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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Jennifer Gerard and Gerard Cosmetics, Inc.)	Reservation ID: 085054506035
	)	CASE NO. 21STCV05412
Plaintiffs,	)	[Assigned for all purposes to:
vs.	)	Hon. Theresa M. Traber, Dept. 47]
	)	(Proposed) ORDER FOR A PRELIMINARY
John Haubrich, Jr., John L. Barber, Armine	)	INJUNCTION
Antonyan, Connie M. Fickel, Tamar Yeghiayan,)	
Lewis Brisbois Bisgaard & Smith, LLP, Tom	)	[Filed concurrently with Plaintiff's Notice of Motion
Ingrassia, Tristan Mullis, Pettit Kohn Ingrassia	)	and Motion for a Preliminary Injunction,
Lutz & Dolin, Travelers Casualty and Surety	)	Memorandum of Points and Authorities; and
Company of America, and Does 1 to 2,000,	)	Declaration of Jennifer Gerard, Exhibits]
Inclusive,)	
	)	Complaint filed: 2/10/2021
Defendants.	)	Trial Date: None set
)	

The motion for a preliminary injunction came on regularly for hearing on May 26, 2021 in Department 47 of the Superior Court, the Hon. Theresa M. Traber presiding. Jennifer Gerard and Gerard Cosmetics, Inc. (**Gerard**) appeared by Stephen L. Thomas and Jay J. Elliott, of Thomas & Elliott, LLP. Defendants, John Haubrich, Jr., John L. Barber, Armine Antonyan, Connie M. Fickel, Tamar Yeghiayan, and Lewis Brisbois Bisgaard & Smith, LLP (**LBBS**) appeared by David D. Samani and Patrik Johansson of Lewis Brisbois Bisgaard & Smith, LLP. Defendant, Travelers Casualty and Surety Company of America (**Travelers**) appeared by Andrew J. Waxler and Bruce Smyth of

1 Kaufman, Dolowich, Voluck. Defendants, Tom Ingrassia, Tristan Mullis, Pettit Kohn Ingrassia Lutz
2 & Dolin appeared by Randall Miller. The court considered the moving and opposing papers and heard
3 oral argument of counsel.

4 This action was commenced by a Verified Complaint seeking declaratory relief and an
5 injunction pursuant to Business and Professions Code § 17200 et. seq. The complaint alleges that
6 Travelers is a liability insurance company that issued a policy of liability insurance to Gerard. Gerard
7 was sued by Shaun White in the White Action and Travelers agreed to defend Gerard under a
8 reservation of rights which created conflicts of interest between Gerard and Travelers. Travelers
9 appointed LBBS to conduct Gerard’s defense of the White Action. LBBS did not investigate potential
10 conflicts of interest created by Travelers’ reservation of rights, did not thoroughly analyze potential
11 conflict, did not make written disclosure of its analysis to Gerard or Travelers and did no seek nor
12 obtain Gerard’s informed written consent to be represented by LBBS before it accepted the defense
13 assignment from Travelers nor before accepting compensation from Travelers.

14 A preliminary injunction is proper where the moving party proves: (1) likelihood that it will
15 ultimately prevail on the merits; and (2) that relative interim harm to the parties from issuance of the
16 injunction weights in its favor. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677,78.) As the
17 California Supreme Court notes, weighing the relative “equities” is paramount: “[By] balancing the
18 respective equities of the parties, [the court] concludes that pending a trial on the merits, defendant
19 should or that he should not be restrained from exercising the right claimed by him.” (*Robbins v.*
20 *Superior Court* (1985) 38 Cal.3d 199, 206.)

21 **Factual Findings**

- 22 1. Travelers issued a policy of liability insurance to Gerard.
- 23 2. Gerard was sued for alleged wrongful employment practices by Shaun White (White
24 Action).
- 25 3. Gerard notified Travelers of the White Action
- 26 4. Travelers agreed to defend Gerard under a reservation of rights.
- 27 5. Travelers appointed LBBS to defend Gerard in the White Action. LBBS is on Travelers’
28 “panel” of approved lawyers regularly hired by Travelers to defend its policyholders.

1 6. LBBS accepted the appointment by Travelers to defend Gerard in the White Action.

2 7. When LBBS accepted the appointment by Travelers to defend Gerard in the White
3 Action, LBBS simultaneously represented Bryan Cunningham directly adversely to Gerard.

4 8. When LBBS accepted the appointment by Travelers to defend Gerard in the White
5 Action, Travelers was a client of LBBS.

6 9. When LBBS accepted the appointment by Travelers to defend Gerard in the White
7 Action, LBBS represented Travelers as the financier of Gerard's defense of the White Action and as a
8 potential indemnitor of the White Action. LBBS also represented Gerard as client and as a potential
9 judgment creditor in the White Action.

10 10. When LBBS accepted the appointment by Travelers to defend Gerard in the White
11 Action, LBBS simultaneously represented Travelers directly adversely to Gerard because each client
12 wants the other client to pay for the White Action.

13 11. LBBS has a business practice to ignore coverage disputes when it is appointed by liability
14 insurers to defend policyholders under a reservation of rights.

15 12. LBBS did not investigate potential conflicts of interest between Gerard and Travelers
16 created by Travelers' reservation of rights.

17 13. LBBS has a business practice to not thoroughly investigate potential conflicts of interest
18 created by reservations of rights issued to liability insurers that appoint them to defend policyholders.

19 14. LBBS did not thoroughly analysis potential conflicts of interest created by Travelers'
20 reservation of rights.

21 15. LBBS has a business practice to not thoroughly analyze potential conflicts of interest
22 created by reservations of rights issued to liability insurers that appoint them to defend policyholders.

23 16. LBBS did not make written disclosure to Gerard or Travlers of any analysis of potential
24 conflicts of interest created by Travelers' reservation of rights.

25 17. LBBS has a business practice to not make written disclosure to policyholders or insurers
26 of any analysis of potential conflicts of interest when liability insurer clients assign LBBS to defend
27 policyholders under a reservation of rights.

28 18. Travelers' reservation of rights created a disqualifying conflict of interest between Gerard

1 and Travelers which in turn required LBBS to obtain the informed written consent of Gerard and
2 Travelers before accepting the assignment from Travelers of the defense of Gerard in the White
3 Action. Travelers' reservation of rights created a disqualifying conflict of interest because Travelers
4 reserved its rights to deny coverage to Gerard on grounds which raised disputed issues of fact or law
5 in common with on disputed issues of fact or law raised in the White Action.

6 19. LBBS did not seek or obtain Gerard's or Travelers' informed written consent to represent
7 the interests of both Gerard and Travelers in the White Action

8 20. LBBS has a business practice to not seek or obtain the informed written consent of its
9 policyholder clients or of its liability insurer clients when the insurer issues a reservation of rights that
10 creates a disqualifying conflict of interest for LBBS.

11 21. LBBS accepted compensation from Travelers to represent Gerard and the interests of
12 Travelers in the defense of the White Action without Gerard's informed written consent.

13 22. LBBS has a business practice to accept compensation from liability insurers which
14 reserve their rights to deny coverage to their policyholders without the policyholder's informed
15 written consent.

16 23. LBBS's business practices are unlawful, unfair, and fraudulent.

17 24. Injunctive relief is appropriate to prevent LBBS's unlawful, unfair, and fraudulent
18 business practices.

19 **Discussion of Law**

20 Based upon the factual findings and evidence presented by the parties, the court finds as
21 follows:

22 1. LBBS had a duty to thoroughly investigate potential conflicts of interest created by
23 Travelers' reservation of rights in order to be able to comply with Rules of Professional Conduct,
24 Rule 1.0.1(e, e-1). This Rule required LBBS to explain the relevant circumstances and material risks,
25 including foreseeable adverse consequences of its representation to Gerard and Travelers. LBBS
26 breached its duty to investigate potential conflicts of interest created by Travelers' reservation of
27 rights.

28 2. LBBS had a duty to thoroughly analyze potential conflicts of interest created by

1 Travelers' reservation of rights pursuant to Rules of Professional Conduct, Rule 1.0.1(e, e-1).

2 3. Rule 1.4 required LBBS to make disclosures to Gerard and Travelers regarding their
3 analysis of conflicts of interest created by Travelers' reservation of rights. "Canons of Ethics impose
4 upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full
5 implications of joint representation in situations where the insurer has reserved its rights to deny
6 coverage." (*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d
7 358, 375.)

8 4. Rule 1.6 and the State Bar Act, Bus. & Prof. Code § 6068 required LBBS to protect
9 Gerard's confidential information from disclosure to Travelers that might adversely impact Gerard's
10 insurance coverage with Travelers. "It is the duty of an attorney to do all of the following: . . . To
11 maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of
12 his or her client." (Bus. & Prof. Code § 6068(e)(1).)

13 5. Rule 1.7 imposes on LBBS a duty of undivided loyalty and requires them to not accept
14 representation of any liability insurers and their policyholder(s) where the insurer reserves its rights to
15 later deny coverage to the policyholders without satisfying the requirements of Rule 1.7. Rule 1.7
16 prohibits LBBS from representing reserving insurers and their policyholder(s) without informed
17 written consent when: 1) dual clients' interests directly conflict; 2) there is a significant risk that the
18 representation of a policyholder will be materially limited by LBBS's responsibilities to or
19 relationship with a reserving insurer; 3) the representation is prohibited by law; 4) the liability
20 insurers assert a claim of non-coverage against the policyholder. Travelers' reservation of rights made
21 its interests directly conflict with the interests of Gerard. Travelers' reservation of rights created a
22 significant risk that LBBS's representation of Gerard would be materially limited by LBBS's
23 responsibilities to or relationship with Travelers. LBBS's representation of Gerard in the White
24 Action is prohibited by the law declared in the Cumis case. Travelers' reservation of rights constitutes
25 is assertion of a claim against Gerard. "An attorney's duty of loyalty to a client is not one that is
26 capable of being divided, at least under circumstances where the ethical obligation to withdraw from
27 further representation of one of the parties is mandatory, rather than subject to disclosure and client
28 consent." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282.) LBBS's representation of Gerard in

1 the White Action is prohibited because LBBS simultaneously represented Bryan Cunningham directly
2 adverse to Gerard.

3 6. The court uses the phrase “Cumis Protocol” to describe LBBS’s duties to always
4 investigate, always analyze, and always make written disclosure of their proper conflict of interest
5 analysis, and to sometimes obtain the policyholders’ and the liability insurers’ informed written
6 consent to representation when the analysis correctly reveals a disqualifying conflict of. LBBS did not
7 follow the Cumis Protocol in the defense of the White Action.

8 7. Rule 1.8.6 requires LBBS to not accept compensation from any liability insurers that
9 reserve their rights to later deny coverage to their policyholders without compliance with the Cumis
10 Protocol. LBBS did accept compensation from Travelers without Gerard’s informed written consent.

11 8. The court finds that LBBS should be preliminarily enjoined from accepting assignments
12 from liability insurers that reserve their rights to later deny coverage to their policyholders to defend
13 policyholders without following the Cumis Protocol.

14 9. The court finds that LBBS should be preliminarily enjoined from accepting compensation
15 from liability insurers that reserve their rights to later deny coverage to their policyholders to defend
16 policyholders without completing the Cumis Protocol and obtaining the policyholders’ informed
17 written consent.

18 10. Based upon the evidence presented, it is likely that LBBS will continue its unlawful,
19 unfair, and fraudulent business practices absent a preliminary injunction.

20 11. Accordingly, the court finds that LBBS should be preliminarily enjoined from accepting
21 assignments in California to defend policyholders of liability insurers in third party liability cases
22 where the liability insurer has reserved its rights to deny coverage to their policyholders, unless LBBS
23 has followed the Cumis Protocol.

24 12. The court also finds that LBBS should be preliminarily enjoined from accepting
25 compensation from liability insurers to defend policyholders of liability insurers in third party liability
26 cases where the liability insurer has reserved its rights to deny coverage to their policyholders, unless
27 LBBS has followed the Cumis Protocol and obtained the policyholder’s informed written consent.

28 13. Gerard is not required to post a bond.

1 Accordingly, after due consideration, it is

2 **ORDERED AND ADJUDGED** that Plaintiffs' Motion for a Preliminary Injunction is
3 GRANTED.

4 Defendants, John Haubrich, Jr., John L. Barber, Armine Antonyan, Connie M. Fickel, Tamar
5 Yeghiayan, and all other California lawyers now or hereafter employed by Lewis Brisbois Bisgaard &
6 Smith, LLP, and their representatives, agents, servants, employees, attorneys, and those persons in
7 active concert or participation with them, are preliminarily enjoined from directly or indirectly:

8 (1) Accepting assignments in California to defend policyholders of liability insurers in third
9 party liability cases where the liability insurer has reserved its rights to deny coverage to their
10 policyholders, unless LBBS has followed the Cumis Protocol.

11 (2) Accepting compensation from liability insurers to defend policyholders of liability
12 insurers in third party liability cases in California where the liability insurer has reserved its rights to
13 deny coverage to their policyholders, unless LBBS has followed the Cumis Protocol and obtained the
14 policyholder's informed written consent.

15 **IT IS FURTHER ORDERED AND ADJUDGED** that on or before Wednesday, June __,
16 2021, defendants, at their own expense, shall contact by U.S. Mail, and if an e-mail address is known,
17 by e-mail, all policyholders and liability insurers that LBBS represent pursuant to assignments from
18 liability insurers which have reserved their rights to later deny coverage to any policyholder and
19 deliver to them a copy of this order and identification of the liability dispute(s) in which any
20 defendant represent them. Defendants shall file with the Clerk of the Court a certification that the
21 aforementioned Notice has been achieved on or before Wednesday, June __, 2021.

22 Dated: May __, 2021
23

24
25 _____
26 Hon. Theresa M. Traber,
27 Judge of the Superior Court
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1 **SERVICE LIST**

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

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