IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 2013-0237

Klauer Manufacturing Company, an Iowa corporation, Plaintiff/Appellee, v. EMCO Building Products, Inc., a North Dakota corporation, Eastside Machine Co., Inc., a North Dakota corporation, and Michael J. Bullinger, Defendants/Appellants.	

****

APPELLEE'S BRIEF

****

Appeal from the Order Denying Defendant's Motion for Injunctive Relief
of the District Court dated July 22, 2013
East Central Judicial District
Cass County District Court
The Honorable Steven L. Marquart

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INTRODUCTION

[1] EMCO Building Products, Inc. ("EMCO"), Eastside Machine Co., Inc. ("Eastside"), and Michael J. Bullinger (collectively "EMCO") seek review of an order denying a preliminary injunction, claiming the District Court abused its discretion in concluding EMCO would not suffer irreparable harm if Klauer Manufacturing Company ("Klauer") ceased producing some EMCO-brand products. EMCO failed to comply with N.D. R. Civ. P. 54(b) and has not established the jurisdictional basis upon which the Supreme Court should review this interlocutory order. Accordingly, Klauer respectfully requests the Court dismiss EMCO's appeal.

[2] Moreover, EMCO seeks to enjoin Klauer from ceasing to manufacture some EMCO-brand products and from informing customers of that decision. EMCO's request for injunctive relief has been mooted by a change in circumstances. Therefore, EMCO's appeal should also be dismissed under N.D. R. App. 42(c).

[3] Finally, EMCO failed to meet its burden of establishing the District Court abused its discretion in declining to order that Klauer continue to manufacture all EMCO-brand products for an indefinite duration. EMCO's business will not be terminated because Klauer stopped manufacturing some products. Klauer continues to produce EMCO steel siding coil; EMCO continues to act as Klauer's sales and marketing representative; and EMCO has the ongoing right to manufacture or source EMCO products discontinued by Klauer. Therefore, the District Court did not abuse its discretion and its order should be affirmed.

STATEMENT OF FACTS

I. The Parties Entered into Detailed Commercial Contracts Regarding the Manufacture, Wholesale Distribution, and Sale of Steel Siding and Accessories.

[1] Klauer manufactures, sells, and distributes steel siding and accessories. (Def. App. 144.) Klauer, EMCO, and Eastside entered into an Asset Purchase Agreement dated December 31, 2011 (the "Purchase Agreement"). (Def. App. 151-193.) Klauer, EMCO, Eastside, and Bullinger are parties to a Covenant Not to Compete, incorporated into the Purchase Agreement as Exhibit F. (Def. App. 176-180.) Klauer and EMCO are also parties to a Sales and Marketing Agreement dated January 5, 2012. (Def. App. 193-202.)

[2] The Purchase Agreement and Covenant Not to Compete provided Klauer with certain manufacturing assets, equipment, and inventory of EMCO and Eastside related to steel siding or accessories. (Def. App. 145.) EMCO, Eastside, and Bullinger were then precluded from any involvement in the manufacture and wholesale distribution of steel siding and accessories. Id.

[3] The commission-based sales and marketing role for EMCO, on behalf of Klauer, was set forth in the Sales and Marketing Agreement. Id. That Agreement provided that ". . . Klauer shall be the exclusive manufacturer of record for all EMCO brand steel and aluminum products." (Def. App. 193.) In turn, ". . . EMCO shall be the exclusive sales and marketing representative of all EMCO brand products." Id. EMCO was not

authorized to control or regulate wholesale distribution and agreed to avoid involvement in that area. (Def. App. 145-46, 176-77.)

[4] The contracts do not obligate Klauer to manufacture a particular product for a particular period of time. Rather, the parties expressly contemplated that Klauer could cease manufacturing products to be distributed and sold through EMCO as evidenced by the Covenant Not to Compete:

> Notwithstanding any term of this Covenant, Buyer hereby agrees and acknowledges that if Buyer permanently discontinues manufacturing an item of Inventory that it purchased under the Asset Purchase Agreement or a color of product item listed in the EMCO Building Products catalog attached to the Asset Purchase Agreement, then Seller shall have the right to manufacture such discontinued product(s) or paint such product item to its specification, as applicable (or to contract with a third party for such manufacture or painting); provided, however, Seller first requests in writing that Buyer continue manufacturing or painting the same and Buyer either refuses or fails to respond within thirty (30) days of such written request.

(Def. App. 177 (emphasis added).)

[5] Simply put, the contracts contemplate this very situation. If Klauer discontinues manufacturing EMCO-brand products, EMCO can request that Klauer continue to manufacture the discontinued products. *Id.* If Klauer declines that request, EMCO is released from its Covenant Not to Compete and can manufacture the product itself or obtain the products from other sources. *Id.*

I. Each Party Asserts Breach of Contract Claims.

[1] Klauer sued, alleging EMCO breached the Covenant Not to Compete and Sales and Marketing Agreement by continuing to engage in the wholesale distribution of EMCO-brand products. (Def. App. 145.) Klauer alleged that EMCO breached those agreements by retaining benefits and payments beyond those allowed by the Sales and Marketing Agreement, including selling products in excess of the "base price" without disclosing that to Klauer and while retaining the excess sales price. (Def. App. 145-46.) EMCO also refused to sell EMCO-brand products to certain Klauer customers, depriving Klauer of the benefits of the wholesale distribution which was reserved to it. (Def. App. 146.)

[2] EMCO alleges Klauer violated the parties' agreements by selling certain EMCO-brand products under the Klauer brand name/label. (Def. App. 94.) During this construction season alone, Klauer will distribute over 12 million pounds of steel siding and related products. (Def. App. 147.) For a few shipments of steel coil, believed to total less than 15,000 pounds, Klauer mistakenly shipped the steel coil product bearing the Klauer brand instead of the EMCO brand. Id. Klauer promptly recognized the clerical error and paid EMCO its full sales commissions. Id.

[3] Klauer also alleges EMCO has engaged in other misconduct including knowingly approving of and selling product with a paint system and application process incompatible with the manufacturing process. (Def. App. 147-48.) After learning of this misconduct, in addition to the other problems pertaining to EMCO's breaches of the parties' agreements, Klauer

advised that it was ceasing to manufacture EMCO-brand products, with the exception of seamless steel siding coil, effective July 1, 2013. (Def. App. 148.)

I. The District Court Denied EMCO's Motion for Injunctive Relief Because EMCO Failed to Establish Irreparable Harm.

[1] On June 13, 2013, EMCO moved for a temporary restraining order and preliminary injunction, requesting that Klauer be restrained and enjoined, as follows:

> (1) ordering Plaintiff to continue business in the ordinary course with respect to Plaintiff's manufacture of all EMCO-brand products under the Marketing Agreement, and prohibiting Plaintiff from its planned breach of the Marketing Agreement by ceasing to manufacture and sale of EMCO branded products as of July 1, 2013;
>
> (2) prohibiting Plaintiff from carrying out its plan to announce to any or all of its customers, whether orally or in writing, that Plaintiff intends to discontinue manufacturing EMCO-branded products;
>
> (3) prohibiting Plaintiff: (a) from selling and/or distributing "seamless steel siding coil", "16-foot box siding" and "portable seamless roofing" products and other exclusively EMCO-brand products (collectively, the "Exclusive EMCO Products") to customers that are not EMCO-approved customers/accounts; (b) from selling and/or distributing the Exclusive EMCO Products under the Klauer-brand name/label; and (c) from otherwise continuing to violate the terms of the Sales and Marketing Agreement.

(Dkt.36.)

[2] The parties filed briefs and opposing affidavits. Klauer did not stop manufacturing certain EMCO-brand products until after the Court's July 11, 2013 injunction hearing. Upon conclusion of that hearing, the District Court denied, from the bench, EMCO's motion. The Order Denying Defendants' Motion for Injunctive Relief was filed on July 22,

2013. (Def. App. 218.) EMCO did not request that the District Court certify the Order as a final judgment under Rule 54(b). (Def. App. 1-4.) EMCO filed a notice of appeal on August 1, 2013. (Def. App. 219.)

[3] On September 3, 2013, EMCO moved the Supreme Court for an injunction pending appeal. Klauer responded on September 23, 2013. On October 3, 2013, the Court denied EMCO's Rule 8 motion.

I. The Parties' Conduct Since the District Court's Ruling Makes Injunctive Relief Moot.

[1] Since the July 11, 2013, oral ruling and July 22, 2013, written order, the parties have substantially changed their business relationship.[1] In July and early August, 2013, Klauer again advised EMCO of its plan to discontinue manufacturing some EMCO-brand products. (Second Igo Aff., ¶ 5.)[2] Klauer extended several alternatives by which EMCO could manufacture or source those products. (Id. ¶ 6.)

[2] Ultimately, in early August 2013, Klauer ceased manufacturing certain EMCO-brand products. (Id. ¶ 7.) EMCO communicated that decision to Klauer customers in writing on August 8,

[1] Those business changes are not part of the record before this Court or the District Court. The Court is being advised of those changes pursuant to N.D. R. App. 42(c) as it pertains to Klauer's argument that the denial of the preliminary injunction is a moot issue. See In re Van Sickle, 2005 ND 69, ¶ 11, 694 N.W.2d 212 (advising the Court of factual developments which mooted the appellate issue); Bright v. Taylor, 554 F.2d 854, 858 (8th Cir. 1977) (permitting the appellee to submit an affidavit advising the Court of intervening factual developments which mooted the appellate issue).

[2] The Second Igo Affidavit was submitted to the Supreme Court in response to EMCO's motion for an injunction pending appeal.

2013. (Id. ¶ 8.) Klauer also communicated that decision to its other customers. Id.

[3] Klauer's decision was not intended to end EMCO's business, nor has it had that effect. Klauer continues to manufacture steel siding coil under the EMCO brand, and EMCO continues to sell that product. (Id. ¶ 7.) EMCO also has the ability to sell Klauer branded products as a sales representative. (Id. ¶ 9.)

[4] Finally, based upon information received by Klauer through others in the industry, EMCO is apparently nearing arrangements with another manufacturer to provide the discontinued EMCO-brand products. (Id. ¶ 10.) That approach is as contemplated by the parties' agreements. (Def. App. 123.) Accordingly, EMCO's argument that its business has been, or will be, terminated is not supported by the facts.

STANDARD OF REVIEW

[1] EMCO appeals the district court's order denying its motion for injunctive relief. As explained in Eberts v. Billings Cnty. Bd. of Commissioners:

> The decision to grant or deny a preliminary injunction is within the discretion of a trial court, and its determination will not be disturbed on appeal absent an abuse of discretion. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law.

2005 ND 85, ¶ 8, 695 N.W.2d 691 (internal citations omitted).

ARGUMENT

I. EMCO's Appeal Should Be Dismissed Because the Court Lacks Jurisdiction.

[1] Before considering the merits of an appeal, the Court must determine whether it has jurisdiction. "Ordinarily, a temporary injunction before trial is not reviewable by interlocutory appeal." Id. ¶ 5. This is because the Court has "a strong tradition that no appeal lies from a judgment that is interlocutory and not final." Barth v. Schmidt, 472 N.W.2d 473, 474 (N.D. 1991) (internal quotations omitted). The Court has established a two-part test to determine whether jurisdiction over an appeal exists:

> First, the order appealed from must meet one of the statutory criteria of appealability set forth in NDCC § 28-27-02. If it does not, our inquiry need go no further and the appeal must be dismissed. If it does, then Rule 54(b), NDRCivP, must be complied with. If it is not, we are without jurisdiction.

[2] Mann v. N.D. Tax Commissioner, 2005 ND 36, ¶ 7, 692 N.W.2d 490.

[3] Klauer agrees that the statutory criteria is met but disputes that EMCO has complied with Rule 54(b) because EMCO did not request that the District Court certify a judgment.

A. EMCO did not seek Rule 54(b) certification and has not established the circumstances are "unusual," "compelling," or "out of the ordinary."

[1] Under Rule 54(b), a district court may enter a final judgment adjudicating fewer than all of the claims upon 'express determination that there is no just reason for delay' and upon 'express direction for the entry of judgment.'" Id. ¶ 8. As the Court explained in Peterson v. Zerr:

> We recognize[] that the purpose of the Rule is to balance the competing policies of permitting accelerated review of certain judgments with the desire to avoid the waste in appellate resources which can accompany piecemeal review, and that therefore certification should not be entered routinely or as a courtesy or accommodation to counsel. Thus, the trial court is to weigh the policy against piecemeal appeals with whatever exigencies the case may present, and the burden is on the proponent to establish prejudice and hardship which would result if certification were denied.

443 N.W.2d 293, 297 (N.D. 1989).

[2] Pursuant to Rule 54(b), the district court must identify relevant factors "demonstrating unusual prejudice or hardship which could counterbalance the strong policy against piecemeal appeals." Barth, 472 N.W.2d at 473. The non-inclusive factors the courts consider when assessing a Rule 54(b) certification include:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

[3] Pifer v. McDermott, 2012 ND 90, ¶ 10, 816 N.W.2d 88.

[4] In a series of cases, the Court has determined that Rule 54(b) certification has been improvidently granted and, consequently, has dismissed the parties' appeals. For example, in Sargent County Bank v. Wentworth, the district court granted the Bank prejudgment possession of a debtor's livestock and farm equipment and then declined Rule 54(b) certification. 434 N.W.2d 562, 563 (N.D. 1989). The Bank moved to

dismiss the debtor's appeal from that order, arguing it was not appealable because it was not certified under Rule 54(b). Id.

[5] Agreeing with the Bank, the Court held "the absence of a Rule 54(b) certification requires [the Court] to decline to consider the propriety of the order appealed from." Id. at 565. The Court reasoned that the "pretrial injunction"[3] did not present the unusual or compelling circumstances necessary to warrant Rule 54(b) certification and some issues raised on appeal could be rendered moot by future developments. Id.

[6] Similarly, in a series of cases entitled Gissel v. Kenmare Township, the Court considered first, a party's failure to seek Rule 54(b) certification, and then, whether certification was improvidently granted. In Gissel I, the Kenmare airport extinguished the right to travel on a township section line road abutting the Gissels' property. 463 N.W.2d 668, 669 (N.D. 1990). Although the district court initially enjoined the closure of the road, it later dissolved that injunction, and the Gissels appealed. Id. at 669-70.

[7] Because the Gissels had not sought Rule 54(b) certification, the Court determined it lacked jurisdiction and dismissed the appeal. Id. at 672. The Court considered that a damages trial was pending and the district court could, at any time, review the interlocutory order. Id.

[8] Subsequent to the appeal, the district court determined there was no just reason for delay and certified a final judgment. Gissel v. Kenmare Township, 479 N.W.2d 876, 877 (N.D. 1992). The Supreme

[3] The Court has described the prejudgment order entered in Sargent Cnty. Bank as being "the equivalent of a 'pretrial injunction.'" Gissel, 463 N.W.2d at 671-72.

Court determined the Rule 54(b) certification had been improvidently granted because this was not the “infrequent harsh case” and again dismissed the Gissels’ appeal. Id. at 877-78.

[9] Likewise, in Rose Creek Dev. Corp. v. Plaza Dev. Group, 514 N.W.2d 368 (N.D. 1994), the parties disputed their respective obligations under a land-development contract. Id. at 369. The district court granted a temporary injunction, ordered the property be sold, and certified its order under Rule 54(b). Id. The Court dismissed the appeal, holding the certification was improperly granted because it ran counter to the Court’s long-standing policy against piecemeal appeals and could result in an advisory opinion. Id. at 369-70. The Court determined the record did not reflect “hardship or prejudice sufficient to consider this an ‘infrequent harsh case’” and that plaintiffs could seek monetary damages for harm they suffered from the sale of their land. Id. at 370.

[10] Finally, in Mann, 2005 ND 36, 692 N.W.2d 490, the Court again deemed Rule 54(b) certification improper. The district court enjoined the State from collecting motor vehicle fuels excise taxes on Native Americans living on reservations. Id. at ¶ 1. The State appealed the order granting an injunction but did not seek certification. Id. ¶ 9-10.

[11] The Court held that even if certification had been granted, it would have been improvident. Id. at ¶¶ 12-13. As the Court explained, the case was not the “‘infrequent harsh case’ warranting the extraordinary remedy of an otherwise interlocutory appeal” and the State had not met its

burden of demonstrating "that the case's circumstances are 'unusual and compelling' or 'out-of-the-ordinary.'" Id. As a result, the Court determined it lacked jurisdiction and dismissed the State's appeal. Id. at ¶ 13.

[12] As in those cases, EMCO was required to seek certification under Rule 54(b). EMCO did not. Accordingly, the record does not reflect facts demonstrating circumstances so "unusual and compelling," that the Court should review an interlocutory order. It also does not reflect consideration of the 54(b) factors, including the relationship between the adjudicated and unadjudicated claims, that these same issues may need to be considered by the Supreme Court upon a later review, and that review might be mooted by future developments. See Gissel II, 479 N.W.2d at 876 (explaining that because the appellant did not seek 54(b) certification, neither party created a record demonstrating out-of-the-ordinary circumstances). EMCO plainly has not carried its burden of establishing that this case is "unusual and compelling" or anything more than an ordinary business dispute between sophisticated parties.

A. This case does not meet the Court's limited Rule 54(b) certification exception.

[1] The Court has carved out a limited exception to 54(b) certification requirements "when interim relief affects fundamental interests of the litigants." Fargo Women's Health Org. v. Lambs of Christ, 502 N.W.2d 536, 538 (N.D. 1993). In cases when the Court has excused the Rule 54(b) certification requirement, the preliminary injunction has implicated constitutional rights. Id.; Eberts, 2005 ND 85, ¶ 5, 695 N.W.2d 691.

[2] In Fargo Women's Health Org. v. Lambs of Christ, the district court granted a preliminary injunction restricting protestors' access to Fargo Women's Health Organization, when those protestors allegedly stormed the clinic, impeded patients' access, and inflicted physical harm upon patients seeking services. 488 N.W.2d 401, 406 (N.D. 1992). Although the district court had not certified under Rule 54(b), the Supreme Court reviewed the preliminary injunction because it implicated the parties' constitutional rights and "str[uck] a balance between the free-speech rights of anti-abortion protestors and the constitutional rights of women to obtain abortions." Fargo Women's Health Org., 502 N.W.2d at 537.

[3] Similarly, in Eberts, 2005 ND 85, ¶ 6, 695 N.W.2d 691, the Court considered whether to review a temporary injunction which involved "a political subdivision's right to use quick take provisions for condemnation proceedings." Acknowledging that a temporary injunction generally is not reviewable absent compliance with Rule 54(b), the Court

determined that certification was not required because the quick take procedures implicated "significant constitutional underpinnings for governmental entities." Id. ¶¶ 5, 6, 9, 11.

[4] On the other hand, in Rose Creek Development, a case not implicating constitutional rights, the Court declined to review the injunction under this exception. Although the district court had ordered the plaintiffs' land be sold to another developer, the Court held the injunction ordering said sale did not "affect such fundamental interests of the litigants that [the Court chose] to review the injunction notwithstanding the improvidently granted 54(b) certification." 514 N.W.2d at 370.

[5] EMCO has not suggested the denial of its preliminary injunction implicates fundamental rights. EMCO has no constitutional right to continued production of certain products by a manufacturer. Accordingly, the Rule 54(b) certification exception does not apply, and the Court should dismiss EMCO's appeal.

I. The Court Should Dismiss EMCO's Appeal Because the Request for Injunction is Moot.

[1] EMCO claims the District Court abused its discretion by denying its motion for a preliminary injunction to "preclude [Klauer] from: a) carrying out its plan to cease manufacture of EMCO brand products, and b) publicly announcing its intentions to do so." Br. at 2. EMCO's request is moot because both of those events have already occurred.

[2] The Supreme Court has summarized North Dakota law on mootness, as follows:

> Before reaching the merits of an appeal, we consider the threshold issue of mootness. This Court does not render advisory opinions, and will dismiss appeals if the issue becomes moot. There must be an actual controversy before this Court in order for it to properly adjudicate. If certain events have occurred which makes it impossible for the Court to issue relief, or when the lapse of time has made the issue moot, then no actual controversy exists. Under N.D.R.App.P. 42, a party has a duty to notify the Court when an issue may be moot due to a change in circumstance and explain why the appeal should or should not be dismissed.

Interest of W.O., 2004 ND 8, ¶¶ 10-11, 673 N.W.2d 264 (internal quotations and citations omitted).

[3] Following the District Court's July 2013 denial of EMCO's motion, Klauer ceased manufacturing EMCO-brand products with the exception of steel seamless siding coil. In early August 2013, both Klauer and EMCO advised customers that Klauer no longer produced some EMCO-brand products.

[4] Despite this fact, EMCO fails to explain why its preliminary injunction motion is not moot in light of the significant change in circumstances which occurred over one month prior to EMCO's filing of its appellate brief. Because of events which had already transpired, EMCO was obligated to inform the Court that its request to enjoin Klauer from "carrying out its plan to cease manufacture of EMCO brand products" and "publicly announcing its intentions to do so" was not merely "maintaining the status quo." See N.D. R. App. P. 42(c) ("When an issue before the court may have become moot due to a change in circumstance, the parties shall advise the court in writing and explain why appeal of the issue should or should not be dismissed."); see also Ashley Educ. Ass'n. v. Ashley Pub. Sch. Dist., 556 N.W.2d 666, 668 (N.D. 1996) (dismissing an appeal as moot

and noting that attorneys are obligated under the rules to advise the court of events which may moot an issue being considered); Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (holding that a party aware of circumstances mooting an issue must inform the court).

I. The District Court Did Not Abuse Its Discretion in Denying EMCO's Preliminary Injunction Motion.

[1] When deciding a preliminary injunction motion, the Court considers the following factors: (1) irreparable injury; (2) substantial probability of success on the merits; (3) harm to other interested parties; and (4) effect on the public interest. Eberts, 2005 ND 85, ¶ 8, 695 N.W.2d 691.

A. EMCO did not meet the irreparable injury standard required for injunctive relief.

[1] When granting injunctive relief, the Court considers whether the moving party will be irreparably harmed absent the grant of the motion. Id. "Irreparable harm" must be something more than a hardship. Hale v. Dep't of Energy, 810 F.2d 910, 918 (9th Cir. 1986). In evaluating "irreparable harm," the United States Supreme Court has held:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974).

1. EMCO's claim it will be forced out of business is not supported by the facts.

[1] The District Court denied EMCO's motion for injunctive relief, determining that EMCO could seek monetary damages if it ultimately prevailed on its breach of contract claim and that EMCO had not established irreparable injury.

[2] EMCO argues the District Court abused its discretion because it claims that "without an injunction, EMCO will be forced out of business." EMCO Br. at ¶ 12. As evidence of this claim, EMCO submitted an Affidavit of Michael Bullinger which states "if [Klauer] ceases to manufacture EMCO brand products, EMCO will have nothing to sell to its customers and will be put out of business." (Def. App. 214.) What Mr. Bullinger does not acknowledge, however, is that Klauer has not ceased manufacturing all EMCO-brand products. Instead, Klauer's June 10, 2013, letter to EMCO announced Klauer would continue manufacturing and producing steel seamless siding coil. (Def. App. 143.) Accordingly, Mr. Bullinger's affidavit does not substantiate EMCO's claim that it will be put out of business because Klauer ceased manufacturing <u>some</u> of its product. There is simply no evidence in the record to support EMCO's claim that it cannot continue operating its business if Klauer produces only steel seamless siding coil.

[3] Moreover, under the Sales and Marketing Agreement, EMCO can continue selling Klauer-branded products as a sales and marketing representative. The parties' agreements also permit EMCO to

either manufacture its own products or seek a third-party manufacturer. EMCO had several months before the discontinuation to consider whether and how it could manufacture or obtain the EMCO-brand products that Klauer no longer supplies.

[4] EMCO's argument that it will suffer irreparable harm is not supported by the facts. EMCO may not have the full business and product line it desires; however, EMCO still has the ability to sell EMCO-brand steel siding coil, sell Klauer-brand products as a sales and marketing representative, and manufacture or source the discontinued EMCO-brand products.

1. EMCO has not met the heightened standard of proving it is entitled to specific performance of a contract.

[1] Although EMCO requests that Klauer be ordered to continue producing certain products, it has not met the heightened standard required for obtaining specific performance of a contract. A party seeking specific performance "is held to a higher standard than if he merely asks for money damages for breach of the contract" and "must clearly show that the legal remedy of damages is inadequate." Livinggood v. Balsdon, 2006 ND 11, ¶ 5, 709 N.W.2d 723. In Livinggood, the Supreme Court held a tenant deprived of access to farmland did not meet the heightened standard of clearly showing monetary damages were inadequate because the tenant could secure farmland elsewhere. Id. at ¶ 7.

[2] Just like in Livinggood, EMCO can seek out another manufacturer to produce its products. EMCO's president, Mr. Bullinger, stated that he "believes" that EMCO will not be able to source these products from other manufacturers. While EMCO has stated its "belief," no record evidence reflects any attempt to obtain another source to manufacture the products or that certain manufacturers have refused to manufacture the discontinued products. Moreover, EMCO has not suggested that it is unable to obtain its own equipment to manufacture the products, as it did prior to January 2012. EMCO even acknowledges that it still possesses some of the machinery it used to produce its product line. (Def. App. 214.) EMCO simply has not met the "higher standard" of proving that monetary damages are inadequate.

[3] If EMCO ultimately succeeds in its argument that Klauer was required to provide the full EMCO-brand product line in perpetuity, it can seek damages for that alleged breach of contract. Presumably, EMCO would seek to recover damages measured by the difference in profits it may have had with a full EMCO line and the profits it actually obtains.

1. EMCO's reliance on Peoples State Bank is misplaced.

[1] EMCO argues Peoples State Bank of Velva v. State Bank of Towner, 253 N.W.2d 174 (N.D. 1977) establishes that loss of potential business contacts and competitive standings amounts to irreparable injuries.

[2] However, Peoples State Bank is not analogous. The district court entered a preliminary injunction, enjoining an illegal banking operation. Id. at 176. The district court then denied the illegal banking operation's motion to stay the preliminary injunction pending appeal, and the bank appealed that denial. Id.

[3] Affirming the district court, the Court determined that granting the stay would not "preserve the status quo" because the illegal bank had already ceased operating. Id. The Court also reasoned there was a substantial likelihood of success on the merits because the bank had operated in violation of North Dakota law and it was not in the public's best interests to have an illegal bank operating. Id. at 176-77. The Court further considered that the competing bank would lose customers and suffer a loss of competitive standing at a Banking Board hearing if the preliminary injunction was not granted. Id. at 177.

[4] As is evident, Peoples State Bank does not support the broad claim that a party is entitled to a preliminary injunction whenever it might lose customers. Rather, the Court considered much different circumstances — whether an illegal bank should be permitted to continue operating, pending appeal, when there was extensive evidence the bank was an illegal operation. EMCO asserts no such claim, nor has it established it is substantially likely the Court will find the parties' agreements impose a duty upon Klauer to continue producing EMCO-brand products. Moreover, EMCO's claim it may lose some customers if it declines to manufacture the

product itself or is unable to find another manufacturer is one in which damages can readily and easily be calculated. Simply stated, Peoples State Bank does not provide the broad support that EMCO claims.

[5] Finally, EMCO's brief does not cite the Court's second Peoples State Bank opinion, which arises from the bank's appeal from the district court's grant of a preliminary injunction. Peoples State Bank of Velva v. State Bank of Towner, 258 N.W.2d 144 (N.D. 1977). The Court dismissed the appeal, holding that issues on appeal had become moot "by occurrences subsequent to the issuance of the preliminary injunction." Id. at 146. Just as in Peoples State Bank II, the action EMCO seeks to enjoin has already occurred and the appeal should be dismissed as moot.[4]

[4] EMCO claims Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 258 (2d Cir. 1983) also establishes courts should grant a preliminary injunction when a company may suffer loss of prestige. But Norlin concerned illegal conduct, and the delisting of stock from the New York Stock Exchange is more akin to an "irreparable injury" than is discontinuing to manufacture certain products.

1. The out-of-jurisdiction cases relied upon by EMCO are not persuasive.

[1] EMCO cites several federal and state court cases in support of its claim that it has suffered irreparable harm because its business will be destroyed by Klauer discontinuing to manufacture some EMCO-brand products. These cases are inapposite as they do not suffer the fatal flaws inherent in EMCO's claim that its business will be lost: (1) Klauer continues to produce seamless steel coil; (2) EMCO continues as Klauer's sales and marketing representative; and (3) EMCO has not established it cannot obtain equipment to manufacture the discontinued products or that a third party will not manufacture those products. Moreover, several of the cases cited employ a different preliminary injunction standard, further evidencing their inapplicability.

a. Semmes Motors, Inc. v. Ford Motor Co. is inapplicable.

[1] EMCO relies on Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970), to support its claim that a preliminary injunction must be granted if there is a threatened loss of a business. The Semmes case is distinguishable in three important respects.

[2] First, the Second Circuit applied a preliminary injunction standard much different than North Dakota's. The Semmes court did not require the plaintiff demonstrate a likelihood of success on the merits.[5] 429

[5] Likewise in Roso-Lino Bev. Distrs, Inc. v. Coco-Cola Bottling Co., 749 F.2d 124, 125 (2d. Cir. 1984), also relied on by EMCO, the Second Circuit again used a different preliminary injunction standard. Moreover, Roso-Lino concerned the termination of a dealership, unlike EMCO's claim that it may be unable to obtain a manufacturer for certain siding products.

F.2d at 1205-06. Moreover, as part of its analysis of irreparable harm, the Second Circuit engaged in a balancing test to determine whether the preliminary injunction would have a greater impact on the plaintiff or defendant. Id. at 1205.

[3] North Dakota law provides no such balancing test and requires the movant establish a substantial likelihood of success on the merits. Because the Semmes' preliminary injunction standard differs, some courts have declined to follow it. See, e.g., Foreign Motors, Inc. v. Audi of America, 755 F. Supp. 30, 33 (D. Mass. 1991) (rejecting the less stringent Semmes preliminary injunction test and declining to deviate from the "well-established criteria" governing injunctive relief); Ormsby Motors, Inc. v. General Motors Corp., 842 F.Supp. 344, 351 n.8 (N.D. Ill. 1994) (finding Semmes "unpersuasive" because it was dated, not controlling, and "clearly contrary to the established authority on the standard for preliminary injunctions in this circuit"); Paw Paw Wine Distr. v. Seagram & Sons, Inc., 603 F. Supp. 398, 399 (W.D. Mich. 1985) (rejecting the relaxed Semmes irreparable harm requirement and applying the traditional injunctive relief standards).

[4] Moreover, the court in Semmes considered whether the district court erred in finding Semmes' company would be destroyed by the loss of a Ford dealership. The termination of a dealership is "tantamount to termination of a business altogether." Paw Paw Wine, 603 F. Supp. at 400. As explained, EMCO has not and will not suffer the loss of its business as a

result of Klauer not manufacturing some EMCO-brand products. EMCO submitted no evidence on the percentage of products Klauer is no longer producing (thereby indicating how much of EMCO's business is impacted by the discontinued products), the identities of any manufacturers who refused to produce the products, the percentage of EMCO's business devoted to serving as the sales and marketing representative for a complete line of Klauer products (a role not impacted by Klauer's decision to cease manufacturing certain products), a description of the machinery EMCO still has in its possession, and a description of EMCO's inability to obtain additional machinery (if needed) so it may produce its own product. See id. at 401 ("[P]laintiffs have presented no proof that they cannot obtain [the product] from other Michigan distributors."). In sum, Klauer's decision to discontinue manufacturing some EMCO-brand products is not "tantamount to termination of a business altogether." See Foreign Motors, 755 F. Supp. at 33 (holding franchisee will not suffer irreparable harm by having its franchise terminated because it can sell other vehicles and recover monetary damages for any lost revenue attributable to the terminated dealership); Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1441 (7th Cir. 1986) (affirming the denial of a preliminary injunction because plaintiff could continue to operate the business and could be compensated for lost profit damages incurred as a result of any damage to its "goodwill").

[5] Finally, in Semmes, the Second Circuit reviewed and affirmed the district court's grant of a preliminary injunction. In this case,

EMCO seeks review under a much different procedural posture: EMCO requests the Court hold the District Court abused its discretion in determining that EMCO would not suffer irreparable harm as a result of Klauer's decision to cease manufacturing some EMCO-brand products.[6] Insufficient evidence supports this claim.

a. Ross-Simons of Warwick, Inc. v. Baccarat, Inc. is inapposite.

[1] EMCO argues that Ross-Simons supports its claim that damage to goodwill, even relating to only 1% of the movant's product, demonstrates irreparable injury. The Ross-Simons district court granted the preliminary injunction because the crystal was very unique and one could not determine whether a potential registrant elected not to register with Ross-Simons because it no longer carried the unique crystal. 102 F.3d 12, 19-20 (1st Cir. 1996). Consequently, the district court determined it would be impossible to quantify Ross-Simons' lost sales of other registry items, alienation of future registrants, and harm to its reputation. Id. at 19.[7]

[6] EMCO's reliance on Graham v. Mary Kay, Inc., 25 S.W.3d 749 (Tex. Ct. App. 2000) is also misplaced. In Graham, the court reviewed the district court's grant of a permanent injunction issued after the court ruled as a matter of law that the defendant tortiously interfered with plaintiff's contractual relations. Id. at 753. Moreover, damages calculations based on the sale of Mary Kay cosmetics at flea markets would be difficult to calculate. Id. at 752-753. Here, EMCO's sales history is well-established and lost profits, if any, could be calculated.

[7] The same court, two years later, upheld the district court's denial of a preliminary injunction to enjoin Pepsi from distributing a competing line of products because it violated Pepsi's agreement with Ocean Spray. Ocean Spray Cranberries, Inc. v. Pepsico, Inc., 160 F.3d 58 (1st Cir. 1998). The First Circuit recognized that the violation of the parties' distribution agreement could diminish the plaintiff's sales, result in the misuse of confidential information, and impair the value of plaintiff's trademark, which would make damages difficult to prove with accuracy. Id. at 62-64. Nevertheless, the Court affirmed the denial, explaining that "the enforcement of contracts by injunction

[2] Unlike Ross-Simons, EMCO's damages are calculable. As EMCO admits, it possesses sales information for 2012 and certainly does for previous years. If it is determined that Klauer was obligated to supply all EMCO-brand products in perpetuity, EMCO's damages could be calculated. See American Express Financial Advisors Inc. v. Temm, 241 F. Supp. 2d 30, 33 (D. Me. 2003) (distinguishing Ross-Simons because lost profits could be calculated from consumer account records and expert testimony). EMCO does not have a claim that it has a unique product or that it does not know who purchases EMCO-brand products.

[3] Moreover, and critical to EMCO's reliance on Ross-Simons, the court in that case did not "find irreparable injury." EMCO Br. at 10 (emphasis added). Rather the appellate court determined it was a "close question" whether Ross-Simons had carried its "substantial" burden on the question of irreparable harm; however, the district court's conclusions were "reasonable," "not speculative," and "enough" in light of the district court's "broad discretion." Ross-Simons, 102 F.3d at 19-20.

[4] Finally, the Ross-Simons court considered that the movant had established a substantial likelihood of success on the merits because the parties' contract required the manufacturer continue to supply crystal to Ross-Simons. As is addressed in Part II(B), the parties' contracts in this case do not require Klauer to continue manufacturing EMCO-brand products, and, in fact, contemplate that Klauer will not.

is the exception rather than the rule" and that Ocean Spray's request for injunctive relief was too broad. Id. at 61.

A. Klauer has not breached the underlying contracts; accordingly, EMCO has not established a substantial likelihood of success on the merits.

[1] EMCO argues it established a substantial likelihood of success on the merits because Klauer will breach the Sales and Marketing Agreement (or now has breached) if it stops manufacturing certain EMCO-brand products. No term of that Agreement, however, obligates Klauer to manufacture EMCO-brand products. Rather, the Agreement appoints Klauer as the "exclusive manufacturer of record for all EMCO-brand steel and aluminum products sold under this Agreement." (Def. App. 193.) While the Agreement precludes EMCO from authorizing another manufacturer to produce EMCO-brand products without following the contractual provisions discussed below, it does not require Klauer to continue producing them. In other words, Klauer has the right to manufacture the product, not the obligation.

[2] EMCO seems to argue that section 3 of the Sales and Marketing Agreement, which establishes its term, obligates Klauer to manufacture EMCO-brand products. But Section 3 merely establishes how long the term remains in effect, and does not speak to the parties' obligations within the term. Section 3 states the term lasts so long as (1) Klauer "continues to manufacture residential steel siding products" and (2) EMCO maintains certain minimum sales volumes. (Def. App. 128.) Again, nothing in the term provision purports to obligate Klauer to continue manufacturing EMCO-brand products.

[3] Contrary to EMCO's position, the related Purchase Agreement and attached Covenant Not to Compete expressly contemplate that Klauer may cease manufacturing these products. They also protect EMCO in such a case.

[4] The Covenant Not to Compete, attached to the Purchase Agreement, prohibits EMCO from being involved in the manufacture or wholesale distribution of steel siding or accessories for five years. (Def. App. 122.) The Covenant states:

> if [Klauer] permanently discontinues manufacturing an item of Inventory that it purchased under the Asset Purchase Agreement or a color of product item listed in the EMCO Building Products catalog attached to the Asset Purchase Agreement, then [EMCO/Eastside] shall have the right to manufacture such discontinued product(s) or paint such product item to its specification, as applicable (or to contract with a third party for such manufacture or painting).

(Def. App. 123.) In other words, if Klauer ceases to manufacture any or all of the products, then the non-competition obligations are modified to allow EMCO/Eastside to manufacture them, or to contract for their manufacture.

[5] The only condition to the exercise of that right is that EMCO/Eastside must first "request" that Klauer "continue manufacturing or painting" the products. (Def. App. 123.) If Klauer does not continuing manufacturing, then EMCO may manufacture the product or contract with someone else for the job. Id. Nothing in the parties' agreements suggests that EMCO has the right to force Klauer to manufacture products or get damages or injunctive relief if it does not.

[6] EMCO seeks to turn its right to make a "request" into a binding obligation that Klauer must continue manufacturing product.

EMCO's approach is not supported by the express language to which it agreed. Accordingly, EMCO has failed to establish a substantial likelihood of success on the merits as to whether the parties' agreements obligate Klauer to continue manufacturing EMCO-brand products.[8]

A. EMCO's motion for a preliminary injunction should be denied because it may harm other interested persons and is contrary to public interest.

[1] The final two considerations, harm to interested persons and the public's interest, also weigh against issuing a preliminary injunction. EMCO argues all 25 of its employees "will have to be terminated if Klauer ceases manufacture of EMCO brand products." Br. at ¶ 20. EMCO does not explain how all of its employees will be terminated when Klauer is still manufacturing and supplying some EMCO-brand products, EMCO still serves as Klauer's sales and marketing representative, and EMCO can either manufacture or seek a third party to manufacture the discontinued EMCO-brand products.

[8] Curiously, EMCO argues Klauer "conceded" it breached the parties' contracts by mistakenly shipping a few orders of EMCO-brand product with the Klauer label. EMCO Br. ¶ 14. EMCO fails to explain, however, how this limited problem (which Klauer acknowledged and provided commissions to EMCO) warrants a preliminary injunction mandating that Klauer continue manufacturing EMCO-brand products. Perhaps EMCO could use this argument to seek an injunction ordering Klauer to cease manufacturing (due to these problems) but not to order the continued manufacture of EMCO-brand product when no contractual term mandates it.

Similarly, EMCO suggests it has established a substantial likelihood of success on the merits because Klauer intends to inform customers that it will no longer produce certain EMCO-brand products. Of course, this issue is moot as both EMCO and Klauer have informed customers of this change. Second Aff. of Mike Igo, ¶ 8. Moreover, this argument only has bearing on EMCO's motion that Klauer should not inform customers and does not affect EMCO's claim that Klauer is required to continue manufacturing product.

[2] Moreover, and contrary to EMCO's assertion, EMCO and Klauer have a significant dispute over the quality of material (particularly the paint system) used in the production of the steel siding products. In May 2013, Klauer learned from the paint company and paint applicator company that EMCO knowingly selected a paint system incompatible with the steel siding manufacturing process. EMCO proceeded with the product despite the obvious potential for rejected materials and warranty claims. Klauer and EMCO have differing views on the quality and selections of the products offered. Therefore, mandating Klauer to produce products, as EMCO wishes and with little regard to quality concerns, would harm the Klauer brand, its reputation, and its customers.

I. EMCO's Motion for a Preliminary Injunction Should be Denied Because It Fails to Comply with N.D.R. Civ. P. 65.

[1] Rule 65 governs the scope of an injunction and provides that a preliminary injunction must (1) "state its terms specifically"; and (2) "describe in reasonable detail, and not by referring to the complaint or other document, the acts restrained or required." N.D.R. Civ. P. 65(g)(2).

[2] On appeal, EMCO asserts that it is seeking a preliminary injunction to preclude Klauer from (1) ceasing to manufacture its products; and (2) announcing its intentions to do so. As reflected in its motion, EMCO seeks an injunction with much broader and less specific terms, including:

> "ordering [Klauer] to continue business in the <u>ordinary course</u> with respect to [Klauer]'s manufacture of <u>all EMCO-brand products</u> under the Marketing Agreement";

> "prohibiting [Klauer] from its planned breach of the Marketing Agreement";
>
> "prohibiting [Klauer] from carrying out its plan to announce to any or all of its customers . . . that [Klauer] intends to discontinue manufacturing EMCO-branded products";
>
> prohibiting [Klauer] from selling certain products to customers that are not EMCO-approved customers;[9] and
>
> prohibiting Klauer "from otherwise continuing to violate the terms of the Sales and Marketing Agreement."

(Dkt.36.)

[1] EMCO's proposed order neither states the terms with specificity, nor describes in reasonable detail the acts required of Klauer or the manner in which Klauer should be restrained. The crux of EMCO's motion is that Klauer should not be permitted to breach the terms of the parties' agreements. Disregarding the fact that the agreements impose no obligation on Klauer to manufacture products for a specified period, Rule 65 expressly states that a preliminary injunction may not refer to some "other document" to specify what acts are to be restrained or required. N.D.R. Civ. P. 65(g)(2)(A)(ii). Courts consistently hold that a preliminary injunction order banning the violation of a contract is unenforceable. See Sterling Drug, Inc. v. Bayer, 14 F.3d 733, 748 (2d Cir. 1994) (holding an injunction prohibiting the violation of a contract ran afoul of Rule 65); McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949).

[2] Rule 65's requirement for specific and detailed prohibitions is made for good reason. A party must be able to divine from the court's

[9] Contrary to EMCO's representation, nothing in the parties' agreements requires Klauer to obtain EMCO's approval to sell products to Klauer customers whether serviced by EMCO or otherwise.

order what acts are forbidden and/or required. See Islip v. Eastern Air Lines, Inc., 793 F.2d 79, 83-84 (2d Cir. 1986). EMCO's proposed preliminary injunction does not clearly specify what Klauer is required to do and prohibited from doing.

[3] EMCO's motion poses practical difficulties, as well. For example, the parties dispute the paint process selected by EMCO. The parties also dispute which customers are to receive the products manufactured by Klauer. The District Court did not abuse its discretion by declining to be placed between the parties as it relates to a variety of day-to-day business decisions, including product availability and options.

CONCLUSION

[1] EMCO's appeal should be dismissed because it fails to comply with Rule 54(b) and the issues raised are moot. In the alternative, the order should be affirmed because the District Court did not abuse its discretion in denying EMCO's preliminary injunction motion.

Dated: October 10, 2013

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Certificate of Compliance

The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7978.

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CERTIFICATE OF SERVICE BY EMAIL

Klauer Manufacturing Company
vs.
EMCO Building Products, Inc., et al.

Supreme Court No. 2013-0237

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned, being first duly sworn, states that she served the attached

Appellee's Brief

On October 10, 2013, by email as follows, to-wit:

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To the best of my knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

/s/ Lori Danielson

Lori Danielson

Subscribed and sworn to before me this 10th day of October, 2013.

/s/ Andrea Nowak

Notary Public
Cass County, North Dakota
My Commission Expires: July 20, 2016

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