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IN THE SUPREME COURT OF CALIFORNIA

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

v.

HARTFORD CASUALTY INSURANCE COMPANY,
Cross-Complainant and Appellant.

SUPREME COURT
FILED

JAN - 8 2014

Frank A. McGuire Clerk

Deputy

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

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

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FURTHER SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452, subdivision (d)(2), and 459, and California Rules of Court, rule 8.252, Hartford Casualty Insurance Company (Hartford) hereby moves that this Court take judicial notice of a trial court document recently filed in this case (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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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
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By: _____
David M. Axelrad

Attorneys for Cross-Complainant and Appellant
HARTFORD CASUALTY INSURANCE COMPANY

DECLARATION OF DAVID M. AXELRAD

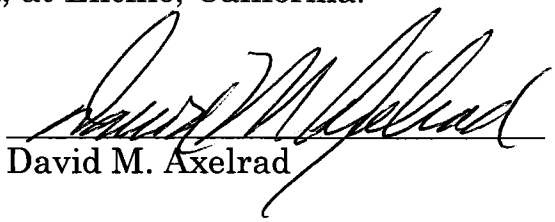
I, David M. Axelrad, declare as follows:

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

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., Plaintiffs, v. HARTFORD CASUALTY INSURANCE COMPANY, et al., Defendants.	Case No. CGC-06-449220 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[1]

[1] 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.].)

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, and Penelope A. Kane ("J.R. Marketing").[2] The Court has considered the evidence, applicable law, and arguments,[3] including those submitted by the parties in their July 9, 2013 and July 17, 2013 filings.[4] The Court now issues this statement of decision, holding that Hartford is entitled to reimbursement in the amount of $4,857,832.00 for J.R.

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

Hartford specifically filed its cross-claim for reimbursement against J.R. Marketing, the Rattos, the DeMartinis, Kane, Scott Harrington, and Squire Sanders LLP—Plaintiffs' counsel. Plaintiffs demurred, which the Court sustained, effectively dismissing Squire Sanders and Harrington from the cross-complaint. On May 17, 2013, the Court of Appeal affirmed this order dismissing the reimbursement claim against Squire Sanders and Harrington. (*J.R. Marketing, L.L.C. v. Hartford Cas. Ins. Co.* (May 17, 2013, A133750) _Cal.App.4th_ [2013 WL 2145094] [nonpub. op.].) Hartford also orally dismissed with prejudice its cross-complaint against Lenore DeMartinis after the jury was impaneled in preparation for the Phase I trial on November 9, 2012. Similarly, Hartford filed a request for dismissal with prejudice its cross-complaint against Germain DeMartinis on January 31, 2013. Accordingly, Hartford's cross-complaint for reimbursement only lies against J.R. Marketing, the Rattos, and Kane.

[3] The Court specifically considered all of the pleadings filed by the parties after it issued its tentative decision on October 25, 2013 and final decision on December 9, 2013: Hartford's November 8, 2013 Objection to Amended Tentative Statement of Decision; J.R. Marketing's November 14, 2013 Objections to the October 25, 2013 Tentative Statement of Decision; Hartford's November 21, 2013 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 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.

Of note, the Court read the objections to the tentative decision before reading the objection for untimeliness. The 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.

The Court has also accounted for pre-judgment interest, awarding Hartford pre-judgment interest at the rate of seven percent annum simple interest and overruling J.R. Marketing's objection on this issue. (*Evanston Ins. Co. v. OEA, Inc.* (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.)

[4] The Court also notes that Hartford admittedly did not go through Squire Sanders' bills line by line to identify specific entries that set forth fees for which it is entitled to reimbursement. However, Squire Sander's bills were admitted into evidence. The Court is obligated to consider and evaluate all the evidence. (*United Pacific Ins. Co. v. Hall* (1988) 199 Cal.App.3d 551, 557 [While *Cumis* may prohibit an insurer from dictating the tactics of litigation, it does not delegate to *Cumis* counsel a meal ticket immunized from judicial review for reasonableness.]; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [The "experienced trial judge is the best judge of the value of professional services rendered in his court."].)

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

BACKGROUND

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

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

On February 3, 2006, J.R. Marketing consequently filed this lawsuit for breach of contract and bad faith against Hartford in light of the parties' insurance agreement. J.R. Marketing moved for summary adjudication on Hartford's duty to defend and J.R. Marketing's right to independent counsel. On July 26, 2006, this Court granted the motion in full. Hartford then began paying for some of J.R. Marketing's defense costs in the Marin action. However, Hartford did not pay for J.R. Marketing's full defense costs in the Marin action. As a result, J.R. Marketing petitioned this Court for enforcement of the duty to defend order, and the Court issued another order, reiterating Hartford's duty to defend. Specifically, the Court determined that Hartford must reimburse J.R. Marketing for all previous defense costs of the Marin action and must pay all future costs. The Court noted that Hartford could challenge the reasonableness of such attorney fees by way of reimbursement after the resolution of the Marin action. The Court of Appeal affirmed this decision on November 30, 2007. In July 2011, Hartford filed its first amended cross-complaint seeking reimbursement of defense fees from J.R. Marketing.

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

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

DISCUSSION

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

The Court considers J.R. Marketing's argument that the Court denied its right to a jury trial on Hartford's reimbursement claim. As discussed below, the Court affirms its decision to bifurcate the case and allow Hartford's claim for reimbursement to proceed as a court trial. J.R. Marketing is

not entitled to a new jury trial on this claim.

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

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

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

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

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

Motion for Judgment

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

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

Motion to Strike

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

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

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

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

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

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

III. Trial Phase II Decision

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

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

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

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