

STATE OF NORTH CAROLINA :
COUNTY OF WAKE :

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-019408

LUKE T-L KWONG.)
)
Plaintiff)
)
v.)
)
L.E. WOOTEN & COMPANY,)
a North Carolina Corporation and)
AMOS L. MOORE, JR, DAN K. BOONE)
V. STEPHEN PLAYER, ROBERT)
E. EGAN, RALPH S. MOBLEY, JR., and)
MARC REESE, individuals)
)
Defendants)

**DEFENDANTS' REPLY TO PLAINTIFF'S
OBJECTION TO BUSINESS COURT
DESIGNATION**

Plaintiff's objection to the Chief Justice's designation of this case as a mandatory complex business case is without merit for the reasons set forth below.

PRELIMINARY STATEMENT

Plaintiff filed this action alleging that he is entitled to stock dividends and/or an employee bonus even though (i) the defendant corporation did not pay dividends to any other stockholder and (ii) Plaintiff voluntarily resigned his employment with the corporation before end-of-year bonuses were paid to those who were employed by the corporation at the end of the year.

On its face, the Complaint relies on the law governing corporations and the duties of directors in multiple respects. First, the Third Claim for Relief expressly asks the Court to compel payment of a dividend by the Defendant Corporation. The caption of that claim expressly states that it is a claim "To Compel Payment of Dividend" and Paragraphs 33 through 35 each allege matters relating to the payment (or non-payment) of dividends and distributions to Plaintiff as a shareholder of the corporation. For example, Paragraph 35 alleges that Plaintiff's

damages include “the full amount of all dividends and distributions (whether in the form of wages and bonus amounts or otherwise) to which he was due and entitled . . .” Similarly Paragraph 34 bases Plaintiff’s alleged entitlement to dividends and other distributions on his status as a shareholder.

Plaintiff trusted and relied on the individual Defendants, in their respective capacities as Shareholders, Directors and Officers, and the Company to act at all times in a manner consistent with their legal duties and obligations and to treat Plaintiff in an equal and non-discriminatory manner in regard to other shareholders owning shares of the same class as the Plaintiff and in regard to the payment of any dividends and distributions . . . and to respect and protect the interest of Plaintiff as a minority shareholder and to pay over to him his just portion of the income and proceeds of the company. [Emphasis added]

Second, Paragraph 37 of the Complaint expressly seeks recovery of attorney’s fees under N.C. Gen. Stat. § 55-6-40(h). The statutory provision invoked by the Plaintiff is part of the Business Corporations Act, and it is entitled “Distributions to Shareholders.” What is more, the specific subsection upon which Plaintiff relies states:

Any action by a shareholder to compel the payment of dividends may be brought against the directors or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney’s fees, incurred in maintaining such action. If the court orders the payment of the dividend, the amount ordered to be paid shall be a debt of the corporation. [Emphasis added]

Third, Plaintiff relies heavily on his perception of the fiduciary duties of the individual defendants as directors of the corporation. For example, Paragraph 3 alleges that Defendant Moore

[W]as at all times material . . . the President of Defendant Wooten, a Shareholder and a Member of the Board of Directors of Defendant Wooten. In his various capacities, Defendant Wooten .

. . . stood in a fiduciary position as respects the [sic] Plaintiff and other shareholders of the Company . . .

Similar allegations with respect to the other individual Defendants appear in Paragraphs 4 through 8 of the Complaints. What is more, the Third Claim for Relief purports to state a claim against the individual defendants for breach of their fiduciary duty as directors. The Third Claim for Relief is expressly designated as a claim for “Breach of Fiduciary Duty” and Paragraphs 33 through 35 of that claim expressly invoke Plaintiff’s perception of the duties of the individual defendants as officers and directors. *See also* the language from Paragraph 34 quoted above. Finally, as noted above, this claim specifically invokes N.C. Gen. Stat. § 55-6-40(h) which governs claims by shareholders against directors to compel the payment of dividends.

Finally, the Complaint specifically invokes a shareholders’ agreement among the shareholders of the Corporate Defendant. *See* Complaint Paragraph 12:

Plaintiff Kwong, along with other shareholders of the Company, entered into a written Shareholders Agreement in February 2005, which Agreement was intended to apply to the ownership and disposition of any shares existing at that time and thereafter . . . Nothing in the Shareholders Agreement provides that a shareholder’s right to receive dividends or other distributions or other payments based, in whole or in part, on the ownership and number of shares owned by a shareholder, would be forfeited or lost for any period during which such shares were owned by any such shareholder.

In light of Plaintiff’s repeated invocation of – and reliance on – the law governing corporations and the duties of directors, Defendants filed a Notice of Designation, pursuant to the mandatory jurisdiction of the Business Court under N.C. Gen. Stat. § 7A-45.4(a)(1) which provides:

(a) A mandatory complex business case is an action that involves a material issue related to:

(1) The law governing corporations [except charitable and religious corporations] . . . including issues concerning

governance, . . . breach of duty of directors, . . . enforcements or interpretation of shareholder agreements, and derivative actions.

Defendants' designation was timely filed on October 21, 2009 and Chief Justice Parker of the North Carolina Supreme Court entered an order providing that "in accordance with . . . N.C.G.S. § 7A-45.4(b), I hereby designate [this] case as a mandatory complex business [case]."

Plaintiff filed an opposition to the Notice of Designation on November 20, 2009, and the Defendants hereby reply to that opposition.

ARGUMENT

Contrary to Plaintiff's apparent belief, referral of this case to the Business Court is not a discretionary matter. Rather, the case falls within the Business Court's mandatory jurisdiction because it involves material issues relating to the law governing corporations and the duties of corporate directors. As a matter of plain English, "mandatory" means "permitting no option; not to be disregarded or modified . . ." *Random House Webster's Unabridged Dictionary*. P.1167 (2d Ed. 2001)(copy attached).

Plaintiff cannot fairly dispute that issues relating to the law governing corporations and the duties of directors are material to his claims. As more fully summarized in the Preliminary Statement above, the Complaint expressly relies on Plaintiff's status as a shareholder of a business corporation, the individual defendants' alleged duties as directors of the corporation and the provisions of the Business Corporations Act including N.C. Gen. Stat. § 55-6-40(h) dealing with actions by shareholders against corporate directors to compel the payments of dividends¹.

¹ Because the basis for designating this case as a "mandatory complex business case" as defined in the statute appear on the face of the Complaint, Plaintiff's reliance on *Workplace Benefits, LLC. v. Life Care Inc.*, 08 CVS 008528 (Business Court July 14, 2008) (copy attached) is misplaced. In contrast to this case, there were no claims or allegations on the face of the Complaint in *Workplace Benefits* that brought the case within Business Court jurisdiction.

In addition, on the face of the Complaint, Plaintiff's purported claims relate to the enforcement or interpretation of a shareholders agreement. For each of these reasons, this case falls squarely within the Business Court's mandatory jurisdiction under N.C. Gen. Stat. § 7A-45.4(a)(1).

Regardless of whether it is accurate (which remains to be seen) Plaintiff's assertion that this "is a relatively simple dispute" does not take this case out of the court's mandatory jurisdiction. Under the express provisions of the statute, a case involving the law governing corporations is by definition a mandatory complex business case. *Cf. Burgess v. American Express Co., Inc.*, 07 CVS-40 (Business Court April 17, 2007) (copy attached) (order by Judge Tennille overruling Plaintiff's objection to removal of case to Business Court):

The Complaint on its face raises issues about Internet advertising. That issue falls squarely within the definition of N.C. Gen.Stat. § 7A-45.4(a)(6) which covers material issues related to the Internet and electronic commerce.

Contrary to Plaintiff's suggestion, this is not a case involving a mere "mention" of Chapter 55 or issues of corporate law. As shown in the Preliminary Statement above, the Complaint does not mention corporate law merely in passing. Rather, Plaintiff relies heavily on the individual defendants' duties as directors of the corporation, his own status as a shareholder and the provisions of N.C. Gen. Stat. § 55-6-40(h) providing for actions by shareholders against corporate directors for dividends and recovery of attorney's fees. Indeed, the Complaint expressly states purported claims against the individual defendants for breach of their duties as directors in purported claims against the corporation for dividends. Thus, the Court's interpretation of and decisions on issues of corporate law and the duties of directors are likely to influence the ultimate decision in this case – and are thus material to the decision of the case. Indeed, Plaintiff would not have infused such concepts throughout his Complaint if he did not intend for them to form a material part of his claim.

Nor can Plaintiff evade Business Court jurisdiction by asserting that the amount in controversy is not particularly great. The Legislature wisely chose not to make the amount in controversy an element of the Business Court's mandatory jurisdiction.² Indeed, this court's expertise in business law – and hence its ability to resolve issues of corporate law efficiently – may be even more useful to the parties in smaller dollar cases where efficient resolution is particularly important.

Finally, contrary to Plaintiff's suggestion, litigation in Business Court is not more burdensome or expensive than litigation in regular Superior Court, except for the initial filing fee. Indeed, the ability to decide motions without hearing [Business Court Rule 15.4], convenience of electronic filing and the saving of attorney's time arising from the Court's pre-existing expertise in business law may result in substantial cost savings to the parties.

Of course, it is true that the initial filing fee for Business Court is substantially higher than the standard Superior Court filing fee but that fee already has been paid by Defendants as the parties invoking the Business Court's mandatory jurisdiction. Plaintiff would be responsible for that fee, if at all, only if it were taxed to him upon a finding that his claim is non-meritorious. Defendants do agree with Plaintiff's apparent lack of confidence of the merits of his claim, but that is not a basis for objection to Business Court jurisdiction.

² Indeed, the amount in controversy has never been a requirement for designation. *See, e.g.*, Chief Justice Lake's Memorandum of March 7, 2001 providing guidelines for assignment of case to the North Carolina Business Court under Rule 2 of the General Rules of Practice for the Superior and District Courts (copy of memorandum attached): "[T]here is no dollar threshold that must be alleged in order to support assignment." The statute defining "mandatory complex business cases" carries this principle forward.

CONCLUSION

For the reasons stated, it is clear on the face of Plaintiff's own Complaint that this case falls within the Business Court's mandatory jurisdiction. Accordingly, there is no merit to Plaintiff's objection to the Chief Justice's referral of the case to Business Court.

RULE 15.8 CERTIFICATION

Undersigned counsel certifies that Defendants' Reply to Plaintiff's Opposition to Business Court Designation conforms to Business Court Rule 15.8.

This the 7th day of December, 2009.

/s/ Michael T. Medford

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CERTIFICATE OF SERVICE

This is to certify that a copy of *Defendants' Reply to Plaintiff's Objection to Business Court Designation* was served this date on counsel for all parties by forwarding a copy thereof enclosed in a postage-paid envelope, deposited in the United States Mail, addressed as follows:

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This the 7th day of December, 2009.

/s/ Michael T. Medford

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several small, song-
y Pipridae, of the
ly having brilliantly

n. a city in and the
Island. 94,697. Also

nyä/nə), Spanish.
ture. —*adv.* 2. to-

dy (1903) by G. B.

an'), n. Irish Myth.

land and the capital of
agro near its conflu-
(1600 km) from the
ian trade. 642,582.

ism, Buddhism. the
mind] —*ma-nas-*

rn in NE Virginia:
B.

first son of Joseph.
tionally descended
of Judah of the 7th

ber of the tribe of

ic Arabian goddess
sidered a daughter

pl. *men-at-arms*.
dier on horseback,
])

n. any of several
genus *Trichechus*,
sset waters, having
oon-shaped tail: all
< Sp *manati* <
us provided with



in N Puerto Rico.

pl. *Naut. Slang*.
aterial. Also, *ma-*

Welsh Legend. a
en, and the second
deri from enchant-

Law. a sum of
is murdered. (bef.

onventional repre-
l, used as a charge.
ME < MF < L
and cuffs, deriv. of

at in NW France.
op.: Saint-Lô.

star), n. 1. a city
ersey estuary by a
, 300. 2. a city in S
central Connecti-

Manchu and conquered China in the 17th century
and established a dynasty there (**Manchu/ dy'nasty** or
Ch'ing 1644-1912). 2. a Tungusic language spoken by
the Manchu. —*adj.* 3. of or pertaining to the Manchu,
their country, or their language.

Man-chu-kuo (man'chōō'kwō'; Chin. mǎn'jō'kwō'),
n. a former country (1932-45) in E Asia, under Japa-
nese control: included Manchuria and parts of Inner
Mongolia; now a part of China. Also, **Man'chou'kuo'**.

Man-chu-ri-a (man chōō'rī'ə), n. a historic region in
NE China: ancestral home of the Manchu. ab. 413,000 sq.
mi. (1,070,000 sq. km). —**Man-chu'ri-an**, *adj.*, n.



man-ci-ple (man'sə pəl), n. an officer or steward of a
monastery, college, etc., authorized to purchase provi-
sions. [1150-1200 in sense "slave"; ME < MF *mançiple*.
var. of *mançipe* < ML *mançipium*, L: a possession,
slave, orig., ownership, equiv. to *mançip-*, s. of *mançeps*
contractor, agent (*man(us)* hand + *-cep-*, comb. form of
capere to take (see **CONCEPT**) + *-s* nom. sing. ending) +
-ium *-ium*]

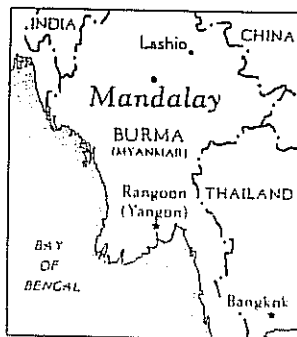
Man-cu-ni-an (man kyōō'nē ən, -kyōōn'yən), n. 1. a
native or resident of Manchester, England. —*adj.* 2. of,
pertaining to, or characteristic of Manchester, England,
or its natives or residents. [1900-05; < ML *Man-
cuni(um)* MANCHESTER + *-AN*]

-mancy, a combining form meaning "divination," of
the kind specified by the initial element: *ecromancy*.
[ME *-manci(e)*, *-mancy(e)* < OF *-mancie* < L *-mantia*
< Gk *manteia* divination. See **MANTIC**, *-CY*]

Man-dae-an (man dē'an), n. 1. a member of an an-
cient Gnostic sect extant in Iraq. 2. the Aramaic lan-
guage of the Mandaean sacred books. —*adj.* 3. of or
pertaining to the Mandaeans. Also, **Mandean**: [1870-75;
< Mandaean *mandayy(ā)* Gnostics (lit., the knowing
ones) + *-AN*] —**Man-dae'an-ism**, n.

man-da-la (mun'dl ə), n. 1. *Oriental Art*, a schemat-
ized representation of the cosmos, chiefly characterized
by a concentric configuration of geometric shapes, each
of which contains an image of a deity or an attribute of
a deity. 2. (in Jungian psychology) a symbol represent-
ing the effort to reunify the self. [1855-60; < Skt *man-
dala* circle]

Man-da-lay (man'dl ā', man'dl ā'), n. a city in cen-
tral Burma (Myanmar), on the Irrawaddy River: the for-
mer capital of Upper Burma. 532,985.



man-da-mus (man dā'məs), n., pl. **-mus-es**, v. *Law*.
—n. 1. a writ from a superior court to an inferior court
or to an officer, corporation, etc., commanding that a
specified thing be done. —*v.t.* 2. to intimidate or serve
with such writ. [< L *mandamus* we command]

man-da-rin-ate (man'dər ə nāt'), n. 1. the status or
position of a mandarin. 2. a group of mandarins or
mandarins collectively. 3. rule or government by man-
darins. [1720-30; MANDARIN + *-ATE*']

man'darin col'lar, a narrow, stand-up collar, not
quite meeting at the front. [1950-55]

man'darin duck', a crested Asian duck, *Aix
galericulata*, having variegated purple, green, chestnut,
and white plumage. [1790-1800]

man'darin or'ange, mandarin (def. 4). [1765-75]

man-da-tar-y (man'də tər'ē), n., pl. **-tar-ies**, a per-
son or nation holding a mandate. Also, **mandatory**.
[1605-15; < LL *mandatarius* one to whom a charge is
given. See **MANDATE**, *-ARY*]

man-date (man'dāt), n., v., **-dat-ed**, **-dat-ing**. —n. 1.
a command or authorization to act in a particular way
on a public issue given by the electorate to its representa-
tive: *The president had a clear mandate to end the war.*
2. a command from a superior court or official to a lower
one. 3. an authoritative order or command: *a royal
mandate*. 4. (in the League of Nations) a commission
given to a nation to administer the government and
affairs of a former Turkish territory or German colony.
5. a mandated territory or colony. 6. *Rom. Cath. Ch.*
an order issued by the pope, esp. one commanding the pre-
ferment of a certain person to a benefice. 7. *Roman and
Civil Law* a contract by which one engages gratuitously
to perform services for another. 8. (in modern civil law)
any contract by which a person undertakes to perform
services for another. 9. *Roman Law* an order or decree
by the emperor, esp. to governors of provinces. —*v.t.*
10. to authorize or decree (a particular action), as by the
enactment of law. 11. to order or require; make manda-
tory: *to mandate sweeping changes in the election pro-
cess*. 12. to consign (a territory, colony, etc.) to the
charge of a particular nation under a mandate. [1540-
50; < L *mandatum*, n. use of neut. of *mandatus*, plp. of
mandare to commission, lit., to give into (someone's)
hand. See **MANUS**, **DATE**']

—*Syn.* 3. fiat, decree, injunction, edict, ruling.

man-da-tor (man dā'tər), n. a person who gives
a mandate. [1675-85; < L *mandator*; see **MANDATE**,
-TOR]

man-da-to-ry (man'də tōr'ē, -tōr'ē), *adj.*, n., pl. **-ries**.
—*adj.* 1. authoritatively ordered; obligatory; compul-
sory: *It is mandatory that all students take two years of
math.* 2. pertaining to, of the nature of, or containing a
command. 3. *Law* permitting no option; not to be disre-
garded or modified: *a mandatory clause*. 4. having re-
ceived a mandate, as a nation. —n. 5. mandatory.
[1655-65; < LL *mandatōrius*. See **MANDATE**, *-TORY*']
—**man'da-to-ri-ly**, *adv.*

—*Syn.* 1. requisite, exigent.

man-day (man'dā'), n., pl. **man-days**, a unit of meas-
urement, esp. in accountancy; based on a standard num-
ber of man-hours in a day of work. [1920-25]

Man-de (mān'dā), n. 1. a branch of the Niger-Congo
subfamily of languages, spoken in western Africa and in-
cluding Mende, Malinke, Bambara, and Kpelle. 2. a
member of any of the peoples who speak these lan-
guages. Also called **Mandingo**.

Man-de-an (man dē'an), n., *adj.* Mandaean.

Man-del (man'dl, man del'), n. a male given name.

Man-de-la (man del'ə), n. **Nelson (Ro-lih-lah-la)** (rō-
lē lä'lə), born 1918, South African black antiapartheid
activist: president of South Africa since 1994.

man-del'ic ac'id (man del'ik, -dē'lik), *Chem.* any
of three stereoisomeric acids having the formula $C_6H_5O_2$,
esp. dl-mandelic acid, a white, crystalline, slightly water-
soluble solid obtainable from amygdalin; used chiefly in
medicine as an antiseptic. Also called **amygdalic acid**.
[1835-45; < G *Mandel* ALMOND + *-IC*]

Man-de-ville (man'də vil'), n. 1. **Bernard de** (də),
c1670-1733, English physician and satirist, born in Hol-
land. 2. **Sir John**, died 1372, English compiler of a book
of travels.

man-di-bile (man'də bəl), n. 1. the bone of the lower
jaw. See illus. on next page. 2. (in birds) a. the lower
part of the bill. b. **mandibles**, the upper and lower parts
of the bill. 3. (in arthropods) one of the first pair

CONCISE PRONUNCIATION KEY: *act*, *cāpe*, *dāre*, *pār't*; *set*, *ēqual*; *if*, *ice*;
ox, *ōver*, *ōrder*, *oil*, *bōok*, *kōōt*, *out*; *up*, *ūrge*; *child*; *sing*; *shoe*; *thin*;
thot; *zh* as in *treasure*. ə = ə as in *alone*, e as in *system*, i as in
easily, o as in *gallop*, u as in *circus*; * as in *fire* (fī'r), *hour* (hōr').
l and n can serve as syllabic consonants, as in *cradle* (krād'l), and
button (but'n). See the full key inside the front cover.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

WORKPLACE BENEFITS, LLC and
DENISE LENGYEL,

Plaintiffs,

v.

LIFECARE, INC.,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 008528

**ORDER GRANTING MOTION TO
REMAND**

This matter is before the Court on Plaintiffs' Motion to Remand this case to the Wake County Superior Court. For the reasons set for below, the motion is GRANTED.

The standard for determining the mandatory jurisdiction of the Court is found in section 7A-45.4 of the North Carolina General Statutes.¹ Defendant relies upon the provisions of the statute governing unfair competition as its basis for removal. The statute allows cases to be designated mandatory complex business case when an action "involves a material issue related to: . . . (4) State trademark or *unfair competition law*, except claims based solely on unfair competition under G.S. 75-1.1. N.C. Gen. Stat. § 7A-45.4 (2007) (emphasis added).

Defendant urges the Court to find that the gravamen of the case is unfair competition. (Def.'s Opp'n 1.) However, the Complaint contains no allegation of unfair competition. Each of the four causes of action requires a construction of Plaintiffs' employment contract. Specifically, Plaintiffs seek a declaratory judgment as to the scope and enforceability of a "Confidentiality" covenant in Ms. Lengyel's contracts with Defendant and assert a breach of contract claim based upon a breach of covenant of good faith and fair dealing alleged to be a part of that contract. Those are contract claims. Both the Plaintiff employee and employer assert tortious interference with the contract between them based upon Defendant's reminder to them of Lengyel's contractual obligations to maintain the confidentiality of specific information. Defendant has not filed suit against Plaintiffs and has not filed an answer or counterclaim. The only pleading to

¹ Chief Justice Lake's 2001 memorandum still provides useful guidance for requests for assignment to the Business Court under Rule 2.1 of the North Carolina General Rules of Practice for the Superior and District Courts. These assignments are made in the discretion of the Chief Justice.

which the Court may look is the Complaint. The Complaint requires a determination as to what is and what is not confidential information as defined in the covenant.

Defendant characterizes the tortious interference and breach of contract claims in the Complaint as assertions of the improper use of the Confidentiality Agreements to restrict Plaintiffs' competitive activities. (Def.'s Opp'n 4.) Those assertions, it says, are claims of unfair competition that fall within the Court's mandatory jurisdiction. (Def.'s Opp'n 4.)

The Court must be guided by the pleadings before it. Plaintiffs have not asserted an unfair competition claim. Nor will every suit based upon a breach of a restrictive covenant or breach of a Confidentiality Agreement give rise to a mandatory business case based upon "unfair competition." In order to raise a material issue of unfair competition, some additional factors must be alleged. For example, allegations of the theft of trade secrets which provide a competitive advantage to one party could give rise to a mandatory case. *See e.g., Analog Devices v. Michalski*, 157 N.C. App. 462, 579 S.E.2d 449 (2003).² Also, actions designed to unfairly damage another's business would give rise to an unfair competition claim. *See, e.g., Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 174 N.C. App. 49, 620 S.E.2d 222 (2005).

At this stage of the pleadings, no additional factors sufficient to raise a material issue involving unfair competition have been alleged. Plaintiffs' only allegations are that they received a letter which indicated Defendant would assert its legal rights if its contractual rights were violated. Tortious interference with contract based upon that simple act can be dealt with on a motion to dismiss. Defining "confidential information" will require application of Connecticut law and is a contract issue.

The Court hereby GRANTS Plaintiffs' motion to remand.

IT IS SO ORDERED this the 14th day of July, 2008.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases

² Parties should note the requirement for specific allegations of trade secret violations imposed by the decision in this case. *See Analog Devices, Inc.*, 157 N.C. App. at 468, 579 S.E.2d at 453.

STATE OF NORTH CAROLINA
COUNTY OF POLK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 40

C. BURGESS,
Plaintiff,

vs.

AMERICAN EXPRESS COMPANY, INC.,
EXPERIAN INFORMATION SOLUTIONS,
INC., INNER CONCEPTS, INC.,
CINGULAR WIRELESS LLC, TARGET
STORES, INC., WAL MART
ASSOCIATES, INC., AIS NETWORK,
INC., CLICKSPRING LLC,
RINGTONE.COM, LLC, EBAY, INC.,
PUREVIDEO NETWORKS, INC., and
VARIOUS, INC., FRISCHMAN
ENTERPRISES, INC., AVIS BUDGET CAR
RENTAL, LLC, VONAGE AMERICA,
INC., OFFICE DEPOT, INC., CITIGROUP
CORPORATE,

Defendants.

ORDER ON PLAINTIFF'S OPPOSITION
TO NOTICE OF DESIGNATION

This matter is before the Court on objection of Plaintiff to removal of this case to the North Carolina Business Court.

The Complaint on its face raises issues involving Internet advertising. That issue falls squarely within the definition of N.C. Gen. Stat. § 7A-45.4(a)(6) which covers material issues related to the Internet and electronic commerce. It also involves issues that would have implications for use of the Internet by others, both consumers and advertisers, who are not parties to this lawsuit.

The removal petition is timely filed.

Plaintiff should be aware that it is the policy of the Business Court to try cases in the county in which they are filed.

For these reasons, Plaintiff's objection is overruled.

IT IS SO ORDERED, this the 17th day of April, 2007.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases



ADMINISTRATIVE OFFICE OF THE COURTS
JUSTICE BUILDING

P.O. Box 244B
RALEIGH, NC 27602
19 (9) 733-7107

DAVID F. HOKE
ASSISTANT DIRECTOR

JUDGE ROBERT H. HULLCOOP
DIRECTOR

-- MEMORANDUM --

TO: All Superior Court Judges

FROM: I. Beverly Lake, Jr. *IBL*
Chief Justice
Supreme Court of North Carolina

David F. Hoke *DFH*
Assistant Director
Administrative Office of the Courts

DATE: March 7, 2001

RE: Guidelines for Assignment of Cases to the North Carolina Business Court

When the North Carolina Business Court was established by amending Rule 2 of the General Rules of Practice for the Superior and District Courts, the Supreme Court had two goals in mind. The first was the establishment of a court where complex business litigation could be handled by one judge from beginning to end, thus reducing the problems of discontinuity created by the normal rotation system. Secondly, the business court was established to generate a body of case law in our State on corporate governance issues. The Supreme Court envisioned that cases arising under Chapter 55 (North Carolina Business Corporation Act), Chapter 55B (Professional Corporation Act), Chapter 57C (North Carolina Limited Liability Company Act), Chapter 59 (Uniform Limited Partnership Act), Chapter 78A (North Carolina Securities Act), Chapter 78B (Tender Offer Disclosure Act), and Chapter 78C (Investment Advisers) would be assigned to the business court so that opinions could be written which would provide uniform guidance on corporate governance issues for North Carolina companies. Antitrust was another area in which the Supreme Court believed a business court would prove beneficial.

This memorandum will explain the policies that the Chief Justice will follow in assigning cases to the business court under Rule 2. In addition, the questions of how cases are assigned to the business court and what criteria should be used in deciding

which cases to recommend for assignment to the business court as a complex business case or as a regular Rule 2.1 case will be addressed.

At the outset, some common misconceptions about the business court may need to be dispelled. First, cases assigned to the business court are tried in the county in which they are filed. They are not moved unless the parties request it. Second, there is no dollar threshold that must be alleged in order to support assignment. Third, right to a jury trial is not eliminated by assignment to the business court. And fourth, although the business court has advanced technology and e-filing capability, attorneys are not required to use the technology.

Rule 2 affords you discretion in recommending cases be assigned as either complex business cases or exceptional cases under Rule 2.1. You may recommend assignment on your own motion or motion of a party; consent is not required. Your recommendation may be made over the objection of one or more parties.

Judge Ben Tennille is currently the only Special Superior Court Judge designated for assignment to complex business cases. With respect to regular Rule 2.1 exceptional case designations, the policy remains the same: In order to obtain exceptional case designation, the parties should secure the prior agreement of a Superior Court Judge to handle the case as exceptional before requesting such designation. Judge Tennille is assigned regular Rule 2.1 exceptional cases in addition to complex business cases.

Based upon current records of complex business case assignments, the Chief Justice holds the opinion that the business court can be more accurately utilized for complex business cases. If there is any uncertainty about the proper classification of a case, the case assignment recommendation may be either complex business or exceptional, and the Chief Justice will determine which classification is appropriate. Normally, cases arising under the chapters of the General Statutes referenced above will be assigned as complex business cases. Additionally, please recommend assignment of any cases involving removal of a director, dissent and appraisal, involuntary dissolution of a corporation, or other corporate governance disputes. Also, Meiselman cases involving disputes in family held businesses are ideal candidates for assignment as complex business cases. Partnership disputes, as well as shareholder derivative actions, are also usually assigned as complex business cases. In order for our judicial system to build a consistent body of case law, these types of cases must be assigned to the business court on a regular basis, and early identification and assignment is preferable.

Other examples of cases that are good candidates for assignment to the business court include: contractual disputes that are motion and paper intensive, involve protracted

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trials, and require significant judicial management; antitrust and theft of trade secret cases; and cases involving determination of legal issues that will have an impact on industry or business practices beyond the confines of the case itself. Some, but not all, class actions may be good candidates for assignment, and the decision on assignment should be made before the issue of class certification is decided.

Requests for assignment of cases to the business court should be addressed to the Chief Justice, but sent to the attention of David F. Hoke, Assistant Director, Administrative Office of the Courts, at Post Office Box 2448, Raleigh, NC 27602. The request should include a statement of the nature of the case, the reasons why it should be assigned, whether the parties have consented to assignment, and the names and addresses of counsel for the parties. In lieu of a detailed statement of the reasons for assignment, any pleadings or motions setting forth those reasons may be attached to the request. Any objections to assignment should also be included. To help expedite the process, please send a copy of the recommendation of assignment simultaneously to Judge Tennille at Suite 200, 200 S. Elm Street, Greensboro, NC 27401.

If you have any questions, please do not hesitate to contact Judge Tennille at (336) 334-5252 or Mr. Hoke at (919) 733-7107.