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MICHAEL TAYLOR DESIGNS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL TAYLOR DESIGNS, INC., a California corporation, Plaintiff, vs. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, a Connecticut corporation, Defendant.	Case No.: C10-02432-RS **PLAINTIFF MICHAEL TAYLOR DESIGNS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: QUANTIFICATION OF DAMAGES** Date: March 10, 2011 Time: 1:30 p.m. Judge: Richard Seeborg Ctrm: 3, 17th Floor

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PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 56 and Civil Local Rules 56-1 and 7-2 of the United States District Court for the Northern District of California, Plaintiff Michael Taylor Designs, Inc. ("MTD") will move on March 10, 2011 at 9:00 a.m., or as soon thereafter as counsel may be heard, for partial summary judgment quantifying damages.

Plaintiff MTD moves for partial summary judgment on damages resulting from Defendant Travelers Property Casualty Company of America's ("Travelers") breach of its duty to defend MTD in *Rosequist v. Michael Taylor Designs, Inc.*, United States District Court for the Northern District of California, Case No. 08-1588-SBA (the "*Rosequist* action").

On January 20, 2011, this Court granted partial summary judgment to MTD on the duty to defend, finding that "the factual allegations of the original *Rosequist* complaint were sufficient to reveal the possibility of a covered claim, and Travelers had a duty to provide MTD a defense from the time that complaint was tendered."[1] The only issue in the case is the quantification of damages owed to MTD, consisting of the reasonable and necessary defense expenses and costs incurred in the underlying litigation that remain unpaid.

Courts routinely decide the issue of "reasonableness" of attorneys' fees and costs as a matter of law. The court should enter summary judgment herein because no genuine issue of material fact exists as to the reasonableness of the defense costs incurred by MTD in the *Rosequist* action.

I. BACKGROUND FACTS

A. The Complaint's Allegations

MTD had a longstanding business relationship with furniture designer Ivy Rosequist, pursuant to which MTD was the exclusive sales representative for Rosequist's well-known line of wicker furniture. In 2008, a dispute arose between MTD and Rosequist over MTD's plans to begin selling synthetic wicker furniture that Rosequist contended were unlawful copies of her designs. On March 24, 2008, Rosequist filed a two-count complaint styled *Rosequist v. Michael Taylor Designs, Inc*., N.D. Cal., Case No. C-08-1588 SBA, alleging breach of contract and violation of the Lanham Act (the "*Rosequist* action").[2]

[1] *See* Order, p. 10 (Document 38).

[2] A copy of the complaint filed in the *Rosequist* action is concurrently submitted as **Exhibit "2."**

Rosequist's Lanham Act claims alleged that MTD had distributed promotional literature to its customers which showed Rosequist's distinctive furniture, but when the customers arrived at the showroom to see the advertised pieces they fell prey to a "bait and switch" technique in which they were instead shown "cheap synthetic knockoffs" of Rosequist's products. Rosequist complained that this behavior created a likelihood of confusion in the minds of consumers as to the origin of the furniture on display, and that this conduct, if unabated, would "dilute and tarnish" her trade dress. (Order, p. 2; Sussman Decl., ¶8)

B. Tender of Defense

The *Rosequist* action was tendered to Travelers on March 31, 2008, and Travelers denied coverage some two weeks later on the grounds that "none of Rosequist's claims implicate any of the offenses enumerated in the definition of 'personal injury', 'advertising injury' or 'web site injury'" in the policy. (Order, p. 2) From March 31, 2008 to January 12, 2010 MTD defended the *Rosequist* action through its undersigned counsel Gauntlett & Associates ("G&A"). (Sussman Decl., ¶10)

C. The Complexity of the Underlying Action

As laid out in detail in the concurrently submitted declaration of Andrew M. Sussman, the *Rosequist* action was rife with complications. The relationship between Rosequist and Taylor went back some 30 years, and G&A was required to explore the complicated factual history between the parties as well as such things as, *inter alia*: (1) Taylor's own design history and expertise; (2) the parties' relative standings and reputation in the design community; (3) the status of Rosequist's efforts to register the designs and marks at issue; (4) the damages at issue in the case; (5) the existence and location of potential party-affiliated and non-party witnesses nationwide, with related phone interviews; (6) the publications and scholarly works cited in the complaint to support Rosequist's claims of reputation and expertise; and (7) Rosequist's representations to the San Francisco Museum of Modern Art (in connection with her donation to the museum of a Jennifer chair) that Taylor had designed the chair. (Sussman Decl., ¶¶ 12-14).

The *Rosequist* action was further complicated when, some two months into the case,

(*See* Declaration of Andrew M. Sussman ("Sussman Decl."), ¶¶ 5-9, 31).

Rosequist passed away. (*Id*, ¶16). Although Rosequist had sued in her personal capacity, at her death her long-time companion William Giffen attempted to substitute in as plaintiff, claiming that the assets at issue in *Rosequist* were part of the *res* of the Rosequist Trust, and that as sole trustee and beneficiary he succeeded to those assets. (*Id*., ¶¶17-20). When MTD successfully opposed that motion, Giffen brought an action for declaratory relief in probate court seeking a ruling that Rosequist's business interests were part of the Trust, and naming MTD as a respondent. (*Id.*, ¶21.)

By stipulation, the *Rosequist* action was stayed while the issue of whether Giffen had standing to substitute in as plaintiff was litigated. MTD was obliged to respond to the probate action, undertake discovery in that matter, and ultimately defeated Giffen in a one-day trial in the probate court. (*Id.*, ¶¶21-28). Thereafter Giffen submitted Rosequist's pourover will to probate, was appointed administrator of Rosequist's estate, and substituted in as plaintiff in that capacity in *Rosequist*.

D. Filing of the Amended Complaint

On October 21, 2009, a first amended complaint (the "FAC") was filed in *Rosequist* which included claims for relief for "Slander of Goods/Slander of Title" which repeatedly asserted that MTD had "disparaged the quality and origin" of Rosequist's goods. (Order, p. 3; Sussman Decl., ¶34). Travelers was provided with a copy of the FAC that same day, which sparked a series of communications between MTD and the insurer in which Travelers ultimately – on December 15, 2009 – agreed to provide a defense to MTD subject to a reservation of rights, and appointed Ropers Majeski to take over the defense of the action from G&A.[3]

Although Travelers stated in several letters during the course of this colloquy that it would pay G&A pursuant to California Civil Code §2860 from the date the FAC was filed until the transition to its chosen counsel occurred, G&A disputed Travelers' rights to unilaterally impose §2860 fees prior to the actual assumption of the defense by Travelers. (*Id.*). The final expression of Travelers intentions, as expressed by Travelers' letter accepting the tender of defense, makes no mention of any purported rights under §2860, but simply states:

[3]A true and correct copy of Travelers' Reservation of Rights Letter is submitted concurrently herewith as **Exhibit "11."** (*Id.*, ¶¶ 35-41.)

> **We will reimburse the reasonable and necessary defense expenses from the date of tender until today's date. In addition, we will reimburse the Gauntlett firm for reasonable and necessary expenses during the period of time reasonably necessary to transition the defense to the Ropers firm.**

(*Id*., ¶ 39; *see* **Exhibit "11"** (emphasis added).)

Consistent with its letter of acknowledging its duty to defend under the FAC, Travelers partially reimbursed MTD for defense costs from the date the FAC was filed until the transition of the defense to the Ropers firm. For the period October 21, 2009 to December 15, 2009, Travelers paid the full amount invoiced by G&A for legal fees, implicitly recognizing that these were "reasonable and necessary defense expenses." (*Id*., ¶ 46). This payment was made without challenge to the rates charged, tasks selected, or time incurred for those tasks.

For the period post-dating its reservation of rights letter (December 16, 2009 to January 12, 2010), however, Travelers unilaterally imposed a rate cap of $220/hour for G&A partners Andrew Sussman and James Lowe, and a rate cap of $190/hour for G&A associate Preston Ascherin. (*Id*., ¶41). Travelers' explanation, provided after a delay of some three months via email, was as follows:

> [Y]ou will recall that by letter dated 12/15/09 Travelers accepted a duty to defend and assigned the defense to the Ropers firm. Therefore, with respect to legal fees reported from 12/16 forward, we applied 2860 rates. (*See* Travelers' email dated March 4, 2010, a true and correct copy is filed concurrently herewith as **Exhibit "13")**

G&A contested the propriety of Travelers' imposition of these reduced rates, noting that §2860 has no retroactive application, and that under California law Travelers cannot simply say that it is going to defend, fail to immediately do so, and then seek to subsequently impose panel fees on G&A for the period between Travelers' acknowledgement that a defense was owed and the date its appointed counsel actually took over the defense. (*Id*., ¶ 41). Travelers only response to this was to claim that it had paid what it deemed was "reasonable and necessary."

Under any analysis, the rates charged by MTD's counsel in the *Rosequist* action are reasonable. In light of the difficulty of the issues litigated, the amount at stake, the experience of the billing attorneys and the relevant geographical areas in which the legal services were rendered, the inescapable conclusion is that all charges to MTD were warranted.

II. THE BURDEN OF PROOF

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[4] The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying [the evidence] which it believes demonstrate the absence of a genuine issue of material fact."[5] The non-moving party must identify specific facts "that might affect the outcome of the suit under the governing law," establishing a genuine issue for trial.[6]

The court views the summary judgment evidence through the prism of the evidentiary standard of proof that would pertain at trial,[7] drawing all reasonable inferences "in favor of the non-moving party, including questions of credibility and of the weight" that particular evidence is accorded.[8] The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party.[9] Where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial"[10] and summary judgment should enter.

B. Burden of Proof

Although MTD filed this motion, Travelers is a wrongfully non-defending insurer. Thus, while "[MTD] 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, **it is the insurer**

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[4] *Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), citing FED. R. CIV. P. 56(c).

[5] *Celotex*, 477 U.S. at 323.

[6] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[7] *Anderson*, 477 U.S. at 255.

[8] *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

[9] *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

[10] *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[Travelers] that must carry the burden of proof that they are in fact unreasonable or unnecessary."[11]

C. Reasonableness Should Be Determined on a Motion for Summary Judgment

Courts decide the issues of reasonableness and amount of attorney's fees as a question of law.[12] Courts that summarily adjudicate the amounts and reasonableness of a wrongfully non-defended insured's underlying defense expenses require only that the insured offer proof as to the amount of the expenses, with the burden then shifting to the insurer to prove that any part of those expenses was unreasonable. " '[I]n the exceptional case, wherein the insurer has breached its duty to defend . . . the insurer must carry the burden of proof that [the underlying suit's defense expenses] are in fact unreasonable or unnecessary."[13]

As the court in *Ultra Coachbuilders* declared:

> Generally, the insured, as the party seeking relief, carries the burden of proving the amount of costs incurred in defense of the action. 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 necessary as defense costs, and **it is the insurer that must carry the burden of proof that they are in fact unreasonable or unnecessary**. [14]

California courts have directly addressed the "insurer burden of proof" issue and hold that where an insured is forced to defend an action because the insurer wrongfully refused to provide a defense, the insured is entitled to recover its reasonable defense costs, including attorney's fees.

> The State met its burden when it demonstrated the hours worked and provided testimony that the work was all related to the defense. Pacific Indemnity has provided no evidence to rebut that claim. Based on this record, we conclude Pacific Indemnity failed to demonstrate that specific costs were either unreasonable or unnecessary to the

[11] *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 64 (1997).

[12] Both Judge Patel in San Francisco [*Foxfire, Inc. v. New Hampshire Ins. Co.*, Nos. C-91-2940 MHP ARB, C-91-3464 MHP, 1994 WL 361815 (N.D. Cal. July 1, 1994)] and Judge Stanton in New York [*Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d 284, 286 (S.D.N.Y. 2002) (applying California law)] resolved these issues by motion.

[13] *State of California v. Pacific Indem. Co.*, 63 Cal. App. 4th 1535, 1548-49 (1998).

[14] *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d 284, 286 (S.D.N.Y. 2002) (applying California law) ("Here, [the insurer] has not carried its burden of proving that the claimed attorneys' fees and costs were unreasonable or unnecessary for Ultra's defense." (emphasis added)).

defense.[15]

Under California law, the party owing attorney's fees in this context has the burden of proving unreasonableness.[16] This is consistent with the position articulated by cases such as *Foxfire*, in which Judge Patel embraced the "undeniable evidence standard" required for a non-defending insurer to escape liability for expenses incurred solely to defend non-covered claims. The Court emphasized that:

> 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.[17]

Although under some circumstances a determination of "reasonableness" of attorneys' fees might involve factual inquiry, in the context of damage quantification "reasonableness" can, as here, be adjudicated as a matter of law. Thus, under circumstances similar to the present case, *Foxfire* placed the burden on the insurer to prove that it was not obliged to pay all of the insured's defense expenses. Herein, Travelers' wrongful refusal to defend MTD requires Travelers to prove that it need not pay any part of plaintiff's damages – a burden it cannot meet. Since there is no genuine issue of material fact, the court should find MTD's damages reasonable as a matter of law and enter summary judgment thereon.[18]

III. ALL LITIGATION EXPENSES INCURRED BY MTD WERE OBJECTIVELY REASONABLE AS A MATTER OF LAW

A. Travelers Concedes that the Rates Charged by G&A Are Reasonable

On or about March 29, 2010, Travelers paid G&A $20,954.27. This represents payment in full of G&A's bills between the date the FAC was tendered (October 21, 2009) and the date of Travelers' reservation of rights letter accepting the defense (December 15, 2009). (Sussman Decl.

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[15] *State of California v. Pacific Indem. Co.*, 63 Cal. App. 4th 1535, 1549 (1998).

[16] *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 64 (1997); *Ultra Coachbuilders*, 229 F. Supp. 2d, 284 at 286.

[17] *Foxfire*, 1994 WL 361815, at *2 (citing *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 564 (1970).

[18] *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000) ("If . . . a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. . . . If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment.").

¶46). Payment by Travelers of G&A's invoices at the rate invoiced is an admission by it that the rates charged were reasonable and necessary. Travelers has, and can have, no evidence that would rebut this presumption.

B. The Attorneys' Experience, Reputation and Ability Justify the Rates

G&A counsel defending the *Rosequist* action have many years of legal experience in similarly complex lawsuits. The exceptionally qualified defense attorneys of G&A include:

- David A. Gauntlett, G&A's principal, with over 30 years of intellectual property litigation experience, author of the best-selling *IP Attorney's Handbook for Insurance Coverage in Intellectual Property Disputes* (ABA, 2010), and selected as a Southern California Super Lawyer for the years 2009, 2010, 2011; (Aboutalib Decl., ¶5.a.)
- James A. Lowe, a G&A partner with over 40 years of litigation and trial experience in a wide variety of intellectual property and business disputes, including the trial of hundreds of cases in state and federal court; (Aboutalib Decl., ¶5.b.)
- Andrew M. Sussman, a G&A attorney with over 27 years of litigation experience in a wide variety of business disputes, including trademark, trade dress, and other intellectual property disputes and related insurance coverage disputes; (Sussman Decl., ¶¶ 3-4.)
- Preston Ascherin, a former G&A attorney with experience in intellectual property litigation and insurance coverage litigation. Mr. Ascherin received his Juris Doctor from the University of California, Los Angeles in 2008. He was admitted to practice in California in 2008; (Aboutalib Decl., ¶5.d.)
- Christoper Lai was an associate at G&A. Mr. Lai received his Juris Doctor from the Loyola Law School. He was admitted to practice in California in 2007. Mr. Lai's practice focused on intellectual property and insurance coverage litigation; (Aboutalib Decl., ¶5.e.)
- Lisa Wright was an associate at G&A. Ms. Wright received her Juris Doctor from the University of Southern California Law School in 2008. She was admitted to practice in California in 2008. Ms. Wright's practice focused on intellectual property and

insurance coverage litigation. (Aboutalib Decl., ¶5.f.)

C. AIPLA Rates Support MTD's Position That the Charged Rates Were Reasonable

MTD's position that the rates charged by MTD's counsel are reasonable is supported by the 2009 biennial Report of Economic Survey published by the American Intellectual Property Law Association ("AIPLA Report").[19] [Aboutalib Decl., ¶¶6-8; **Exh. "35."**] Courts have found AIPLA surveys to be persuasive evidence of the market cost of attorney services in intellectual property cases.[20] Applying California law, *Ultra Coachbuilders* relied heavily on the AIPLA Survey to determine the reasonableness of billing rates.[21]

The rates charged by MTD's defense counsel are reasonable when compared with rates for attorneys with similar knowledge and skill in California. The 2009 AIPLA report shows that the 75th percentile billing rate in the San Francisco area for partners was $660 per hour, and the 75th percentile billing rate for an associate was $488 per hour. Averaging the rates for partner and associates, the 75th percentile rate was $574.

The principal attorney representing MTD in *Rosequist* was Andrew M. Sussman whose rate varied between $300-$325 per hour during the course of G&A's representation of MTD. (Sussman Decl., ¶ 42). The average[22] partner rate charged by Gauntlett & Associates was $550, and the

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[19]Every two years, the AIPLA conducts nationwide surveys and reports the rates charged by intellectual property attorneys and the costs of litigating various types of intellectual property suits. The most recent AIPLA report was published in 2009 and was based on 2008 billing rates.

[20]*See, e.g., Superior Form Builders v. Dan Chase Taxidermy Supply Co., Inc.*, 881 F. Supp. 1021, 1026 (E.D. Va. 1994) (court looked to the litigating attorney's itemized billing statements and the 1993 Economic Survey Report of billing rates published by the AIPLA);

Mathis v. Spears, 857 F.2d 749, 755 (Fed. Cir. 1998) (Applying California law, the court affirmed the district court finding that it "properly considered the [AIPLA Economic] surveys" when determining the appropriate rate for the attorneys' services in an intellectual property action.);

Comark Communications, Inc. v. Harris Corp., No. 95-2123, 1998 WL 150946, at *4 (E.D. Pa. March 30, 1998) (AIPLA economic surveys were relied upon to determine the appropriate rate for the services of the attorneys in an intellectual property case.).

[21]*Ultra Coachbuilders, Inc.*, 229 F. Supp. 2d at 284, 287-88 (The court found that **partners'** average rates of **$324.06** per hour and **associates'** average rates of **$204.60** per hour were reasonable because they were below the average rates of partners ($350 per hour) and associates ($235 per hour) listed in the 2001 AIPLA survey.)

[22]The average hourly rate was determined by averaging the hourly rates as stated in the G&A invoices for partners, associates, and counsel.

average associate rate charged was $275. (Aboutalib Decl., ¶9.) These rates were facially reasonable given the complexity of the issues litigated, the experience of the attorneys and the geographical area (San Francisco) in which the litigation arose.

Rates comparable to or much higher than those charged by G&A have been found appropriate by numerous courts.[23] The comparable rates in the 2009 AIPLA Report support a finding that MTD's counsel's hourly rates are reasonable as G&A attorneys assigned to this case have significant experience in the practice of intellectual property law, the rates charged to MTD were consistent with rates charged to other clients, and the rates charged are well within the AIPLA rates. (Sussman Decl., ¶¶42-43).

IV. TRAVELERS HAS NO BASIS TO CHALLENGE ANY DEFENSE EXPENSES, AS PLAINTIFF'S ACTUAL, UNREIMBURSED *ROSEQUIST* DEFENSE COSTS ARE REASONABLE

A. Travelers' Wrongful Denial of a Defense Transfers the Burden of Proof re Unreasonableness of Fees and Challenges to Rates Fail

As this Court found, Travelers wrongfully denied coverage and refused to provide a defense to MTD in the underlying *Rosequist* action. (*See* Order, Document 38) Therefore, whatever

[23] *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. 02-4770 MRP (AJWx), 2007 WL 5279897, at *7 (C.D. Cal. Nov. 5, 2007) (Although the court recognized that the rate of **$1,000 per hour** is "at the upper end for attorneys in the community," it still held that this rate was reasonable based on that attorney's "abilities and a skill set that are largely unique and particularly valuable in a case of this complexity.");

Realsongs, Universal Music Corp. v. 3A North Park Ave. Rest Corp., No. 09-574, 2010 WL 4320404 (E.D.N.Y. Oct. 26, 2010) ("The Court notes that this district has previously approved **higher hourly rates** in **intellectual property** matters as they require specialized knowledge, even when such actions were considered in a default setting." (emphasis added));

Microsoft Corp. v. Computer Care Ctr., Inc., No. 06-CV-1429, 2008 WL 4179653, at *14-15 (E.D.N.Y. Sept. 10, 2008) (approving hourly rate of **$500** for a **partner** and **$385** for an intellectual property **associate** with several years of experience)." (emphasis added));

In re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 589 (S.D.N.Y. 2008) ("The current hourly rates of the partners litigating this action on behalf of the Class, who performed the vast majority of the **partner-level** work on this matter, range from **$700 to $750**. Those rates fall within the norm of the rates charged by those attorneys' common adversaries in the defense bar. Likewise, **associate rates** for the majority of work charged by Plaintiffs' Counsel range from a low of **$300** per hour to a high of **$550** per hour. Those rates, too, are consistent with rates charged by the defense bar for similar work." (emphasis added));

In re Independent Energy Holdings PLC Sec. Litig., No. 00 Civ. 6689(SAS), 2003 WL 22244676, at *9 (S.D.N.Y. Sept. 29, 2003) (Attorney rates for **partners** at **$650/hour** and **$300-$425/hour** for **associates** were "not extraordinary for a topflight New York City law firm." (emphasis added)).

limitations on damages that may have been available to Travelers had it decided to provide a defense, are now unavailable. Under California law, the necessary consequence of Travelers' decision to deny coverage and refusal to provide any defense is to make Travelers "liable for all costs and attorneys' fees expended by [its insured] for this purpose."[24]

B. Calculating the Reasonableness of Rate

California courts recognize that "the usual and ordinary meaning of the words 'reasonable attorney's fees' is the consideration that a litigant pays or becomes liable to pay in exchange for legal representation."[25] This is consistent with the concept of the "presumptively reasonable fee," as recently enunciated by the Second Circuit:

> **The reasonable hourly rate is the rate a paying client would be willing to pay**. In determining what rate a paying client would be willing to pay, the district court should … bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the "presumptively reasonable fee."[26]

In accordance with this reasoning, the reasonable hourly rate subject to Travelers' reimbursement here is the "rate a paying client would be willing to pay"[27] – which equates to the rate the MTD bound itself to pay. The only analysis this Court is required to undertake is the ministerial determination that the rates charged by MTD's counsel fall within the established bounds of what is deemed "reasonable" in the relevant legal communities. Once that hurdle is met, these rates are deemed to be "presumptively reasonable" and subject to reimbursement.

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[24] *Amato v. Mercury Cas. Co.*, 18 Cal. App. 4th 1784, 1793 (1993) (citing *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 564, 91 Cal. Rptr. 153, 155 (1970)).

[25] *Strauss v. Sheffield Ins. Corp.*, No. 05CV1310-H (CAB), 2006 WL 6158774, at *2 (S.D. Cal. Aug. 23, 2006) (quoting *Trope v. Katz*, 11 Cal. 4th 274, 282, 45 Cal. Rptr. 2d 241, 902 P.2d 259 (1995)).

[26] *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 190 (2d Cir. (N.Y.) 2008) (emphasis added);

See also Crescent Publ'g Group, Inc. v. Playboy Enters., Inc., 246 F.3d 142, 151 (2d Cir. (N.Y.) 2001) (explaining that an attorney-client agreement may provide compelling evidence of the "prevailing market rate.").

[27] *Id.*

As one might expect, part and parcel of this analysis is an inquiry into counsel's customary billing rates, since it is almost axiomatic that where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.[28] Here, as established by the declarations of counsel, there were no extraordinary fees charged. MTD was simply charged the same rate every other client of G&A was charged. (Sussman Decl., ¶¶42-43) The rates are thus presumptively reasonable[29] and should be paid by Travelers without argument.

C. The Tasks Undertaken and Time Accrued for Those Tasks Evidence That Reasonable Fees Were Expended Herein

1. Market Value is Established by Travelers' Payment of the 10/21/09 to 12/15/09 Fees

In defending the *Rosequist* action plaintiff incurred at least $201,553.89 for fees and costs billed by retained defense counsel. (Sussman Decl., ¶46.) This amount is established by plaintiff's concurrently-submitted invoices for all *Rosequist* action defense expenses. (*See* **Exhibits "31," "32."**)

Plaintiff has provided detailed documentation of the legal services performed and the costs incurred in connection with the *Rosequist* action defense, as well as the identification and qualifications of the attorneys who performed the work, by billing statements and declarations.[30] It informs the Court of the type of work performed, the number of hours worked and the identity of the individuals who performed the work as well as their hourly billing rates.

A number of courts have held that a plaintiff's agreement to pay attorneys' fees establishes that the fees were reasonable.[31] The straightforward rationale for this approach is based on the

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[28] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) ("The value of an attorney's time generally is reflected in his normal billing rate.").

[29] *See also Blum v. Stenson*, 465 U.S. 886, 886 (1984) (holding that "[reasonable rates] are to be calculated according to the prevailing market rates in [the] relevant community.").

[30] Moreover, spreadsheets detailing G&A's attorneys' fees and costs broken out by month are attached to the concurrently filed Declaration of Samer S. Aboutalib as exhibits thereto.

[31] *Crescent Publ'g Group, Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 150-51 (2d Cir. (N.Y. 2001) (explaining that an attorney-client agreement may provide compelling evidence of the "prevailing market rate");

See also Reade-Alvarez v. Eltman, Eltman, & Cooper, P.C., No. CV-04-2195 (CPS), 2006 WL 3681138, at *9 (E.D.N.Y. Dec. 11, 2006) ("In determining a reasonable hourly rate, the court

recognition that:

> Courts award fees at the market rate, and **the best evidence of the market value of legal services is what people pay for it. Indeed, this is not "evidence" about market value; it *is* market value**. Although courts interpolate the word "reasonable" into clauses of this kind, the best guarantee of reasonableness is willingness to pay.[32]

The declarations of MTD's independent counsel in the underlying *Rosequist* action establish that MTD paid *Rosequist* defense expenses at the invoiced rate before this Court found that Travelers had breached its policy by failing to defend plaintiff, and at a time when any recovery of those expenses was uncertain. (Sussman Decl., ¶10).

2. MTD's Expenses in Responding to the Related Probate Were Necessary and Reasonable to Defend the *Rosequist* Action

After Rosequist's death her long-term companion Giffen attempted to substitute in as plaintiff in the *Rosequist* action. MTD opposed the substitution motion on the grounds that Giffen lacked standing to step in as plaintiff, which led to a three-month long battle in probate court over the question of whether Rosequist's business assets were part of her Trust or were to be administered through probate. MTD won the declaratory relief action in probate court, which required Giffen to file Rosequist's pourover will in probate and seek to be appointed as administrator.

MTD's objections to Giffen's attempts to substitute in as plaintiff were well-taken, both in the sense that they were legally correct (i.e., Giffen did not have standing), and the rationale for opposing Giffen's attempts to substitute in also had merit. The lack of a plaintiff in the underlying action, of course, meant that it could not proceed against MTD, and MTD had reasonable grounds to believe that Giffen did not want to open a probate case for Rosequist and risk potential disputes with Rosequist's relatives about who would be the ultimate beneficiary of the *Rosequist* action, or whether such action should be maintained at the probate estate's expense. (Sussman Decl., ¶19.)

Strategically, opposing Giffen's motion for substitution and subsequent declaratory relief action gave rise to the possibility that the *Rosequist* action would simply disappear for want of

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considers the attorney's 'normal billing rate').

[32] *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.,* 73 F.3d 150, 153 (7th Cir. (Ill.) 1996) (first emphasis added).

prosecution, or that MTD would be in the position of dealing with a plaintiff (i.e., an independent administrator of the estate) that was less invested in prosecuting the claims against MTD. (Sussman Decl., ¶19).

There can be many reasons for conducting defense efforts in alternate venues including strategic considerations, jurisdictional issues or contractual requirements. But the focus of the defense action does not determine whether it is defensive. "A duty to defend would be nothing but a form of words if it did not encompass all litigation by the insured which could defeat its liability, including claims and actions for contribution and indemnification."[33]

As respondent in the declaratory relief case filed by Giffen in probate court, MTD was forced to engage in action that, although outside the technical confines of the *Rosequist* action, had the effect of assisting in its defense. The case at bar is thus directly analogous to those situations in which an insured has been forced to file separate proceedings to protect itself from liability in another action, or take other steps to minimize its potential liability. In such cases, courts have deemed that fees incurred to protect against liability constitute defense costs.

Thus, attorneys fees incurred pursuing a patent claim have been held to be recoverable as defense costs where they had the effect of defending against a disparagement claim in a separate action;[34] site investigation costs were recoverable in an environmental action as a necessary part (and predicate) of the defense;[35] repair costs of non-plaintiff homes in a development have been held potentially recoverable as related to the defense;[36] and the cost of prosecution of CERCLA claims by the State were found to be so inextricably related and intertwined with the defense of counterclaims as to merit recovery of all fees as defense costs.[37] These cases at their core recognize the principal that sometimes the best defense is a good offense.

> The Court finds persuasive the reasoning in *IBP, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, which held that even though an

[33] *Great West Cas. Co. v. Marathon Oil Co.*, 315 F. Supp. 2d 879, 882-83 (N.D. Ill. 2003).

[34] *KLA-Tencor Corp. v. Travelers Indem. Co. of Ill.*, No. C-02-05641, 2004 WL 1737297, at *1 (N.D. Cal. Aug. 4, 2004).

[35] *See Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 38 (1997).

[36] *Barratt Am., Inc. v. Transcontinental Ins. Co.*, 102 Cal. App. 4th 848, 848 (2002).

[37] *State of California v. Pacific Indemnity Co.*, 63 Cal. App. 4th 1535, 1548-49 (1998).

> insured initiates a lawsuit, that fact does not automatically preclude coverage for defense-type legal fees and expenses where the insured is resisting a contention of liability for damages.[38]

The reasonableness and necessity of expenses incurred in defense and conducted against liability must be determined on an objective basis.

> [W]hether the insured's . . . expenses are reasonable and necessary to avoid or at least minimize liability must be assessed under an objective standard . . . What matters here is whether the . . . expenses would be incurred against liability by a reasonable insured under the same circumstances. Were it not, this question . . . would require a discernment of motive. Why is the insured incurring the . . . expenses at issue? to resist liability? for that reason and some other? for a reason altogether different? "Motive," again, "is 'hard ... to discern.'"[39]

Travelers cannot present evidence of subjective factual considerations such as MTD's supposed "actual" motives for incurring fees at any point or for any purpose. That evidence would be entirely irrelevant. **"[T]he subjective motivations of the insured [and]or its attorneys are not relevant in the analysis."**[40] Here, MTD has given a reasonable explanation for why and how the costs incurred in the probate action came about, and explained their significance to the defense of the *Rosequist* action. Travelers has no basis for contending that these costs should not be reimbursed as defense costs.

V. PRE-JUDGMENT INTEREST IS DUE AT 10% PER ANNUM

A. MTD Is Entitled to Pre-Judgment Interest

Travelers breached its insurance contract by failing to agree to defend its insured immediately and completely in this lawsuit. Cal. Civ. Code § 3287 governs pre-judgment interest in this case because the attorneys' fees in the *Rosequist* action are based on the insurance contract.[41] Section 3287(a) provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular

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[38] *See Adobe Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. C 07-00385 JSW, 2007 WL 3256492 (N.D. Cal. Nov. 5, 2007).

[39] *Aerojet-General Corp.* 17 Cal. 4th at 63.

[40] *Barratt Am., Inc. v. Transcontinental Ins. Co.*, 102 Cal. App. 4th 848, 858 (2002) (emphasis added).

[41] *See California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1 (1985) (Breach of insurer's duty to defend under insurance policy was grounded in contract law.).

day, is entitled also to recover interest thereon from that day."[42] The statute's "certainty" requirement "has been reduced to two tests: (1) whether the debtor knows the amount owed or (2) whether the debtor would be able to compute the damages" from reasonably available information.[43] Travelers must pay pre-judgment interest under Cal. Civ. Code § 3287(a) and at a 10% rate per annum.[44]

B. Prejudgment Interest Is Due from the Date of Invoice

Under California law, an insured that incurred defense expenses which the insurer must pay is entitled to pre-judgment interest from the expense invoices' dates, as in *Copart*, where the insurer breached its duty to defend a copyright lawsuit, and pre-judgment interest was awarded on the insured's defense expenses from the invoices' billing dates.[45] Damages are considered certain or capable of being made certain when "there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage."[46]

MTD's attorneys' fees became determinable under Cal. Civ. Code § 3287 on the date of each invoice. The ability to calculate is not affected by any reduction or recovery of particular fees.

> The test for recovery of prejudgment interest under [California Civil Code § 3287(a)] is whether defendant actually know[s] the amount owed or from reasonably available MTDmation could the defendant have computed that amount. The Court concludes that the date on which Federal *could have* computed the amount owed was **on the date Longs was billed** for the attorneys fees and costs in the *Palacio* action." (bold emphasis added)); *see also Copart*, 1999 WL 977948, at

[42]The pre-judgment interest rate is 10% per annum. CAL. CIV. CODE § 3289(b).

[43]*Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.*, 211 Cal. App. 3d 1285, 1307 (1989); *Cassinos v. Union Oil Co.*, 14 Cal. App. 4th 1770, 1789 (1993).

[44]CAL. CIV. CODE § 3289(b) ("If a contract entered into after January 1, 1986 does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.").

[45]*Copart, Inc. v. Travelers Indem. Co.*, No. C-97-1862-VRW, 1999 WL 977948, at *3 (N.D. Cal. Oct. 22, 1999), *aff'd*, Nos. 99-17380, 99-17470, 2001 WL 327747 (9th Cir. April 3, 2001);

See also Overholtzer v. Northern Counties Title Ins. Co., 116 Cal. App. 2d 113, 127 (1953) ("Obviously, the amount [of litigation expenses] thereof became fixed, for interest purposes, when liability therefor was incurred by the [plaintiffs].");

Ultra Coachbuilders, Inc., 229 F. Supp. 2d at 288 (applying California law) ("The pre-judgment interest will run from the date of each invoice.").

[46]*Esgro Cent., Inc. v. General Ins. Co.*, 20 Cal. App. 3d 1054, 1060 (1971).

> *3 (finding that damages were capable of being computed by defendant on the date that the insured was billed.[47]

Travelers breached its defense obligation to MTD. Travelers owes not only the invoiced defense expenses, less the discount and recovery, but also interest from date of invoice. Where the insurer has breached its duty to defend and "the insured in fact retains counsel to defend the claim, the proper measure of damages is the reasonable attorneys' fees and costs incurred by the insured in defense of the claim."[48] These amounts were capable of being made certain by calculation. The date on which MTD's attorneys' expenses became vested for the purpose of calculating pre-judgment interest under Cal. Civ. Code § 3287(a) is that date on which the fees were billed to MTD, for if Travelers had not breached its duty to defend, it would have incurred fees on that date.[49] Travelers was on notice from the date of tender that MTD would incur litigation expenses.

Using the billing dates is consistent with Section 3287 and the insurer's policy obligations.[50] Moreover, a finding by the district court that the fees were ascertainable as incurred without need for an accounting is granted wide discretion.[51] Therefore, the total defense expenses and pre-judgment interest outstanding through March 10, 2011 is $221,969.42. (Aboutalib Decl., ¶3, **Exhibit "32."**)

C. The Proper Rate of Interest Is 10% Per Annum

MTD is entitled to pre-judgment interest at 10% per annum. "[S]ection 3287 of the California Civil Code . . . provides for an award of prejudgment interest whenever a plaintiff prevails in a breach of contract claim for an amount of damages that is certain or is capable of being made certain by calculation. **The legal rate of interest is ten percent, Cal. Civ. Code § 3289(b) . . . ."**[52] The total prejudgment interest, through March 10, 2011 for MTD's defense expenses is $40,689.10.

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[47] *Longs Drug Stores Calif., Inc. v. Federal Ins. Co.*, No. C 03-01746 JSW, 2005 WL 2072296, at *4 (N.D. Cal. Aug. 26, 2005).

[48] *Marie Y. v. General Star Indem. Co.*, 110 Cal. App. 4th 928, 961 (2003).

[49] *Ultra Coachbuilders, Inc.*, 229 F. Supp. 2d at 288 (applying California law) (Claimant is entitled to pre-judgment interest from the date of each invoice under section 3287.).

[50] *Executive Aviation v. National Ins. Underwriters*, 16 Cal. App. 3d 799, 808 (1971).

[51] *Highlands Ins. Co. v. Continental Cas. Co.*, 64 F.3d 514, 521-22 (9th Cir. (Cal.) 1995) (reviewing award of pre-judgment interest under § 3287(a) for abuse of discretion).

[52] *Unocal Corp. v. United States*, 222 F.3d 528, 541 (9th Cir. 2000) (emphasis added).

(Aboutalib Decl., ¶3, **Exhibit "32."**). Per diem interest of $49.67 is due after March 10, 2011. (Sussman Decl. ¶47, **Exhibit "32."**)

VI. CALIFORNIA CIVIL CODE § 2860 IS INAPPLICABLE TO DIMINISH THE RATE PAYABLE UNTIL TRAVELERS' APPOINTED COUNSEL ASSUMED MTD'S DEFENSE EXPENSES

A. Travelers Cannot Limit The Rates It Will Pay In Reimbursing Mtd's Defense Expenses Incurred Before Travelers Agreed To Defend

Under California law, until an insurer has honored its duty to defend, it cannot enjoy the benefit of limiting the rates it will pay under Cal. Civ. Code § 2860. As Judge, now State Court Justice, Manella observed:[53]

> To take advantage of the provisions of § 2860, an insurer must meet its duty to defend and accept tender of the insured's defense, subject to a reservation of rights . . . . Hartford "had ample opportunity to step in and hire counsel at its own set rates. Having wrongfully refused to defend [Coustic], it cannot now insist that [Coustic] should have paid defense counsel only what [Hartford] itself would have paid its counsel. . . .

In *Concept Enterprises*, the insurer refused to take tender of the *entire* defense as required by California law. Citing *Buss*[54] the court emphasized that "[t]o defend meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely." It is not recognition of the obligation to provide a complete defense that triggers application of Civil Code §2860 but actual performance in accordance with its terms.

Here, although Travelers agreed to defend the entire action under a reservation of rights, it failed to defend MTD *entirely* at least until January 12, 2010 when it substituted Ropers as MTD's defense counsel because until that time it could not "meaningfully" and "immediately" defend MTD in the *Rosequist* action. (Sussman Decl., ¶40.) Until that time, even if Travelers had not agreed in its December 15th letter to reimburse MTD's reasonable and necessary defense fees, it would still be precluded from limiting MTD's reimbursement to defense fees under Civil Code §2860.

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[53] *Concept Enterprises, Inc. v. Hartford Ins. Co.*, No. CV 00-7267 NM (JWJx), 2001 U.S. Dist. LEXIS 6901, at *8-12 (C.D. Cal. May 21, 2001) (bold emphasis added).

[54] *Buss v. Superior Court*, 16 Cal. 4th 35, 49 (1997).

B. By Materially Breaching Its Duty To Provide Independent Counsel Pursuant To Section 2860, Travelers Forfeited Any Rights That Section Would Otherwise Have Afforded It

Having failed to provide a defense, Travelers cannot cure its breach by simply promising a defense at some future time, and then – when it finally retained counsel – seek to retroactively impose as a limitation on G&A only those fees Travelers maintains it would have paid had it accepted its duty and provided an immediate defense. Travelers was precluded from applying Civil Code §2860 rates until it completely and entirely defended MTD by having its appointed counsel assume full responsibility for the *Rosequist* defense, which did not occur until January 12, 2010.

Though as a practical matter the difference between what Travelers paid and what G&A billed for the roughly three weeks at issue here (i.e., December 15, 2009 – January 12, 2010) is fairly small ($5,659.71), the principal is important. An insurer may not promise to defend, assume the defense at its convenience, and then seek to pay only what it deems appropriate during the period before is actually begins defending.

To rule otherwise is to invite insurers like Travelers to make an illusory promise to defend and leave the insured to its own devices until and unless ordered by the court to actually take over the defense – at which point the insurer will simply cure its dilatoriness by cutting its insured a check for whatever it feels like paying. Saying that one will provide a defense, and actually providing it are two different things, and Travelers should not be allowed to gain an economic benefit at its insured's expense by dragging its feet before *actually* having Ropers assume the defense.

C. California Courts Have Routinely Recognized the Proposition that an Insurer's Ability to Impose a Civil Code § 2860 Cap Depends on Its Performance of Its Contract Obligations

As one of the first courts to address this issue observed:

> When an insurer wrongfully refuses to defend, the insured is relieved of his or her obligation to allow the insurer to manage the litigation and may proceed in whatever manner is deemed appropriate.[55]

Moreover, an insurer who refuses to defend loses its right to control the litigation. That loss of control can be overcome only by a resumption of direct defense duties.

[55] *Eigner v. Worthington*, 57 Cal. App. 4th 188, 196 (1997).

Here, no prospective right to retain independent counsel was recognized, but Travelers acknowledged and agreed to pay G&A its reasonable fees for defending MTD. (Sussman Decl., ¶39). That obligation cannot be transformed into one limiting G&A's reimbursement rate to that governed by California Civil Code § 2860. For the same reasons, an insurer who breaches its duty to defend under section 2860 to provide independent counsel may not invoke that section's provisions regarding arbitration.[56] This follows because "if [a] plaintiff is able to establish a breach of the duty to defend, its damages are not limited by California Civil Code § 2860."[57]

D. No California Case Law Supports a Contrary Result on the Facts Herein

To the extent the court reads *Karsant*[58] for the proposition that an insurer may seek to impose §2860 fees on independent defense counsel before actually assuming the defense, MTD believes that *Karsant* is factually distinguishable. In *Karsant*, independent counsel was chosen by the insured and Allstate approved that attorney and agreed to pay him "all costs" incurred prior to acceptance of the tender, but thereafter sought to limit his compensation pursuant to a rate cap. *Id*. at *2. The insured objected that §2860 was inapplicable because of the prior failure to defend by Allstate, and the court disagreed.

G&A is not the new independent counsel chosen by Travelers to represent MTD after its belated acceptance of tender. Rather, G&A represented MTD from the inception of the litigation, during the period when Travelers wrongfully refused to defend, and MTD was specifically informed that Travelers chose to replace G&A with a law firm selected by Travelers (i.e., Ropers). The terms of payment to G&A were outlined in Travelers' reservation of rights letter, in which it explicitly stated that:

> [Travelers] will reimburse the **reasonable and necessary** defense expenses of your present representatives from the date of tender until today's date. In addition, we will reimburse the Gauntlett firm for **reasonable and necessary** expenses during the period of time reasonably necessary in order to transition defense to the Ropers firm.[59]

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[56] *Intergulf Dev. v. Superior Court*, 183 Cal. App. 4th 16, 20, 22 (2010).

[57] *Atmel Corp. v. St. Paul Fire & Marine*, 426 F. Supp. 2d 1039, 1047 (N.D. Cal. 2005).

[58] *Karsant Family Ltd. Partnership v. Allstate Ins. Co.*, No. C 08-01490 SI, 2009 WL 188036, at *5 (N.D. Cal. Jan. 27, 2009).

[59] (*See* **Exhibit "11"**) (Sussman Decl., ¶39)

There is no mention by Travelers of any intention to cap G&A's fees during either the period prior to acceptance of tender, or during the transition period while Ropers was brought up to speed on the case, but only a promise to pay "reasonable and necessary" defense expenses for both of those periods. (Sussman Decl., ¶39.) For Travelers to pay G&A's entire bill as invoiced for the two months between tender and acceptance (as it did) and then turn around and attempt to unilaterally cap G&A's rates for the three-week transition period thereafter (as it did) would be inequitable, as the "reasonable and necessary" rates that Travelers promised to pay in its reservation of rights letter are exactly the same for both periods: to wit, they are the entire amount of the legal bills invoiced until Travelers' chosen counsel, Ropers, assumed the defense. (Sussman Decl., ¶¶ 39,40.)

VII. CONCLUSION

Travelers cannot raise a genuine issue of material fact that MTD's defense expenses were unreasonable or unnecessary. Absent such showing by Travelers, MTD is entitled to reimbursement of all fees in the *Rosequist* legal actions under the presumption that such expenditures were reasonable and necessary as defense costs. This Court should grant summary judgment to MTD and against Travelers for: (1) the defense expenses it incurred in the *Rosequist* action that remain unpaid by Travelers totaling $181,280.33, plus pre-judgment interest thereon at 10% per annum, in the amount of $40,689.10 (calculated to the date of hearing on March 10, 2011) with daily interest thereafter of $49.67.

Dated: January 28, 2011

GAUNTLETT & ASSOCIATES

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