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**LAW OFFICES OF RICHARD D. FARKAS**  
**RICHARD D. FARKAS, ESQ. (State Bar No. 89157)**  
**15300 Ventura Boulevard**  
**Suite 504**  
**Sherman Oaks, California 91403**  
**Telephone: (818) 789-6001**  
**Facsimile: (818) 789-6002**

Attorneys for Plaintiffs RICHARD STELLAR  
and MILES STELLAR

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF LOS ANGELES (NORTHWEST DISTRICT)**

RICHARD STELLAR, an individual, MILES )  
STELLAR, an individual, )

Plaintiffs, )

vs. )

STATE FARM GENERAL INSURANCE )  
COMPANY, an Illinois Corporation; and )  
DOES 1 through 100, inclusive, )

Defendants. )

Case No. LC 074358

**PLAINTIFFS RICHARD AND MILES  
STELLAR 's POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEFENDANT 'S MOTION FOR  
SUMMARY JUDGMENT.**

(Filed concurrently with Response to Separate  
Statement, Declarations of Richard Stellar and  
Richard D. Farkas; S tellars Separate  
Statement of Material Facts in Dispute and  
Contentions of Law.)

DATE: October 31, 2006  
TIME: 8:30 a.m.  
DEPARTMENT M

(Judge Michael Harwin)

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1 Plaintiffs RICHARD STELLAR and MILES STELLAR (hereafter “Plaintiffs” or  
2 “STELLARS”), oppose the Motion for Summary Judgment of Defendant STATE FARM  
3 GENERAL INSURANCE COMPANY (“STATE FARM”) as follows.

4 **I. FACTUAL BACKGROUND.**

5 **A. Factual Allegations of the Complaint.**

6 In this action, Plaintiffs RICHARD STELLAR and his son, MILES STELLAR, are  
7 individuals who were insured by Defendant STATE FARM under a homeowners insurance policy.  
8 RICHARD STELLAR and MILES STELLAR were sued by RICHARD STELLAR’S brother,  
9 PHILIP STELLAR, and they tendered the defense of that lawsuit to their insurer, STATE FARM.  
10 Defendant STATE FARM is occasionally referred to as the “Defendant Insurance Company.”

11 Despite repeated tenders of defense, Defendant STATE FARM declined to defend  
12 RICHARD or MILES STELLAR, who were thus forced to defend the underlying claims by  
13 themselves, at extraordinary expense. RICHARD and MILES STELLAR ultimately prevailed in  
14 their defense against the underlying claims against them, and have brought this lawsuit against  
15 STATE FARM to recover their fees and costs incurred in having to defend themselves, and for bad  
16 faith insurance practices.

17 **B. The Parties.** Plaintiffs RICHARD and MILES STELLAR are father and son. Plaintiff  
18 RICHARD STELLAR has a brother named Philip Stellar (who is, therefore, also the uncle of  
19 MILES STELLAR), who, as detailed herein, filed a legal action against RICHARD STELLAR and  
20 MILES STELLAR, which lawsuit (the “Underlying Lawsuit” or “Underlying Cross-complaint”) was  
21 tendered to STATE FARM for provision of a legal defense. Defendant STATE FARM issued  
22 liability insurance extending coverage for claims and actions seeking to impose liability on its  
23 insured for a variety of damages and liabilities, including damage arising out of the causes of action  
24 alleged in the Underlying Lawsuit of Philip Stellar.

25 Plaintiff RICHARD STELLAR (individually, through legal counsel, and on behalf of his son,  
26 MILES STELLAR) timely tendered the defense of the Underlying Lawsuit to Defendant STATE  
27 FARM. Defendant STATE FARM has denied coverage and the duty to defend the Underlying

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1 Lawsuit. Plaintiffs herein allege that Defendant STATE FARM initially wrongfully failed and  
2 refused to pay for Plaintiffs' defense, despite the fact that STATE FARM was obligated to do so and  
3 Plaintiffs continually demanded same. STATE FARM took various steps designed to circumvent its  
4 obligations under the insurance Policy referenced herein, interfering with Plaintiffs' defense efforts,  
5 interfering with Plaintiffs' ability to utilize counsel of their choosing, failing to settle the Underlying  
6 Lawsuit, and failing to make payment of defense fees and costs, despite its duty to do so.

7 [Complaint ¶ 9.]

8 **C. The Insurance Policy:**

9 11. STATE FARM issued a Homeowners Insurance Policy, number 71-E6-6082-6, (the  
10 "State Farm Policy"), to Plaintiffs which includes coverage for the defense and indemnification of  
11 liability actions for the claims asserted by the Individual Litigants in the Underlying Lawsuit.

12 12. In the "Personal Liability" Section of the policy, for example, the State Farm Policy  
13 provides:

14 "If a claim is made or a suit is brought against an **insured** for damages because of **bodily**  
15 **injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

- 16 1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and  
17 2. provide a defense at our expense by counsel of our choice..."

18 The policy further defines "occurrence" as follows:

19 "occurrence," when used in ... this policy, means an accident, including exposure to  
20 conditions, which results in:

- 21 a. **bodily injury**; or  
22 b. **property damage**;  
23 during the policy period."

24 As detailed in their complaint, on December 9, 2004, Plaintiffs RICHARD STELLAR (and  
25 his wife) filed a lawsuit against Philip Stellar (*Richard and Nuala Stellar vs. Philip Stellar*, Los  
26 Angeles Superior Court Case number LC 070058). The substance of the Plaintiffs' claims against  
27

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1 Philip Stellar were summarized in paragraph 7 of that Complaint, which stated “From October 2002  
 2 to the present date, Defendant [Philip Stellar] has engaged in an ongoing effort to denigrate and  
 3 ridicule Plaintiffs in writings (letters, facsimiles, and emails) and verbally, to other family members,  
 4 employers, co-workers, and social workers. Said effort has subjected Plaintiffs to a loss of their  
 5 reputations, shame, mortification, and injury to their persons and feelings, all to their damage in a  
 6 total amount to be established by proof at trial.” [*Stellar vs. Stellar* Complaint, ¶ 7.] Philip Stellar’s  
 7 actions have also led several individuals to seek restraining orders against him, including his mother,  
 8 brother, and attorneys in this case and related matters.  
 9

#### 10 **D. Summary of Cross-complaint in the Underlying Case.**

11 PHILIP STELLAR responded to the Plaintiffs complaint with a cross-complaint against his  
 12 brother, RICHARD STELLAR, and RICHARD STELLAR’S 17 year-old son, MILES STELLAR.<sup>1</sup>  
 13 The cross-complaint alleged causes of action for Slander per se, Libel, and Intentional Infliction of  
 14 Emotional Distress. PHILIP STELLAR alleged that “Richard Stellar and Miles Stellar engaged in  
 15 ,attempted character assassination of PHILIP STELLAR,” and that “RICHARD STELLAR did  
 16 cause their mother, Mrs. Mary Stellar, to be a party in the restraining order petition that he  
 17 engineered to prevent PHILIP from seeing their mother.”  
 18

19 Among other things, the Cross-complaint charges that “on or about July 23, 2004, Cross-  
 20 Defendant RICHARD STELLAR, in an oral statement to Mr. Joe Tavitian, an employee of the Los  
 21 Angeles County Adult Protective Services division, stated that Cross Complainant had sexually  
 22 molested Cross-Complainant’s eight-year old son.” [Cross-complaint ¶ 8.] He further alleges that  
 23 RICHARD STELLAR told others that “Philip is on drugs, or an old gambling problem has struck  
 24

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25 <sup>1</sup> Philip Stellar had also filed a separate small claims action (subsequently dismissed) against  
 26 STATE FARM insured.

1 him again,” and that his nephew, MILES STELLAR, published an internet posting referencing  
2 PHILIP STELLAR (not by name) as a pedophile with his adopted son.

3 Among the allegations in his cross-complaint, PHILIP STELLAR contends that “Because of  
4 Cross-Defendant RICHARD STELLAR’s outrageous, extreme, unfair and wrongful conduct as  
5 herein alleged, Mrs. Stellar and her grandson are unable to have a relationship,” and that “RICHARD  
6 STELLAR now seeks to control and dominate their elderly and infirm mother, to the exclusion of  
7 outside contacts, so that his thefts will not be challenged and he held accountable.” [Defendants  
8 Motion, Ex. 2 (Philip Stellar’s Cross-complaint ¶ 27).]

### 10 **E. Procedural History of the Case and Status of Discovery.**

#### 11 **Plaintiffs’ Tender Letters.**

12 As did Plaintiffs’ original attorney, current counsel for Plaintiffs herein sent STATE FARM a  
13 letter (“Tender Letter”) on September 6, 2005. In that letter (attached to Defendants’ Motion as  
14 Exhibit 4), STATE FARM was advised “Our investigation is continuing, but our preliminary review  
15 of the facts indicates that the allegations of the cross-complainant unquestionably fall within the  
16 scope of protection afforded by the above-referenced policy. Accordingly, tender of the defense of  
17 this action (previously made by the Stellars’ original litigation attorney) is again made by this letter.”

18 The September 6, 2005 Tender Letter to STATE FARM further stated: “Our review of this  
19 file indicates that tender of the defense of this matter was first made to State Farm shortly after the  
20 cross-complaint was served on your insured. State Farm wrongfully denied coverage on the claimed  
21 bases set forth in its March 31, 2005 letter. We have reviewed this denial letter in light of the  
22 allegations of the cross-complaint and surrounding circumstances, and have concluded, beyond a  
23 doubt, that State Farm has a duty to defend.”

24 The duties of STATE FARM to Plaintiffs herein was also noted in the September 6, 2005  
25 Tender Letter, as follows: “An insurer must defend its insured against claims that create a potential  
26  
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1 for indemnity under the policy. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287,  
2 295 (*Montrose*); *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275 (*Gray*)). The duty to  
3 defend is broader than the duty to indemnify, and it may apply even in an action where no damages  
4 are ultimately awarded. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.)”

5 Under California law, determination of the duty to defend depends, in the first instance, on a  
6 comparison between the allegations of the complaint and the terms of the policy. (*Montrose*, *supra*,  
7 6 Cal.4th 287, 295.) But the duty also exists where extrinsic facts known to the insurer suggest that  
8 the claim may be covered. (*Ibid.*) Moreover, that the precise causes of action pled by the third-  
9 party complaint may fall outside policy coverage does not excuse the duty to defend where, under  
10 the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to  
11 state a covered liability. (*Gray, supra*, 65 Cal.2d 263, 275-276; *CNA Casualty of California v.*  
12 *Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 610-611.)

13  
14 The Tender Letter advised STATE FARM: “Philip Stellar’s cross-complaint contains causes  
15 of action against Richard Stellar and Miles Stellar for damages for slander per se, libel, and  
16 intentional infliction of emotional distress, and the allegations “stated and fairly inferable” therein,  
17 without question, “suggest a claim potentially covered by the policy.” His cross-complaint alleges  
18 that he has “suffered severe general damages to his reputation, extreme shame and mortification, and  
19 significant injury to his emotional state, well-being and feelings.” [Cross-complaint ¶s 10, 15, 19,  
20 24.] He further alleges that he has suffered “extreme emotional and physical injury and damage...  
21 including severe emotional distress, and including but not limited to sleep disruption, worry, upset  
22 stomach episodes, inability to concentrate on his professional and personal matters, nervousness,  
23 extra concerns for the conditions of his beloved mother and his young son, and undue stress.”

24  
25 [Cross-complaint ¶28; see also Richard Farkas declaration, Ex. A.]

1 The Tender Letter further stated: “That the claims that are potentially covered by the  
2 insurance policy is reinforced by Philip Stellar’s discovery responses, in which he asserts, among  
3 other things, that the actions of your insured “have caused injuries to Philip Stellar, such as severe  
4 emotional distress, sleep disruption, headache, worry, upset [sic] stomach, inability to concentrate  
5 fully, general nervousness, exacerbated scalp condition (seborrheic dermatitis), extra worry and  
6 concern for his mother and son, and overall stress.” [Richard Farkas declaration, Ex. A (Philip  
7 Stellar interrogatory responses, 6.2.) These are clearly allegations of “bodily injuries,” rendering the  
8 authorities cited by State Farm (involving purely emotional injuries) wholly inapplicable to this case.  
9

10 Defendant STATE FARM immediately and consistently denied any duty to defend or  
11 indemnify Plaintiffs in the Underlying Litigation. It failed to investigate the underlying claims.  
12 Cross-complainant Philip Stellar was deposed on at least two occasions, and he responded to written  
13 discovery; it appears that STATE FARM made no effort to review any of the discovery in the  
14 underlying litigation.  
15

16 Tender of the defense against the Underlying Cross-complaint in the Underlying Litigation  
17 was made to Defendant STATE FARM. In the Tender Letter described above, STATE FARM was  
18 notified: “Our clients have already spent considerable sums defending against the claims of Philip  
19 Stellar, and cannot afford the cost of properly defending this case through trial. Based upon the  
20 foregoing, demand is again made that State Farm recognize its duty to defend, and reimburse my  
21 clients for defenses costs incurred, as is required pursuant to the authorities cited herein.” [Motion,  
22 Ex. 4.] STATE FARM has failed and refused to accept its duty to defend or indemnify Plaintiffs,  
23 and has taken no steps to protect its insured.  
24

25 The State Farm policy issued to Plaintiffs stated, on its cover sheet, “**This policy is one of**  
26 **the broadest forms available today**, and provides you with outstanding value for your insurance  
27

1 dollars. It contained no exclusions for the acts or injuries alleged by Philip Stellar. [State Farm  
2 Motion for Summary Judgment, Exhibit 3.]

3 Ultimately, the Underlying Litigation proceeded to a lengthy jury trial. Most of Cross-  
4 com plainant Philip S tellar s claim s were defeated through directed verdicts. The jury rejected the  
5 balance of his claims, but Plaintiffs herein were subjected to a horrific and expensive legal ordeal,  
6 without any support of their insurance carrier.  
7

## 8 **II. SUMMARY JUDGMENT IS INAPPROPRIATE WHERE, AS HERE, MATERIAL** 9 **FACTUAL DISPUTES EXIST.**

### 10 **A. APPLICABLE LEGAL STANDARDS.**

11 In a motion for summary judgment, the burden is on the moving party to establish both that  
12 there is no genuine issue as to any material fact and that the movant is entitled to judgment as a  
13 matter of law. *Quadra v. Superior Court of San Francisco*, 378 F.Supp. 605 (N.D. Cal. 1974).

14 In determining a Motion for Summary Judgment, the evidence must be viewed by the Court  
15 in the light most favorable to the non-moving party, and any factual conflicts must be resolved in  
16 favor of the non-moving party. [*Chesny v. Grisham* (1976) 64 Cal.App.3d 120, 134 Cal.Rptr. 238.]  
17 The moving party bears the burden of furnishing supporting documents that establish that the claims  
18 of the adverse party are entirely without merit on any legal theory. *Lipson v. Superior Court* (1982)  
19 31 Cal.3d 362, 374; see also *FSR Brokerage Inc., v. Superior Court* (1995) 35 Cal.App.4th 69  
20 (construing 1993 amendment to summary judgment statute, Calif. *Code of Civil Proc.* § 437c). The  
21 facts alleged in affidavits by the non-moving party must be accepted as true. *Zeilman vs. County of*  
22 *Kern* (1985) 168 Cal.App.3d 1174, 1178, 214 Cal. Rptr. 746.

23 Further, the court must consider not only the direct evidence presented, but also the  
24 reasonable inferences to be drawn therefrom. California *Code of Civil Procedure* section 437c(c);  
25 *Mann v. Cracciolo* (1985) 35 Cal.3d 18, 210 Cal.Rptr. 62. Any doubt as to the propriety of the  
26 motion is resolved in favor of the party opposing the motion. *Stationer's Corp. v. Dunn &*  
27 *Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449.

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1           At the summary judgment stage, the court's sole function is issue-finding, not issue  
2 determination. [California *Code of Civil Procedure* section 437c.] The summary judgment  
3 procedure is “drastic,” and is to be used with caution so that it does not become a substitute for a full  
4 trial. [*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 372, 178 Cal.Rptr 783.] “It is only  
5 when the witnesses are present and subject to cross-examination that their credibility and the weight  
6 to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which  
7 so Long has been the hallmark of, even handed justice.” [*Poller v Columbia Broadcasting* (1962)  
8 368 U.S. 464, 473, 82 S.Ct. 486 491. (Emphasis added).]

9           **B. BURDEN OF THE PARTIES.** Where the defendants are the moving parties, a court  
10 must determine whether they have met their burden under subdivision (o)(2) of section 437c of  
11 producing admissible evidence showing that a cause of action has no merit because “one or more  
12 elements of the cause of action, even if not separately pleaded, cannot be established, or there is a  
13 complete defense to that cause of action.” if the moving party has met its statutory burden and the  
14 summary judgment motion prima facie justifies a judgment, we determine whether the opposing  
15 party has met its burden under section 437c. (*Zavala, supra*, 58 Cal.App.4th at p. 926; 437c, subd.  
16 (o)(1-2).) If defendants have met their burden, the court must then determine whether the plaintiff  
17 has met his burden under subdivision (o)(2) of section 437c of producing admissible evidence  
18 showing that “a triable issue of one or more material facts exists as to that cause of action or a  
19 defense thereto.” In making this determination, courts must strictly construe the evidence of the  
20 moving parties and liberally construe that of the opponents, and any doubts as to the propriety of  
21 granting the motion should be resolved in favor of the parties opposing the motion. [*Branco v.*  
22 *Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189.]

23           Under the current version of section 437c of the *Code of Civil Procedure*, a defendant  
24 moving for summary adjudication has met its “burden of showing that a cause of action has no merit  
25 if that party has shown that one or more elements of the cause of action, even if not separately  
26 pleaded, cannot be established.” Only once the defendant has met that burden does the burden shift  
27

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1 to the plaintiff “to show that a triable issue of one or more material facts exists as to that cause of  
2 action.” (§ 437c, subd. (o)(2), emphasis added.)

3 As explained in *Certain Underwriters at Lloyd's Of London (Lowsley-Williams) v. Superior*  
4 *Court of Los Angeles County (Southern California Gas Company)* (1997) 56 Cal.App.4th 952,  
5 “Under the plain language of the statute, the burden does not shift to the plaintiff unless the moving  
6 defendant first meets its burden of “showing” that the plaintiff cannot establish at least one element  
7 of its cause of action. (§ 437c, subd. (o)(2).) Under our holding in *Leslie* (and under the rules  
8 announced in all of the cases decided since the 1993 amendment to section 437c [Stats. 1993, ch.  
9 276]), this initial burden can be met by the presentation of “factually vague discovery responses or  
10 otherwise” -- but we know of no case suggesting that section 437c permits the moving defendant to  
11 meet its initial burden without any showing at all.”

12 STATE FARM, in providing essentially no evidence or documentation to refute STELLAR S  
13 facts, fails even to meet its initial burden because it has made no showing of an absence of material  
14 facts at all. Defendant s Motion cannot be granted under these standards.

15 **III. MATERIAL FACTUAL DISPUTES ARE PRESENTED, REQUIRING DENIAL**  
16 **OF DEFENDANT’S SUMMARY JUDGMENT MOTION.**

17 **A. INSURANCE EXCLUSION CLAUSES ARE TO BE STRICTLY CONSTRUED IN**  
18 **FAVOR OF THE INSURED.**

19 The insurer bears the burden of bringing itself within a policy's exclusionary clauses.  
20 [*Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 880, 151 Cal.Rptr. 285 (1978).] Exclusionary clauses  
21 are strictly construed. [*Loyola Marymount Univ. v. Hartford Accident and Indem. Co.*, 219  
22 Cal.App.3d 1217, 1223, 271 Cal.Rptr. 528 (1990). See also *State Farm Mut. Auto. Ins. Co. v.*  
23 *Partridge*, 10 Cal.3d 94, 101, 109 Cal.Rptr. 811 (1973) (“Whereas coverage clauses are interpreted  
24 broadly so as to afford the greatest possible protection to the insured, exclusionary clauses are  
25 interpreted narrowly against the insured.”) (citations omitted).]

26 It is a basic principle of insurance contract interpretation that doubts, uncertainties and  
27 ambiguities arising out of policy language ordinarily should be resolved in favor of the insured in

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1 order to protect his reasonable expectation of coverage. [*Producers Dairy Delivery Co. v. Sentry Ins.*  
2 *Co.*, 41 Cal.3d 903, 912, 226 Cal.Rptr. 558 (1986) (citations omitted) (emphasis in original).]

3 **B. AN INSURER MUST DEFEND ITS INSURED AGAINST CLAIMS THAT**  
4 **CREATE EVEN A POTENTIAL FOR INDEMNITY UNDER THE POLICY.**

5 Tender of the defense of this matter was first made to STATE FARM shortly after the cross-  
6 complaint was served on its insureds. STATE FARM wrongfully denied coverage on the claimed  
7 bases set forth in its March 31, 2005 letter. Plaintiffs herein later reviewed this denial letter in light  
8 of the allegations of the cross-complaint and surrounding circumstances, and again concluded,  
9 beyond a doubt, that STATE FARM had a duty to defend. It has been stated that, so far as the  
10 insured is concerned, the duty to defend may be as important as the duty to indemnify. (*Montrose*  
11 *Chemical Corp. v. Superior Court* (1993) 6 Cal. 4th 287, 295-296 [24 Cal. Rptr. 2d 467, 861 P.2d  
12 1153]; see *Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal. 2d 27, 37 [17 Cal. Rptr. 12, 366  
13 P.2d 455].)

14 **C. INSURANCE AS CONTRACTUAL OBLIGATION.**

15 An insurance policy is a contract between an insurer and an insured (e.g., *Montrose Chemical*  
16 *Corp. v. Admiral Ins. Co.* (1995) 10 Cal. 4th 645, 666 [42 Cal. Rptr. 2d 324, 913 P.2d 878]; *Bank of*  
17 *the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1264 [10 Cal. Rptr. 2d 538, 833 P.2d 545]), the  
18 insurer making promises, and the insured paying premiums, the one in consideration for the other,  
19 against the risk of loss (e.g., *California Physicians' Service v. Garrison* (1946) 28 Cal. 2d 790, 803-  
20 804 [172 P.2d 4, 167 A.L.R. 306]; *Headen v. Miller* (1983) 141 Cal. App. 3d 169, 173 [190 Cal.  
21 Rptr. 198]; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal. App. 3d 201, 213 [137  
22 Cal. Rptr. 118]).

23 To yield their meaning, the provisions of a policy must be considered in their full context.  
24 (E.g., *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal. 4th 1, 18-19 [44 Cal. Rptr. 2d 370, 900  
25 P.2d 619]; *Bank of the West v. Superior Court, supra*, 2 Cal. 4th at p. 1265.) Where it is clear, the  
26 language must be read accordingly. (E.g., *Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal. 4th at  
27 pp. 18-19; *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal. 4th at pp. 666-667; *Bank of*

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1 *the West v. Superior Court, supra*, 2 Cal. 4th at p. 1264.) Where it is not, it must be read in  
2 conformity with what the insurer believed the insured understood thereby at the time of formation  
3 (e.g., *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal. 4th at p. 667; *Bank of the West v.*  
4 *Superior Court, supra*, 2 Cal. 4th at pp. 1264-1265; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d  
5 807, 822 [274 Cal. Rptr. 820, 799 P.2d 1253]) and, if it remains problematic, in the sense that  
6 satisfies the insured's objectively reasonable expectations (see, e.g., *Montrose Chemical Corp. v.*  
7 *Admiral Ins. Co., supra*, 10 Cal. 4th at p. 667; *Bank of the West v. Superior Court, supra*, 2 Cal. 4th  
8 at p. 1265; *AIU Ins. Co. v. Superior Court, supra*, 51 Cal. 3d at p. 822).

9 An insurer must defend its insured against claims that create a *potential* for indemnity under  
10 the policy. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 (*Montrose*);  
11 *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275 (*Gray*)). The duty to defend is broader than  
12 the duty to indemnify, and it may apply even in an action where no damages are ultimately awarded.  
13 (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.)

14 Determination of the duty to defend depends, in the first instance, on a comparison between  
15 the allegations of the complaint and the terms of the policy. (*Montrose, supra*, 6 Cal.4th 287, 295.)  
16 But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be  
17 covered. (*Ibid.*) Moreover, that the precise causes of action pled by the third-party complaint may  
18 fall outside policy coverage does not excuse the duty to defend where, under the facts alleged,  
19 reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered  
20 liability. (*Gray, supra*, 65 Cal.2d 263, 275-276; *CNA Casualty of California v. Seaboard Surety Co.*  
21 (1986) 176 Cal.App.3d 598, 610-611.)

22 The defense duty arises upon tender of a potentially covered claim and lasts until the  
23 underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage.  
24 (*Montrose, supra*, 6 Cal.4th 287, 295.) When the duty, having arisen, is extinguished by a showing  
25 that no claim can in fact be covered, “it is extinguished only prospectively and not retroactively.”  
26 (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 46 (*Buss*); see also *Aerojet-General Corp. v.*  
27 *Transport Indemnity Co.* (1997) 17 Cal.4th 38, 58 (*Aerojet-General*)).

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1 As the California Supreme Court held as recently as July of this year, “If any facts stated or  
2 fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim  
3 potentially covered by the policy, the insurer’s duty to defend arises and is not extinguished until the  
4 insurer negates all facts suggesting potential coverage.” (*Scottsdale Insurance vs. MC*  
5 *Transportation* (2005) No. S123766, 2005 WL 1712889 (Cal. July 25, 2005). The Court further  
6 noted: “Thus, the insurer’s duty to defend *arises* whenever the third party complaint and/or the  
7 available extrinsic facts suggest, under applicable law, the possibility of covered claims. In such  
8 circumstances, if the insured tenders defense of the third party action, the insurer must assume it.  
9 The duty to defend then continues until the third party litigation ends, unless the insurer sooner  
10 proves, by facts subsequently developed, that the potential for coverage which previously appeared  
11 cannot possibly materialize, or no longer exists. The insurer must absorb all costs it expended on  
12 behalf of its insured while the duty to defend was in effect— i.e., before the insurer established that  
13 the duty had *ended*. (*Montrose, supra*, 6 Cal.4th 287, 295-304; see also, e.g., *Haskel, Inc. v.*  
14 *Superior Court* (1995) 33 Cal.App.4th 963, 977 (*Haskel*); *Hartford Accident & Indemnity Co. v.*  
15 *Superior Court* (1994) 23 Cal.App.4th 1774, 1780-1781.)”

16 **D. THE DUTY TO DEFEND IS EVEN BROADER THAN THE DUTY TO**  
17 **INDEMNIFY.**

18 It is a well-established precept of insurance law that the duty to defend is broader than the  
19 duty to indemnify. *Montrose Chemical Corp. v. Superior Court*, 861 P.2d 1153, 1160 (Cal. 1993) (en  
20 banc) (*Montrose I*.)” An insurer may have a duty to defend even when it ultimately has no obligation  
21 to indemnify, either because no damages are awarded in the underlying action against the insured or  
22 because the actual judgment is for damages not covered under the policy.” *Borg v. Transamerica Ins.*  
23 *Co.*, 54 Cal. Rptr. 2d 811, 814 (Cal. Ct. App. 1996).

24 To determine whether the insurer owes a duty to defend, the court must compare the  
25 allegations of the underlying complaint with the terms of the policy. *Montrose I*, 861 P.2d at 1157.  
26 “[W]hen a suit against an insured alleges a claim that ,potentially or even ,possibly could subject  
27 the insured to liability for covered damages, an insurer must defend unless and until the insurer can

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1 demonstrate by reference to `undisputed facts' that the claim cannot be covered.” *Vann v. The*  
2 *Travelers Co.*, 46 Cal. Rptr. 2d 614, 619 (C al. Ct. App. 1995). “This obligation can be excused only  
3 when the third party complaint can by no conceivable theory raise a single issue which could bring it  
4 within the policy coverage.” [*Lebas Fashion Imports v. ITT Hartford*, 59 Cal. Rptr. 2d 36, 40 (Cal.  
5 Ct. App. 1996) (quotations omitted).]

6 At summary judgment stage, the insured must prove only the existence of any potential for  
7 coverage, while the insurer must establish the absence of any such potential. *Vann*. 46 Cal. Rptr. at  
8 619.

9 In determining whether a duty to defend exists, courts look to all the facts available to the  
10 insurer at the time the insured tenders its claim for the defense. “[T]he insured is entitled to a defense  
11 if the underlying complaint alleges the insured's liability for damages potentially covered under the  
12 policy, or if the complaint might be amended to give rise to a liability that would be covered under  
13 the policy.” (quoting *Montrose I*, 861 P.2d at 1160).

14 **E. THE INSURER’S DUTY RUNS TO CLAIMS THAT ARE MERELY**  
15 **POTENTIALLY COVERED.**

16 Any doubt as to whether there is a duty to defend must be resolved in favor of the insured.  
17 *Montrose I*, 861 P.2d at 1160. The insurer's duty to defend runs to claims that are merely potentially  
18 covered, in light of facts alleged or otherwise disclosed. (E.g., *Montrose Chemical Corp. v. Superior*  
19 *Court, supra*, 6 Cal. 4th at p. 295; *Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 276-277 [54  
20 Cal. Rptr. 104, 419 P.2d 168].) It entails the rendering of a service, viz., the mounting and funding  
21 of a defense (*Continental Cas. Co. v. Zurich Ins. Co., supra*, 57 Cal. 2d at p. 36; *Financial Indem.*  
22 *Co. v. Colonial Ins. Co., supra*, 132 Cal. App. 2d at p. 211, disapproved on another point,  
23 *Continental Cas. Co. v. Zurich Ins. Co., supra*, 57 Cal. 2d at p. 38) in order to avoid or at least  
24 minimize liability (see *Gray v. Zurich Insurance Co., supra*, 65 Cal. 2d at p. 279). It arises as soon as  
25 tender is made. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal. 4th at p. 295.)

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1 The insurer's duty to defend is broader than its duty to indemnify. (E.g., *Montrose Chemical*  
 2 *Corp. v. Superior Court, supra*, 6 Cal. 4th at p. 295; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4  
 3 Cal. 4th 1076, 1081 [17 Cal. Rptr. 2d 210, 846 P.2d 792].)

4 Thus, in an action wherein all the claims are at least potentially covered, the insurer has a  
 5 duty to defend. (*Hogan v. Midland National Ins. Co., supra*, 3 Cal. 3d at p. 563; see, e.g., *Horace*  
 6 *Mann Ins. Co. v. Barbara B., supra*, 4 Cal. 4th at pp. 1081-1087 [holding that the insurer has a duty  
 7 to defend when only one of several claims is at least potentially covered].)

8 **F. THE INSURER HAS A DUTY TO DEFEND THE ENTIRE ACTION, IN**  
 9 **“MIXED” CAUSES OF ACTION.**

10 In a “mixed” action (alleging potentially covered causes of action with non-covered causes of  
 11 action), the insurer has still has a duty to defend the action in its entirety. (*Horace Mann Ins. Co. v.*  
 12 *Barbara B., supra*, 4 Cal. 4th at p. 1081; see *Hogan v. Midland National Ins. Co., supra*, 3 Cal. 3d at  
 13 p. 563.) This holding is rooted in *Hogan*. (See *Horace Mann Ins. Co. v. Barbara B., supra*, 4 Cal. 4th  
 14 at p. 1081; *California Union Ins. Co. v. Club Aquarius, Inc.* (1980) 113 Cal. App. 3d 243, 247-248  
 15 [169 Cal. Rptr. 685].) To defend meaningfully, the insurer must defend immediately. (*Montrose*  
 16 *Chemical Corp. v. Superior Court, supra*, 6 Cal. 4th at p. 295.) To defend immediately, it must  
 17 defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from  
 18 those that are not. To do so, California courts have held, would be time consuming. It might also be  
 19 futile: The “plasticity of modern pleading” (*Gray v. Zurich Insurance Co., supra*, 65 Cal. 2d at p.  
 20 276) allows the transformation of claims that are at least potentially covered into claims that are not,  
 21 and vice versa.

22 \* \* \*

23 **IV. B O T H P H I L I P S T E L L A R ’ S C R O S S - C O M P L A I N T A N D H I S E X T R I N S I C**  
 24 **A L L E G A T I O N S C O N T A I N C L A I M S P O T E N T I A L L Y C O V E R E D , G I V I N G R I S E T O A N**  
 25 **A B S O L U T E D U T Y T O D E F E N D .**

26 Philip S tellar s cross-complaint contains causes of action against Richard Stellar and Miles  
 27 Stellar for damages for slander per se, libel, and intentional infliction of emotional distress, and the

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1 allegations “stated and fairly inferable” therein, without question, “suggest a claim potentially  
 2 covered by the policy.” His cross-complaint, which STATE FARM failed to fully investigate (in the  
 3 one day before it denied coverage), alleges that he has “suffered severe general damages to his  
 4 reputation, extreme shame and mortification, and significant injury to his emotional state, well-being  
 5 and feelings.” [Cross-complaint ¶s 10, 15, 19, 24.] He further alleged that he has suffered “extreme  
 6 emotional and physical injury and dam age... including severe em otional distress, and including but  
 7 not limited to sleep disruption, worry, upset stomach episodes, inability to concentrate on his  
 8 professional and personal matters, nervousness, extra concerns for the conditions of his beloved  
 9 mother and his young son, and undue stress.” [Cross-complaint ¶28.]

10 That the claims that are potentially covered by the insurance policy is reinforced by Philip  
 11 Stellar s discovery responses, in w hich he asserts, am ong other things, that the actions of your  
 12 insured “have caused injuries to Philip Stellar, such as severe emotional distress, sleep disruption,  
 13 headache, worry, unset [*sic*] stomach, inability to concentrate fully, general nervousness, exacerbated  
 14 scalp condition (seborrheic dermatitis), extra worry and concern for his mother and son, and overall  
 15 stress.” [Richard Farkas declaration, Ex. A (Philip Stellar interrogatory responses, 6.2).]

16 Philip Stellar, in his interrogatory answers, further alleges that “Richard Stellar violated the  
 17 California criminal statutes that proscribe: false and fraudulent reporting of child abuse, theft and  
 18 embezzlement; identity theft; knowingly filing false documents with the California courts; perjury;  
 19 conspiracy to commit those crimes. He also violated the United States Code federal criminal  
 20 provisions regarding defrauding banks, and false and fraudulent bank transactions. (Plaintiffs and  
 21 cross-defendants also violated the civil laws giving rise to the cross-complaint.)” [Richard D. Farkas  
 22 Declaration, Ex. A (Philip Stellar interrogatory responses, 14.1).]

23 **V. PHILIP STELLAR’S DEFAMATION CLAIMS ARE ALSO SUBJECT TO**  
 24 **COVERAGE UNDER THE POLICY.**

25 State Farm, in denying coverage in this case, rejected its duty to defend against Philip  
 26 Stellar s libel and slander (defam ation) claim s on the basis that “defamation is not covered under a  
 27



1 homeowners policy.” Citing almost exclusively inapplicable authorities<sup>2</sup> from other jurisdictions,  
2 State Farm, therefore, incorrectly concluded that defamation claims, by definition, are intentional  
3 acts, not subject to coverage.

4 Philip Stellar’s defamation claims were against Richard Stellar and his son, Miles Stellar, and  
5 were far-reaching, and fall within the coverage afforded by the State Farm policy. Contrary to the  
6 authorities cited in the moving papers, Philip Stellar explicitly alleged that he suffered “personal  
7 injuries” and “bodily injury.” Furthermore, State Farm is incorrect in asserting that defamation  
8 claims are necessarily intentional acts. In *Uhrich vs. State Farm Fire and Casualty Company*  
9 (2003), 109 Cal.App. 4<sup>th</sup> 598, for example, the Court expressly stated that “**an insured could be**  
10 **liable for defamation for negligently publishing a defamatory statement.” [*Uhrich vs. State*  
11 *Farm Fire and Casualty Company* (2003), 109 Cal.App. 4<sup>th</sup> 598 at 611, citing *Hellar vs. Bianco*  
12 (1952) 111 Cal App. 2<sup>nd</sup> 424, 426; Restatement 2<sup>nd</sup>, Torts, Section 577, 5 Witkin, Cal. Procedure (9<sup>th</sup>  
13 ed. 1988) Torts § 477, p. 561.) The Court noted that “[This] example illustrate[s] the point that  
14 claims do not exist in the ether, they consist of pleaded allegations coupled with extrinsic facts. That  
15 is what defines the insurer’s coverage duties, not the label chosen by the pleader. Thus, the *Hellar*  
16 *vs. Bianco* Court noted that “Publication of defamatory matter is its communication intentionally **or**  
17 **by a negligent act** to one other than the person defamed.” [*Hellar vs. Bianco* (1952) 111 Cal.App.  
18 2<sup>nd</sup> 424, 426, citing Restatement of the Law of Torts, § 577 (emphasis added).]<sup>3</sup>**

## 19 VI. DEFENDANT MAY BE FOUND LIABLE FOR BAD FAITH.

20 In its motion, STATE FARM contends that it is entitled to summary adjudication on the  
21 causes of action based upon bad faith, on the basis that “When there is no duty to defend, as a matter  
22 of law there can be no breach of the covenant of good faith and fair dealing.” [Motion, page 17,

23 <sup>2</sup> The authorities cited by State Farm dealt with allegations of purely intentional conduct, and discussed cases in which  
24 there were no allegations of “bodily injury” (as contrasted with emotional injuries). In this action, Philip Stellar  
25 specifically alleged a number of covered claims, for which he alleged a number of “bodily injuries,” to his scalp,  
26 stomach, head, and elsewhere.

27 <sup>3</sup> This Court should remain mindful that Philip Stellar also alleged a number of other acts and occurrences allegedly  
28 taken by Richard and Miles Stellar which were unrelated to his defamation claims.

1 lines 8-10] First of all, as demonstrated above, State Farm did have a duty to defend. Moreover, a  
2 trier of fact, under these circumstances, can find that it breached its duty of good faith and fair  
3 dealing.

4 California has long recognized that “[t]here is an implied covenant of good faith and fair  
5 dealing in every contract that neither party will do anything which will injure the right of the other to  
6 receive the benefits of the agreement.” [*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d  
7 654, 658.] This principle applies to insurance policies which are, after all, contracts. [*Ibid.*] In most  
8 contexts, breach of the covenant is compensated with contract remedies alone since the covenant is a  
9 contract term. [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684.] But an insurer’s breach  
10 of the covenant in insurance policies is also compensable with broader tort remedies to advance the  
11 social policy of safeguarding an insured in an inferior bargaining position who contracts for calamity  
12 protection, not commercial advantage. [*Id.* at pp. 684-685; *Egan v. Mutual of Omaha Ins. Co.* (1979)  
13 24 Cal.3d 809, 819-820, cert.den. and app. disp. (1980) 445 U.S. 912.]

14 The scope of the duty of good faith and fair dealing depends upon the purposes of the  
15 particular contract because the covenant is aimed at making effective the agreement’s promises.”  
16 (*Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at pp. 683-584; *Egan v. Mutual of Omaha Ins.*  
17 *Co.*, *supra*, 24 Cal.3d at p. 818.) Therefore, “[t]he terms and conditions of the [insurance] policy  
18 define the duties and performance to which the insured is entitled.” [*Western Polymer Technology,*  
19 *Inc. v. Reliance Ins. Co.* (1995) 32 Cal.App.4th 14, 24.]

20 STATE FARM has sought to deny coverage and defense based on a complete disregard of  
21 the allegations of the underlying case, and a misapplication of applicable law. It failed to fully  
22 investigate the nature and extent of Philip Stellar’s claim, and, within a day of tender, it blithely  
23 denied its duty to defend on a cursory review of the causes of action. Thus, RICHARD and MILES  
24 STELLAR are entitled to a trial to determine the “reasonableness” or “bad faith” of STATE  
25 FARM’S actions.

26 ///  
27 ///

1                   **VII. CONCLUSION.**

2                   In the underlying litigation, Philip Stellar asserted a number of claims against Richard Stellar  
3 and his son, Miles Stellar. The claims included, but were not limited to, defamation, and included a  
4 number of alleged actions that were covered— actually and potentially— by Plaintiff s insurance  
5 policy. Philip Stellar alleged actions that could be intentional or unintentional. He alleged negligent  
6 “occurrences” that he claimed caused him “bodily injury,” including stomach problems and an  
7 exacerbated scalp condition (seborrheic dermatitis).

8                   State Farm s policy boasted that “This policy is one of the broadest forms available today,”  
9 and it contained no exclusions of the claims asserted in the underlying litigation. Plaintiffs herein  
10 only need to demonstrate that the claims were potentially covered. State Farm failed to even  
11 investigate these claims, much less provide a defense. Based on the points and authorities set forth  
12 herein, it is respectfully submitted that State Farm s motion for summary judgment must be denied.

13  
14 DATED: October 6, 2006

LAW OFFICES OF RICHARD D. FARKAS

15  
16  
17 By: \_\_\_\_\_  
18                   RICHARD D. FARKAS,  
19                   Attorneys for Plaintiffs  
20                   RICHARD and MILES STELLAR

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*RICHARD AND MILES STELLAR vs. STATE FARM*  
*Superior Court Case No. LC 074358*

**PROOF OF SERVICE**

I am a resident of the State of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is Law Offices of Richard D. Farkas, 15300 Ventura Boulevard, Suite 504, Sherman Oaks, California 91403. On the date listed below, I served the following document(s):

**PLAINTIFFS RICHARD AND MILES STELLAR'S POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.**

\_ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5 p.m. Our facsimile machine reported the "send" as successful.

**XX** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in the affidavit.

\_ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, deposited with Federal Express Corporation on the same date set out below in the ordinary course of business; that on the date set below, I caused to be served a true copy of the attached document(s).

\_ by personally delivering the document(s) listed above to the person at the address set forth below.

William R. Lowe 9483 Haven Avenue, Suite 102 Rancho Cucamonga, CA 91729	
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October \_\_\_\_, 2006

\_\_\_\_\_  
KERRI CONAWAY