**Michael J. Grohs**
**973.622.3333**
**mgrohs@saiber.com**

March 28, 2018

**VIA NYSCEF**
Hon. Jerry Garguilo, J.S.C.
New York Supreme Court – Suffolk County
Commercial Division Part 48
John P. Cohalan, Jr., Courthouse (Courtroom S-33)
400 Carleton Avenue
Central Islip, New York 11722

**Re: Michael Nocella v. Allstate Insurance Company**
**Index No. 604642/2018 [Motion Sequence #2]**

Dear Justice Garguilo:

On behalf of defendant Allstate Insurance Company ("Allstate"), we respectfully submit this reply letter, in lieu of a more formal memorandum of law, in response to Plaintiffs' recently filed opposition to Allstate's Motion, pursuant to CPLR 6314, to modify certain aspects of the temporary restraining order (the "TRO") that was entered in this matter on March 15, 2018.

**A. Procedural Background Relating to Allstate's Motion to Modify the TRO**

As Your Honor is aware, the Court conducted a pre-motion telephone conference with counsel on Friday, March 15, 2018, during which Allstate advised the Court of Allstate's intent to file this Motion. In accordance with the Court's directives, Allstate filed its Motion on Monday, March 19 (see NYSCEF Doc. Nos. 40-50), Plaintiffs were to file any opposition on Tuesday, March 20, and the Court indicated its intent to issue a decision on the Motion on or about Wednesday, March 21. On March 20, Plaintiffs requested an adjournment to file their opposition and, on March 21, counsel for both parties appeared in Court on the Motion and

ultimately the Court adjourned the Motion to afford Plaintiffs the opportunity to file opposition papers. Following another 1-day extension requested by Plaintiffs' counsel on March 26 (see ECF Doc. No. 51), Plaintiffs filed papers in opposition to the Motion on March 27. (See NYSCEF Doc. Nos. 52-61).[1]

According to information available the eCourts WebCivil Supreme system, the return date on Allstate's Motion is now April 4, 2018. However, given the Court's prior indications during the pre-motion telephone conference on March 16 and the conference on March 21, Allstate is compelled to file this reply letter to address the procedural impropriety of Plaintiffs' submission and also to respond to certain assertions contained therein.

**B. Plaintiffs' "Opposition" is Really an Improper Cross-Motion That Fails to Comply with CPLR 2215**

Though styled as an "Opposition", Plaintiffs' submission is actually an improper cross-motion that requests that the Court modify the TRO in Plaintiffs' favor as to three provisions of the proposed TRO that were denied by the Court. (See Plaintiffs' Memo of Law [NYSCEF Doc. No. 62], at pp. 1.). As the 1980 amendment to CPLR 2215 makes clear, a party seeking to obtain affirmative relief against a moving party is required to serve an "explicit notice of cross motion." Matter of Briger, 95 A.D.2d 887, 888 (3d Dep't 1983). Indeed, the Practice Commentary to CPLR 2215 explains that:

> The notice of cross-motion should conform essentially to an original notice of motion, except that it sets no different time of return. If no notice of cross-motion is used, affirmative relief will ordinarily not be granted to the party responding to the main motion. It is not sufficient to demand such relief in answering affidavits or memoranda.

[1] On March 28 (today), Plaintiffs' counsel e-filed an "updated" Memorandum of Law and an "updated" Exhibit A [Affidavit in Opposition of Michael Nocella].

See Practice Commentaries, McKinney's Cons. Laws of N.Y., CPLR C2215:1D.

Thus, courts routinely deny requests for affirmative relief if the requirements of CPLR 2215 are not strictly met. See, e.g., N.Y.S. Div. of Human Rights v. Oceanside Cove, 39 A.D.3d 608, 609 (2d Dep't 2007) (citing several cases in which the Second Department has denied relief to a party that failed to serve a notice of cross-motion); Blam v. Netcher, 17 A.D.3d 495, 496 (2d Dep't 2005) ("[I]n the absence of a cross motion the Supreme Court should not have considered the defendant's informal request for an extension of time to answer.") (citing CPLR 2215; Siegel, N.Y. Prac. §249). As noted by the Second Department in Oceanside Cove, the failure to seek relief in a formal notice of cross-motion meant that the request was not made "upon notice" as defined by CPLR 2211, and as is required for an appeal of right under CPLR 5701(a)(2). Oceanside Cove, 39 A.D.3d at 609; see also Vanyo v. Buffalo Police Benevolent Association, Inc., --- N.Y.S.3d ----, 2018 WL 1357500, 2018 N.Y. Slip. Op. 01827, at *4 (4th Dep't March 16, 2018) ("[A] request for relief in reply or opposition papers is improper. A request for relief made in the absence of a notice of cross motion is not a "motion...made upon notice" (CPLR 5701[a][2] ), so an order granting or denying the request is not appealable as of right, and permission to appeal is necessary (see CPLR 5701 [c].)) (citing Blam, 17 A.D.3d at 496).

Here, Plaintiffs' opposition papers (specifically, the Memorandum of Law and the Nocella Affidavit in Opposition [NYSCEF Doc. Nos. 62 and 63]) seek affirmative relief but fail to include a notice of cross-motion as is required under CPLR 2215. Accordingly, Allstate respectfully submits that Plaintiffs' improper request for affirmative relief should be denied, and their allegations and arguments in support of such relief should not be considered by the Court.

C. **Plaintiffs' Opposition Further Supports Allstate's Position**

The law and pertinent facts set forth in Allstate's moving papers amply demonstrate that modification of the mandatory injunctive relief contained TRO is warranted under CPLR 6314 and the case law interpreting that rule. The majority of Plaintiffs' opposition is a simple rehash of the litany of excuses as to why Mr. Nocella believes Allstate was wrong to terminate the Exclusive Agency Agreement, which are irrelevant to the relief Allstate seeks in this Motion. Thus, it is not necessary, nor is it appropriate, for Allstate to address each of Plaintiffs' points at this time. Instead, Allstate will fully respond to Plaintiffs' factual averments and legal arguments when Allstate submits its opposition to Plaintiffs' application for a preliminary injunction.[2]

Nonetheless, there are a handful of assertions and inconsistencies in Plaintiffs' opposition that, Allstate submits, warrant calling to the Court's attention in this reply submission because they lend further support to Allstate's request that the Court grant the Motion and modify the TRO in accordance with Allstate's proposed form of Order (see NYSCEF Doc. No. 50).

First, nothing in the Nocella Affidavit, nor in the Affidavit of Daniel Bach, suggests that Mr. Bach and the agency support staff are not being permitted to service and access information relating to existing Allstate customers who were formerly serviced by the Nocella Agency. In fact, Mr. Nocella and Mr. Bach confirm that calls from customers who were formerly serviced by the Nocella Agency are being received by the Bach Agency, and any customers who attempt

[2] In this regard, and as will be demonstrated in Allstate's submission prior to the preliminary injunction hearing, Plaintiffs' opposition is replete with assertions that further reinforce that Allstate had the absolute and unqualified right to terminate the Exclusive Agency Agreement with or without cause and that the with cause termination was, in fact, fully justified under the Agreement and the law. (See e.g., Nocella Affidavit, at ¶10, admitting that the information Mr. Nocella provided for his own house was inaccurate even on the first submission.). Tellingly, nowhere in the submissions do Plaintiffs deny that four Allstate Homeowners' insurance policies were bound by the Nocella Agency based upon false information about the homes being insured.

to email Mr. Nocella are being provided with a phone number and email address for the Bach Agency. (See Nocella Affidavit, ¶6 and Exh. D; Bach Affidavit, ¶7). In this regard, simply because Mr. Nocella has not received a response to the email that he allegedly sent does not necessarily mean that his email was not received, nor does it mean that emails of others were not received and answered.

Moreover, as argued by Allstate in its Motion, all of Plaintiffs' alleged harm can be addressed by monetary damages. Indeed, the lack of immediate irreparable harm is confirmed by reference to statements made in the Bach Affidavit (see ¶9) and the Nocella Affidavit (see ¶5) that the servicing of the book of business by the Bach Agency is, in fact, a "temporary situation." In this regard, the Exclusive Agent Manual clearly provides that the Company will service the book of business for 3 months after the effective date of termination, or until Plaintiffs accept the termination payment or sale their interest in the book of business to an approved buyer. (See Exhibit I to Plaintiffs' Affidavit filed in support of the Order to Show Cause [NYSCEF Doc. No. 18]). If anything, Mr. Nocella's lawsuit and request that that Court stay the sale of the book of business is only serving to make the situation less "temporary."

Additionally, the transcript of the recorded phone call between Mr. Nocella and Territorial Sales Leader Ankur Chaturvedi clearly shows that Mr. Chaturvedi is, among other things, urging Mr. Nocella to speak to and consider negotiating with prospective buyers for the economic interest in the book of business. (See Plaintiffs' Opposition, Exh. G, p. 24). Moreover, now that Plaintiffs' have submitted the entire call transcript, it is obvious that Plaintiffs' prior submissions to the Court completely mischaracterize Mr. Nocella's call with Mr. Chaturvedi and that statements allegedly made by Mr. Chaturvedi were either never said or taken

completely out of context. Compare Plaintiffs' Supplemental Affidavit (NYSCEF Doc. No. 36) and Supplemental Affirmation (NYSCEF Doc. No. 38) with Exhibit G of Plaintiffs' Opposition (NYSCEF Doc. No. 60).

* * *

For these reasons, those set forth in Allstate's moving papers, Allstate respectfully submits that the TRO relief contained in the Order to Show Cause dated March 16, 2018 should be modified as reflected in the proposed Order submitted by Allstate. Moreover, Allstate respectfully submits that all of the affirmative relief sought by Plaintiffs in their Opposition be denied in its entirety.

We thank the Court for its continued attention to, and consideration of, this matter.

Respectfully submitted,

Michael J. Grohs

GRO/

cc: Anthony P. DellUniversita, Esq. (via NYSCEF)