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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

WILLIAM KAINZ AND GEOCHEMICALS, LLC, Plaintiff and Appellee, vs. JACAM CHEMICAL COMPANY 2013, LLC, Defendant and Appellant,	20220135 SUPREME COURT CASE NO. ~~20200180~~ Stark County District Court ~~53-2019-CV-01518~~ 45-2019-CV-00703 Southwest Judicial District Honorable William A. Herauf

BRIEF OF APPELLEE JACAM CHEMICAL COMPANY, 2013, LLC

APPEAL FROM ORDER STAYING CASE DATED JANUARY 19, 2022 (R. 258), ORDER DENYING MOTION FOR RECONSIDERATION (R. 272) AND ORDER GRANTING ATTORNEY FEES (R. 285)

ORAL ARGUMENT REQUESTED

Dated: September 26, 2022.

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JURISDICTION

I. THE COURT MUST DISMISS THE APPEAL OF THE DISTRICT COURT'S ORDER STAYING THE ACTION PENDING THE CONCLUSION OF THE KANSAS ACTION.

A. The District Court's Order Staying The Action Is Not An Appealable Order.

[1] At issue is whether the district court erred in entering its January 19, 2022 Order Granting Motion to Abate (the "Stay Order") (R 258), which stays this case pending resolution of an almost mirror-image Kansas case. In the Kansas case, filed eighty-one days before the above- captioned action, Appellants William Kainz ("Mr. Kainz") and GEOCHEMICALS, LLC ("GEO") are defendants and now counterclaim plaintiffs. An order granting a stay is not an appealable order as defined by statute for the following reasons.

[2] Only final judgments and orders enumerated by statute are appealable. *Energy Transfer LP v. N.D. Private Investigative & Sec. Bd.*, 2022 ND 84, ¶ 7, 973 N.W.2d 404, 409. In determining whether the Stay Order is appealable, the Court must first determine if it "meets one of the statutory criteria of appealability [] in N.D. CENT. CODE § 28-7-02. If it does not, [the] inquiry need go no further and the appeal must be dismissed." *Investors Title Ins. Co. v. Herzig*, 2010 ND 138, ¶ 23, 785 N.W.2d 863, 871 (citation and quotation marks omitted). "When an order or judgment is not appealable, this Court will dismiss the appeal sua sponte." *Gasic v. Bosworth*, 2014 ND 85, ¶ 4, 845 N.W.2d 306, 307.

[3] The Stay Order is not an order "affecting a substantial right … when such order in effect determines the action and prevents a judgment from which an appeal might be taken." N.D. CENT. CODE § 28-7-02(1). It neither determines Mr. Kainz's/GEO's North Dakota action on the merits nor permanently forecloses the North Dakota state courts to

the parties. *See Triple Quest, Inc. v. Cleveland Gear Co., Inc*., 2001 ND 101, ¶¶ 7-8, 627 N.W.2d 379, 381; *Gasic*, 2014 ND 85, ¶ 12; *State by and through Workforce Safety & Ins. v. Boechler, PC*, 2022 ND 98, ¶ 7, 974 S.W.2d 409, 411.

[4] Unlike a dismissal, "a stay is a temporary suspension of a procedure in a case[,] …. halts all progress of the action …. [and] merely operates to preserve the status quo …. A stay is [] distinct from an abatement in that the abatement of a suit results in the complete dismissal and discontinuance of the action." 13 AM. JUR. 2d *Actions* § 66. *See also City of Chicago v. Fulton*, 141 S. Ct. 585, 590 (2021). Thus, this case remains pending. If the Kansas action terminates before resolution on the merits, the stay in this case will be lifted and Mr. Kainz and GEO will proceed here in the North Dakota. If, on the other hand, the Kansas action terminates in a final judgment,[1] this case must be dismissed on res judicata grounds. *See* Prop. I, *infra* at ¶¶ 38-39. At that point, Mr. Kainz/GEO would be entitled to appeal.

B. The Court Should Refuse To Entertain Mr. Kainz's/GEO's Alternative Request For A Supervisory Writ.

[5] In the alternative, Mr. Kainz/GEO seek a supervisory writ. The Court's authority to grant a supervisory writ is discretionary. *Roe v. Rothe-Seeger*, 2000 ND 63, ¶ 5, 608 N.W.2d 289, 291. "Courts generally will not exercise supervisory jurisdiction where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay." *Id*. (citation and quotation marks omitted). The Court will exercise its discretion "rarely and cautiously and only to rectify errors and prevent injustice

[1] At this juncture, the outcome of the remaining claims in the Kansas litigation is wholly speculative.

in extraordinary cases in which there is no adequate remedy." *Id. See also Sauvageau v. Bailey*, 2022 ND 86, ¶ 7, 983 N.W.2d 207, 210.

[6] As noted, if the Kansas action terminates other than on the merits, the stay in this matter will be lifted and Mr. Kainz/GEO can proceed in this action. Clearly, an adequate alternative remedy exists. Moreover, this case does not present "matters of important public interest." *See, e.g., Sauvageau*, 2022 ND 86, ¶ 8 (exercising supervisory jurisdiction when the case involved a conflict between the government's eminent domain powers and private property rights in the arena of construction of flood control that affected the public). Rather, it presents a purely private matter between private parties. Not only that, events in Kansas which occurred after Mr. Kainz/GEO filed this appeal mooted the only public policy argument Mr. Kainz/GEO raise to support their challenge to the Stay Order. Thus, the case no longer even arguably implicates an important public interest. Mr. Kainz's/GEO's appeal is, in good part, based on an alleged conflict between two North Dakota public policies: one prohibiting improper claim splitting and the other prohibiting enforcement of non-competition/non-solicitation provisions in employment contracts per *Osborne v. Brown & Saenger, Inc*., 2017 ND 288, 904 N.W.2d 34.

[7] On August 3, 2022, the Kansas court determined that Mr. Kainz's and Jacam 2013's Employment Agreement's ("Employment Agreement") restrictive covenants were unenforceable by Jacam 2013 in North Dakota and granted judgment in favor of Mr. Kainz/GEO on any Jacam 2013 cause of action based on the alleged violation of the restrictive covenants. (*See* Exhibit "A," ¶¶ 2, 4, Appellants' Joint Motion to Take Judicial Notice of Non-Record Items). Now that the Kansas court has refused to enforce the non-competition/non-solicitation provisions against Mr. Kainz, even if the public policy

conflict rose to the level of an important public interest (which Jacam 2013 disputes), the issue no longer constitutes an active controversy for this Court's review. *See In re E.T.*, 2000 ND 174, ¶ 5, 617 N.W.2d 470, 471 (N.D. 2000) ("[a]n appeal will be dismissed if the issues become moot or academic such that no actual controversy is left to be determined" and no actual controversy exists when "related events" occur "which make it impossible for a court to grant effective relief").

[8] Mr. Kainz/GEO assert that because the Kansas court's order is interlocutory, "there is more than a hypothetical danger that" the Kansas court will attempt to enforce the non-competition/non-solicitation provisions in the Employment Agreement. *See* Appellants' Brief, ¶ 45. Mr. Kainz/GEO offer nothing to support their statement that a real danger exists. The Kansas court adopted the reasoning that the trial court in this case employed in entering a preliminary injunction in determining that North Dakota public policy forbade it from enforcing non-competition/non-solicitation provisions in North Dakota. No evidence exists that the Kansas court is inclined to change its mind. Additionally, the trial court's preliminary injunction in this case prevents Jacam 2013 from enforcing the non-competition/non-solicitation provisions in North Dakota even if the Kansas court were to change its mind. If the Kansas court's final judgment reflects a different result, Mr. Kainz/GEO can appeal from the final dismissal in this case.

[9] Because the Stay Order is an unappealable interlocutory order, the Court should dismiss this appeal as to the Stay Order.[2]

[2] The district court's attorney fee award is likely appealable. *Dieterle v. Dieterle*, 2022 ND 161, ¶ 13, – N.W.2d – (citation omitted).

STATEMENT OF THE ISSUES

[10] Whether the Court must dismiss Mr. Kainz's/GEO's appeal as to the Stay Order because it is not an appealable order.

[11] Whether the district court erred in concluding that there exists no exception to North Dakota's claim splitting doctrine when the law of the foreign jurisdiction contravenes North Dakota public policy.

[12] Whether the district court properly stayed the case when the record shows that Mr. Kainz's/GEO's North Dakota claims arise from the same transaction, or series of connected transactions and implicate a common nucleus of operative facts as Jacam 2013's claims in Kansas, and Mr. Kainz/GEO have brought the exact same claims in Kansas.

[13] Whether the district court abused its discretion in determining that Mr. Kainz's/GEO's Joint Motion for Reconsideration of Order Granting Motion to Abate (R. 260) was frivolous warranting an award of attorney fees to Jacam 2013.

STATEMENT OF THE CASE

[14] On June 6, 2019, Jacam 2013 filed suit against Mr. Kainz and GEO in Rice County, Kansas, District Court (the "Kansas court"). (R. 82: pp. 1, 14-18). Mr. Kainz and GEO (as well as others who are no longer part of the case) subsequently commenced an action in the North Dakota state court. (R. 1). Jacam 2013 moved to abate the North Dakota action (R. 208: p. 1: ¶ 1) arguing that Mr. Kainz's/GEO's North Dakota claims arise from the same transaction, or series of connected transactions, and implicate a common nucleus of operative facts as Jacam 2013's claims in Kansas. This is an appeal from the Honorable William A. Herauf's January 19, 2022, Order Granting Motion to Abate. (R 258).

[15] Also at issue is the district court's decision to award attorney fees to Jacam 2013 (R. 275; R. 285) following what the court deemed was Mr. Kainz's/GEO's frivolous quest to obtain reconsideration of the district court's Stay Order. (R. 260: p. 1: ¶ 1).

STATEMENT OF FACTS

I. THE KANSAS ACTION.

[16] Jacam 2013 manufactures, produces, markets, sells, and distributes specialty petrochemicals to its customers in the oil and gas field. (R. 79: p. 2: ¶ 3). Jacam 2013 does business in a highly competitive market. (*Id*.). Jacam 2013's success depends largely on its reputation and goodwill in the market, which is largely impacted by its senior managers and other key employees. (*Id*.)

[17] Jacam 2013 employed Mr. Kainz as Account Manager III, a senior level salesperson. (R. 79: p. 6: ¶ 18). He e-signed an Employee Agreement which contains non-disclosure provisions that protect the confidentiality of Jacam 2013's proprietary trade secrets and confidential information including, but not limited to, customer lists, details of the specific treatment programs Jacam 2013 is either offering a prospective customer or providing to an existing one, pricing, and analytical work – including laboratory work and well-site observations and measurements. (R. 79: pp. 2-6: ¶¶ 5, 9, 11-14). The Employee Agreement also contains covenants not to compete with Jacam 2013 or to solicit Jacam 2013's customers, prospective customers, or employees for a two-year period following termination within the relevant region. (R. 78: p. 3: ¶ 11).

[18] Mr. Kainz worked for Jacam 2013 from April 2014 until May 31, 2019, when he resigned and immediately began working for GEO, a direct competitor to Jacam 2013 in several states including Kansas and North Dakota. (R. 78: pp. 3, 7: ¶¶ 7, 18). In the course

of examining Mr. Kainz's company phone after he resigned, Jacam 2013 learned that for several weeks before he resigned), Mr. Kainz had been forwarding Jacam 2013's confidential information and trade secrets to his personal Gmail account and secretly delivering them by email to GEO employees formerly employed by Jacam 2013. (R. 78: p. 8, ¶ 25). In these emails, Mr. Kainz attached Jacam 2013's confidential production data, customer proposals and trade secret tools, with detailed information about Jacam 2013's confidential pricing information. (*Id*.). Among other attachments, Mr. Kainz sent GEO proprietary calculator tools built by Jacam 2013 and its affiliates, based on data and testing that Jacam 2013 spent considerable time, money and resources developing. Other attachments Mr. Kainz disclosed to GEO included lists of wells and production updates. (*Id*.).

[19] Consequently, on June 6, 2019, Jacam 2013 filed suit against Mr. Kainz/GEO in the Kansas court alleging (1) Mr. Kainz/GEO violated Kansas Uniform Trade Secrets Act, (2) Mr. Kainz breached his contractual agreements, (3) Mr. Kainz breached his fiduciary duties, and (4) GEO tortiously interfered with Jacam 2013's existing and prospective contractual relations. (R. 82: pp. 1, 14-18).

[20] Notably, throughout their briefing, Mr. Kainz/GEO repeatedly accuse Jacam 2013 of "racing to the [Kansas] courthouse" presumably to prevent them from bringing claims in North Dakota. But Mr. Kainz's/GEO's implication that Kansas's connections to the parties' dispute are merely fortuitous – solely a function of the Employee Agreement's choice of law provision – is simply wrong. GEO is a Kansas limited liability company headquartered in Kansas. (R. 78: p. 3: ¶ 7). Jacam 2013 was injured by Mr. Kainz's/GEO's joint actions both in Kansas and in North Dakota. Additionally, Mr. Kainz had substantial

contacts with Kansas.[3] Jacam 2013 performs all of its payroll, human resources, accounting, manufacturing, and laboratory analysis in Kansas; thus, Mr. Kainz had regular and repeated contact with Kansas via telephone, mail, and electronic communications. (R. 78: p. 7: ¶¶ 21-22). He ordered Jacam 2013 products from Kansas, sent customer samples to Kansas for laboratory analysis in Kansas, and directed any questions he had regarding payroll, human resources, and accounting to Kansas. (*Id*.) Mr. Kainz also received his paycheck from Kansas and had extensive contacts with GEO which is based in Kansas. (*Id*.).

[21] The Kansas court issued an ex parte temporary restraining order ("TRO") against Mr. Kainz/GEO, which was extended twice *by agreement* of the parties. (R. 87: p. 1; R. 89: p. 1; R. 90: p. 1). On July 10, 2019, GEO filed its answer raising as an affirmative defense that the forum selection and choice of law provisions in the Employee Agreement are unenforceable under North Dakota law, and that the "contracts" on which Jacam 2013 relied were unenforceable under North Dakota Law. (R. 211: p. 30). GEO asserted counterclaims against Jacam 2013, claiming that Jacam 2013 tortiously interfered with GEO's current and prospective contractual relations. (R. 211: pp. 31, 36-39). Specifically, GEO claimed that "beginning in early June 2019" (not surprisingly, when Jacam 2013 filed the Kansas action) Jacam 2013's agents, among other things, "[e]ssentially [] threatened to unnecessarily draw GEO's customers into this litigation – which was brought in a bad-faith attempt to quash legitimate competition." (R. 211: p. 34). On July 19, 2019, Mr. Kainz

[3] Additionally, the dispute involves more than the non-competition/non-solicitation provisions in the Employment Agreement. Mr. Kainz/GEO choose to ignore that the Employee Agreements contain non-disclosure provisions to protect proprietary, confidential information and trade secrets which North Dakota protects. *See* N.D. CENT. CODE § 47-25.1 *et seq*.; *SolarBee, Inc. v. Walker*, 833 N.W.2d 422 (N.D. 2013).

filed his answer. (R. 212: p. 1). Like GEO, Mr. Kainz asserted the unenforceability of Jacam 2013's contract as a defense in his answer. (R. 212: pp. 2, 3). Further, Mr. Kainz admitted that he had signed the Employment Agreement with Jacam 2013, which contained restrictive covenants. (R. 212: p. 2).

[22] On March 20, 2020, Jacam 2013 filed a motion for partial summary judgment arguing that Kansas law applied to Mr. Kainz's contract and, therefore, the restrictive covenants in his contract were enforceable. (R. 213: p. 7). Mr. Kainz and GEO each responded claiming that regardless of the terms of the Employment Agreement, North Dakota law applied. (R. 201 and 202: p. 23; R. 203: p. 16). Both argued that pursuant to North Dakota law, the Employment Agreement's non-competition/non-solicitation and forum solicitation clauses were unenforceable. (*Id*.).

[23] More than two years later, on May 2, 2022, Mr. Kainz/GEO filed a joint motion for summary judgment seeking an order: (1) holding that the restrictive covenants in the Employment Agreement were unenforceable against him in North Dakota as a matter of law, and (2) dismissing any Jacam 2013 claim against Mr. Kainz and GEO based on the unenforceable restrictive covenants in the Employment Agreement. (*See* Exhibit "A," Appellee's Motion to Take Judicial Notice of Non-Record Items). The Kansas court has refused to enforce the non-competition/non-solicitation provisions against Mr. Kainz. (*See* Exhibit "A," Appellants' Joint Motion to Take Judicial Notice of Non-Record Items).

[24] Moreover, on August 12, 2022, Mr. Kainz/GEO filed a joint motion for leave to file amended pleadings, which the Kansas court granted on August 30, 2022. (*See* Exhibit "B," Appellee's Motion to Take Judicial Notice of Non-Record Items). Mr. Kainz has since filed his amended pleading, including claims for (1) abuse of process for wrongfully

obtaining a TRO in Kansas, (2) malicious prosecution for continuing to pursue claims reliant on the restrictive covenants in Mr. Kainz's Employment Agreement, and (3) breach of contract. (*See* Exhibit "C," Appellee's Motion to Take Judicial Notice of Non-Record Items).

II. THE NORTH DAKOTA ACTION.

[25] Jacam 2013 did not file the action in Kansas mere days before Mr. Kainz/GEO filed an action in North Dakota. Instead, Jacam 2013 filed the Kansas action eighty-one days before Mr. Kainz/GEO (among others) commenced an action in the North Dakota state court. (R. 1). Nothing in the record suggests that Mr. Kainz/GEO had contemplated bringing an action in North Dakota prior to Jacam 2013 filing an action in Kansas or, if they did, that Jacam 2013 knew of those plans. Thus, despite Mr. Kainz's/GEO's claims, the record shows that Jacam 2013 did not rush to the Kansas courthouse with the intent of beating Mr. Kainz/GEO to the North Dakota courthouse.

[26] In this case, Mr. Kainz/GEO allege that Jacam 2013 sued them and obtained a TRO based on the non-competition/non-solicitation provisions in the Employment Agreement. (R. 1: pp. 6-9: ¶¶ 45, 47-59). Mr. Kainz/GEO brought a claim that Jacam 2013 tortiously interfered with Mr. Kainz's and GEO's employment agreement by filing the Kansas case and obtaining a TRO knowing the non-competition/non-solicitation provisions were unenforceable in North Dakota and in an attempt to contravene North Dakota law. (*Id*.: p.p. 12-13: ¶¶ 87-95). Further, Mr. Kainz/GEO sought a declaratory judgment that the non-competition/non-solicitation provisions were unenforceable and an injunction preventing Jacam 2013 from enforcing the provisions. (*Id*.: pp. 13-16: ¶¶ 94-105 and pp. 16-18: ¶¶ 106-13). Jacam 2013 removed this action twice on the basis of diversity jurisdiction. (R.

54; R. 63). After each removal, Jacam 2013 requested that the federal court abstain from determining the action pending resolution of the same claims in Kansas. (R. 210: pp. 1, 5: ¶¶ 1, 17).

[27] On August 31, 2021, Mr. Kainz/GEO filed an Amended Complaint. (R. 186: p. 1). New to the Amended Complaint were allegations that Jacam 2013 wrongfully obtained the Kansas TRO not only because it knew that the non-competition/non-solicitation provisions in the Employment Agreement were unenforceable, but it misled the judge who granted the order. (*Id*.: p.3: ¶¶ 17-18.)[4] In addition to the tortious interference, declaratory judgment and injunction actions pleaded in the Complaint, Mr. Kainz/GEO brought an additional claim for abuse of process based on the allegedly wrongfully procured TRO. (*Id*.: p. 11: ¶¶ 70-76).

[28] Mr. Kainz/GEO also moved for a preliminary injunction to prevent Jacam 2013 from enforcing the non-competition/non-solicitation provisions of Mr. Kainz's Employment Agreement. Jacam 2013 responded, in part, by arguing that Mr. Kainz/GEO were impermissibly claim splitting in pursuing their North Dakota claims. (R. 76: ¶¶ 44-45). Mr. Kainz/GEO conclusorily replied that they were not impermissibly claim splitting but did not otherwise argue that Jacam 2013 had waived application of the doctrine by failing to plead it. (R. 97: p. 6: ¶12). The court entered a preliminary injunction on May 6, 2021, prohibiting Jacam 2013 from enforcing the restrictive covenants in Mr. Kainz's Employment Agreement in North Dakota. (R. 109: p.7, ¶ 16).

[4] Presumably, Mr. Kainz/GEO were in possession of Jacam 2013's application for TRO and the order by the time they filed the Complaint, but apparently, they did not compare the application with the order until a year later.

[29] On November 4, 2021, Jacam 2013 moved to abate the case. (R. 208: p. 1: ¶ 1). In opposition, Mr. Kainz/GEO argued that pursuant to *Osborne*, 2017 ND 288, North Dakota courts must exclusively determine the enforceability of non-competition/non-solicitation provisions of employees working in North Dakota; thus, it was permissible to bring claims implicating the enforceability of such provisions in North Dakota. (R. 218: pp. 3-4; ¶ 5). Additionally, Mr. Kainz/GEO argued that they were not impermissibly splitting claims essentially because (1) Mr. Kainz was not pursuing claims in Kansas, (2) GEO's Kansas claims for tortious interference were limited to contracts/relationships with existing and prospective customers, not with employees and thus were not based on the same operative facts as the claims in North Dakota, and (3) several of their claims were unknown or did not arise until the Kansas case was filed. (R. 218: pp. 7-9: ¶¶ 12-15).

[30] In issuing the Stay Order, the district court determined, first, that Jacam 2013 had sufficiently raised the issue of claim splitting/abatement in its pleadings such that Mr. Kainz/GEO were not surprised and had the opportunity to fully brief the issue. (R. 258: pp. 1-2; ¶¶ 3. 5). Noting that the Kansas action was filed first in time, the trial court further concluded that the North Dakota claims arose from the same series of transactions as the Kansas claims and that sufficient identity of the parties exited. (R. 258: p. 2: ¶¶ 4-5).

[31] Mr. Kainz/GEO moved to reconsider on February 16, 2022, and asked whether the Stay Order permitted Jacam 2013 to violate the trial court's preliminary injunction. ((R. 260: p. 1: ¶ 1; R. 261: p. 1: ¶ 3). They argued again that there was not an identity of either claims or parties between the Kansas and North Dakota actions and asserted that Jacam 2013 was ignoring the preliminary injunction by continuing to seek damages in Kansas. (R. 261: p. 2: ¶ 5).

[32] The district court denied Mr. Kainz's/GEO's motion to reconsider noting that they had failed to identify any grounds to reconsider. (R. 272: p. 1: ¶ 1). Subsequently, Jacam 2013 moved for attorney fees arguing that Mr. Kainz's/GEO's motion for reconsideration was frivolous. (R. 275: pp. 1-2: ¶¶ 6, 10-15). The district court agreed and awarded Jacam 2013 attorney fees. (R. 285). This appeal followed.

LAW AND ARGUMENT

I. BECAUSE THERE IS NO PUBLIC POLICY EXCEPTION TO APPLICATION OF THE RULE AGAINST CLAIM SPLITTING, THE DISTRICT COURT DID NOT ERR.

[33] Mr. Kainz/GEO assert that the district court erred in staying the North Dakota action since it is against North Dakota public policy to enforce the Employment Agreement's choice of law and non-competition/non-solicitation provisions. Other than to extensively cite from *Osborne*,[5] Mr. Kainz/GEO offer authority to support their position. However, they essentially argue that the trial court should have applied a public policy exception to North Dakota's rule against claim splitting. As noted, resolution of the public policy issue was mooted by the Kansas court's August 3, 2022, order holding that the Employment Agreement's non-competition/non-solicitation covenants were unenforceable against Mr. Kainz in North Dakota and granting judgment to Mr. Kainz/GEO on any Jacam 2013 cause of action based on the alleged violation of the

[5] It is beyond debate that *Osborne*, 2017 ND 288, articulates North Dakota's public policy as Mr. Kainz/GEO argue in the Appellants' Brief, ¶¶ 38-43. Notwithstanding, the sole issue before the Court in *Osborne* was whether the choice of law/forum selection clause in plaintiff's contract with defendant was enforceable *in a North Dakota court*. *Osborne* does not purport to address the issue now before this Court – whether Mr. Kainz's/GEO's subsequently-filed action must be abated in favor of the first-filed Kansas action due to their improper claim splitting. Jacam 2013 legally and properly brought an action against Mr. Kainz/GEO before they field this action. *See* SOF ¶ 22.

restrictive covenants, *see* Statement of Facts ("SOF"), ¶ 25. However, even if this was not the case, the trial court in this case correctly determined that there is no North Dakota public policy exception to the claim splitting doctrine.

[34] As the Court in *Lucas v. Porter*, 2008 ND 160, ¶ 10, 755 N.W.2d 88, 93 observed, "[a] party with a single cause of action generally may not split that cause of action and maintain several lawsuits for different parts of the action." The "single cause of action theory" prevents claims splitting by requiring either (1) abatement during the pendency of the first lawsuit – if the two actions are maintained simultaneously – or (2) a bar to judgment in the second suit by application of res judicata – if the first suit is terminated in a judgment on the merits. *Id*.

[35] The Court further noted that a res judicata analysis determines whether a party has impermissibly split claims. *Id*. That is, if the requisite elements of res judicata are present but the first-filed case has not yet gone to judgment, the court must presume that it will ultimately dismiss the case on res judicata grounds. *Id*. In other words, abatement may be characterized as an "anticipatory" res judicata bar.

[36] The United States Supreme Court has made clear:

> Regarding judgments [], the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. *For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.*

Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (emphasis added). Crucially, not only is there no "ubiquitous public policy exception permitting one State to resist recognition of another State's judgment," but there are "no considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith

and credit clause … require[s] to be given a judgment outside the state of its rendition." *Id*. (citations and quotation marks omitted). *See also Grove v. Juul Labs, Inc.*, 293 Cal. Rptr.3d 202, 216 (Cal. Ct. App. 2022).

[37] This Court likewise applies this well-established constitutional principal. "[C]onstitutional full faith and credit is afforded to foreign judgments even though a similar judgment could not be obtained in the forum state as a matter of law, or though the judgment could not be obtained in the forum state as a matter of strong public policy." *Am. Standard Life & Acc. Ins. Co. v. Speros*, 494 N.W.2d 599, 602 (N.D. 1993). A North Dakota court may refuse to recognize a foreign judgment only if rendered without due process, or by a court without jurisdiction, or if the judgment was fraudulently obtained. *Brossart v. Janke*, 2020 N.D. 98, ¶ 28, 942 N.W.2d 856, 864.

[38] Since the res judicata doctrine is determinative in the claims splitting analysis, it follows that if a North Dakota court would be required to recognize a final foreign judgment for res judicata purposes, a North Dakota court would also be required to recognize a potentially final foreign judgment in determining whether to abate for improper claim splitting. To be sure, the principle of fundamental fairness underlies the determination of privity and res judicata, and the doctrine should not be applied "to defeat the ends of justice or to work an injustice." *Fredricks v. Vogel Law Firm*, 2020 N.D. 171, ¶ 12, 946 N.W.2d 507, 511.[6] Notwithstanding, simply because a foreign judgment is at

[6] *See also, e.g.*, *Global Mktg Solutions, L.L.C. v. Chevron U.S.A. Inc.*, 286 So.3d 1054, 1064 (La. Ct. App. 2019) ("These cases suggest that the 'exceptional circumstances' provision is likely to be applied most often in complex procedural situations, in which litigants are deprived of any opportunity to present their claims because of some quirk in the system which could not have been anticipated. 'Exceptional circumstances' might also be applied to factual scenarios that could not possibly be anticipated by the parties or decisions that are totally beyond the control of the parties."); *People v. Jones*, 845 N.E.2d

odds with North Dakota public policy is not a valid consideration when determining whether a foreign judgment has res judicata effect in North Dakota. The requirement that North Dakota recognize a foreign judgment has a constitutional dimension to which North Dakota public policy must yield.

[39] The trial court did not err in determining that claims splitting applied despite the fact that North Dakota public policy prohibits the application, in North Dakota courts, of several of the restrictive covenants in the Employment Agreement.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT MR. KAINZ/GEO IMPERMISSIBLY SPLIT THEIR CLAIMS.

A. Standard of review.

[40] The applicability of res judicata, and thus, whether a case must be abated or dismissed, is a question of law. *Matter of Estate of Finstrom*, 2020 ND 227, ¶ 46, 950 N.W.2d 401, 413. The Court, therefore, reviews the issue de novo. *Botteicher v. Becker*, 2018 ND 111, ¶ 8, 910 N.W.2d 861, 864.

B. By filing the North Dakota action, Mr. Kainz and GEO improperly split claims.

[41] As noted, North Dakota law is clear that claim splitting is not permissible. *Lucas*, 2008 ND 160, ¶ 10. "[W]hen there is a single cause of action, although there may be different kinds of damages, only one suit can be brought." *Id*., ¶ 17. "[A] valid final judgment on plaintiff's claim extinguishes all rights of plaintiff to remedies against defendant with respect to all or any part of [a] transaction, or series of connected

598, 608-09 (Ill. 2006), *abrogated on other gds. by People v. McDonald*, 77 N.E.3d 26 (Ill. 2016) (special circumstances may suspend the doctrine of collateral estoppel if application "would result in manifest injustice" such as when a litigant is denied the opportunity to litigate the issue).

transactions out of which [the] action arose" and "transaction connotes a natural grouping or common nucleus of operative facts." *Id*., ¶ 18 (cation omitted). Moreover:

> Res judicata applies even though the subsequent claims may be based on a different legal theory. If the subsequent claims are based upon the identical factual situation as the claims in the earlier action, then they should have been raised in the earlier action. It does not matter that the substantive issues were not directly decided in the earlier action, the key is that they were capable of being, and should have been raised, as part of the earlier action.

Fredericks, 2020 ND 171, ¶ 11 (citations omitted). *See also SNAPS Holding Co. v. Leach*, 2017 ND 140, ¶ 28, 895 N.W.2d 763, 770.

[42] Mr. Kainz/GEO argue that *Lucas* is distinguishable because there was "no dispute that North Dakota was a proper venue" in that case. *See* Appellants' Brief, ¶ 58. Apparently, Mr. Kainz/GEO question whether Kansas is the proper venue for claims related to the "non-compete agreements." *Id*. Mr. Kainz's/GEO's reference to "venue" is unclear. If they intend to refer to the Employment Agreement's forum selection provision which dictates that lawsuits arising from breaches of the Employment Agreement must be brought in Kansas, Mr. Kainz/GEO have never disputed that the Kansas court has personal jurisdiction over both of them. Thus, Jacam 2013 properly sued Mr. Kainz/GEO in Kansas even in the absence of a forum selection clause. Moreover, the Kansas court was free to reject, and indeed ultimately did reject, Jacam 2013's argument that it must apply the Employment Agreement's choice of law provision to determine the enforceability of the non-competition/non-solicitation provisions of the Employment Agreement. Whether Jacam 2013 could have brought its claims arising from breaches of the non-competition/non-solicitation provisions of the Employment Agreement in North Dakota is simply no longer a live issue.

[43] *Lucas* is instructive on how to apply the identity of claims and identity of parties analysis. Lucas owned 30%, James Porter owned 30% and Becker owned 40% of Bancshares, a holding company which owned the shares of First State Bank. Lucas and Mr. Porter agreed to maintain equal shares of Bancshares and jointly offered to purchase Becker's shares. Unknown to Lucas, Mr. Porter later purchased all of Becker's shares, which prompted Lucas to sue Mr. Porter, and Bancshares and First State Bank as Mr. Porter's agents ("*Lucas I*"). Lucas sought (1) involuntary dissolution of Bancshares, (2) an order directing Bancshares to deliver 30% of its stock in First State Bank, (3) conversion damages, (4) an order allowing Lucas to vote his First State Bank shares, (5) an order prohibiting First State Bank from holding shareholder meetings, and (6) attorney fees. Lucas later amended his complaint to omit Mr. Porter.

[44] Shortly before trial in *Lucas I*, Lucas sued Mr. Porter and his wife, Becker, Bancshares, and First State Bank asserting that after Mr. Porter reneged on his agreement to purchase one half of Becker's shares in Bancshares, Mr. Porter voted his shares in Bancshares to prevent Lucas from engaging in management of Bancshares and First State Bank (*Lucas II*). Lucas brought claims for (1) breach of contract against Mr. Porter, (2) breach of fiduciary duty against Mr. Porter and Becker, (3) minority shareholder oppression against the Porters and Becker, (4) constructive trust against Mr. Porter and Bancshares, (5) conversion against the Porters, and (6) vicarious liability against the entities. Lucas also sought remove James as a shareholder and director of the entities.

[45] After a trial and judgment in *Lucas I*, defendants moved to dismiss *Lucas II* alleging improper claims splitting. On appeal from the dismissal, this Court concluded that although the parties to the two actions were not exactly the same, "the allegations in *Lucas I* and

Lucas II arose out of the same common operative facts … and those facts constitute the same cause of action for purposes of the prohibition against splitting a cause of action." *Lucas*, 2008 ND 160, ¶ 21. Lucas could not escape application of the rule against claim splitting merely by asserting that the claims in the two cases differ because they are based on different legal remedies or theories. *Id*.

[46] Applying *Lucas*, the district court correctly determined that Mr. Kainz/GEO had impermissibly split their claims by filing the North Dakota action. Mr. Kainz/GEO assert that the district court erred because the requisite identity of claims does not exist between the Kansas and North Dakota cases. GEO argues that its initially filed intentional interference claims in Kansas arose from factual circumstances distinct from the interference claims in North Dakota. Mr. Kainz argues that because he did not pursue counterclaims in Kansas, he cannot be accused of claim splitting by filing claims here. Both positions are incorrect for several reasons.

[47] First, Mr. Kainz/GEO misapprehend the parameters of the same "transaction, or series of connected transactions" or a "common nucleus of operative facts," *Lucas*, 2008 ND 160, ¶ 18. Specifically: (1) Despite having executed an agreement with Jacam 2013 in which he promised not to compete with or solicit customers from Jacam 2013 or to disclose Jacam 2013's proprietary information post-employment, Mr. Kainz left Jacam 2013's employ and, even before leaving, began to compete with and solicit customers from Jacam 2013 and to disclose Jacam 2013's proprietary information to GEO (SOF, ¶¶ 19-20); (2) Despite knowing that Mr. Kainz had agreed not to compete with and solicit customers from Jacam 2013, GEO hired him; (3) Jacam 2013 filed suit in Kansas and obtained a TRO (which was twice extended through agreement of the parties) prohibiting Mr. Kainz from

working for GEO (SOF, ¶ 21); (4) Both Mr. Kainz/GEO filed answers in Kansas alleging that the non-competition/non-solicitation provisions in the Employment Agreement were unenforceable and, therefore, they could not be liable to Jacam 2013 for claims arising from any breach of those provisions (SOF, ¶ 23); (5) In Kansas, GEO filed counterclaims for intentional interference with existing and prospective customers and suppliers asserting, in part, that Jacam 2013 threatened to draw customers and suppliers into the Kansas litigation if they did business with GEO (SOF, ¶ 23); (6) In their amended complaint in this action, Mr. Kainz/GEO asserted abuse of process and malicious prosecution claims alleging that Jacam 2013 prosecuted the Kansas litigation, including obtaining a TRO, with knowledge that the non-competition/non-solicitation provisions in the Employment Agreement were unenforceable under North Dakota law (SOF, ¶ 29); (7) In Kansas, Mr. Kainz and GEO recently obtained permission to amend their answers (and Mr. Kainz has in fact amended his answer) to include claims essentially the same claims they brought here. SOF, ¶ 26.

[48] It is certainly true, that GEO's intentional interference claims in Kansas challenge Jacam 2013's contended interference with its customers and suppliers as opposed to its employment relationship with Mr. Kainz.[7] This argument misses the point. The question is whether GEO's North Dakota claims arise from the same transaction or series of transactions as Jacam 2013's claims in Kansas, not whether GEO's permissive counterclaim in Kansas arises from the same transaction or series of transactions as Jacam 2013's claims in Kansas (which they do). As GEO's own pleadings unequivocally demonstrate, all of GEO's interference claims pleaded in North Dakota (and now Kansas)

[7] *See* Appellants' Brief, ¶ 60.

arise from the alleged breach of the Employment Agreement and Jacam 2013's Kansas lawsuit. According to Mr. Kainz/GEO, Jacam 2013's Kansas lawsuit – allegedly wrongfully asserting unenforceable contractual provisions – likewise forms the basis for their North Dakota tortious interference claims. SOF, ¶¶ 26, 29. Regardless of what claims for relief Mr. Kainz/GEO asserted, the facts, transactions and occurrences underlying all of the claims for relief are exactly the same. Thus, the claims arise out of the same transactions or series of connected transactions.

[49] Second, Mr. Kainz/GEO ignore that "[u]nder the doctrine of res judicata, a valid, existing final judgment from a court of competent jurisdiction is conclusive on the parties … with regard to the issues raised, ***or those that could have been raised***, and determined therein." *Pennington v. Cont'l Res., Inc.*, 2021 ND 105, ¶ 9, 961 N.W.2d 264, 267 (citation and quotation marks omitted) (emphasis added). Importantly, claims arising from the same transaction or series of connected transactions are compulsory counterclaims in both Kansas and in North Dakota. *U.S. Fid. & Guar. Co. v. Maish*, 908 P.2d 1329, 1334 (Kan. Ct. App. 1995); *Yesel v. Brandon*, 2015 ND 195, ¶ 16, 867 N.W.2d 677, 682-83. The failure to assert a compulsory counterclaim "bars its assertion in a later action involving the same transaction or occurrence." *Id*. *See also Konopasek v. Ozark Kenworth, Inc.*, 2018 WL 1744520, at *3 (D. Kan. Apr. 11, 2018).

[50] Mr. Kainz/GEO argue that the trial court did not properly consider that claim splitting does not apply to unknown or unaccrued claims. *See* Appellants' Brief, ¶ 62. Mr. Kainz/GEO argued below that they did not know the facts underlying their North Dakota claims when they filed answers, and GEO brought a counterclaim in Kansas. Mr. Kainz's/GEO's Kansas pleadings belie that assertion. As Jacam 2013 pointed out to the

district court, Mr. Kainz's/GEO's pleadings are rife with allegations that Jacam 2013 acted in bad faith in bringing the Kansas action. (R. 222: pp. 6-8: ¶¶ 14, 16). Moreover, since Jacam 2013's application for TRO and the Kansas court's order granting it (the basis for Mr. Kainz's/GEO's North Dakota claims, including their abuse of process claim) were filed more than two months before Mr. Kainz/GEO filed the above-captioned action, their claims had accrued, and they knew or should have known about them. *See* SOF, ¶¶ 22-23.

[51] Since their claims had accrued and they should have known they existed, nothing prevented Mr. Kainz/GEO from pursuing, in Kansas, the claims they instead initially opted to pursue in North Dakota. And a mere two months before the scheduled Kansas trial, Mr. Kainz/GEO sought and received permission to amend their Kansas pleadings to add counterclaims for the same abuse of process and malicious prosecution claims they pleaded in North Dakota that allegedly arise from Jacam 2013's purported wrongful action in obtaining a TRO in Kansas. *See* SOF, ¶ 26. Mr. Kainz has filed an amended pleading, while GEO has not. Thus, Mr. Kainz is the plaintiff[8] in both Kansas and North Dakota seeking the exact same relief on the exact same claims. When GEO files its amended pleading, it too will be the plaintiff in both jurisdictions seeking the exact same relief. Consequently, to the extent Mr. Kainz/GEO claim they would be prejudiced by not being able to fully litigate their claims against Jacam 2013 in Kansas, any alleged controversy has been

[8] Simply because, at the inception of the case, Mr. Kainz was only a defendant, he was not relieved of the res judicata effect of a judgment for Jacam 2013 even in the absence of filing compulsory counterclaims. *See Mills v. City of Grand Forks*, 2012 ND 56, ¶ 12, 2012 N.W.2d 574, 578 ("[A]n action based on an omitted defense cannot be permitted in guise of a claim for restitution of a former judgment already paid or for damages measured by its execution.") (citations and quotation marks omitted)).

resolved.[9] Resolution on the merits of the claims in Kansas will determine all facts underlying the North Dakota claims, so res judicata will require the district court in this case to dismiss.

[52] Third, an identity of the parties exists between the Kansas and the North Dakota cases. Mr. Kainz/GEO are parties (both as defendants and counterclaim plaintiffs) in Kansas and in North Dakota. A judgment in Kansas for or against Jacam 2013 will bind Jacam 2013, Mr. Kainz and GEO, and will prevent them from relitigating issues that were resolved against them in any subsequently filed suit, including this one. Thus, although Jacam 2013 addressed in the district court whether Mr. Kainz was in privity[10] with GEO and thus bound by a resolution of GEO's Kansas counterclaim, he has now brought claims against Jacam 2013 and whether he is in privity with GEO is no longer an issue.

[53] Applying the claim splitting doctrine in this case did not permit Jacam 2013 to avoid North Dakota's public policy. Not only is North Dakota required to recognize a foreign judgment even if against North Dakota public policy for res judicata purposes, *see* Prop. I, *supra*, ¶¶ 36-40, but Jacam 2013 did not evade North Dakota public policy. The Kansas court applied North Dakota law and entered judgment in favor of Mr. Kainz/GEO.

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[9] If the Kansas and North Dakota cases are not identical, it is because Mr. Kainz/GEO have purposefully failed to address all of their claims in Kansas seemingly in a bid to preserve an argument that they did not impermissibly split claims by filing the above-captioned action.

[10] Mr. Kainz's undeniably close connection to GEO with regard to the claims at issue show he is in privity with GEO. North Dakota applies an "'expanded' version of privity" such that "privity exists if a person is 'so identified in interest with another that he represents the same legal right.'" *Lucas*, 2008 ND 160, ¶ 22 (quoting *Ungar v. N.D. State Univ.*, 2006 ND 185, ¶ 12, 721 N.W. 16 and *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992)). Prior to Mr. Kainz amending his pleadings, his and GEO's interests were identical such that GEO represented Mr. Kainz's legal rights.

III. JACAM 2013 DID NOT WAIVE IMPROPER CLAIM SPLITTING BY FAILING TO PLEAD IT AS AN AFFIRMATIVE DEFENSE.

A. The trial court did not err in considering Jacam 2013's Motion to Abate even assuming Jacam 2013 failed to raise claim splitting in its Answer to the First Amended Complaint.

1. Standard of review.

[54] Assuming *arguendo* that improper claims splitting is an affirmative defense in North Dakota, in addressing Jacam 2013's Motion to Abate, the district court either determined that the pleaded affirmative defenses adequately encompassed claim splitting or essentially permitted Jacam 2013 to amend its pleadings. This Court reviews the district court's determination for abuse of discretion. *See Hagen v. N. D. Ins. Res. Fund*, 2022 ND 53, ¶ 8, 971 N.W.2d 833, 836.

2. Mr. Kainz/GEO had ample notice of Jacam 2013's claim splitting argument.

[55] North Dakota follows a liberalized pleading approach requiring only that the pleading "place the [opposing party] on notice as to the general nature" of the claim. *Tibert v. Minto Grain, LLC*, 2004 ND 133, ¶ 18, 682 N.W.2d 294, 297. "All pleadings shall be so construed as to do substantial justice." *Id.* (brackets removed) (citation omitted).

[56] In *First Nat'l Bank of Belfield v. Burich*, 367 N.W.2d 148, 152 (N.D. 1985), defendant did not plead failure of consideration as an affirmative defense. However, the Court determined that the failure to plead the defense did not constitute a waiver because defendant's defense and counterclaim for breach of contract were so similar in substance to the affirmative defense of failure of consideration as to provide adequate notice and to prevent any surprise to plaintiff. Consequently, failure to precisely comply with N.D. R. CIV. P. 8(c)was not fatal. *See also Hansen v. First Am. Bank & Trust of Minot*, 452 N.W.2d 770 (N.D. 1990) (holding that the district court did not abuse its discretion in permitting

the bank to amend its pleadings to raise affirmative defenses on the date set for trial because courts should freely permit amendment and plaintiff was not prejudiced since the court allowed plaintiff time to brief the issues and prepare a defense); *Leet v. City of Minot*, 2006 ND 191, 721 N.W.2d 398, 402 (the trial court did not abuse its discretion in permitting defendant to raise an affirmative defense for the first time in a summary judgment motion). Applying this authority, because the abatement analysis is identical to the res judicata analysis, Jacam 2013's preservation of that affirmative defense in its Answer to First Amended Complaint more than amply provided the requisite notice to Mr. Kainz/GEO that their claims were subject to dismissal for impermissible claim splitting.

[57] Mr. Kainz/GEO argue that the district court erred by failing to determine that Jacam 2013 waived the doctrine of claim splitting by not raising it for two years. They blatantly ignore that Jacam 2013 raised the very issue in federal court twice before moving to abate the case in North Dakota on its final remand. SOF, ¶ 28. And, as Mr. Kainz/GEO acknowledged in their briefing supporting their request for a preliminary injunction, Jacam 2013 raised the issue of claim splitting in April 2021 before it filed its answer on September 13, 2021 SOF, ¶ 30. The district court did not err in determining that Mr. Kainz/GEO had notice of the claim splitting issue.

3. Claim splitting is not an affirmative defense in North Dakota.

[58] Jacam 2013 pleaded estoppel and res judicata as affirmative defenses which are included in the list of affirmative defenses in RULE 8(c)(1). However, neither "improper claim splitting" nor "abatement" are enumerated affirmative defenses in North Dakota.

[59] An affirmative defense is a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's [] claim, even if all of the allegations in the complaint are

true." *Safeway Transit LLC v. Discount Party Bus, Inc.*, 954 F.3d 1171, 1182 (8th Cir. 2020) (quoting *Black's Law Dictionary* (11th ed.)). North Dakota authority holds that abatement is not an affirmative defense. Instead, "[t]he defense of another action pending between the same parties for the same cause is a dilatory plea." *Meagher v. Quale*, 77 N.W.2d 878, 881 (N.D. 1956). A dilatory plea is a defense "at common law, founded on some matter of fact *not connected to the merits of the case*, but such as might exist without impeaching the right of action itself." *Black's Law Dictionary* 411 (5th ed.) (emphasis added). A dilatory plea defeats a cause of action regardless of whether the claims have merit. *See* 1 AM. JUR. 2d *Abatement, Survival, and Revival* § 2 (2005) (internal footnotes omitted) ("A defense in abatement is dilatory in nature and is intended to defeat the particular action because that action has been improperly brought in some respect that does not go to the merits of the cause of action ….").

[60] Unlike a dilatory plea where the merits of plaintiff's claims are not at issue, the court and/or the fact finder must assess the merits of the plaintiff's cause of action in applying an affirmative defense. Admittedly, *Meagher* pre-dates modern pleading standards. However, given the paucity of law on the subject, a North Dakota litigant would be hard-pressed to know that abatement is an affirmative defense if indeed it is one.

[61] Mr. Kainz's/GEO's citation to Alabama law is inapposite. At issue in *Baldwin Mut. Ins. Co. v. McCain*, 260 So.3d 801 (Ala. 2018), was an Alabama statute that provided when two actions involving the same cause and parties are pending simultaneously in Alabama state courts, "the pendency of the [first-filed case] is a good defense to the [later-filed case]. *Id*. at 810 (quoting ALA. CODE § 6-5-440). The statute expressly required defendant to "raise the first-filed action as a defense." *Id*. (citation omitted). As Jacam 2013 has pointed

out, no North Dakota statute requires a party to plead as a defense that another action is pending between the same parties for the same claims.

[62] Moreover, in *McCain*, plaintiff McCain (the case on appeal) was a defendant/counterclaimant in a second-filed suit, *Baldwin Mut. Ins. Co. v. Adair*, 181 So.2d 1033 (Ala. 2014). The *Adair* court granted summary judgment in favor of Baldwin Mutual on both its claims and McCains counterclaims. McCain did not appeal. In *McCain*, plaintiff McCain argued that the *Adair* final judgment was not preclusive of her claims in *McCain* because the court of first filing, *McCain*, obtained exclusive jurisdiction leaving the *Adair* court with no subject matter jurisdiction. The *McCain* court rejected the argument concluding that the *Adair* court had concurrent subject matter jurisdiction and that McCain's failure to seek to abate *Adair* either before final judgment or on appeal waived the § 6-5-440 defense. *Id*. at 811.

[63] Unlike plaintiff McCain, Jacam 2013 did not waive claim splitting by not raising it before the North Dakota court to enter judgment against it. And as Jacam 2013 has already pointed out, the trial court did not abuse its discretion in entertaining the motion since Mr. Kainz/GEO had ample notice of and opportunity to be heard on the issue.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT MR. KAINZ'S/GEO'S MOTION TO RECONSIDER WAS FRIVOLOUS.

A. Standard of review.

[64] N.D. CENT. CODE § 28-26-01(2) authorizes the district court, in the exercise of its discretion, to determine whether a claim is frivolous, but once it does, it must award fees. *Rath v. Rath*, 2016 ND 105, ¶ 6, 879 N.W.2d 735, 738. Thus, this Court reviews the district court's determination that Mr. Kainz's/GEO's motion to reconsider was frivolous for abuse of discretion. *Id*. "A district court abused 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." *Bolinske v. Sandstrom*, 2022 ND 148, ¶ 30, 978 N.W.2d 72, 83.

B. Mr. Kainz's/GEO's Motion for Reconsideration was not filed for a proper purpose.

[65] Motions for reconsideration are not recognized in North Dakota. *Hoffarth v. Hoffarth*, 2020 ND 218, ¶ 7, 949 N.W.2d 824, 827. Rather, courts treat such motions as either N.D. R. CIV. P. 59(j) motions or N.D. R. CIV. P. 60(b) motions. *Id*. In this case, Mr. Kainz/GEO invoked RULE 59(j) in support of their Motion for Reconsideration. (R. 261: p. 1: ¶ 1)

[66] RULE 59(j) "may be used to ask the court to reconsider its judgment and correct errors of law." *Flaten v. Couture*, 2018 ND 136, ¶ 28, 912 N.W.2d 330, 338. *See also Fonder v. Fonder*, 2012 ND 228, ¶ 10, 823 N.W.2d 504, 508. "[M]otions for reconsideration are not vehicles for relitigating old issues." *Dvorak v. Dvorak*, 2001 ND 178, ¶ 8, 635 N.W.2d 135, 138. Additionally, it is improper to raise an argument for the first time in a motion to reconsider that could have been raised earlier. *Id*. (citing *Ellingson v. Knudson*, 498 N.W.2d 814, 818 (N.D. 1993) (stating "[this] kind of afterthought, or shifting of ground, is not one of the circumstances in which a motion for reconsideration is appropriate")).

[67] Rather, as the Court in *Ellingson* observed:

> A motion to reconsider is appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

498 N.W.2d at 818 (citation, quotation marks and internal brackets omitted). *See also Akpovi v. Douglas*, 43 F.4th 832, 837 (8th Cir. 2022) ("Motions under [FED. R. CIV. P. Rule 59(e)] which is exactly the same as RULE 59(j)[11] serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence and cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to the entry of judgment." (citation and quotation marks omitted)).

[68] "To constitute clear error within the meaning of RULE 59(e), courts have required a very exacting standard, such that the Court's final judgment must be dead wrong to constitute clear error." *Smith v. Lynch*, 115 F. Supp. 3d 5, 11 (D.D.C. 2015) (citations and quotation marks omitted). Thus, a court does not abuse its discretion to deny a RULE 59(e) motion that merely relies on the arguments previously made with no citation to an intervening change of law or that does not present new evidence. *Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006); *In re Gen. Motors Corp. Anti-Lock Brake Prod. Liab. Litig*., 174 F.R.D. 444, 446 (E.D. Mo. 1997).

[69] A claim is frivolous "if there is such a complete absence of facts or law a reasonable person could not have expected a court would render a judgment in that person's favor." *Matter of Guardianship of S.M.H.*, 2021 ND 104, ¶27, 960 N.W.2d 811, 819. This Court has affirmed the award of sanctions in the context of improper motions to reconsider. In *Negaard v. Negaard*, 2005 ND 96, ¶ 24, 969 N.W.2d 498, 504, for instance, the Court

[11] The Court "may look to persuasive federal authority when interpreting" North Dakota's civil procedure rules. *City of Bismarck v. McCormick*, 2012 ND 53, ¶ 12, 813 N.W.2d 599, 603.

concluded that the district court did not abuse its discretion in awarding attorney fees when appellant's motion to reconsider included no legal authority "that would require the [district court] to reverse its Order" and appellant "did not offer new legal arguments or facts that would cause the [district court] to reconsider." *Cf. Larson v. Larson*, 2002 ND 196, ¶¶ 12-13, 653 N.W.2d 869, 874 (awarding appeal-related attorney fees). Federal courts agree that "[a] motion to reconsider is frivolous if it contains no new evidence or arguments of law that explain why the magistrate should change an original order that was proper when made." *Magnus Elecs., Inc. v. Masco Corp. of Ind.*, 871 F.2d 626, 630 (7th Cir. 1989). *See also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986).

[70] Extant authority supports the district court's conclusion that a motion to reconsider filed for an improper purpose is a frivolous filing. A review of Mr. Kainz's/GEO's pleadings reveals that they did not identify any clear error on the part of the district court warranting reconsideration. *See* SOF ¶ 33. Moreover, Mr. Kainz's/GEO's stated reason for seeking reconsideration – to alert the district court to the possibility that its Stay Order conflicted with its preliminary injunction – makes little sense. Presumably a stay does not negatively impact already-existing orders, like the trial court's preliminary injunction.

[71] Therefore, the district court was well within its discretion to conclude that Mr. Kainz's/GEO's Joint Motion for Reconsideration – which was nothing but a rehash of its prior arguments, or perhaps an attempt to raise a new issue (the effect of the Stay Order on the preliminary injunction) that could have been raised in response to Jacam 2013's Motion to Abate – was filed for an improper purpose. Because the trial court did not abuse its discretion in determining that the Joint Motion for Reconsideration was frivolous, it was required to award reasonable fees pursuant to § 28-26-01(2).

REQUEST FOR ORAL ARGUMENT

[72] Jacam 2013 requests oral argument. Oral argument will assist the Court by allowing counsel for the parties to address any specific questions the Court may have.

CONCLUSION

[73] Mr. Kainz/GEO have failed to establish that they are entitled to relief. First, the district court's Stay Order is not appealable at this time. Second, even if it was, the district court did not err in its application of North Dakota law prohibiting claim splitting. Third, the district court did not abuse its discretion in concluding that Mr. Kainz's/GEO's Motion for Reconsideration was frivolous and, accordingly, awarding Jacam 2013 attorney fees.

Dated this 26th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

[74] The undersigned, as attorneys for the Appellee in the above matter, and as the author of the above brief, hereby certify, in compliance with RULE 32(a) of the NORTH DAKOTA RULES OF APPELLATE PROCEDURE, that the above brief was prepared with proportional type face in 12-point font and equals 38 pages, exclusive of this Certificate of Compliance.

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I hereby certify that on September 26, 2022, a true and correct copy of the foregoing **BRIEF OF APPELLEE JACAM CHEMICAL COMPANY 2013, LLC** was served by email to the following:

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