**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

National Association of Professional Allstate Agents, Inc., an association, *et al.*, *Plaintiffs*, *v.* **Allstate Insurance Company,** *Defendant.*	**Civil Case No.** 21-L-7947 Judge Margaret A. Brennan

Plaintiffs' Response in Opposition to Allstate Insurance Company's 2-619.1 Motion to Dismiss

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Plaintiffs National Association of Professional Allstate Agents, Inc. ("**NAPAA**"), Scott Verbarg, Ross Shales, Brad Rehonic, and Joseph Rehonic respectfully respond to Defendant Allstate Insurance Company's Motion to Dismiss. In opposition to the motion, Plaintiffs state as follows:

Background

NAPAA is a membership association dedicated to the success of Allstate Exclusive Agency Owners ("**EA(s)**"). Ver. Compl. ¶8. It advocates on behalf of EAs and has more than 1000 members, including active and retired Allstate EAs, all of whom have or had a contractual relationship with Allstate. *Id.* Plaintiffs Verbarg, Shales, Brad Rehonic, and Joseph Rehonic are former EAs.

EAs are independent contractors of defendant Allstate Insurance Company who are authorized to sell insurance policies on behalf of Allstate in exchange for commission and building a valuable book of business. Ver. Compl. ¶14. In order to become aan EA with Allstate, all prospective EA's must enter into the R3001 (S or C) Exclusive Agency Agreement and accompanying integrated documents with Allstate. *Id.* at ¶15 (collectively, "**EA Agreement**"). *See* Compl. Exs. 1-4.

NAPAA brought Counts I-IV of the Verified Complaint, all of which seek declaratory and/or injunctive relief on behalf of its members. Count I claims Allstate breached the EA Agreement by instituting a blanket policy not to consider existing EAs for agency sales. Count II claims that Allstate breached the EA Agreement by authorizing Independent Agents ("**IA(s)**") to sell Allstate policies in areas served by EAs. Count III claims that Allstate breached the EA

Agreement by "poaching" policies from EAs through its CCC/Internet portals. Count IV claims Allstate breached the EA Agreement by mandating EAs convert their telephone systems to an Allstate-owned system—Allstate Agency Voice ("**AAV**").

Counts V-XI all relate to Plaintiffs Verbarg, Shales, Brad Rehonic, or Joseph Rehonic and involve claims of breach of contract related to the sales of their agencies and/or their terminations as EAs.

Argument

"A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (Ill. 2006). In reviewing the sufficiency of a complaint, a court accepts as true *all* facts and makes all reasonable inferences that may be drawn from those facts. *Id.* (citing *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 96-97 (Ill. 2004)) (emphasis added). The court must also construe all allegations in the light most favorable to the plaintiff. *Marshall*, 222 Ill. 2d at 429. (citing *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (Ill. 2005)). Therefore, a cause of action will only be dismissed if it is *clearly* apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Id.* (citing *Canel v. Topinka*, 212 Ill. 2d 311, 318 (Ill. 2004)).

Plaintiffs have pled facts sufficient enough to show that they are entitled to recovery. NAPAA has standing to sue through associational standing. Each of the counts NAPAA brought state a claim upon which relief may be granted, and the individual plaintiffs have stated claims upon which relief may be granted.

I. NAPAA has standing to sue on behalf of its members.

A plaintiff need not allege facts establishing standing. *International Union of Operating Engineers Local 148 AFL-CIO v. Illinois Dept. of Employment Sec.*, 215 Ill. 2d 37, 45 (Ill. 2005) ("*International Union*"). "Rather, it is the defendant's burden to prove lack of standing." *Id.* (internal citations omitted). "Where standing is challenged by a motion to dismiss, a court *must* accept as true all facts in the plaintiff's complaint and inferences that can reasonably be drawn in the plaintiff's favor." *Id.* at 45 (internal citations omitted) (emphasis added).

An association has standing to sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 47. (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Allstate does not attempt to argue any of the elements except for the third.[1] *See Allstate Motion to Dismiss* at 4 ("**Allstate MTD**").

The Illinois Supreme Court noted that associational standing "serves important functions in the vindication of the rights of members of associations and in the preservation of scarce judicial resources." *International Union*, 215 Ill. 2d at 50. The court also recognized that one of primary reasons people join such an organization is because the organization is an "effective vehicle for vindicating interests that they share with others." *Id.* Associational standing is

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[1] Since Defendant's do not attempt to argue the first two elements, NAPAA will not address them as "it is the defendant's burden to prove lack of standing." *International Union*, 215 Ill.2d at 45.

especially supported when the matter can be settled for the most part as a question of law. *See id.* at 52 (finding that even though unique facts of each union member's claim would have to be later considered, the case could be litigated and the remedy would inure to the benefits of the members who were determined to have been injured). Further, the court recognized that the union likely had access to information relevant to its members so standing supported the goal of judicial economy. *See id.* at 56; see also *Guns Save Life, Inc. v. Raoul* 2019 IL App (4th) 190334 at ¶31 (2019) (holding the third element of associational standing satisfied if "significant participation by the individual members" is not necessary to establish right to relief).

Allstate argues that "before this Court could grant the broad relief requested by NAPAA, each of [the EAs] must demonstrate that they substantially performed under the contract." Allstate MTD at 5. That is an inaccurate reading of the law surrounding both pleadings and associational standing.

First, NAPAA has satisfied the relevant pleading standard for associational standing here—and this Court must accept these alleged facts and any inferences that can reasonably be drawn in the plaintiff's favor as true in its analysis. *See International Union*, 215 Ill. 2d at 45. NAPAA alleges that its members consist of "active and retired Allstate EAs, all of whom have or had a contractual relationship with Allstate." Ver. Compl. ¶ 8. One cannot be an "active" Allstate EA who has a contractual relationship with Allstate without substantially performing under the EA Agreement. *See generally* EA Agreement. To be an EA, an agent has to enter into the EA Agreement. Ver. Compl. ¶ 15. If someone did not enter into the EA Agreement, she is by definition, not an EA. Conversely, every EA necessarily has entered into the EA Agreement and

"performed" by accepting its obligations. Surely, this is a reasonable inference that this Court must recognize under *International Union.*

Second, NAPAA satisfies the requirements of the third element of associational standing that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. NAPAA brought Counts 1-4 in this case, which all allege Allstate breached its contract with NAPAA's member EAs in various ways. All four counts will primarily be determined as a matter of law, not fact. *See infra* Part II. NAPAA has sought declaratory and/or injunctive relief for all of its claims on behalf of its members, not damages. Under *International Union*, this type of relief will significantly decrease, not increase, the amount of participation required by NAPAA members. Just as the union in *International Union* had access to information relevant to its members' interests, NAPAA has information and data supporting the facts of their claims on behalf of its members.

NAPAA has sufficiently alleged facts that support its associational standing. Reasonable inferences can be drawn from NAPAA's allegations that also support its associational standing. NAPAA's claims will not require significant participation from its individual members. Therefore, NAPAA has satisfied the third prong of the *Hunt* test for associational standing.

II. Counts I-IV State a Claim upon Which Relief May Be Granted.

Allstate argues that NAPAA did not allege "that its members substantially performed their obligations under the EA Agreement." Allstate MTD at 6. In its view, this "failure" is fatal to a breach of contract claim. *Id.* at 4. First, NAPAA maintains it did so allege when it stated its members were active and former EAs who had to enter and perform under the EA Agreement.

Ver. Compl. ¶ 8.

Even if this Court disagrees that NAPAA's Verified Complaint makes sufficient allegations to support the breach of contract claims, the solution is amending the pleading, not dismissal. 735 ILCS 5/2-616(c). ("A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just."). In order to determine whether to permit amended pleadings, courts in Illinois consider whether: (1) the proposed amendment would cure a defective pleading; (2) the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) the moving party had previous opportunities to amend. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 101A (finding most important factors is the prejudice to the opposing party).

Here, virtually no discovery has occurred and this case is in the earliest stages of litigation. Allstate would not be prejudiced by NAPAA's amendment of the complaint, if this Court deems it necessary. In this case, NAPAA can simply amend its complaint to allege its members "performed all the conditions on [their] part to be performed under the contract." IL R S CT Rule 133(c). If Allstate denies this, it is required to allege factually wherein there has been a failure to perform by the EA. *Id.*

Counts I-IV are sufficiently pled by NAPAA's allegations, but each specific count is sufficiently pled as well.

A. Allstate's Blanket Policy to Not Consider Existing EAs for Agency Sales Is a Breach of Contract.

Under the EA Agreement, Allstate has the "exclusive authority" in considering whether

to approve a sale. Allstate MTD at 7. NAPAA does not argue any differently. The question of law is how that exclusive authority obligates Allstate to deal with EAs as related to the exercise of its authority.

"[T]here is a duty of good faith and fair dealing included in every contract as a matter of law." *Barrille v. Sears Roebuck and Co*, 289 Ill. App.3d 171, 175 (1997). (citing *Saunders v. Michigan Ave. National Bank*, 278 Ill. App. 3d 307 (1996)). That duty requires a party vested with discretion under a contract to "exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Barrille*, 289 Ill. App. 3d at 175 (quoting *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 991 (1984)).

Allstate argues that the Verified Complaint gives two examples "where Allstate approved sales by one EA to another," which it argues completely undercuts NAPAA's allegations concerning Allstate's blanket policy. Allstate MTD at 7. The fact that Allstate may have occasionally deviated from its blanket policy does not mean that the policy does not exist.

Since Allstate has discretion (by virtue of its "exclusive authority") in considering whether to approve a sale—this is discretion may be exercised on a case by case basis. Meaning, in any given case, it has that authority. But Allstate seems to be arguing something different. It argues that since it has this case by case authority to approve a sale, it can essentially eliminate the option to sell entirely. That would render the EA's contractual right to sell her economic interest superfluous.

Allstate's discretion means, under Illinois law, that its discretion must be exercised under

the duty of good faith and fair dealing. The Manual states that in order to be considered for a book purchase, the agent must meet qualifications established by Allstate. *See* Manual at 39-40. Allstate then sets out objective criteria to evaluate whether an existing EA buyer is qualified. *See Id.* This list of objective qualifications gives EA's a reasonable expectation that Allstate will at least *consider* a potential existing EA buyer if that existing buyer meets the objective qualifications. However, Allstate has adopted a blanket policy in which Allstate refuses to even consider approving a sale of a book of business to an otherwise qualified EA. Ver. Compl. ¶158.

This blanket refusal to consider sales to objectively qualified existing EA buyers is an arbitrary and capricious decision in violation of the reasonable expectation of the parties. NAPAA's allegations are sufficient under the law and Count I should not be dismissed.

B. Allstate's Expansion of IAs into Markets Served by EAs Is a Breach of Contract.

Count II is a breach of contract claim based upon Allstate's expansion of IAs into areas served by EAs. The question of law for this court to determine is whether this action by Allstate beaches its contract with EAs on the basis of its course of dealing and Allstate representative's statements.

Illinois courts recognize that parties often modify agreements "orally or by their subsequent actions" despite integration clauses such as the one in the EA Agreement, especially when a contract is terminable at will by either party. *Alderman Drugs, Inc. v. Metro. Life Ins. Co.*, 161 Ill. App. 3d 783, 792 (1987). Implied terms cannot supplant express terms of a contract, however implied terms can supplement express terms. *Hentze v. Unverfehrt*, 237 Ill. App.3d 606, 611 (5th Dist. 1992). Further, if the language of a contract is facially unambiguous, then the

contract is interpreted by the trial court as a matter of law. *Alecta Real Estate USA, LLC v. BAB Operations, Inc.*, 2015 IL App (1st) 132916-U at *14. If the language is susceptible to more than one meaning, then an ambiguity is present. *Id.*

NAPAA does not claim that EAs have exclusive territorial rights under the EA Agreement. *See* Allstate MTD at 8. Allstate cites to the EA Agreement for its "sole discretion" to determine "the number of agencies, Satellite Agencies, Enhanced Satellite Agencies, and local agency extensions in a market based upon the local market conditions." Allstate MTD at 8. Allstate's quoted discretion does *not* include IAs—under the EA Agreement it can bring in as many Allstate agencies as it wants in a given market. But bringing in other Allstate agencies is fundamentally different than Allstate's authorization of IAs in a market that is served by an EA.

Over the course of conduct between Allstate and its EA's, a mutual agreement and understanding has developed that Allstate will only authorize IA's to sell Allstate policies in areas unserved by EA's. Compl. at ¶27. An Allstate spokesperson sent an email to PC360 stating Allstate "will consider appointing independent agency owners only in rural markets where we do not deploy exclusive agents." *See* Compl., Ex. 5. NAPAA claims that through the course of dealings and *statements made by an Allstate representative* that Allstate will only approve IAs in areas unserved by EAs. IAs are not mentioned in the EA Agreement except in regards to what type of financial investment/interest is allowed in EAs or IAs. *See* Manual at 9. As such, the EA Agreement is silent as to where Allstate will allow IAs to operate in the same territory as EAs.

The EA Agreement is ambiguous on the question of whether IAs are allowed in areas served by EAs. The agreement is silent as to IAs, and the statements of Allstate representatives

say that IAs will only be only in areas unserved by EA's. *See* Exhibit 5. Through the course of dealings and from statements by Allstate representatives, an implied term that IAs will only be authorized in areas unserved by EAs has been created that supplements the express terms. Therefore, Count II is supported by NAPAA's allegations and should not be dismissed.

C. Allstate's "Poaching" of Policies from EAs Through its CCC/Internet Is a Breach of Contract.

Implied terms can be used to supplement express terms of a contract. *Hentze*, 237 Ill. App. 3d at 611. Through the course of conduct between Allstate and EA's, and the terms of the EA Agreement, EAs reasonably expect that if they have substantive discussions with potential customers, they should have a fair opportunity to bind the business themselves without undue interference from Allstate's CCC/Internet. Count III is supported by NAPAA's allegations and should not be dismissed.

D. Allstate's Mandate of AAV Is a Breach of Contract.

A clearly ascertained legal right can plainly be stated as a "substantive interest recognized by statute or common law." *Kilhafner v. Harshbarger*, 235 Ill. App. 3d 227, 229 (1993). The terms of an agreement, if unambiguous, should generally be enforced as they appear, and those terms will control the rights of the parties. *Coghlan v. Beck*, 984 N.E.2d 132, 143 (Ill. App. Ct. 2013).

The EA Agreement contains clear language regarding the EA's responsibility toward the day-to-day running of her agency. This includes a clause which states that "agencies will be required to supply and maintain at their own expense . . . telephone systems." Supplement for the R3001 Agreement, Compl. Ex. 3 at 32. Allstate's argues that this only applies to agencies using

technology that the agencies supply. Allstate MTD at 10. This contorts the language of the EA Agreement from a mandatory obligation of agents to provide technology to something akin to, "that only applies if we ask you to supply it. Otherwise, you have to use ours." Since the EA Agreement expressly provides that the EAs can supply their own phone system at their sole expense, it supports NAPAA's position that Allstate does not have the right to dictate who supplies the phone system.

Allstate argues that since it retains ownership of the EA's telephone number, it has the right to require the use of AAV. NAPAA does not argue Allstate owns the number. But the EA Agreement gives EAs the express right to provide the telephone system. This is rather meaningful to EA's. By having control over the equipment in their agency, agents can ensure that the agency runs as intended when they signed the Agreement. Further, the provision in the Agreement on telephone systems imbues the agents with the ability to pick and choose between different services and service rates.

Therefore, Count IV states a claim for breach of contract upon which relief can be granted.

E. NAPAA is entitled to Injunctive Relief.

NAPAA is entitled to injunctive relief for the breach of the EA Agreement.[2] All the cases Allstate cites in support of their argument are cases in which a party was attempting to enjoin another party from terminating the contract when there had been no breach of the contract. *See Gage v. Village of Wilmette*, 315 Ill. 328 (1924); *S. & F. Corp v. American Express Co.*, 60 Ill.

[2]For full discussion on right to injunctive relief see Pl. Memo of Law in Supp. of Amend. Mot. for Prelim. Injunc.

App. 3d 824 (1st Dist. 1978); *Alderman Drugs v. Metropolitan Life Ins. Co.*, 161 Ill. App. 3d 783 (1st Dist. 1987). In each of these cases, a party was attempting to stop the other party from terminating the contract without allegations of breach or bad faith. None are analogous here.

NAPAA asks this Court to enjoin Allstate's AAV mandate because it's a breach of the EA Agreement. A party who materially breaches a contract cannot take advantage of the terms of the contract that benefit that party. *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 599 (1st Dist. 1987). (citing *Robinhorne Constr. Corp. v. Snyder*, 113 Ill. App. 2d 288, 297 (1969)). As such, Allstate cannot point to the termination at will provision in the contract to cover for its breach of the contract.

III. The Individual Plaintiffs All State Claims upon Which Relief Can Be Granted.

"Where facts of necessity are within defendant's knowledge and not within plaintiff's knowledge, a complaint which is as complete as the nature of the case allows is sufficient." *In re Estate of DiMatteo*, 2013 IL App (1st) 122948 at ¶82 (2013). Plaintiffs at times "may be forced to present allegations of express authority upon information and belief." *Id.* (quoting *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148 ¶40 (2012)) (noting that an allegation made on information and belief is not equivalent to an allegation of relevant fact). A cause of action will not be dismissed unless it is *clear that no set of facts* can be proven. *Id.* at 84. (citing *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994)).

Counts V, VI, and VII each has a set of facts that can readily be proven. For each count, there is only one paragraph that is based on information and belief. Ver. Compl. ¶75, 82, 100. Every other paragraph is a specific allegation of fact. Taking every allegation and inference in the light most favorable to the plaintiffs, they have stated a claim upon which relief may be granted.

Plaintiffs have further alleged portions of the EA Agreement that Allstate has breached. *Id.* at ¶59. The EA Agreement states that Allstate is to have no involvement in an agency sale, except to approve or deny the sale.

> In sale of agency situations, Allstate is never the buyer or seller. The only times Allstate is involved is to approve the buyer and when you elect to receive the termination payment. If you elect to sell, you do not receive the termination payment from Allstate. It is your responsibility to establish a value and negotiate the sale price for your economic interest in any of the business included in the transfer.

Manual at 38.

In regards to Count VIII, "there is a duty of good faith and fair dealing included in every contract as a matter of law." *Barrille v. Sears Roebuck and Co*, 289 Ill. App.3d 171, 175 (1997). (citing *Saunders v. Michigan Ave. National Bank*, 278 Ill. App. 3d 307 (1996)). That duty requires a party vested with discretion under a contract to "exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Barrille*, 289 Ill. App. 3d at 175 (quoting *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 991 (1984)).

While Allstate is allowed broad discretion in approving or denying sales, Manual at 39, that discretion must be exercised with good faith and fair dealing. Plaintiff Verbarg had found an otherwise objectively qualified buyer; Allstate's FSL specifically told Plaintiff Verbarg it be "very unlikely" to approve the sale. Ver. Compl. at ¶¶ 71, 112. Allstate breached its duty of good faith and fair dealing when it discouraged the sale to an objectively qualified buyer in favor of a less qualified buyer, resulting in a loss to Plaintiff Verbarg. *Id.* at 114. Allstate's argues that when its authorized representative makes it clear that a sale won't be approved, it didn't actually

"deny" the sale. This argument is a distinction without a difference.

Conclusion

For the foregoing reasons, NAPAA respectfully requests that this Court deny Allstate's motion to dismiss.

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Respectfully submitted,
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Certificate of Service

I certify that the foregoing document was filed on November 4, 2021, using the court's electronic filing system, which will send notice of filing to all counsel of record.

/s/ James Bopp, Jr.
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