

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 6417

STUART STOUT; SHELBY STOUT;
JONAH HIRSCH; and MFWH
PRODUCTIONS, LLC,

Plaintiffs and
Counterclaim
Defendants,

v.

ALCON ENTERTAINMENT, LLC;
and STEVEN WEGNER,

Defendants and
Counterclaim
Plaintiffs.

ORDER ON DESIGNATION

1. **THIS MATTER** is before the Court pursuant to the Determination Order issued on 20 October 2021 by the Honorable Paul Newby, 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) and (b). (*See* Determination Order, ECF No. 10.)

2. Plaintiffs Stuart Stout and Shelby Stout, along with their production company, MFWH Productions, LLC, and executive producer Jonah Hirsch (“Hirsch”) (collectively, the “Plaintiffs”), filed the Complaint initiating this action in Mecklenburg County Superior Court on 24 April 2020, asserting claims against Defendants Andrew Kosove (“Kosove”), Broderick Johnson (“Johnson”), Walden Media, LLC (“Walden”), Alcon Media Group, LLC (“Alcon Media”), Alcon Entertainment, LLC (“Alcon”) and Steven Wegner (“Wegner”; together with Alcon, the “Moving Defendants”) for fraud, negligent misrepresentation, and unfair and

deceptive trade practices under N.C.G.S. § 75-1.1. (See Compl. ¶¶ 77–111, ECF No. 2.) In addition, Hirsch asserted a claim of unjust enrichment against Alcon and Alcon Media. (See Compl. ¶¶ 112–17.)

3. Alcon, Alcon Media, Kosove, and Johnson timely filed an initial Notice of Designation (the “First NOD”) in June 2020, contending that designation as a mandatory business case was proper under N.C.G.S. § 7A-45.4(a)(5). (See Notice Designation Action Mandatory Complex Bus. Case Under N.C.G.S. § 7A-45.4 at 1–2 [hereinafter “First NOD”], ECF No. 3.) This Court determined that designation under section 7A-45.4(a)(5) was improper, because the allegations in the Complaint—the pleading on which the First NOD was based—were “focused on Defendants’ allegedly fraudulent conduct . . . and actions taken by Plaintiffs in reliance on Defendants’ misrepresentations rather than on the underlying intellectual property aspects . . . as required under section 7A-45.4(a)(5).” *Stout v. Alcon Entm’t, LLC*, 2020 NCBC LEXIS 77, at *3 (N.C. Super. Ct. June 30, 2020) (ECF No. 4).

4. Consequently, this action was not assigned to a Special Superior Court Judge for Complex Business Cases and instead proceeded on the regular civil superior court docket in Judicial District 26.

5. On 17 September 2020, Plaintiffs filed their First Amended Complaint, again asserting claims against Kosove, Johnson, Alcon Media, Alcon, and Wegner for fraud, negligent misrepresentation, and unfair and deceptive trade practices under N.C.G.S. § 75-1.1. (See First Am. Compl. ¶¶ 139–76 [hereinafter “FAC”], ECF No. 6.) The First Amended Complaint also included Hirsch’s claim for unjust enrichment

against Alcon and Alcon Media. (See FAC ¶¶ 177–82.) Plaintiffs did not, however, assert any claims against Walden. (See generally FAC.)

6. On 25 February 2021, all claims against Kosove, Johnson, and Alcon Media were dismissed with prejudice for lack of personal jurisdiction. (See Order Partially Granting Defs.’ Mots. Dismiss Pls.’ First Am. Compl. 5, ECF No. 7.)

7. Alcon subsequently filed its Answer and Counterclaim to Plaintiffs’ First Amended Complaint (the “Counterclaims”) on 30 March 2021, asserting counterclaims against Plaintiffs for fraudulent inducement, negligent misrepresentation, unfair and deceptive trade practices under N.C.G.S. § 75-1.1, conspiracy/facilitating fraud, frivolous or malicious action under N.C.G.S. § 1D-45, abuse of process, slander *per se*, defamation/libel *per se*, and punitive damages. (See Answer & Countercl. Def. Alcon Pls.’ First Am. Compl. ¶¶ 199–271 [hereinafter “Countercls.”], ECF No. 8.)

8. Defendants assert that at a scheduling conference in this action on 30 September 2021, the Superior Court Judge presiding suggested that Alcon may wish to seek designation of this matter as a mandatory complex business case as a qualifying case involving more than \$5 million in prospective damages. (See Joint Notice Designation 5 [hereinafter “Second NOD”], ECF No. 9.) As a result, the Moving Defendants filed a Joint Notice of Designation (the “Second NOD”) on 13 October 2021, contending that designation as a mandatory complex business case is proper under N.C.G.S. § 7A-45.4(a)(2),(5), and (b)(2). (See Second NOD 1–3.)

9. When seeking designation as a mandatory complex business case, the NOD “shall be filed[] . . . [b]y the plaintiff, the third-party plaintiff, or the petitioner for judicial review contemporaneously with the filing of the complaint, third-party complaint, or the petition for judicial review in the action.” N.C.G.S. § 7A-45.4(d)(1). “The Court interprets ‘plaintiff or third-party plaintiff’ and ‘complaint’ or ‘third-party complaint’ in subsection 7A-45.4(d)(1) to include counterclaim plaintiffs and counterclaims.” *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc.*, 2016 NCBC LEXIS 11, at *7 (N.C. Super. Ct. Feb. 5, 2016.)

10. The Moving Defendants use Alcon’s Counterclaims as the basis for designation in the Second NOD. (*See* Second NOD 7.) However, because the Counterclaims were filed on 30 March 2021, more than six months before the Second NOD was filed, the Second NOD is untimely. *See* N.C.G.S. § 7A-45.4(d)(1) (“[T]he Notice of Designation shall be filed[] . . . *contemporaneously* with the filing of the [counterclaims].” (emphasis added)).

11. Nevertheless, section 7A-45.4(g) still permits designation “[i]f an action required to be designated as a mandatory complex business case pursuant to subsection (b) of this section is not so designated[.]” *Id.* § 7A-45.4(g). Because the Moving Defendants also seek designation under section 7A-45.4(b)(2), (*see* Second NOD 2–3), the Court must determine if designation under that section is proper.

12. Section 7A-45.4(b)(2) provides that “[a]n action described in subdivision (1), (2), (3), (4), (5), or (8) of subsection (a) of this section in which the amount in controversy computed in accordance with G.S. 7A-243 is at least five million dollars

(\$5,000,000) shall be designated as a mandatory complex business case by the party whose pleading caused the amount in controversy to equal or exceed five million dollars (\$5,000,000).” N.C.G.S. § 7A-45.4(b)(2).

13. Regardless of whether the allegations contained in Alcon’s Counterclaims provide a sufficient basis for designation under section 7A-45.4(a)(2) and/or (5), for the reasons discussed below, the Court concludes that designation under section 7A-45.4(b)(2) is improper on the facts of record here.

14. In support of designation under section 7A-45.4(b)(2), the Moving Defendants contend that “Plaintiffs allege damages of approximately \$33,055,000.00.” (Second NOD 7.) These alleged damages appear not as a prayer for relief in Plaintiffs’ First Amended Complaint, but in Stuart Stout’s response to Interrogatory 8 of his responses to Alcon’s First Set of Interrogatories and Requests for Production, attached as Exhibit 3 to the Second NOD. (See Second NOD Ex. 3 Pl. Stuart Stout’s Resps. Def. Alcon’s First Set Interrogs. & Reqs. Production 4.)

15. But section 7A-45.4(b)(2) makes clear that the amount in controversy that exceeds the \$5 million threshold must appear in the *pleading*. See N.C.G.S. § 7A-45.4(b)(2) (requiring designation when the “*pleading* caused the amount in controversy to equal or exceed five million dollars” (emphasis added)).

16. Section 7A-45.4(b)(2) states that the “amount in controversy [shall be] computed in accordance with G.S. 7A-243,” *id.*, which in turn focuses on the “relief prayed” for in determining the amount in controversy, *id.* § 7A-243. At the same time, Rule 8 of the North Carolina Rules of Civil Procedure requires that “[i]n all

actions involving a material issue related to any of the subjects listed in G.S. 7A-45.4(a)(1), (2), (3), (4), (5), or (8), the *pleading* shall state whether or not relief is demanded for damages incurred or to be incurred in an amount equal to or exceeding five million dollars (\$5,000,000).” N.C. R. Civ. P. 8(a)(1) (emphasis added).

17. Nowhere in Plaintiffs’ First Amended Complaint do Plaintiffs pray for relief equal to or in excess of \$5 million, much less the \$33 million figure stated in the Second NOD. (*See* FAC 17.) Moreover, the Second NOD is based on Alcon’s Counterclaims, not Plaintiffs’ First Amended Complaint, and Alcon has not pleaded that it seeks damages in an amount equal to or in excess of the \$5 million threshold required by section 7A-45.4(b)(2). (*See* Counterclaims 74.) Because the pleadings in this matter do not seek to recover monetary or non-monetary relief for any party in an amount equal to or in excess of \$5 million, designation under section 7A-45.4(b)(2) is not proper.

18. Based on the foregoing, the Court concludes that this action shall not proceed as a mandatory complex business case under N.C.G.S. § 7A-45.4(a) or (b) and thus shall not be assigned to a Special Superior Court Judge for Complex Business Cases.

19. 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 21st day of October, 2021.

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