SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KASOWITZ BENSON TORRES LLP, Plaintiff, v. GLENN AGRE BERGMAN & FUENTES LLP, Defendant.	Hon. Lyle Frank Index No. 650008/2023 Motion Seq. No. 1

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

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Defendant Glenn Agre Bergman & Fuentes LLP ("Defendant," "Glenn Agre," or "GABF"), by and through its undersigned attorneys, respectfully submits this memorandum of law in opposition to the motion, by order to show cause, for a temporary restraining order and preliminary injunction (the "Motion" or "Mtn.") filed by plaintiff Kasowitz Benson Torres LLP ("Plaintiff," "Kasowitz Benson," or "KBT").[1]

PRELIMINARY STATEMENT

This action involves a dispute between Glenn Agre and Kasowitz Benson over their respective shares of a success fee secured by Glenn Agre on behalf of its client (the "Client"), which formerly was represented by Kasowitz Benson. In short, this is a commercial dispute over money. Nothing more. Nevertheless, Kasowitz Benson seeks the extraordinary remedy of a temporary restraining order and preliminary injunction enjoining disbursement of the success fee—even though Glenn Agre has not yet received the money, and even though money damages are, by definition, an adequate remedy at law, which precludes any award of injunctive relief.

As shown below, Kasowitz Benson has not met—and cannot meet—its burden to demonstrate by clear and convincing evidence that each, let alone all, of the elements necessary to award preliminary injunctive relief has been satisfied. Specifically, Kasowitz Benson has not shown and cannot show (i) immediate and irreparable harm, (ii) any likelihood of success on the merits, or that (iii) the equities militate in favor of granting temporary injunctive relief. Accordingly, the Motion should be denied.

[1] "Complaint" refers to the complaint filed in the above-captioned action dated December 30, 2022. "Compl. ¶ _" refers to the specified paragraph in the Complaint. "Exhibit _" or "Ex. _" refers to the specified exhibit annexed to the accompanying affirmation of Trevor J. Welch, dated January 4, 2023 ("Affirmation"). "Aff. ¶ _" refers to the specified paragraph in the Affirmation.

FACTS

Effective June 25, 2016, the Client retained Kasowitz Benson to perform certain professional legal services on its behalf, including commencing a lawsuit (the "Action" and collectively, the "Engagement"). Aff. ¶ 4. Kasowitz Benson's retention agreement provided, in relevant part, for a "25% discount on our hourly rates through the time that we defeat a motion to dismiss" in exchange for a "10% of the recovery as a success fee after deduction for all fees and expenses." *Id.* During its representation of the Client, Kasowitz Benson conducted an initial investigation of the Client's potential claims, filed the original complaint, and opposed defendant's preliminary dispositive motions and associated appeals, which were not fully adjudicated until October 7, 2020. *Id.* ¶ 5.

Only four months later, on February 1, 2021, seven former Kasowitz Benson partners—including all of the partners involved in representing the Client in the Engagement—resigned from Kasowitz Benson and formed Glenn Agre. Shortly thereafter, the Client terminated Kasowitz Benson's representation and retained Glenn Agre to represent the Client in, among other things, the pending Action. *Id.* ¶ 6.

Effective February 1, 2021, the Client retained Glenn Agre to perform certain professional legal services, including the prosecution of the Action to resolution, pursuant to a written retainer agreement. *Id.* ¶ 7. Glenn Agre's retention agreement provided, in relevant part, for a "40% discount on our hourly rates until the submission and response to motions for summary judgment" in exchange for a "15% of the recovery as a success fee after deduction for all fees and expenses." *Id.* During Glenn Agre's representation of the Client from February 1, 2021 to the present, Glenn Agre, among many other things: (i) obtained, reviewed, and analyzed millions of pages of documents from the defendant and over forty third parties, (ii) conducted nineteen examinations before trial, (iii) participated in an extensive mediation process, including

in-depth briefing and multiple sessions with the mediator over several months, and (iv) negotiated and documented a settlement of the Action. *Id.* ¶ 8.

On November 28, 2022, Glenn Agre contacted Kasowitz Benson to inform it that the Client and defendant had reached an agreement in principle to settle the Action. In particular, Glenn Agre advised Kasowitz Benson that the "settlement agreement has not been signed, but we expect that to happen soon, and the proceeds could be distributed by year-end." *Id.* ¶ 9. Glenn Agre further advised that, before it could share information about the settlement, Kasowitz Benson would have to enter into a confidentiality agreement governing and limiting the disclosure of the settlement agreement and/or its terms. *Id.*

From November 28 to December 21, Glenn Agre and Kasowitz Benson negotiated the terms of such a confidentiality agreement. When it was finalized on December 21, Glenn Agre immediately disclosed the recently finalized settlement agreement to Kasowitz Benson. *Id.* ¶ 11.

From December 21 until the Motion was filed on December 30, Glenn Agre and Kasowitz Benson engaged in what Glenn Agre, at least, believed to be good faith negotiations concerning the fee split. *Id.* ¶¶ 11-13.[2] On December 21, Glenn Agre proposed a fee split—*i.e.*, a proportionate allocation of the success fee between the two firms. *Id.* ¶ 11. Kasowitz Benson did not make a counter-proposal for over a week, but did request information about Glenn Agre's

[2] CPLR § 4547 provides that settlement communications "shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages." By its express terms, however, CPLR § 4547 does "not limit the admissibility of such evidence when it is offered for another purpose." *See*, *e.g.*, *In re Liquidation of Midland Insurance Co*., 87 A.D.3d 487 (1st Dep't 2011) (settlement communications admissible to show the settlement procedure). Here, Glenn Agre proffers settlement communications, not to establish the invalidity of the underlying claim or the amount of the putative damages, but for the limited purpose of establishing that Glenn Agre negotiated in good faith and that Kasowitz Benson, by contrast, filed the Motion precipitously and for the apparent purpose of seeking an undue advantage in a commercial negotiation over money. Moreover, and in any event, Glenn Agre redacted the proposed and counter-proposed settlement amounts.

time billed to the matter. *Id*. Glenn Agre requested the same from Kasowitz Benson, while noting that "hours billed" is not a dispositive or controlling factor under the caselaw. *Id*.

On Thursday, December 29, Kasowitz Benson proposed a "pro rata split" of the success fee based exclusively on the unadjusted ratio of the putative number of hours billed by each firm. *Id.* ¶ 13. In other words, contrary to settled New York law, Kasowitz Benson proposed a purely *quantitative* analysis of the hours billed by the two firms without any consideration for, among other relevant *qualitative* factors, the actual work performed, the difficulty of the questions involved, the skill required to handle the matter, the attorney's skills and experience, and the effectiveness of counsel in bringing the matter to resolution. *Id*. Nor did Kasowitz Benson's proposal take account of the fact that it had already been paid seventy-five cents on the dollar for the hours it had billed—while the Glenn Agre hours had only been reimbursed at sixty cents on the dollar. *Id*.

That same day, in an effort to resolve the matter, Glenn Agre increased its offer "subject to the same conditions (*i.e*., it is agreed to/resolved by tomorrow)." *Id.* Rather than counter, Kasowitz Benson requested that Glenn Agre "provide the amount of the total fee and how it was calculated." *Id*. Glenn Agre did so immediately, stating:

> The total fee and calculation are below. **We have not yet received the settlement fee**, but are trying to arrange for this to come together tomorrow, including paying KBT its share of the fee, assuming we can reach agreement between now and tomorrow. [*Id*. (emphasis supplied)]

In response, Kasowitz Benson finally countered with a dollar amount, effectively decreasing its demand and stating that the offer "expires 5 pm tomorrow and subject to verification of expenses." *Id*. Glenn Agre, in turn, increased its offer, further narrowing the gap. *Id.*

On Friday, December 30, Glenn Agre and Kasowitz Benson continued their negotiations concerning the fee split. *Id.* ¶ 14. That day, Kasowitz Benson made what it characterized as its

"last and final" offer "expiring 5 pm today and subject to expense verification." *Id*. Glenn Agre promptly made a counter-offer, explaining:

> Your rationale that the KBT hours entitle you to a pro rata split of the fee is wrong as a matter of law, and fatally flawed in these circumstances in any event. For example, your hours analysis, even if assumed to be correct, fails to take into account that GABF took a larger discount in fees than KBT did (we were at 40% on Day 1, and KBT's discount ranged from 15%-25% for a significant period). Moreover, all the witnesses with personal knowledge will attest to the fact that the winning theory of the case was devised at and based on the work of GABF, not KBT, and that GABF's work drove the resolution at the mediation.
>
> **Finally, as I already told you, we have not received the fee amount yet from the settlement. We will notify you once we are in possession of the fee amount, and we will not be distributing any of these funds today in any event**. [*Id*. (emphasis supplied)].

A few hours later, Kasowitz Benson filed the Motion. As of the date of this submission, Glenn Agre has not received the success fee. *Id.* ¶¶ 14-15.

SPECULATION AND FALSEHOODS IN THE MOTION

Kasowitz Benson's Motion is premised on speculation and falsehoods. For example, in an apparent attempt to create a sense of urgency, Kasowitz Benson speculates that Glenn Agre "**may** have entered into a third-party litigation funding agreement in order to have the financial means to form [Glenn Agre] and **may** have included its potential recovery from the Client's representation in connection with the Engagement as collateral for such loan, which Defendant now intends to satisfy from the Disputed Funds." Schrage Aff. ¶ 40 (emphasis supplied).[3] That speculation is baseless and false. Aff. ¶ 16. Glenn Agre did not enter into any litigation funding agreement to finance its formation or to fund the Action, and Glenn Agre's share of the success

[3] "Schrage Aff." refers to the affirmation of Mitchell R. Schrage, dated December 30, 2022, submitted by Kasowitz Benson in support of the Motion.

fee in the Action has not been pledged as collateral for any such loan (because there is no such loan). *Id*.

Kasowitz Benson also asserts that Glenn Agre intends to distribute the success fee "in violation of Kasowitz's charging lien." Schrage Aff. ¶ 42. That is incorrect. Glenn Agre does not dispute—and has never disputed—that Kasowitz Benson (i) asserted a charging lien in connection with the Client's recovery in the Action by letter dated April 12, 2021, and (ii) is entitled to a share of the success fee commensurate with its proportionate contribution to the outcome of the Action in accordance with applicable law. That is why Glenn Agre proactively reached out to Kasowitz Benson, before the settlement was even signed, to begin negotiating an appropriate fee split. Aff. ¶ 9.

Similarly, Kasowitz asserts that Glenn Agre "failed and refused to provide Kasowitz with its former partners' and attorneys' complete and accurate time charges." Schrage Aff. ¶ 20. That is incorrect or, at best, misleading. On December 29, Glenn Agre sent Kasowitz Benson all five of the invoices it has issued to the Client to date, noting that the sixth "most recent invoice is not yet in final." Exhibit E. Moreover, notwithstanding Kasowitz Benson's suggestion to the contrary (Schrage Aff. ¶ 19), the partners departing Kasowitz Benson to found Glenn Agre rendered complete and accurate time charges relating to the Engagement. Aff. ¶ 18.

ARGUMENT

To obtain a temporary restraining order ("TRO") pending adjudication of its preliminary injunction motion, Kasowitz Benson must show that "immediate and irreparable injury, loss or damages will result unless [Glenn Agre is] restrained before a hearing can be had." CPLR § 6313. Preliminary injunctive relief of any sort, especially a TRO, is a "drastic remedy and will only be granted if the movant establishes a clear right to it under the law and undisputed facts

found in the moving papers." *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001).[4] To obtain preliminary injunctive relief, Kasowitz Benson has the burden to establish by clear and convincing evidence that (i) irreparable injury will occur without injunctive relief; (ii) it is likely to succeed on the merits of its claims; and (iii) a balance of the equities favors Defendant. *Id*. "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail. If key facts are in dispute, the relief will be denied." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996). As shown below, Kasowitz Benson has not and cannot demonstrate—at all, let alone by clear and convincing evidence—any of these three elements. Accordingly, injunctive relief should be denied.

I. KASOWITZ BENSON HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE HARM ABSENT A GRANT OF INJUNCTIVE RELIEF

Kasowitz Benson has failed to establish—as is its burden—that it will suffer any harm, let alone the requisite imminent and irreparable harm in the absence of a TRO (or preliminary injunction). "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is *likely* to suffer irreparable harm if equitable relief is denied." *GFI Securities LLC v. Tradition Asiel Securities Inc.*, No. 601183/08, 2008 N.Y. Slip Op. 52041(U) at *6 (Sup. Ct. N.Y. Cty. July 28, 2008). The burden is on the party seeking the injunctive relief to make a "clear showing" that it will suffer irreparable injury. *Id.* Kasowitz Benson has not made and cannot make the requisite showing.

The First Department's decision in *Schneider, Kleinick, Weitz, Damashek & Shoot v City of NY*, 302 AD2d 183, 190 (1st Dep't 2002) (cited by Kasowitz Benson in the Motion at 9) is

[4] Internal citations omitted throughout unless otherwise stated.

directly on point. In that case, the Appellate Division explained that even though a settlement in an underlying litigation gave the party asserting a charging lien (*i.e.*, the client's former law firm) a "vested right to an undetermined portion of the proceeds of the settlement and standing to move for a temporary restraining order to protect its fees," the trial court properly "**refused to issue a restraining order to prevent the payment of fees**" to the client's current law firm. *Id*. (emphasis supplied). As the Appellate Division explained with approval, the trial court:

> was employing the law as it applies to restraining orders, and was demonstrating that it recognized that **plaintiff's injury was not irreparable but was remediable by money damages**; and that the [defendant] would have sufficient funds to pay the fee if, and when, plaintiff established its entitlement to one.

Id. (emphasis supplied).

So too here—as in *Schneider, Kleinick, Weitz, Damashek & Shoot* and a plethora of other cases[5]—any prospective violation of Kasowitz Benson's asserted right to an "undetermined portion of the proceeds of the settlement" would "not [be] irreparable" because it would be "remediable by money damages." *Id*., 302 A.D.2d at 190. Indeed, as evinced by Kasowitz Benson's own request for compensatory damages in its complaint, whatever relief Kasowitz Benson may seek in the Motion would at most constitute an economic loss and, accordingly, which is plainly compensable by monetary damages. Compl. ¶ 51.

[5] *See, e.g.*, *U.S. Re Cos., Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007) ("This quantifiable remedy precludes a finding of irreparable harm."); *Sterling Fifth Assocs. v. Carpentille Corp*., 5 A.D.3d 328, 329 (1st Dep't 2004) ("Lost profits... however difficult to compute they may be, are clearly compensable with money damages"); *Atlantis Worldwide, Ltd. v. Benitez*, 290 A.D.2d 379, 379-80 (1st Dep't 2002) (holding that employer could not show irreparable harm "where money damages would fully compensate plaintiff for any lost profit attributable to defendant employee's complained of conduct"); *Kanan, Corbin, Schupak & Aronow, Inc. v. FD Int'l, Ltd*., 8 Misc.3d 412, 797 N.Y.S.2d 883, 890 (Sup. Ct. N.Y. Cty. 2005) ("[T]he injury alleged here is easily calculable as a measure of lost fees.").

Nor has Kasowitz Benson argued, much less shown, that Glenn Agre would lack "sufficient funds to pay" Kasowitz Benson's proportionate share of the success "fee if, and when, [Kasowitz Benson] established its entitlement to [it]." *Schneider, Kleinick, Weitz, Damashek & Shoot*, 302 AD2d at 190. Kasowitz Benson does not press this point because it has no basis to suggest Glenn Agre has insufficient funds. Instead, it tries through innuendo to suggest insufficient funds by timidly speculating that settlement proceeds "may" be used by Glenn Agre to satisfy some unspecified litigation funding. Schrage Aff. ¶ 40. But even Kasowitz Benson admits by its use of speculative terms ("may") that this is raw—and therefore baseless—speculation. It is in fact not true. Aff. ¶ 16. Glenn Agre is a thriving and profitable law firm that has grown from seven to thirty attorneys in the less-than two years since its founding partners left Kasowitz Benson to form Glenn Agre. *Id.*

Such speculation is not an evidentiary showing at all—it is certainly nowhere near sufficient to meet Kasowitz Benson's heavy burden to make a clear, convincing, and detailed evidentiary showing in support of its application for preliminary injunctive relief.[6] The Motion should be denied for that reason alone.[7]

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[6] *See, e.g., 61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 A.D.3d 330, 335 (1st Dep't 2010) (criticizing affidavits submitted in injunctive relief proceeding that "offered nothing but . . . inadmissible hearsay" and self-serving allegations); *U.S. Re Cos., Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007) (vacating preliminary injunction where there was no "concrete evidence" that defendant's conduct breached agreement at issue); *TMP Worldwide Inc. v. Franzino*, 269 A.D.2d 332, 332 (1st Dep't 2000) (affirming denial of preliminary injunction where plaintiff failed "to show, by means of competent evidence," irreparable injury).

[7] Ignoring the controlling analysis and holding in the 2002 First Department decision in *Schneider, Kleinick*, Kasowitz Benson instead relies on the earlier decided *Klein v Eubank*, 232 A.D.2d 183, 183 (1st Dep't 1996). (Mtn. at 9-10.) But Klein is distinguishable. In that case, the Court of Appeals reversed summary judgment and the lower court granted the injunction as mandated by the appellate decision. *Id.* at 183. Here, of course, there has been no summary judgment motion or appellate mandate. Unlike the facts in *Klein*, Kasowitz Benson seeks to enjoin the entirety of the fee when it has no claim to that fee in its entirety and there has been no showing whatsoever that, in the absence of injunctive relief, it will not be able to recover its

II. KASOWITZ BENSON HAS NOT AND CANNOT MEET ITS BURDEN TO SHOW A LIKELIHOOD OF SHOWING ENTITLEMENT TO THE ENTIRE FEE

Glenn Agre does not dispute that Kasowitz Benson is entitled to a *portion* of the success fee commensurate with its proportionate contribution to the outcome of the Action in accordance with applicable law. Aff. ¶ 17. Kasowitz Benson, however, seeks to enjoin distribution of the *entire* success fee. *Id*. ¶ 2. Its application for such an injunction fails for the simple reason that it has no legal basis to claim the entirety of the fee for itself. *Buchta v. Union-Endicott Cent. Sch. Dist*., 296 AD2d 688, 688 (3d Dep't 2002) (prior firm is entitled only to a share of the success fee commensurate with its "proportionate contribution" to the resolution of the action).

"In assessing each firm's proportionate contribution, [NewYork courts] focus on the time and labor spent by each, the actual work performed, the difficulty of the questions involved, the skill required to handle the matter, the attorney's skills and experience, [and] the effectiveness of counsel in bringing the matter to resolution." *Buchta*, 296 AD2d at 688. Here, during its representation of the Client, Kasowitz Benson conducted an initial investigation of the Client's potential claims, filed the original complaint, and opposed defendants' preliminary dispositive motions and associated appeals, which were not fully adjudicated until October 7, 2020. Aff. ¶ 5. By comparison, Glenn Agre, among many other things: (i) obtained, reviewed, and analyzed millions of pages of documents from the defendant and over forty third parties, (ii) conducted nineteen examinations before trial, (iii) participated in extensive mediation, including in-depth briefing and multiple sessions with the mediator over several months, and (iv) negotiated and

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proportionate share of that "fee if, and when, [it] establish[es] its entitlement" to it. *Schneider, Kleinick, Weitz, Damashek & Shoot*, 302 A.D.2d at 190. That lack of irreparable harm – a point on which the pithy decision in Klein is silent – is dispositive here under well-established law.

documented a settlement of the Action. *Id*. ¶ 8. Consistent with Kasowitz Benson's "proportionate contribution" to the resolution of the Action (concerning which Glenn Agre has first-hand knowledge) and ample legal authority, Kasowitz Benson is entitled to only a small fraction of the success fee.[8]

III. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF DENYING PRELIMINARY INJUNCTIVE RELIEF

To obtain injunctive relief, Kasowitz Benson must show that the balancing of the equities weighs in its favor such that, if an injunction is denied, it will suffer a greater harm than Glenn Agre will suffer if an injunction is issued. *See generally Doe v. Axlerod*, 73 N.Y.2d 748, 536 N.Y.S.2d 44 (1988). Here, the balance of equities tilts decidedly in favor of Glenn Agre.

As both parties' submissions on this Motion make clear, this is simply a commercial dispute about money. Glenn Agre never disputed that Kasowitz Benson is entitled to a portion of the fee. It was Glenn Agre that notified Kasowitz Benson of the fee in the first place. It was Glenn Agre that provided the confidentiality stipulation allowing Kasowitz Benson's access to the terms of the settlement. It was Glenn Agre that provided additional billing information so that Kasowitz Benson could assess its proportionate share for itself. And it was Glenn Agre that offered to pay Kasowitz Benson immediately upon agreement as to the amount of its share of the fee. Glenn Agre was negotiating in good faith when Kasowitz Benson ran to court, on the eve of

[8] *See, e.g., Buszko v City of NY*, 118 AD3d 464, 464-465 (1st Dep't 2014) (awarding 5% to original counsel and 95% to replacement counsel where original counsel engaged in preliminary discovery and retained experts, while replacement counsel "performed the lion's share of the work, including … preparing a summary judgment motion, continuing discovery, and successfully mediating" the case to resolution); *Brown v. Governele,* 29 AD3d 617, 618 (2d Dep't 2006) (awarding 5% to original counsel and 95% to replacement counsel where original counsel commenced the action, while replacement counsel "filed an amended summons and complaint on behalf of the plaintiff, conducted discovery, successfully opposed a motion for summary judgment … and represented the plaintiff at mediation").

a holiday weekend, to seek a TRO against the distribution of *money*—the quintessential asset for which damages are an adequate remedy at law.

In contrast to the good faith of Glenn Agre, Kasowitz Benson thus has no valid justification for seeking immediate judicial intervention and the extraordinary relief of a TRO over such a quotidian fee negotiation – even before the fee has been paid pursuant to the underlying settlement. Kasowitz Benson's application is rife with false and misleading statements (outlined above). Its conduct in making this application is a transparent tactic for leverage – to threaten to embargo the entirety of the fee amount so that it can leverage more than its fair share of the fee from Glenn Agre.

It is inherently unjust to deprive Glenn Agre of the use and enjoyment of its own earned fee in order to advantage Kasowitz Benson in its effort to dictate a higher fee for itself, taking credit and payment for the work of another law firm. The Courts do not tolerate such "heavy-handed" tactics. That is why the TRO and injunction standard – which is designed precisely to prohibit the use of the courts for leverage in commercial transactions – bars the relief Kasowitz Benson improperly seeks on this application.

CONCLUSION

For the reasons stated, the Court should deny the Motion.

Dated: New York, New York
January 4, 2023

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RULE 202.8-B CERTIFICATION

The undersigned counsel hereby certifies pursuant to 22 NYCRR 202.8-b that the foregoing document, exclusive of caption, table of contents, table of authorities, and signature block, has a word count of 4013 and complies with the word limit of this rule.

/s/ Trevor J. Welch
Trevor J. Welch