

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

PENTHOUSE OWNERS ASSOCIATION, INC. PLAINTIFF
VERSUS CIVIL ACTION NO. 1:07CV568-HSO-RHW
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON DEFENDANT

**PENTHOUSE'S MOTION AND MEMORANDUM FOR
ATTORNEYS' FEES, EXPENSES AND INTEREST**

Penthouse Owners Association, Inc. ("Penthouse"), by and through counsel, respectfully moves this Court for an order granting attorneys' fees of \$2,312,312.17, expenses of \$279,338.28, and prejudgment interest to be calculated at 8% per annum, compounded, from and after October 29, 2005, in the amount of \$950,389.02.

On February 24, 2011, following the return of a jury verdict for Penthouse, the Court found and held that there was no arguable basis for Defendants' denial of Penthouse's insurance claim and that Penthouse is entitled to recover attorneys' fees, costs and prejudgment interest.

Pursuant to the Court's Order of February 25, 2011, Penthouse submits this motion regarding the amount of fees and expenses requested, the rate of prejudgment interest, and the calculation of that interest.

I. Attorneys' Fees of \$2,312,312.17 Are Reasonable.

A. Standards For Determining Reasonableness

In this diversity case, Mississippi substantive law governs the analysis of reasonable attorneys' fees, costs and prejudgment interest. It is well settled that the amount of reasonable attorneys' fee is left to the sound discretion of the trial court. *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474, 486 (Miss. 2002). Miss. Code Ann. § 9-1-41 (1991) provides that courts

are not to require the party seeking fees to put on proof as to the reasonableness of the amount sought, but rather to “make the award based on the information already before it and the court’s own opinion based on experience and observation.” The Court may, however, allow the seeking party to submit evidence. Miss Code Ann. § 9-1-41; See also *Regency Nissan, Inc. v. Jenkins*, 678 So.2d 95, 103 (Miss. 1995); *Raines v. Bottrell Ins. Agency*, 992 So 2d 642, 648 (Miss. App. 2008). Penthouse offers in support of this motion the affidavit of lead counsel Don Barrett (Collective Exhibit 1); the affidavit of Walker W. Jones, III (Exhibit 2); and the affidavit of James M. Gary (Exhibit 3).

The United States Supreme Court has adopted the “lodestar” method to determine reasonableness. See *Hensley v. Eckhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed. 2d 80 (1983). The Court further stated that a reasonable fee must, obviously, be determined based on the facts of each case. *Hensley*, 461 U.S. at 429, 103 S. Ct. at 1937. The Court set out twelve factors for trial courts to consider in determining reasonableness:

“(1) The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.” *Id.* At 1938 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974))

The Mississippi Rules of Professional Conduct set out a nearly identical list of factors to be used to establish a reasonable fee:

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;

3. the fee 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.

Mississippi Rules of Professional Conduct 1.5(a).

These eight factors were adopted by the Mississippi Supreme Court in *McKee v. McKee*, 418 So.2d 764 (Miss. 1982). The *McKee* court also described a ninth factor, “the relative financial ability of the parties.” *Id.* at 767. As that Court has recently noted, the “*McKee* factors are strikingly similar to the factors set out in Miss. R. Prof. Conduct 1.5(a).” *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So.2d 495, 521 (Miss. 2007). As a result, Mississippi courts have used the *McKee* factors and Rule 1.5 interchangeably. *See Mabus v. Mabus*, 910 So.2d 486, 489 (Miss. 2005) (“The reasonableness of attorneys’ fees are controlled by the applicable Mississippi Rule of Professional Conduct 1.5 factors and the *McKee* factors.”); *Upchurch Plumbing, Inc. v. Greenwood Utilities Com’n*, 964 So.2d 1100, 1115 (Miss. 2007) (noting *McKee* factors are adopted from Rule 1.5(a)).

In deciding what is “reasonable,” counsel’s lodestar is the starting point and to be given substantial weight:

Therefore, a trial court’s award of attorneys’ fees will be on course for probable affirmance on appeal if the trial judge used as a starting point the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate, after which the issue of attorneys’ fees must then be appropriately considered in light of Miss. R. Prof. Conduct 1.5(a) and the *McKee* factors.

Tupelo Redevelopment Agency, 972 So.2d at 522. See also, *Bellsouth Pers. Commun., LLC v. Bd. Of Supervisors*, 912 So.2d 436, 446-447 (Miss. 2005) (the lodestar “provides an objective basis on which to make an initial estimate of the value of a lawyer’s services”); *Daly v. Bank One*, Slip Copy, 2007 WL 1725426, at *1 (S.D. Miss. June 12, 2007) (J. Guirola) (finding the lodestar is presumptively reasonable and should be modified only in exceptional cases); *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638 (1992) (“We have established a ‘strong presumption’ that the lodestar represents the ‘reasonable’ fee.”). A reasonable estimate of hours expended is all that is necessary to arrive at the lodestar. *Heasley v. C.I.R.*, 967 F.2d 116, 123 (5th Cir. 1992) (failure to provide contemporaneous billing records does not preclude recovery so long as there is presented adequate evidence to permit the Court to determine the number of reimbursable hours.”); *CWTM Corp. v. AM General LLC*, 2006 WL 1804623, at *3 (S.D. Tex. June 28, 2006) (court used the hours defense counsel billed in order to ascertain a reasonable number of hours for Plaintiff’s counsel, who did not keep time records).

B. The McKee Factors and Mississippi Rule of Professional Conduct 1.5(a) Support Penthouse’s Hourly Lodestar Request.

Penthouse requests attorneys’ fees in the amount of \$2,312,312.17, which represents 7,822.98 hours of attorney and paralegal time, and expenses of \$279,123.42. The following charts summarize the lodestar hours of each responsible attorney and paralegal as well as the expenses incurred by each law firm.

TIME

<u>Lawyer or Paralegal</u>	<u>Firm</u>	<u>Hours</u>	<u>Rate</u>	<u>Lodestar</u>
Don Barrett	Barrett Law Office, P.A.	924.3	475.00	439,047.25
David McMullan	Barrett Law Office, P.A.	1279.5	345.00	441,427.50
Sally Williamson	Barrett Law Office, P.A.	235.3	300.00	70,575.00
Carolyn Mirick (Paralegal)	Barrett Law Office, P.A.	454.0	90.00	40,860.00

Sterling Brown (Paralegal)	Barrett Law Office, P.A.	310.5	90.00	27,945.00
Paul Taylor (Paralegal)	Barrett Law Office, P.A.	5.0	75.00	375.00
Danny Brett (Paralegal)	Barrett Law Office, P.A.	279.0	75.00	20,925.00
Chris Hammett (Paralegal)	Barrett Law Office, P.A.	250.4	75.00	18,780.00
Thomas P. Thrash	Thrash Law Firm	1258.78	425.00	534,982.92
Gary Yarbrough	Hesse & Butterworth	1,882.8	225.00	423,630.00
Dewitt M. Lovelace	Lovelace Law Firm	711.0	375.00	266,625.00
Alex Peet	Lovelace Law Firm	13.70	225.00	3,082.50
Sandy Rosenthal (Paralegal and Accountant)	Lovelace Law Firm	218.70	110.00	24,057.00
Total		7,822.98		\$2,312,312.17

EXPENSES

<u>Law Firm</u>	<u>Expenses</u>
Katrina Litigation Group	\$188,424.65
Barrett Law Office, P.A.	\$70,734.30
Thrash Law Firm	\$2,845.88
Lovelace Law Firm, P.A.	\$7,904.92
Hesse & Butterworth	\$9,428.53
Total	\$279,338.28

The Affidavit of Don Barrett confirms the time expended by Penthouse's counsel to prosecute this litigation, broken down by attorney and paralegal. Penthouse's counsel has detailed records supporting the above time and expenses. Penthouse has submitted herewith the records of the attorneys and paralegals for consideration by the Court *in camera*. The detailed records are privileged as they obviously provide insight into counsel's litigation and trial strategy.¹

¹ If the Defendants wish to challenge the reasonableness of this fee and expense request, and demands to review the detailed records of Penthouse's counsel — and the Court agrees — Penthouse respectfully requests that this Court order Defendants to disclose their own attorneys' fees and expenses, simply for comparison purposes. This sort of comparison has been viewed as an effective tool in determining a reasonable fee. See *Heng v. Rotech Medical Corp.*, 720 N.W.2d 54, 65 (N.D. 2006) (“A comparison of hours and rates by opposing counsel is probative of the reasonableness of a request for attorney fees by prevailing counsel.”); *CWTM Corp.*, *supra*, 2006 WL 1804623, at *3 (Court used the hours defense counsel billed in order to ascertain a reasonable number of hours for Penthouse's counsel, who did not keep time records).

1. The Time and Labor Required, the Novelty and Difficulty of the Questions Involved, and the Skill Requisite to Perform the Legal Service Properly All Support The Requested Fee.

Much time and labor was required to properly represent Penthouse. Since Penthouse filed its case on April 24, 2007, over 400 pleadings have been filed. The case was vigorously litigated by both parties. Thirty-one (31) depositions were taken and sixty-eight (68) motions were filed and fully briefed, including four (4) motions for summary judgment. As the Court is also aware, this case was complicated by an interlocutory appeal regarding the interpretation of the subject insurance policy. Additionally, counsel were required to prepare for trial on three different occasions.

As reflected in the history of the pleadings and the two hundred thirty-nine (239) page pretrial order, this case was factually and legally complex and involved numerous contested issues. The two week trial, counsel would submit, reflected the high level of skill and preparation required of all counsel.

2. The Likelihood, If Apparent to the Client, That the Acceptance of the Particular Employment Will Preclude Other Employment by the Lawyer, Supports the Requested Fee.

For weeks prior to and during trial, Penthouse's trial team did almost nothing other than prepare for and try this case. Penthouse's counsel worked 12-16 hour days, in preparation for what proved to be a hard fought trial. Corporate representatives spent a great deal of time with the trial team before and during trial. Consequently, this case precluded other employment during the time leading up to and through the course of trial. As shown by Affidavit of Don Barrett, all of the firms employed by Penthouse are busy with cases every working hour. Every minute spent on this case necessarily precluded time being spent on other pending matters. Barrett Affidavit ¶ 13.

3. The Fee Customarily Charged In the Locality for Similar Legal Services Does Not Necessarily Support the Requested Fee, but Should Not Be Determinative in This Case.

Penthouse seeks hourly rates for attorneys commensurate with their level of experience and skill. The requested rates are reasonable. As noted in the Barrett Affidavit at ¶ 5, the hourly rates requested for the responsible lawyers are comparable to the “Average Billing Rates by Specialty Area and Years in Practice” found in the “2011 Survey Report: Billing Rates And Practice: A Study of the Billing Rates of Attorneys in Small and Midsize Firms,” which was extracted from the National Law Journal’s “Survey of Law Firm Economics.” Although the requested hourly rates are somewhat higher than the average hourly rates charged by counsel on the Gulf Coast, the requested rates are the appropriate rates which should be used.

It is misleading and unfair to assume that the reported hourly rates accurately reflect what plaintiffs’ attorneys are paid. Except in rare circumstances, plaintiffs who have to sue their insurance carrier cannot afford to pay an attorney by the hour, and thus sign contingency contracts. Thus a realistic hourly charge for the plaintiffs’ attorney is unavailable when surveys are taken; plaintiffs’ firms simply do not charge that way. Thus “average” rates must disproportionately reflect discounted and negotiated rates that defense firms charge with the prospect of doing volume work and getting repeat business, and getting paid every month, whether they win or lose. As the Court is aware, hourly rates charged by firms typically are a function of the nature of the relationship with the client and the matter. Insurers and other repeat defendants generally demand reduced hourly rates from firms based on agreements to direct cases to those firms on a volume basis. The rates requested here are for skilled attorneys, with much experience in this difficult, contentious area of law, who are representing the Plaintiff for this case only, with no chance for repeat business. Moreover, each of the *McKee* factors support

the use of the requested billing rates (i.e., time and labor required, novelty, skill required, contingent fee).

4. The Amount Involved and the Results Obtained Support the Requested Fee.

The Mississippi Supreme Court has stated that “[t]he most critical factor in determining the reasonableness of an award of attorneys’ fees is ‘the degree of success obtained.’” *Amite County School Dist. v. Floyd*, 935 So.2d 1034, 1046 (Miss. App. 2005) (citing *Cruse v. Nunley*, 699 So.2d 941, 944 (Miss. 1997)). This factor clearly supports Penthouse’s fee request. Although Penthouse seeks a substantial amount for fees and expenses, the total is proportionate to the amount of work involved, the financial investment of Penthouse’s counsel, the risk of loss and the successful result. The jury’s verdict in Penthouse’s favor came only after a complicated and challenging trial. In this light, the fee request is certainly fair and reasonable.

The Fifth Circuit and other courts have upheld fee requests that are much larger than the underlying damage awards. For example, in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Supreme Court approved fees of approximately \$245,000 where the Plaintiff had received a \$33,350 verdict. The *Rivera* court held that in a civil rights context:

The amount of damages a plaintiff recovers is certainly relevant to the amount of attorneys’ fees to be awarded under § 1988. It is, however, only one of many factors that a court should consider in calculating an award of attorney’s fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.

Id. at 574.

Other courts, including the Fifth Circuit, have approved attorneys’ fees amounts that exceed the recovery. See *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 126 (5th Cir. 1993) (fees of \$564,748 approved on a judgment of approximately \$9,000); *Dunkin’ Donuts, Inc. v. Mercantile Ventures, Inc.*, 1994 WL 720236, at *6 (W.D. Tex. Aug. 11, 1994) (\$889,986.50 in

fees on a \$137,974.62 award); *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 837 N.E.2d 1121, 1137 (Mass. 2005) (approving \$1,000,000 fee award on damages of \$118,950); *Askvig v. Wells Fargo Bank Wyoming, N.A.*, 2005 WY 138, 121 P.3d 783 (Wyo. 2005) (affirming \$169,424 fee award equal to more than 200% of the amount recovered); *Reneau v. Mossy Motors*, 622 F.2d 192, 196 (5th Cir. 1980) (“While an award greatly in excess of a client’s recovery requires strong support from the particular circumstances of the case, the ceiling on the client’s recovery should not operate as an impenetrable barrier to reasonable compensation. ***Righteous campaigns are not always won at modest cost.***”) (emphasis added).

The long and complicated road to trial in this case, which led to a favorable verdict for the Plaintiff, supports the requested fee.

5. The Time Limitations Imposed by the Client or by the Circumstances Supports the Requested Fee.

As this Court knows well, it is rare for a case to go to trial. When it does, any trial creates time limitations on the attorneys (and the court), requiring the attorneys to set aside all other professional and personal commitments in order to properly litigate the case. Such was the case with the Penthouse trial, and, as noted above, counsel were required to prepare for trial not once, but on three separate occasions.

6. The Nature and Length of the Professional Relationship with the Client Supports the Requested Fee.

Penthouse had no prior professional relationship with counsel prior to Hurricane Katrina or this litigation. The undersigned were employed as a result of the Defendants’ wrongful conduct in handling Penthouse’s insurance claim. As the Court has already ruled, Defendants denied this claim without an arguable reason. The Defendants defended the claim with dogged determination and great skill. In order to win their award, Plaintiff’s counsel were required to

expend the time and money reported herein. But for the wrongful denial Plaintiff would not have had to ever hire a lawyer at all, and the opportunity of future employment of these lawyers by Penthouse is realistically nonexistent.

7. The Experience, Reputation, and Ability of the Lawyer or Lawyers Performing the Services Supports the Requested Fee.

The Court is in the best position to assess this factor, given its experience with Penthouse's counsel before and during the trial. The résumés of Penthouse's counsel, Don Barrett, Tom Thrash, David McMullan, Gary Yarborough, Alex Peet, Dewitt M. Lovelace and Sally Williamson, are presented through the Barrett Affidavit. As these résumés show, Penthouse's law firms have extensive experience and ability in litigating and trying cases of this type. Barrett Affidavit ¶ 15.

Counsel for Penthouse are the most experienced lawyers in the nation in handling insurance cases related to Hurricane Katrina. Counsel have successfully prosecuted and settled over 1,600 Katrina-related insurance cases. The Penthouse attorneys are the only group to have tried cases to verdict in both state and federal court. Counsel were the first to try a Hurricane Katrina case to a jury verdict in State Court, in *Lisanby v. USAA*. The degree of direct experience in these cases further supports the use of the requested billing rates. Penthouse simply could not have hired any lawyers in the nation with as much relevant experience.

8. Whether the Fee is Fixed or Contingent Supports the Request Fee.

Penthouse counsel were hired on a contingency, obligating Penthouse to pay one third (1/3) of all amounts collected. Barrett Affidavit ¶ 16.

For purposes of this fee request, the important point is that Penthouse's counsel receive nothing unless they force Defendants to pay money to Penthouse. For this reason, Penthouse's counsel should receive either a higher rate for their hours spent or a multiplier of their lodestar

time. *See Hensley v. Eckerhart*, 461 U.S. 424, 448-449 (1983) (“Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference, however, reflects the time-value of money and the risk of non-recovery usually borne by clients in cases where lawyers are paid an hourly rate.”)²

Counsel prosecuted this case for nearly four years, at substantial risk of recovering nothing. Very few lawyers take on such risk, especially in today’s environment where the costs and risks of litigation have significantly increased. As such, the requested fee is appropriate and reasonable.

a. Defendant’s Likely “Made Whole” Argument

Defendants may contend that Penthouse’s contingency contract limits any possible fee recovery. Defendants may argue that Penthouse will be “made whole” by an award equal to one third of the jury verdict pursuant to the contingency contract. That argument, however, would require that the Court find and hold that Rule 1.5 and *McKee* are inapplicable.

The Mississippi Supreme Court has rejected this argument. In *United American Insurance Co. v. Merrill*, 978 So.2d 613, 620, 630 (Miss. 2007), the Court, in a 9-0 decision, affirmed an award of \$527,479.69 in fees and expenses with facts similar to this case. The policyholder in *Merrill* was an insured policyholder whose contract was breached by the insurance carrier. The Court plainly stated that in determining fees in this context, “[t]he reasonableness of an attorneys’ fees award is determined by reference to the factors set forth in

² Court used the hours defense counsel billed in order to ascertain a reasonable number of hours for Penthouse’s counsel, who did not keep time records.

Rule 1.5 of the Mississippi Rules of Professional Conduct.” *Id.* at 636 (citing *Miss. Power & Light Co. v. Cook*, 832 So.2d 474, 486 (Miss. 2002)). Penthouse’s contingency contract certainly does not impose any artificial barrier to a fee and expense award, and no fee-imposing statute is involved here.

Merrill is not new law. *Miss. Power & Light Co. v. Cook* mirrors the analysis in *Merrill*. In *Cook*, the plaintiff brought a bad faith claim for denial of worker’s compensation benefits. The jury awarded punitive damages, supporting an award of attorneys’ fees. As here, no fee imposing statute was involved. The trial court awarded the plaintiff \$2,060,000 in fees, which equaled 40% of the combined compensatory and punitive damage awards. The Mississippi Supreme Court rejected the trial court’s award and forcefully held:

The *McKee* factors should have been applied by the trial judge in determining the amount of attorneys’ fees to be awarded....The award of attorneys’ fees should be vacated and remanded to the trial court. The trial judge should reconsider this issue in light of the *McKee* factors and support a new award, if any, based on findings of fact and conclusions of law concerning those specific factors.

Id. at 487.³ Clearly, a contingency agreement does not impose an automatic ceiling on an award of attorneys’ fees. Limiting fees in this manner would also violate public policy by discouraging counsel from taking on cases involving smaller claims.

b. Attorneys’ Fees Under the “Made Whole” Theory

Even under any “made whole” theory, Penthouse counsel would still be owed a fee of one-third of all amounts collected for Penthouse from this litigation. Barrett Affidavit ¶ 16. Assuming for argument’s sake that Penthouse is limited to the language of the contingency agreement and the *McKee* factors do not apply, the fee agreement calls for the Penthouse to pay

³ It must be noted that the plaintiff in *Cook* clearly attempted to use the contingency fee as a weapon, whereas here, Defendant would like to use it as a defense. In *Cook*, a 40% award would likely be more money than the attorneys’ lodestar. Here, obviously the one third contingency agreement is less than Penthouse’s counsel’s lodestar. With *Merrill* and *Cook*, the Mississippi Supreme Court has rejected this type of gamesmanship and clearly outlined the factors a court must use to arrive at a reasonable fee.

“one third of all amounts collected.” The amounts collected would include the contract damages awarded by the jury and the extra-contractual amounts awarded by this Court.

By advancing the explanation of the contract Penthouse does not suggest that the fee contract controls the fee award. Under Mississippi law it clearly does not. The relevance of the fee contract is that: (1) Penthouse’s counsel are operating on a “get paid only if you win” contingency; and (2) in order to make Penthouse whole, required under *Veasley* and *Merrill*, the fee formula as set out in paragraph 16 of the Barrett affidavit, is the minimum or baseline fee award which could be made. Penthouse submits that its attorneys deserve a fair and reasonable award, based on the Rule 1.5 and *McKee* factors, not a minimum award.

8. The Relative Financial Ability of the Parties Supports the Requested Fee Award.

Penthouse, as demonstrated at trial, was placed in a position of undue hardship by the failure of Defendants to pay what was owed. Penthouse, the evidence showed, has struggled to rebuild, and has been delayed in so doing for four years, by Defendant’s wrongful denial of this claim. Defendants are huge multinational companies with substantial net worth. Defendants’ proposed stipulation at trial regarding net worth was that the Defendants’ net worth exceeded one billion dollars. Defendants clearly have the resources to pay Penthouse’s fee request without any hardship.

Each of the *McKee* factors clearly supports the requested attorneys’ fees. This matter, spanning four years, has required an enormous investment of time by counsel, at substantial risk, in order to obtain an excellent result for Penthouse. Counsel for the Defendants vigorously defended their clients, but were compensated along the way. Counsel for Penthouse should now be awarded the fee requested.

II. Penthouse's Expenses Were Reasonable And Necessary.

Mr. Barrett's affidavit demonstrates that all expenses, to the best of his informed belief, were (1) necessary, (2) reasonable, and (3) actually incurred.

A substantial portion of the accrued expenses were for Penthouse's experts. Experts in the fields of appraisal, structural engineering, and meteorology were necessary. Penthouse retained competent and well-qualified experts. Detailed expert reports were required and Defendants deposed each expert prior to trial.⁴

Travel-related expenses in this matter were also substantial. Counsel for Penthouse live in Little Rock, Arkansas; Destin, Florida; and Lexington, Oxford, and Bay St. Louis, Mississippi. Penthouse's corporate representatives reside in Birmingham, Alabama, and on the Gulf Coast. Depositions of the parties, fact witnesses, experts and other witnesses required substantial travel time and expenses, all of which were unavoidable by Penthouse.⁵

During the course of this case, Defendants used at least eight lawyers from Jackson and from Atlanta, Georgia. Penthouse's lawyers assigned five attorneys to the trial. Their presence in Gulfport before and during the trial was absolutely necessary to present the best case reasonably possible for Penthouse.

The total amount of expenses here is comparable to litigation costs of other significant litigation. It is sad but true that \$279,338.28 is not an unusual sum when compared with the usual costs of litigating other significant cases in today's litigation environment. Barrett Affidavit ¶8 (for comparison with litigation expenses of recent cases where his firm was involved).

⁴ None of the experts' time has been previously paid by Defendants.

⁵ Due to the Defendants' refusal to make a corporate representative available for a deposition in Mississippi, counsel was required to travel to London, England to obtain Defendants' 30(b)(6) deposition.

Penthouse reasonably believes that Defendant's litigation expenses for this case are comparable to its own. Penthouse suggests that if Defendants question the expenses amount requested by Penthouse, that they submit all expense records to the Court for its *in camera* review. Regardless of Defendant's own costs, however, Plaintiff's counsel actually incurred (and paid, out of their own pockets) the litigation expenses for which they seek reimbursement. Plaintiff's counsel were conscious of the need not to waste their own money, ever, and they tried their best not to.

III. Prejudgment Interest Should be Awarded From October 29, 2005, at a Rate of 8% Per Annum, Compounded Annually.

Penthouse requests prejudgment interest at a rate of 8%, beginning from sixty (60) days after August 30, 2005, the date that the loss was reported. The loss payment provision of Penthouse's Policy provides that Underwriters "will pay for covered loss or damage within 30 days after [they] receive the sworn proof of loss." (See Penthouse's Policy [Exhibit "A" to *d.e.*1] at p. 10 of 14.) Such loss payment provisions are to be strictly construed against the insurer. (See *Gates v. State Farm General Ins. Co.*, 740 F. Supp. 1237, 1240 (S.D. Miss. 1990). Underwriters accepted the claim made on August 30 by Ray Deloteus. The adjuster Darrell Livingston had inspected the premises and completed his report by October 1. Sixty days is a generous time span to give Underwriters to make their required payment.

Prejudgment interest awards are within the sound discretion of the trial court. *Cash Distributing Co., Inc. v. Neely*, 947 So.2d 286, 298 (Miss. 2007); *In re Guardianship of Duckett*, 991 So.2d 1165 (Miss. 2008) The purpose of prejudgment interest is to provide parties with "compensation for the detention of money overdue." *Sunburst Bank v. Keith*, 648 So.2d 1147, 1153 (Miss. 1995). See also, *Preferred Risk Mut. Ins. Co. v. Johnson*, 730 So.2d 574, 577-78 (Miss. 1998) (prejudgment interest is allowed where the amount of loss is in dispute and as

compensation for detention of money); *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So.2d 187, 192 (Miss. 2000) (prejudgment interest awarded in addition to amount of money converted).

There is sound logic in this position. As the Fifth Circuit has stated, the recovery of interest is a “marketplace concept” and the use of money is a “mercantile privilege” which should not go uncompensated. *Phillips Petroleum Co. v. Adams*, 513 F.2d 355, 366-68 (5th Cir. 1975). To allow a party — here the Defendants — to unlawfully take and use money that belongs to an insured without compensation would simply allow the wrongdoers the opportunity to enjoy the financial advantage for so long and not pay anything for the privilege.

Moreover, the Mississippi Supreme Court has recognized in *Veasley* and *Merrill* that in the context of denial of a claim, an insurer should expect to pay whatever amounts are necessary to make the insured whole. *Veasley*, 610 So.2d at 295. Obviously, the amount to make Penthouse whole includes interest on the amount of money that the Defendants wrongfully withheld for over five years.

Penthouse requests prejudgment interest calculated at a rate of 8%, an amount Mississippi courts typically award. Miss. Code Ann. § 75-17-1 provides:

Legal rate of interest; finance charges

(1) The legal rate of interest on all notes, accounts and contracts shall be eight percent (8%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

The Supreme Court has routinely referred to this statute as a source for an applicable interest rate for prejudgment interest. *Bank of Mississippi v. Mississippi Life and Health Ins. Guar. Ass'n*, 850 So.2d 127, 142 (Miss. App. 2003) (citing *Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.*, 725 So.2d 902, 921 (Miss. 1998)); *Cavagnaro v. Coldwell Banker Alfonso Realty, Inc.*, 2008 WL 427939, at *2 (Miss. App. 2008) (affirming prejudgment interest award of

8%); *Moeller v. American Guarantee and Liability Ins. Co.*, 812 So.2d 953, 959 (Miss. 2002) (affirming prejudgment interest award of 8%).

An award of reasonable prejudgment interest in this case is necessary to place Penthouse back in the position that it would have been in if Defendants had not wrongfully denied its claim. Defendants have effectively held Penthouse's money since October 29, 2005, and it is wholly just and proper to require Defendants to pay reasonable interest on these withheld funds.

This Court has the discretion regarding not only the rate at which prejudgment interest shall apply, but also the discretion to award compound prejudgment interest. See *In Re: The Guardianship of Duckett*, 991 So.2d 1165, 1183 (Miss. 2008). In *Duckett* the Supreme Court held that the Chancery Court did not abuse its discretion by awarding prejudgment interest "at the rate of 8% per annum, compounded annually." *Id.* The Supreme Court noted:

"[m]any courts have held that, in order for an award of prejudgment interest to fully compensate a party for the time value of the overdue money, such interest must be compounded. *Id.*, citing *Cement Div., Nat. 'l Gypsum Co. v. City of Milwaukee*, 144 F. 3d 1111, 1117 (7th Cir. 1998); *Saulpaugh v. Monroe Cumty. Hosp.* 4 F.3d 134, 145 (2nd Cir. 1993); *U.S. v. 429.59 Acres of Land* 612 F.2d 459, 465(9th Cir. 1980); *Mars, Inc. v. Cohen Acceptors, Inc.*, 513 F. Supp. 2d 128, 137 (D.N.J. 2007) (citations omitted); *In Re; Air crash Near Nantucket Island*, 462 F.Supp.2d 360, 370 n.12 (E.D.N.Y. 2006) (citation omitted). "One court has even argued that compound interest should always be awarded." *Id.*, citing *Onti, Inc. v. Integra Bank*, 751 A. 2d 904. 929 (Del. Ch. 1999) ("the grounds for rule of simple interest are at best the inability of a prudent investor to receive compound interest and are at worst a blind adherence to the past.")

In *Duckett* the court noted that it was "necessary to compound prejudgment interest in order to compensate for the time value of the money due as damages from the date the claim arises to the date the judgment is entered..." *Id.* Here the claim reasonably arose October 28, 2005, sixty days after the notice of the claim was filed with Lloyds. It is clearly necessary to

compound the prejudgment interest in this matter so as to compensate Penthouse for the time value of the money that Defendants wrongfully failed to pay.

As noted in the Barrett Affidavit at ¶ 14, Hiscox Syndicate 33, the lead Underwriter, publicly reported an average return on equity (ROE) from 2006-2010 of a remarkable 22%. In practical terms, that means that apparently Hiscox has earned enough with Penthouse's wrongfully withheld money not only to be able now to pay with these ill-gotten earnings, its 40% share of the requested interest, attorneys' fees and expenses, but also to stick an extra \$14,000 or thereabouts into its brimming coffers. See Barrett Affidavit at ¶ 14. Although the Defendants imprudently failed to pay Penthouse's claim, they were indeed prudent investors of Penthouse's funds.

Penthouse does not suggest that this Court should set a prejudgment interest rate equal to the Hiscox ROE. Penthouse does suggest that the higher the effective rate of prejudgment interest awarded here, the less incentive will these defendants have to repeat their wrongful conduct in the future. Certainly the compounding of interest on an annual basis is one reasonable way to deal with this issue. For this additional reason Penthouse requests that the prejudgment interest awarded be compounded on an annual basis.

CONCLUSION

Based on the foregoing, Penthouse respectfully request that its motion be granted, that the Court award to Penthouse reasonable attorneys' fees of \$2,312,312.17; reasonable litigation expenses of \$249,338.28, and reasonable and fair prejudgment interest from October 29, 2005, at a rate of 8% compounded annually, in the amount of \$950,389.02. Penthouse further requests

that the order granting this motion be in the form of a final, appealable judgment, bearing interest at the legal rate of 8% from and after the entry of said order.

Dated: March 23, 2011.

Respectfully submitted,

/s/ Don Barrett

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that he has on this date served the above and foregoing document on all counsel of record via the Court's ECF system.

This the 23rd day of March, 2011.

/s/ Don Barrett

Don Barrett