SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

BBB Bonding Corporation, Plaintiff vs. Cadwell, Defendant	Case No. RG19041553 **ORDER AFTER HEARING GRANTING PRELIMINARY INJUNCTION**

Cross-Complainant Kiara Caldwell seeks a preliminary injunction staying or barring defendant BBBB Bonding Company (dba Bad Boys Bail Bonds) from prosecuting actions brought to enforce or collect on credit bail agreements against cosigners who have not been provided notice pursuant to Civil Code section 1799.91. Caldwell claims that she and many other cosigners were pressured into signing agreements to guarantee bail premium payments. She, like other cosigners, signed an Unpaid Premium Agreement, an Indemnity Agreement and an Indemnitor/Guarantee Checklist. Neither at the time the cosigners signed these agreements nor at any time thereafter were they provided a notice as specified under section 1799.91.

This action was initiated by BBBB as a simple breach of contract collections matter. BBBB sought to recover unpaid premiums and fees incurred by Caldwell, alleging that she failed to pay pursuant to a Premium Agreement and Indemnity Agreement she signed to provide a bail bond for a friend. Caldwell cross-complained, alleging a class action on behalf of "Every cosigner of a Bad Boys bail bond agreement signed on or after October 30, 2015 in California, or for which payment was owed, made, or sought on or after October 30, 2015." On behalf of herself and the class, she seeks

injunctive relief for an alleged violation of the Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 et.seq.), stemming from the failure of BBBB to provide a required notice under Civil Code section 1799.91.

The UCL expressly provides for injunctive relief. (Bus. & Prof. Code §17203.) Preliminary injunctive relief may be granted in a class action prior to an order certifying a class, (Code Civ. Proc. § 527(b).) In considering a motion for a preliminary injunction, the Court considers and weighs two interrelated factors: the likelihood that plaintiff will prevail at trial and the comparative interim harm to the parties if the relief is granted or denied. (*People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630.) These two factors are weighed on a sliding scale—the more likely the plaintiff will ultimately prevail, the less severe must be the hardship they allege will occur in the absence of the injunction, and vice versa. (*Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342, 1350-1351.)

Background

The primary issues in the current motion are whether section 1799.91 applies to bail transactions in general, or as structured by BBBB, and the relative harm to the parties if the relief is granted or denied.

Section 1799.91 is a general consumer statute that applies to consumer credit contracts. Section 1799.91 covers contracts that include an obligation to pay "on a deferred payment basis . . . where the subject matter of the contract is primarily personal, family or household purposes" and pertain to retail installment contracts or accounts and certain other types of contracts. (Civ. Code § 1799.90(a)). Unless signers are married to each other, "each creditor who obtains the signature of more than one person to a

consumer credit contract shall deliver to each person . . . prior to that person's becoming obligated on the consumer credit contract, a notice" providing:

> You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.
> You may have to pay up to the full amount of the debt if the borrower does not pay. You may have to pay late fees or collection costs, which increase the amount.
> The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages etc. If this debt is ever in default, that fact may become a part of *your* credit record.
> This notice is not the contract that makes you liable for the debt.

Section 1799.95 prohibits any action to enforce a contract subject to section 1799.91 where the required notice was not given.

Caldwell and declarants Rivera, Pitre, Elias, and Salas each declare that they were contacted by BBBB and asked to sign documents and provide a bond premium for a friend or family member. They were not provided the notice required by section 1799.91.

When a person is arrested and taken into pretrial custody subject to bail, in order to obtain release, they can either pay the bail or obtain a surety bail bond from a bail bond agency by paying a premium. To obtain the bond, an agreement between the surety company and the person obtaining the bond (the indemnitor) is required. Such agreements typically provide that the indemnitor will pay the full amount of the bail if the defendant fails to appear in court as ordered. If the indemnitor cannot pay the full amount of the bond in cash, the indemnitor may pay the premium in installments, in which case an unpaid premium agreement is required. (Venn Decl. ¶ 4.) A review of collections complaints filed by BBBB indicates that these agreements are typically signed by both the arrestee and the family or friend who acts as an indemnitor. (Roberts Decl. 3, Ex. B;

Roberts Supp. Decl. ¶ 2, Ex. A.) Caldwell has identified 150 Superior Court actions filed by BBBB since July 1, 2019 in which BBBB has sought to collect on these agreements (which are attached to the actions). The cosigner agreements all call for payment in 4 or more installments. (Roberts Decl. ¶ 4) In no case is there any indication that a section 1799.91 notice is provided. (Roberts Dec. ¶ 3.) BBBB's evidentiary objections to these portions of the Roberts declaration are overruled.

Likelihood of Prevailing on Merits

As a preliminary matter, the Court rejects BBBB's assertion that Caldwell fails to establish standing under UCL. By paying a $500 premium fee, despite the absence of the notice, she has lost money as a result of the alleged unfair competition. (Bus. & Prof. Code § 17204.) This is confirmed by her unrebutted declaration that she would not have cosigned had she been informed of the terms of the notice. (Caldwell Decl. ¶ 9.)

There is no dispute that Caldwell, her other declarants, or the parties to the 150 cases identified by Caldwell, did not receive the section 1799.91 notice. Nor does BBBB dispute the contracts signed by Caldwell and her declarants were primarily for personal, family, or household purposes, or that they met the other conditions of section 1799.90. Instead, BBBB argues bail transactions in general are not encompassed by section 1799.91. It notes that the statute does not refer to bail-related transactions, which, while true, proves little. The statute speaks in general terms and does not refer to any particular types of consumer credit contracts. By its plain language, the statute appears to contemplate the transactions in question here.

BBBB points to the legislative history for the statute and notes that nowhere in the history is bail mentioned. Likewise, it points to the legislative history of the Insurance Code provisions that pertain to bail transactions (Ins. Code §§ 1800 *et.seq.*), and notes

there is no reference to consumer credit transactions. (Millemann Decl. ¶¶ 2-3.) (The Court grants BBBB's unopposed Request for Judicial Notice Exs.A.,B, C, D & E). BBBB also notes the Insurance regulations for bail also do not refer to consumer credit contract law. (Millemann Decl. ¶ 4.) But this absence in the various legislative histories and regulations does not indicate a legislative intent to exclude coverage under section 1799.91, a statute with broad reach. Nor does the failure to pass a statute that was asserted to "clarify" section 1799.91's applicability to bail bond agreements establish a legislative intent to exclude such transactions from that section's reach. "[T]the failure of the Legislature to adopt proposed amendments . . . could merely reflect a determination that such amendments were unnecessary because the law already so provided." (*Eastburn v. Regional Fire Protection Auth.* (2003) 31 Cal.4th 1175, 1184). The fact that the Insurance Code has provisions relating to bail, and regulations pertaining to them, does not establish that the bail industry is exempt from consumer statutes like 1799.91. Nothing in these statutes or regulations purports to preempt consumer statutes.

BBBB argues that section 1799.91 does not apply to the transactions in question because, pursuant to its practice, it only has one person sign each bail agreement, and thus does not come within section 1799.91's requirement that there be "the signature of more than one person" on a consumer contract. BBBB does not explicitly dispute that the arrestee signs similar, if not identical documents, a fact that is confirmed by the attachments of numerous actions to enforce the agreements. Indeed BBBB's Director of Administration and Project Management refers "arrestees and/or their co-signers on their bail agreements" in his declaration that purports to calculate the financial cost of the proposed injunction. (Jones Decl. ¶¶ 4-5.) The CEO of BBBB also refers to the non-arrestee indemnitor as a "cosigner." (Roberts Decl. ¶ 2 & Ex. A.) (The Court overrules

BBBB's evidentiary objection to this statement.) Finally, Caldwell declares she was told by BBBB that her friend who was arrested "would separately sign her own copies of the agreements I was cosigning." (Supp. Caldwell Decl. ¶ 2.)

Can section 1799.91 be so easily circumvented by simply having the arrestee and co-signer sign different although identical documents? Such a practice would not accord with the manifest purpose of the statute, which is to inform cosigners of the consequences of their signing. Here, the arrestee and his or her cosigner are engaged in one overall transaction, the purpose of which is to guarantee payment of the bond and its premium. Several writings that pertain to the same matter may be treated as one contract, even where different parties signed the agreements, whether expressly linked together or "it appears from extrinsic evidence that they were executed as part of one transaction." (1 Witkin Summary of California Law, Contacts § 770 p. 826 (11th ed., 2017).) "Where, as here, the written instruments are all part of the same transaction, they may be considered together even when the counterparties to each instrument are different." (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1322.)

BBBB argues that insurance regulations, which specify certain documents must be used and filed, create a "safe harbor" under the UCL. But it is clear that only the Legislature can create a "safe harbor." Indeed, one court has explicitly rejected an attempt to rely on insurance regulations as support for a safe harbor finding. (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 940.)

In any event, the regulations BBBB relies on merely provide that BBBB must file certain forms with the Department of Insurance. (Cal. Code Regs., tit. 10, §§ 2083, 2084, 2096.) None of these regulations address consumer notices or suggest that compliance

with the regulations creates a safe harbor against UCL violations or excuses noncompliance with consumer lending statutes.

The Court rejects BBBB's claims that the Department of Insurance has primary jurisdiction or that this action should be stayed. Primary jurisdiction is appropriate "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'" (*Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 390, quoting *United States v. Western Pac. R. Co.* (1956) 352 U.S. 59, 63–64.) Here, however, the question is one of interpretation of applicable statutes, "an inherently judicial function." (*Elder v. Pacific Bell Tel. Co.* (2012) 205 Cal. App. 4th 841, 855.)

Finally, BBBB claims that it has changed the forms it uses for these transactions and accordingly there is no showing of continued unlawful conduct. While it offers declarations that indicate that BBBB has changed forms (Venn Decl, ¶ 7), the forms continue to fail to provide the notice required under section 1799.90. (Kennedy Decl. ¶ 5 and Exs .A & B.). Moreover, the change in forms does not apply to those individuals—including those who have been sued - who signed the same version of the form signed by Caldwell. BBBB continued to file collection actions against such individuals without providing the notice as recently as February 9, 2021. (Roberts Decl. ¶ 3 and Ex.B.)

The Court accordingly concludes that Caldwell has shown a substantial likelihood of success on the merits for her UCL claim under its unlawful prong. (Bus. & Prof. Code §17200.) The Court need not address the further contention that BBBB's conduct violates the unfairness prong.

Balance of Hardships and Scope of Injunction

The balance of hardships also tips decidedly towards Caldwell. The Legislature mandated the notice under section 1799.91 to protect consumers. Caldwell and her declarants all demonstrate how they have been victimized by the lack of notice. BBBB claims it could lose bail premiums worth millions of dollars if the statute is enforced. But it makes no showing it cannot provide the notice and comply with the statute. "In any event, the injunction does not prevent defendants from conducting business in California. Rather, it merely conditions their continued activity on compliance with California's consumer protection laws." (*People ex rel. Brown v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 342.)

Thus, the Court finds that injunctive relief is appropriate to restrain BBBB from filing actions or attempting to collect on contracts in contravention of Civ. Code 1799.91 and 1799.95. Such relief is appropriate to stop an ongoing illegal practice. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 104.) Civil Code section 1799.95 expressly bars a creditor from filing any action or enforcing a consumer contract where the required notice under section 1799.91 has not been given. The Court accordingly has authority to "restrain the commission or continuance" of illegal acts. (Code Civ. Proc. §526(a)(1); *see also id.* § 526(a)(3).) The court has authority to enjoin actions to "prevent a multiplicity of judicial proceedings" (Code Civ. Proc. §526(a)(6).).

BBBB argues that pre-existing collections actions may not be enjoined under the doctrine of exclusive concurrent jurisdiction. That doctrine provides that when two or more courts possess concurrent jurisdiction over a cause, the court that first asserts jurisdiction assumes it to the exclusion of all others. *(Franklin v. & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1175.) This equitable doctrine

generally applies when the same parties are involved in each action, although exactitude is not required where the issues in the two proceedings are substantially the same. (*Id.*). The purpose of this rule is to avoid "unseemly conflict between the courts that might arise if they were free to make contradictory decisions or awards at the same time relating to the same controversy." (*Scott v. Industrial Acc. Com.*(1956) 46 Cal.2d 76, 81-82; *Advanced Bionics Corp.v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 706.)

Caldwell is not a party to the 150 or so cases noted above. More importantly, however, this case is the only case, with one exception, identified by the parties where the section 1799.91 issue is raised, and the only class action. The exception is a case where an individual defendant sought to raise the section 1799.91 issue. BBBB, citing this case, requested a stay in that action. (BBBB's RJN A & B). The vast majority of the cases cited by Caldwell that have been resolved have been resolved by default judgments. (Roberts Decl. ¶ 6.) Under these circumstances, the court concludes that the doctrine of concurrent jurisdiction does not preclude injunctive relief.

BBBB argues the requested relief is for a mandatory injunction. The court disagrees. The "general rule is that an injunction is prohibitory if it requires a person to refrain from a particular act and mandatory if it compels performance of an affirmative act that changes the position of the parties." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446.) "The substance of the injunction, not the form, determines whether it is mandatory or prohibitory." (*Id.*) A preliminary injunction requiring a party to cease an on-going violation of the law, even if the injunction has some incidentally mandatory aspects, is prohibitory. (*People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13.) Thus in *Mobile Magic Sales, Inc.*, the trial court issued a preliminary injunction to prohibit defendant from displaying an arguably unlawful sign.

While the removal of the sign was undoubtedly an affirmative act, it was incidental to the injunction's "objective to restrain further violation of a valid statutory provision." (*Id.* See also *People ex rel. Brown v. iMergent, Inc., supra.* 170 Cal.App.4th at p. 342–343.) Here the preliminary injunction is not only prohibitory in form, but also in substance. It prohibits an ongoing violation of law. It enforces the prohibition in Civil Code §1799.95.

Injunction Bond

BBBB argues that a very substantial bond is required. (Code Civ. Proc §529(a).) Caldwell, citing Code Civ. Proc §995.240, argues the bond should be waived because of Caldwell's meager resources. She declares that her "income goes entirely to monthly necessities for myself and my family. I have no financial resources to dedicate to getting a bond in this case." (Caldwell Dec. ¶ 16.) The cost of a bond would be well beyond her reach. (Scharf Decl. ¶¶ 2-4.)

Although mandatory in form, there are recognized exceptions to the bond requirement, such as the poverty of the plaintiffs. (*Conover v. Hall* (1974) 11 Cal.3d 842, 850-851.) There is a split of authority as to whether in fixing the amount of the undertaking the likelihood of prevailing in the case may be taken into account. (*Compare ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 16 fn.8, *with Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1062.).

Considering the nature of this action, the meager resources of the plaintiff, and the scope of the injunction, the Court concludes that no bond is required. While BBBB suggests the court should take into account the resources of putative class members, it cites no authority for such a requirement. (Cf. *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1433-1436 (class members not liable for costs).)

Order

BBBB, its agents, employees, and all persons acting in concert with any of them are accordingly preliminarily enjoined from 1) filing any actions to enforce or collect on credit bail agreements against cosigners who have not been provided the notice required by Civil Code section 1799.91 2) otherwise attempting to collect on such agreements; or 3) prosecuting any actions already filed or seeking to enforce, execute, or collect on any judgments against such cosigners who have not been provided the notice required by Civil Code § 1799.91..

The court stays implementation of this order for 15 days.

IT IS SO ORDERED.

DATED: April 8, 2021

BRAD SELIGMAN, JUDGE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG19041553
Case Name: BBBB Bonding Corporation v. Caldwell

RE: ORDER AFTER HEARING GRANTING PRELIMINARY INJUNCTION

CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed: 04/08/2021

Jhalisa Castaneda
Courtroom Clerk, Dept. 23

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