

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 23220

PINSIGHT TECHNOLOGY, INC.,
for itself and as successor-in-interest
to API ENTERPRISES, INC. f/k/a
ACCUPOINTE, INC. and D5
ENTERPRISES, LLC f/k/a DIRECT
500, LLC all d/b/a ACCUPOINTE,

Plaintiffs,

v.

DRIVEN BRANDS, INC. d/b/a
DRIVEN BRANDS; RKL
ESOLUTIONS, LLC; RALPH DOUG
CRUMP; TIMOTHY FUTRELL;
FRANK WILSON; and FERDINAND
YSIBIDO,

Defendants.

ORDER ON DESIGNATION

1. **THIS MATTER** is before the Court pursuant to the Determination Order issued on February 17, 2020 by the Honorable Cheri Beasley, Chief Justice of the Supreme Court of North Carolina, directing the undersigned to determine whether this action is properly designated as a mandatory complex business case in accord with N.C.G.S. § 7A-45.4(a) (the “Determination Order”). As explained below, the Court concludes that it is not.

2. This case involves claims by a former employer against two competitors and four former employees arising out of the former employees’ alleged breach of certain restrictive covenants. According to Plaintiff, Plaintiff entered into a Master Services Agreement (“MSA”) with Defendant Driven Brands, Inc. (“Driven Brands”) in May 2016. The MSA included a non-solicitation clause providing that neither party would “hire, directly or indirectly, any employee of the other party during the term of the

Agreement” or for one year after termination “without the express written consent of the other party[.]” (Compl. ¶ 13.) In November 2016, Plaintiff negotiated the sale of its assets, including its Sage 500 division, to Network, Inc. (“NAW”). (Compl. ¶ 15.) At the time of the sale, Defendants Ralph Doug Crump, Timothy Futrell, Frank Wilson, and Ferdinand Ysibido (“Employee Defendants”) were employees in the Sage 500 division. (Compl. ¶ 14.) Each had signed a document titled “Employment Trade Secret and/or Nondisclosure Agreement” (the “NDA”), which “proscribe[d] them from disclosing customer or vendor lists during or after employment, among other terms.” (Compl. ¶ 22.)

3. Plaintiff alleges that, during its negotiations with NAW, Driven Brands colluded with Defendant RKL Esolutions, LLC (“RKL”), an industry competitor of both Plaintiff and NAW, (Compl. ¶¶ 16, 28), to successfully solicit the Employee Defendants to work for Driven Brands, (Compl. ¶¶ 24–25, 31). Plaintiff further alleges that the Employee Defendants, “in collusion with one or both of Driven Brands and/or RKL,” breached their NDAs with Plaintiff by disclosing Plaintiff’s customers to Driven Brands and/or RKL. (Compl. ¶ 39.)

4. Plaintiff filed the Complaint initiating this action in Mecklenburg County Superior Court on December 20, 2019, alleging claims for breach of contract, tortious interference with contract, unjust enrichment, breach of the implied warranty of good faith and fair dealing, unfair and deceptive trade practices under N.C.G.S. § 75-1.1, and civil conspiracy. Driven Brands accepted service of the Complaint on January 22, 2020 and timely filed a Conditional Notice of Designation for Complex Business

Case (“NOD”) on February 14, 2020, contending that mandatory complex business case designation is proper under N.C.G.S. § 7A-45.4(a)(3), (5), (8), and (9).

A. Section 7A-45.4(a)(3)

5. Designation under section 7A-45.4(a)(3) is proper if the action involves a material issue related to “[d]isputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under G.S. 75-1.1 or Article 2 of Chapter 75 of the General Statutes.” “This Court has not historically designated cases based on restrictive covenants in the employment context under section 7A-45.4(a)(3) unless ‘they included additional claims of trade-secret misappropriation or . . . they asserted claims of unfair competition before unfair-competition claims were excluded by amendments to section 7A-45.4.’ ” *UNOX, Inc. v. Conway*, 2019 NCBC LEXIS 41, at *8–9 (N.C. Super. Ct. June 28, 2019) (quoting *Van Gilder v. Novus Techs., Inc.*, 2017 NCBC LEXIS 46, at *2–3 (N.C. Super. Ct. May 24, 2017)).

6. In support of designation under this section, Driven Brands argues that Plaintiff’s allegations that Defendants “colluded for an improper and anti-competitive purpose[.]” (NOD ¶ 2; *see* Compl. ¶¶ 21, 35–36), and engaged in unfair and deceptive trade practices including under N.C.G.S. § 75-1.1, (NOD ¶ 2; *see* Compl. ¶¶ 7–8), and that Plaintiff alleged a claim for civil conspiracy, (NOD ¶ 2; *see* Compl. ¶ 8), permit designation. The Court disagrees.

7. Plaintiff’s allegation that RKL and Driven Brands colluded for an “improper and anticompetitive purpose” is based entirely on those Defendants’ alleged

solicitation of the Employee Defendants in violation of the MSA and the Employee Defendants' NDAs, (Compl. ¶¶ 21, 35–36), and the allegations supporting the section 75-1.1 and civil conspiracy claims derive entirely from those same allegations, (Compl. ¶¶ 72–74, 76–80). Such claims sound in contract, not antitrust. Moreover, Plaintiff has not alleged trade secret misappropriation, a Chapter 75 claim other than one under section 75-1.1, or otherwise invoked state or federal antitrust law. Designation under section 7A-45.4(a)(3) is therefore improper. *See Charah v. Sequoia Servs. LLC*, 2019 NCBC LEXIS 87, at *2 (N.C. Super. Ct. May 30, 2019) (holding that (a)(3) designation was improper where plaintiff's Chapter 75 claim was “brought solely under section 75-1.1 and Plaintiff d[id] not reference, invoke, or otherwise seek recovery under any other provision of Chapter 75 in its Complaint[,] . . . or contend that the . . . action involve[d] consideration and application of federal or state antitrust law, other than section 75-1.1”).

B. Section 7A-45.4(a)(5)

8. Designation under section 7A-45.4(a)(5) is proper if the action involves a material issue related to “[d]isputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.” To qualify for mandatory complex business case designation under this section, the material issue must relate to a dispute that is “closely tied to the underlying intellectual property

aspects” of the intellectual property at issue. *Cardioventis AG v. IQVIA Ltd.*, 2018 NCBC LEXIS 64, at *6 (N.C. Super. Ct. June 27, 2018).

9. In support of designation under this section, Driven Brands argues that this action includes “a dispute involving the use of Plaintiff’s data, including disclosure of its procedures for implementation of Sage 500 and its employees and customers.” (NOD ¶ 3; *see* Compl. 24–27, 32–33, 35–36, 38–39.) Plaintiff’s allegations, however, invoke a straightforward claim for breach of the NDAs, which requires for its resolution nothing more than the application of contract law principles. Because resolution of Plaintiff’s contract claims is not “closely tied to the underlying intellectual property aspects” of the data Employee Defendants allegedly disclosed to Driven Brands or RKL, designation under section 7A-45.4(a)(5) is improper. *See State Farm Mut. Auto. Ins. Co. v. Miller*, 2020 NCBC LEXIS 18, at *3 (N.C. Super Ct. Feb. 11, 2020) (deciding that (a)(5) designation was improper where central allegation was “that Defendant retained Plaintiffs’ proprietary or confidential information and equipment in contravention of their written agreements and . . . [t]he primary relief sought [wa]s return of the information and equipment taken and damages arising from possession and use of that information and equipment by Defendant”); *Grifols Therapeutics LLC v. Z Automation Co.*, 2019 NCBC LEXIS 91, at *2–4 (N.C. Super. Ct. July 3, 2019) (concluding (a)(5) designation was improper where claim for breach of purchase agreement for intellectual property only required application of contract law principles); *Grid Therapeutics, LLC v. Song*, 2019 NCBC LEXIS 99, at *2–3 (N.C. Super. Ct. May 31, 2019) (holding that “dispute over the continued viability of a

sublicense for the use and commercial exploitation of certain intellectual property” only required “straightforward application of contract law” and was not properly designated under (a)(5)).

C. Section 7A-45.4(a)(8)

10. Designation under section 7A-45.4(a)(8) is proper if the action involves a material issue related to “[d]isputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.” Although mandatory complex business case designation under this section is “most often premised on a claim or counterclaim under the North Carolina Trade Secrets Protection Act, N.C.G.S. § 66-152, et seq.[,] . . . [t]he designation statute makes clear . . . that it need not be.” *Relx, Inc. v. Morrow*, 2020 NCBC LEXIS 21, at *4 (N.C. Super Ct. Feb. 18, 2020).

11. To support designation under this section, Driven Brands argues that Plaintiff has alleged that its “trade secrets are [in] dispute” since (i) “Defendants conspired to obtain information regarding Plaintiff’s employees [and] customers,” (ii) “Driven Brands and RKL cause[d] Plaintiff’s employees to breach [their] Non-Disclosure Agreements[,]” (NOD ¶ 4; *see* Compl. ¶¶ 12–13, 21–23, 32–36, 38–39), and (iii) “Driven Brands and RKL have benefited from Plaintiff’s confidential information and/or proprietary information[,]” (NOD ¶ 4; Compl. ¶ 6).

12. Driven Brands’ contentions are unavailing. Indeed, “[this] Court has never construed the [designation] statute so broadly as to permit ‘designation of an action as a mandatory complex business case based on claims involving generalized

confidential or proprietary information’—a fitting description of many claims for breach of restrictive covenants in employment agreements.” *UNOX, Inc.*, 2019 NCBC LEXIS 41, at *4 (quoting *Cornerstone Health Care, P.A.*, 2015 NCBC LEXIS 65, at *6 (N.C. Super. Ct. June 22, 2015)). Moreover, “[t]his Court has also made plain that it will not recognize designation where it appears . . . that [the pleading party] potentially could have, but chose not to, allege a claim that ‘puts the existence, ownership, or misuse of alleged trade secrets at issue[.]’” *State Farm Mut. Auto. Ins. Co.*, 2020 NCBC LEXIS 18, at *4 (quoting *UNOX, Inc.*, 2019 NCBC LEXIS 41, at *6).

13. Here, Plaintiff has neither alleged a claim for trade secret misappropriation nor alleged facts that put “the existence, ownership, or misuse of alleged trade secrets at issue.” *UNOX, Inc.*, 2019 NCBC LEXIS 41, at *7. Instead, Plaintiff alleges only that the Employee Defendants signed NDAs that precluded them “from disclosing customer or vendor lists during or after employment, among other terms,” (Compl. ¶ 22), and that they made improper disclosures to Driven Brands or RKL, “including, but not limited to, the unauthorized disclosure of [Plaintiff’s] customers[.]” (Compl. ¶ 39). Plaintiff does not allege that its customer or vendor lists constituted trade secrets, that the Employee Defendants were made aware of or had access to Plaintiff’s trade secrets, or that the Employee Defendants disclosed any of Plaintiff’s trade secrets to Driven Brands or RKL.

14. Because Plaintiff’s Complaint does not put “the existence, ownership, or misuse of alleged trade secrets at issue,” designation under section 7A-45.4(a)(8) is improper. *See Stay Alert Safety Servs., Inc. v. Pratt*, 2017 NCBC LEXIS 101, at *6

(N.C. Super. Ct. Nov. 1, 2017) (deciding that (a)(8) designation was improper where complaint referenced trade secrets and confidential information but the plaintiff “indicated no intent to claim any trade secret misappropriation”).

D. Section 7A-45.4(a)(9)

15. Designation under section 7A-45.4(a)(9) is proper if the action involves a material issue related to:

Contract disputes in which all of the following conditions are met:

- a. At least one plaintiff and at least one defendant is a corporation, partnership, or limited liability company, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.
- b. The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.
- c. The amount in controversy computed in accordance with G.S. 7A-243 is at least one million dollars (\$ 1,000,000).
- d. All parties consent to the designation.

16. Driven Brands contends that designation is warranted, but the NOD reflects that Plaintiff does not consent. (NOD ¶ 5(d).) As such, designation under section 7A-45(a)(9) is improper.¹

¹ It appears Driven Brands may misunderstand the interplay between section 7A-45.4(a)(9)(d), which requires that “[a]ll parties consent to the designation[.]” and Business Court Rule 2.5 (“BCR”), which permits conditional designation under section 7A-45.4(a)(9) under certain circumstances. Although BCR 2.5 allows a designating party to conditionally file a notice of designation and thereafter obtain the consent of the other parties within thirty days, where, as here, a designating defendant reflects that the plaintiff does not consent to designation, designation as a mandatory complex business case is unavailable under section 7A-45.4(a)(9).

E. Conclusion

17. Based on the foregoing, the Court concludes that this action shall not proceed as a mandatory complex business case under section 7A-45.4(a) and thus shall not be assigned to a Special Superior Court Judge for Complex Business Cases.

18. Consistent with the Determination Order, the Court hereby advises the Senior Resident Superior Court Judge of Judicial District 26 that this action is not properly designated as a mandatory complex business case so that the action may be treated as any other civil action, wherein the parties may pursue designation as a Rule 2.1 exceptional case with the Senior Resident Judge.

SO ORDERED, this the 20th day of February, 2020.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge