STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 06 CVS 6091
MITCHELL, BREWER, RICHARDSON, ADAMS, BURGE & BOUGHMAN, PLLC, GLENN B. ADAMS, HAROLD L. BOUGHMAN, JR. and VICKIE L. BURGE, Plaintiffs, v. COY E. BREWER, JR., RONNIE A. MITCHELL, WILLIAM O. RICHARDSON and CHARLES BRITTAIN, Defendants.	**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Preliminary injunctions are not insurance policies to secure pre-judgment relief for Plaintiffs in corporate litigation. Yet that is exactly what Plaintiffs are seeking in this case. They want the Court to enjoin Defendants from receiving any income from the contingency fee cases at issue so that, if Plaintiffs prevail, they will be assured there are funds to satisfy a judgment. The law does not permit such extraordinary protections in such ordinary cases.

Preliminary injunctions are reserved for the rare circumstances where a plaintiff can show both an irreparable injury and a likelihood of success on the merits. Neither element is present here. Most fatal to their claim, Plaintiffs have not cited a shred of evidence to show that failure to issue an injunction will somehow "irreparably" harm Plaintiffs' ability to collect money damages at the conclusion of the lawsuit. Defendants are successful lawyers who are continuing to practice law and generate revenue. If Defendants are ultimately liable for a judgment, Plaintiffs will have every opportunity to collect a judgment from them through ordinary statutory

means. The fungible nature of cash, especially in a going concern like a law practice, is the very reason it is not an asset that is subject to preliminary relief.

Further, contrary to Plaintiffs' assertions, the Court has not issued any ruling on the merits of Plaintiffs' claim that they are entitled to a share of fees from the specific contingency fee cases at issue. Plaintiffs first have to prove that the cases had an ascertainable value as of a certain date, and also that Plaintiffs are entitled to recover a share of that value. The Court has not determined what value, if any, the cases had as of a date certain. Indeed, the Court acknowledged that the question of valuation is "more problematic" if Plaintiffs are not able to show that the Firm has dissolved.

ARGUMENT

A. The Required Showings for a Preliminary Injunction.

Preliminary injunctions are granted sparingly—only in cases where "irreparable injury is real and immediate." *United Tel. Co. of the Carolinas, Inc. v. Universal Plastics, Inc.*, 287 N.C. 232, 235, 214 S.E.2d 49, 51 (1975); *accord DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586, 561 S.E.2d 276, 286 (2002). The plaintiff bears the twin burdens to show (1) a likelihood of success on the merits of his case and (2) that the plaintiff is likely to sustain irreparable loss unless the injunction is issued, or that an injunction is "necessary for the protection of [the] plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977); *see also Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466, 579 S.E.2d 449, 452 (2003); *Myers v. H. McBride Realty, Inc.*, 93 N.C. App. 689, 693, 379 S.E.2d 70, 72 (1989) (the moving party bears the burden of proof on each element at issue).

Injunctions generally do not lie where the Plaintiff has an adequate remedy at law. *See, e.g.*, *Bd. of Light & Water Comm'rs v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423, 271

S.E.2d 402, 404 (1980) ("Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie."). Because money is a fungible asset, a claim for money damages—even money damages derived from a specific transaction—may be adequately addressed by a judgment for a specific amount. *Cf. id*. at 424, 271 S.E.2d at 404 ("an injury is considered irreparable when money alone cannot compensate for it."). For that reason, injunctions requiring a party to retain or escrow *money* during the pendency of litigation simply to secure a potential judgment appear rarely—if at all—in North Carolina case law.[1] Rather, injunctions, when issued, normally prohibit a specific course of *conduct* by a party during the course of litigation—the most notable examples being cases involving covenants not to compete or trade secrets where the Court is asked to enjoin the defendant from competing with the Plaintiffs or using trade secrets. *See, e.g.*, *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 405, 302 S.E.2d 754, 762 (1983) (covenant not to compete); *Kennedy v. Kennedy*, 160 N.C. App. 1, 15, 584 S.E.2d 328, 337 (2003) (covenant not to compete); *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 597, 424 S.E.2d 226, 230 (1993) (trade secrets); *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E.2d 478, 483-84 (1976) (trade secrets).

Courts also consider the effect an injunction will have on the party sought to be enjoined. Specifically, courts are charged to carefully weigh the equities in determining whether to issue an injunction, including the advantages and disadvantages of an injunction upon each party. *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 780, 525 S.E.2d 826, 829-30 (2000). The Court must specifically balance the gravity of harm to the plaintiff if the injunction is denied

[1] Defendants' counsel has not found any appellate case law in North Carolina that order escrow of funds comparable to that which the Plaintiffs request here. In exceptional circumstances—where the defendant is seeking to hide or dispose of assets with the intent to defraud creditors—a plaintiff may be able to attach the defendant's property pursuant to N.C.G.S. § 1-440.3. Those circumstances are clearly absent in this case.

against the harm to the defendant if injunctive relief is granted, *see Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 421 S.E.2d 828, 835 (1993), and determine whether the granting of an injunction "would work greater injury to the defendant than is reasonably necessary for the protection of the plaintiff." *Huskins v. Yancey Hospital*, 238 N.C. 357, 361, 78 S.E.2d 116, 120 (1953).

B. Plaintiffs Fail to Show a Likelihood of Success on the Merits.

Plaintiffs *assume* success on the merits for the sole reason that the Court denied the Defendants' motion to dismiss. Specifically, Plaintiffs cite footnote 14 of the Court's order as evidence that "they are entitled to receive some portion of the fees and expense reimbursement received in connection with the Disputed Cases, regardless of whether Plaintiffs withdrew from the Firm or the Firm dissolved." (Pls.' Br. at 3 (emphasis in original).) This is not a proper reading of the Court's opinion.

The dispositive question in this case is whether the contingency fee cases at issue had an ascertainable value on the date that Plaintiffs withdrew from the Firm or the Firm dissolved. The Court has not resolved that question. Although the Court held it was "unable at this stage to conclude as a matter of law that Contingent Fee Cases are not assets of the Firm in which Plaintiffs have a recoverable interest upon dissolution" (Order Denying Defs.' Mot. Dismiss 16), the Court did not hold that any contingency fee case actually had an ascertainable value at the date Plaintiffs withdrew or the Firm dissolved. The valuation of each case is a fact-intensive inquiry, and Defendants are still free to argue that an unresolved contingency fee case—even if it is potentially an "asset" of the Firm—has no value at a given point in time. Expert witnesses may be called to address this very point.

The Court further acknowledged that the question of valuation will turn on whether Plaintiffs' departure constituted a withdrawal from, or dissolution of, the Firm:

> Whether the Breakup ultimately is found to be a dissolution (as it is deemed for purposes of the Defendants' Motion), or a withdrawal by Plaintiffs (as contended by Defendants), the primary difference between the two is when and how Plaintiffs' rights of distribution are valued. If a withdrawal is ultimately found to have occurred, valuation of Engagements such as the Contingent Fee Cases would appear to be more problematic for Plaintiffs.

(*Id.* at 16 n.14 (citations omitted).) The Court's pointed reference to the "problematic" nature of valuing contingency fee cases at the date of a withdrawal is additional evidence that the question of valuation in this case is an open one.

Even if there was a dissolution of the Firm and the Court held that the contingency cases could be valued by fees actually recovered in those cases, the proposed injunction is hopelessly overbroad. If Plaintiffs were to win all that they have demanded, they would recover only a *portion* of the fees at issue—yet Plaintiffs ask the Court to escrow *all* of the fees Defendants have received. Plaintiffs' recovery could very well be offset by their share of the expenses in those cases and the fees that Plaintiffs took in from pre-July 1, 2005 cases that are the subject of Defendants' counterclaims. So even if Plaintiffs are entitled to a share of certain fees in the contingency fee cases at issue, there is no way to estimate what their "net" gains would be once all of the claims and counterclaims are resolved.[2]

C. Plaintiffs Cannot Show a Risk of Irreparable Harm.

Plaintiffs must do more than simply allege irreparable harm. They must set forth facts "with particularity . . . so the court can decide for itself if irreparable injury will occur." *See*

[2] Because Defendants made counterclaims that include, among other things, claims to recover of a share of Plaintiffs' revenues generated from cases pending at the Firm on July 1, 2005, the same arguments Plaintiffs make in support of their motion, if adopted, would apply equally against them.

United Tel. Co., 287 N.C. at 236, 214 S.E.2d at 52. An injury is "irreparable" if there is no adequate remedy at law or if damages cannot be reasonably or accurately ascertained. *See A.E.P. Indus., Inc.*, 308 N.C. at 405, 302 S.E.2d at 762; *Asheville Mall, Inc. v. Sam Wyche Sports World, Inc.*, 97 N.C. App. 133, 135, 387 S.E.2d 70, 71 (1990). Most pertinent to this case, "an injury is considered irreparable when money alone cannot compensate for it." *Bd. of Light & Water Comm'rs*, 49 N.C. App. at 421, 271 S.E.2d at 424; *accord Frink v. N.C. Bd. of Transp.*, 27 N.C. App. 207, 218 S.E.2d 713 (1975) (injury is irreparable where "compensation in money alone cannot atone for it"). Plaintiffs fail to allege with any specificity—much less prove—that their alleged injuries cannot be adequately remedied through payment of monetary damages at the conclusion of the lawsuit.

First, except for their claim for an accounting, Plaintiffs' prayer for relief in their Amended Complaint seeks money damages based upon a share of certain contingency fee cases. These claims—if successful—can be reasonably or accurately ascertained at the conclusion of the litigation. The claim for an accounting is ancillary to the ultimate claim for money damages because the purpose of any such accounting would be to quantify the amount of money Plaintiffs claim they are entitled to receive.

Second, Plaintiffs' characterization of the money sought as an "asset" or "*res*" that warrants protection during the course of the litigation (Pls.' Mot. Prelim. Inj. 3) misunderstands the fungible nature of money. Plaintiffs are certainly correct that fees earned by a law practice are an "asset" of the law practice. But the fees are nothing more than money that may be collected through a judgment in their favor at the conclusion of the lawsuit. To the extent some of the fees at issue have been spent to fund the ongoing operations of Defendants' law practice,

the law practice has generated and will continue to generate ongoing revenues that may be used to satisfy any judgment that may be awarded.

Third, even if the Court determined that money is an asset that may be preserved by injunctive relief as a theoretical matter, Plaintiffs have not cited a shred of evidence to support their fear that Defendant's continuing use of the fees "will render any judgment in favor of Plaintiffs ineffectual." (Pls.' Br. Supp. Mot. Prelim. Inj. 3.) Plaintiffs do not allege that Defendants are in bankruptcy or otherwise insolvent, or that their law practice is being acquired, is closing, is hiding assets, or is subject to any other extraordinary and permanent condition that would make the recovery of money damages impossible at the conclusion of the lawsuit. Indeed, the lack of any evidence that Defendants are permanently disposing of all assets necessary to satisfy a potential judgment makes this case wholly unlike the cases cited by Plaintiffs in their own brief. *Cf. Fairview Machine & Tool Co. v. Oakbrook Int'l, Inc.*, 77 F. Supp. 2d 199, 205 (D. Mass. 1999) (defendant had "disposed of the vast majority of its assets and . . . paid the cash it received for these assets to third parties"); *Holborn Oil Trading Ltd. v. Interpetrol Bermuda, Ltd.*, 658 F. Supp. 1205, 1210-11 (S.D.N.Y. 1987) (respondent was insolvent and a receiver's report "indicate[d] no success . . . in locating any assets" of respondent).

D. The Balancing of the Equities in This Case Favors Defendants.

Even if Plaintiffs show a likelihood of success *and* irreparable injury, the Court must also balance the equities to determine whether the harm to the plaintiff in the absence of an injunction outweighs the harm to defendant if an injunction is issued. *See Kaplan*, 111 N.C. App. at 16, 431 S.E.2d at 835. Plaintiffs have not carried their initial burden to show any harm they would suffer absent an injunction, and any such harm is counterbalanced by a far greater harm that would fall upon Defendants if an injunction is issued.

Like any professional business, Defendants use the revenues generated from their contingency fee cases to fund their ongoing operations—that is, payment of expenses and salaries to enable their practice to complete additional cases. To freeze the practice's revenues pending the outcome of litigation is not only *unnecessary* because Plaintiffs can obtain a money judgment at the close of the litigation, it is simply *inequitable* to deprive Defendants of revenues earned in the course of an ongoing successful business. Indeed, it would send a dangerous message that a plaintiff in a commercial case could tie up the business operations of a defendant by freezing the defendant's revenues until the outcome of that litigation—without any evidence that ordinary legal remedies would be inadequate to enforce a monetary judgment.

Put plainly, Plaintiffs' argument to this point has been that (1) they have the ability to leave the Firm, (2) Defendants must continue to work for them and distribute money to them, and (3) at the same time, Plaintiffs have the right to compete with Defendants for the Defendants' existing clients. Now they go a step further. They contend that Defendants cannot use the fees they receive as working capital to pay themselves.

E. Plaintiffs' Lengthy Delay in Filing Their Motion for Preliminary Injunction Is Further Evidence That They Are Not Suffering Irreparable Harm.

The absence of irreparable harm in this case is emphasized by Plaintiffs' failure to file for a preliminary injunction through more than a year and a half of litigation. Although North Carolina courts have not specifically addressed the consequences of delay, the "immediate and irreparable harm" required to be shown calls for instantaneous action. And federal courts have specifically recognized that a plaintiff's delay in filing for a preliminary injunction suggests an absence of irreparable harm that justifies the denial of injunctive relief. *See, e.g.*, *Quince Orchard Valley Citizens Association, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (delay in filing for an injunction " 'may . . . indicate an absence of the kind of irreparable harm required to

support a preliminary injunction' " (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)); *see also Candle Factory, Inc. v. Trade Assocs. Group, Ltd.*, 23 F. App'x 134, 138 (4th Cir. 2001) ("[A]ny delay attributable to plaintiffs in initiating a preliminary injunction request . . . should be considered when the question of irreparable harm to plaintiff is balanced against harm to defendants.").

Plaintiffs waited more than one year and seven months after filing their amended complaint before moving the Court for a preliminary injunction. After sitting on their rights so long, Plaintiffs are poorly positioned to claim that they are suffering immediate or irreparable harm. In noting that "Defendants have already received fees and cost reimbursement in excess of $1.8 million from three of the Disputed Cases that have already concluded," Plaintiffs refer to information gleaned from the deposition of Coy Brewer, which occurred over a year ago. (Pls.' Mot. Prelim. Inj. ¶ 2.) If, as Plaintiffs contend, the distribution of fees from contingency fee cases during the pendency of this case risks irreparable harm to Plaintiffs, then Plaintiffs should have moved for an injunction immediately upon learning that Defendants were distributing fees earned from contingency fee cases.

CONCLUSION

Because Plaintiffs have not met their burden of showing likelihood of success on the merits and a risk of irreparable harm, their motion for preliminary injunction should be denied.

Respectfully submitted this the 27th day of March, 2008.

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WORD COUNT CERTIFICATION

Pursuant to Rule 15.8 of the Rules of the North Carolina Business Court, counsel for the Defendants certifies that the foregoing brief is less than 7,500 words as reported by the word-processing software.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing has been duly served upon the parties electronically and/or by hand delivering a copy thereof in the United States mail, first-class, postage prepaid, addressed to the following counsel of record:

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This the 27th day of March, 2008.

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