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STATE COMPENSATION INSURANCE FUND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

SENECA INSURANCE COMPANY, INC.,

Plaintiff,

vs.

CYBERNET ENTERTAINMENT, LLC; et al.,

Defendants.

CYBERNET ENTERTAINMENT, LLC,

Third Party Plaintiff,

vs.

STATE COMPENSATION INSURANCE FUND,

Third Party Defendant.

CASE NO. 4:16-CV-06554-YGR

THIRD PARTY DEFENDANT STATE COMPENSATION INSURANCE FUND'S OPPOSITION TO CYBERNET ENTERTAINMENT, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND NOTICE OF CROSS MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT AGAINST CYBERNET ENTERTAINMENT, LLC. [FED R. CIV. PROC., RULE 56]

Date: July 18, 2017
Time: 2:00 p.m.
Courtroom: 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE THAT, on July 18 at 2:00 p.m. or as soon thereafter as this matter may be heard in Courtroom 1 of the United States District Court, Northern District of California, Oakland Division located at 1301 Clay Street in Oakland, California, Third Party Defendant State Compensation Insurance Fund ("State Fund") will and hereby does move the Court, per the Federal Rules of Civil Procedure, Rule 56, for summary judgment on the grounds that State Fund had no duty to defend or indemnify Third Party Plaintiff Cybernet Entertainment, LLC ("Cybernet") in the following civil actions: (1) John Doe v. KINK.COM, et al. (San Francisco Superior Court Case No. CGC-15-545540); (2) Cameron Adams v. KINK.COM, et al. (San Francisco Superior Court Case No. CGC-15-547035), and (3) Joshua Rodgers v. KINK.COM (San Francisco Superior Court Case No. CGC-15-547036) ("lawsuits").

State Fund requests that the Court grant summary judgment in its favor, by finding that State Fund has no obligation to defend or indemnify Cybernet for the lawsuits under Part Two of the State Fund Policy.

State Fund makes this motion on the grounds that, as a matter of law, State Fund owes no duty to defend or indemnify Cybernet under Part Two of the Policy because: (1) the plaintiffs in the lawsuits have as their exclusive remedy under California law for their alleged injuries, workers' compensation, the coverage under Part One of the State Fund Policy, and (2) the underlying allegations do not give rise to a duty to defend under Part Two of the State Fund Policy because the underlying allegations are barred from coverage pursuant to California law and/or the express language of the State Fund Policy. State Fund's motion is based upon this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities, State Fund's Separate Statement of Undisputed Material Facts, the Declaration of Jennifer D. Wellman, the Declaration of Emily Carpio, the pleadings and records on file in this action; and on such further oral and documentary evidence that may be presented to this Court at the hearing of this motion.

I. INTRODUCTION

This case involves three injured workers who are attempting to get two bites at the same apple. On the one hand, they seek to recover workers' compensation benefits before the Workers'

Compensation Appeals Board ("WCAB") and, on the other, seek to recover civil damages from their employer in their superior court lawsuits ("lawsuits") for the same injuries. As the employer's workers' compensation carrier at the time, it is State Fund that is caught in the crossfire.

The three workers, John Doe, Cameron Adams, and Joshua Rodgers, plaintiffs in the superior court lawsuits, ("plaintiffs") work in the adult pornography business and allege that, in 2013, they were injured while performing in pornographic films directed and produced by Cybernet Entertainment, LLC ("Cybernet"). At the time of the alleged injuries, Cybernet had a workers' compensation insurance policy ("Policy") issued by State Fund. Following the alleged injuries, the workers filed separate claims for workers' compensation benefits under Cybernet's workers' compensation policy.

Consistent with its obligations under the Policy, State Fund accepted the workers' claims because the alleged occupational injuries occurred during the coverage period. State Fund has paid appropriate medical expenses for the workers' claims. The claims are currently pending before the WCAB.

One year later, and while State Fund continued to defend the actions in the WCAB, the three workers each filed separate lawsuits against Cybernet seeking damages for the *same injuries* for which they continue to seek recovery for workers' compensation benefits. In response, Cybernet again called on State Fund, this time tendering to State Fund the defense of the lawsuits under the employer's liability portion of the Policy. Initially, State Fund provided Cybernet a defense in the lawsuits under a reservation of rights. This defense was later withdrawn in December 2016.

Cybernet brought a third party complaint against State Fund in this proceeding seeking a declaration that State Fund has a duty to defend Cybernet in the lawsuits under the employer's liability portion of the Policy.

On May 23, 2017, Cybernet filed a motion for partial summary judgment. Cybernet seeks a determination that State Fund has a duty to defend Cybernet in the lawsuits under the employer's liability portion of the policy. State Fund hereby opposes that motion and, on its own motion, seeks a declaration from this Court that State Fund has no duty to defend under the employer's liability portion of the Policy because: (1) all allegations in the lawsuits are covered by California's workers'

compensation statutory framework and are expressly barred from employer's liability coverage; (2) State Fund has no duty to defend Cybernet against Cybernet's own 'willful acts;' and (3) any allegations relating to Cybernet's intentional conduct are expressly excluded from employer's liability coverage by the provisions of the Policy.

As a result, Cybernet's motion for partial summary judgment must be denied and State Fund's motion for summary judgment must be granted in its entirety.

II. FACTUAL BACKGROUND

The plaintiffs allege that they were injured in the course and scope of their work for Cybernet on various occasions between May and August 2013. (Declaration of Jennifer D. Wellman ("Wellman Decl.") at ¶¶ 2-4, Exs. A-C.) At the time of the alleged injuries, Cybernet had a workers' compensation insurance policy issued by State Fund. (State Fund Separate Statement of Material Facts ("State Fund SSUMF") No. 1; Cybernet's Separate Statement of Undisputed Material Facts ("Cybernet SSUMF"), No. 56.) The Policy has two parts: Part One is for payment of workers' compensation benefits ("Part One") and Part Two is for employer's liability insurance ("Part Two"). Part Two defines the very narrow and only circumstances under which State Fund is required to defend and/or indemnify Cybernet against causes of action by workers employed by Cybernet for damages in civil proceedings (i.e. outside the workers' compensation system). (Wellman Decl., ¶ 5, Ex. D, Policy, Part Two.)

A. The Workers' Compensation Claims

Prior to filing their lawsuits, the plaintiffs filed claims with State Fund seeking workers' compensation benefits for their alleged injuries. (State Fund SSUMF No. 2) State Fund has accepted all three claims for purposes of adjusting the claims and paying benefits, as appropriate. (SSUMF Nos. 3, 4.) State Fund was first advised of the three separate workers' compensation claims shortly after the alleged injuries occurred in the Summer of 2013. (Declaration of Emily Carpio ("Carpio Decl.") at ¶¶ 3, 8, 12.) To date, State Fund has paid a portion of Cameron Adams' claim for which she produced medical evidence of her injury. (Carpio Decl. at ¶ 9.) State Fund also paid medical expenses for John Doe that were incurred during the initial thirty (30) day period in which State Fund adjusted the claim. (Carpio Decl. at ¶ 7.) To date, State Fund has denied liability

for any remaining portions of the three claims because the plaintiffs have not yet presented sufficient evidence proving that they suffered the claimed injury/disease during the course and scope of employment. (Carpio Decl. at ¶¶ 4, 9, 13)

In October 2014, the plaintiffs filed separate applications with the WCAB disputing State Fund's initial denial; those actions are currently pending. (Carpio Decl. at ¶¶ 4, 9, 14.) Should the plaintiffs prove in the WCAB action that he/she has suffered an occupational injury/disease in the course and scope of their employment with Cybernet, State Fund will pay all appropriate workers' compensation benefits that are due and owing under Part One of the Policy. (State Fund SSUMF No. 9.)

B. The Defense and Withdrawal of Defense by State Fund of the Lawsuits

In June and July 2015, respectively, the three workers filed the following superior court lawsuits: (1) John Doe v. KINK.COM, et al. (San Francisco Superior Court Case No. CGC-15-545540; (2) Cameron Adams v. KINK.COM, et al. (San Francisco Superior Court Case No. CGC-15-547035, and (3) Joshua Rodgers v. KINK.COM (San Francisco Superior Court Case No. CGC-15-547036 ("lawsuits"). (Wellman Decl., Exs. A-C.) In response, Cybernet tendered the defense of the lawsuits *under Part Two of the Policy* which State Fund initially accepted under a reservation of rights. (Declaration of Karen Tynan In Support of Cybernet's Motion for Summary Judgment ((("Tynan Decl."), ¶ 4, Ex. 1.) On December 7, 2016, State Fund withdrew its defense of the lawsuits under Part Two of the Policy which has given rise to this action. (Tynan Decl., ¶ 5, Ex. 2.)

C. Summary Of The Underlying Allegations

The complaints in the lawsuits allege the following causes of action[1]:

Negligence Based Causes of Action (all plaintiffs):

Number One - Negligence

Number Two - Negligence Per Se

Number Five - Breach of Implied Covenant of Good Faith and Fair Dealing

Number Six - Negligent Supervision

[1] The ninth cause of action for premises liability in the lawsuits is not alleged against Cybernet.

Number Seven - Negligent Hiring/Retention

Under the circumstances in this case, there is no theory under which State Fund would have a duty to defend Cybernet against the above negligence based causes of action. As discussed below, there is no coverage, whatsoever, for negligence based causes of action under Part Two of the Policy. The Court's inquiry is, therefore, confined to whether any of the intentional allegations trigger employer's liability coverage under Part Two of the Policy.

Intentional Conduct Causes of Action[2]

Number Three - Intentional/Fraudulent Misrepresentation

Number Four - Civil Conspiracy to Commit Fraud

Number Eight - Intentional Infliction of Emotional Distress

Number Ten - Battery[3]

(Wellman Decl., Exs. A-C.) In addition to the fact that these claims are covered by Part One of the Policy, there is no coverage under Part Two of the Policy because the plaintiffs allege that Cybernet's intentional acts "were despicable and committed knowingly, willfully and maliciously, with the intent to harm, injure, vex, annoy and oppress Plaintiff and with a conscious disregard of Plaintiff's rights, health, and safety." (State Fund SSMUF No. 10; Wellman Decl, Ex. A at ¶¶ 108, 120, 165, 189; Ex. B at ¶¶ 95, 107, 152, 191; and Ex. C at ¶¶ 93, 105, 150.) There is, therefore, no coverage for these causes of action under Part Two of the Policy given the 'intentional act exclusion' and California Insurance Code section 533, discussed below.

D. Policy Information

State Fund issued California Workers' Compensation and Employer's Liability Policy, policy number 1704509-2012, to Cybernet Entertainment, LLC for the policy period of August 20, 2012 to August 20, 2013. The Policy automatically renews every August 20 until cancelled (Cybernet SSUMF No. 56.) Cybernet does not dispute that State Fund has no duty to defend Cybernet in the lawsuits under Part One of the Policy. (State Fund SSUMF No. 13.) As provided

[2] The plaintiffs allege ratification in their intentional tort causes of action only.

[3] The tenth cause of action was alleged by Doe and Adams only.

above, the tender of defense of the lawsuits was made pursuant to Part Two of the Policy only. (Tynan Decl.) at ¶¶ 4, 5; Ex. 1, 2.). Part Two of the Policy provides:

> PART TWO – EMPLOYER'S LIABILITY INSURANCE
>
> A. How This Insurance Applies
>
> This employer's liability insurance applies to bodily injury by accident or bodily injury by disease of an employee. Bodily injury means physical or mental injury, including resulting death. Bodily injury does not include emotional distress, anxiety, discomfort, inconvenience, depression, dissatisfaction or shock to the nervous system, unless caused by either a manifest physical injury or a disease with a physical dysfunction or condition resulting in treatment by a licensed physician or surgeon. Accident is defined as an event that is neither expected nor intended from the standpoint of the insured.
>
> 1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
> 2. The employment must be necessary or incidental to your work in California.
> 3. Bodily injury by accident must occur during the policy period.
> 4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.
> 5. If you are sued, the suit and any related legal actions for damages for bodily injury by accident or by disease must be brought under the laws of the State of California.
>
> B. We Will Pay
>
> We will pay all sums you legally must pay as damages because of bodily injury to your employees eligible for benefits under this policy, provided the bodily injury is covered by this employer's liability insurance.
>
> * * *
>
> C. Exclusions
>
> This insurance does not cover:
>
> * * *
>
> *4. any obligation imposed by a workers' compensation, occupational disease, unemployment compensation or disability benefits law, the provisions of any federal law unless endorsed on this policy or any similar law;*
> *5. damages or bodily injury intentionally caused or aggravated by you*;

(Wellman Decl., ¶ 5, Ex. D, Part Two (emphasis added).)

III. SUMMARY JUDGMENT STANDARD

In the context of employer's liability coverage, a moving party is entitled to summary judgment if it proves that there is no duty to indemnify the underlying claims because of governing law, policy terms, or exclusions. *Everest Nat'l Ins. Co. v. Valley Flooring Specialties*, 2009 U.S. Dist. LEXIS 36757, No. CV F 08-1695 LJO GSA (E.D. Cal. 2009). "[T]he duty to defend *is not unlimited 'and is measured by the nature and kinds of risks covered by the policy*." *Id.*, 2009 U.S. Dist. LEXIS at 21 (quoting *Waller v. Truck Ins. Exch.*, 11 Cal. 4th 1, 19 (1995)) (emphasis added).

Where a moving party proves that there is governing law and policy language that precludes coverage, there can be no reasonable expectation of a defense and consequently there is no duty to defend. *Reagens Vacuum Truck Serv., Inc. v. Beaver Ins. Co.*, 31 Cal. App. 4th 375, 383 (1994). The insured may not "speculate about unpled third party claims to manufacture coverage." *Gen. Star Indem. v. Schools Excess Liability*, 888 F. Supp. 1022, 1029 (N.D. Cal. 1995), quoting, *Hurley Constr. Co. v. State Farm Fire & Cas. Co.*, 10 Cal. App. 4th 533, 535 (1992).

IV. THE DUTY TO DEFEND UNDER A *WORKERS' COMPENSATION POLICY* IS VERY NARROW

As a perfunctory matter, it is worth noting that all 'duties to defend' are not created equal. The duty to defend under the employer's liability insurance portion of a workers' compensation insurance policy is more narrow than that of a general liability policy. The Court in *Producers Dairy Delivery Co. v. Sentry Ins. Co.* ("Producers Dairy") directly rejected the appellants' attempt to compare the workers' compensation duty to defend to that of a general liability policy. *Producers Dairy*, 41 Cal. 3d 903 (1986). In doing so, the Court cited to applicable workers' compensation insurance code sections to support its finding that the workers' compensation duty to defend was not as broad as the duty to defend in other insurance policies.

> Insurance Code section 11750, authorizing the creation of a rating organization for workers' compensation, states in pertinent part: "The purpose of this article is to promote the public welfare by regulating concert of action between insurers in collecting and tabulating rating information and other data that may be helpful in the making of adequate pure premium rates for workers' compensation insurance and for employers liability insurance incidental thereto and written in connection therewith ...." (Italics added.) California Insurance code section 108 provides that general liability insurance shall not include workers' compensation coverage.

> The Insurance Commissioner has also ruled that other classes of insurance may not be included in the same policy providing workers' compensation and employer's liability insurance. (Cal. Admin. Code, tit. 10, § 2350 [general rule 8, published separately in the Manual of Rules, Classification and Basic Rates for Workers' Compensation Insurance].)

Producers Dairy, 41 Cal. 3d at 914-915.

The public policy explained in *Producers Dairy* is further bolstered by the limited statutory carve-outs to the broad scope of the workers' compensation 'exclusive remedy rule'. Virtually all injuries suffered in the course and scope of employment fall within the ambit of workers' compensation, even if benefits ultimately are not payable for the subject injury. Specifically, there are a few rare instances where the Legislature has carved out injuries from the exclusive remedy provisions of the workers' compensation law. These "carve-outs" authorize such employees to sue their employers in civil court for damages, but not for workers' compensation benefits which must be pursued before the WCAB. Cal. Lab. Code §§ 3602, 4558. Importantly, and as discussed below, workers' compensation insurance carriers may further limit the scope of employer's liability coverage with express exclusions in the policy, as State Fund has done in its Policy, further limiting an insurer's duty to defend. *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 809 (1982).

V. LEGAL ARGUMENT

A. The Court Must Deny Cybernet's Partial Summary Judgment Motion Because It Cannot Prove That The Plaintiffs Were Cybernet Employees

A prerequisite to coverage under workers' compensation or employer's liability coverage is that the underlying claim must be made by an *employee of the insured*. Cal. Ins. Code § 11750.1(f) (Employer's liability insurance means "insurance of any liability of employers for injuries to, or death of, employees arising out of, and in the course of employment …") (emphasis added); *Producers Dairy*, 41 Cal. 3d at 913-14; (Wellman Decl., Ex. D, Policy, Part Two, A -"This employer's liability insurance applies to bodily injury by accident or bodily injury by disease of an employee.").

To prevail on its motion for partial summary judgment, Cybernet must prove as a matter of law that Cybernet was the plaintiffs' employer at the time of the alleged injuries. An independent

contractor is not an employee. *S.G. Borello & Sons v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350-51 (1989).

John Doe and Joshua Rodgers both assert that they were independent contractors, not employees. (Wellman Decl., Ex. A at ¶ 21, and Ex. C at ¶ 26). Cybernet has presented no evidence that Doe or Rodgers were not independent contractors at the time of the alleged injuries. In her complaint, Adams does not assert that she was an employee of Cybernet. Instead, Adams states that her talent agent was contacted by Kink.com. (Wellman Decl., Ex. B at ¶ 23.) Cybernet has produced no other evidence proving that Adams was one of its employees. As a matter of law, Cybernet has the burden to prove that the plaintiffs were Cybernet employees in order to prevail on its motion. Cybernet, as the moving party, has the burden to show that all elements of its cause of action have been met. Cybernet has failed to prove the required employment status for coverage under the Policy. Therefore, this Court must deny Cybernet's motion for partial summary judgment its entirety.

Notably, State Fund is not raising the status of the plaintiffs' employment in its summary judgment motion because such a distinction does not change the fact that there is no theory under which State Fund has a duty to defend Cybernet in the lawsuits. Regardless of whether the plaintiffs were independent contractors or employees of Cybernet, State Fund has no duty to defend Cybernet in the lawsuits under Part Two of the Policy. *Power Fabricating, Inc. v. State Comp. Ins. Fund*, 167 Cal. App. 4th 1446, 1455 (2008) ("[T]he issue regarding who employed Kryzak at the time of the accident does not preclude summary judgment for State Fund. If Kryzak was not Power's employee, ELI coverage would not be triggered. If Kryzak was Power's employee, the workers' compensation exclusion would apply."). The Court may, therefore, grant State Fund's summary judgment motion without rendering any affirmative determination of the plaintiffs' 'employment status' at the time of their alleged injuries.

B. State Fund Has No Duty To Defend Cybernet In The Lawsuits Under Part Two Of The Policy Because The Claims Are Exclusively Covered By California's Workers' Compensation System

The court must deny Cybernet's motion and grant State Fund's motion because State Fund has no duty to defend Cybernet in the lawsuits under Part Two of the Policy for claims that are

exclusively covered by California's workers' compensation system.

Part One of State Fund's Policy provides for workers' compensation benefits. Workers' compensation insurance covers claims by injured workers who suffer injuries or occupational diseases in the course and scope of their employment. Cal. Lab. Code § 3600; see also *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem.* ("La Jolla Beach")

Workers' compensation benefits are designed to provide the injured worker with the medical treatment he/she needs in order to recover from any work related injury or illness, partially replace the wages he/she loses during recovery, and help the injured worker return to work. Generally, all injuries suffered in the course and scope of employment are covered by California's workers' compensation system, and provide the exclusive remedy for the employee. Labor Code section 3602(a) provides:

> Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, *the sole and exclusive remedy of the employee* or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."

(emphasis added).

Injured workers' claims are litigated before the WCAB. Section 3600 provides in pertinent part:

> (a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:
>
> ***
>
> (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.
>
> (3) Where the injury is proximately caused by the employment, either with or without negligence.

***

> (7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

The exclusive remedy doctrine extends, therefore, to claims *based on negligence and intentional acts* under most circumstances. Cal. Lab. Code § 3600(a)(3),(a)(7). Workers' compensation laws even extend to claims for intentional acts *including those injuries that result when the employee is not the initial aggressor*. Cal. Lab. Code § 3600 (a)(7) (emphasis added).

Workers' compensation and employer's liability insurance are mutually exclusive. *Culligan v. State Comp. Ins. Fund*, 81 Cal. App. 4th 429, 436 (2000). Specifically, if an employee's claim is compensable under California workers' compensation law, then it is not covered by the employer liability portion of a workers' compensation policy. *La Jolla Beach.*, 9 Cal. 4th at 42.

In *Producers Dairy*, worker Henry Noyes was seriously injured when he fell while unloading milk from one of Producers' trucks. *Producers Dairy*, 41 Cal. 3d at 907. Sentry Insurance had issued a joint "Workers Compensation and Employer Liability Policy to LAS and Producers." *Id*. Noyes, as an employee of LAS, sought and collected workers' compensation benefits under the Sentry policy. *Id*. After collecting workers' compensation benefits from Sentry, Noyes and his wife sued Producers for personal injuries and loss of consortium, respectively, on the theory that Producers failed to maintain the delivery truck in a safe condition. *Id*. The Court held that because Noyes collected benefits under Sentry's workers' compensation policy, he and his wife were not entitled to recover damages for personal injuries and loss of consortium under the employer liability portion of the policy. *Id*. Producers argued that Sentry had a duty to defend Producers in the underlying action under the employer liability portion of the policy. *Id*. at 911-12. The Court rejected Producers' argument and held:

> Rather than filling any gaps in coverage, appellants' proffered construction of the policy would require Sentry to pay for Noyes's injuries twice, once by providing on LAS's behalf workers' compensation benefits owing to Noyes as an LAS employee, and the second time by providing on Producers' behalf indemnity for Noyes's tort suit as a nonemployee. This dual recovery under a single policy is contrary to both the plain meaning of the policy itself, and the concept of employers' liability insurance as it is commonly understood.

Id. at 917. The Court explained that "these two kinds of coverage are mutually exclusive. Most employers' liability policies limit coverage to liability for which the insured is held liable as an employer." *Id.* at 916. Here, as in *Producers Dairy*, the plaintiffs are attempting to disguise workers' compensation benefits as inflated damages sought in civil court. The plaintiffs are attempting to recover both workers' compensation benefits and civil damages for the same injuries – the very reason, and policy behind, why the two coverages are mutually exclusive.

There are nine causes of action alleged against Cybernet in the Doe and Adams actions, and eight causes of action alleged against Cybernet in the Rodgers action. (Wellman Decl., Exs. A-C.) For *all* causes of action, the plaintiffs allege that they were performing service growing out of and incidental to his/her employment and were acting within the course of his/her employment. The plaintiffs also allege that their injuries were proximately caused by their employment, either with or without negligence. Indeed, the same information and allegations submitted in the lawsuits are currently pending before the WCAB. (Carpio Decl. ¶¶ 4, 8, 12 and Cybernet SSUMF Nos. 16, 35, 52.) Given the underlying allegations, Cybernet must show that an exception to California's exclusive remedy rule applies in order to allow coverage under Part Two.

Rather than provide a viable exception to the workers' compensation exclusive remedy rule, Cybernet argues that State Fund's failure to pay the full amount of the claimed workers' compensation benefits under Part One triggers State Fund's obligation to defend Cybernet against those same claims for damages in the lawsuits under Part Two of the Policy. In support of its position Cybernet cites only to State Fund's claim denial letters which provide that: "there is no medical evidence to support that you [the workers] sustained a work related injury while performing your job with Cybernet Entertainment LLC." (Tynan Decl. Ex. 4.) To adopt Cybernet's approach is to allow every injured worker to file a civil action for damages against his/her employer in state court after their claim for workers' compensation benefits is denied – this approach circumvents public policy and it is not the law.

Indeed, while State Fund defends against workers' compensation claims under Part One of the Policy, it is under no obligation to pay any portion of the claims if industrial and medical causation cannot be shown. See *LaTourette v. Workers' Comp. Appeals Bd.*, 17 Cal. 4th 644, 650

(1998), quoting *McAllister v. Workmen's Comp. App. Bd.* 69 Cal. 2d 408 (1968) ("The applicant for workers 'compensation benefits has the burden of establishing the reasonable probability of industrial causation'."). The outcome of the workers' compensation claim litigated before the WCAB does not give the employee the right to sue its employer for civil damages. Such an interpretation directly contravenes the very purpose of the workers' compensation exclusive remedy rule. Cal. Lab. Code § 3600, *et seq*.

If the WCAB were to hold that the plaintiffs suffered their injury/disease in the course and scope of their employment with Cybernet, the plaintiffs would be entitled to workers' compensation benefits from State Fund. (Carpio Decl. at ¶¶ 6, 11, 15.) Determination of those issues is within the exclusive jurisdiction of the WCAB and the benefits are afforded under Part One of the Policy only within the workers' compensation system. State Fund is under no obligation to defend Cybernet against those same allegations in superior court. On this basis alone, State Fund's motion must be granted and Cybernet's motion must be denied because all underlying allegations are covered by California's workers' compensation exclusive remedy rule.

1. The Workers' Compensation Exclusion in Part Two Precludes Coverage For Claims Covered By Part One Of The Policy

"An insurance policy, like any other contract, must be construed in its entirety, with each clause lending meaning to the other." *Producers Dairy*, 41 Cal. 3d at 916-17; citing *Holz Rubber Co., Inc. v. Am. Star Ins. Co.*, 14 Cal. 3d 45, 56 (1975); Cal. Civ. Code § 1641; see also *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 465 (1974) (holding that a clause when read in conjunction with other parts of the policy, can be interpreted as excluding persons eligible for workers' compensation benefits *whether or not they receive such benefits*.).

Consistent with California's exclusive remedy rule, Part Two of the Policy contains a workers' compensation exclusion that provides that "This insurance does not cover: … 4. Any obligation imposed by workers' compensation, occupational disease, unemployment compensation or disability benefits law, the provision of any federal law unless endorsed on this policy or any similar law;…" (Wellman Decl., Ex. D, Part II, C. 4.) Part Two of the Policy, therefore, expressly bars coverage for those claims covered by Part One of the Policy, workers' compensation insurance.

In *Transamerica Insurance Co. v. Superior Court*, the Court interpreted State Fund's Policy and specifically the workers' compensation law exclusion. In interpreting the language, the Court held:

> "[T]here is a clear exclusion in the amendment relating to the employer's liability portion of the Policy, excluding coverage 'for any obligation for which the insured or any carrier as his insurer may be held liable under any workers' compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law. ...'
>
> This clearly indicates that where workers' compensation liability exists, there is no coverage under the employer's liability portion of the Policy, thereby affording only defense and indemnity for the workers' compensation claim. A workers' compensation claim was successfully made in this case and a defense was provided to [the employer] for the claim."

Transamerica Ins. Co. v. Sup. Court, 29 Cal. App. 4th 1705, 1715 (1994).

The exclusion in the State Fund Policy was also analyzed by the Court of Appeal in the *Culligan* case. In that case, an employer was sued by three of his employees who alleged wrongful termination and discharge based on retaliation for having complained about noxious odors coming from a printing and dry cleaning business leased by the employer in the same building. *Id.* at 432. The employees alleged respiratory distress, headaches, nausea, and other health problems, but the relief they sought in the complaint was only for lost wages and benefits, plus emotional distress as a result of being fired. *Id.* The employees' complaint alleged causes of action for breach of employment contract, breach of the implied covenant of good faith, and wrongful discharge. *Id.*

The employer, Culligan, tendered the claims to State Fund, under its workers' compensation and employer's liability policy. *Culligan*, 81 Cal.App.4th at 432-33. State Fund declined the tender of defense and Culligan brought a separate action for breach of contract, bad faith, unfair business practices, and declaratory relief, alleging that, at a minimum, a defense obligation was owed under the employer's liability provision of the Policy. *Id.* at 433. The trial court granted summary judgment to State Fund, Culligan appealed, and the Court of Appeal affirmed the trial court's order granting summary judgment to State Fund. *Id.*

The Court held that the "exclusion for workers' compensation benefits 'either payable' or required to be provided' … was held to manifest a clear intention to exclude coverage for any injury

incurred in the course and scope of employment." *Id.* at 438, (citing *Bailey v. Interinsurance Exch.*, 49 Cal. App. 3d 399, 403 (1975)). The court continued,

> [T]he 'obligation imposed' by the workers' compensation law is readily understood to mean the obligation as an employer, under workers' compensation to provide benefits. The inchoate obligation exists whether or not an employee actually chooses to seek benefits... under Culligan's [the employee's] construction, that structural distinction would be lost, for an employee required by the exclusivity rule to use only workers' compensation could simply choose not to use it and consequently create a duty to defend. The cost limits of the compensation bargain would be lost, all at the whim of the employee.

Culligan, 81 Cal. App. 4th at 439.

As a result, the plaintiffs' sole remedy with regard to their claims covered by the workers' compensation system is to pursue their pending actions in the WCAB *whether or not they are actually awarded benefits*.

Here, regardless of whether the plaintiffs pursue their WCAB actions is irrelevant to State Fund's coverage obligations under Part Two. What is important is that the plaintiffs are required to comply with workers' compensation laws for injuries sustained in the course and scope of their employment. In that vein, there is no dispute that State Fund has provided Cybernet with all appropriate insurance coverages and services under the workers' compensation insurance portion (Part One) of the Policy. Specifically, State Fund has affirmed the existence of coverage for purposes of adjusting, defending, and paying workers' compensation benefits, if any are owed. (State Fund SSUMF Nos. 4, 8.)

Accordingly, Cybernet's motion must be denied and State Fund's motion must be granted in its entirety because the plaintiffs' claims are covered by Part One of the policy and, therefore, barred from coverage under the express exclusion (Part II, C.4.) in Part Two of the Policy.

2. State Fund's Motion Must Be Granted Because No Applicable *Statutory* Exceptions To California's Workers' Compensation Exclusive Remedy Rule Apply To This Case

Express statutory exceptions to the workers' compensation exclusive remedy rule contained in Labor Code section 3600 are found at Labor code sections 3602 (b), 3706 and 4558 – none of them are applicable to the facts here.

Labor Code section 3602 (b) provides:

> (b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:
>
> (1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.
>
> (2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.
>
> (3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

The exceptions provided in subsections (b)(1) and (b)(2) do not apply here given Insurance Code section 533 and/or the "intentional" act exclusion in Part Two of the Policy (discussed in sections C.1. and C.2. below). There are no allegations in the lawsuits that a defective product caused or contributed to the alleged injuries. (Wellman Decl., Exs. A-C.) Labor Code section 3602 (b) is, therefore, not applicable.

Labor Code section 3706 refers to an employer's failure to secure workers' compensation directly. There is no dispute that Cybernet secured a workers' compensation insurance policy from State Fund. Nor does Labor Code section 4558 (b) apply, as there are no allegations in the lawsuits regarding a guard on a power press. (Wellman Decl., Exs. A-C.)

3. State Fund's Motion Must Be Granted Because *No Common Law* Exceptions to California's Workers' Compensation Exclusive Remedy Rule Apply

In support of its "common law exception" argument, Cybernet relies on a narrow body of case law which holds that an action can be maintained against an employer for damages where an employer's conduct is of such an extreme nature that it falls outside the employment compensation agreement. See *Fermino v. Fedco ("Fermino")*, 7 Cal. 4th 701 (1994) and *Lee v. W. Kern Water*

Dist. ("Lee"), 5 Cal. App. 5th 606 (2016). Those cases are factually distinguishable and the legal principles discussed therein are not applicable here.

In *Fermino*, the court explained that workplace injuries fell into three potential categories: (1) injuries caused by employer negligence or without employer fault that are compensated at a normal rate under the workers' compensation system; (2) injuries caused by normal employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under the workers' compensation system, and (3) intentional employer conduct which brings the employer beyond the boundaries of the compensation bargain, for which workers' compensation is not an employee's exclusive remedy. (Cybernet's Motion at 11:7-14), citing *Fermino,* 7 Cal. 4th at 713-14.

As stated in Cybernet's motion: "The *Lee* court applied *Fermino* to approve a jury instruction stating, 'Employer conduct is considered outside the scope of the worker's compensation scheme when the employer steps outside of its proper role or engages in conduct unrelated to the employment'." (Cybernet Motion, 12:15-17); *Lee.*, 5 Cal. App. 5th at 618 . Cybernet cites *Fermino*, "What matters, the court explained, is whether the conduct itself, concretely, is of the kind that is within the compensation bargain.'' (Cybernet Motion, 11:24-25.) (internal quotation marks omitted); *Fermino,* 7 Cal. 4th at 718.

As for the first and second categories, the plaintiffs' allegations of negligent and intentional conduct falls within California's workers' compensation exclusive remedy rule and is excluded from Part Two coverage of the Policy.

Cybernet rests the crux of its "common law exception" argument on its assertion that the plaintiffs allege conduct that falls under the third category of workplace injuries, those "outside the compensation bargain." Cybernet's argument fails as a matter of law because the allegations in the lawsuits relate to Cybernet's conduct as the plaintiffs' employer (i.e. recruitment, directing, and producing pornographic material).

Specifically, all allegations in the lawsuits stem from the recruitment, direction, and filming of pornographic movies. (Wellman Decl., Exs. A-C.) Cybernet cannot dispute its role as the employer regarding these allegations. Simply stated - Cybernet directs and produces pornographic

films. All acts *alleged* relate to the recruitment, filming, and post-filming interview activities. Cybernet expressly concedes that "Cybernet is in the business of producing videos depicting sexually explicit activity and bondage." (Cybernet Motion at 10:14-15.) Cameron Adams alleges:

> Cybernet employs the staff and management who work on the various productions for PUBLICDISGRACE.COM… Defendant KINK.COM comprises a network of fetish and BDSM (bondage, discipline, sadism, masochism) sites,… Defendant PUBLICDISGRACE.COM is one of Defendant KINK.COM's BDSM sites that describes itself as follows: "Public Disgrace is hardcore public sex with women fu [**]ed and bound while being used in extreme gangbangs and BDSM sex in public.

(Wellman Decl., Ex. B at ¶ 18.)

Indeed, the mere availability of a 'limits sheet' in which workers may limit the types of acts they are to perform or to which they would be subjected, and the plaintiffs' inherent acknowledgement that certain undesired conduct is a very real possibility, shows that the alleged conduct was a contemplated part of the employment. Even more, the plaintiffs allege that they were put on notice of risks during the shoot when they observed blood pathogens, yet they continued to perform despite their observations during the filming. (Cybernet SSUMF Nos. 6, 28, 45.) Moreover, Doe and Rodgers both allege that they knew prior to filming that Cybernet did not require models to be tested for STDs or HIV. (Wellman Decl., Ex. A at ¶ 31, Ex. C at ¶ 35.) Adams alleges that she was "encouraged by KINK Defendants to interact with members of the public," that she knew had not been tested for HIV or STDs, "and got paid extra to do so." (Wellman Decl., Ex. B at ¶ 41.) Adams was, therefore, compensated extra for the very work she agreed to perform, and for which she now seeks damages.

Finally, all three plaintiffs include in their underlying allegations an article that was published several months before the incidents that gave rise to their alleged injuries, as follows:

> On February 20, 2013, *SF Weekly* published a front page article titled "Gag Order: Sex Workers Allege Mistreatment at Kink.com." In the article, author Kate Conger outlines ACWORTH's recent arrest for cocaine possession, stating "many were surprised by the misstep from a man who's built his empire on a strict code of ethical behavior and transparency ... " Ms. Conger continues:
>
> "However, even as *Kink* flourishes - it's nearly doubled the number of sites it operates since moving into the Armory – doubts about its ethical standards linger. The Company attracted unwanted attention last summer when it abruptly switched its cam

> girls' pay rate and sparked a debate about its commitment to models' rights. Now, two former models allege they were denied workers' compensation when injured on Kink sets, one of whom further states she was coerced into a performance that left her with long·standing injuries and was offered money in exchange for keeping quiet about those injuries. Other workers claim to have been terminated ... when they questioned Kink's business practices, including the use of an erectile dysfunction drug called Trimix ....
>
> The potential legal quandaries revealed by former Kink models challenge Acworth's ethical claims, and this isn't the first time he's been called out for going against his models' rights and shooting rules."

(Wellman Decl., Ex. A at ¶ 42, Ex. B at ¶ 43, and Ex. C at ¶ 33.) Even with this pre-existing knowledge of Cybernet's alleged unethical conduct and unlawful business practices, the plaintiffs chose to work for Cybernet.

This is not, therefore, a claim by a water district desk clerk for severe emotional distress damages following a mock *armed* robbery (*Lee*) or a situation where a check-out clerk at a department store was held against her will in a room for several hours after she begged to leave based on her employer's suspicion of theft of $4.95 (*Fermino*). *Lee*, 5 Cal. App. 5th 606; *Fermino*, 7 Cal. 4th 701. Unlike *Fermino* and *Lee*, the underlying allegations show that the plaintiffs were not exposed to any risks that were not part of their employment. To the contrary, the allegations demonstrate that the plaintiffs had actual and/or constructive knowledge of the risks associated with employment by Cybernet. To suggest that the facts regarding the compensation bargain contemplated by the courts in *Fermino* and *Lee* are even remotely similar to this case is astounding.

Moreover, the Court in *Fermino* was not asked to determine whether an insurer's duty to defend was triggered due to the underlying allegations. *Fermino*, 7 Cal. 4th at 708 (1994). While the court held that the employee had a right of action against the employer, the Court was not asked to interpret Insurance Code section 533 or the 'intentional act exclusion' in an employer's liability insurance policy, as we have here. (Wellman Decl., Ex. D., Policy, Part II, C.5.)

Even assuming *arguendo* there are allegations that could possibly fall outside the compensation bargain, there remain only the allegations of Cybernet's "intent to injure" the plaintiffs which fall squarely into the express exclusions of Insurance Code section 533 and the terms of the Policy. Cal. Ins. Code § 533; (Wellman Decl., Ex. D, Policy, Part II.).

Because there is no statutory or common law exception to California's workers' compensation exclusive remedy rule, Cybernet's motion fails as a matter of law and must be denied. For the same reason, State Fund's motion must be granted because all claims are covered by Part One under which State Fund is not obligated to defend Cybernet in a civil action.

C. State Fund Has No Duty to Defend Or Indemnify Cybernet Under Part Two Of The Policy

1. State Fund's Motion Must Be Granted Because Part Two Of The Policy Expressly Bars Coverage For Cybernet's Alleged Intentional Acts

As mentioned briefly above, any allegations that are arguably not covered by the workers' compensation system are expressly barred by the employer intentional act exclusion as follows: "[T]his insurance does not cover: …(5) damages or bodily injury intentionally caused or aggravated by you." (Wellman Decl., Ex. D, Policy, Part II, C.5.)

As discussed in Cybernet's motion, it is the plaintiffs' allegations that may give rise to State Fund's duty to defend. Indeed, Cybernet concedes, "[I]n determining whether there is a duty to defend, State Fund must consider the allegations in the underlying complaint and any extrinsic facts it has learned." (Cybernet's Motion at 16:11-13); citing *Waller v. Truck Ins. Exch.*, 11 Cal. 4th at 19.

The plaintiffs allege that all intentional tort causes of action "were despicable and committed knowingly, willfully and maliciously, with the intent to harm, injure, vex, annoy and oppress Plaintiff and with a conscious disregard of Plaintiff's rights, health, and safety." (State Fund SSMUF No. 11; Wellman Decl. at Ex. A at ¶¶ 108, 120, 165, 189; Ex. B at ¶¶ 95, 107, 152, 191; and Ex. C at ¶¶ 93, 105, 150 (emphasis added).)

In its motion, Cybernet offers a blatant misrepresentation to the Court that the "plaintiffs allege only that Cybernet ratified the conduct of others."

The underlying allegations of Cybernet's actual intent to injure the plaintiffs is the exact conduct that Cybernet is trying to disavow and avoid as such conduct is expressly excluded from Part Two coverage of the Policy. (Wellman Decl. Ex. D, Policy, Part II, C. 5.) To that end, Cybernet's suggestion that intent to harm or injure must be actually proven in the lawsuits before the

exclusion is triggered is entirely unsupported, as it is only the allegations that are relevant to State Fund's duty to defend.

Cybernet's arguments relating to its alleged intentional conduct fail as a matter of law because Cybernet's entire analysis is based on the faulty foundation that the plaintiffs do not allege actual intent to injure. On this basis alone, and as a matter of law, State Fund has no duty to defend any causes of action that include Cybernet's specific intent to injure which includes – the third (Intentional/Fraudulent Misrepresentation), fourth (Civil Conspiracy to Commit Fraud), eighth (Intentional Infliction of Emotional Distress) or tenth (Battery as to Doe and Adams only) as those causes of action all include allegations of the specific intent/conduct that is expressly excluded by Part Two, section C. 5. of the Policy.

2. State Fund's Motion Must Be Granted Because State Fund Has No Duty to Defend Cybernet Against Intentional Acts Pursuant to California Insurance Code Section 533.

A third hurdle that Cybernet cannot, as a matter of law, defeat is that of California Insurance Code section 533. Specifically, even if the Court were to find that the intentional act exclusion does not apply, State Fund has no duty to defend Cybernet against the plaintiffs' claims of intentional conduct because California Insurance Code section 533 bars coverage for 'willful acts' of an insured. Specifically, Section 533 provides: "[A]n insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Cal. Ins. Code § 533.

In *Transport Indemnity Co.* v. *Aerojet General Corp.*, the court was asked to determine whether an employer's aggravation of injuries by fraudulent concealment is necessarily a "wilful act" under section 533, thus precluding coverage under the employer's liability portion of the workers' compensation policy. *Transp. Indem. Co. v. Aerojet Gen. Corp. ("Transport"),* 202 Cal. App. 3d 1184 (1988). The Court defined "wilful act" for purposes of section 533 as follows:

> A "wilful act" as the term is used in section 533, is conduct "more blameworthy than the sort of misconduct involved in ordinary negligence, and something more than the mere intentional doing of an act constituting such negligence." (citations omitted) Similarly, a wilful act within the meaning of section 533 is more than conduct amounting to conscious or reckless disregard of the safety of others. (citations omitted.)

Id. at 1188 (citations omitted). The court held that section 533 did not absolve the insurer's duty to defend *because there was no "specific intent to injure" alleged*. *Id.* at 1189-1191.

The Ninth Circuit has also commented on the long standing public policy behind section 533 as follows: "[S]ection 533 ... reflects the very sound and long standing public policy ... which disapproves of contracts which directly or indirectly exempt anyone from personal responsibility for his own wilful injury to another." *Aetna Cas. Surety Co. v. Sheft H*, 989 F. 2d 1105 (9th Cir. 1993) (citing *Evans v. Pac. Indem. Co.*, 49 Cal. App. 3d 537, 539 (1982)).

Here, the plaintiffs' allegations fall squarely within the definition of a "wilful action" to trigger Section 533, as all three plaintiffs allege that Cybernet committed all intentional torts with "**with the intent to harm, injure, vex, annoy and oppress Plaintiff…"** (State Fund SSUMF No. 14 (emphasis added).)

On this basis alone, State Fund has no duty to defend any causes of action that include Cybernet's specific intent to injure as a matter of law - the third (Intentional/Fraudulent Misrepresentation), fourth (Civil Conspiracy to Commit Fraud), eighth (Intentional Infliction of Emotional Distress) or tenth (Battery as to Doe and Adams only) - as all include allegations of the specific intent/conduct that is expressly excluded by Insurance Code Section 533.

3. <u>Other Intentional Acts</u>

a. <u>Allegations of Ratification Do Not Obligate State Fund to Defend or Indemnify Cybernet In The Lawsuits.</u>

Cybernet argues throughout its motion that the plaintiffs' allegations of ratification of conduct provides a basis for an exception to the workers' compensation exclusive remedy rule under Labor Code section 3602(b)(1). To the contrary, ratification is expressly excluded from coverage by the intentional act exclusion (Part Two, C. 5) because ratification can only result from intentional conduct. Specifically,

> Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from *which an intention to consent to or adopt the act may be fairly inferred*, including conduct which is 'inconsistent with

> any reasonable intention on his part, other than that he intended approving and adopting it'.

Rakestraw v. Rodrigues, 8 Cal. 3d 67, 73 (1972) (emphasis added). Ratification is, therefore, an intentional tort that can only be completed with the requisite intent.

Next, Cybernet relies on two cases for the proposition that "an employer may be held civilly liable for co-worker assault by ratification." *Hart v. Nat'l Mortg. & Land Co.*, 189 Cal. App. 3d 1420 (1987); *Fretland v. Cnty. of Humboldt*, 69 Cal. App. 4th 1478 (1987). While this may be true, nonetheless, ratification is an intentional tort and is not covered by Part Two of the Policy. (Wellman Decl., Ex. D, Policy, Part II, C. 5.)

Cybernet next argues that "whether an employer has ratified an employee's conduct is generally a factual question." *StreetScenes v. ITC Entm't Grp., Inc.*, 103 Cal. App. 4th 233, 242 (2002); *Baptist v. Robinson*, 143 Cal. App. 4th 151, 169-170 (2006). Relying on *Mirpad, LLC v. California Insurance Guaranty Association*, Cybernet illogically concludes that the very existence of a factual question establishes a duty to defend. *Mirpad, LLC v. Calif. Ins. Guar. Ass'n ("Mirpad")* 132 Cal. App. 4th 1058, 1068 (2005).

Cybernet's analysis is misguided for two reasons:

First, as discussed above, State Fund is not required to prove that Cybernet actually ratified the alleged conduct in order to determine whether it has a duty to defend as the underlying allegations dictate whether a duty to defend attaches. Here, not only is ratification an intentional tort, but it is alleged only within the intentional tort causes of action (i.e. intentional misrepresentation, civil conspiracy to commit fraud, intentional infliction of emotional distress, and battery). In these causes of action, the plaintiffs also allege Cybernet's express "intent to injure" them.

Second, in *Mirpad,* the disputed fact related to the language of the policy, not the nature of the underlying action. *Id.* Here, Cybernet has not raised a factual dispute as to the meaning of any word or phrase in the Policy. There is, unlike in *Mirpad*, no outstanding factual issue for this Court to resolve in order to determine that State Fund has no duty to defend.

Cybernet's argument that allegations of ratification in the underlying complaints give rise to State Fund's duty to defend under Part Two of the Policy fails as a matter of law because ratification

is an intentional tort and, therefore, barred by statute and the express exclusion in the Policy. Cal. Ins. Code § 533; (Wellman Decl., Ex. D, Policy, Part II C. 5.)

b. Emotional Distress Allegations Do Not Give Rise To A Duty To Defend Or Indemnity Cybernet In The Lawsuits.

Cybernet relies on *Herrick v. Quality Hotels, and Inns & Resorts, Inc.*, for the proposition that a claim for emotional distress may also trigger an exception to the exclusivity rule and that determining such a claim is a factual question. *Herrick v. Quality Hotels, and Inns & Resorts, Inc.* ("*Herrick*"), 19 Cal. App. 4th 1608 (1993). There, a manager pulled a handgun on an employee and threatened to kill him. *Id*. at 613. The employee brought a civil action for damages which included a claim for intentional infliction of emotional distress against the employer directly. But the court was not asked to determine whether the employer's workers' compensation insurer had a duty to defend those claims. The court found an exception to the workers' compensation exclusive remedy rule based on the employer's *intentional* conduct under Labor Code section 3602(b)(1). *Id*. at 1620; see also Cal. Lab. Code § 3602(b)(1) ("Where the employee's injury or death is proximately caused by a willful physical assault by the employer). As discussed in section B. 2. above, the Labor Code section 3602(b)(1) exclusion does not apply to the facts of this case.

Here, the plaintiffs' causes of actions in their lawsuits, for intentional infliction of emotional distress, include allegations of Cybernet's actual intent to injure which is expressly excluded from Part Two coverage of the Policy. (Wellman Decl., Ex. A at ¶ 165, Ex. B at ¶ 152, and Ex. C at ¶ 150.) Any ratification of intent to cause emotional distress is also intentional and is expressly excluded.

Therefore, unlike in *Herrick*, Labor Code section 3602(b)(1) does not provide a statutory exception that would afford coverage under Part Two because such intentional acts are expressly excluded from coverage both by California Insurance Code section 533 and the intentional act exclusion of the Policy. As a result, Cybernet's argument that a claim for emotional distress triggers State Fund's duty to defend under Part Two of the Policy fails as a matter of law.

VI. CONCLUSION

Cybernet's motion for partial summary judgment must be denied in its entirety because Cybernet has failed to meet its burden to show as a matter of law that: (1) the plaintiffs were Cybernet employees at the time of the alleged injuries; (2) there is any applicable exception to California's workers' compensation exclusive remedy rule that applies in this case; or (3) there is coverage under Part Two of the Policy given the underlying allegations of Cybernet's express intent to injure.

State Fund's motion for summary judgment should be granted in its entirety because there is no conceivable theory under which the plaintiffs' causes of actions in their lawsuits trigger State Fund's duty to defend under Part Two of the Policy because: (1) the alleged claims are covered by California's workers' compensation exclusive remedy rule; and (2) any allegations that are arguably not covered by California's workers' compensation statutory framework are barred from Part Two coverage by the Policy's 'intentional acts' exclusion and/or Insurance Code section 533.

Respectfully Submitted,

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