejudice. Full Decl., Exs. B (Rough Trial Tr. (Nov. 9,
5 2012)) and C (Hartford's Request for Dismissal). In lieu of closing arguments, the
6 parties submitted post-trial briefing. In Plaintiffs' post-trial memorandum, Plaintiffs
7 specifically requested that the Court issue a tentative decision pursuant to California
8 Rules of Court Rule 3.1590. *See* Plaintiffs' May 23, 2013 Post-Trial Memorandum
9 (Phase II). On June 24, 2013, the Court filed a "Statement of Decision" as opposed
10 to a tentative decision or a proposed statement of decision. Full Decl. at Ex. A.

11 As of the date of this filing, no judgment has been entered with respect to
12 either phase of this case. Plaintiffs expect that, upon resolution of all the objections
13 and issues raised regarding the Court's Statement of Decision, the Court will enter a
14 judgment memorializing both the jury verdict from Phase I of trial and the decision
15 of the Court with respect to Phase II for Hartford's cross-claim for reimbursement.
16 But it is unclear whether Plaintiffs should treat the Court's June 24, 2013
17 "Statement of Decision" as a tentative decision, a proposed statement of decision,
18 proposed judgment, some other type of document as contemplated by Rule
19 3.1590—in response to which Plaintiffs should file objections—or an Order as
20 described in Section 1003 of the Code of Civil Procedure—in response to which
21 Plaintiffs should file a motion under Rule 1008 of the Code of Civil Procedure. In
22 light of this uncertainty, Plaintiffs file these timely objections and/or request that
23 the Court reconsider, modify or revoke the June 24, 2013 "Statement of Decision."
24 Plaintiffs also request that the Court reflect the same in any final statement of
25 decision or judgment.

26 **III. OBJECTIONS AND ARGUMENT**

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

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

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

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

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

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

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

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

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

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

11 Here, Hartford failed to introduce any evidence during discovery or at trial
12 identifying the specific fees that it sought to recover, and failed to introduce
13 evidence establishing that those specific fees were unreasonable or unnecessary.
14 The Court expressly acknowledged those failures in the Decision. (Decision p. 5:7-
15 10 ("Hartford never disclosed any line-by-line challenges to Squire Sanders' billing
16 entries during the discovery process or trial."); *id.* at 21 (finding Hartford's
17 evidence was too general to support a claim for reimbursement for fees allegedly
18 incurred on uncovered persons, claims, or lawsuits)).

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

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

28

1 When Hartford attempted to challenge specific fees in its post-trial materials,
2 the Court recognized that “considering such information would be prejudicial”
3 because “this is the precise information that Hartford” had failed to provide during
4 discovery and at trial. (Decision p. 5:9-10). Yet despite this acknowledgement, the
5 Court proceeded to sift through the legal bills for itself and held that specific billing
6 entries were unreasonable and/or unnecessary without offering Plaintiffs any
7 opportunity to introduce rebuttal evidence. (Decision p. 12:23-13:24, 15:3-9,
8 15:25-16:7, 17:9-17, 18:11-20). This unprecedented and improper procedure is a
9 clear violation of Plaintiffs’ right to Due Process under the California and federal
10 constitutions.

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

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

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

1 Hartford's reimbursement claim.

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

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

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

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

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

11 **B. Plaintiffs Were Entitled To A Jury Trial.**

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

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

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

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

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

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

12 5. *The Decision does not identify the specific billing entries that the*
13 *Court deemed to be unreasonable or unnecessary. (Decision p. 12:23-27, 13:1-25,*
14 *15:3-9, 16:2-8, 17:12-18, 18:11-20).*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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