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BATES, RICHARD L.

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GANNETT CO., INC.

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STATE OF NEW YORK
SUPREME COURT: COUNTY OF MONROE

RICHARD L. BATES,

Plaintiff,

v

GANNETT CO., INC.,

Defendant.

FRANCIS L. GOODSELL, ET AL,

Plaintiffs,

v

GANNETT CO., INC.,

Defendant.

BALLARD TACKETT, ET AL,

Plaintiffs,

v

GANNETT CO., INC.,

Defendant.

Index No. E2019009790
Index No. E2020002131
Index No. E2020007368

HON. DEBORAH A. CHIMES

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY OF ACTIONS PURSUANT TO CPLR 2201

Dated: September 30, 2022

HARTER SECREST & EMERY LLP
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PRELIMINARY STATEMENT

These cases raise a familiar issue. When an employee sues his or her employer for injuries caused by the employer's negligence, who decides whether those claims are compensable under New York's workers' compensation regime? The answer is well-settled. Where an employer has "secured compensation" (by purchasing workers' compensation insurance), it is for the Workers' Compensation Board to determine whether the claims occurred in the "course of employment" and are compensable by workers' compensation. Ordinarily, an injured employee will report his or her injuries to the employer and file a claim with the Workers' Compensation Board. But occasionally, an employee will skip this step and sue the employer directly for damages, prompting the employer to raise the affirmative defense of workers' compensation. In such cases, Supreme Court will *not* adjudicate the action on the merits (whether by motion or trial), but instead will refer the plaintiff's claims to the Workers' Compensation Board, which has primary jurisdiction to determine whether the claims arose in the course of employment. If so, the claims will be compensable by workers' compensation, which is an exclusive remedy barring a tort action for negligence.

These lawsuits seek relief under the New York Child Victims Act ("CVA"), but do not otherwise depart from the familiar scenario described above. All but one of the Plaintiffs allege that they were employed by Defendant in the 1980s as minor (under the age of 18) newspaper carriers for the Democrat & Chronicle newspaper, and that Defendant negligently allowed them to be injured by a district manager, Jack Lazeroff. One Plaintiff alleges that he was abused by an unidentified employee hired to restock newspaper vending machines ("Unnamed Employee"). At the time (and for decades prior), state law required newspapers to provide workers' compensation insurance for their minor newspaper carriers. Defendant complied, purchasing a workers' compensation policy from Liberty Mutual Insurance Company covering its minor newspaper

carriers throughout the 1980s, which is the decade during which all Plaintiffs' claims arose. Yet at no time, either contemporaneous with their injuries or following the enactment of the CVA in 2019, did Plaintiffs file claims with the Workers' Compensation Board. Instead, they commenced these negligence lawsuits.

For these reasons, as expanded upon below and in the accompanying supporting papers, the Court should stay these cases and refer the claims to the Workers' Compensation Board to determine whether Plaintiffs' injuries occurred in the course of their employment.

FACTS

The Plaintiffs allege that they were employed by Defendant in the 1980s as minor newspaper carriers for the Democrat & Chronicle newspaper in Rochester (*see* Dean Aff. Ex. A [Pleadings][1]). They claim that they were sexually abused by district manager Jack Lazeroff, and for one plaintiff, by the Unnamed Employee. Plaintiffs assert a single cause of action, for negligence, alleging that Defendant failed to exercise reasonable care in employing Lazeroff and the Unnamed Employee and allowing them to sexually abuse Plaintiffs (*see* Bates Compl. ¶¶ 44–67; Goodsell Compl. ¶¶ 109–132; Tackett Compl. ¶¶ 117–141). They allege that their negligence claims—which accrued decades ago—were revived by the New York Child Victims Act (*see* Bates Compl. ¶ 8; Goodsell First Am. Compl. ¶ 10; Tackett First Am. Compl. ¶ 12). Nowhere do they allege that Defendant failed to secure workers' compensation insurance for them.

Since 1962, the Legislature has defined the work of minor newspaper carriers as hazardous work for which an employer is required to pay workers' compensation in the event of injury (*see* Workers' Compensation Law § 3[1] [Group 21]), and further, has defined minor newspaper

[1] For ease of reference, we refer to the operative pleadings as "Bates Compl.," "Bates Answer," "Goodsell First. Am. Compl.," "Goodsell Answer," "Tackett First Am. Compl.," and "Tackett Answer."

carriers as "employees" and their newspaper companies as "employers" (*see* Workers' Compensation Law § 2[3], [4]).

True to the statute, Defendant purchased workers' compensation insurance throughout the 1980s. Arthur Proulx is the President of Blades, Crout & Proulx LLC ("Blades"), an insurance consulting firm that has advised Defendant since 1970 (*see* Proulx Aff. ¶ 3). Based on his personal knowledge and experience, Mr. Proulx avers that Defendant purchased a workers' compensation policy with Liberty Mutual each year between 1980 and 1990 ("WC Policy") and that the WC Policy covered Defendant's minor newspaper carriers (Proulx Aff. ¶ 6). Proulx provides the complete WC Policy for 1982 (*see* Proulx Aff Ex. A). The policy shows that the first year of coverage was 1975, and that the 1982 version was a renewal from the prior year (1981) (*see* Proulx Aff. ¶ 8). It named Defendant and its Rochester division as insureds (*see* Proulx Aff. ¶ 9), and listed dozens of covered operations, including "newspaper carrier boys (NY)," assigning that operation a unique code number, 4312 (*see* Proulx Aff. ¶ 9). The total estimated standard premium for all operations was $4,942,472, and for newspaper carrier boys—Rochester Newspapers Divisions of Gannett Co., Inc., the total estimated standard premium was $105,618. (*see* Proulx Aff. ¶ 12). Defendant would have paid only 25% of this amount because it was responsible for a deductible for each claim (*see* Proulx Aff. ¶ 11). Consequently, the total "deposit premium" (the premium paid upfront in a year) for all operations was $1,235,631 (*see* Proulx Aff. ¶ 12). Of this, the deposit premium to cover "newspaper carrier boys" in the Rochester division would have been approximately $25,404.50 (*see* Proulx Aff. ¶ 12).

Proulx also provides a partial copy of the WC Policy for 1984 (*see* Proulx Aff. Ex. B), which was a renewal from the prior year (1983) (*see* Proulx Aff. ¶ 15). It again named Defendant and its Rochester division as insureds, and again listed "newspaper carrier boys" as a covered

operation (code number 4312) (*see* Proulx Aff. ¶ 16). The exact deposit premium paid to cover minor carriers in the Rochester office is unclear because the pertinent extension schedules are missing from the partial 1984 WC Policy that survives (*see* Proulx Aff. ¶ 17). Nonetheless, it is clear that the deposit premium covered that operation because the total annual estimated premiums for all operations in 1984 ($4.54 million) was consistent with the total for 1982 ($4.9 million) (*see* Proulx Aff. ¶ 17).

Because the 1982 and 1984 policies were renewals, it is clear that the WC Policy was in effect for 1981 and 1983 (*see* Proulx Aff. ¶ 18). For three other years—1985, 1986 and 1990—Blades has located "information pages" (a snapshot of the policy) establishing that the WC Policy was in effect those years (*see* Proulx Aff. ¶ 21). As additional evidence, Defendant produced "coverage bulletins" from Liberty Mutual, showing that the WC Policy was in effect for 1980, 1981, 1982, 1983, 1984, 1985, and 1986 (*see* Proulx Aff. Ex. G). For 1988, Blades located "endorsement pages" (changes to a policy's terms) establishing that the WC Policy was in effect that year (Proulx Aff. ¶ 22). And for the entire decade, Blades located a handwritten fax showing that the WC Policy was in effect for 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, and 1990 (*see* Proulx Aff. Ex. F).

It is also clear that minor newspaper carriers availed themselves of the WC Policy throughout the 1980s. Defendant retained workers' compensation records from the 1980s for minor newspaper carriers (*see* Dean Aff. ¶ 14, Dean Aff. Ex. D). During the 1980s, 216 minor newspaper carriers (ages 11 through 17) reported job-related injuries to Defendant (*see* Dean Aff. Ex. ¶ E). Most claims were for mundane injuries, such as carriers falling from bicycles (*see* Dean Aff. Ex. ¶ E). But there were more serious claims, including for sexual assault and physical assault

against minor carriers (Dean Aff. Ex. E). Notably, one of the Plaintiffs himself filed a workers' compensation claim in 1989, after slipping on ice and injuring his elbow (*see* Dean Aff. Ex. E).

The Plaintiffs allege that they were abused by Lazeroff and the Unnamed Employee in the 1980s, that the abuse occurred in the course of their employment, and that Defendant should be liable in negligence for allowing the abuse to occur (*see* Bates Compl. ¶¶ 1–5, 44–67; Goodsell First Am. Compl. ¶¶ 16, 98, 109–132; Tackett First Am. Compl. ¶¶ 34–36, 117–141). They allege that Lazeroff was a "district [sales] manager" (*see, e.g.*, Bates Compl. ¶ 2). But nowhere do they allege that Defendant failed to secure workers' compensation for them. Moreover, Plaintiffs conceded in sworn testimony that neither they (nor their parents) submitted claims to the Workers' Compensation Board, either in the 1980s or following enactment of the CVA in 2019 (*see* Dean Aff Ex. C [deposition excerpts] [Ash Dep. at 61:20-23; Bates Dep. at 115:5-18; Copenhagen Dep. at 120:15-21; Goodsell Dep. at 84:17-22; Penberg Dep. at 112:25-113:13; Tackett Dep. at 103:2-104:10; Tracy Dep. at 269:5-16; York Dep. at 80:5-81:2]).

In its Answers to the Complaints, Defendant asserted the affirmative defense that Plaintiffs' claims are barred by the exclusive remedy provisions of the Workers' Compensation Law (*see* Dean Aff. Ex. B [Def.'s Ans. Bates Compl. ¶ 19; Def.'s Ans. Goodsell First Am. Compl. ¶ 21; Def.'s Ans. Tackett First Am. Compl. ¶ 21]). During discovery, Defendant produced documents establishing that it had secured workers' compensation coverage for the employee Plaintiffs during the years in which they allege they were injured during their employment due to Defendant's negligence.

STANDARD OF REVIEW

The Court may grant a stay of any action "in a proper case, upon such terms as may be just" (CPLR 2201). "It is left to the Court to determine what a 'proper case' is as a matter of discretion . . . ." (David Siegel, N.Y. Practice § 255 [6th Ed. 2018]). A court's determination to

stay an action will be disturbed only if it constitutes an abuse of discretion (*see, e.g., Concord Assoc., L.P. v EPT Concord, LLC*, 101 AD3d 1574, 1575 [3d Dept 2012]).

ARGUMENT

The Workers' Compensation Law is a statutory compensation regime intended to provide a "swift and secure source of benefits" to employees injured in the course of employment (*see O'Rourke v Long*, 41 NY2d 219, 222 [1976]). Employers must "secure compensation" for their employees, which requires "procurement of one of several forms of insurance, or, alternatively, obtaining authorization to rely upon self-insurance" (*id.*). Where an employer "secures compensation" for its employees (by obtaining insurance), those employees will enjoy secure benefits for their injuries (*see id.*). However, "the price for these secure benefits is the loss of the common-law tort action in which greater benefits might be obtained" (*id.*). In other words, for injuries caused by an employer's negligence, workers' compensation is an exclusive remedy (*see id.*; *see also* Workers' Compensation Law § 11).

Workers' compensation covers negligence and other unintentional torts of the employer, but does not apply where the employer intentionally perpetrates or directs the commission of an injury to an employee (*see Morris v United Parcel Serv.*, 134 AD2d 840, 841 [4th Dept 1987]). Because it covers unintentional torts, workers' compensation is the exclusive remedy for claims of negligent hiring, training, and supervision (*see Miller v Natl. Prop. Mgt. Assoc., Inc.*, 191 AD3d 1341, 1342 [4th Dept 2021]). It likewise covers claims for negligence against the employer predicated upon sexual assault committed by a manager or supervisor against subordinates (*see, e.g., Doe v State of NY*, 89 AD3d 787, 788 [2d Dept 2011] [affirming dismissal of claims against employer of sexual assault by corrections officer against fellow corrections officers]; *Barbato v Bowden*, 63 AD3d 1580, 1581 [4th Dept 2009] [dismissing teacher's claims for sexual harassment against school principal]; *Thomas v Northeast Theatre Corp.*, 51 AD3d 588, 589 [1st Dept 2008]

[exclusivity barred tort action by employee who was surreptitiously videotaped in a changing room by a manager]; *Sormani v Orange County Community Coll.*, 240 AD2d 724, 724 [2d Dept 1997] [dismissing claim for negligence against employer for sexual harassment committed by a basketball coach against employee]).

Because workers' compensation is an exclusive remedy, "whenever it appears . . . from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and, in any event, of proving noncoverage falls on the plaintiff" (*Murray v New York*, 43 NY2d 400, 407 [1977]). The existence of coverage is a question of law for Supreme Court to resolve (*see O'Rourke*, 41 NY2d at 222). After that, where an employer secured compensation, questions of whether an employee's injuries "occurred in the course of employment"—and are therefore compensable by workers' compensation—must be determined by the Workers' Compensation Board (*see id.* at 227). Indeed, "primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board and . . . it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board" (*Botwinick v Ogden*, 59 NY2d 909, 911 [1983]).

The Workers' Compensation Board's determination of this question—i.e., whether the injury occurred in the course of employment—will dramatically shape any pending or ensuing plenary action (*see O'Rourke*, 41 NY2d at 226–227). More to the point for present purposes, if the Workers' Compensation Board determines that the subject injuries occurred within the course of employment, there can be no unintentional tort action at all because workers' compensation is an exclusive remedy (*see id.*). On the other hand, if the Workers' Compensation Board determines that the injuries did not occur in the course of employment, a plaintiff may continue in his or her

plenary tort action. Of course, in that instance, any recovery against the defendant will be "tenuous," because "[a]n injury sustained outside of the course of employment would, in most conceivable situations, lack the necessary common-law connection to the fault of the employer" (*see id.* at 226).

A. Defendant "Secured Compensation" for Plaintiffs By Purchasing Workers' Compensation Insurance Covering Them.

Since 1962, the Legislature has defined the work of minor newspaper carriers (ages 11 to 17) as hazardous work for which an employer is required to pay workers' compensation in the event of injury (*see* Workers' Compensation Law § 3[1] [Group 21]; *O'Rourke*, 41 NY2d at 224). The Legislature further defined minor newspaper carriers as "employees" for workers' compensation purposes (*see* Workers' Compensation Law § 2[3]). Since then, minor newspaper carriers injured in the course of employment are entitled to workers' compensation benefits (*see, e.g., Birdsall v Peters*, 46 AD2d 11, 12 [3d Dept 1974] [affirming award of workers' compensation benefits to 16-year-old newspaper carrier suffering from a fractured skull after falling from his bicycle during the course of his employment]).

The Court of Appeals addressed these issues in *O'Rourke v. Long* (41 NY2d 219), where the plaintiff—a 10-year old newspaper carrier for the Long Island Press newspaper—was injured when he was struck by a vehicle after pausing his route to buy ice cream (*see id.*at 221). A claim was filed for the plaintiff with the Workers' Compensation Board and a check issued, but his attorney returned the check and commenced a plenary action for personal injuries (*see id.*). The lower court tried the case on the merits and dismissed it—and the Appellate Division affirmed (*see id.*). The Court of Appeals reversed, holding that "it was error for the courts below to have passed upon the merits of the plaintiffs' tort claim" and that instead, the case should have been referred

to the Workers' Compensation Board to determine whether the injuries occurred in the course of employment (*id.* at 221, 224).

Here, it is beyond fair dispute that—true to the statute—Defendant purchased workers' compensation insurance throughout the 1980s. Despite the passage of nearly four decades, copies of the WC Policy survive for the years 1982 and 1984, and those copies were renewals, establishing that coverage existed in 1981 and 1983 (*see* Proulx Aff. ¶¶ 8, 15). A host of other documents—including "information pages," "endorsement pages," and "coverage bulletins"—establish that the WC Policy was in effect in 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1988 and 1990 (*see* Proulx Aff. ¶¶ 21–23). And a handwritten fax kept by Defendant's insurance consultant, Blades, establishes that the WC Policy was in effect throughout the entire decade (*see* Proulx Aff. Ex. F).

It is likewise clear that the WC Policy covered Defendant's minor newspaper carriers, including Plaintiffs. The 1982 WC Policy identifies "newspaper carrier boys (NY)" as a covered operation for the Rochester office, and lists an estimated standard premium for that coverage of $105,618, of which Defendant would have actually paid approximately $26,404.50 upfront (*see* Proulx Aff. ¶ 12). The 1984 WC Policy similarly covered "newspaper carrier boys," and although it is unclear what the exact premium was for that coverage in the Rochester division, the policy clearly included such premiums as part of the estimated total annual premium, which was materially similar to that charged in 1982 (*see* Proulx Aff. ¶ 17). Providing specificity to this general evidence of applicable coverage, it should be noted that 216 minor newspaper carriers filed workers' compensation claims throughout the 1980s (*see* Dean Aff. Ex. D), and one of those claimants is a Plaintiff in these cases, who filed such a claim in 1989, after slipping on ice (*see* Dean Aff. Ex. E).

In light of the multitude of documents evidencing coverage, there exists no reasonable dispute that Defendant secured workers' compensation for Plaintiffs in the 1980s by purchasing the WC Policy.

B. The Court Should Stay the Actions And Refer the Claims to the Workers' Compensation Board.

As discussed, "[p]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board and . . . it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board" (*Botwinick*, 59 NY2d at 911). Consequently, a court may not credit (or reject) the defense of workers' compensation exclusivity until the Workers' Compensation Board determines whether a plaintiff's injuries were sustained in the course of employment (*see Brown v Hall*, 139 AD3d 1404, 1405 [4th Dept 2016]). Where the question of applicability of the Workers' Compensation Law first arises in Supreme Court, the "case should [be] referred to the Board for a determination whether [the] plaintiff has a valid cause of action for damages or whether he [or she] is limited to benefits under the Workers' Compensation Law" (*Davis v Erie County Dept. of Social Servs.*, 133 AD3d 1373, 1374 [4th Dept 2015]; *see also Warren v E.J. Militello Concrete, Inc.*, 177 AD3d 1370, 1371 [4th Dept 2019]).

A stay is appropriate in such cases. For example, In *Clark v Armon Prods.*, the plaintiff—a machine operator—sued his employer for negligence after he was assaulted by an off-the-clock employee of the defendant (*see* No. 22851/2017E, 2019 NY Misc. Lexis 22898, at *1–*2 [Sup Ct, Bronx County 2019]). After filing the lawsuit, the plaintiff filed a workers' compensation claim for his injuries—but a hearing was never held before the Workers' Compensation Board (*see id.* at *2). The employer moved pursuant to CPLR 2201 for a stay of the lawsuit pending a determination of the Workers' Compensation Board of the plaintiff's status, and the plaintiff

opposed the motion as "premature because there is outstanding discovery" (*id.*). Supreme Court granted the motion and entered a stay, reasoning that because the plaintiff alleged in his complaint that he was an employee and injured within the scope of his employment, "the Workers' Compensation Board has primary jurisdiction regarding the relevant issues presented" (*id.*). The court rejected the plaintiff's claim that he needed additional discovery, saying that it would not be relevant to determining the appropriateness of a stay (*see id.* at *5).

While not binding on this Court, *Clark* is abundantly persuasive authority. The Plaintiffs allege that they were employees of Defendant and were sexually assaulted by Lazeroff and the Unnamed Employee, who acted in the course and scope of their employment to cause such abuse (*see* Dean Aff. Ex. A [Bates Compl. ¶ 1, 4–5]; [Goodsell First Am. Compl. ¶¶ 16, 98]; [Tackett First Am. Compl. ¶¶ 34, 36]). They allege a single cause of action against Defendant, for negligence (*see* Dean Aff. Ex. A [Bates Compl. ¶¶ 44–67]; [Goodsell Compl. ¶¶ 109–132]; [Tackett Compl. ¶¶ 117–141]). They do not allege that Defendant failed to secure compensation (*see Murray*, 43 NY2d at 407). But even if they had, or do, it is clear that Defendant secured compensation by purchasing the WC Policy, which covered Plaintiffs throughout the 1980s (*see supra* Part A[1]). Yet because of Plaintiffs' election to not file Workers' Compensation claims, the Workers' Compensation Board has not yet had an opportunity to exercise its primary jurisdiction over Plaintiffs' allegations (*see* Dean Aff Ex. C [Ash Dep. at 61:20-23; Bates Dep. at 115:5-18; Copenhagen Dep. at 120:15-21; Goodsell Dep. at 84:17-22; Penberg Dep. at 112:25-113:13; Tackett Dep. at 103:2-104:10; Tracy Dep. at 269:5-16; York Dep. at 80:5-81:2]). Accordingly, the case should be stayed, and no amount of additional discovery will change that (*see Clark*, 2019 NY Misc. Lexis 22898, at *5).

In opposition to Defendant's motion, it is anticipated that Plaintiffs will argue that they were independent contractors or that they were not injured in the course of their employment, but such would ignore their own Complaints—which squarely allege the opposite—and would further ignore that the statute required newspaper carriers to be treated as employees for workers' compensation purposes (*see* Workers' Compensation Law § 3[1] [Group 21]). In any event, it is for the Workers' Compensation Board, and not this Court, to decide such issues (*see McGee v Van Erden*, 66 AD3d 1426, 1427 [4th Dept 2009]). And as discussed, it would be self-defeating for Plaintiffs to make these arguments because "[a]n injury sustained outside of the course of employment would, in most conceivable situations, lack the necessary common-law connection to the fault of the employer" (*O'Rourke*, 41 NY2d at 226).

In other words, had Lazeroff and the Unnamed Employee assaulted Plaintiffs outside of the course of their employment with Defendant, such abuse would be deemed to have been "motivated by private concerns not related to any conduct in furtherance of defendant's business, and thus defendant [would not be] liable under the doctrine of respondeat superior" (*see Villongco v. Tompkins Sq. Bagels*, 155 A.D.3d 589, 590 [1st Dep't 2017]; *see also Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999] [affirming dismissal of lawsuit by patient against hospital whose employee sexually assaulted the patient, reasoning that "assuming plaintiff's allegations of sexual abuse are true, it is clear that the employee here departed from his duties for solely personal motives unrelated to the furtherance of the [h]ospital's business"]).

It is expected that Plaintiffs will invoke *Peters v. Coxsackie-Athens Central School District*, but that case is inapposite (*see Peters v. Coxsackie-Athens Central School District*, No.EF2019-956 [Sup. Ct. Greene Cnty. June 2, 2022] [Mackey, J.]). In *Peters*, Supreme Court (Green County) denied a motion for *dismissal* of a plaintiff-employee's negligence claims where

there was no proof of insurance coverage—and because the issue was presented by motion to dismiss, the court was obligated to afford the complaint every favorable inference (*see Peters v. Coxsackie-Athens Central School District*, No. EF2019-956 [Sup. Ct. Greene Cnty. June 2, 2022] [Mackey, J.]). *Peters* seems contrary to binding precedent because it ignores that Plaintiffs' must plead the non-existence of coverage (*see Murray*, 43 NY2d at 407). But regardless, Defendant here does not seek dismissal of these actions; instead, it seeks a stay of the actions to allow the Workers' Compensation Board to exercise the primary jurisdiction vested in it by the Legislature.

Importantly, it cannot be said that Defendant waived its right to seek a stay of these actions. As discussed, the Court cannot address the workers' compensation defense without first referring the claims to the Workers' Compensation Board (*see Brown*, 139 AD3d at 1404; *Warren*, 177 AD3d at 1371). Defendant would have waived the defense only if it ignored the issue through trial (*see Murray*, 43 NY2d at 407 ["Workmen's compensation is an exclusive remedy . . . . Although the issue may be waived . . . such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself"]; *see also Shine v Duncan Petroleum Transp., Inc*., 60 NY2d 22, 25 [1983] [reversing order granting stay of action pending referral to workers' compensation Board, where defendant delayed until jury selection of trial to raise motion for stay]). But here, Defendant asserted the defense in its Answers to the Complaints and raises it now, by motion, at the first practical opportunity following the depositions of Plaintiffs and documentary productions by Defendant establishing the requisite fact of the existence of coverage.

Plaintiffs may also contend that their employment was illegal because it is unclear whether they had "work certificates" in the 1980s as required by Education Law Section 3228 (*see* Plaintiff Letter to Chambers at 3 [Sept. 4, 2022]). This is a red herring. Although Defendant is confident that its newspaper carriers were legally authorized to work and were issued the proper certificates,

the Court of Appeals rejected a nearly identical argument in *O'Rourke*, holding that "the fact that the employment was illegal is not a circumstance which removes the employer or the employee from the scope of the compensation law" but instead allows "imposition of an award [of workers' compensation] twice the amount ordinarily payable" (*O'Rourke*, 41 NY2d at 223 [rejecting argument that illegal employment of 10-year-old paperboy (who ought have been 12 years pursuant to the Education Law) removed claim from workers' compensation exclusivity]).

For these reasons, Defendant respectfully asks that the Court enter an order staying these actions pursuant to CPLR 2201 and referring the claims to the Workers' Compensation Board (*see* CPLR 2201, *see also Nepomuceno*, 94 AD3d at 454). Because Plaintiffs openly allege that they were Defendant's employees and were injured in the course of their employment, and because Defendant "secured compensation" by purchasing workers' compensation insurance for them, the Workers' Compensation Board has primary jurisdiction to determine whether Plaintiffs' injuries occurred in the course of employment (*Botwinick*, 59 NY2d at 911). To allow the actions to proceed without first hearing from the Workers' Compensation Board risks subjecting Defendant "to lengthy and expensive pretrial and trial proceedings before a tribunal that [may be] without authority to impose tort liability" (*O'Rourke*, 41 NY2d at 221).[2]

[2] It is of no moment that Plaintiffs may oppose filing claims with the Workers' Compensation Board. "The board has the discretion to process a claim for compensation and render a decision, even though the claimant objects and even though a civil action was pending in the courts" (*O'Rourke*, 41 NY2d at 227–28).

C. It Would Not be Unfair to Stay the Actions Pending Referral to the Workers' Compensation Board.

Whether to treat these Child Victims Act claims as workplace injuries raises important questions, particularly whether workers' compensation is an adequate remedy for claims of workplace sexual abuse. But irrespective of the gravity of the question, it would be inappropriate for the Court to answer it before the Workers' Compensation Board has an opportunity to do so (*see O'Rourke*, 41 NY2d at 221), particularly because Defendant scrupulously adhered to the Workers' Compensation Law and maintained workers' compensation coverage for its minor newspaper carriers.

In the same way that workers' compensation is the exclusive remedy of injured employees, it is the exclusive liability of employers who undertake to purchase workers' compensation insurance (*see* Workers' Compensation Law § 11 ["The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever"]). By securing compensation to its employees, an employer trades the ongoing expense of insuring against injuries (that might never occur) for the certainty of knowing that it will not "be subject to fending off liability in a forum from which the Legislature provided a shield" (*O'Rourke*, 41 NY2d at 221). Defendant purchased workers' compensation insurance for its minor carriers throughout the 1980s, trusting that in doing so it would not be required to litigate negligence actions in Supreme Court. To disregard this would countermand the statute, depriving Defendant the "shield" provided by the Legislature (*see id*.).

It is important to note that Plaintiffs omitted to submit their claims to the Workers' Compensation Board even after the passage of the CVA in 2019. The CVA revived "civil claim[s] or cause[s] of action" for a window of two years and six months, ending August 14, 2021 (*see* CPLR 214-g). There is some doubt whether the CVA revived claims for workers' compensation,

because "[t]he courts have repeatedly held that a proceeding under the Workers' Compensation Law is not an action or special proceeding under the CPLR or the former Civil Practice Act, but a statutory proceeding having its own rules as to limitations" (*Taylor v Vassar Coll.*, 138 AD2d 70, 72 [3d Dept 1988] [emphasis added]). In other words, the Workers' Compensation Board could determine that the claims fall within that tribunal's exclusive jurisdiction and were revived, but are time-barred because Plaintiffs failed after 2019 to submit claims to it. Alternatively, the WCB might conclude that Plaintiffs' claims were not revived at all by the CVA, in which case they were filed nearly 40 years too late. But for better or worse, neither determination affects Defendant's request or this Court's limited authority under the circumstances.

Should the Workers' Compensation Board reject the claims as time-barred, Plaintiffs' concerns for the fairness of such an outcome would be for the Legislature, the only body that may revive such claims (*see Thompson v Maimonides Med. Ctr.*, 86 AD2d 867, 868 [2d Dept 1982] ["The workers' compensation bar applies even though the employee suffers some loss for which he cannot be compensated under the Workers' Compensation Law . . . . However harsh such a result may seem under certain circumstances, the remedy is with the Legislature and not the courts"]). Ultimately, such concerns would boil down to one thing: dissatisfaction that the Legislature treats workplace sexual assault as a workplace injury subject to workers' compensation at all or that it saw fit not to revive such claims by way of the CVA (*see, e.g.*, *Doe*, 89 AD3d at 788; *Barbato*, 63 AD3d at 1581; *Thomas*, 51 AD3d at 589; *Sormani*, 240 AD2d at 724). Regardless, it for the Legislature and not this Court to address that concern. Indeed, legislators have repeatedly introduced bills to amend the Workers' Compensation Law to allow civil actions

by employees injured as a result of sexual assault caused by the negligent acts or omissions of their employers, but those bills have yet to make it out of committee.[3]

Ultimately, to the extent the Court is inclined to consider notions of fairness with respect to this Stay Motion, Defendant submits that until the Workers' Compensation Board weighs in, it would not be fair to require Defendant to litigate in a forum that lacks primary jurisdiction over Plaintiffs' claims (*see O'Rourke*, 41 NY2d at 221 ["by considering a complaint on its merits, particularly if the plaintiff is permitted to put in favorable proof at a trial, the employer would be subject to fending off liability in a forum from which the Legislature provided a shield . . . [and] put to lengthy and expensive pretrial and trial proceedings before a tribunal that was without authority to impose tort liability"]).

D. The Court Should Defer Considering Whether to Allow Amendment of the Complaints Until the Workers' Compensation Board Speaks.

To evade the exclusivity of workers' compensation, it is expected that Plaintiffs will seek to amend their Complaints to allege discrimination claims and intentional torts. Defendant would oppose any motion to amend the Complaints at this late stage. But importantly, unless Plaintiffs withdraw their negligence claims altogether, the Workers' Compensation Board will inevitably be required to address them. Thus, the Court should stay any further developments in this case, including amendment of the pleadings, until such time as the WCB has had the opportunity to discharge its statutory duty to assess Plaintiffs' claims of injury. Should the Court nonetheless be inclined to consider amendment at this stage, Defendant offers the following argument.

[3] *See* S.3955B [1999-2000 Regular Session] [Died in Senate Labor Committee]; S.1986 [2001-2002 Regular Session] [Died in Senate Labor Committee]; S.1829 [2003-2004 Regular Session] [Died in Senate Labor Committee]; S.307 [2005-2006 Regular Session] [Died in Senate Labor Committee]; S.1572 [2007-2008 Regular Session] [Died in Senate Labor Committee]; S.1795/A.7767 [2009-2010 Regular Session] [Died in Senate/Died in Assembly Labor]; S.1227/A.838 [2011-2012 Regular Session] [Died in Labor]; S.990/A.946 [2013-2014 Regular Session] [Died in Labor]; S.1892 [2015-2016 Regular Session] [Died in Labor]; S.3462 [2017-2018 Regular Session] [Referred to Labor]; S.4537 [2019-2020 Regular Session] [Referred to Labor]; S.4672 [2021-2022 Regular Session] [Referred to Labor].

Although leave to amend a complaint "shall be freely given," it should be denied if the proposed amendment "manifestly lacks merit or is palpably insufficient on its face" or if amendment is sought so late as to cause significant prejudice to the defendant (*Washburn v Citibank, N.A.*, 190 AD2d 1057 [4th Dept 1993]; *see* CPLR 3025[b]; *Holst v Liberatore*, 105 AD3d 1374, 1375 [4th Dept 2013]). To allege a claim for discriminatory employment practices under the Human Rights Law (Executive Law § 296),[4] Plaintiffs would be required to allege that Lazeroff and the Unnamed employee discriminated against them on the basis of a protected category (as they existed in the 1980s), such as race, creed, color, national origin, or sex, and that Defendant "became a party to [Lazeroff's and the Unnamed Employee's] conduct by encouraging, condoning, or approving it" (*State Div. of Human Rights ex rel. Greene v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985]; *see State Div. of Human Rights v Henderson*, 49 AD2d 1026, 1026 [4th Dept 1975]; *see also Hart v Sullivan*, 84 AD2d 865, 865 [3d Dept 1981]). To state a claim for an intentional tort, such as battery and sexual assault, Plaintiffs would be required to allege that Lazeroff and the Unnamed Employee held positions of such a high level in the company that their conduct may be imputed to Defendant (*see Randall v Tod-Nik Audiology, Inc.*, 270 AD2d 38, 39 [1st Dept 2000] [assault by president and half-owner of company might be imputable to company to avoid workers' compensation bar]). Plaintiffs will be unable to plausibly allege that Lazeroff or the Unnamed employee targeted them on the basis of a protected characteristic, much less that that Defendant was sufficiently cognizant of the alleged abuse that it "became a party" to that conduct (*cf. Spoon v Am. Agriculturalist, Inc.*, 120 AD2d 857, 860 [3d Dept 1986] [requiring "pervasive knowledge" by the employer of the wrongful conduct]). Similarly, they will be unable

[4] Which Defendant would oppose as time-barred and not revived by the CVA because it revived claims predicated on conduct that would constitute a sexual offense under Penal Law Section 130 (or incest or use of a child in a sexual performance) (*see* CPLR 214-g)), not for discrimination under the Human Rights Law.

to plausibly allege that the perpetrators, a low-level supervisor and a vending machine re-stocker, held sufficiently high positions in the company to impute their conduct to Defendant.

Moreover, it would cause significant prejudice to Defendant to allow amendment now—three years after these actions began—when any facts that might support a claim for an intentional tort were available years ago upon the filing of the Complaints. Defendant deposed all eight plaintiffs, produced over 41,000 pages of documents in response to 178 requests from Plaintiffs, and responded to 59 interrogatories from Plaintiffs. To allow Plaintiffs to radically alter their theory of liability now would require new depositions of Plaintiffs and a new round of requests and interrogatories from Plaintiffs—essentially, a repeat of years' worth of discovery (*see* Dean Aff. ¶ 25).

It is clear that any motion to amend the Complaints would be tactical and designed to avoid referral to the Workers' Compensation Board. The Court should not countenance such tactics. Rather, should Plaintiffs cross-move to amend their Complaints, the Court should refer the negligence claims to the Workers' Compensation Board and stay consideration of the cross-motions pending the conclusion of the Board's deliberations.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court enter an order: (a) referring these actions to the Workers' Compensation Board for consideration of whether Plaintiffs' injuries occurred in the course of employment and are compensable by workers' compensation; (b) staying these actions pending the determination of the Workers' Compensation Board; and (c) granting such other and further relief as the Court deems necessary, just, and proper.

Dated: September 30, 2022

Harter Secrest & Emery LLP

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CERTIFICATION PURSUANT TO UNIFORM RULE 202.8-B

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme and County Court, I certify that this Memorandum of Law contains 6,366 words, using the word count feature of the software used to prepare this Memorandum of Law, excluding the caption, table of contents, table of authorities, and signature block.

Dated: September 30, 2022 By: _____
Andrew M. Dean, Esq.