

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL WASGATT,
Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, and
GLENN T. SHAPIRO,
Defendants.

Civil Action No. 4:20-cv-40118

**PLAINTIFF’S REPLY TO DEFENDANT ALLSTATE INSURANCE COMPANY’S
OPPOSITION TO HIS MOTION FOR ENTRY OF PRELIMINARY INJUNCTION**

The record speaks for itself. For over a year and half following the termination of Paul Wasgatt (“Mr. Wasgatt”) as an employee agent, Allstate Insurance Company (“Allstate”) continued to use his photograph and name to solicit Mr. Wasgatt’s current customers, as well as to solicit the broader public. This was done by Allstate for the commercial purpose of benefiting its house account.¹ When caught soliciting Mr. Wasgatt’s clients in December of 2020 (a year and a half *after* his termination) using his picture and name, Allstate fundamentally ignored the request of Mr. Wasgatt’s counsel to cease using Mr. Wasgatt’s picture (likeness) and name and to explain what right Allstate believed it had to use his picture and name.² Late in the day on December 18th Allstate e-mailed the undersigned an ambiguous response stating that Allstate was confirming a few additional details and would provide a response to the undersigned’s letter before the Christmas holiday.³ The e-mail did not state that Allstate had or would stop the misappropriation

¹ Allstate is misleading the court to the extent that it suggests that the marketing e-mails were sent out using Mr. Wasgatt’s likeness and name were associated with another agent. This is false. When Allstate terminated Mr. Wasgatt, the book of business managed by Mr. Wasgatt became a house account. Additionally, it should be made clear that a large portion of Allstate’s sales is through its online sales (like GIECO) managed by its in-house sales force. This is an important fact in analyzing the misclassification of its Exclusive Agents in Massachusetts.

² See Exhibit “1” attached to Plaintiff’s Memorandum of Law, Doc. No. 30-1.

³ See Exhibit “2” attached to Plaintiff’s Memorandum of Law, Doc. No. 30-2.

of Mr. Wasgatt's likeness or name, or that Allstate had a legal right to use his picture or name.⁴ The Christmas holiday came and passed without further word from Allstate's counsel. Allstate's ambiguous response and subsequent silence forced the filing of leave to file a second amended complaint, along with an application for a preliminary injunction.

It was only after Mr. Wasgatt filed the present motion for injunctive relief on January 29th that Defendant sent out e-mails on February 5th (a week later) to a limited (unknown) number of persons to whom Allstate had solicited business by using Mr. Wasgatt's likeness and name, apologizing for using Mr. Wasgatt's likeness and name. Neither Mr. Wasgatt nor his counsel were sent copies of or notified by Allstate or its counsel of these e-mails until February 12th. Allstate falsely insinuated in its papers that its counsel actively and openly communicated with Mr. Wasgatt's counsel regarding Allstate's efforts to mitigate the harm and damages incurred by Mr. Wasgatt as result of Allstate's misappropriation of his likeness and name. There were no such communications from December 18th to February 12th. It was not until the late morning of the 12th, hours before filing its opposition, that Allstate's counsel initiated a telephone conference with counsel for Mr. Wasgatt during which Allstate's counsel acknowledged the misuse of Mr. Wasgatt's likeness and name and disclosed that Allstate had sent e-mails on February 5th and was preparing a second round of e-mails that would go out to a broader scope of the public that Allstate solicited using Mr. Wasgatt's likeness and name.⁵

⁴ See Exhibit "2" attached to Plaintiff's Memorandum of Law, Doc. No. 30-2.

⁵ In hindsight, it is clear that the purpose for Allstate's counsel calling the undersigned on February 12th was to be able to put statements into its opposition that Allstate had been in communications with Mr. Wasgatt's counsel regarding mitigating the damage caused by Allstate's misappropriation of Mr. Wasgatt's likeness and name. Unfortunately, Allstate sought to mischaracterize the brief and relatively uninformative telephone conference of the 12th as not being a single conversation but multiple communications between counsel that extended over a period of time. When, in fact, the only material act taken by Allstate from December 18th to February 12th was to send an e-mail to a limited number of persons who had received Allstate's false and misleading e-mails over the last year and half.

The primary consideration as to whether to grant a preliminary injunction is if a plaintiff is likely to succeed on the merits. Esso Standard Oil Co. (Puerto Rico) v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006) ("If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity") (quoting New Comm. Wireless Servs., Inc. v. SprintCom., Inc., 287 F.3d 1, 9 (1st Cir. 2002)); Waldron v. George Weston Bakeries, Inc., 570 F.3d 5, 9 (1st Cir. 2009); EEOC v. Astra USA, Inc., 94 F.3d. 738, 743 (1st Cir. 1996) ("when the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief"). Here, there is no dispute that Allstate misappropriated both Mr. Wasgatt's likeness (picture) and name. There is no dispute that Mr. Wasgatt's clients and the public at large were and continue to be deceived by Allstate's misappropriation of Mr. Wasgatt's likeness and name over the previous year and a half.

Allstate's arguments in its opposition to the issuance of a preliminary injunction are flawed and disingenuous. First, Allstate relies on a single provision found in a 59-page manual that was referenced in the Exclusive Agency Agreement. To begin, the Exclusive Agency Agreement is an unenforceable, illegal contract in that it violates Massachusetts General Laws, Chapters 149, §148B; 151, 152 and 62B by illegally classifying Mr. Wasgatt as an independent contractor. The rule in Massachusetts is well established that "[a] contract is unenforceable if the contract calls for an illegal performance, or if the defendant's performance rendered under a contract was illegal." MA Superior Civil Jury Instructions, Basic Contract, § 13.2.11 Illegality, Citing Adamsky v. Mendes, 326 Mass. 603, 607 (1950) and Tocci v. Lembo, 325 Mass. 707, 710 (1950); also see Amended Complaint, Doc. No. 19. In addition, Allstate cannot enforce the purported Exclusive Agency Agreement because it is in material breach of the agreement. *See Plaintiff's First*

Amended Complaint, Doc. No. 19; and MA Superior Court Civil Jury Instructions, Basic Contract Cases, § 13.1.19 Breach of Contract.

Putting aside the illegality of the Exclusive Agency Agreement and its unenforceability because of Allstate's non-performance, the section culled from Exclusive Agent Manual and relied upon by Allstate, does not mention or grant Allstate any rights to use Mr. Wasgatt's likeness (picture). Nor does it grant Allstate unlimited use of Mr. Wasgatt's name or to use his name in its various marketing programs.⁶ The clause only references the use of Mr. Wasgatt's name and was intended to simply allow Allstate a 120-day safe harbor to transition those clients that Mr. Wasgatt serviced for Allstate. Mr. Wasgatt did not grant Allstate the right to deceive or mislead persons who he had dealt with into falsely believing that he was still employed by Allstate and that he continued to promote Allstate's products. Nor does it relieve Allstate of its liability for the misappropriation of Mr. Wasgatt's likeness or name, whether under the Lanham Act or G.L.c. 214 § 3A -- particularly if Allstate does not inform Mr. Wasgatt that it is using his likeness and name to solicit business. Nor did Mr. Wasgatt grant Allstate the right to interfere with his business relationships.

At page 5 of its opposition, Allstate represents that the removal of a terminated employee agent's name from the "system"⁷ is done manually. Putting aside the difficulty in believing that such a removal is done manually, it leaves open the question as to why Mr. Wasgatt's picture and name were exported to and used by Allstate in its *new* PRE marketing program/platform. The answer to this question is that the use of Mr. Wasgatt's picture and name was *not* an excusable

⁶ Mr. Wasgatt picture and name, according to the Hoyda Declaration, was copied from the eAgent Agency Management System ("eAgent") and on October 19, 2020 Allstate commenced using Mr. Wasgatt's picture and name in its Personalized Renewal Program ("PRE").

⁷ Allstate's reference to its "system" is vague and amorphous in light of the fact that it has multiple databases, software programs and marketing programs.

error;⁸ but rather it was done pursuant to an overall marketing scheme devised by Allstate. Mr. Wasgatt is informed that Allstate routinely uses the names, and at times pictures, of ex-agents, without their knowledge or consent, to market and sell its insurance products as part of its PRE marketing program. Allstate restructured and automated how it sells insurance policies, resulting in the massive growth of its in-house sales force known as the In-House Outbound Sales Department.⁹ Allstate automated the sales of its products whereby consumers can now purchase Allstate insurance products online and Allstate can use low paid workers to manage the marketing and sales system. To ensure the financial success of this shift in sales strategy, Allstate sent, and continues to send, out e-mails in the name, and often along with the picture, of ex-agents to unsuspecting consumers. These unsuspecting consumers¹⁰ are deceived into thinking that they are being contacted by a real person that they once knew, when in fact they are being solicited by an Allstate computer program posing as that person. When a system is manually changed, or when an automated system is overridden, or when the name and likeness of an ex-employee is imported/exported to a new marketing platform/program (PRE), such a change or act is done consciously and deliberately.

At page 6 of its opposition and at paragraph 17 of Hoyda's Declaration, Allstate appears to play a slight of hand with language. Allstate's papers state: "Following the investigation, Wasgatt's photo was deleted from the central repository on January 7, 2021." There is no confirmatory statement that his name was removed. Then in subsequent statements, the papers state "... Wasgatt's photo and/or name in future communications sent to Allstate policy holders"

⁸ In its papers, Allstate states that the use of Mr. Wasgatt's picture and name in the PRE was in "error", but never defines what it means by "error" or what the "error" consists of or how the "error" was remedied.

⁹ The existence of the In-House Outbound Sales Department is irrefutable evidence that Allstate is in the business of selling insurance and that Mr. Wasgatt, as an exclusive agent, only permitted to sell Allstate insurance products, was improperly classified as an independent contractor under the laws of Massachusetts.

¹⁰ More than 2,700 unsuspecting customers in Mr. Wasgatt's case as admitted to by Allstate in its papers.

will not be used. This language appears crafted to mislead an unwary reader to believe that Allstate deleted Mr. Wasgatt's name from its systems and thus ceased using both his name and photograph when a careful reading reveals that Allstate only represents that it stopped using Mr. Wasgatt's photograph to solicit individuals currently holding an Allstate policy. The representations contained in Hoyda's Declaration do not include the purging of Mr. Wasgatt's name. A further reading of the same language reveals that Allstate only ceased the sending of e-mails containing the misappropriated likeness and name to those individuals holding an Allstate policy. As Allstate acknowledges in other places in its paperwork, as well as by Mr. Wasgatt in his moving papers, Allstate used Mr. Wasgatt's likeness and name to solicit persons who do not hold an Allstate policy. This is the more problematic and troubling group of people that Allstate markets to using Mr. Wasgatt's name and likeness. Accordingly, by focusing on the qualifications attached to Allstate's representations, it is evident that Allstate intends, if not reserves the ability, to continue to market its products to persons who currently do not hold an Allstate policy using either Mr. Wasgatt's name or likeness, or both.

Moreover, there appears to be some confusion as to how Allstate came into possession of and used Mr. Wasgatt's photograph and name. While employed by Allstate, Mr. Wasgatt set up an e-mail marketing program to reach out to customers he was servicing for Allstate. This is called the "drip campaign". Upon his termination, Allstate was to cease using Mr. Wasgatt's name -- under no set of facts was Allstate ever authorized to use his picture. Then on October 19, 2020 Allstate took Mr. Wasgatt's photograph and name and used it in a new and entirely separate marketing program labeled the Personalized Renewal Experience ("PRE").¹¹ This was done over a year *after* Mr. Wasgatt was terminated and *after* the commencement of the present litigation.

¹¹ Declaration of Hoyda, ¶¶ 2, 10 & 11 [Doc. No. 33-5]. "10. Mr. Wasgatt's photograph was also sent out as part of the PRE process."

The clear purpose of the PRE marketing e-mail was to mislead Mr. Wasgatt's clients into falsely believing that Mr. Wasgatt was personally encouraging them to renew with Allstate. The contact information on the e-mail was not Mr. Wasgatt's, but was that of Allstate's Customer Service Center. Allstate was actively and consciously seeking to separate Mr. Wasgatt from his current clients through deceptive practices and drive business to its In-House Outbound Sales Department using Mr. Wasgatt's likeness and name, as well as those of other ex-agents. The timing, over a year *after* his termination, as well as the use of his name and likeness in an entirely new and separate marketing program, PRE, demonstrates that this was not a simple oversight/error by Allstate, but rather was a conscious and calculating act.

Then when one adds the backdrop of the pending litigation for misclassification that personally involves the President of the company, Mr. Shapiro, and the jurisdictional disputes associated with the filing of the motion to remand based on Mr. Shapiro's claimed residency, there appears to be added reason for Allstate to use Mr. Wasgatt's picture and name to target his clients and potential clients, which is to financially squeeze him.

Allstate's core argument appears to be one of trust. It asks that the Court turn a blind eye to its admitted violations of law and trust it to self-regulate. Allstate makes this request while at the same time it has not cured its illegal conduct and appears not committed to doing so. There is no dispute that Allstate misappropriated Mr. Wasgatt's likeness and name, and that Mr. Wasgatt will prevail on all his claims set forth in his Second Amended Complaint. Allstate's continued use of Mr. Wasgatt's name and likeness will cause Mr. Wasgatt irreparable harm and no harm will be incurred by Allstate if injunctive relief is granted. Finally, for the last year and half the public was

misled and deceived by Allstate's misappropriation of Mr. Wasgatt's likeness and name and they too require protection, a protection that can only be afforded by the issuance of injunctive relief.

DATED: FEBRUARY 19, 2021

PLAINTIFF,
By his attorney,

/s/ Timothy K. Cutler
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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed through the CM/ECF system and will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 19th day of February 2021.

/s/ Timothy K. Cutler
Timothy K. Cutler