

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

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APPEALTECH, LLC, :
 :
 : Index No. 602218/04
 :
 : Plaintiff, :
 :
 : (Justice Karla Moskowitz)
 :
 : -against- :
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 :
 :
 : ERIC R. LARKE and APPELLATE :
 : INNOVATIONS LLC, :
 :
 :
 : Defendants. :
-----X

**PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF APPLICATION FOR PRELIMINARY INJUNCTIVE RELIEF**

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PRELIMINARY STATEMENT

Plaintiff AppealTech, LLC (“AppealTech”) respectfully submits this reply memorandum of law in further support of its application pursuant to CPLR 6301 et seq. for preliminary injunctive relief against defendants Eric R. Larke and Appellate Innovations LLC (“Appellate Innovations”) (collectively, “Defendants”).

Unable to successfully oppose the application AppealTech has made, the Defendants instead oppose the application they apparently wish AppealTech had made. The Defendants understandably desire to mischaracterize the scope of the injunctive relief AppealTech seeks. They do not, however, have that luxury. There should be no mistake on this critical point: AppealTech does not seek either to put Appellate Innovations out of business or otherwise preclude it from competing in the appellate printing industry. To the contrary, the scope of relief sought here is extraordinarily narrow and tailored to afford some reasonable measure of protection to AppealTech’s legitimate business interests without unduly interfering with Larke’s ability to earn a living.

Self-righteously wrapping themselves in the mantle of “capitalism,” “free enterprise” and the “free market system,” the Defendants would have the Court accept the notion that they are entitled to compete with whomever they please and in any manner they please. This just is not so. Larke freely assumed certain restrictions on that freedom as a condition to his employment at AppealTech. For years, Larke enjoyed the considerable benefits flowing from that relationship. Having abruptly severed that business relationship, Larke now seeks to jettison the obligations that went along with it. Even in the “capitalist, free enterprise system” the Defendants purport to champion, employees and partners are not permitted to so cavalierly walk away from their contractual and fiduciary obligations.

What the Defendants refuse to acknowledge is the reality that there are some 4,500 law firms in New York City alone. On this application, AppealTech merely seeks to hold Larke to his commitment not to solicit the 400 or so law firm clients with which the company regularly does business. As for the remaining universe of potential clients, Larke is free to pursue those business opportunities -- provided that, in doing so, he does not use AppealTech's confidential and proprietary materials. Far from being the draconian measure the Defendants portray it to be, this restriction is entirely reasonable. It is Defendants who are being unreasonable and irresponsible here, not AppealTech.

As for the Defendants' cross-motion directed at Count Five of the Complaint, it is entirely without merit. Once again resorting to gross mischaracterizations, the Defendants portray Count Five as asserting a claim for preliminary injunctive relief. It is not. In Count Five, AppealTech asserts a claim for permanent injunctive relief. This is a colorable claim on which AppealTech is entitled to pursue discovery and present its proofs. The Defendants' cross-motion should be denied in its entirety.¹

¹ AppealTech continues to reserve its objection to Milber, Makris, Plousadis & Seiden, LLP's ("Milber Makris") representation of the Defendants in this litigation. Pursuant to the New York Disciplinary Rules of the Code of Professional Responsibility, a lawyer may not represent a client in a particular litigation if "the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client." See N.Y. Code of Prof. Resp. DR 5-102 (2004) (emphasis supplied). This rule plainly precludes Milber Makris from proceeding with its representation of the Defendants in this case.

One or more Milber Makris attorneys will be called to testify on numerous issues of substantial importance to this dispute. The testimony of these Milber Makris attorneys clearly stands to prejudice the Defendants. Nowhere in his opposition does Larke deny that Milber Makris played a significant role in the formation of Appellate Innovations and the commencement of the company's operations. See Affidavit of Janice H. Richman, ¶¶ 91, 93. Indeed, at paragraph 38 of his affidavit, Larke states that "several months" prior to leaving AppealTech, he interviewed with Milber Makris for a paralegal position. "During the interview," Larke states, "[Milber Makris] broached with me the prospect of branching out into the appellate industry. Over the course of the next several months, I (*cont. next page*)

POINT I.

**APPEALTECH HAS ESTABLISHED A
LIKELIHOOD OF SUCCESS ON THE MERITS**

**A. Factual Issues Are Insufficient
to Defeat This Application**

The Defendants strive mightily to avoid injunctive relief by manufacturing factual issues in the hopes of undermining AppealTech’s ability to establish a likelihood of success on the merits of its claims. AppealTech, the Defendants contend at page 3 of their brief, has failed to establish a likelihood of success on the merit “given the sharply disputed issues of material fact.” This strategy is ill-conceived. The existence of unresolved factual issues is hardly surprising at this pre-discovery phase in the litigation; in any event, any such factual disputes are no bar to injunctive relief. On this application, AppealTech need only demonstrate a likelihood of success on the merits, not a probability of ultimate success. The former standard is far more relaxed than the latter. Contrary to the Defendants’ apparent belief, a determination that factual issues exist does not preclude a determination that injunctive relief is appropriate. As the First Department recently observed:

It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive.

continued discussions with [Milber Makris] as to the possibility of venturing into the appellate industry.” The substance and timing of these discussions will play a critical role in establishing AppealTech’s claims against Larke. Further, Larke does not deny that one or more attorneys with Milber Makris hold an ownership interest in Appellate Innovations. *Id.*, ¶ 92. Similarly, Larke does not deny that although Milber Makris had been one of AppealTech’s most important clients prior to Larke’s departure from AppealTech, the firm now is working strictly with Appellate Innovations. *Id.*, ¶¶ 96-99. AppealTech respectfully submits that, under the circumstances, Milber Makris should voluntarily and immediately withdraw from the case. If it declines to do so, Milber Makris should be disqualified.

