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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Jennifer Gerard and Gerard Cosmetics, Inc. Plaintiffs, vs. John Haubrich, Jr., John L. Barber, Armine Antonyan, Connie M. Fickel, Tamar Yeghiayan, Lewis Brisbois Bisgaard & Smith, LLP, Tom Ingrassia, Tristan Mullis, Pettit Kohn Ingrassia Lutz & Dolin, Travelers Casualty and Surety Company of America, and Does 1 to 2,000, Inclusive, Defendants.	**CRS Reservation ID: 085054506035** CASE NO. 21STCV05412 [Assigned for all purposes to: Hon. Theresa M. Traber, Dept. 47] PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION Date: May 26, 2021 Time: 10:00 am Dept: 47 [Filed concurrently with Plaintiffs' Notice of Motion and Motion for a Preliminary Injunction, Declaration of Jennifer Gerard, Exhibits, and Proposed Order] Complaint filed: 2/10/2021 Trial Date: None set

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PROLOGUE

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

INTRODUCTION

Defendants, Lewis Brisbois Bisgaard & Smith, LLP and its individual lawyers (collectively **LBBS**), violate California law each time they accept an assignment from their insurance company clients who have agreed to defend their policyholder under a reservation of rights. Specifically, LBBS ignores the Cumis Rule: "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." *(San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc*. (1984) 162 Cal.App.3d 358, 375 (Cumis).)

Defendant Travelers Casualty and Surety Company of America (**Travelers**) regularly hires LBBS to defend its policyholders against third party liability disputes, often agreeing to defend the policyholders subject to a reservation of rights to later deny indemnity coverage. A reservation of rights always creates some conflict between an insurer and its policyholder because each wants the other to pay. Because LBBS jointly represent the insurer and its policyholder, the reservation of rights triggers mandatory ethical duties for LBBS to always investigate, analyze, and make written disclosure to both clients, and sometimes obtain their informed written consent. LBBS does none of this, depriving its policyholder clients of due process of law and exposing them to uninsured financial harm.

Plaintiff Jennifer Gerard and her company, Gerard Cosmetics, Inc. (**Gerard**) are victims of these practices. Shaun White sued Gerard in an employment liability lawsuit and Travelers agreed to defend them under a reservation of rights. Travelers hired LBBS to defend the lawsuit and LBBS accepted the assignment. However, LBBS refused to investigate, analyze, disclose, or obtain informed written consent from Gerard even though Travelers' reserved its rights on grounds that are common to disputed issues of fact and law in the Shaun White lawsuit.

As a matter of law LBBS should always comply with the prophylactic Cumis Rule by following a protocol of always investigating and analyzing potential conflicts of interest, making written disclosure of its analysis to its clients, and sometimes obtaining their informed written consent (the "**Cumis protocol**"). That LBBS does not do so constitutes unlawful, unfair and fraudulent business

practices that must be stopped immediately so that policyholders like Gerard are provided with the competent and ethical legal representation to which they are entitled by law. The Court should prevent LBBS from continuing to ignore its ethical duties by enjoining LBBS from accepting assignments or compensation from insurers who have reserved their rights unless LBBS follows the Cumis protocol.

FACTUAL STATEMENT

Jennifer Gerard is the founder and sole owner of Gerard Cosmetics, Inc. Ms. Gerard bought a liability insurance policy from Travelers to protect her and her business. (Dec.¶2; Ex.1, pp.1-18)[1]. The policy insures both Gerard Cosmetics Inc and Gerard (collectively "**Gerard**") for liability arising out of employment related practices. The policy makes two primary promises: to defend Gerard in a suit and to indemnify Gerard for a judgment.

On September 23, 2019, Shaun White, a former employee of Gerard, filed a complaint against Gerard (**White Action**) for employment related causes of action. (Dec.¶5; Ex.2, pp.19-36.) Gerard notified Travelers of the White Action. (Dec.¶6; Ex.3, p.38.) In a letter dated February 26, 2020, Travelers' claim attorney, Veronica Hallett (**Hallett**), agreed to defend Gerard in the White Action under a broad reservation of rights. (Dec.¶8; Ex.4, pp.40-45.) The letter specifies grounds to deny coverage in six broad categories, including that damages sought by White were not covered and that Gerard may not be insured for acts outside of the scope of her employment with Gerard Cosmetics. (*Id.*)

Travelers unilaterally appointed defendant Lewis Brisbois Bisgaard & Smith, LLP (**Lewis**) to defend Gerard in the White Action. (*Id.)* Lewis was first contacted by Travelers on February 21, 2020 via email from Hallett to defendant John L. Barber (**Barber**), the national chair of the employment and labor department at Lewis. The email identifies Lewis "as part of our EPL panel" and instructs Barber to do a "conflict check". (Dec.¶26; Ex.17,p.95.) That same day Barber emailed Veronica and said: "Veronica – No conflicts and we will assign today." (Dec.¶26; Ex.17,p.95.) Barber did not contact Gerard before accepting the assignment nor did he ask Travelers if there was any reservation of rights.

[1] "Dec." refers to the Declaration of Jennifer Gerard, often by paragraph number. "Ex." refers to Exhibits attached to the Declaration often by consecutive page number on the center bottom.

(Dec.¶14.)

On February 26, 2020, Gerard received a letter via email from Barber advising that his firm had been retained by Travelers to represent Gerard in the White action and that since the policy had a $25,000 SIR, Travelers had requested that Lewis initially bill Gerard directly. (Dec.¶10.).

LBBS commenced representation of Gerard in the White action without investigating whether Travelers had issued a reservation of rights. As discussed below, LBBS only became aware of the reservation of rights when Gerard brought it to their attention. In addition, LBBS agreed to represent Gerard in the White action at the same time that LBBS was representing Bryan Cunningham directly adverse to Jennifer Gerard in a pending arbitration entitled *Gerard v. Cunningham.* (Dec.¶12). LBBS did not disclose this conflict to Gerard or Travelers. (Dec.¶14.)

Gerard was concerned about the Travelers reservation of rights letter and emailed a copy and other documents to Haubrich and associate Armine Antonyan (Antonyan) asking for an explanation how it would effect the firm's handling of the case. (Dec.¶15; Ex.5,6,7,pp.46-58.) Haubrich refused to provide any analysis. He also refused to answer questions posed by Gerard in a questionnaire included in her email. (Dec.¶16,17; Ex.5.) In a March 6, 2020 email, Haubrich stated that he could not "opine on the particulars of your insurance policy or any reservation of rights letters issued by your insurer. (The tripartite relationship as defined under California law protects all three parties by precluding me from becoming involved in coverage discussions.)" (Dec.¶19.) Gerard persisted in her inquiry regarding the impact of the coverage reservations on her defense in the White action. She provided to LBBS legal research memoranda from the internet about the tripartite relationship and the duty of disclosure. (Dec.¶20; Ex.8,9,pp.59-67.) However, LBBS continued to deny any obligation to analyze the reservation of rights. (Dec.¶23; Ex.15,pp.87-88.) Gerard became frustrated and told Haubrich in an email: "You John are my one and only lawyer. If you cannot advise me on all matters relating to this lawsuit , then I want someone who can." (Dec.¶20.)

On November, 10, 2020, Gerard talked by telephone with Haubrich, Antonyan and Hallett, following which Gerard confirmed the substance of the discussion (Dec.¶21; Ex.10,pp.68-72) and provided to them more materials regarding the Cumis case. (Id.; Ex.11,pp73-78.) In addition, Gerard complained that LBBS had represented Bryan Cunningham adversely to Gerard in an arbitration that

was still pending at the time Travelers retained LBBS to defend the White Action. (Ex.10,p.70.)

On November 11, 2020, Haubrich sent an email to Gerard which stated in part as follows:

> "I stated definitively over the phone to you that our firm was retained only to defend the employment litigation at issue here. . . . Despite that, your email below continues to seek coverage advice which I have now informed you on several occasions that I cannot provide. My firm was retained by your insurer to defend you and the company in the action instituted by Shaun White. That is the scope of our representation." (Dec.¶21; Ex.10,pp.71-72.)

On November 19, 2020, Gerard spoke with Haubrich and then sent him a completed Ethical Compliance Questionnaire and a confirming email. (Dec.¶22; Ex.12&13, pp.80-84). In her email, Gerard stated as follows:

> "I told you that I'm not asking you to take sides to advise me regarding coverage with Travelers, but that I believe that the Cumis case says that part of your representation of me requires you to investigate and analyze potential conflicts of interest created by Travelers' reservation of rights and then disclose your analysis to me and Travelers in writing. You told me that is not your job. You said: 'I'm not the person to ask about conflicts of interest.' You have no opinion whether Cumis is good or bad law. You are familiar with Rule 1.7, but our conversation is not an ethics class and your job is not to answer my ethics questions. You refuse to do any of this for me or for any of your clients in any other cases. You said: 'Yes, this is the way I always handle claims.'"[2]

Haubrich responded to Gerard in an email dated November 30, 2020 and again refused to analyze Travelers' reservation of rights stating that "In essence, what we discussed on our most recent call was already discussed in writing and/or on prior phone calls (including the lengthy call with Hallett). Despite that, you continued to ask these questions which I continuously stated I could not answer given the scope of my representation. . . . I cannot accept the premise of the questionnaire and am at a loss as to the continued focus on it in spite of my efforts to explain the inappropriate nature of

[2] Gerard also informed Barber, who did nothing to comply with the Rules. (Dec.¶14.)

it." (Dec.¶25; Ex.16,pp.90-91.)[3]

Notwithstanding Halbrich's refusal to "get involved with coverage" he told Gerard that Travelers would withdraw its reservation of rights and pay all damages. Hallet agreed to explore that option with upper management at Travelers (Dec.¶34; Ex.14.) On November 22, 2020, Hallet responded: "You have also asked that Travelers revise its coverage letter and waive its reservations under the policy. After reviewing your request, we decline to waive our reservations." (Dec.¶22; Ex.22,p.122.)

Hallet identified to Gerard other lawyers on Travelers' panel to take over the defense. Gerard contacted each firm but none of them would comply with the Cumis protocol as laid out in the Cumis test. (Dec.¶28-31.) Left with no other option, Gerard hired independent counsel, Peter Garrell at Fortis LLP, who followed the Cumis Protocol, disclosed to Gerard a conflict of interest analysis and obtained Gerard's informed written consent to represent Gerard, but not Travelers in the White action. (Dec.¶39-40;Ex.25,pp.131-154.) Broadly, Fortis concludes that Travelers' reservation of rights asserts six grounds to later deny coverage, three of which create disqualifying conflicts of interest. Fortis LLP substituted in for LBBS as Gerard's attorneys of record.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

The court has broad discretion to grant a preliminary injunction by balancing the likelihood that Gerard will prevail at trial with the risk of harm that LBBS may experience prior to trial. Here, the facts are clear and much of the evidence against LBBS comes from its own lawyers. Also, the purpose of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et. seq.) is to prevent harm to the public. This injunction requires LBBS to obey the law so as to protect many of their clients from harm.

1. Balance Likelihood of Prevailing With Possible Harm

"In determining whether to issue a preliminary injunction, the trial court considers two related factors: (1) the likelihood that the plaintiff will prevail on the merits of its case at trial, and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction." (*Take Me Home*

[3] However, Haubrich did not challenge the accuracy of any of the answers on the completed Ethical Compliance Questionnaire. (Ex.13,pp.82-84.)

Rescue v. Luri (2012) 208 Cal.App.4th 1342, 1350.)

2. The UCL's Purpose Is To Prevent Public Harm

"[T]he unfair competition law (**UCL**; Bus. & Prof. Code, § 17200 et seq.) . . . has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public. ¶ Its purpose is to protect . . . consumers. . . . We conclude that . . . a private individual who . . . has standing . . . is filing the lawsuit . . . on behalf of the general public. ¶ The Supreme Court determined that public injunctive relief remains a remedy available to private plaintiffs under the UCL." (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 951-61 (*McGill*) (emphasis added).) The plaintiff's "action to enjoin (the defendant's) alleged deceptive business practices is undertaken for the public benefit, whether designated as a claim under the CLRA or Business and Professions Code section 17200 or section 17500: it is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff." (*Cruz v. Pacificare Health Sys., Inc.* (2003) 30 Cal.4th 303, 316.)

Other clients of LBBS who are being defended in third party liability disputes, funded by liability insurers that have reserved their rights need to be protected from LBBS' violations of law.

GERARD HAS STANDING TO SUE

Gerard has standing to sue LBBS because Gerard has suffered injury and lost money. Gerard has no adequate remedy at law to change LBBS' behavior. Gerard brings this motion for an injunction for the benefit of others, not themselves.

1. Standing to Sue - Injury in Fact

Under the UCL, "[a]ctions for relief . . . shall be prosecuted . . . by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code § 17204.) Gerard paid LBBS $1,091 for their legal services in purporting to defend the White Action. (Dec.¶11.) Gerard has also had to hire independent counsel to conduct their defense of the White Action at hourly rates which exceed the rates which Travelers has agreed to pay. Gerard has paid the self insured retention of $25,000 and the differential between what Travelers will pay and what independent counsel charges for the White defense. Gerard has also retained Thomas & Elliott LLP to assist in seeking to resolve this dispute prior to commencing this action. (Dec.¶¶10, 27, 28.)

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'." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.) 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.) In *Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171 (*Ghazarian*), 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." (*Id.* at 193.) 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." (*Ibid.*) *Ghazarian* held that paying an attorney in response to unfair competition "is sufficient to establish standing under the UCL." (*Ibid.*)

2. No Adequate Remedy at Law

No language in the UCL requires that an injured plaintiff have no adequate remedy at law in order to seek or obtain an injunction. The remedies permitted by the UCL are limited to an injunction to correct improper behavior of defendants and restitution. An injunction is simply not available as a remedy at law.

On this motion, Gerard's remedy against LBBS 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.) LBBS has violated the Cumis Rule, failed to properly apply the Cumis Test (Ex.25), and failed to follow the Cumis Protocol (see, pp.9-12 ante). "[T]he 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 Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257, 263.)

3. No Class Action Is Required

Gerard may obtain injunctive relief as a single victim without showing harm to others or filing a class action. In *McGill, supra*, 2 Cal.5th at 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, supra*, 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).)

4. The Rules of Professional Conduct are Remedial

An injunction is a particularly appropriate remedy to enforce the purpose of lawyers' Canons of Ethics, which is to ensure proper behavior by licensed lawyers. 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.) This court must act now so defendant attorneys cannot continue their unlawful, unfair, and fraudulent conduct in the future which if not stopped will only make more victims suffer.

LBBS BREACHED ITS ETHICAL DUTIES TO GERARD

1. LBBS Represented Cunningham Directly Adverse to Gerard

When LBBS accepted Travelers' assignment to defend Gerard in the White Action it also represented Bryan Cunningham in a then pending arbitration directly adverse to Jennifer Gerard. This is a clear violation of the Rules of Professional Conduct, Rule 1.7(a) which provides in part: "A lawyer shall not, without informed written consent from each client . . . represent a client if the representation is directly adverse to another client in the same or a separate matter." This Rule codifies the duty of undivided loyalty that LBBS owed to Gerard. "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. . . . Even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required. Indeed, in all but a few instances, the rule of disqualification in simultaneous representation

cases is a per se or "automatic" one." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-86)[4]

2. LBBS Ignored the Cumis Rule

The reservation of rights by Travelers triggered application of the landmark Cumis case which states its enduring holding in two parts. Part one states that when a liability insurer such as Travelers agrees to defend its policyholder (Gerard) but reserves its rights to later deny coverage to its policyholder, the lawyer hired by Travelers (LBBS) must comply with the Canons of Ethics. Part two (not presented on this motion) states that if LBBS fails to obtain the policyholders informed written consent, the reserving insurer must pay for independent counsel, selected and directed by the policyholder alone, to control the defense. (Ex.25,pp.149-150.)

In order to comply with the holding in Cumis, LBBS should have immediately reviewed the reservation of rights by Travelers to determine if it created a disqualifying conflict of interest for LBBS to represent both Travelers and Gerard in the White action. "Conflicts [of interest] come in all shapes and sizes." (*Manfredi & Levine v. Superior Court (Barles)* (1998) 66 Cal.App.4th 1128, 1134.) Not all conflicts of interest between dual clients will necessarily ethically disqualify LBBS from representing the interests of a liability insurer and its policyholder. But fortunately, California case law and the Restatement of Liability Insurance clearly describe conflicts of interest that do and do not disqualify lawyers. Perhaps the best statement of the Cumis Test is this: "Cumis can be read to suggest that this conflict arises whenever the insurer asserts a reservation of its right to assert noncoverage, while still providing a defense to the liability action. This interpretation of Cumis would be erroneous. 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* (1989) 216 Cal.App.3d 1222, 1231, fn.3 (citations omitted, emphasis added).)

"When an insurer with the duty to defend provides the insured notice of a ground for

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[4] "The mandatory rule of disqualification in cases of dual representations involving unrelated matters - analogous to the biblical injunction against 'serving two masters' (Matthew 6:24) - is such a self-evident one that there are few published appellate decisions elaborating on it." (*Id.* at 286.)

contesting coverage under § 15 and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action."

(Rest. Liab. Ins. § 16. The Obligation to Provide an Independent Defense.)[5]

"Civil Code section 2860 does not clearly state when the right to an independent counsel vests." (*Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007 fn5 (*Dynamic Concepts*).) "The language of Civil Code section 2860 'does not preclude judicial determination of conflict of interest and duty to provide independent counsel such as was accomplished in Cumis so long as that determination is consistent with the section.'" (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1395-96.)

3. LBBS Did Not Follow the Cumis Protocol

A. LBBS Did Not Investigate

As required in Cumis, LBBS has "an obligation to explain to the insured and the insurer the full implications of joint representation" (*Cumis, supra*, 162 Cal.App.3d at 375.) The information needed to apply the Cumis Test goes to "whether the coverage questions are logically unrelated (that is, irrelevant) to the issues of consequence in the [liability] cases. . . . To decide [one] must determine: . . . what issues remain to be decided . . . [which] defenses to coverage . . . do each of the carriers intend to pursue . . . [w]hat facts have to be determined to reach the merits of the carriers' defenses . . . [and w]ho has the burden of proof? . . . Then and only then can [one] determine whether the issues overlap and make the type of detailed findings needed for meaningful appellate review." (*Montrose Chemical Corp. v. Superior Court* (1994) 25 Cal.App.4th 902, 909-10 (some ellipses omitted).)

Cumis requires that when LBBS receives an assignment from an insurance company client, LBBS must investigate to determine if there has been a reservation of rights issued by the insurer. If so, then at a minimum, LBBS must review the policy and the reservation of rights letter, interview the clients, and conduct appropriate legal research. Here, with respect to Gerard, LBBS did not even

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[5] Numerous California reported opinions consistently recognize what is here called the Cumis Test. (Ex.25, pp.153-154.)

inquire as to whether there was a reservation of rights issued by Travelers. (Ex.17,p.95.) Even after Gerard told LBBS about the reservation of rights, LBBS did nothing further to investigate and said it was under no obligation to do so. (Ex.16,pp.90-91.)

B. LBBS Did Not Analyze The Insurer's Reservation Of Rights

LBBS refused to conduct an analysis of the Travelers reservation of rights - even when Gerard asked LBBS to do so. An adequate analysis of potential conflicts of interest created by Travelers reservation is required and would include the following: "(1) what is the exact nature of the claims asserted in the underlying action, (2) what defenses to coverage are asserted by the insurers, and to what extent, if at all, are they logically related to the liability issues raised in the underlying action, (3) what factual questions have to be resolved in order to sustain or defeat such defenses, (4) what is the likely nature of the available evidence, (5) to what extent, if at all, will [the policyholder] suffer prejudice by the enforced discovery of the evidence which tends to support or defeat its claim of coverage or the defenses raised by the insurers and (6) to what extent, if at all, will a confidentiality order realistically protect [the policyholder] from prejudicial disclosure." (*Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980.)

The burden of an adequate analysis of potential conflicts of interest falls to LBBS, not the client. "The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs." (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1685.) It is improper for LBBS to simply ignore conflicts of interest analysis or to delegate that burden to the policyholder or the reserving insurer.

C. LBBS Did Not Make Written Disclosure

Rule 1.4 imposes on all lawyers a mandatory duty of disclosure. As it applies to accepting insurance company assignments, Rule 1.4 requires LBBS to: (a)(1) promptly inform the [policyholder] of any . . . circumstance [requiring] the client's informed consent, . . . ; (2) reasonably consult with the [policyholder] . . . ; (3) keep the [policyholder] client reasonably informed . . . including promptly complying with reasonable requests for information and copies of significant documents. . . ; (4) advise the client about any relevant limitation on the lawyer's conduct. . . . (b) [LBBS] shall explain . . . to permit the [policyholder] to make informed decisions." The attorney must take the initiative to

make disclosure to the client. The lawyer has "an affirmative obligation to make full disclosure, and the non-disclosure itself is a 'fraud.'" (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 (*Neel*).)

In order to make intelligent decisions about the subject matter of an engagement, the client must be adequately educated by the lawyer. Thus, lawyers have "the obligation to render a full and fair disclosure to the [client] of all facts which materially affect his rights and interest." (*Id.* at 188-89.) "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.) Attorneys must "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments." (Bus. & Prof. Code § 6068(m).)

Per Rule 1.4, LBBS was duty bound to keep Gerard informed, promptly complying with reasonable requests for information, and advise Gerard in writing about any relevant limitation on the lawyer's conduct so that Gerard could make informed decisions. The reservation of rights issued by Travelers created an affirmative duty on the part of LBBS to make written disclosure to Gerard concerning the conflicts created by the insurer's coverage reservations and how that might impact the attorney's representation of Gerard in the lawsuit. LBBS ignored this duty and refused to make written disclosure to Gerard concerning the reservation of rights issued by Travelers.[6]

In cases where there is a conflict between jointly represented clients, LBBS has "an independent ethical obligation to disclose the conflict to [the clients] and either obtain written waivers of the conflict or withdraw." (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 132.)

D. LBBS Did Not Obtain Gerard's Informed Written Consent When It Was Required To Do So

Although *Flatt* enunciates a "per se" or "automatic" rule of attorney disqualification, the Cumis Test is less stringent. LBBS must obtain the informed written consent of the policyholder and the insurer only if the lawyer's investigation, thorough analysis, and written disclosure reveals that an

[6] Rule 1.0.1(e-1) is clear that for LBBS to obtain a policyholders informed written consent, "the disclosures and the consent required . . . must be in writing."

"actual" rather than a merely "potential" conflict of interest exists. "The conflict must be significant, not merely theoretical, actual, not merely potential." (*Dynamic Concepts, supra*, 61 Cal.App.4th at 1007.) In this case, Travelers' reservation of rights did create disqualifying conflicts of interest under the Cumis Test, because the Travelers' reservation of rights asserts six grounds to later deny coverage, three of which create disqualifying conflicts of interest and three of which do not. (Ex.25.) As such, LBBS was required to obtain Gerard's informed written consent in order to represent Gerard in the underlying lawsuit. LBBS made no such attempt to obtain Gerard's informed written consent.

INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE

The UCL may "borrow" statutes, regulations, Rules of Professional Conduct, and case law to seek an injunction to stop unlawful conduct by LBBS. "By proscribing 'any unlawful' business practice, 'section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. . . . However, the law does more than just borrow. The statutory language referring to 'any unlawful, unfair or fraudulent' practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. 'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition - acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." (*Cel-Tech Communications, Inc. v. L.A. Cellular Tele. Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).)

1. LBBS' Business Practices Are Unlawful

The evidence on this motion establishes that LBBS has violated the State Bar Act, the Rules, and a vast body of case law. By its own admission, LBBS has a business practice of not complying with the Cumis Rule, not applying the Cumis Test to determine whether its insurer clients' reservations of rights create disqualifying conflicts of interest, not following the Cumis Protocol (by conducting a thorough investigation of the facts and law, doing an in depth analysis, making written disclosure of its conflict of interest analysis, and seeking its dual clients' informed written consent to representation). All of this conduct is unlawful and must be stopped by this court.

2. LBBS' Business Practices Are Unfair

The clear law establishing LBBS' obligations to its clients is an expression of the well

established public policy of this State in the State Bar Act and the Rules of Professional Conduct. Given the nature of the attorney client relationship and the likely unsophisticated nature of the policyholder clients, it is manifestly unfair for LBBS to ignore these ethical obligations. As explained by our Supreme Court in *Cel-Tech*, an enjoinable offence may be "unfair" even if it not "unlawful."

3. LBBS' Business Practices Are Fraudulent

Despite Gerard's repeated attempts to get clarification regarding conflicts of interest, LBBS refused to make required disclosures to Gerard. LBBS has "an affirmative obligation to make full disclosure, and the non-disclosure itself is a 'fraud.'" (*Neel, supra*, 6 Cal.3d at 189.) *Cel-Tech* also empowers this court to stop LBBS for its conduct which constitutes fraud. "The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief' under the UCL. (Citations) This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices. (*Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453.)" (*In Re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.)

RULE 1.8.6 BARS ACCEPTING PAYMENT FROM RESERVING INSURER

LBBS may not ethically accept compensation from Travelers without Gerard's informed written consent. Rule 1.8.6 imposes on all lawyers in mandatory language that LBBS "shall not . . . charge, or accept compensation for representing a [policyholder] from [a reserving insurer] unless: . . . (c) the lawyer obtains the client's informed written consent." "[A] lawyer who, while purporting to continue to represent an insured and who devotes himself to the interests of the insurer without notification or disclosure to the insured, breaches his obligations to the insured and is guilty of negligence." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716.) A failure to make required written disclosure and obtain informed written consent of a policyholder may bar LBBS from accepting payment from any reserving insurer.

Here, LBBS accepted compensation from Travelers to purport to defend Gerard without informed written consent. LBBS should disgorge these ill gotten gains back to Travelers. In turn,

Travelers should credit those sums back to Gerard to be available for their defense of the White Action. The Policy is self-liquidating, meaning that costs of defense reduce the available policy limit.

THE COURT SHOULD NOT REQUIRE A BOND

Because Gerard has limited means and cannot obtain sureties for a bond, the Court should exercise its discretion to waive a provision for a bond or undertaking. The court has discretion to "waive a provision for a bond in an action . . . and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers. In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived." (Code Civ. Proc. § 995.240.) "California courts retain common law authority to waive such bond requirements at the behest of poor litigants." (*Conover v. Hall* (1974) 11 Cal.3d 842, 847.) If the plaintiff makes a prima facie showing that "[s]he is unable to furnish" the litigation bond, then the court can use its statutory and common law discretion to waive it. (*Baltayan v. Est. of Getemyan* (2001) 90 Cal.App.4th 1427, 1434.) In a case like this - brought by a litigant whose limited resources make them "unable to furnish" a litigation bond and brought on behalf of other consumers of limited means - the circumstances call for the Court to waive a bond requirement.

CONCLUSION

The court should grant Gerard's motion for a preliminary injunction and require LBBS to start obeying California law immediately.

April 27 2021

Thomas & Elliott LLP

/s/ Stephen L. Thomas
By: Stephen L. Thomas
Attorneys for plaintiffs, Jennifer Gerard and Gerard Cosmetics, Inc.

PROOF OF SERVICE

Gerard v. John Haubrich, Jr., et al. Case No. 21STCV05412

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and I am not a party to the within action. My business address is 12400 Wilshire Blvd., Suite 400, Los Angeles, CA 90025.

On April 27, 2021, I served true copies of the following document(s): MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION on the interested parties in this action as follows:

[x] (BY E-MAIL) Pursuant to a court order or agreement among the parties to accept service via email or electronic transmission I caused the above referenced document to be transmitted electronically to the persons at the email addresses so indicated on the attached list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 27 2021, at Los Angeles, California.

/s/ Stephen L. Thomas
Stephen L. Thomas

SERVICE LIST

Gerard v. John Haubrich, Jr., et al. Case No. 21STCV05412

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