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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

# REPLY BRIEF OF APPELLANTS ILLINOIS NATIONAL INSURANCE COMPANY AND ARCH INSURANCE COMPANY REGARDING THE REASONABLENESS OF TIAA-CREF'S DEFENSE COSTS

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Dated: April 16, 2018

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## ARGUMENT

### I. TIAA-CREF HAS NOT PROVIDED LEGALLY SUFFICIENT EVIDENCE TO JUSTIFY ALL THE DEFENSE COSTS BILLED IN THE *BAUER-RAMAZANI* ACTION.

It was TIAA-CREF's burden at trial to establish that the amounts it sought to recover were, under the policy definition of "Defense Costs," reasonable and necessary. TIAA-CREF cannot shift its burden of proving coverage for defense costs under the Policies to the Insurers by suggesting the Insurers breached a duty to defend. The Insurers owed no duty to defend because TIAA-CREF opted to purchase reimbursement policies.

At trial, TIAA-CREF did not present sufficient evidence to satisfy its burden of proof and support the jury's verdict with respect to the defense costs at issue in the *Bauer-Ramazani* Action. The jury was not provided a legally sufficient evidentiary basis to conclude that every dollar of the $7,519,822.91 in defense costs incurred for the *Bauer-Ramazani* Action was reasonable and necessary. Its own expert, who admittedly did not review all of the entries, ignored the rates of the locality and agreed that he would have taken deductions for certain types of entries, as unreasonable and unnecessary, had he undertaken a full review.

In Delaware (and in New York), the reasonableness of rates must be guided by the "fees customarily charged in the locality for similar legal services."[1] The Superior Court improperly allowed TIAA-CREF to recover at attorney billing rates of [redacted] per hour for the *Bauer-Ramazani* Action even though those rates were more than double and triple the rates of the locality. TIAA-CREF's Answering Brief places undue emphasis on the fact that the *Cox* factors are non-exclusive[2] to argue that the rates of the locality do not apply to the defense of an ERISA class action. Contrary to Plaintiffs' argument, all of the *Cox* factors, including the rates of the locality, must be considered.[3] The cases TIAA-CREF

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[1] *See, e.g., Curtis v. Nutmeg Ins. Co.*, 681 N.Y.S.2d 620, 620 (N.Y. App. Div. 1998) (In determining reasonable counsel fees, the court reviews the testimony pertaining to the integral factors which include "the fee customarily charged in the locality."); *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973) ("Factors to be considered as guides in determining the reasonableness of a fee include the following: . . . (3) The fees customarily charged in the locality for similar legal services.").

[2] 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 Regarding To Defendants Below / Appellants Illinois National and Arch's Opening Brief Regarding the Reasonableness of TIAA-CREF's Defense Costs, at 24, dated March 9, 2018, Lexis Trans. ID 61785078 ("TIAA-CREF's Answering Brief on Defense Costs"); *Miller v. Onix Silverside, LLC*, 2016 Del. Super. LEXIS 434, at *24 n. 99 (Del. Super. Ct. Aug. 26, 2016) (merely noting that not every factor of the Delaware Lawyers' Rule of Professional Conduct 1.5 will be relevant).

[3] *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 659 (Del. 2008) (holding that even though *Cox* factors are guidelines, and not mandatory rules, the record still [redacted]

cites from other jurisdictions do not warrant a departure from *Cox*. Moreover, TIAA-CREF did not present, under the standards enunciated in those decisions, a basis to conclude that the [redacted] billing rates were reasonable and necessary.

### A. TIAA-CREF Is Not Entitled To A Presumption That The Fees It Incurred Were Reasonable.

TIAA-CREF is not entitled to a presumption of reasonableness based upon the notion that a duty to defend was breached. The Policies, which are excess to a $[redacted] self-insured deductible for which TIAA-CREF is responsible, do not incorporate a duty to defend. The requirement that costs be "reasonable and necessary" is part of the policy definition of "Defense Costs."[4] All the items for which an Insured seeks reimbursement must satisfy the language of the definition

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needs to show that the *Cox* factors were considered); *Friebel v. Nat'l Glass & Metal*, 2004 Del. Super. LEXIS 128, at *18 (Del. Super. Ct. Apr. 30, 2004) (stating that "[i]t is essential that all of the factors be considered" and that it is an abuse of discretion to "neglect[] to consider all the factors.").

[4] JA2541.08 at II.3 (emphasis added); JA5815 at 212:15-213:2. In accordance with Delaware Supreme Court Rule 14(j), the parties to the consolidated appeals filed a Joint Appendix of documents bates-stamped with the prefix "JA." Additionally, Defendants Below / Appellants Illinois National Insurance Company, ACE Insurance Company and Arch Insurance Company filed a Defense Appendix of documents bates-stamped with the prefix "DA" with their Opening Brief and have filed a separate appendix for additional documents cited in this Reply with the prefix "DAR." In this brief, Appellants cite documents contained in these appendices by the bates-stamped pages.

[redacted]

of "Loss," which includes "Defense Costs."[5] Thus, TIAA-CREF bears the burden of proving that its claim for "Defense Costs" falls within the scope of the Policies.[6]

In the event of a covered claim, TIAA-CREF only could recover for costs that were reasonable and necessary and in excess of the $[redacted] deductible.[7] At trial, TIAA-CREF's Senior Director of Corporate Risk Insurance, Ira Cohen, acknowledged that TIAA-CREF elected to purchase a reimbursement policy, above a $[redacted] deductible for which TIAA-CREF was responsible, as it satisfied TIAA-CREF's desire to control its own defense.[8] By the express policy terms that TIAA-CREF sought and negotiated, Defense Costs are recoverable as an element of "Loss" only if they were both "reasonable" and "necessary."[9] Further, despite Illinois National's repeated requests, TIAA-CREF never provided

[5] JA2541.08 at II.5; JA5815 at 212:15-213:2.

[6] *Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690 (N.Y. 2002); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997); *Verizon Communs., Inc. v. Ill. Nat'l Ins. Co.*, 2017 Del. Super. LEXIS 250, at *17-18 (Del. Super. Ct. Mar. 2, 2017) ("Plaintiffs, as the insureds, ultimately 'bear[] the burden of proving that a claim is covered by an insurance policy.'").

[7] JA5767-5768 at 21:17-22:9, JA5815-16 at 212:11-213:9, 214:13-215:8, 215:17-216:4.

[8] JA5815-16 at 212:11-20, 212:22-213:12, 214:13-20.

[9] JA5816 at 214:13-20, 215:14-216:4.

[redacted]

it with the Defense Costs to review.[10] Thus, Illinois National had no prior knowledge of the billing now at issue.

TIAA-CREF's reliance on the Seventh Circuit Court's opinion in *Taco Bell* is misplaced and cannot be used to disrupt this Court's well-established *Cox* case law.[11] As the Superior Court recognized, "neither Delaware nor New York has relied on *Taco Bell* to dispense with the well-established multi-factor approach to determining reasonableness of defense costs."[12] Moreover, contrary to TIAA-CREF's assertion of a presumption that Defense Costs it agreed to pay are *per se* reasonable, the general rule "is that the initial burden is on the insured to prove that its fees were reasonable (not on the insurer to prove the negative)."[13] The fact that a party pays for litigation out of their own pocket does not give it "carte blanche to retain some of the most expensive lawyers in the country to represent them with

[10] JA5822-83 at 11:21-17:13.

[11] *Compare Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069 (7th Cir. 2004); *with Nat'l Grange Mut. Ins. v. Elegant Slumming, Inc.*, 59 A.3d 928, 933 (Del. 2012) (affirming the Superior Court's use of the *Cox* factors to determine reasonableness).

[12] JA5240-41.

[13] *Emhart Indus. v. Home Ins. Co.*, 515 F. Supp. 2d 228, 251 (D.R.I. 2007) ("Moreover Taco Bell itself is hardly the watershed that [insured's] argument implies."); *see also Steadfast Ins. Co. v. Purdue Federick Co*., 2006 Conn. Super. LEXIS 1089, at *5 (Conn. Super. Ct. Apr. 10, 2006) (rejecting *Taco Bell* under Connecticut law which does not allow courts to presume insured's attorney's fees reasonable unless there was no evidence of unreasonableness) (cited in *Emhart Indus.*, 515 F. Supp. 2d at 251 n. 24).

[redacted]

the hope that [the other party] would foot the entire bill."[14] Therefore, paying defense costs out of pocket does not create a presumption, but instead is "one of many factors to be considered when determining the reasonableness of defense costs – nothing more."[15]

The parties agree that, in the event of a conflict, the policies at issue in this action should be construed pursuant to New York law, under which there is no presumption that the defense costs incurred are reasonable.[16] Under New York law, TIAA-CREF bears the burden of proving that its defense costs were

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[14] *Deal v. Hamilton Cty. Dep't of Educ.*, 2006 U.S. Dist. LEXIS 76324, at *54-55 (E.D. Tenn. Aug. 1, 2006).

[15] JA5240 (citing *Danaher Corp. v. Travelers Indem. Co.*, 2015 WL 409525, at *2-3 (S.D.N.Y. Jan. 16, 2015), *amended*, 2015 WL 417820 (S.D.N.Y. Jan. 29, 2015), *adopted*, 2015 WL 1647435 (S.D.N.Y. Apr. 2015, and *report and recommendation adopted*, 2015 WL 1647435 (S.D.N.Y. Apr. 14, 2015)); *Aveta Inc. v. Bengoa*, 2010 Del. Ch. LEXIS 175, at *18 (Del. Ch. Aug. 13, 2010) (noting that payment out of pocket was "[a] further indication of reasonableness" and then proceeding with its *Cox* analysis.); *Arbitrium Handels AG v. Johnston*, 1998 Del. Ch. LEXIS 41, at *7 (Del. Ch. Mar. 23, 1998) (Even though the court stated that the plaintiff's agreement to pay the fees without a contingency agreement evidenced his belief that the fees were reasonable, the court continued to apply the *Cox* factors by comparing the rates between similar firms and the quality of attorneys.)

[16] The parties agree that, under Delaware's conflict of law's principles, the applicable law in the event of a conflict is that of New York, the location of policy negotiation, policy issuance, and the Named Insureds' headquarters. JA5024-25 at 13:13-14:13; JA5044-46 at 33:7-35:3; JA5056 at 45:11-13; *see e.g.*, *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at *5 (Del. Super. Ct. Aug. 31, 2011) (holding that Arkansas law applied to policies procured, negotiated, and delivered to insureds at their respective Arkansas headquarters, and noting that other than the fact that insureds were incorporated in Delaware, Delaware had "no real interest" in applying its own laws to policies).

reasonable.[17] In *Curtis*, the New York Appellate Division affirmed the trial court's refusal to award all defense costs incurred by a policyholder after the policyholder failed to carry its burden to prove that the entirety of those costs were reasonable, expressly noting that the burden was upon the policyholder.[18]

Similarly, in *U.S. Underwriters*, the court applied New York law and held that the insured's evidence was "insufficient to permit an award to be made by this court which has a duty to determine the reasonableness of the amount."[19] Therefore, it is clear that under New York law, TIAA-CREF bears the burden and must affirmatively prove that its defense costs were reasonable.

### B. TIAA-CREF Did Not Present Competent Evidence To Diverge From Rates Customarily Charged In The Locality.

Careful examination of TIAA-CREF's response highlights the very proof issues which should have led the Superior Court to overturn the jury's verdict with respect to the hourly rates billed in the *Bauer-Ramazani* Action. As to that action, TIAA-CREF never proffered case law or competent evidence to support its

[17] *Curtis*, 681 N.Y.S.2d at 621 ("With the burden upon the [policy holders,] the paucity of evidence [supporting a finding of reasonableness] proved fatal."); JA5238-41; JA6075-76 at 6:21-7:8.
[18] *Curtis*, 681 N.Y.S.2d at 621.
[19] *U.S. Underwriters, Ins. Co. v. Weatherization, Inc.*, 21 F.Supp. 2d 318, 327 (S.D.N.Y. Apr. 30, 1998).

[redacted]

position that it was entitled to ignore entirely the rates "customarily charged in the locality" for whatever the [redacted] firm chose to charge.

According to TIAA-CREF, the "'locality' element of the *Cox* factors does not specify that rates must match that of geographically local counsel or other local (here, Vermont-based) firms."[20] TIAA-CREF does not cite any case law for that proposition, which ignores that the standard "applied to attorneys' fees in most civil litigation is normally presumed to be the local community in which the services are rendered."[21]

TIAA-CREF does acknowledge that the locality element "asks what rates are 'customarily charged in the locality for similar legal services.'"[22] On that basis, TIAA-CREF contends that, "if national firms practicing in federal court in the District of Vermont charge rates commensurate with [redacted]'s rates, this element is satisfied."[23] The problem again is that TIAA-CREF presented no evidence at trial to establish what it suggests – that national firms practicing in

[20] TIAA-CREF's Answering Brief on Defense Costs, at 29.
[21] *In re Temple Retirement Comty.*, 97 B.R. 333, 342 (Bankr. W.D. Tex. 1989); *see also Vieques Conservation & Historical Trust, Inc. v. Martinez*, 313 F. Supp. 2d 40, 46 (D.P.R. 2004)("Under First Circuit law, there is a presumption that the proper rate to be applied to the work of out-of-town counsel is that of the forum community, rather than that which the attorney charges in the community in which he or she practices.").
[22] TIAA-CREF's Answering Brief on Defense Costs, at 29.
[23] *Id.*

[redacted]

federal court in the District of Vermont charge rates commensurate with [redacted]'s rates. TIAA-CREF's expert pointed to one firm only.[24] That firm, a plaintiffs' firm retained to represent the *Bauer-Ramazani* Plaintiffs, had been retained on a contingent basis and never even *charged* the rates in question.[25] TIAA-CREF never established – through any evidence – a range of reasonableness for national firms practicing in federal court in the District of Vermont.

TIAA-CREF also argues, without support from Delaware law, that it is not bound by the *Cox* element of what is "customarily charged in the locality" because *Bauer-Ramazani* was brought as a federal class-action suit asserting claims under ERISA and [redacted] had expertise in ERISA. That is not a basis to avoid scrutiny of [redacted]'s rates pursuant to the *Cox* locality factor. In no way do the non-Delaware cases that TIAA-CREF cites support a finding that the [redacted] rates were reasonable and necessary. The cases TIAA-CREF cites from other jurisdictions, on different issues, do not change *Cox*. Further, TIAA-CREF has not introduced the unique circumstances, or satisfied the standards of proof, enunciated by the courts in those cases.

TIAA-CREF cited a bankruptcy court case, from the Southern District of Ohio, that, unlike *Cox*, took the professional's customary hourly rate as "the

[24] JA5856 at 147:6-17.
[25] JA5856 at 147:18-148:23; JA5858-60 at 158:22-164:21.
[redacted]

starting point" for determining fee awards in Chapter 11 cases.[26] This decision, therefore, does not represent law analogous to *Cox.* Even that case recognized, moreover, that, in consideration of the criteria for awarding appropriate compensation, whether the customary hourly rate of a particular professional is reasonable and appropriate under the circumstances may be adjusted depending on, for example, whether the work could have been performed by someone with less experience at a lower rate, and whether the rate is in line with rates charged by comparable professionals with offices in the same locale as the applicant.[27] TIAA-CREF offered no evidence on these factors.

The decision, from the First Circuit Court of Appeals, affirmed that "the local rate is the appropriate yardstick" in an ordinary case requiring no specialized abilities not amply reflected among local lawyers, but that, if the client needs to go to a different city to find that specialist, he will expect to pay the rate prevailing in that city, which is most likely to be that outside specialist's ordinary rate.[28] To be clear, while we know what was billed, technically no one from [redacted] presented an affidavit or testimony detailing the *ordinary* rates charged by that firm. In addition, TIAA-CREF did not establish that local lawyers lacked the

[26] *Matter of Baldwin United Corp.*, 36 B.R. 401, 403 (Bankr. S.D. Ohio 1984).
[27] *Id.*
[28] *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983).

[redacted]

specialized ability required to defend the action proceeding in federal district court *in Vermont*.[29]

The last case cited, from the federal district court in New York, involved hundreds of fee petitions of claimant counsel taking cases on a contingent basis in the *Agent Orange* litigation. The trial court reasoned that an "informed assessment of the fee petitions requires consideration of the system of toxic tort litigation as well as of the unique circumstances of this case."[30] The trial court attempted to balance both "the large risk of no recovery -- or of a limited one -- even when a case appears to have merit" versus a concern that "[o]verly generous fee awards may encourage cases without merit to be brought and pressed beyond reasonable limits."[31]

"Faced with a flood of fee petitions from counsel located in all regions of the country, the district court utilized national hourly rates for calculating the fee awards for each attorney."[32] As the Court of Appeals explained it, while the trial court "recognized that the general rule for fee calculation in this circuit requires the

[29] TIAA-CREF's expert admittedly had made no effort to determine whether a firm in Vermont or neighboring New Hampshire was qualified to defend the action. JA5856-57 at 150:10-153:5; JA5861-62 at 168:11-171:9.
[30] *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296, 1303 (E.D.N.Y. 1985), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987).
[31] 611 F. Supp. at 1303–04.
[32] *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 231 (2d Cir. 1987).

use of 'the hourly rate normally charged for similar work by attorneys of like skill in the area,'" the trial court "noted that special problems arise 'in applying this general standard in a complex multidistrict litigation that is national in scope, involves counsel from all over the country and extends over many years during which the rates for particular lawyers and classes of lawyers are changing.'"[33]

In examining the trial court decision, the Court of Appeals reasoned that "the use of national hourly rates in exceptional multiparty cases of national scope, where dozens of non-local counsel are involved, appears to be the best available method of ensuring adherence to the principles of the lodestar analysis."[34] The Court of Appeals made clear that its decision was guided by, and limited to, those very unique circumstances:

> The risk of overcompensation or undercompensation on a large scale, apparent under the forum rule, is somewhat neutralized, while, at the same time, the administrative burden on the district court, apparent under the varying rate rule, is reduced to a manageable level. In granting the district court this discretion, however, we caution that such rates should be employed *only* in the exceptional case presenting problems similar to those presented here.[35]

[33] *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 231 (2d Cir. 1987) (citing *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1303, 1308 (E.D.N.Y. 1985)).
[34] *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 233 (2d Cir. 1987).
[35] *Id.* (emphasis in original).

On a very different record, TIAA-CREF submitted its legal fees for defending one class action, the *Bauer-Ramazani* Action, and, thus, the fees customarily charged in the locality were easily ascertainable. The *Bauer-Ramazani* Action cannot be said to present "problems similar to those presented" in the *Agent Orange* litigation, which involved fee petitions submitted by hundreds of different firms from all over the country who were prosecuting claims on a contingent basis. Accordingly, it is not "the exceptional case" that the Court of Appeals declared may warrant employing a national rate.

Even if this Court were to determine that the *Bauer-Ramazani* Action was analogous to the circumstances presented by the hundreds of fee petitions in the *Agent Orange* litigation, TIAA-CREF did not satisfy the standard of proof. As the Court of Appeals had cautioned, "even in similar cases, national hourly rates should be employed **only when** the district court is presented with an adequate evidentiary basis on which to fix such rates."[36] The Court of Appeals instructed that once the trial court is satisfied with the evidence, it should make clear, factual findings that support its determination. Relying on five separate sources, the district court in that case "developed" the national rates to be applied – national hourly rates of $150 for partners, $100 for associates and $125 for law

[36] *Id.* (emphasis added in bold).

professors.[37] Thus, even under this decision, TIAA-CREF would have been required to develop, based on an adequate evidentiary basis, the national rates of such specialized counsel to be applied. TIAA-CREF's expert never addressed specifically the rates of ERISA counsel, or developed the "national rates" to be applied for ERISA defense counsel. This case, therefore, also offers no grounds on which TIAA-CREF may recover at rates at several hundred dollars in excess of what is customarily charged in the locality.

Reductions must be taken to reflect the evidence presented by the Insurers (Illinois National, Arch, and Zurich) on rate of the locality. In harmony with the evidence provided by plaintiffs' counsel in the *Bauer-Ramazani* Action, as to the rates of the locality, the Insurers' expert, Brand Cooper, accepted as reasonable, and applied, the slightly higher hourly rates of $[redacted] for partners and $[redacted] for associates charged to TIAA-CREF by its local Vermont counsel, the [redacted] firm.[38] Application of those rates, to all the entries, reduces the defense fees in *Bauer-Ramazani* by $3.515 million.[39]

[37] *Id.* at 231.
[38] JA6189 at 50:2-18.
[39] JA6189 at 50:2-18.
[redacted]

### C. The Evidence That TIAA-CREF Did Present Was Not Competent to Establish That All Of The Billing Entries Were Reasonable And Necessary.

TIAA-CREF's Answering Brief misses a significant point raised by Illinois National and Arch, which is that the evidence that was presented by TIAA-CREF was not competent to support a full award for the *Bauer-Ramazani* fees. The testimony of TIAA-CREF's proffered expert Leif Clark simply cannot be deemed competent to support a conclusion that all the fees were reasonable and necessary, because his own testimony supports a reduction and he ignored the rates of the locality – addressed above.[40]

Mr. Clark admitted that as bankruptcy judge, he would "essentially review the fee applications from beginning to end and really drill down on what the attorneys did, why they did it, and how they did it relating to what was going on in each of the respective cases."[41] In this case "[he] didn't -- [he] wasn't asked to do that here."[42] The truly fatal flaw in his opinion is his concession that had he followed his normal process, he would have taken deductions.[43]

[40] JA5862 at 172:7-17; JA5862 at 174:11-20.
[41] JA5853 at 136:8-15
[42] JA5852-53 at 134:18-137:16.
[43] JA5860-61 at 165:18-167:17; JA5862 at 171:10-172:22; JA5862 at 174:11-20.

By way of one example, Mr. Cooper identified $[redacted] in clerical entries billed by the [redacted] firm.[44] TIAA-CREF has responded that Mr. Cooper "delegated his work to a computer program,"[45] but Mr. Cooper clearly testified that he examined every billing entry, and that he used the software to assist his review.[46] During his review, he discovered people at the [redacted] Firm that were billing for clerical work such as organizing documents and labeling them.[47] Mr. Clark made no reduction for clerical work even though TIAA-CREF's expert admitted that there was "quite a bit of work that is described…as clerical work" and that a client should not have to pay attorney rates for clerical work.[48]

TIAA-CREF asserts that [redacted]'s testimony established the necessity of time spent and billed and discounts the fact that she joined the *Bauer-Ramazani* defense team in 2012, more than three years after the suit was filed.[49] She had no involvement or firsthand knowledge of staffing decisions made from the inception of the litigation in 2009 until her involvement in 2012.[50] As for her knowledge of the billing rates, she admitted that what she knew during that time period was

[44] DAR0072; DAR0074; DAR0091; DAR0093; JA6192-93 at 53:13-54:15.
[45] TIAA-CREF's Answering Brief on Defense Costs, at 26.
[46] JA6153 at 14:6-22; JA6158 at 19:11-15.
[47] DAR0072; JA6192-93 at 55:19- 56:8.
[48] JA5847 at 114:17-23; JA5860-61 at 165:18-167:17.
[49] TIAA-CREF's Answering Brief on Defense Costs, at 26; JA5331 at 26:6-12; JA5386-87 at 81:19-82:15; JA5416 at 111:9-22.
[50] JA5405-06 at 100:17-101:21.

[redacted]

"what [she] was told" and that even when she was on the *Bauer-Ramazani* defense team, her knowledge was "second hand, meaning [she] would have heard it from other people at [redacted]."[51] Furthermore, she never acted as a billing attorney, never reviewed the bills before submission to TIAA, never had any responsibility for reviewing bills to ensure compliance with reasonable billing standards, and never answered questions regarding billing.[52] Therefore, she had no knowledge as to whether the bills actually charged for work done in the case were reasonable or necessary.

In sum, therefore, the opinion of TIAA-CREF's expert, Leif Clark, should have been rejected for several reasons, including that:

- Despite being proffered as an expert, based upon his practice as a bankruptcy judge, Mr. Clark admittedly made no effort to follow his normal practice of reviewing every entry for reasonableness and

[51] To the extent TIAA-CREF asserts there is a 15% discount, the only evidence in the record is [redacted]'s statement that she believed a discount was applied, however, she admitted that her knowledge was based on "what she was told." JA5408-09 at 103:12-104:11.

[52] JA5386-87 at 81:19-82:11; JA5391-92 at 86:21-87:7; JA5402-03 at 97:22-98:3; JA5407 at 102:13-22.

[redacted]

necessity.[53] Mr. Clark admitted that, had he followed his normal process, he would have taken deductions.[54]

- Mr. Clark's decision to ignore the rates of the locality – entirely – was not based upon any credible record evidence, but, rather, upon impermissible speculation as to why the [redacted] firm was hired when he admitted there was no testimony whatsoever on that topic;[55]
- Mr. Clark speculated regarding the purported need for counsel experienced in ERISA litigation without having had determined whether suitable counsel existed in the locality; [56]
- Mr. Clark took no reductions in rates even though he proffered no basis to defend hourly rates of $[redacted] to $[redacted] for inexperienced attorneys with three years or less experience; [57] and
- Mr. Clark made no reduction for clerical work even though he admitted that a client should not have to pay the higher rates for clerical work.[58]

[53] JA5853 at 135:1-136:18; JA5853 at 137:4-13.
[54] JA5860-61 at 165:18-167:17; JA5862 at 171:10-172:22; JA5862 at 174:11-20.
[55] JA5856-57 at 150:10-152:13.
[56] JA5856-57 at 150:10-153:5; JA5861-62 at 168:11-171:9.
[57] JA05841-42 at 90:8-91:6; JA5860-61 at 164:22-167:17; JA6183-84 at 44:6-45:9; JA6188 at 49:3-18.
[58] JA5847 at 114:17-23; JA5860-61 at 165:18-167:17.

[redacted]

For these reasons, there is no basis to accept that the evidence presented was legally sufficient to justify a jury verdict finding reasonable and necessary the entire amount of fees billed for the *Bauer-Ramazani* Action.

## II. CONCLUSION

TIAA-CREF did not present competent evidence to meet its burden to establish that all of the "Defense Costs" incurred in the *Bauer-Ramazani* Action were reasonable and necessary, as defined by the Policies. The Superior Court erred in refusing Illinois National's and Arch's requests that the award be overturned and adjusted to comport with the evidence so as to reflect rates customarily charged in the locality and reductions for billing practices that its own expert agreed were unreasonable. Any award for defense fees should be overturned and remanded for a new trial or with instructions to make these adjustments.[59]

[59] Super. Ct. Civ. R. 50 (d).

[redacted]