**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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**HARTFORD CASUALTY INSURANCE CO., an Indiana corporation,**

**Plaintiff,**

**v.** **No. 2:07-cv-02405-BBD-cgc**

**CALCOT, LTD., a California corporation, and GLOBAL COTTON RECOVERY, LLC, a Tennessee limited liability company,**

**Defendants.**

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## REPORT AND RECOMMENDATION

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Before the Court is Plaintiff Hartford Casualty Insurance Company's ("Hartford") "Motion to Set its Previously Filed FRCP 59 Post-Judgment Motion Before the Court" ("Motion to Set"). (D.E. #149). The "motion and costs hearing" were referred to United States Magistrate Judge Charmiane G. Claxton, and a hearing was held on the instant motion on November 4, 2009.[1] For the reasons set forth herein, the Court RECOMMENDS[2] that Plaintiff's Motion to Set be GRANTED.

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[1] At the hearing on the instant motion, Defendants asserted that the United States Magistrate Judge may not hear this motion pursuant to 28 U.S.C. § 636 and that, instead, the authority rests in the United States District Judge to enter a ruling on the pending motion. However, the United States Court of Appeals has held that a referral to a magistrate judge for post-judgment damages is proper pursuant to 28 U.S.C. § 636(b)(3), which provides that a "magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States." Callier v. Gray, 167 F.3d 977, 983 (6th Cir. 1999).

[2] The order referring the instant motion did not expressly state whether the motion was referred for determination or for report and recommendation. However, 28 U.S.C. § 636(b)(1)(a) states that a magistrate may "hear and *determine* any *pretrial matter*," with certain enumerated exceptions. 28 U.S.C. § 636(b)(1)(a) (emphasis added). Additionally, the United States Court of Appeals for the Sixth Circuit has held that Section 636(b)(1)(A) generally should not be used for a referral on issues of determination of damages because such questions are "not normally a pretrial matter." Callier, 167 F.3d at 982. As the instant motion is not a pretrial matter with Section 636(b)(1)(A), the Court finds that it is proper to issue a report and recommendation to the United States District Judge.

**I. Introduction**

This case arises from Hartford's Complaint for Declaratory Judgment and Breach of Contract in relation to a policy of insurance issued to Defendant Calcot, Ltd. ("Calcot"), the parent company of Defendant Global Cotton Recovery, LLC ("GCR"). On July 21, 2009, United States District Judge Bernice B. Donald issued an Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment on July 21, 2009. This order determined that the insurance policy is void and that all monies paid to Defendants by Hartford arising out of the insurance claims from the Mount Carmel Plant fire, including the $1,125,583.39 presently held in the registry of the Clerk of Court of the United States District Court for the Western District of Tennessee, should be returned to Hartford. Order Denying Def.'s Mot. for Summ. J. and Granting Pl.'s Motion for Summ. J. at 12.

On August 5, 2009, Hartford filed its Certificate of Interest and Costs ("Certificate") and its Memorandum in Support of the Certificate of Interest and Costs ("Memorandum") (D.E. #142). The Memorandum requested that the Clerk of Court tax the costs pursuant to Rule 54 of the Federal Rules of Civil Procedure and that the District Court alter or amend the judgment to award prejudgment interest pursuant to Rule 59 of the Federal Rules of Civil Procedure. This document was filed on the docket for the United States District Court for the Western District of Tennessee as a "Bill of Costs" rather than a motion for relief.

On August 25, 2009, Defendants filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. The parties submitted initial filings to the appellate court and mediated the case with a Circuit Mediator. However, the appellate briefing schedule was altered due to Hartford's contention that a Rule 59 motion was pending before the United States District

Court for the Western District of Tennessee.

On October 5, 2009, Hartford filed its Motion to Set (D.E.#149) requesting that its Memorandum be set and heard before the Court, rather than the Clerk of Court as stated in the Certificate, as the Court must determine the issue of whether pre-judgment interest is appropriate under Rule 59. The Motion to Set was referred to United States Magistrate Judge Charmiane G. Claxton with instructions that the referral encompassed the "motion and costs hearing." (D.E. #151).

Defendants filed a Response and Supplemental Response to Hartford's Motion to Set on October 20 and 23, 2009. The Response set forth the following issues: (1) the Certificate filed August 5, 2009 was not a Rule 59 Motion; (2) an award of prejudgment interest is inappropriate because the Judgment and the Order Granting Plaintiff's Motion for Summary Judgment omitted such an award; (3) the time to file a Rule 59 motion ran on August 10, 2009, and thus the Motion to Set filed on October 5, 2009 cannot be considered a timely filed motion under Rule 59; (4) under California law, an award of pre-judgment interest in a contract case is discretionary when damages are unliquidated; and (5) that, even if pre-judgment interest were proper, interest begins to accrue, at the earliest, from the date the Complaint was filed. The Supplemental Response asserted that the District Court does not have jurisdiction due to Defendants' August 25, 2009 filing of a Notice of Appeal. Following the filing of two separate responses to the Motion to Set, Hartford filed a Motion to Strike Defendants' Supplemental Response. United States Magistrate Judge Charmiane G. Claxton denied the Motion to Strike on October 29, 2009 and held a hearing on November 4, 2009 to address the referred Motion to Set and cost hearing.

**II. Analysis**

Initially, the Court notes that the analysis of the Motion to Set and costs hearing raises several issues. First, the Motion to Set requires the Court to determine the appropriate classification of the August 5, 2009 motion, as this classification is central to the analysis of whether jurisdiction exists in the District Court to set the motion as requested. Next, the Court must determine the proper award of costs as explicitly instructed by the District Judge. However, as discussed below, the Court finds that a determination of whether prejudgment interest should be awarded and, if so, the amount thereof, is not explicitly referred to the Magistrate Judge. Thus the Court will defer to the District Judge to determine the request for relief pursuant to Rule 59.

***A. Classification of August 5, 2009 Request for Pre-Judgment Interest***

The Court begins its analysis by determining the appropriate classification of Hartford's Certificate and Memorandum under the Federal Rules of Civil Procedure. Hartford asserts that the Certificate and Memorandum should be considered as a motion for costs pursuant to Rule 54(d)(1) and a motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. In support of its position, Hartford relies upon the Memorandum, which states as follows:

> *Pursuant to* FRCP 54(d)(1) and *FRCP 59*, Plaintiff Hartford Casualty Insurance Company submits this statement of costs *and interest* incurred in the above referenced matter, and *moves* that the Judgment of Dismissal entered on July 27, 2009 *be altered or amended* to reflect the award of the costs *and interest* in the total amount of $4,181,504.42.

Pl.'s Memo. at 1 (emphasis added). Hartford further asserts that the central argument contained in the Memorandum is whether the judgment should be altered or amended to include an award of prejudgment interest. Thus, Hartford contends that the substance of the Certificate and Memorandum, taken as a whole, make manifestly clear that Hartford intended for the filing to be

a motion for relief under Rule 59, even though it was not titled as such. Id. at 1-3.

Defendants respond that Hartford's Certificate and Memorandum do not constitute a properly filed Rule 59 motion. Defendants state that the Certificate itself does not mention Rule 59 whatsoever and is merely a request upon the Clerk of Court. Further, Defendants state that they would be unduly prejudiced if this Court were to consider Hartford's Certificate to be a Rule 59 motion because the case has been proceeding at the United States Court of Appeals for the Sixth Circuit.

Under Rule 7 of the Federal Rules of Civil Procedure, a request for a court order must be made by motion, must be in writing, must state with particularity the grounds for seeking the order, and must state the relief sought. Fed. R. Civ. P. 7(b)(1). The United States Court of Appeals for the Sixth Circuit has held that a motion under Rule 59 is "inadequate" if it does not state the grounds for the motion or if it is not filed within ten days as required by Rule 59. Intera Corporation v. Henderson, 428 F.3d 605, 611 (6th Cir. 2005) (citing Linsmeier v. Brown, 156 F.3d 1230 (6th Cir. 1998)). Further, the Henderson court held that a motion that merely had a "concise reference" to a "specific ground for the motion" satisfies the particularly requirement. 428 F.3d at 613. The Sixth Circuit has liberally construed these requirements, and has held that a motion that "makes no mention" of Rule 59 itself and "does not facially purport do be a Rule 59 motion should be construed as a timely filed motion to alter or amend" due to the nature of relief sought therein. Inge v. Rock Financial Corp., 281 F.3d 613, 617-18 (6th Cir. 2002).

In the instant case, it is undisputed that Hartford filed the Certificate and Memorandum in writing setting forth its arguments. The Memorandum contained detailed explanations of the bases for seeking an altered or amended judgment to award prejudgment interest and explicitly requested

this relief pursuant to Rule 59. Even though the Certificate by itself did not "facially purport" to be a Rule 59 request, the August 5, 2009 filing taken as a whole demonstrates that Hartford sought relief under Rule 59 to alter or amend the judgment. Thus, the Court finds that the Certificate and Memorandum states with particularity the grounds for seeking the order and states the relief sought in accordance with Rule 7.

The sole remaining issue under Rule 7 is whether the request was "made by motion." Fed. R. Civ. P. 7(b)(1). Defendants contend that the filing of the Certificate and Memorandum are not a proper "motion" because it was not styled as such either in the title of the document or in the electronic court filing system, where it was labeled "Bill of Costs." While Plaintiff concedes that the title and filing of this document are incorrect, the Memorandum explicitly "*moves* that the Judgment of Dismissal entered on July 27, 2009 be altered or amended to reflect the award of the costs and interest." Pl.'s Memo. at 1. Further, the United States Court of Appeals has held that, even if the title of a motion is "cryptic," the Court should determine whether "it is clear from its content" what relief the filing requests. United States v. Lowe, 978 F.2d 1260 (6th Cir. 1992). In the instant case, the content of the erroneously titled document makes abundantly clear that it requests, *inter alia*, that the judgment be amended to award prejudgment interest under Rule 59. As the judgment in this case did not reference prejudgment interest whatsoever, the Sixth Circuit has held that this is a proper motion to be pursued under Rule 59. Pogor v. Makita, U.S.A., Inc., 135 F.3d 384, 388 (6th Cir. 1998).

Finally, in addition to the requirements of Rule 7, Rule 59 requires that a motion filed under that rule must be served "no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e). As the Judgment in this case was filed on July 27, 2009 and the Certificate and Memorandum

were filed on August 5, 2009, the Court finds that the documents were timely filed in compliance with Rule 59. Accordingly, the Court RECOMMENDS that Hartford's Certificate and Memorandum be construed as a timely filed motion to alter or amend judgment in accordance with Rule 7 and Rule 59 of the Federal Rules of Civil Procedure.

***B. Jurisdiction***

Next, the Court must determine how the filing of the Certificate requesting relief under Rule 59 of the Federal Rules of Civil Procedure affects the jurisdictional analysis in this case. Specifically, the Court must analyze whether the August 25, 2009 Notice of Appeal divested the District Court of jurisdiction or whether the Notice of Appeal is ineffective due to the pending August 5, 2009 request for relief under Rule 59.

Notwithstanding the proceedings that have taken place to date in the appellate court, Rule 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure provides as follows:

> If a party files a notice of appeal after the court announces or enters a judgment–but before it disposes of any motion listed in Rule 4(a)(4)(A) [which includes a motion to alter or amend judgment under Rule 59]–the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Fed. R. App. P. 4(a)(4)(B)(i).

Additionally, the United States Supreme Court has held that a post-judgment motion for discretionary prejudgment interest constitutes a motion to alter or amend judgment, thus rendering the notice of appeal filed before disposition of the motion ineffective. Osterneck v. Ernst & Whinney, 489 U.S. 169, 176 (1989). Specifically, the Supreme Court stated that "a motion for discretionary prejudgment interest does not raise issues wholly collateral to the judgment in the main cause of action, nor does it require an inquiry wholly separate from the decision on the merits." Id.

at 176 (internal quotations and citations omitted). Thus, the rule setting forth that jurisdiction remains in the District Court "helps further the important goal of avoiding piecemeal review of judgments." Id. at 177.

Although Osterneck involved a motion for discretionary interest, the Court opined that its holding would apply to cases involving mandatory prejudgment interest as well. Id. at 176 n.3. ("We do not believe the result should be different where prejudgment interest is available as a matter of right. . . . [M]andatory prejudgment interest, no less than discretionary prejudgment interest, serves to remedy the injury giving rise to the action."); see also Pogor, 135 F.3d at 387. Thus, although the parties in the instant case dispute whether an award of prejudgment interest is mandatory or discretionary under California law, the Osterneck court has clarified that this issue does not affect the jurisdictional analysis.

Therefore, in accordance with Rule 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure and Osterneck, the Court RECOMMENDS that jurisdiction in this matter lies with the United States District Court for the Western District of Tennessee rather than the United States Court of Appeals for the Sixth Circuit. Thus, the Court RECOMMENDS that the Motion to Set be GRANTED. Further, the Court RECOMMENDS that the August 25, 2009 Notice of Appeal shall not be deemed effective in accordance with Rule 4(a)(4)(B)(i) until the order disposing of the August 5, 2009 request for relief under Rule 59 is entered.

***C. Costs***

Turning to the merits of Hartford's Certificate requesting relief under Rule 59, the Order of Reference explicitly states that the issue of costs is referred to the United States Magistrate Judge. At the hearing held before United States Magistrate Judge Charmiane G. Claxton, the parties stated

that they did not dispute any issues regarding the award of costs, including the amount, and did not dispute that this issue was properly referred to the Magistrate Judge. Accordingly, the Court RECOMMENDS that the costs requested in the Certificate in the amount of $6,828.52 be awarded to Hartford.

***D. Pre-Judgment Interest***

As to the request for of an award of pre-judgment interest, the Court allowed argument on this issue at the November 4, 2009 hearing. Defendants objected to the United States Magistrate Judge making a determination or issuing a report and recommendation on the issue of amending or altering the United States District Judge's judgment on the issue of pre-judgment interest. Specifically, Defendants stated that only the United States District Judge should be permitted to alter or amend a judgment issued by the District Court, and that United States District Judge Bernice B. Donald should determine whether the award is appropriate in the instant case due to her familiarity with the litigation and her issuance of the Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment.

Upon consideration, the Court determines that the issue of whether an award of prejudgment interest is proper was not explicitly referred to the United States Magistrate Judge for determination or for report and recommendation, as it is beyond the scope of the issues presented in the Motion to Set and is not encompassed in the instruction to hold a "cost hearing." Accordingly, the Court defers to the United States District Judge to determine the issues raised in the August 5, 2009 Rule 59 request, including whether an award of prejudgment interest is appropriate and, if so, the proper amount of the award.

***E. Amendment of Judgment***

Finally, upon consideration of the issues presented in the instant motion, the Court discovered that the Judgment entered in the instant case appears to be inconsistent with the relief

set forth in the District Court's Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment. Rule 60(a) of the Federal Rules of Civil Procedure provides that the court "may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice." Fed. R. Civ. P. 60. Accordingly, the Court RECOMMENDS that the judgment be amended pursuant to Rule 60 of the Federal Rules of Civil Procedure to set forth the proper relief granted by the District Court in its Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment.[3]

**III. Conclusion**

For the reasons set forth herein, the Court RECOMMENDS that the Motion to Set be GRANTED. The Court further RECOMMENDS as follows: (1) that Calcot's Certificate of Interest and Costs and its accompanying Memorandum be considered as a motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure; (2) that the timely filing of the Certificate requires that the United States District Court for the Western District of Tennessee retain jurisdiction over the instant matter until the Rule 59 motion has been disposed; (3) that costs in the amount of $6828.52 be awarded to Hartford; (4) that the United States District Court should hear and determine the issue of whether the judgment should be amended pursuant to Rule 59 to award prejudgment interest; and (5) that the United States District Court should *sua sponte* amend the judgment pursuant to Rule 60 to reflect the relief granted by the District Court's Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment.

[3] Although the Court recommends that the District Court alter or amend the judgment under Rule 60 of the Federal Rules of Civil Procedure due to the clerical error, the Court does not intend to suggest whether the District Court should or should not alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure to award prejudgment interest, as discussed, *supra*, at 8.

**IT IS SO ORDERED** this 5th day of November, 2009.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

**ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.**