

GERARD E. LYNCH, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the Court's affirmance of the preliminary injunction insofar as it bars Gutman from competing with JLM and from using the name "Hayley Paige Gutman" and its derivatives in trade or commerce, and I join fully in Parts II.A, B, C, and E of Judge Park's thoughtful and careful analysis of the issues. I write separately, however, because I disagree with Part II.D, and would also affirm paragraphs 1 and 2 of the preliminary injunction, at least insofar as they apply to the Instagram account.¹ I do not believe the district court erred in entering those portions of the injunction without determining the question of ownership.

Paragraph 1 of the preliminary injunction bars Gutman from "[m]aking any changes to any of the [Instagram] account[] . . . including but not limited to . . . posting any new content thereto and/or deleting or altering any content located therein . . . without the express written permission of Plaintiff's chief

¹ The parties' arguments as to the other social media accounts are not well developed. Their focus is on the three Disputed Accounts, and especially the Instagram account. Given that my view has not prevailed, I see no need to opine on whether the district court's injunction, which is being vacated in any event, is overbroad insofar as it relates to other social media accounts. I therefore confine my discussion to the Instagram account, which seems to be the main bone of contention between the parties, and as to which the record is most developed.

executive officer, Joseph L. Murphy” and directs Gutman to give JLM access credentials to the Instagram account, which she had unilaterally revoked in November 2019. *JLM Couture, Inc. v. Gutman*, No. 20-cv-10575, 2021 WL 827749, at *23 (S.D.N.Y. Mar. 4, 2021). The majority considers these provisions tantamount to awarding ownership of the account, and thus as justifiable only on a finding, which the district court did not make, that JLM owns the account and is likely to prevail on its claims of conversion and trespass to chattels. Op. at 25-31.

I don’t think that is so. The district court did not purport to give JLM control over the Instagram account because JLM is the account’s rightful owner. Rather, the injunction was granted to restore the operation and control of the account to the manner in which they were operated before Gutman unilaterally seized exclusive control, pending resolution of the case. The district court’s determination that JLM had shown a likelihood of success on its claims for breach of contract adequately justifies this type of injunctive relief.

As the district court found, and as this Court agrees, on July 13, 2011, Gutman granted JLM the exclusive world-wide right and license to use her name for certain purposes. It is undisputed that Gutman opened the @misshayleypaige

Instagram account on April 6, 2012, after she began her employment with JLM and assigned rights to her name to JLM. Substantial record evidence supports the district court's factual findings that (1) the Instagram account was created during Gutman's employment with JLM and bears the name that she conveyed to JLM for commercial use; (2) the account was used to promote JLM's business; and (3) JLM not only retained considerable control over what Gutman posted, but also had the ability to post material on its own, without her being able to veto what it posted. In short, throughout her employment with JLM, Gutman collaborated with JLM to operate the account, and while Gutman had primary access to the account, JLM employees also had access, and JLM had final approval over content generated to the account.

The district court's injunction essentially returns the parties – and the Instagram account – to the position they were in prior to Gutman's breach.² Using a preliminary injunction to restore parties to the pre-breach status quo,

² For the same reasons I do not address the other social media accounts, I do not elaborate on the possibility that the injunction as written could be modified on appeal to better reflect the *joint* management and control of the Instagram account that existed before Gutman's breach, or the extent to which the turnover of exclusive control to JLM might be justified by the impracticability of having the parties jointly operate the account given their present contentious relationship.

upon a finding that the plaintiff has shown a substantial likelihood of success on her claim for breach of contract, is an uncontroversial provisional equitable remedy. A finding of ownership is not a prerequisite to the district court's equitable solution, which is proportionate to and justified by Gutman's breach. I therefore cannot conclude that the district court abused its discretion in requiring Gutman to undo her seizure of unilateral control over the Instagram account, and I respectfully dissent from the judgment of the Court to the extent it vacates that portion of the preliminary injunction.