**LEGEND** (to find and replace)

&Client& means the policyholder

&DC& means dependent counsel

&IC& means independent counsel

&InsCo& means the liability insurer

&Blank& means supply appropriate information

&Victim& means the injured third party plaintiff

Attorneys for Plaintiff,

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

&Client&

 Plaintiff,

vs.

&DC&, &InsCo& and DOES 1 to 250, Inclusive,

 Defendants.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

)))))))))

Case No.

PLAINTIFF’S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PERMANENT INJUNCTION SHOULD NOT BE ISSUED; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF &Client& and &IC&

Dept:

Time:

Action Filed: &Date&

**EX PARTE APPLICATION**

 Pursuant to Bus. & Prof. Code § 17200 et. seq., Code Civ. Proc. §§ 525, 526(a), 527, Rules of Court 3.1150, and 3.1200 to 3.1207, Plaintiff, &Client& applies, on an *ex parte* basis, for a temporary restraining order, and an order requiring Defendants, &DC& and &InsCo& as well as all officers, directors, shareholders, members, employees and agents, and all persons acting on their behalf, to show cause why a permanent injunction should not be issued.

 This application is based upon the attached memorandum of points and authorities, the

declarations of &Client& and &IC&, the Complaint filed in this action, and upon such further argument or evidence as maybe presented at the hearing on this Application.

 **SUMMARY OF CASE**

 Plaintiff, &Client& is forced to file this action and bring this ex parte application for a temporary restraining order to prevent the irreparable damage to &Client& from unethical and unlawful conduct by Defendant, &DC&, a firm of attorneys, and from unlawful conduct by Defendnant, &InsCo&. Undisputable evidence establishes that: 1) &DC& and &InsCo& have previously and continue to violate and enable the violation of Rules of Professional Conduct (Rule), Rules 1.7 and 1.8.6, the Cumis Rule and the Cumis Test.

 The two part Cumis Rule requires first that &DC& always investigate, analyze, and disclose potential conflicts of interest when its insurer/client agrees to pay for the defense of its policyholder in a third party liability dispute, issues a reservation of rights to its policyholder challenging coverage for the suit, and appoints &DC& to represent both the insurer/client and the policyholder/client in the same action that involves disputed issues of fact or law that could impact coverage. The second part of the Cumis Rule requires &InsCo& to pay for independent counsel if: 1) &DC& fails to investigate, analyze and disclosure potential conflicts of interest; or 2) a disqualifying conflict of interest exists.

 The determination of whether a disqualifying conflict of interest exists is controlled by the two part Cumis Test, that: 1) &DC& has failed to adequately investigate, analyze, and disclose potential conflicts of interest; or 2) &DC& has adequately investigated, analyzed, and disclosed potential conflicts of interest, and either A) correctly determined that no disqualifying conflict of interest exists; or B) obtains both clients’ informed written consent.

 Where &DC& and/or &InsCo& violate the Cumis Rule or fail the Cumis Test, then &DC& must quit and &InsCo& must promptly pay for independent counsel selected and directed by solely by the policyholder to conduct the defense. Undisputable facts establish that &DC& and &InsCo& have violated the Cumis Rule and failed the Cumis Test.

 This application is made pursuant to Code Civ. Proc. § 527 on the grounds that: (i) Plaintiff is likely to succeed on the merits of its claim for breach of fiduciary duty; (ii) that unless the temporary restraining order is granted, Plaintiff will continue to suffer irreparable injury; and (iii) that the balance of hardships tips lopsidedly in Plaintiff’s favor. &DC& and &InsCo& are behaving unlawfully, unfairly, and fraudulently.

 **NOTICE OF APPLICATION**

 Pursuant to Rule of Court 3.1204(b), notice of this ex parte application was provided

to Defendant, &DC& by emailing a copy of this application which states with specificity the nature of the relief requested and the date, time, and place for the presentation of the application. &DC& responded to &Client&’s email by advising that it would appear to oppose the application.

**NATURE OF RELIEF REQUESTED**

 Plaintiff requests that this Court issue a temporary restraining order and an order to show cause why a permanent injunction should not be issued as follows:

 Pursuant to Code Civ. Proc. § 527, Plaintiff seeks an order that Defendant, &DC& appear in this Court on a specific date and time, to show cause why they and their agents, employees, representatives, and all persons acting in concert or participation with it or them, should not be:

1) enjoined from representing &Client& in the &Victim& action;

2) enjoined from accepting compensation from &InsCo& to represent &Client& in the &Victim& action;

3) permanently enjoined from representing any policyholder in any third party liability action in California on behalf of any liability insurer that has issued a reservation of rights without first complying with Rule 1.7, the Cumis Rule, and the Cumis Test; and

4) permanently enjoined from accepting compensation to represent any policyholder in any third party liability action pending in California from any liability insurer that has issued a reservation of rights without first complying with Rules 1.8.6, 1.7, the Cumis Rule, and the Cumis Test.

 Pursuant to Code Civ. Proc. § 527, Plaintiff also seeks an order that Defendant &InsCo& appear in this Court on a specific date and time, to show cause why it and its agents, employees, representatives, and all persons acting in concert or participation with it or them, should not be:

1) enjoined from paying compensation to &DC& to represent &Client& in the &Victim& action;

2) permanently enjoined from appointing any counsel to represent any policyholder in any third party liability action pending in California when it issues any reservation of rights unless its chosen counsel first complies with Rules 1.7 and 1.8.6, the Cumis Rule, and the Cumis Test;

3) permanently enjoined from compensating any appointed counsel to represent any policyholder in any third party liability action pending in California when it has issued a reservation of rights unless its chosen counsel first complies with Rules 1.7 and 1.8.6, the Cumis Rule, and the Cumis Test.

October \_, 2020

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

By:

Attorneys for Plaintiff,

&Client&

**TABLE OF CONTENTS**

PROLOGUE

INTRODUCTION

FACTUAL STATEMENT

DISCUSSION

1. The Attorney-Client Relationship Is Fiduciary, Including Duties of

 Undivided Loyalty, Disclosure, and Confidentiality

2. Rules 1.7 Prohibits Conflicted Dual Representation

3. Rules 1.8.6 Prohibits Insurer Compensation

4. The Two Part Cumis Rule

5. The Required Quality of Conflict of Interest Analysis

6. The Cumis Test

7 &DC& Has Failed to Comply With California Law

8. The Unfair Competition Law (UCL)

 A. The “Unlawful”, “Unfair” and “Fraudulent” Prongs

 B. Standing to Sue - Injury in Fact

 C. No Adequate Remedy at Law

 D. No Class Action Is Required

 E. Public Interest

9. &DC&’s Business Practices Are “Unlawful”, “Unfair”, and “Fraudulent”

CONCLUSION

**TABLE OF AUTHORITIES**

**Federal Cases**

*Armstrong Cleaners, Inc. v. Erie Ins. Exch.*

(S.D. Ind. 2005) 363 F.Supp.2d 797

*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*

(9th Cir. 2014) 752 F3d 755

*Price v. City of Stockton*

(9th Cir. 2004) 390 F.3d 1105

**State Cases**

*Aerojet-General Corp. v. Transport Indemnity Co.*

(1997) 17 Cal.4th 38

*Allied Grape Growers v. Bronco Wine Co.*

(1988) 203 Cal.App.3d 432

*American Mut. Liab. Ins. Co. v. Superior Court*

(1974) 38 Cal.App.3d 579

*Anderson v. Eaton*

(1930) 211 Cal. 113

*Assn. of Calif. Ins. Cos v. Jones*

(2017) 2 Cal.5th 376

*Barquis v. Merchants Collection Assn.*

(1972) 7 Cal.3d 94

*Blanchard v. State Farm Fire & Casualty Co.*

(1991) 2 Cal.App.4th 345

*Buss v. Superior Court* (1997)

16 Cal.4th 35

*Calvert v. State Bar*

(1991) 54 Cal.3d 765

*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton*

(2003) 109 Cal App 4th 1219

*Clayworth v. Pfizer, Inc.*

(2010) 49 Cal.4th 758

*Community Assisting Recovery, Inc. v. Aegis Ins. Co.*

(2001) 92 Cal.App.4th 886

*Cox v. Delmas*

(1893) 99 Cal. 104

*Dynamic Concepts, Inc. v. Truck Ins. Exchange*

(1998) 61 Cal.App.4th 999

*Flatt v. Superior Court*

(1994) 9 Cal.4th 275

*Foremost Ins. Co. v. Wilks*

(1988) 206 Cal.App.3d 251

*Gafcon, Inc. v. Ponsor & Associates*

(2002) 98 Cal.App.4th 1388

*Ghazarian v. Magellan Health, Inc.*

(2020) 53 Cal.App.5th 171

*Golden Eagle Ins. Co. v. Foremost Ins. Co.*

(1993) 20 Cal. App. 4th 1372

*Gregori v. Bank of America*

(1989) 207 Cal. App. 3d 291, 308

*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*

(2000) 79 Cal.App.4th 114

*Haraguchi v. Superior Court*

(2008) 43 Cal.4th 706

*Haskel, Inc. v. Superior Court*

(1995) 33 Cal.App.4th 963

*Industrial Indem. Co. v. Great American Ins. Co.*

(1977) 73 Cal.App. 3d 529

*In re Jordan*

(1972) 7 Cal.3d 930

*Ishmael v. Millington*

(1966) 241 Cal.App.2d 520

*James 3 Corp. v. Truck Ins. Exchange*

(2001) 91 Cal.App.4th 1093

*Jeffry v. Pounds*

(1977) 67 Cal.App.3d 6

*Kwikset Corp. v. Superior Court*

(2011) 51 Cal.4th 310

*Long v. Century Indemnity Co.*

(2008) 163 Cal.App.4th 1460

*Lysick v. Walcom*

(1968) 258 Cal.App.2d 136

*Manufacturers Life Insurance Co. v. Superior Court*

(1995) 10 Cal.4th 257

*McGee v. Superior Court*

(1985) 176 Cal.App.3d 221

*McGill v. Citibank, N.A.*

(2017) 2 Cal.5th 945

*Montrose Chemical Corp. v. Superior Court*

(1993) 6 Cal.4th 287

*Moradi-Shalal v. Fireman’s Fund Ins. Co.*

(1988) 46 Cal.3d 287

*Neel v. Magana, Olney, Levy, Cathcart & Gelfand*

(1971) 6 Cal.3d 176

*Novak v. Low, Ball & Lynch*

(1999) 77 Cal.App.4th 278

*People v. Cappuccio, Inc.*

(1988) 204 Cal.App.3d 750

*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*

(1999) 20 Cal.4th 1135

*Purdy v. Pacific Automobile Ins. Co.*

(1984) 157 Cal.App.3d 59

*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.*

(1984) 162 Cal.App.3d 358

*Santa Clara County Counsel Attorneys Assn. v. Woodside*

(1994) 7 Cal.4th 525

*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*

(2016) 244 Cal.App.4th 590

*Spindle v. Chubb/Pacific Indemnity Group*

(1979) 89 Cal.App.3d 706

*State Farm Fire & Cas. Co. v. Superior Court*

(1989) 216 Cal.App.3d 1222

*Truck Ins. Exchange v. Superior Court*

(1996) 51 Cal.App.4th 985

*United Enterprises, Inc. v. Superior Court*

(2010) 183 Cal. App. 4th 1004

*Vega v. Jones, Day, Reavis & Pogue*

(2004) 121 Cal.App.4th 282

*Vu v. Prudential Prop. & Cas. Ins. Co.*

(2001) 26 Cal.4th 1142

*Woods v. Superior Court*

(1983) 149 Cal.App.3d 931

*Zhang v. Superior Court*

(2013) 57 Cal.4th 364

**Statutes**

Bus. & Prof. Code § 6068(m)

Bus. & Prof. Code § 17200

Bus. & Prof. Code § 17203

Bus. & Prof. Code § 17204

Bus. & Prof. Code § 17205

Civ. Code § 2860

Civ. Code § 3368

Civ. Code § 3420

Ins. Code § 790.03(h)

**Regulations**

Cal. Code Regs. § 2695.4

**Rules of Professional Conduct**

Rule 1.0.1(e)

Rule 1.4

Rule 1.6

Rule 1.7

Rule 1.8.6

Rule 5-102(B)

**Treatises**

The Bible: Matthew 6:24

Fifty State Survey: http://dutytodefend.com/50-state-survey-does-rpc-rule-1-7-

 disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-

 independent-counsel-when-reserving-rights-to-deny-coverage/

Rest.3d Law Governing Lawyers § 20

Rest. Liab. Ins.

**PROLOGUE**

“No one can serve two masters.” (Matthew 6:24.)

**INTRODUCTION**

 This court should grant to &Client& a immediate TRO, followed promptly by a permanent injunction (as set forth in detail in the Application) based upon indisputable facts and clear law compelling &DC& and &InsCo& from clear, systemic violations of California law, including Rules of Professional Conduct (Rule), Rule 1.7 and 1.8.6, the Cumis Rule, the Cumis Test, Insurance Code § 790.03(h), California Code of Regulations, sections 2695 et. seq., and others.

 Whenever an injured third party plaintiff sues a defendant with liability insurance, whose insurer agrees to defend the policyholder under a reservation of its rights to later deny coverage to the policyholder and to the injured plaintiff and the insurer appointed lawyers from its panel, here identified as **de**pendent counsel (whose counterparts are **in**dependent counsel), both dependent counsel and the reserving insurer must follow a well defined and strict Cumis protocol.

 Dependent counsel must investigate, analyze, and make written disclosure of its analysis to both the reserving insurer and the policyholder. If dependent counsel fails to do so, it may not accept the assignment from the reserving insurer nor accept compensation for any work performed in violation of Canons of Ethics. If dependent counsel does make the required disclosures and correctly concludes that no disqualifying conflict of interest exists or concludes the opposite but secures the informed written consent of both clients (the reserving insurer and the policyholder), it may accept the assignment and compensation.

 Here &DC& and &InsCo& did not adhere to the Cumis protocol, did not follow the Cumis Rule, and failed the Cumis Test. Worse, defendants have arrogantly disclaimed that they are subject to any of this well established law, threatening to visit their unlawful conduct on all other similarly situated California policyholders and injured plaintiffs. They should be stopped. Now.

**FACTUAL STATEMENT**

 &InsCo& issued a policy of liability insurance to &Client&. &Victim& sued &Client& (the **&Victim& Action**). &InsCo& agreed to defend &Client& in the &Victim& Action under a broad reservation of rights to deny coverage. &InsCo& appointed one of its panel counsel, &CD& to defend &Client& in the &Victim& Action. &CD& accepted the assignment from &InsCo& to represent &Client& in the &Victim& Action. &CD& accepted compensation from &InsCo& to represent &Client& in the &Victim& Action. &CD& did not comply with the Rules 1.7 or 1.8.6. The attorney-client relationship between &Client& and &DC& is established by the fact that &DC& has entered an appearance in this action purporting to represent &Client&’s interests. In a long series of communications that sought to resolve this situation, &DC& has declared that it has and attorney client relationship with &InsCo&, that it has and will continue to communicate confidential information to &InsCo&, has and intends to continue to accept compensation from &InsCo& to purport to represent &Client& in the &Victim& action, and that it never investigates, analyzes, or discloses in writing its analysis of potential conflicts of interest created by any liability insurer’s reservation of rights.

**DISCUSSION**

 **1. The Attorney-Client Relationship Is Fiduciary, Including Duties of**

 **Undivided Loyalty, Disclosure, and Confidentiality**

 &DC& owes fiduciary duties to &Client&. “The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity.” (*Cox v. Delmas* (1893) 99 Cal. 104, 123.) “[A]n attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client’s interests.” (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 (*Anderson*) (citations omitted.))

 &DC& owes a duty of undivided loyalty to &Client&. “An attorney’s duty of loyalty to a client is not one that is capable of being divided, at least under circumstances where the ethical obligation to withdraw from further representation of one of the parties is mandatory, rather than subject to disclosure and client consent.” (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 (*Flatt*).)

 &DC& owes a duty of disclosure to &Client&. “It is the duty of an attorney to . . . respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed. . . .” (Bus. & Prof. Code § 6068(m); see also, (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-89 (*Neel*).) “Adequate communication with clients is an integral part of competent professional performance as an attorney.” (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.) “[T]he existence of a conflict of interest should be identified early in the proceedings so it can be treated effectively before prejudice has occurred to either party.” (*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 371, fn.7 (*Cumis*).)

 &DC& may not communicate to &InsCo& confidential information received by &DC& from &Client& that may impact &Client&’s insurance coverage with &InsCo&. “It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. & Prof. Code. § 6068(e)(1).) “A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent.” (Rule 1.6.) “[T]he protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance which are reflected in numerous statutes.” (*In re Jordan*, (1972) 7 Cal.3d 930, 940-41.) “An insurer does not have the right to receive any information of the insured that is protected by attorney–client privilege, work-product immunity, or a defense lawyer’s duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured.” (Rest. Liab. Ins. § 11(2).)

 [Discuss facts showing &DC& has violated these duties]

 **2. Rule 1.7 Prohibits Conflicted Dual Representation**

 Rule 1.7 prohibits &DC& from representing dual client, both &InsCo& and &Client&, when certain conflicts of interest loom, if: 1) the clients are directly adverse; **or** 2) &DC&’s representation of &Client& risks being materially limited. &DC& may ethically represent &Client& only if : 1) &DC& reasonably believes that it represent both; **and**; 2) there is no legal bar; **and** 3) the representation “does not involve” &InsCo& reservation against &Client&. &DC&’s reasonable belief alone is insufficient. The Cumis Test, discussed below, tracks these requirements: &DC& may not ethically represent &Client& unless &InsCo&’s reservation of rights it limited to grounds that have “nothing to do with” issues raised in this coverage action. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1470 (*Long*).)

 California is a two-client state. “In the insured-insurer relationship, . . . the attorney has two clients.” (*American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 591-92.) “The signed defense guidelines, with the negotiated hourly rate, and subsequent correspondence, along with the subsequent dealings between the [dependent counsel and the insurer], reflected an agreement between them and an attorney-client relationship as a matter of law.” (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 127 (*Berger, Kahn*).) Independently of the existence of an attorney-client relationship, &DC& must comply with Rule 1.7 because &InsCo& qualifies as “another person who may be affected substantially by resolution of the matter.” (Rule 1.7, Comment [4].)

 [Discuss facts showing that &InsCo& is &DC&’s client.]

 **3. Rule 1.8.6 Prohibits Insurer Compensation**

 Rule 1.8.6 prohibits &DC& from charging or accepting compensation for representing &Client& from &InsCo& unless &DC& obtains the policyholder’s informed written consent. Any violation of these Rules renders the contract between &InsCo& and &DC& void as against public policy. “A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer’s compensation for the matter.” (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2016) 244 Cal.App.4th 590, 614-17: see also *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 11, denying recovery of any fees for work performed after a conflict arose.

 [Discuss facts showing &DC& has accepted compensation.]

 **4. The Two Part Cumis Rule**

 In the landmark Cumis case in 1984, the court entered a two part ruling, one recognizing dependent counsel’s ethical obligations to the policyholder, and the second requiring a reserving insurer to pay for independent counsel in appropriate circumstances. Part One: “Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage.” (*Cumis, supra*, 162 Cal.App.3d at 375.) Part Two: “If the insured does not give an informed consent to continued representation, counsel must cease to represent both.” (*Ibid*.)

 **5. The Cumis Quality of Conflict of Interest Analysis**

 Dependent counsel must thoroughly investigate and analyze potential conflicts of interest in order to obtain a client’s “informed written consent” to ethical representation. Rule 1.0.1(e) defines informed consent to mean the policyholder’s “agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.” Rule 1.4 provides that &DC& must inform &Client& of “any decision or circumstance with respect to which disclosure or the client’s informed consent is required . . . promptly complying with reasonable requests for information . . . to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

 The purpose of dependent counsel’s written disclosure is to warn the policyholder to at least consider distrusting a reserving insurer and its dependent counsel. The policyholder is entitled to “an opportunity to take any steps that it may deem reasonable or necessary in response - including whether to accept defense at the insurer’s hands and under the insurer’s control . . . or, instead, to defend itself as it chooses.” (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 61, fn.27.)

 The quality of disclosure required is extensive. “There is no talismanic rule that allows a facile determination of whether a disqualifying conflict of interest exists. Instead, ‘[t]he potential for conflict requires a careful analysis of the parties’ respective interests to determine whether they can be reconciled . . . or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.’” (*Berger, Kahn, supra*, 79 Cal.App.4th at 131 quoting *Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007-08 (*Dynamic Concepts)*; see also, *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980; *Armstrong Cleaners, Inc. v. Erie Ins. Exch.* (S.D. Ind. 2005) 363 F.Supp.2d 797, 816 (“fact- intensive and case-specific nature of the inquiry.”).)

 &DC& has a duty to initiate “full and fair disclosure to the [client] of all facts which materially affect his rights and interests.” (*Neel, supra*, 6 Cal.3d at 188-89.) &DC& also owes a duty to &Client& “under Civil Code, section 2860, to disclose potential conflicts of interest.” (*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton* (2003) 109 Cal App 4th 1219, 1224.)

 [Discuss facts showing &DC& has not done an adequate analysis.]

 **6. The Cumis Test**

 In California[[1]](#footnote-1), “not every conflict of interest triggers an obligation on the part of the insurer to provide the insured with independent counsel at the insurer’s expense.” (*James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1101; see also, *Dynamic Concepts, supra* 61 Cal.App.4th at 1006.)

 Identifying reservations of rights that do or do not require &DC& to obtain &Client&’s informed written consent is well established. “It is only when the basis for the reservation of rights is such as to cause assertion of **factual or legal theories** which undermine or are contrary to the positions to be asserted in the liability case that a conflict of interest sufficient to require independent counsel, to be chosen by the insured, will arise.” (*State Farm Fire & Casualty Co. v. Superior Court* (*Durant*) (1989) 216 Cal.App.3d 1222, 1231, fn.3 (citations omitted, emphasis added).)

 However, the California test has been expressed by fourteen published opinions in a variety of ways, both negatively and positively. *Expressed negatively*, dependent counsel has no disqualifying conflict of interest and the liability insurer that reserves its rights *is not required* to pay for independent counsel if each ground upon which the insurer may later deny coverage: 1) has “nothing to do with the issues being litigated in the underlying action” (*Long, supra*, 163 Cal.App.4th at 1470 (citation and ellipsis omitted)); 2) “is logically unrelated to the issues of consequence in the underlying case” (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 302; 3) “is independent of the issues in the underlying case;” (*Blanchard v. State Farm Fire & Casualty Co.* (1991) 2 Cal.App.4th 345, 350; see also, *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1422 (*Gafcon*)); or 4) “is extrinsic to the issues in the underlying action.” (*Gafcon, supra*, 98 Cal.App.4th at 1422.)

 *Expressed positively*, dependent counsel has no disqualifying conflict of interest and the liability insurer that reserves its rights *is required* to pay for independent counsel: 1) “whenever [the insurer’s and policyholder’s] common lawyer’s representation of the one is rendered less effective” (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713); 2) if coverage issues “overlap” issues in the third party liability action (*United Enterprises, Inc. v. Superior Court* (2010) 183 Cal. App. 4th 1004, 1010); 3) if any coverage question depends “upon the insured’s own conduct” (*Foremost Ins. Co. v. Wilks* (1988) 206 Cal.App.3d 251, 261); 4) if “[i]nsurance counsel had [an] incentive to attach liability to [the insured]” (*Berger, Kahn, supra*, 79 Cal.App.4th at 131; 5) if “the ground of noncoverage was based on the nature of the insured’s conduct” (*McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226); 6) if “the outcome of the coverage issue can be controlled by the way counsel defends the case” (*Novak v. Low, Ball & Lynch* (1999) 77 Cal.App.4th 278, 282; Civ. Code § 2860(a)); 7) “can be controlled by counsel first retained by the insurer for the defense of the claim” (Civ. Code § 2860(b)); 8) “the way counsel retained by the insurance company defends the action will affect an underlying coverage dispute between the insurer and the insured” (*James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1108); 9) “the basis for the reservation of rights is such as to cause assertion of factual or legal theories which undermine the positions to be asserted in the liability case” (*State Farm Fire & Cas. Co. v. Superior Court* (1989) 216 Cal.App.3d 1222, 1226, fn.3.) and 10) “where the issue creating the conflict is one which must be decided in the underlying action.” (*Truck Ins. Exchange v. Superior Court* (1996) 51 Cal.App.4th 985, 994; see also, *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal. App. 4th 1372, 1395-1396.)

 The authoritative A.L.I. Restatement of Liability Insurance expresses the Cumis Test as follows: “When . . . there are **facts at issue that are common** to the legal action . . ., the insurer must provide an independent defense of the action.” (Rest. Liab. Ins. § 16.)

 **7. &DC& Has Failed to Comply With Rule 1.7**

 [Discuss facts showing &DC& failed to investigate, adequately analyze, make written disclosure, or seek or obtain &Client&’s informed written consent.]

 **8. The Unfair Competition Law (UCL)**

 Any person who has suffered injury in fact and has lost money as a result of any unlawful, unfair or fraudulent business act or practice may enjoin the practice pursuant to the Unfair Competition Law. Under the statute, “unfair competition” means “any unlawful, unfair or fraudulent business act or practice.” (Bus. & Prof. Code § 17200.) “Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined . . . to prevent the use or employment by any person of any practice which constitutes unfair competition.” (Bus. & Prof. Code § 17203.) “Actions for relief . . . shall be prosecuted . . . by a person who has suffered injury in fact and has lost money . . . as a result of the unfair competition.” (Bus. & Prof. Code § 17204.) “[T]he remedies . . . provided by this chapter are cumulative to each other and to the remedies . . . available under all other laws of this state.” (Bus. & Prof. Code § 17205.) “Preventive relief is given by prohibiting a party from doing that which ought not to be done.” (Civ. Code § 3368 see also, Civ. Code § 3420.) The three prongs of the UCL, “Unlawful”, “Unfair”, and “Fraudulent” “are alternate grounds for relief.” (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 (*Zhang*).)

 “The ‘unfair competition statutes have always been framed in broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man’s invention would contrive.’ (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112 (quotation marks omitted).) ‘The statute [section 17200] imposes strict liability. It is not necessary to show that the defendant intended to injure anyone.’” (*Community Assisting Recovery, Inc. v. Aegis Ins. Co.* (2001) 92 Cal.App.4th 886, 891.)

 Clarifying that *Moradi-Shalal v. Fireman’s Fund Ins. Co.* (1988) 46 Cal.3d 287 **does not bar** policyholders from seeking non-monetary **injunctive relief** pursuant to the UCL, our Supreme Court in *Manufacturers Life Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257, 263 state that “the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted to the Insurance Commissioner to enjoin future unlawful acts and impose sanctions in the form of license and certificate suspension or revocation when a member of the industry violates any applicable statute, rule, or regulation.”

 **A. The “Unlawful”, “Unfair” and “Fraudulent” Prongs**

 The “Unlawful” prong may “borrow” from other judicial, statutory, or regulatory law. “By proscribing ‘any unlawful’ business act or practice, the UCL ‘borrows’ rules set out in other laws and makes violations of those rules independently actionable. However, a practice may violate the UCL even if it is not prohibited by another statute.” (*Zhang, supra*, 57 Cal.4th at 370 (citations and quotation marks omitted).)

 Conduct which violates the **Unfair** Insurance Claims Settlement Practices Act clearly qualifies as a basis for injunctive relief which is “unfair”. (See, *Assn. of Calif. Ins. Cos v. Jones* (2017) 2 Cal.5th 376, 386-388 (emphasis added).)

 As discussed above, &DC& owes fiduciary obligations to &Client&. A lawyer has “an affirmative obligation to make full disclosure, and the non-disclosure itself is a ‘fraud.”’ (*Id*. at 189.) “Active concealment or suppression of facts [even] by a nonfiduciary ‘is the equivalent of a false representation, i.e., actual fraud.’” (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 (ellipsis omitted).)

 [Discuss facts showing that defendants’ conduct is unlawful, unfair, and fraudulent.] **B. Standing to Sue - Injury in Fact**

 &Client& has standing to sue defendants because is has suffered injury in fact and has lost money. “Actions for relief . . . shall be prosecuted . . . by a person who has suffered injury in fact and has lost money.” (Bus. & Prof. Code § 17204.) In (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321 (*Kwikset*), the Supreme Court stated that “injury in fact is not a substantial or insurmountable hurdle; as then Judge Alito put it: ‘Injury-in-fact is not Mount Everest’.” The court clarified that Proposition 64 changed the statute to require that a plaintiff must be a person who had business dealings with a defendant who suffered some economic injury caused by an unfair business practice, of which there are “innumerable ways in which economic injury from unfair competition may be shown. (*Id.* at 323.)

 The recent case of *Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171, the court stated that under the UCL, “private standing is limited to any ‘person who has suffered injury in fact and has lost money or property’ as a result of unfair competition.” (quoting, *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788.) The purpose of this rule is ‘to confine standing to those actually injured by a defendant’s business practices and to curtail the prior practice of filing suits on behalf of ‘“clients who have not used the defendant’s product or service, viewed the defendant’s advertising, or had any other business. (See also, *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 854.) *Ghazarian* held that paying an attorney in response to unfair competition “is sufficient to establish standing under the UCL.”

 [Discuss facts showing that &Client& had direct business dealing with both defendants and that it paid a sum of money caused by the defendants’ conduct.]

 **C. No Adequate Remedy at Law**

 An award of monetary damages will not adequately give &Client& the relief to which it is entitled. First, &Client& seeks an injunction in order to compel a change in behavior of the defendants. No award of monetary damages guarantees any change in behavior. Second, &Client& does not seek to recover monetary damages or attorneys fees on its claim for injunctive relief, as both are barred by the statute. Therefore the relief sought on &Client&’s injunctive relief cause of action is not redundant of it other causes of action seeking monetary damages.

 A remedy against &DC& under the Cumis Rule is behavioral, not compensatory. “If the insured does not give an informed consent to continued representation, counsel must cease to represent both.” (*Cumis, supra*, 162 Cal.App.3d at 375.) &DC& has violated the Cumis Rule and failed the Cumis Test. Again, “the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted . . . to enjoin future unlawful acts and impose sanctions. . . when a member of the industry violates any applicable statute, rule, or regulation.” (*Manufacturers Life, supra*, 10 Cal.4th at 263.)

 [Discuss facts showing that &Client& an award of damages at some time in the future will not correct the unlawful, unfair and fraudulent conduct causing harm daily, such as: Compliance with the Canons of Ethics is designed to be prophylactic, not remedial nor punitive. (See, *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, 546; *Gregori v. Bank of America* (1989) 207 Cal. App. 3d 291, 308-309.) For this court to allow defendants to continue their unlawful, unfair, and fraudulent conduct in the future in the hopes of unwinding the consequences is like trying to reconstitute a whole, viable egg from a baked cake.]

 **D. No Class Action Is Required**

 &Client& may obtain injunctive relief as a single victim without showing harm to others or filing a class action. In *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 959-60, the Supreme Court held that a plaintiff seeking UCL injunctive relief need not file a class action, stating that a class action requirement “would largely eliminate the ability of a private plaintiff to pursue such relief.” (See also, *Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171.)

 A business practice can violate the UCL even though it does not affect more than a single victim. (See *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 453.) “[F]airness, as based upon an industry-wide custom and practice, is not a defense. . . . Irrespective of the asserted fairness of the practice, it is in fact unlawful and therefore enjoinable.” (*People v. Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 763; see also, *Price v. City of Stockton* (9th Cir. 2004) 390 F.3d 1105, 1117 (an injunction that benefits nonparties is permissible).)

 **E. The Public Interest**

 This application for a temporary restraining order serves the public interest. “This ‘public interest’ inquiry generally addresses the impact upon nonparties of granting or withholding injunctive relief.” (*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton* (9th Cir. 2014) 752 F3d 755, 766). This motion makes a small ask (obeying the law) with potentially huge returns to the litigating public.

**CONCLUSION**

 [Discuss facts and law.]

October \_, 2020

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

By:

Attorneys for Plaintiff,

&Client&

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

&Client&

 Plaintiff,

vs.

&DC&, &InsCo& and DOES 1 to 250, Inclusive,

 Defendants.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

)))))))))

Case No.

(Proposed)

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PERMANENT INJUNCTION SHOULD NOT BE ISSUED

Action Filed: &Date&

**ORDER TO SHOW CAUSE WHY A**

**PERMANENT INJUNCTION SHOULD NOT BE ISSUED**

 The application for an order to show cause by Plaintiff, &Client& came on regularly for hearing on &Date& in Department \_\_ of the Los Angeles Superior Court, the Hon. \_\_, presiding. &IC& appeared for Plaintiff, &Client&. &DC& appeared for defendants, &DC&. &Blank& appeared for defendant, &InsCo&. Having considered the moving and opposing papers and the oral argument of counsel, the court hereby grants the application.

 Defendants, &DC& is ordered to appear in Department \_\_ of the Los Angeles Superior Court at 8:30 a.m. and show cause why it and as well as all officers, directors, shareholders, members, employees and agents, and all persons acting on their behalf should not be permanently enjoined from:

1) representing &Client& in the &Victim& action;

2) accepting compensation from &InsCo& to represent &Client& in the &Victim& action;

3) representing any policyholder in any third party liability action pending in California on behalf of any liability insurer that has issued a reservation of rights without first complying with Rule 1.7; and

4) accepting compensation from any liability insurer that has issued a reservation of rights to represent any policyholder in any third party liability action pending in California without first complying with Rule 1.8.6.

 Defendant, &InsCo& is ordered to appear in Department \_\_ of the Los Angeles Superior Court at 8:30 a.m. and show cause why it and as well as all officers, directors, shareholders, members, employees and agents, and all persons acting on their behalf should not be permanently enjoined from:

1) paying compensation to &DC& to represent &Client& in the &Victim& action;

2) appointing any counsel to represent any policyholder in any third party liability action when it has issued a reservation of rights unless its chosen counsel first complies with Rule 1.7;

3) compensating any counsel to represent any policyholder in any third party liability action when it has issued a reservation of rights unless its chosen counsel first complies with Rule 1.8.6.

 &Client& is ordered to serve this order to show cause on Defendants, &DC& and &InsCo& by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ no later then \_\_\_\_\_\_\_\_\_\_\_, and deliver to this court a proof of service of this Order to Show Cause.

 Defendants, &DC& and &InsCo& shall file and serve their opposing papers by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. &Client shall file and serve its reply brief by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**TEMPORARY RESTRAINING ORDER**

 The application for a temporary restraining order by Plaintiff, &Client& came on regularly for hearing on &Date&. &IC& appeared for Plaintiff, &Client&. &DC& appeared for defendants, &DC&. &Blank& appeared for defendant, &InsCo&. Having considered the moving and opposing papers and the oral argument of counsel, the court hereby grants the application.

 It appears that the commission or continuance of following described acts during this action violate the rights of and would produce great or irreparable injury, to &Client& and others similarly situated, tending to render a judgment ineffectual, since pecuniary compensation would not afford adequate relief and where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

 Pursuant to Bus. & Prof. Code § 17200 et. seq. and Code Civ. Proc. §§ 525, 526(a), and 527, Defendants, &DC& as well as all officers, directors, shareholders, members, employees and agents, and all persons acting on their behalf are ordered to refrain from:

1) representing &Client& in the &Victim& action;

2) accepting compensation from &InsCo& to represent &Client& in the &Victim& action;

3) representing any policyholder in any third party liability action pending in California on behalf of any liability insurer that has issued a reservation of rights without first complying with Rule 1.7; and

4) accepting compensation from any liability insurer that has issued a reservation of rights to represent any policyholder in any third party liability action pending in California without first complying with Rule 1.8.6.

 Defendant, &InsCo& as well as all officers, directors, shareholders, members, employees and agents, and all persons acting on their behalf are ordered to refrain from:

1) paying compensation to &DC& to represent &Client& in the &Victim& action;

2) appointing any counsel to represent any policyholder in any third party liability action pending in California when it has issued a reservation of rights unless its chosen counsel first complies with Rule 1.7;

3) compensating any counsel to represent any policyholder in any third party liability action pending in California when it has issued a reservation of rights unless its chosen counsel first complies with Rule 1.8.6.

October \_, 2020

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge of the Superior Court

1. About three-fifths of American jurisdictions follow the “per se” rule that **all** reservations of rights require a reserving insurer to pay for independent counsel See, http://dutytodefend.com/ 50-state-survey-does-rpc-rule-1-7-disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-independent-counsel-when-reserving-rights-to-deny-coverage/ [↑](#footnote-ref-1)