

**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 TO AMEND THE COMPLAINT**

Plaintiff Paul Wasgatt (“Mr. Wasgatt”) incorporates by reference his Reply to Defendant’s Opposition to Plaintiff’s Entry of a Preliminary Injunction filed concurrently herewith.

Defendant’s opposition to plaintiff’s Motion to Amend the Complaint appears to be essentially a motion in dismiss. In applying the well-established standards for reviewing a motion to dismiss, Defendant’s present motion should be found to be without legal basis. The first well-established principle is that in reviewing a motion for the dismissal of a complaint under Fed. R. Civ. P. 12(b)(6), a court is to assume that all pleaded facts and reasonable inferences drawn from those facts are true. In re Lantus Direct Purchaser Antitrust Litigation, 950 F.3d 1, 5 (1<sup>st</sup> Cir. 2020) (The Court of Appeals reversed the lower court’s granting of a motion to dismiss). All that is required is that the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Atlantic Corp. v. Twombly, 550 U.S. 554, 127 S.Ct. 1955, 67 L.Ed. 2d 929 (2007). It is not a task of the court “to decide whether the plaintiff ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim.” Rodi, 389 F.3d at 13. As such, “[t]he purpose of Rule(b) is to provide notice, not to test the factual allegation of the claim.” In re Wellnx Marketing & Sales Practices Litigation, 673 F.Supp. 2d 43,

51 (D. Mass. 2009) (*quoting* Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 414 (3<sup>rd</sup> Cir. 2003)). To survive a motion to dismiss, the complaint must simply allege a plausible entitlement to relief. Wellnx, 673 F.Supp. 2d at 49 (“To survive a motion to dismiss, a complaint must allege ‘a plausible entitlement to relief.’” (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007))); and Bryan Corporation v. Chemwerth, Inc., 911 F.Supp.2d 103, 108 (D. Mass. 2012) (“Motion to dismiss under Rule 12(b)(6) tests sufficiency of the pleadings. Thus, when confronted with a motion to dismiss, the court accepts as true all reasonable inferences in favor of non-moving party. ... Dismissal is only appropriate if the pleadings, so viewed fail to support ‘a plausible entitlement to relief.’” (*quoting* Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 93 (1st Cir. 2007))). A court is only to “uphold a dismissal on this ground ‘only if the plaintiff’s averments hold out no hope of recovery on any theory adumbrated in [his] complaint.’” Rodi v. Southern New England School of Law, 389 F.3d 5, 13 (2004) (quoting In re Colonial Mortg. Bankers Corp., 324 F.3d 12, 15, (1<sup>st</sup> Cir. 2003)).

Allstate misappropriated and used Mr. Wasgatt’s picture and name in its e-mails to solicitate business. In doing so, Allstate created the false impression that Mr. Wasgatt endorses Allstate and its products and that by clicking on the link in the e-mail customer is doing business with and purchasing insurance from Mr. Wasgatt, when in reality they were doing business with Allstate. The contact information in in the e-mails was to Defendant’s Customer Service Center. These e-mails misled, and continue to mislead, people into thinking that they were and are purchasing insurance from a familiar and trusted face, Paul Wasgatt, when in fact they were and are purchasing insurance from Defendant’s corporate Customer Service Center, its house account.

As pled in the second amended complaint, Defendant misappropriated Mr. Wasgatt's likeness to advertise its insurance products in violation of G.L.c. 214 § 3A. In doing so, Defendant deceived the public in violation of the Lanham Act. Furthermore, Defendant interfered with Mr. Wasgatt's business relationships by sending false and misleading e-mails to the customers of his new insurance practice falsely representing that they were sent by Mr. Wasgatt, when in fact they were sent by Allstate.

As briefed in Mr. Wasgatt's Reply to Defendant's Opposition for Entry of a Preliminary Injunction, the provision from the Exclusive Agents Manual does not discuss or grant Defendant a right to use, in any manner, Mr. Wasgatt's picture (likeness). Nor did the provision grant Allstate unlimited use of Mr. Wasgatt's name. These arguments are in addition to the arguments that the Exclusive Agency Agreement is an illegal contract as a matter of law and unenforceable by Allstate because Allstate is in material breach of the agreement.

The use of the misleading e-mails to deceive Mr. Wasgatt's current customers to cease doing business with him and to purchase their insurance from Allstate constitutes a wrongful interference with business relations. Ryan, Elliott & Co., Inc. v. Leggat, McCall & Werner, Inc., 8 Mass. App. Ct. 686, 691-92 (1979); Restatement (Second) of Torts § 767, cmts. a-g (1977); Melo-Tone Vending, Inc. v. Sherry, Inc., 39 Mass. App. Ct. 315, 319 (1995). The claims arise out of a commercial setting as a basis of a Chapter 93A claim. Darvis v. Petros, 442 Mass. 274 (2004). Therefore, colorable claims for misappropriation of likeness, violation of the Lanham Act, wrongful interference with business relations and violation of Chapter 93A have adequately been pled.

Damages recoverable pursuant to each of these legal claims are the value of the policies placed by Defendant with the persons to whom Allstate sent the false and misleading marketing e-mails or the loss of sales and business by Mr. Wasgatt.

**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 19<sup>th</sup> day of February 2021.

/s/ Timothy K. Cutler  
Timothy K. Cutler