

STATE OF NORTH CAROLINA
COUNTY OF IREDELL

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-3733

POLYTEC, INC.

Plaintiff,

vs.

RANDALL F. ANDREWS; ALCHEM
INCORPORATED; INDUSTRIAL &
AGRICULTURAL CHEMICALS,
INCORPORATED; BRENNTAG
SOUTHEAST, INC.; PURE WATER
TECHNOLOGIES, LLC; DENISE K.
WOLCOTT and ROBERT WOLCOTT,

Defendants.

**OPPOSITION TO NOTICE OF
DESIGNATION OF ACTION AS
MANDATORY COMPLEX BUSINESS
CASE UNDER N.C. GEN. STAT. § 7A-45.4**

COMES NOW Plaintiff Polytec, Inc. ("Polytec") in opposition to the designation of this civil action as a "mandatory complex business case" under N.C. Gen. Stat. § 7A-45.4. In support of this opposition, Polytec respectfully shows the Court as follows:

1. Polytec commenced this civil action on October 9, 2009 in Iredell County Superior Court against Randall F. Andrews ("Andrews"), Alchem Incorporated ("Alchem"), Industrial & Agricultural Chemicals Incorporated ("IAC"), Brenntag Southeast, Inc. ("Brenntag"), Pure Water Technologies, LLC ("Pure Water"), Denise K. Wolcott ("D. Wolcott") and Robert Wolcott ("R. Wolcott").

2. This lawsuit concerns (1) Andrews', Alchem's and IAC's breaches of a 2006 settlement agreement (the "Agreement") entered into in settlement of a prior lawsuit filed in Iredell County Superior Court in 2005 (Case No. 05-CVS-2406) and (2) the remaining Defendants' assistance with those breaches and interference with Polytec's contract rights under the Agreement.

3. The Agreement, which was fully executed on October 31, 2006, includes a "Non-Competition Covenant," which provides, among other things, that for a period of three (3) years after the Closing Date (October 31, 2006), Andrews, Alchem or IAC shall not, without the express written consent of Polytec, own, manage, operate, control or in any other material capacity, engage, participate, or become affiliated or connected in any material business relationship with any Competing Business which competes with the business of Polytec. A "Competing Business" is defined to include, among other things, providing and selling certain chemical products to municipal and industrial wastewater treatment facilities for wastewater

treatment purposes or selling calcium hydroxide to existing customers of Polytec (for wastewater use only).

4. The sum and substance of the allegations that form the basis for the claims against the Defendants in this lawsuit are that (1) Andrews, Alchem and/or IAC have been directly and indirectly selling and/or providing calcium hydroxide and perhaps other products to existing customers of Polytec before the expiration of the 3-year Non-Competition Covenant term in violation of the Agreement and (2) Brenntag, Pure Water, D. Wolcott and R. Wolcott were aware of the rights of Polytec and the obligations of Andrews, Alchem and IAC under the Agreement but nevertheless cooperated with Andrews, Alchem and IAC to interfere with Polytec's contractual rights.

5. Based on the basic factual allegations included in the Complaint, Polytec has asserted claims for (1) Breach of Contract against Andrews, Alchem and IAC, (2) Tortious Interference with Contractual Relations and Prospective Economic Advantage against Brenntag, Pure Water and the Wolcotts and (3) Unfair and Deceptive Trade Practices, Civil Conspiracy and (4) Equitable Tolling/Permanent Injunction against all Defendants arising out of and relating to the breach of the Agreement.

6. On November 11, 2009, Brenntag designated this lawsuit as a mandatory complex business case, alleging that the issues in this lawsuit concern state trademark or unfair competition law. According to Brenntag, this lawsuit concerns "several material issues of state unfair competition law, including, inter alia, the enforceability and/or applicability of the non-compete agreement in question to the challenged business transactions; the extent to which a non-compete can bind parties not in privity with the plaintiff . . . and the extent to which the justification of legitimate market competition provides a defense to the claims of tortious interference."

7. To warrant the mandatory designation of a case as complex business and secure the adjudication of an action under the jurisdiction of the North Carolina Business Court, N.C. Gen. Stat. § 7A-45.4(a) requires that the matter concern one or more of the following issues:

- (1) The law governing corporations, partnerships, limited liability companies and limited liability partnerships;
- (2) Securities law;
- (3) Antitrust law, except claims based solely on unfair competition under N.C. Gen. Stat. § 75-1.1;
- (4) State trademark or unfair competition law, except claims based solely on unfair competition under N.C. Gen. Stat. § 75-1.1;
- (5) Intellectual property law; or
- (6) The Internet, electronic commerce, and biotechnology.

8. The designation of this lawsuit as complex business, requiring adjudication within the Business Court, is without merit. Polytec asserts no claims concerning state trademark law. To the extent that Polytec's claims against the Defendants concern "state unfair competition law," those claims only support claims for under N.C. Gen. Stat. § 75-1.1, which § 7A-45.4(a)


expressly excludes from designation as mandatory complex business designation. Polytec's claims against the Defendants concern only (1) breaches of the Agreement or (2) tortious interference with the performance of the Agreement. Those claims support a claim under N.C. Gen. Stat. § 75-1.1 but do not involve complex issues of "state unfair competition law" such as misappropriation of trade secrets, which each of the cases cited by Brenntag in its Notice of Designation involved. *See Covenant Equip. Corp. v. Forklift Pro. Inc.*, 2008 NCBC 10, *11 (N.C. Super. Ct. 2008) (citing claims for misappropriation of trade secrets); *Better Bus. Forms & Prods. v. Craver*, 2007 NCBC 34, *1 (N.C. Super. Ct. 2007) (citing claims under North Carolina Trade Secrets Protection Act); *Digital Recorders, Inc. v. McFarland*, 2007 NCBC 23, *5 (N.C. Super. Ct. 2007) (citing claims for misappropriation of trade secrets). Moreover, this dispute does not even include requests for temporary and preliminary injunctive relief that the Business Court might otherwise provide more available accommodations. Therefore, under the express exception of § 7A-45.4(a), a complex business designation is unwarranted under the circumstances.

9. Brenntag's interpretation of "state trademark or unfair competition law" is overly broad and inconsistent with the context of the mandatory complex business criteria. Under the reading of § 7A-45.4(a) proposed by Brenntag, virtually every case involving a basic covenant not to compete would be subject to a mandatory designation as complex business. Considering the level of complexity of the § 7A-45.4(a) factors and the express exception of the § 75-1.1 claims, designation of every lawsuit concerning a non-compete agreement, without more, as complex business is inconsistent with the purpose of § 7A-45.4(a). There is no basis to conclude that § 7A-45.4(a) mandates that the claims at issue in this lawsuit, all of which surround the breach of a simple non-compete provision contained in a settlement agreement, warrant mandatory proceedings before the North Carolina Business Court.

WHEREFORE, Plaintiff Polytec, Inc. respectfully requests that the Court remand this matter to the Iredell County Superior Court for all further proceedings.

This the 11th day of December, 2009.

JOHNSTON, ALLISON & HORD, P.A.


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO NOTICE OF DESIGNATION OF ACTION AS MANDATORY COMPLEX BUSINESS CASE UNDER N.C. GEN. STAT. § 7A-45.4** was served on each party by sending a true and accurate copy of same by U.S. first class mail, addressed as follows:

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This the 11th day of December, 2009.

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