UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CGS INDUSTRIES, INC., a Florida corporation, Plaintiff, vs. THE CHARTER OAK FIRE INSURANCE COMPANY, a Connecticut corporation, Defendant.	CASE NO.: CV10-3186 Hon. Jack B. Weinstein **PLAINTIFF CGS INDUSTRIES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: QUANTIFICATION OF DAMAGES**

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I. SUMMARY OF ARGUMENT

By Order entered November 16, 2010 this Court found that defendant Charter Oak Fire Insurance Company ("Charter Oak") breached the insurance policy with its insured, plaintiff CGS Industries, Inc. ("CGSI"), by failing and refusing to defend CGSI in the underlying litigation brought by Five Four Clothing, Inc. ("Five Four").[1] (Order, Docket No. 46, p. 14.) The Court further held the "Charter Oak must therefore defend CGSI until it is definitively resolved that the Web Xtend Policy does not apply." (*Id.*)

By this summary judgment motion, CGSI seeks a determination of the sole remaining issue: to wit, the amount of CGSI's damages now owed by Charter Oak, as measured by CGSI's unreimbursed attorneys' fees and costs in the underlying litigation.

As more fully explained herein and as documented by this motion and the accompanying declarations and exhibits, CGSI's damages in the *Five Four* suit total $498,805.43, which is comprised of: $173,775.68 in fees and costs paid by CGSI to its counsel, Buchanan Ingersoll & Rooney ("BIR"); $57,379.44 incurred by CGSI in fees and costs for defense counsel for co-defendant Wal-Mart, Inc.; $3,854.51 in other expenses borne by CGSI directly; $250,000 paid by CGSI to Five Four to settle all claims against it; and $13,795.80 in interest which has accrued to date on those amounts.[2]

The question of CGSI's right to be reimbursed the above-listed amounts involves no genuine issues of disputed material fact and should be resolved by summary judgment. For the reasons described herein, CGSI respectfully requests that this Court enter judgment in its favor and against Charter One in the amount of $498,805.43.

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[1] Reference to the underlying action in this matter refers to *Five Four Clothing, Inc., et al. v. Wal-Mart Stores, Inc. et al*, Case No. CV 09-9431 GW (CWx), United States District Court, Central District of California (the "underlying action" or the "*Five Four* suit.")

[2] Damages are calculated through November 24, 2010, and interest thereafter continues to accrue at a rate of $119.59 per day.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

On December 23, 2009, Five Four filed a complaint against Wal-Mart Stores, Inc. for trademark and trade dress infringement relating to Five four's trademarks and trade dress. (Order, Docket No. 46, p. 3). On March 24, 2010, Five Four filed a second amended complaint which added CGSI as a defendant. (*Id.*). On July 18, 2010, a third amended complaint was filed alleging eight claims for, *inter alia*, counterfeiting, trademark infringement, false designation of origin, false advertising, trade dress infringement, and unfair competition. (*Id.*) Charter Oak denied CGSI's request for a defense on April 24, 2010,[3] requiring CGSI to defend itself in the *Five Four* lawsuit.[4]

Charter Oak's denial letter briefly recited five exclusions that it contended barred a defense but failed to explain how the facts pled in the *Five Four* complaint against CGSI triggered any of the exclusions.[5] CGSI provided timely notice to Charter Oak of the amendments to the complaint, but Charter Oak continued to maintain it had no duty to defend, claiming that there was no "advertising injury" and that a number of policy exclusions might apply (Order, Docket No. 46, p. 4).

This coverage action, filed on July 13, 2010, seeks recovery of CGSI's defense costs in the underlying *Five Four* suit. (*Id.* at 5). After filing an amended complaint on August 4, 2010, CGSI moved for partial summary judgment, in response to which Charter Oak moved for judgment on the pleadings. (*Id.*) The Court on its own initiative ruled that all motions were to be treated as cross-motions for summary judgment and set the matter accordingly. After briefing the matter was heard before this Court, which granted summary judgment in favor of CGSI (and denied Charter Oaks' cross-motion for summary judgment). By order entered November 16, 2010, the Court found that—for a panoply of reasons—Charter Oak was obliged to provide a

[3]Declaration of Bruce A. McDonald ("McDonald Decl."), ¶ 7, **Exhibit 10.**

[4]Declaration of Leonard M. Braun Decl. ("Braun Decl."), ¶ 11.

[5]McDonald Decl., ¶ 7, **Exhibit 10.**

defense to CGSI in the *Five Four* suit.

III. THE BURDEN OF PROOF

A. Summary Judgment Standards

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[6] The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying [the evidence] which it believes demonstrates the absence of a genuine issue of material fact."[7] The non-moving party must identify specific facts "that might affect the outcome of the suit under the governing law," thereby establishing a genuine issue for trial.[8]

The court views the summary judgment evidence through the prism of the standard of proof that would govern at trial,[9] drawing all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded.[10] "Mere conclusory allegations, speculation, or conjecture" will not suffice.[11] The court determines whether the non-moving party's "specific facts," coupled with undisputed background or contextual facts, are such that a reasonable jury might return a verdict for that

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[6]Fed. R. Civ. P. 56(c)(2); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2nd Cir. 2004).

[7]*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2nd Cir. (N.Y.) 1995).

[8]Fed. R. Civ. P. 56(e)(2); *Anderson*, 477 U.S. at 248 (1986).

[9]*Anderson*, 477 U.S. at 255 (1986).

[10]*See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991); *Sledge v. Kooi*, 556 F.3d 137, 140 (2nd Cir. (N.Y.) 2009).

[11]*Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2nd Cir. (N.Y.) 1996); *see also Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2nd Cir. (N.Y.) 1990).

party.[12] If not, and 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[13] and summary judgment should enter.[14]

In this case, liability has been established in CGSI's favor and against Charter Oak. (*See, generally,* Order, Docket No. 46, p. 14.) The only remaining issue is the amount of defense fees and costs for which CGSI is entitled to be reimbursed.

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

New York courts "decide the issues of reasonableness and amount of attorney's fees as a question of law."[15] 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.[16]

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

[13] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[14] *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. (Cal.) 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.").

[15] *Comi v. DSC Finance Corp.*, 994 F. Supp. 121, 126 (N.D.N.Y. 1998);

See also Jones, Sledzik, Garneua & Nardone, LLP v. DeFoe, No. 2003-1190 W C, 2004 WL 1574714, at *1 (N.Y. Sup. Ct. July 1, 2004)(reasonableness of attorney's fees is matter properly determined by the court as matter of law);

Burroughs Wellcome Co. v. Commercial Union Ins. Co., 713 F. Supp. 694, 697-98 (S.D.N.Y. 1989) ("Such a recovery may properly be the subject of a motion for summary judgment.");

[16] *See Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp. 2d 284, 286 (S.D.N.Y. 2002) (resolving award of attorney's fees via motion);

See also Foxfire, Inc. v. New Hampshire Ins. Co., No. C-91-2940 MHP ARB, C-91-4364 MHP, 1994 WL 361815 (N.D. Cal. July 1, 1994) (same);

See also Comark Communications, Inc. v. Harris Corp., No. CIV. A. 95-2123, 1998 WL 150946, at *1, 47 U.S.P.Q.2d 1469 (E.D. Pa. Mar. 30, 1998) (fee motion in patent infringement case resolved on briefs and affidavits), *aff'd*, 156 F.3d 1182 (Fed. Cir. 1998); *Superior Form Builders v. Dan Chase Taxidermy Supply Co.*, 881 F. Supp. 1021, 1026 (E.D. Va. 1994), *aff'd*, 74 F.3d 488 (4th Cir. 1996) (in copyright infringement action, court awarded plaintiff's attorneys' fees based on litigating attorney's own affidavits, attorney's itemized billing statements, and affidavits from area attorneys); *Howes v. Med. Components, Inc.*, 761 F. Supp. 1193, 1194 (E.D. Pa. 1990) (petition for attorneys' fees, costs and expenses granted on the basis of affidavits and supporting exhibits).

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**.[17]

New York courts have directly addressed the "insurer burden of proof" issue, flatly declaring 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."[18]

Recently Judge Stanton confirmed that "under New York law, the party owing attorney's fees in this context has the burden of proving unreasonableness."[19] In this respect, the position of New York courts is consistent with that articulated by cases such as *Foxfire*, in which Chief Judge Patel of the Northern District of California embraced the "undeniable evidence standard" required for a non-defending insurer to escape liability for expenses incurred solely to defend

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[17] *Ultra Coachbuilders, supra*, 229 F. Supp. 2d at 286 ("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).

[18] *U.S. Underwriters Ins. Co. v. Weatherization, Inc.*, 21 F. Supp. 2d 318, 326 (S.D.N.Y. 1998);

See also, e.g., Burroughs Wellcome Co. v. Commercial Union Ins. Co., 713 F. Supp. 694, 697 (S.D.N.Y. 1989) (An insurer breaching the covenant to defend "is liable to the insured for the reasonable counsel fees and necessary expenses incurred.")

Colon v. Aetna Life & Cas. Ins. Co., 66 N.Y.2d 6, 10, 494 N.Y.S.2d 688 (App. Div. 1985) (affirming summary judgment on claim for attorney's fees incurred in defending action insurer wrongfully refused to defend);

United States Fidelity & Guar. Co. v. Copfer, 48 N.Y.2d 871, 873, 624 N.Y.S.2d 356 (App. Div. 1979) (affirming award of expenses incurred in defending action insurer wrongfully refused to defend);

International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322, 326-27, 361 N.Y.S.2d 873 (App. Div. 1974) (reinstating lower court ruling awarding legal fees and disbursements incurred in defending action insurer wrongfully refused to defend).

[19] *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d 284, 286 (S.D.N.Y. 2002).

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." [20]

Although under some circumstances (notably not present here) a determination of "reasonableness" of attorneys' fees might involve factual inquiry, in the context of damage quantification "reasonableness" should be adjudicated as a matter of law. 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. In this case, Charter Oak's wrongful refusal to defend CGSI requires Charter Oak 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 CGSI's damages reasonable as a matter of law and enter summary judgment thereon.

IV. CGSI IS ENTITLED TO RECOVER ITS ACTUAL, UNREIMBURSED *FIVE FOUR* SUIT DEFENSE COSTS TOTALING $498,805.43 FROM WRONGFULLY NON-DEFENDING INSURER CHARTER OAK

As this Court found, Charter Oak wrongfully denied coverage and refused to provide a defense to CGSI. Therefore, whatever limitations on damages that may have been available to Charter Oak had it decided to provide a defense are now unavailable. Under New York law, the necessary consequence of Charter Oak's decision to deny coverage and refusal to provide any defense is to make Charter Oak liable for the actual costs of the defense incurred by CGSI.[21]

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[20] *Foxfire*, 1994 WL 361815, at *2 (citing *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 564 (1970) ("In its pragmatic aspect, any precise allocation of expenses in this context would be extremely difficult and, if ever feasible, could be made only if the insurer provides undeniable evidence of the allocability of specific expenses; the insurer having breached its contract to defend should be charged with a heavy burden of proof of even partial freedom from liability for harm to the insured which ostensibly flowed from the breach.") (emphasis added)).

[21] *Burroughs Wellcome Co.*., 713 F. Supp. at 697 ("As a general rule, a breach of the covenant to defend makes the insurer liable to the insured for the reasonable counsel fees and necessary expenses incurred.");

See also U.S. Underwriters Ins. Co., 21 F. Supp. 2d at 326 (S.D.N.Y. 1998) (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.");

See also Sucrest Corp. v. Fisher Governor Co., 83 Misc.2d 394, 371 N.Y.S.2d 927, 941 (N.Y. 2nd

V. PLAINTIFF'S ACTUAL, UNREIMBURSED *FIVE FOUR* SUIT ATTORNEYS FEES AND COSTS ARE REASONABLE

A. Calculating the Reasonableness of Fees

New York law vests this Court with broad discretion to determine the method of calculating "reasonable attorney fees."[22] The Court may apply the "lodestar" method, which sets fees by multiplying a reasonable hourly rate by the reasonable number of hours spent on the matter to arrive at the lodestar fee.[23] The lodestar fee may then be adjusted upwards or downwards based on other external factors such as the difficulty of the problem, the lawyer's skill and experience, the amount involved in the case, and the quality of the work performed.[24]

While the traditional lodestar method for determining the reasonableness of fees is a widely-accepted practice, recently the Second Circuit suggested that a more appropriate method

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1975) ("[Insurer's] obligation to reimburse [insured] for expenses and fees incurred would run from the date of its refusal to accept the defense of the action.").

[22] *Nestor v. Britt*, No. L & T 68220/06, 2009 WL 1636913, at *1 (N.Y. Civ. Ct. June 11, 2009) ("Courts have the discretion to determine what constitutes reasonable attorney fees. This court exercises its discretion by using the lodestar method, multiplying a reasonable billing rate by reasonable hours counsel spent.").

[23] *Ross v. Congregation B'Nai Abraham Mordechai*, 12 Misc. 3d 559, 814 N.Y.S.2d 837, 842-43 (N.Y. City Civ. Ct. 2006) ("This court uses the lodestar method to determine the reasonableness of attorney fees; the lodestar method takes into account counsel's reasonable time multiplied by counsel's reasonable hourly rate. . . . The Second, Tenth, and Eleventh Circuits' approach is the most persuasive. These circuits consider the lodestar analysis and any existing fee agreement.");

See also Queenie, Ltd. v. Nygard Intern., 204 F. Supp. 2d 601, 607 (S.D.N.Y. 2002) (court adopted the lodestar method to determine reasonableness of fees);

See F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1263 (2nd Cir. (N.Y.) 1987) ("In general, the court uses a 'lodestar' method, in which 'the hours reasonably spent by counsel, as determined by the Court, [are] multiplied by the reasonable hourly rate.'").

[24] *ATC Healthcare Services, Inc. v. Personnel Solutions, Inc.*, No. 01 CV 762(CBA), 2007 WL 1893205, at *2 (E.D.N.Y. 2007) ("Under New York law, the resulting lodestar estimate may be adjusted up or down based on the following factors: (1) the novelty and difficulty of the questions presented; (2) the skill requisite to perform the legal services properly; (3) the preclusion of other employment by the attorney due to acceptance of the case; (4) whether the fee is fixed or contingent; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the amount involved and the results obtained; (8) the undesirability of the case; and (9) awards in similar cases.") .

is to dispense with the "lodestar" analysis and instead embrace the concept of the "presumptively reasonable fee."[25] As the panel in *Arbor Hill* stated:

> The meaning of the term "lodestar" has shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness. … **[T]he better course**—and the one most consistent with attorney's fees jurisprudence—**is for the district court**, in exercising its considerable discretion, **to bear in mind [that] [t]he 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]

Consistent with the Second Circuit's reasoning, the reasonable hourly rate subject to Charter Oak's reimbursement here is the "rate a paying client would be willing to pay"[27]—which in this case equates to the rate the client (CGSI) *did* pay. The only analysis this Court is required to undertake is the ministerial determination that the rates charged by CGSI'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"[28] and subject to reimbursement.

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

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

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.").

[26] *Id* (emphasis added).

[27] *Id*.

[28] *Staples, Inc. v. W.J.R. Associates*, No. 04-CV-904 (SJ)(KAM), 2007 WL 2572175, at *3 (E.D.N.Y. Sept. 4, 2007).

established rate for billing clients, that rate will likely be a reasonable rate."[29] Here, as established by the declarations of counsel, there were no extraordinary fees charged. CGSI was simply charged what every other client of BIR and Foley was charged. The rates are thus presumptively reasonable[30] and should be paid by Charter Oak without argument.

B. Application of the Lodestar Method Herein

In defending the *Five Four* suit plaintiff incurred at least $231,155.12 for fees and costs billed by all retained defense counsel.[31] (Braun Decl., ¶¶ 19, 20) This amount is established by plaintiff's concurrently-submitted invoices for all *Five Four* suit defense expenses. (*See* **Exhibits 15 and 16**).

Plaintiff has provided detailed documentation of the legal services performed and the costs incurred in connection with the *Five Four* suit defense, as well as the identification and qualifications of the attorneys who performed the work, by their counsels' billing statements and declarations.[32] This documentation 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.

Although no New York state courts have directly ruled on the issue**,** a number of courts in the Southern District of New York—all construing New York law—have held that a plaintiff's actual payment of attorneys' fees establishes that the fees were reasonable.[33] The straightforward

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[29]*Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, 597 (1983);

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

[30]*See also Blum v. Stenson*, 465 U.S. 886, 895 (1984) (holding that "[r]easonable rates are to be calculated according to the prevailing market rates in the relevant community.").

[31]CGSI's counsel in the *Five Four* suit were Buchanan Ingersoll & Rooney ("BIR"); Wal-Mart's counsel in the *Five Four* suit were Foley & Lardner ("FA").

[32]Pursuant to the parties' stipulation, unredacted billing statements for plaintiff's *Five Four* suit defense expenses were provided to counsel for Charter Oak.

[33]*Arbor Hill*, 484 F.3d at 169 (2nd Cir. (N.Y.) 2007), amended and superseded on other grounds, 493 F.3d 110 (2007); amended and superseded on other grounds, 522 F.3d 182 (2008).

rationale for this approach is based on the undisputed fact that the "fees in dispute here are not pie-in-the sky numbers that one litigant seeks to collect from a stranger but would never dream of paying itself. These are bills that [plaintiff] actually paid in the ordinary course of its business.[34] Putting the matter even more succinctly, the Seventh Circuit stated:

> 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.[35]

The declarations of CGSI's independent counsel in the underlying *Five Four* suit establish that CGSI actually paid *Five Four* suit defense expenses at the invoiced rate before this Court found that Charter Oak had breached its policy by failing to defend plaintiff, and at a time when any recovery of those expenses was uncertain.[36]

Under either a simple loadstar analysis or the alternative suggested by the Second Circuit, the rates charged by CGSI's counsel in the *Five Four* suit were reasonable. In light of the difficulty of the issues litigated, the amount at stake, the results achieved, the experience of the billing attorneys and the relevant geographical areas in which the legal services were rendered,

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

See also Reade-Alvarez, 2006 WL 3681138, at *9 ("In determining a reasonable hourly rate, the court considers the attorney's 'normal billing rate').

[34]*Medcom Holding Co. v. Baxter Travenol Labs*., 200 F.3d 518, 520 (7th Cir. (Ill.) 1999).

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

[36]While all of BIR's invoices have been paid (*See, e.g.* Braun Decl. and McDonald Decl., generally), the invoices submitted concurrently herewith show that CGSI has incurred but has not yet paid $25,751.58 of Foley's invoices for work performed on behalf of co-defendant Wal-Mart. For purposes of recovery of these costs, actual payment is of no moment, as it is well established that plaintiff "is entitled to recover its defense costs, as well as pre-judgment interest on those costs running from the date of each invoice, **regardless of its present delinquency in payment."** *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d 284, 286 (S.D.N.Y. 2002)(emphasis added).

the inescapable conclusion is that all charges to CGSI were warranted.[37] All the factors considered by New York courts weigh in favor of the reasonableness of the fees CGSI now seeks.

The reasonableness of plaintiff' counsels' billing rates in the *Five Four* suit is further established by comparing them to the relevant partner and associate billing rates set forth in the 2009 Biennial Reports of Economic Survey ("AIPLA Reports"), published every two years by the American Intellectual Property Law Association ("AIPLA"). Each AIPLA Report contains the rates charged by intellectual property attorneys of different levels of experience and locations during the Report's year of publication and the preceding year.

Numerous courts nationwide, including New York district courts, have held that AIPLA Reports are highly persuasive evidence of the market cost of legal services.[38] New York law permits the court to hold counsel's fees reasonable even if the fees were higher than the highest rate listed in the AIPLA surveys.[39]

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[37] *See, e.g., Genworth Life and Health Ins. Co. v. Beverly*, 547 F. Supp. 2d 186, 189 (N.D.N.Y. 2008).

[38] *Yamanouchi Pharmaceutical Co., Ltd. v. Danbury Pharmacal, Inc.*, 51 F. Supp. 2d 302, 304 (S.D.N.Y. 1999) ("In determining a reasonable rate, the court may refer to American Intellectual Property Law Association (AIPLA) surveys.");

Takeda Chemical Industries, Ltd. v. Mylan Laboratories, Inc., Nos. 03 CIV. 8253(DLC), 04 CIV.1966(DLC), 2007 WL 840368, at *3 (S.D.N.Y. March 21, 2007) (court considered the AIPLA surveys when determining the reasonableness of the rates charged.);

Video-Cinema Films, Inc. v. Cable News Network, Inc., No. 98 Civ.7128 BSJ, 2004 WL 213032, at *1 (S.D.N.Y. Feb. 3, 2004) ("[C]ourts have considered various publication surveys of billing rates, such as the … billing rate surveys conducted by the American Intellectual Property Law Association ("AIPLA").");

Yurman Designs, Inc. v. PAJ, Inc., 125 F. Supp. 2d 54, 57 (S.D.N.Y. 2000) ("The AIPLA survey for the appropriate hourly rate for a New York City intellectual property attorney has … been used.").

[39] *Howes v. Medical Components, Inc.*, 761 F. Supp. 1193, 1196-97 (E.D. Pa.1990) (court determined that plaintiffs' New York City counsel's rates were reasonable despite fact that they were higher than the highest rate listed in the AIPLA survey.).

C. Buchanan Ingersoll & Rooney

1. Partners

In 2010, BIR firm partner Bruce McDonald's billing rate was $475 per hour. (McDonald Decl. ¶ 11). The average BIR partner billed time on the *Five Four* suit at a rate of $513.75 per hour. (*Id.*) The rates for the principal billing attorneys (and others of similar experience) are reasonable as compared to those of similarly-situated attorneys. (*Id.*, ¶¶ 13, 14)

According to the 2009 AIPLA Report, for a partner of a private firm litigating intellectual property matters with 15-24 years of experience, the median hourly billing rate was $445 and the third quartile hourly billing rate was $570. (*Id.*, ¶ 27). Given their excellent credentials and professional recognition, it is reasonable for the BIR attorneys to charge rates at or above the third quartile shown in the AIPLA surveys (though in most cases BIR attorney's rates are below the third quartile) (*Id.*, ¶¶ 16, 17, 18, 20).

Principal counsel for CGSI at BIR have held the following positions in the legal community and received the following honors: Senior Advisor to the International IP Rights Commission; Co-Chair of Working Groups on Service of Process by Electronic Mail within the American Bar Association and International Trademark Association, respectively; Liaison of the ABA Section of International Law to the International Trademark Association; Chair of the Federal Courts Committee and the Federal Bench-Bar Conference for the Philadelphia Bar Association; Editor-in-Chief of Litigation News for the ABA's Committee on Intellectual Property Litigation; Vice Chair of the U.S. Trademark Law Committee; Chair of the ABA's Trademark Licensing Committee in the Section of Intellectual Property Law; and elected to *Virginia Business* Magazine's "The Legal Elite" list in 2007 and 2008 for IP Practice.

With their rates comfortably within the relevant ranges of the 2009 AIPLA Report data, the BIR partners' rates are not only presumptively reasonable, but indisputably so.

2. Associates

Similarly, the BIR associates' rates are also reasonable when compared to the rates of similarly-situated attorneys. The average rate charged by BIR "of counsel" and associates in 2010 was $365. (*Id.*, ¶ 12). According to the 2009 AIPLA reports, the median hourly billing rate for intellectual property litigation associates in private firms was $285 and the third quartile was $375. (*Id.*, ¶ 28) The rates of the BIR firm associates were comfortably within the ranges reflected in the AIPLA Reports for attorneys with similar experience and practice areas and are thus facially reasonable.

D. Foley & Lardner

The highest Foley & Lardner ("Foley") billing rate in the *Five Four* case was the $475/hr charged by lead counsel Laura L. Chapman, representing co-defendant Wal-Mart at CGSI's expense. Two senior associates assisted with the case and their hourly rates, respectively, were $350 and $365. (Lawrence Decl., ¶¶ 6, 7). These rates are reasonable compared to similarly-situated attorneys practicing in either San Francisco (where Ms. Chapman offices), or Los Angeles (where the underlying case was filed). The billing rates charged by the Foley attorneys fall well within the guidelines set out in the 2009 AIPLA Report, conform to rates charged by similarly-situated practitioners, (*Id.*, ¶ 7) and are therefore presumptively reasonable.

E. The Firms' Rates Are Reasonable

All the partner and associate rates discussed above are reasonable given the complexity inherent in trademark infringement and trade dress infringement cases (*i.e.*, the litigated *Five Four* suit issues), the experience of the attorneys, and the geographical areas in which the legal services were rendered. Rates comparable to or much higher than those charged by BIR and Foley have been found reasonable by New York courts and courts across the country.[40]

[40] *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770 MRP (AJWx), 2007 WL 5279897, at *7 (C.D. Cal. Nov. 5, 2007) (although the court recognized that the rate of between $900 to

The enumerated rates in the 2009 AIPLA Report buttress the finding that CGSI's attorneys' hourly rates were and are reasonable. Plaintiff's actual and timely payment of those fees at the charged rates[41] is further evidence of their reasonableness. Charter Oak cannot meet its burden of proving otherwise.

VI. MONIES PAID IN SETTLEMENT ARE FULLY RECOVERABLE

A. Charter Oak is Obligated to Reimburse CGSI for Amounts Paid in Settlement

In addition to recovery of reasonable counsel fees and necessary expenses incurred in defense of the underlying action, it is well settled that where an insurer unjustifiably refuses to defend the insured may make a reasonable settlement of the underlying claim and will thereafter be entitled to reimbursement from the carrier, even though that the policy purports to avoid liability for a settlement made without the insurer's consent.[42] New York's century-old rule is

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$1100 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");

In re Telik, Inc. Securities Litigation, 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.");

See, e.g., In re Indep. 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.");

See Realsongs, Universal Music Corp. v. 3A North Park Ave. Rest Corp., ___ F. Supp. 2d ___, 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. *See Microsoft Corp. v. Computer Care Ctr., Inc*., 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).");

See, e.g., Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 741 (Minn. 1997) (affirming award of attorneys' fees ranging from $400 to $475 per hour).

[41]*See* Braun Decl., ¶¶ 14-17.

[42]*Texaco A/S (Denmark) v. Commercial Ins. Co. of Newark, NJ*, 160 F.3d 124, 128 (2nd Cir. (N.Y.) 1998) ("New York law provides that '[w]hen an insurer declines coverage, ... an insured may settle rather than proceed to trial to determine its legal liability.'") (citation omitted);

elegant in its simplicity: "Where there is a [wrongful] 'denial of coverage,' the insured will be entitled to recover the settlement amount."[43]

Any argument by Charter Oak that reimbursement of the settlement is not required based on the policy's "consent to settle" provisions would lack merit. Settled law in New York holds that a policyholder's obligation to seek the insurance company's consent to a settlement is excused where the insurance company previously denied coverage for the claim. A policyholder's duty to cooperate extends only to the insurance company's and the policyholder's united defense of an underlying claim.[44] That defense can only be "united" if the insurer has accepted full coverage for the results of that underlying claim. Thus, under New York law, if an insurance company denies coverage, it waives any right to assert that the policyholder has breached a cooperation or consent to settle provision. The rationale behind this rule is that:

> a claimant should not be required to approach his insurer, hat in hand, and request consent to settle with another when he has already been told in essence, that the insurer is not concerned, and he is to go his way. It is difficult to see why an insurer should be allowed, on the one hand, to deny liability and thus, in the eyes of the insured breach his contract and, at the same time, on the other

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PB Americas, Inc. v. Continental Cas. Co., 690 F. Supp. 2d 242, 250 (S.D.N.Y. 2010) (holding that reimbursement of the settlement by the insured is proper even if the insured failed to obtain the consent of the insurer prior to entering into a settlement);

U.S. Underwriters, 21 F. Supp. 2d 318, 326-27 ("A breach of the covenant to defend makes the insurer liable to the insured for the reasonable counsel fees and necessary expenses, as well as the cost of settlement. . . .").

[43]*Texaco, supra*, at 128;

See In re Empire State Sur. Co., 214 N.Y. 553, 563 (1915)(same);

See Cardinal v. State of N.Y., 304 N.Y. 400, 410 (1952)(same);

See Sucrest Corp. v. Fisher Governor Co., 83 Misc.2d 394, 371 N.Y.S.2d 927, 941 (N.Y. Sup. 1975) (same);

See Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins. Co. of N.Y., 31 N.Y.2d 342, 347 (1972) (same);

See Rochester Woodcraft Shop, Inc. v. General Acc. Fire & Life Assur. Corp., 35 A.D.2d 186, 316 N.Y.S.2d 281, 283 (App. Div. 1970) (same);

See Allied Grand Doll Mfg. Co. v. Globe Indem. Co., 28 Misc.2d 1048, 215 N.Y.S.2d 945, 947 (N.Y. Sup. 1961) (same).

[44]*Isadore Rosen*, 31 N.Y.2d at 347.

> hand, be allowed to insist that the insured honor all his contractual commitments.[45]

A breaching insurer simply may not, post-settlement, object to a *fait accompli* by saying: "But Your Honor, the insured didn't get our consent to settle!" Other jurisdictions also recognize that the insured should not be required to go through the futile exercise of seeking consent from a breaching insurer, and find that waiver of the consent provision is appropriate upon the insurer's wrongful denial of defense.[46]

In the case at bar, Charter Oak's breach has been conclusively established. Charter Oak is in no position to second-guess its insured's decision to settle the *Five-Four* matter. Charter Oak was given every opportunity to step in and provide a defense to CGSI and simply ignored CGSI's pleas for assistance.[47] Instead, Charter Oak took a calculated risk that it wouldn't have to pay any money on behalf of CGSI—and lost. Charter Oak's breach leads the inexorable conclusion that must reimburse CGSI for all amounts expended to settle the *Five Four* case.

B. The Settlement Was Reasonable

Settlement agreements are generally presumed to be reasonable. In New York, a presumption of fairness, adequacy, and reasonableness attaches as long as there were "arm's length negotiations between experienced, capable counsel after meaningful discovery."[48] In the case at bar, the settlement between CGSI and Five Four came about after months of negotiation through the auspices of a well-respected mediator, Greg David Derin, who teaches mediation at

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[45] *Stephens v. State Farm Mut. Auto. Ins. Co.,* 508 F.2d 1363, 1366 (5th Cir. (Tex.) 1975).

[46] *See* ***Charter Oak Fire Ins. Co****. v. Color Converting Indus. Co.*, 45 F.3d 1170, 1172 (7th Cir. (Wis.) 1995) (noting cases holding that "if the existence and extent of the insurance company's liability are clear, yet the company unreasonably delays in paying,... the insurance contract has been broken and the insured can resort to appropriate self-help, including settling with its tort victim")(emphasis added).

[47] *See* Braun Decl., ¶¶ 12, 13, 18; *see also* McDonald Decl., ¶¶ 3-6).

[48] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2nd Cir. (N.Y. 2005);

In re PaineWebber Ltd. P'ships Litig., 147 F.3d 132, 138 (2nd Cir. (N.Y.) 1998) (reiterating "strong judicial policy in favor of settlements.");

See also 4 NEWBERG § 11:41, at 87 ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

Harvard Law School and, among other honors, is the former Chair of the California State Bar Standing Committee on Alternative Dispute Resolution, a member of the California Academy of Distinguished Neutrals, and sits on the Mediation Panel of the World Intellectual Property Organization (WIPO). In the absence of a defense by Charter Oak, when faced with rapidly mounting legal bills and the inherent uncertainty of litigation, CGSI exercised its best judgment and settled the *Five Four* case for $250,000—an amount well within the Charter Oak policy limits, and well with the limits of CGSI's exposure. (Braun Decl., ¶ 18). Charter Oak has no factual or legal basis to question the reasonableness of the settlement and cannot manufacture one herein.

VII. CHARTER OAK MUST REIMBURSE CGSI FOR CO-DEFENDANT WAL-MART'S DEFENSE FEES

CGSI incurred $57,379.44 in legal fees on behalf of co-defendant Wal-Mart under a contractual indemnity obligation. (Braun Decl., ¶ 15). Charter Oak is obliged to reimburse CGSI for this expense notwithstanding any assertion that such reimbursement runs afoul of the "contractual liability" exclusion embedded in its policy.

A proper reading of that exclusion leads one directly to the express exception for "damages that the insured would have in the absence of the contract or agreement."[49] Here, the Five Four complaint sought damages arising from CGSI's allegedly wrongful conduct. As pled, these include damages for which Wal-Mart could have been found vicariously liable, as it was CGSI's sale of its allegedly "counterfeit" products to Wal-Mart that was the proximate cause of Five Four's damages. There is no dispute that Wal-Mart was not responsible for any of the claimed counterfeiting, packaging, or trade dress infringement, despite the complaint's boilerplate agency claims. (*See* Third Amended Complaint, **Exhibit 12**, ¶¶ 29-34).

As a matter of law, CGSI would have been liable for any damages awarded against Wal-Mart because Wal-Mart's liability would have simply been vicariously imposed. Thus Wal-Mart

[49]See **Exhibit 1** to the Appendix of Exhibits, p. 6 of CGL Coverage Form GC 00 01 10 01.

would have had a viable claim for indemnity against CGSI even in the absence of an express contractual indemnity provision.[50] The New York rule in cases such as this could not be plainer, instructing that "contractual liability exclusions are inapposite where there is a basis for liability independent of a contractual indemnity provision."[51] Here, application of the rule means that Charter Oak's policy exclusion does not apply, and that it is obliged to reimburse CGSI for defense costs incurred on behalf of Wal-Mart.

VIII. CGSI IS ENTITLED TO ADDITIONAL *FIVE FOUR* SUIT-RELATED DAMAGES

CGSI also requests the award of additional sums incurred in connection with its *Five Four* suit defense but not included among those billed by CGSI's or Wal-Mart's defense counsel. As established by the concurrently-submitted Declaration of Leonard M. Braun, these additional damages are: (1) $1,856.25 for payment to the court-ordered mediator; (2) $1,523.51 for travel, lodging and meal expenses in connection with the mediation; and (3) $475.75 to reimburse CGSI for internally copying documents produced in the *Five Four* suit.[52] The total amount of these additional expenses is $3,854.51.

These expenses were indisputably necessary. CGSI's photocopy costs were required by the exigencies of discovery in the underlying case. The mediation to which CGSI's mediator fees

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[50] *See Lumbermens Mutual Casualty Co. v. Town of Pound Ridge*, 362 F.2d 430, 434 (2nd Cir. (N.Y.) 1966) (contractual liability exclusion not applicable where liability asserted against insured did not depend on contract, but arose from insured's own acts).

[51] *U.S. Underwriters Ins. Co. v. Falcon Const. Corp.*, No. 02 Civ. 4182(LTS)(GWG), 2003 WL 22019429, at *6 (S.D.N.Y. 2003);

National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund, 636 N.Y.S.2d 31, 33 (1995) (finding that the exclusion against contractually assumed indemnification claims does not serve to bar coverage "because the included common-law liability and the excluded contractual liability may co-exist");

Modern Scaffold Co. v. Karell Realty Corp., 28 A.D.2d 581, 279 N.Y.S.2d 436, 439 (App. Div. 1967) ("it is possible that the insured will be held responsible on the basis of liability which exists at law and without regard to the express agreement, in which event the exclusion clause would be inoperative and coverage possible").

[52] Braun Decl., ¶¶ 18-21.

and travel expenses pertain was essential to the *Five Four* suit's prompt resolution. Charter Oak cannot meet its burden of proving these amounts are not reasonable; indeed, given that CGSI did not know whether Charter Oak would ever be held liable for defense expenses, it had every incentive to spend as little as possible on these out-of-pocket costs, which makes them presumptively reasonable.[53]

As a final point, Charter Oak's policy—in which it defines its obligation and duty to defend CGSI against "any 'suit' seeking [covered] damages'"[54]—contains no exclusion for mediator, travel or photocopy expenses, nor does it distinguish such expenses from those Charter Oak would pay in the ordinary course to "defend" CGSI in a covered lawsuit. If Charter Oak had intended to except costs paid directly by the insured from those costs deemed "covered," it had every opportunity to include language to that effect in its policy, but it did not. The failure to include such language leads to the inference that the parties did not intend such a result.[55] Indeed, such a result would be facially absurd in light of the fact that such expenses are routinely covered when paid directly by defense counsel.

IX. CGSI IS ENTITLED TO PREJUDGMENT INTEREST ON ALL DEFENSE COSTS

Under New York law, a party is entitled to prejudgment interest "on recoverable costs, running from the date of each invoice."[56] Prejudgment interest is recoverable as a matter of

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[53] *Taco Bell Corp. v. Continental Cas. Co.*, 388 F.3d 1069, 1075-76 (7th Cir. (Ill.) 2004) ("Because of the resulting uncertainty about [insurer] reimbursement, Taco Bell had an incentive to minimize its legal expenses (for it might not be able to shift them); and where there are market incentives to economize, there is no occasion for a painstaking judicial review.").

[54] Docket No. 9-2, p. 32 of 66, Coverage B(1)(a).

[55] *Broome Co-op. Fire Ins. Co. v. Aetna Life & Cas. Co.*, 75 Misc.2d 587, 347 N.Y.S.2d 778, 782 (N.Y. Sup. 1973) ("This Court will not supply words of limitation to an insurance contract where the insurers themselves have not seen fit to do so.")

[56] *Ultra Coachbuilders*, 229 F. Supp. 2d at 288;

See also CoPart v. Travelers Indemnity Co., No. C-97-1862-VRW, 1999 WL 977948, at *8 (N.D. Cal. Oct. 22, 1999) ('Interest began to accrue on the date CoPart incurred its obligations (i.e., **the billing dates**).'").

right[57] and cannot be waived.[58] The New York C.P.L.R. provides that "interest shall be recovered upon a sum awarded because of breach of a performance of a contract."[59] It also provides that "interest shall be computed from the earliest ascertainable date the cause of action existed,"[60] and that "interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute."[61] Accordingly, prejudgment interest in the present case is properly calculated at 9% per year from the date the first invoice was issued in the underlying case.[62]

CGSI has provided all invoices evidencing its defense costs in the underlying litigation, and has provided spreadsheets detailing the calculation of 9% simple interest on the sums since interest began accruing, which amounts to $13,795.80. (*See* **Exhibit 27** to the Appendix of Exhibits filed herewith). With these invoices in hand, even if the parties are unable to stipulate as to the arithmetical total, the Court can easily calculate the interest that is due and owing as required by New York law.[63]

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[57]*See Graham v. James*, 144 F.3d 229, 239 (2nd Cir. (N.Y.) 1998);

Adams v. Lindblad Travel. Inc., 730 F.2d 89, 93 (2nd Cir. (N.Y.) 1984).

[58]*See Julien J. Studley, Inc. v. Gulf Oil Corp*., 425 F.2d 947, 949 (2nd Cir. (N.Y.) 1969);

Stanford Square, L.L.C. v. Nomura Asset Capital Corp., 232 F. Supp. 2d 289, 292 (S.D.N.Y. 2002) (J. Marrero).

[59]NEW YORK MCKINNEY'S CIVIL PRACTICE LAW AND RULES § 5001(a).

[60]N.Y. MCKINNEY'S C.P.L.R. § 5001(b).

[61]N.Y. MCKINNEY'S C.P.L.R. § 5004.

[62]*Ultra Coachbuilders*, 229 F. Supp. 2d at 288;

Liberty Mut. Ins. Co. v. Fast Lane Car Service, Inc., 681 F. Supp. 2d 340, 350 (E.D.N.Y. 2010) (J. Block) ("Under New York law, where claims involve a breach of contract … the plaintiff is entitled to 9% per annum prejudgment interest");

MRC Indus., Inc. v. Global Therapy Systems, LLC, No. 06-CV-33, 2009 WL 2461106, at *4 (E.D.N.Y. Aug. 7, 2009) (M. J. Wall) (same)

New Eng. Ins. Co. v. Healthcare Underwriters Mut. Ins. Co., 352 F.3d 599, 606 (2d Cir. (N.Y. 2003) (same);

Carco Group, Inc. v. Machonachy, 644 F. Supp. 2d 218, 246 (E.D.N.Y. 2009) (M.J. Lindsay) (same).

[63]*See* N.Y. MCKINNEY'S C.P.L.R. § 5004.

X. CONCLUSION

There is no genuine dispute of material fact as to either Charter Oak's defense obligations or the reasonableness of plaintiff's defense fees and other expenses. Thus, based on the foregoing, CGSI respectfully requests that this Honorable Court enter judgment in favor of CGSI and against Charter Oak in the aggregate amount of $498,805.43.

Dated: November 24, 2010

/s/ David A. Gauntlett

LOCAL COUNSEL:

Eugene Killian, Jr. (EK 9972)
THE KILLIAN FIRM, P.C.
14 Wall Street, 20th Floor
New York, NY 10005
Telephone: (212) 618-1409
Facsimile: (212) 618-1705
-and-
555 Route 1 South, Suite 430
Iselin, NJ 08830
Telephone: (732) 912-2100
Facsimile: (732) 912-2101
ekillian@tkfpc.com

David A. Gauntlett *[Pro Hac Vice]*
Andrew M. Sussman *[Pro Hac Vice]*
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, CA 92612
Telephone: (949) 553-1010
Facsimile: (949) 553-2050
info@gauntlettlaw.com
ams@gauntlettlaw.com

Attorneys for Plaintiff
CGSI Industries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

Lawrence A. Levy (LAL 3182)
Celeste M. Butera (CB 5659)
RIVKIN RADLER LLP
926 RXR Plaza
Uniondale, NY 11556-0926
Telephone: (516) 357-3000
Facsimile: (516) 357-3333
larrylevy@rivkin.com
celeste.butera@rivkin.com

Attorneys for Defendant
The Charter Oak Fire Insurance Company

/s/ David A. Gauntlett

LOCAL COUNSEL:

Eugene Killian, Jr. (EK 9972)
THE KILLIAN FIRM, P.C.
14 Wall Street, 20th Floor
New York, NY 10005
Telephone: (212) 618-1409
Facsimile: (212) 618-1705
-and-
555 Route 1 South, Suite 430
Iselin, NJ 08830
Telephone: (732) 912-2100
Facsimile: (732) 912-2101
ekillian@tkfpc.com

David A. Gauntlett *[Pro Hac Vice]*
Andrew M. Sussman *[Pro Hac Vice]*
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, CA 92612
Telephone: (949) 553-1010
Facsimile: (949) 553-2050
info@gauntlettlaw.com
ams@gauntlettlaw.com

Attorneys for Plaintiff
CGSI Industries, Inc.