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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TIAA-CREF INSURANCE APPEALS	) No. 478,2017 **PUBLIC VERSION**) No. 479,2017) No. 480,2017) No. 481,2017)) Court Below–Superior Court of the) State of Delaware) C.A. No. N14C-05-178 JRJ (CCLD))

ANSWERING BRIEF OF PLAINTIFFS BELOW / APPELLEES TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC; TIAA-CREF INVESTMENT MANAGEMENT, LLC; TEACHERS ADVISORS, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; AND COLLEGE RETIREMENT EQUITIES FUND TO DEFENDANTS BELOW / APPELLANTS ILLINOIS NATIONAL AND ARCH'S OPENING BRIEF REGARDING THE REASONABLENESS OF TIAA-CREF'S DEFENSE COSTS

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NATURE OF THE PROCEEDINGS

More than ten years ago, Plaintiff-Appellee TIAA-CREF[1] was sued in the first of three related class action lawsuits (the "Underlying Actions"), which included complex claims asserting liabilities under ERISA, seeking more than [redacted] in damages. When its insurers refused to pay for its defense – under policies that the Court rulings and jury verdict in this case have confirmed fully covered those claims – TIAA-CREF was forced to undertake the costs of that defense alone, with no guarantee that it would ever be reimbursed for those costs. Ultimately, that defense resulted in the dismissal of the majority of the complex claims asserted and a favorable settlement of the remaining claims.

Both the Superior Court and the jury in this insurance coverage action correctly determined that [redacted] spent in defense and settlement of two of the Underlying Actions should have been paid years ago by Insurers,[2] rather than from TIAA-CREF's own pocket. Insurers no longer challenge that conclusion

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[1] TIAA-CREF Individual & Institutional Services, LLC; TIAA-CREF Investment Management, LLC; Teachers Advisors, Inc.; Teachers Insurance and Annuity Association of America; and College Retirement Equities Fund ("CREF") are referred to herein as "Plaintiffs" or "TIAA-CREF."

[2] "Insurers" refers to primary insurer Illinois National Insurance Company ("Illinois National"), an AIG affiliate, and excess insurer Arch Insurance Company ("Arch").

[redacted]

with respect to one of those Underlying Actions, the *Rink* Action.[3] However, they claim that the evidence does not support either the jury's verdict or the Superior Court's refusal to overturn that verdict with respect to the reasonableness of the costs incurred in the *Bauer-Ramazani* Action.

Insurers do not come close to overcoming the high hurdles required for this Court to overturn the verdict or reverse the Superior Court's denial of their post-trial motion for judgment as a matter of law regarding the reasonableness of the defense fees incurred by TIAA-CREF. In fact, Insurers cannot do so, because both the verdict and the Superior Court's refusal to overturn it were fully supported by the evidence admitted at trial.

Contrary to Insurers' contention, this Court's ruling in *General Motors Corporation v. Cox*, 304 A.2d 55 (Del. 1973) ("*Cox*"), does not prescribe a particular type of evidence or witness that must be presented in order to establish the reasonableness of attorneys' fees. Rather, it provides a non-exclusive list of factors that go into that determination. TIAA-CREF presented ample evidence to meet those standards, including evidence that the underlying *Bauer-Ramazani*

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[3] The "Underlying Actions" are *Rink v. CREF*, No. 07-CI-10761 (Ky. Cir. Ct.) (the "*Rink* Action") and *Bauer-Ramazani v. TIAA-CREF, et al.*, No. 1:09-cv-00190 (D. Vt.) (the "*Bauer-Ramazani* Action").

[redacted]

Action, a class action brought under ERISA, was complex and high-stakes for the company, and thus not only warranted, but required, the retention of counsel with specialized ERISA expertise. [redacted] one of the lead attorneys on that case, testified to the complexities of the case and the highly specialized defense counsel necessary to TIAA-CREF's defense. Leif Clark, a former federal bankruptcy judge[4] who reviewed thousands of fee petitions on the bench, testified that the rates charged and billing practices of underlying counsel were reasonable, and conducted a point-by-point refutation of the various challenges that Insurers made to the fees and billing practices. The jury was fully entitled to find that evidence persuasive and credible. The record also supports the jury's decision to reject the testimony of Insurers' reasonableness expert, particularly in light of testimony elicited on cross-examination which showed significant flaws in both his methodology and the standards of reasonableness he applied to reach his conclusions.

In particular, Insurers assert that the reasonableness of the hourly rates charged by attorneys with the particular skills needed to defend against a federal class action alleging nationwide complex ERISA claims should be measured by the

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[4] Pursuant to the Superior Court's instruction, TIAA-CREF referred to Judge Clark as "Mr. Clark" throughout trial and does so in this appeal.

[redacted]

rates charged by Vermont attorneys without that special expertise. This argument fails as both a matter of fact and law. Under the *Cox* standards, the reasonableness of the hourly rates charged by counsel must take into account the nature and complexity of the claim and the special expertise needed to address those claims. TIAA-CREF introduced expert testimony that the relevant pool for "comparison" of the rates charged in this case should not be limited to attorneys local to Vermont, but must include those firms with the federal class-action and ERISA expertise necessary to defend against the massive claims TIAA-CREF faced – and faced alone. That testimony provides more than ample support for the verdict and the Superior Court's refusal to overturn it.

Finally, the verdict should also be affirmed on the alternative basis that TIAA-CREF was entitled to a presumption that the fees incurred were reasonable, which Insurers did not rebut. Courts throughout the country have held that where insurance companies wrongly deny coverage and leave an insured to defend itself, with no expectation that it may ever be able to recoup its defense costs from an insurer, the policyholder's incentive to minimize costs justifies a presumption of reasonableness that the insurer must affirmatively rebut. This rationale is borne out here, as TIAA-CREF negotiated for a 15% discount on all of its primary counsel's billing rates. The fact that the jury found the defense costs incurred to be

[redacted]

both reasonable and necessary *without* applying such a presumption in TIAA-CREF's favor provides yet another basis for upholding that verdict and affirming the Superior Court's denial of Insurers' post-trial motion.

SUMMARY OF ARGUMENTS

1. Denied. The Superior Court correctly respected the jury's verdict that the defense costs incurred by TIAA-CREF in the Underlying Actions were reasonable and necessary, as the evidence at trial more than fully supported that verdict under the *Cox* standards. In addition to the documents detailing every billing entry incurred, TIAA-CREF presented the testimony of two of the attorneys who conducted TIAA-CREF's defense, including that of a lead counsel for its defense through the period during which almost 90% of the billings in *Bauer-Ramazani* took place. Those attorneys provided evidence of the nature of the claims, the work performed, and the results achieved. In addition, TIAA-CREF's expert witness explained to the jury the review he conducted of the costs incurred and the hourly rates charged, and his reasons for concluding that both were reasonable. The jury accepted that evidence in preference to that of Insurers' proffered expert, whose analysis contained notable errors in both methodology and the standards he employed, which were brought out on cross-examination. The evidence also supported the jury's conclusion that the hourly rates charged by underlying counsel were in accord with those charged by firms with similar expertise, and that such expertise was necessary to the proper defense of the case.

The Superior Court correctly deferred to the jury's well-supported verdict in denying Illinois National's motion for judgment as a matter of law ("JMOL"). That ruling – and the verdict – should be affirmed.

Alternatively, the Superior Court's ruling should be affirmed because TIAA-CREF is entitled to a presumption, which Insurers did not rebut, that its defense costs were reasonable, as TIAA-CREF was forced to retain its own counsel and pay its own defense costs out-of-pocket, with no guarantee of reimbursement from its insurers.

STATEMENT OF FACTS

A. The Underlying Claims and Settlements

While this action arises out of TIAA-CREF's claims for insurance coverage with respect to three Underlying Actions, only the defense costs incurred in the *Bauer-Ramazani* Action are at issue in this appeal.[5] In that Action, commenced in 2009 in federal court in the District of Vermont, the plaintiffs alleged that they were harmed by delays in TIAA-CREF's processing of their transfer or withdrawal requests, and sought damages in the amount of the alleged appreciation of their investment accounts. JA1285-96; JA1513-23.

The *Bauer-Ramazani* Action included claims under ERISA, a highly complex and specialized federal statute that had the potential to complicate the outcome of the case and have serious ramifications for TIAA-CREF. JA5839 at 79:14-82:4; *see also* TB0008-10; TB0032-33, TB0040. The class action plaintiffs alleged that TIAA-CREF was a fiduciary under ERISA and thus had heightened

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[5] Coverage issues relating to another class action, *Cummings v. TIAA-CREF, et al.*, No. 1:12-cv-93 (D. Vt.), were excluded from trial by stipulation of the parties, and are not at issue on this appeal. TA0690. Further, Insurers do not challenge the jury's conclusion that the defense costs incurred in connection with the *Rink* Action were reasonable and necessary.

[redacted]

duties. JA5345; JA1561-1564. Class plaintiffs sought as much as [redacted] in damages. JA0791.

Because of the severity of the claims against it, TIAA-CREF sought out counsel experienced in this area, the law firm of [redacted] JA5839 at 79:14-82:4.[6] The evidence introduced at trial established that, at the time of the *Bauer-Ramazani* litigation, [redacted] was a highly-respected litigation firm with approximately 800 lawyers at 16 offices worldwide (TA0794), and possessed the special expertise in ERISA law the case required. In fact, its ERISA litigation practice group was highly-ranked by Chambers USA. TA0795. TIAA-CREF's legal team at [redacted] included [redacted] a former U.S. Department of Labor litigator who had overseen the Department's ERISA litigation and was hired by [redacted] specifically for her expertise in ERISA issues. TA0781-783.

In the course of the defense, TIAA-CREF's attorneys at [redacted] engaged in discovery, identified expert witnesses, and fought class certification. TA788-89. Faced with tight deadlines, [redacted] staffed its legal team with associates to

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[6] TIAA-CREF also retained the firm [redacted] to serve as local counsel in Vermont. JA5849. Late in the case, TIAA-CREF retained the firm [redacted] to consult on specialized securities law issues. JA5850 at 124:20-125:17; TA0803.

[redacted]

help with researching and discovery, as well as experts to target particular issues. TA0795. Finally, throughout its representation of TIAA-CREF, [redacted] discounted its standard rates by 15% (a fact notably absent from Insurers' brief). TA0805 at 103:10-15.

The *Bauer-Ramazani* court ultimately granted class certification, resulting in a "huge nationwide class action" against TIAA-CREF. TA0789 at 51:4-52:4. Following class certification, counsel at [redacted] filed a motion for summary judgment in 2013, which successfully resulted in the dismissal of all but one of the claims against TIAA-CREF. TA790; JA1680-1702. Trial was set for January 2014, on a claim demand which could still have exceeded [redacted] JA1702; JA0791.

On January 31, 2014, TIAA-CREF entered into a class action settlement agreement in the *Bauer-Ramazani* Action, pursuant to which it paid [redacted] in settlement and [redacted] for class counsel fees in March 2014. JA0673-701 at ¶¶ 4, 30; TA709. Along with [redacted] in defense and administrative costs, TIAA-CREF paid [redacted] in connection with the *Bauer-Ramazani* Action. TA0742-57.

B. The Insurance Policies at Issue

To protect against precisely the risks presented by the Underlying Actions,

[redacted]

TIAA-CREF purchased a tower of claims-made professional liability insurance each year from various insurers, including Appellant Insurers. All Policies promised to "pay the Loss of the Insured . . . for any actual or alleged Wrongful Act [*i.e.* any breach of duty, neglect, error, misstatement, misleading statement, omission or other act] of any Insured" in the rendering of or failure to render Professional Services. JA0352-55 at § I, II.9. They define "Loss" as including "judgments and settlements" and "any Defense Costs." JA0353 at § II.5. "Defense Costs" is defined as "reasonable and necessary fees, costs and expenses consented to by the Insurer...resulting solely from the investigation, adjustment, defense and appeal of any Claim against an Insured, but excluding salaries of an Insured." JA0353 at § II.3.

In an April 23, 2013 letter, Illinois National denied coverage for the *Bauer-Ramazani* Action. TA0763-67. Despite never objecting to TIAA-CREF's choice of defense counsel (JA5783-84 at 85:12-86:5) to date, neither Insurer has paid TIAA-CREF a penny, forcing TIAA-CREF to pay its defense costs out-of-pocket for those fully-covered claims.

C. Trial Proceedings on Reasonableness of Defense Costs

TIAA-CREF commenced this coverage action in May 2014. After the majority of Insurers' defenses to coverage were rejected by the Superior Court or

[redacted]

withdrawn, trial commenced on December 5, 2016 and continued for six days. Trial centered on certain insurers' notice and consent defenses, and whether the defense costs in the Underlying Actions were reasonable. JA6515-20; TA0849-52.

On the defense costs issue, TIAA-CREF presented testimony from [redacted] who led the *Bauer-Ramazani* defense for three years, during which the vast majority of [redacted] billed fees were incurred. TA0745-757 (showing that 87% of fees were incurred after [redacted] joined the team). [redacted] explained to the jury what ERISA is and testified that she has practiced ERISA law for more than twenty years. TA0781 at 19:5-17. [redacted], who joined [redacted] for its specialized ERISA practice group (TA0783 at 23:22-24:18), testified that the *Bauer-Ramazani* case involved multiple allegations of ERISA violations, including breaches of fiduciary duty and the duty of impartiality (TA0787 at 45:13-46:11), and that "the case *required* ERISA lawyers." TA0798 at 83:12 (emphasis added). Notably, [redacted] the Kentucky lawyer who led TIAA-CREF's defense in the *Rink* Action, testified that he would not and could not have represented TIAA-CREF in the *Bauer-Ramazani* Action, because he is not an ERISA lawyer.[7]

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[7] JA5756-57 at 226:23-227:10 ("Q: If TIAA had offered you to represent them in the *Bauer-Ramazani* ERISA case, would you have taken that case? A: It would

[redacted].

[redacted] also testified as to the qualifications and experience of other [redacted] lawyers, including [redacted] an experienced ERISA lawyer, who worked on the *Bauer-Ramazani* case beginning in 2009 when it was first filed. [redacted] had approximately 35 years of ERISA experience. TA0798 at 83:3-7. The jury also heard testimony and saw documentary evidence reflecting that [redacted] ERISA Litigation practice group was nationally ranked, as was [redacted] another lead [redacted] partner who worked on the *Bauer-Ramazani* case. TA0794-95 at 68:16-70:9; TB0121-131.

[redacted] testified that when she joined the legal team defending the *Bauer-Ramazani* Action, she familiarized herself with the ongoing case, reviewed the docket and relevant pleadings, and spoke with attorneys who already worked on the case. TA0784 at 26:13-23. [redacted] walked the jury through the counts in the *Bauer-Ramazani* complaint (TA0784-88) and the docket, which contained more than 400 entries. TB0045-111.[8] She testified that when she joined the case in

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have been hard to say no, but I would have to say no. Q: Why? A: It's not an area I'm familiar with.").

[8] [redacted] noted that the 400 docket entries do not reflect all of the activity in the case and explained that discovery requests, discovery responses, and negotiation and resolution of disputes between counsel also take time in litigation but do not appear on the docket. TA0793 at 63:13-64:1.

[redacted]

2012, the plaintiffs were seeking class certification, which could determine whether the case became "a huge nationwide class" that required "an infinite amount of time and expense that would be necessary to defend the case." TA0789 at 51:4-19. She further testified that the court ultimately granted class certification, and that the [redacted] team then moved on to drafting a largely successful motion for summary judgment and focusing on trial preparation. TA790-791 at 53:9-57:16.

[redacted] also detailed the work that continued to be necessary in the wake of the parties' settlement, including seeking court approval of the class settlement. TA0792 at 60:1-14. The jury heard excerpts from the motion for preliminary approval of the settlement (TB0023-44), which was admitted into evidence, setting forth that the case involved complicated ERISA claims, more than 100,000 class members over a 10-year class period, 19 fact witness depositions, and thousands of documents. TA0793-94 at 64:2-67:14. [redacted] testified that [redacted] did not bill TIAA-CREF at its current rates but applied a 15% discount to its invoices. TA0805 at 103:10-15.

The jury also heard testimony from TIAA-CREF's retained expert Leif Clark, a former federal bankruptcy judge who spent 25 years on the bench and reviewed thousands of attorney fee applications for reasonableness. JA5831-32 at

[redacted]

48:13-16, 50:22-53:12. Mr. Clark testified that when he was on the bench, he reviewed fee applications to establish that the fees requested were reasonable under the circumstances. This meant looking at fee applications as a whole and evaluating the fees against what he knew had happened in the case. JA5833 at 55:18-58:4. In that work, he always looked at attorney billing practices as a tool to determine whether fees were reasonable. *Id.*

In this case, Mr. Clark began his analysis with "a fairly extensive review of a lot of material," including the dockets in the Underlying Actions, the complaints, answers, and dispositive motions filed in those cases, and the invoices submitted by the lawyers. JA5836 at 68:8-70:22. When Mr. Clark reviewed the invoices, he testified that he did not need to read every single entry of every single bill to conduct his analysis, but that based on his level of experience, he could review the dockets and the bills simultaneously to get a sense of what was going on in the case with respect to certain milestones. JA5837 at 74:1-13. Mr. Clark also reviewed a summary spreadsheet of the various invoices, listing dates and amounts

billed to TIAA-CREF. TA0745-757. The jury saw three binders of defense fee invoices and proof of payment that were admitted into evidence.[9]

Mr. Clark testified that when analyzing the reasonableness of billing rates, he evaluated the rates in terms of his familiarity with the marketplace, as well as sampling, and used the *Cox* factors to determine appropriate rates. JA5838 at 75:23-78:5. He explained that he looked at the underlying attorneys' hourly rates and reached an opinion that they were reasonable given the "relevant market," (JA5837 at 71:17-22) and that "locality depends on the nature of the litigation and the nature of the engagement" and "in some cases . . . refers to a larger market than simply the local community." JA5855 at 144:9-16. To determine whether [redacted]rates were reasonable for the defense of a class action ERISA litigation filed in federal court, Mr. Clark looked at the prevailing market rate for a national law firm of the same skill and ability. JA 5842 at 91:19-92:9. Mr. Clark concluded that [redacted] rates were reasonable based on the firm's quality, experience, and expertise in light of the demands of the case:

> The fact that this was class action litigation in federal court with a complicated federal enactment that could complicate the whole outcome in the way the case was handled during the course of the

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[9] Plaintiffs' Trial Exhibit PX 191, admitted at trial, contains every invoice at issue, and will be provided upon request.

[redacted]

> litigation, and the exposure nationwide and given the nature of TIAA-CREF as the kind of entity that it is, the stakes were high. And because the stakes were high, the company had, I believe, legitimate reasons for hiring the best counsel they could get. And so they did... They hired [redacted] because [redacted] had people who had a reputation for being some of the best in the business in terms of ERISA litigation. And the people that they brought to bear were in fact some of the best in the business. So, I looked at that. And my conclusion was that given that they – given the nature of the case and the nature of the litigation and the rationale for hiring a firm of the quality and experience and expertise and resources of [redacted] and Myers, I think the rates that were charged by that firm were reasonable.

JA5839 at 80:23-82:4.

Mr. Clark also testified that the billing practices employed by [redacted] and other firms hired for specialized tasks or as local counsel (*i.e.*, [redacted] and [redacted]), were not unreasonable. JA5849 at 122:10-17; JA5850-51 at 126:11-127:11. Mr. Clark walked the jury through various billing practices that Insurers' expert had criticized, and applied his experience to evaluate whether any of those criticisms warranted a deduction from the fee charged. The jury heard Mr. Clark's well-founded opinions on reasonable case staffing (JA5843-44 at 98:4-23; 100:13-101:11), as well as his analysis of so-called "transient" billing (JA5844-45 at 102:5-105:3); block billing (JA5846 at 110:2-12); vague entries (JA5847 at 112:16-113:8); billing for clerical-seeming tasks (JA5847-48 at 114:17-115:9); and redacted entries (JA5848 at 118:7-10). After considering [redacted] billing

[redacted]

entries in the *Bauer-Ramazani* Action, which were already voluntarily reduced 15% across the board before TIAA-CREF paid them (TA0805 at 103:10-15), Mr. Clark did not find any basis to further reduce the fees charged. TA5849 at 119:6-12.[10]

In response to the evidence presented by TIAA-CREF, Insurers presented their own expert, Brand Cooper. Mr. Cooper admitted on cross-examination that he did not sit down and read the invoices that were submitted to TIAA-CREF (JA6279 at 140:2-5), but rather scanned the bills through a computer program that "unscrambles them" and takes them out of chronological order. JA6151 at 12:3-15. Cross-examination revealed significant flaws in that methodology. For example, Mr. Cooper had proposed a reduction in the fee demand to account for so-called "blank" or redacted time entries that supposedly contained no description of the work performed. On cross-examination, however, TIAA-CREF demonstrated that Mr. Cooper's computer program had improperly deducted time entries with full descriptions of the work performed, because those descriptions contained the word "redacted" – to reflect, for example a review of redacted

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[10] That detailed analysis is in striking contrast to Insurers' implication that Mr. Clark's conclusion that all of the fees sought by TIAA-CREF were necessary and reasonable resulted from a mere rubber stamping of the demand. JA6429-30.

[redacted]

documents in the underlying case. JA6294-98 at 155:11-159:7. Mr. Cooper also admitted on cross-examination that his demonstrative exhibit showing the total amount of deductions he proposed was miscalculated by $15,000. JA6238-39 at 99:16-100:1.

At the close of trial, the Superior Court instructed the jury: "You must determine if the Defense Costs the TIAA-CREF Plaintiffs paid in defending the Underlying Lawsuits were reasonable and necessary. The TIAA Plaintiffs have the burden of proving by a preponderance of the evidence that the Defense Costs incurred by them in connection with the defense of *Rink* and *Bauer-Ramazani* were reasonable and necessary." JA6534. The court also instructed the jury that it could consider the non-exclusive *Cox* factors when evaluating the fees incurred.[11] JA6534-35. Insurers did not object to this jury instruction.

On December 12, 2016, the jury returned its verdict, finding for TIAA-CREF on all issues relating to Arch and Illinois National, including that 100% of the defense costs incurred in connection with both Actions were reasonable. JA6519-20.

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[11] TIAA-CREF objected to the instruction to the extent that it stated that Plaintiffs, rather than Insurers, bore the burden of proof on reasonableness of fees. JA6075-76.

D. Post-Trial Proceedings

Despite the jury's decisive verdict on the propriety of TIAA-CREF's defense costs, Illinois National moved for judgment as a matter of law and asked the Superior Court to overturn the verdict. DA0158-178. The Superior Court denied Illinois National's motion and upheld the verdict that all [redacted] of TIAA-CREF's incurred costs were reasonable and necessary. JA6642-50. In its decision, the Superior Court held that the testimony of [redacted] and Leif Clark, as well as three binders of defense cost invoices and payment confirmations, supported the verdict. JA6645-47. The Court noted the significant expertise in ERISA litigation possessed by [redacted] in general and [redacted] in particular, and Mr. Clark's testimony that "TIAA-CREF had legitimate reasons to hire the best counsel available, i.e. a defense firm with the experience, expertise, and resources to defend a class action involving a national class of plaintiffs and ERISA claims." JA6646.

In particular, the Court affirmed the sufficiency of Mr. Clark's analysis, summarizing that he reviewed the *Bauer-Ramazani* docket, the case activity, the qualifications of defense counsel, the result of the litigation, and the qualification of the class action plaintiffs' counsel. *Id.* The Court found that Mr. Clark's

[redacted]

analysis and conclusion were consistent with [redacted] testimony about her involvement in the case and the actions taken by [redacted] *Id.*

The Superior Court rejected the very arguments asserted by Insurers in this Court – that as a matter of law TIAA-CREF was required to submit testimony from a witness who had reviewed every invoice, or from an attorney who had been active on the matter from day one, or was limited to rates applicable to firms located in Vermont:

> Illinois National's arguments—that it is entitled to JMOL because TIAA-CREF did not present testimony that *every* bill in the *Bauer-Ramazani* Action was evaluated for reasonableness and necessity, because TIAA-CREF did not present the testimony of an [redacted] lawyer who worked *Bauer-Ramazani* prior to 2012, because Mr. Clark did not discuss the Vermont rates for 'complex litigation work'—**attempt to impose an evidentiary burden on TIAA-CREF that it did not have.**

Id. (emphasis added).

[redacted]

ARGUMENT

I. THE JURY'S VERDICT WAS FULLY SUPPORTED BY THE EVIDENCE AT TRIAL, AND WAS CORRECTLY UPHELD BY THE SUPERIOR COURT

A. Question Presented

Did the Superior Court correctly uphold the jury's verdict that the full [redacted] TIAA-CREF incurred in defending the *Bauer-Ramazani* Action was reasonable and necessary? JA6646-47; JA0286-319; JA5200-5244; JA6520; TB0151-170.

B. Standard and Scope of Review

"Under Delaware law, enormous deference is given to jury verdicts," and they should not be disturbed unless "the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result." *Shapira v. Christiana Care Health Services, Inc.*, 99 A.3d 217, 224 (Del. 2014) (quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)). The decision of the trial court as to whether the verdict was supported by the evidence will be upheld unless it constitutes an abuse of the court's discretion. *Storey*, 401 A.2d at 465; *In re Viking Pump, Inc.,* 148 A.3d 633, 656 (Del. 2016).

On a motion for judgment as a matter of law, the jury's verdict will be upheld where, under any reasonable view of the evidence, the jury could have

[redacted]

justifiably found for the non-moving party. *See Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998). If a verdict is supported by palpable evidence, it must be upheld. *Mahani v. Walls*, 2001 WL 1223193, at *1 (Del. Super. Ct. Sept. 21, 2001).

C. Merits of the Argument

At trial, TIAA-CREF presented more than sufficient evidence to satisfy its burden of proof and support the jury's verdict that all of TIAA-CREF's defense costs were recoverable. In a last effort to avoid bearing the costs of a defense that both the Court and the jury have held is fully covered under their policies, Insurers assert that TIAA-CREF was required to introduce specific types of evidence, without citing any legal authority for supporting such a requirement. As the Superior Court correctly held, those assertions would impose on TIAA-CREF a burden of proof that the law simply does not support.

In *Cox*, this Court set forth factors to be considered as guides in determining the reasonableness of attorney's fees:

> 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

[redacted]

3) the fees customarily charged in the locality for similar legal services;

4) the amount involved and the results obtained;

5) the time limitations imposed by the client or by the circumstances;

6) the nature and length of the professional relationship with the client;

7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

8) whether the fee is fixed or contingent.

304 A.2d at 57; JA5236. The *Cox* factors are guidelines, not mandatory rules; not only does *Cox* not mandate or limit the type of evidence necessary to establish those factors, it recognizes that not every factor will be relevant in assessing the reasonableness of attorney's fees in every case. *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 659 (Del. 2008); *see also Miller v. Silverside,* 2016 WL 4502012, at *8 n.99 (Del. Super. Ct. Aug. 26, 2016) (noting that similar factors in Delaware Lawyers' Rule of Professional Conduct 1.5 are not exclusive). The Superior Court's instruction to the jury – to which Insurers did not object – properly informed the jury both of the nature of the factors and that they were non-exclusive. JA6534-35; JA6645. There is not the slightest indication that the jury failed to follow those proper instructions; to the contrary, their verdict was fully supported by the evidence presented.

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1. TIAA-CREF's Witnesses Testified to the Reasonableness and Necessity of the Work Done

The witnesses TIAA-CREF presented at trial competently testified to the reasonableness of the billings and necessity of the legal work done in defense of the *Bauer-Ramazani* Action. Also, every bill was submitted as evidence, with no objection by Insurers. To deflect from that undeniable proof, Insurers instead focus on witnesses who did not testify at trial. No authority holds, and nothing in the *Cox* factors suggests, that TIAA-CREF was required to offer a witness who specifically hired or paid its outside counsel, negotiated rates, staffed the case, approved bills, or read every single billing entry. As the Superior Court held, this testimony was not necessary for TIAA-CREF to meet their burden, and the evidence TIAA-CREF chose to present fully satisfied the burden of proof. JA6646.

At trial, the jury heard from [redacted] detailed renditions of the specialized needs of the *Bauer-Ramazani* Action and the qualifications of the firms that handled that case. [redacted] testimony also established the necessity of the time spent and billed in defending the case from start to finish. The fact that [redacted] joined the *Bauer-Ramazani* defense team in 2012 is inconsequential to the impact of her testimony. As shown in TIAA-CREF's summary exhibit (TA0745-757), the

[redacted]

vast majority of [redacted]'s billed fees – 87% – were invoiced after [redacted] joined the team. [redacted] testified that she was well aware of the case requirements and the work done before she joined the team in 2012, as she reviewed the docket, determined what the legal and fact issues were, and talked to attorneys who had already been working on the case. TA0784 at 26:13-23.

As to Insurers' complaint that Mr. Clark did not sufficiently review the fee detail in this case, Mr. Clark testified that, based on his extensive experience in reviewing, evaluating and approving fee requests as a bankruptcy judge, he was able to give his conclusions in this case without reading every single entry in every single bill. In fact, contrary to Insurers' suggestion, Mr. Clark testified that he ***did*** review the bills, and, unlike Mr. Cooper (who delegated his work to a computer program), that he reviewed them ***alongside the relevant case dockets***, so that he could match the billing entries to the developments in the case. JA5837 at 73:15-74:12. That Mr. Clark's process for reviewing fee applications in this case differed in some respects from the process that he conducted as a federal bankruptcy judge reviewing statutory fee applications was made clear to the jury on cross-examination by Insurers. They were fully entitled to conclude, as they did, that those differences did not undermine his conclusions.

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The jury was also entitled to credit Mr. Clark's testimony that the billing practices of TIAA-CREF's local counsel were proper and their fees were reasonable. JA5849 at 122:10-17; JA5850-51 at 126:11-127:11. Mr. Clark's conclusions in that regard were supported by [redacted] testimony that [redacted] was brought on to lend its expertise in securities litigation to the *Bauer-Ramazani* defense team, and that they collaborated with [redacted] on motions that were filed. TA0803 at 97:2-21.

Just as they were entitled to credit TIAA-CREF's evidence, so, too, the jury was entitled to reject Mr. Cooper's suggestion that the fees were unreasonable and should be reduced. "The credibility of witnesses is for the jury. In addition, as fact finder, the jury has a right to accept the testimony of one expert witness over that of another expert's." *Stern v. Kulina*, 1998 WL 109856, at *6 (Del. Super. Ct. Feb. 26, 1998). That is particularly true here, given the significance of the flaws in Mr. Cooper's data and analysis brought out on cross-examination.

Indeed, Insurers' arguments in their Opening Brief only serve to highlight those errors. Insurers forcefully argue that the verdict should have been overturned because the jury failed to deduct from the reasonable fees $15,000 to account what Insurers claimed were "missing time entries." Insurers' Opening Brief at 20. JA5862 at 174:11-20. In fact, however, after cross-examination showed that the

[redacted]

computer program utilized by Mr. Cooper had mistaken entries containing the word "redacted" (supporting work done to redact confidential material) for blank time entries, Insurers never elicited testimony from Mr. Cooper to establish if any of the invoices were actually "missing time entries completely." *Id.*; JA6294-98 at 155:11-159:7.

Mr. Cooper also testified to an understanding of the import of the *Cox* factors that differed significantly from the Court's instructions to the jury. Mr. Cooper testified that the *Cox* factors were the exclusive considerations the jury should take into account when determining whether the defense fees were reasonable, and the only factors that he had taken into account in evaluating the reasonableness of the fees. JA6224 at 85:3-11. As noted, however, the Court correctly instructed the jury that they were non-exclusive factors. JA6534-35. In weighing the credibility of the two experts, the jury was fully entitled to consider Mr. Cooper's mistakes as a basis for rejecting his opinions in favor of those of Mr. Clark.

2. TIAA-CREF's Evidence Supported the Billing Rates Charged in *Bauer-Ramazani*

Of all the non-exclusive *Cox* factors the jury was permitted to consider, Insurers focus their appeal primarily on their claim that there was no support for

[redacted]

the jury's conclusion that the hourly rates charged by TIAA-CREF's attorneys were reasonable. In particular, they argue that because the *Bauer-Ramazani* Action, a federal class action involving ERISA claims, was filed in the District of Vermont, the reasonableness of the rates charged may be measured only in comparison to rates charged by Vermont attorneys, as Vermont is the "locality" of the work performed. That contention is wrong as both a matter of law and fact.

The "locality" element does not specify that rates must match that of geographically local counsel or other local (here, Vermont-based) firms. Rather, it asks what rates are "customarily charged in the locality for similar legal services." *Cox*, 304 A.2d at 57. Therefore, if national firms practicing in federal court in the District of Vermont charge rates commensurate with [redacted]rates, this element is satisfied.

Mr. Clark explained this distinction when he testified to the factors that made *Bauer-Ramazani* a more expensive case to defend than the earlier *Rink* case. As he noted, the fact that *Bauer-Ramazani* was brought as a federal class-action suit asserting claims under the federal ERISA statute required counsel with special expertise, and thus, that the reasonableness of the fees be measured against those charged by firms with that special expertise. JA5839 at 79:16-80:2. As Mr. Clark

[redacted]

explained, "[t]hey hired [redacted] because [redacted] had people who had a reputation for being some of the best in the business in terms of ERISA litigation." *Id.* at 80:23-81:19.

Mr. Clark testified that he reviewed the underlying attorneys' hourly rates and reached an opinion that they were reasonable hourly rates given the "relevant market." JA5837 at 71:17-22. Mr. Clark explained that "locality depends on the nature of the litigation and the nature of the engagement" and "in some cases the locality refers to a larger market than simply the local community." JA5855 at 144:9-16. This is consistent with the *Cox* factors and their application.

Courts will expand the "locality" requirement when awarding fees in a case where the special expertise of counsel from a distant district is required. *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (noting that "prevailing" rate "in the community" for work performed by outside specialist (where retention of outside specialist is reasonable) is most likely outside specialist's ordinary rate); *see also Matter of Baldwin United Corp.*, 36 B.R. 401, 402 (Bankr. S.D. Ohio 1984) (declining to limit fees to rates charged by Cincinnati bankruptcy lawyers merely because case filed in Cincinnati); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1308 (E.D.N.Y. 1985) ("Courts in civil rights cases have developed several exceptions to the locality rule. First, when a need for 'the special expertise

[redacted]

of counsel from a distant district' is shown, the appropriate hourly rate is that of the attorney's own community."). [12]

Multiple witnesses testified that the *Bauer-Ramazani* Action involved complex federal ERISA claims that a general litigator could not competently handle, and that [redacted] attorneys had substantial experience in this highly specialized field. Mr. Clark described TIAA-CREF attorney [redacted] as a "big league player" in the area of ERISA law (JA5840 at 86:6-13), and [redacted] testified to her vast ERISA experience and the accolades her firm had received. TA0795. Conversely, Mr. Cooper failed to consider the lack of ERISA expertise of the Vermont lawyers whose rates he surveyed (JA6262-63 at 123:13-124:8); thus, he did not properly assess the fees customarily charged in the locality for "similar legal services," as required by the *Cox* factors.

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[12] *Curtis v. Nutmeg Insurance Co.*, 681 N.Y.S.2d 620, 621 (N.Y. App. Div. 1998), on which Insurers rely, is not to the contrary, as in that case "[w]ithout submitting any expert testimony concerning fees commonly charged, counsel simply submitted a decision rendered by a Federal Magistrate pertaining to a case tried in the same geographic area wherein his hourly billing rate was deemed reasonable." More importantly, unlike the Superior Court here, the trial court in *Curtis* had exercised its discretion to reduce the hourly rate; the deference accorded to that exercise of discretion in *Curtis* supports the affirmance here of the Superior Court's determination to uphold the verdict awarding the full amount of fees requested.

[redacted]

Considering the evidence presented, Insurers' claim that Plaintiffs failed to present any evidence as to *why* TIAA-CREF hired [redacted] to defend the *Bauer-Ramazani* Action rings hollow. [redacted] had expertise in ERISA claims and TIAA-CREF was sued under ERISA. Mr. Clark reinforced the obvious conclusion that TIAA-CREF reasonably chose to employ [redacted] "because [redacted] had people who had a reputation for being some of the best in the business in terms of ERISA litigation." Jurors are not precluded from using common sense to reach a verdict, provided the topic is within a layman's common knowledge. *Mazda Motor Corp.*, 706 A.2d at 533 n.28; *see also Taylor v. State,* 777 A.2d 759, 771 (Del. 2001) (stating function of jury is to make judgments based on common sense and to use logical steps to form rational basis for an inference). Thus, even as laypeople, the jury could conclude that, just as a patient diagnosed with a brain tumor could reasonably seek the advice of a brain surgeon rather than a general surgeon or general practitioner, so, too, it was reasonable and necessary for TIAA-CREF to employ a firm with a nationally-ranked ERISA practice. JA6390-92.

Accordingly, as the Superior Court correctly held, the jury could reasonably conclude that the reasonableness of the rates charged by [redacted] were to be measured not against local Vermont firms who did not specialize in national class

[redacted]

action ERISA suits, but by firms with a national ERISA practice – and that on that basis, the hourly rates charged were reasonable within the meaning of the fourth *Cox* factor.

3. Alternatively, the Award of Fees Should Be Affirmed on the Ground that TIAA-CREF's Defense Costs Were Presumptively Reasonable

Alternatively, the Court should affirm the Superior Court's denial of Insurers' JMOL and uphold the verdict because TIAA-CREF's defense costs were entitled to a presumption of reasonableness, which Insurers did not rebut.[13] TIAA-CREF paid its legal fees out-of-pocket with no promise of reimbursement, warranting a presumption that the fees were reasonable and necessary.

If a party cannot be certain it will be able to shift expenses at the time those expenses are incurred, the prospect that the party will bear its own expenses

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[13] TIAA-CREF sought summary judgment prior to trial applying that presumption. The Superior Court denied that motion, holding that although TIAA-CREF had an incentive to minimize its defense costs because it was paying them out-of-pocket, the fact finder still had to consider the *Cox* factors to determine whether costs were reasonable. JA5241. In addition, TIAA-CREF objected to the Superior Court's instruction to the jury that TIAA-CREF bore the burden of proof on the reasonableness issue. JA6075-76. Both of those rulings were mooted by the jury's verdict in TIAA-CREF's favor. Nonetheless, as set forth above, they were incorrectly decided and the presumption to which TIAA-CREF was entitled provides an alternative basis for affirmance. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995) (appellee may raise alternative ground for affirmance fairly raised below despite not having cross-appealed on that issue).

provides "sufficient incentive to monitor its counsel's work and ensure that counsel [does] not engage in excessive or unnecessary efforts." *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010); *see Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1998 WL 155550, at *2 (Del. Ch. Mar. 30, 1998) (considering that client faced prospect of bearing full cost of litigation when evaluating reasonableness), *aff'd*, 720 A.2d 542 (Del. 1998).[14]

When a policyholder is abandoned by its insurer and forced to pay the costs of its own defense, the amounts it expends in that defense are presumed to be reasonable. *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069 (7th Cir. 2004). In *Taco Bell*, the policyholder sought to recover amounts it spent defending against an underlying injury claim covered under an insurance policy it purchased. 388 F.3d at 1072. The insurer refused to pay the defense, forcing Taco Bell to incur and pay its own attorney fees, roughly $800,000 of which were the insurer's responsibility after accounting for the underlying self-insured retention. *Id.* at 1076.

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[14] "[A]n arm's-length agreement, particularly with a sophisticated client ... can provide an initial 'rough cut' of a commercially reasonable fee." *Wis. Inv. Bd. v. Bartlett*, 2002 WL 568417, at *6 (Del. Ch. Apr. 9, 2002), *aff'd*, 808 A.2d 1205 (Del. 2002).

As here, the insurer argued that its policyholder overpaid for legal services. The court rejected the insurer's "excessive fees" argument and entered summary judgment for the policyholder, noting:

> Because of the resulting uncertainty about 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 to do a painstaking judicial review.

Id. at 1075-76. The court cited *Balcor Real Estate Holdings Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996), which explained: "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."

As in *Taco Bell*, TIAA-CREF was forced to defend the Underlying Actions on its own, with no expectation that it would be reimbursed by its insurers. Accordingly, TIAA-CREF had every incentive to minimize these costs, and the fact that TIAA-CREF paid these costs out-of-pocket establishes their *per se* reasonableness, and further supports the jury's verdict.

Because TIAA-CREF's defense costs were presumptively reasonable, the burden should have been on Insurers to prove otherwise. Because Insurers breached the relevant insurance policies by wrongfully denying coverage, the

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burden shifted to Insurers to prove that TIAA-CREF's defense costs were not reasonable and necessary. *See Olin Corp. v. Ins. Co. of North America,* 218 F. Supp. 3d 212, 228 (S.D.N.Y. 2016) (holding that when insurer breaches its duty to defend, insured's fees are presumed to be reasonable and burden shifts to insurer to establish that fees are unreasonable); *Danaher Corp. v. Travelers Indem. Co.,* 2015 WL 409525, at *7 (S.D.N.Y. Jan. 16, 2015), *adopted by* 2015 WL 1647435 (S.D.N.Y. Apr. 14, 2015) (same). Insurers have not met that burden here, and their attempt to impose "an evidentiary burden on TIAA-CREF that it did not have" should be rejected. JA6645.

[redacted]

CONCLUSION

For the reasons set forth above, TIAA-CREF respectfully requests that this Court uphold the Superior Court's denial of Insurers' Motion for Judgment as a Matter of Law and enforce the jury's verdict that TIAA-CREF proved the entirety of its incurred defense costs were reasonable and necessary.

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