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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

WILLIAM KAINZ and GEOCHEMICALS, LLC, *Plaintiffs and Appellants,* vs. JACAM CHEMICAL COMPANY 2013, LLC, *Defendant and Appellee.*	Supreme Court No. 20220135 Stark County No. 45-2019-CV- 00703

APPELLANTS WILLIAM KAINZ AND GEOCHEMICALS, LLC'S JOINT MOTION TO TAKE JUDICIAL NOTICE OF NON-RECORD ITEMS

[¶1] Appellants William Kainz and GeoChemicals, LLC (collectively "Appellants"), by and through their attorneys of record and pursuant to North Dakota Rule of Appellate Procedure 27, move this Court to take judicial notice of pleadings filed after this appeal was filed in a related proceeding pending in the Rice County, Kansas district court.

ARGUMENT

[¶2] This appeal involves this action and a related action pending in Kansas state court as described in detail in Appellants' Brief. After this appeal was filed, Appellee filed a motion to dismiss certain claims of Mr. Kainz in Kansas; this motion impacts this appeal and Appellants want to bring to this Court's attention to provide current information about the status of the Kansas action. The motion in Kansas is discussed in paragraphs 6 through 9 of Appellants' Reply Brief. A copy of the motion is attached as Exhibit A. Further, after this appeal, Appellee filed a response opposing a motion to amend pleadings of Appellants in Kansas; this response brief impacts this appeal and Appellants want to bring to this Court's attention to provide current

information about the status of the Kansas action. The response brief in Kansas is discussed in paragraph 12 of Appellants' Reply Brief. A copy of the response brief is attached as Exhibit B.

CONCLUSION

[¶3] This Court should grant the motion and take judicial notice of the Kansas pleadings filed by Appellee.

Dated this 20th day of October, 2022.

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IN THE TWENTIETH JUDICIAL DISTRICT COURT
DISTRICT COURT, RICE COUNTY, KANSAS
CIVIL DEPARTMENT

JACAM CHEMICAL COMPANY 2013, LLC, *Plaintiff,* vs. WILLIAM A. KAINZ, GEOCHEMICALS, LLC, and GENE ZAID, *Defendants.*	CASE NO. 2019-CV-000021

(Pursuant to K.S.A. Chapter 60)

JACAM 2013'S ANTI-SLAPP MOTION TO STRIKE OR
IN THE ALTERNATIVE MOTION TO DISMISS WILLIAM A. KAINZ'S CLAIMS

COMES NOW Plaintiff Jacam Chemical Company 2013, LLC ("Jacam 2013") and, pursuant to the Kansas Public Speech Protection Act, moves to strike or alternatively, pursuant to KSA § 60-212(b)(6), to dismiss counterclaims asserted by Defendant William A. Kainz ("Kainz") in his Amended Answer to Jacam 2013's Second Amended Verified Petition and Application for Temporary and Permanent Injunction ("Amended Answer"), and states as follows:

I. SUMMARY OF MOTIONS

Pursuant to the Kansas Public Speech Protection Act ("KPSPA"), Jacam 2013 moves to strike Kainz's three mirror image counterclaims against Jacam 2013—malicious prosecution, abuse of process, and breach of contract—("Counterclaims"). The Counterclaims, intended to

harass, intimidate, and punish Jacam 2013 for exercising its First Amendment right to petition the government and courts for redress, are the type of pernicious litigation, known as "strategic lawsuits against public participation," or "SLAPP" cases, that judges and legislatures, including in Kansas, recognize as a violation of the First Amendment. The Court should strike the Counterclaims because they arise from protected activity—Jacam 2013's right to petition--and Kainz cannot meet his burden of providing substantial competent evidence to support a prima facie case for any of his Counterclaims.

Alternatively, Jacam 2013 moves to dismiss the Counterclaims for failure to state a claim upon which relief may be granted pursuant to K.S.A. § 60-212(b)(6). Taking all facts alleged as true, rather than setting forth sufficient facts to support his Counterclaims, Kainz makes only conclusory statements, which fail to establish legally cognizable claims. Specifically: (1) Kainz's malicious prosecution claim is premature; (2) Kainz's malicious prosecution claim is otherwise deficient because it fails to provide facts that show how or why Jacam 2013 lacked probable cause in its pursuit of the TRO; (3) Kainz's abuse of process claim fails because there is no factual averment to show that Jacam 2013 used the legal process for an improper purpose in securing the TRO; and (4) Kainz's breach of contract claim fails because he does not allege facts to support the essential elements of this claim.

II. LEGAL STANDARD

A. Dismissal Under the Kansas Anti-SLAPP Statute

Claims are subject to strike under the KPSPA when the claims are **"based on, relate[] to or [are] in response to a party's exercise of the right of free speech, right to petition or right of association."** K.S.A. § 60-5320(d). Under the KPSPA, a party may move to strike such claims any time within "60 days of the service of the most recent complaint." *Id*. When a party makes

such a motion and shows that the claims trigger the KPSPA, the burden of proof shifts to the non-movant to provide substantial competent evidence to establish a prima facia case for the claims. *Id.* If the non-movant fails to meet his burden, the court must dismiss his claims. *Id*. All discovery and hearings are stayed once a KPSPA motion is filed, and a hearing must be held within thirty days of service of the motion. *Id*. If the Court denies a KPSA motion to strike, the movant has the right to file an interlocutory appeal. K.S.A. § 60-5320(f).

B. Dismissal for Failure to State a Claim

Pursuant to K.S.A. § 60-212(b)(6), a pleading is subject to dismissal when the pleader can prove no set of facts in support of his claim that would entitle him to relief. *See Goldbarth v. Kansas State Bd. Of Regents*, 269 Kan. 881, 9 P.3d 1251, 1254 (2000) (affirming dismissal pursuant to K.S.A. 60-212(b)(6) for failure to state a claim upon which relief could be granted). Under this standard, the pleading must give the court reason to believe the pleader has a reasonable likelihood of musting factual support for his claims. *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)). If the pleader cannot, dismissal is appropriate. *Id*.; *Rector v. Tatham*, 287 Kan. 230, Syl. ¶ 1, 196 P.3d 364 (2008) (dismissal for failure to state claim proper if factual allegations of petition fail to establish any theory of recovery). To survive a motion to dismiss, a pleading must contain more than a threadbare recitation of the law and conclusory allegations. *See Loggins v. Cline*, 568 F. Supp. 2d 1265, 1268 (D. Kan. 2008); *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim for relief) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

III. FACTUAL BACKGROUND

Jacam 2013, which is headquartered in Kansas, manufactures, produces, markets, sells, and distributes specialty petrochemicals to its customers in the oil and gas field. *See* Exhibit 1, Affidavit of Vern Disney, at ¶ 2. Jacam 2013 does business in a highly competitive market. *Id*. Jacam 2013's success depends on its reputation and goodwill in the market, which is largely impacted by its senior managers and other key employees. *Id*.

A. Kainz's Employee Agreement with Jacam 2013

Jacam 2013 employed Kainz as Account Manager III, a senior level salesperson. Ex. 1, at ¶ 10. Kainz worked for Jacam 2013 in North Dakota from April 2014 until May 31, 2019, when he resigned and immediately began working for GeoChemicals, LLC ("Geo"), a Kansas limited liability company that directly competes with Jacam 2013 in several states including Kansas and North Dakota. Ex. 1 at ¶ 10.

Upon hire by Jacam 2013, Kainz signed an Employee Agreement and a Code of Business Conduct (the "Employee Agreement"), both of which contain 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. Ex. 1 at ¶¶ 3, 5; Exhibit 2, Code of Business Conduct pp. 6-7; Exhibit 3, Kainz Employee Agreement pp. 2-6. Kainz's Employee Agreement also includes 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. *Id.* at pp. 4-5. Kainz's Employee Agreement includes Kansas choice of law and venue provisions. *Id.* at p. 7.

B. Kainz's Breach of the Employee Agreement

While examining Kainz's company phone after he resigned, Jacam 2013 learned that for several weeks before he resigned, 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. Ex. 1 at ¶ 16. In these emails, 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*. Other attachments Kainz disclosed to Geo included lists of wells and production updates. *Id*.

Given the provisions contained in Kainz's Employee Agreement, including the Kansas choice of law and forum selection clauses, Jacam 2013 believed that Kainz's act of going to work for Geo, his acts of soliciting Jacam 2013's customers and employees, and his acts of taking Jacam 2013's confidential and proprietary property and giving it to Jacam 2013's competitor were all illegal acts. *See generally* Verified Petition and Application for Temporary Restraining Order and Temporary Permanent Injunction.[1]

C. Jacam 2013 Exercises its Right to Petition and Sues Kainz in Kansas

On June 6, 2019, Jacam 2013 filed a Verified Petition and Application for Temporary Restraining Order and Temporary Permanent Injunction ("Verified Petition") against Kainz and Geo in this Court. Jacam 2013 alleged that (1) Kainz and Geo violated the Kansas Uniform Trade Secrets Act, (2) Kainz breached the Employee Agreement and Code of Business Conduct, (3) Kainz breached his fiduciary duties to Jacam 2013, and (4) Geo tortiously interfered with Jacam

[1] Upon the Court's request, Jacam 2013 will provide copies of the previously filed pleadings and other papers, which are referenced in this Motion. Pursuant to KPSPA, K.S.A. § 60-5320(d), the court shall consider pleadings and affidavits as evidence.

2013's existing and prospective contractual relations. *See Id*. at pp. 14-18. On July 19, 2019, Kainz filed his answer.

Jacam 2013 had every right to seek relief in a Kansas court. Jacam 2013 is headquartered in Kansas, and Geo is a Kansas limited liability company. *See* Verified Petition at pp. 3-4. Jacam 2013 was injured by Kainz's and Geo's actions in Kansas. Additionally, Kainz had substantial contacts with Kansas. Jacam 2013 performs all of its payroll, human resources, accounting, manufacturing, and laboratory analysis in Kansas, thus, Kainz had regular and repeated contact with Kansas via telephone, mail, and electronic communications. Ex. 1 at ¶¶ 13, 15. Kainz 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*. Kainz also received his paycheck from Kansas and had extensive contacts with Geo, which is based in Kansas. *Id*. Accordingly, Jacam 2013 had a right to seek relief in Kansas, and a reasonable basis to believe the Kansas choice of law and forum selection clauses contained in Kainz's Employee Agreement would be enforced.

D. The Court Enters a Temporary Restraining Order

On June 11, 2019, based on the evidence presented to it, the Court issued an *ex parte* temporary restraining order ("TRO") against Kainz and Geo, which all parties, including Geo and Kainz, agreed twice to extend. Exhibit 4, Temporary Restraining Order, p. 1; *See* Exhibit 5, Agreed Order Extending Temporary Restraining Order and Staying Order on Motion for Expedited Discovery, pp. 1-2; *See* Exhibit 6, Agreed Order Extending Temporary Restraining Order, pp. 1-2

In entering the TRO, the Court found that Jacam 2013 would suffer irreparable injury if the TRO was not issued *ex parte*. Ex. 5 at ¶ 2. Based on the evidence presented, Judge Hipp determined that Jacam 2013 was not required to give the Defendants advance notice due to the risk

of misappropriated information being destroyed and Kainz's demonstrated "willingness to engage in surreptitious efforts by misappropriating the information in the first place." *Id*. at ¶ 6. Further, the Court found that Jacam 2013 had no adequate remedy at law and was at risk of losing intangible assets such as reputation and goodwill if Kainz and Geo were not immediately enjoined. *Id*. at ¶ 3.

Pursuant to the TRO, (1) Kainz and Geo were enjoined from altering, deleting, or misappropriating Jacam 2013's confidential information, (2) Kainz and Geo were required to permit forensic imaging of their electronic devices and systems, (3) Kainz was enjoined from working for Geo or any other company in any state engaged in competition with Jacam 2013, and (4) Kainz was enjoined from soliciting Jacam 2013's customers (regardless of where those customers were located). *Id*. at ¶ 4. The court did not require a bond. *Id*. at ¶ 5.

The Court's decision gave Jacam 2013 the right to lawfully enforce the TRO. Ex. 5. There is no evidence that Jacam 2013 acted outside the confines of the legal system to pursue Kainz, or that Jacam 2013 provided false information to obtain the TRO. The TRO was enforced in the same manner as all similar TROs are enforced, and Jacam 2013 curtailed only the conduct explicitly restrained by the Court in the TRO (and the subsequent agreed extensions).

E. Kainz Twice Agrees to Extend the TRO

Notably, despite Kainz's claims now that Jacam 2013 "maliciously prosecuted" him and "abused process" via the TRO, Kainz twice voluntarily agreed to extend the TRO. Specifically, on June 19, 2019 and again on August 1, 2019, Kainz and Geo agreed to be bound by the TRO "until the earlier of when the parties agree otherwise, or until a hearing is held on Plaintiff's Motion for Temporary Injunction …" Ex. 6, Ex. 7. Further, for nearly three years, neither Kainz nor Geo took any action in this Court, such as seeking to modify or vacate the TRO or filing a dispositive motion, seeking a ruling as to any aspect of the TRO.

Instead, Jacam 2013 filed a motion for partial summary judgment in March 2020 seeking a ruling from the Court that Kainz's restrictive covenants are enforceable under Kansas law because Kainz's Employee Agreement contains a Kansas choice of law provision, and Kansas bears a material relationship to that agreement and the parties' relationship. *See* Plaintiff Jacam Chemical Company 2013, LLC's Motion for Partial Summary Judgment and Brief in Support. In their responses, Kainz and Geo argued that North Dakota law, rather than Kansas law as the Employee Agreement provides, should apply and that under North Dakota law, Kainz's non-competition, customer non-solicitation, and forum selection clauses were unenforceable. *See* Kainz's Response to MPSJ at p. 23; *See* Geo's Response to MPSJ at p. 16.

At the hearing on Jacam 2013's summary judgment motion, Defendants' counsel urged Judge Hipp to deny Jacam 2013's motion, rule that North Dakota law applies to Kainz's Employee Agreement, and rule that Kainz's restrictive covenants are unenforceable. Exhibit 7, Transcript at pp. 16, 48-49, 54. Finding that genuine issues of material fact precluded summary judgment, Judge Hipp denied Jacam 2013's motion. *Id*. at p. 59. Importantly, for purposes of the present Motion, Judge Hipp declined to rule, as Defendants requested, that the restrictive covenants were unenforceable or that North Dakota law applied. *See generally id*.

F. Kainz Adds the Counterclaims Three Years After Entry of the TRO

Nearly three years after entry of the TRO and two years after Judge Hipp's refusal to find the restrictive covenants unenforceable, Kainz and Geo filed a Joint Motion for Summary Judgment seeking an order (1) holding that the restrictive covenants in Kainz's Employee Agreement were unenforceable against him in North Dakota as a matter of law, and (2) dismissing any Jacam 2013 claim against Kainz and Geo based on the unenforceable restrictive covenants in

Kainz's Employee Agreement. *See generally* Defendants' Joint Motion for Partial Summary Judgment.

On August 3, 2022, the Court granted Defendants' Joint Motion for Summary Judgment, determining that North Dakota law applied to the Employee Agreement's "non-competition and post-termination customer non-solicitation restrictive covenants." *See* Exhibit 8, Journal Entry of Judgment on Defendants' Joint Motion for Partial Summary Judgment at p. 2. The Order did not impact the remainder of the TRO.

On August 12, 2022, Kainz and Geo filed a Joint Motion for Leave to File Amended Pleadings, which this Court granted on August 30, 2022. *See* Joint Motion. On September 20, 2022, Kainz filed his Amended Answer with the following Counterclaims: (1) abuse of process, alleging that Jacam 2013 "wrongfully obtained" the TRO; (2) malicious prosecution, alleging that Jacam 2013 continued to pursue claims reliant on the restrictive covenants in Kainz's Employee Agreement; and (3) breach of contract, alleging that Jacam 2013 breached the Employee Agreement by enforcing the restrictive covenants. *See* Kainz's Amended Answer at pp. 10-11. In all three Counterclaims, which are based solely on Jacam 2013's alleged conduct and statements made in connection with the TRO, Kainz asserts that Jacam 2013 is liable for damages to Kainz because it obtained, pursued, and/or sought enforcement of the TRO. *Id*. at pp. 8-12.

IV. ARGUMENTS AND AUTHORITIES

A. The Court Should Strike the Counterclaims Pursuant to the KPSPA

a. *The Kansas Public Speech Protection Act*

More than thirty states and the District of Columbia have enacted laws to address "strategic lawsuits against public participation" or "SLAPPs," which have a chilling effect on free speech. "The hallmark of these statutes is the ability of a defendant to file an early 'motion to strike' so

the court can make an initial determination whether the lawsuit has been filed to harass the defendant or to stifle the defendant's right of free speech." *T&T Fin. of Kansas City, LLC v. Taylor*, 408 P.3d 491, 2017 WL 6546634, at *3 (Kan. App. 2017) (unpublished).

Kansas passed the KPSPA to protect against "meritless lawsuits that chill free speech." *Caranchini v. Peck*, 355 F.Supp.3d 1052, 1055 (D. Kan. 2018) (holding that speech and conduct undertaken in TRO proceeding all related to "defendants' right to free speech and right to petition" and fell under the KPSPA). The stated purpose of the statute is to "encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issues of public interest to the maximum extent permitted by law, while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury." K.S.A. § 60-5320(b).

Under the Act, a party may bring a motion to strike the claim if it is 'based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association.'" *Peck*, 355 F.Supp.3d at 1055 (citing K.S.A. § 60-5320(b) and K.S.A. § 60-5320(d)). The Kansas Legislature expressed its intent that courts apply and liberally construe the Kansas anti-SLAPP statute "to effectuate its general purposes." K.S.A. § 60-5320(k); *see Zaid v. Boyd*, No. 22-1089-EFM, 2022 WL 4534633, at *4 (D. Kan. Sept. 28, 2022) ("In interpreting the KPSPA, the Court is mindful of the statutory mandate that '[t]he provisions of the [KPSPA] shall be applied and construed liberally to effectuate its general purposes.'").

There is a two-part test to determine whether a court must dismiss a plaintiff's claims pursuant to KPSPA. First, **the "arising from" prong**: the court must find that the claims arise from a party's exercise of the right of free speech, right to petition, or right of association. K.S.A. § 60-5320(c); *Taylor*, 2017 WL 6546634, at *5 ("Step one of the analysis … only concerns the

content of the claims," not the motive or merits). If the court determines the movant has made this threshold showing, the court turns to **the** "**probability of prevailing**" **prong**: "the burden shifts to the [claimant] to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case." K.S.A. § 60-5320(d) (emphasis added). If the claimant is unable to meet this burden, the court must grant the motion to strike, dismiss the claim, and award costs, fees, and sanctions where warranted to deter similar conduct. K.S.A. § 60-5320(g) (the "court shall award the defending party, upon a determination that the moving party has prevailed on its motion to strike … (1) Costs of litigation and reasonable attorney fees; and such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situated."); *Taylor*, 2017 WL 6546634, at *4 (KPSPA "provides a procedural remedy early in the litigation for those parties claiming to be harassed by a SLAPP lawsuit.").

b. The Counterclaims Are Based on Speech and Conduct Protected by the KPSPA

The KPSPA applies when claims arise from a party's exercise of its right to speak, petition, or associate. K.S.A. § 60-5320(c). The KPSPA defines "exercise of the right of free speech" to mean "a communication made in connection with a public issue or issue of public interest." K.S.A. § 60-5320(c)(1). A "communication" means the "making or submitting of a statement or document in any form or medium, including oral, visual or electronic." K.S.A. § 60-5320(c)(2). An "issue of public interest" includes issues related to "a good, product or service in the marketplace." K.S.A. § 60-5320(c)(7). Further, "[t]he communications protected by the [KPSPA] include communications 'in connection with an issue under consideration or review of an issue by a legislative, executive, judicial or other governmental or official proceeding.'" *Doe v. KSU*, 499 P.3d 1136, 1141 (Kan. App. 2021) (citing K.S.A. § 60-5320(c)(5)(B)); ("An 'official proceeding'

is defined in the Act to mean 'any type of administrative, executive, legislative or judicial proceeding that may be conducted before a public servant.'"); K.S.A. § 60-5320(c)(7). "Public servant' means a person 'elected, selected, appointed, employed or otherwise designated as one of the following, … an officer, employee or agent of the government,' and a 'person who is authorized by law or private written agreement to hear or determine a cause or controversy,' among others." *Doe*, 499 P.3d at 1141. In interpreting the "exercise of the right of free speech," Kansas courts broadly interpret the Act's protections, as the legislature intended. *Doe*, 499 P.3d at 1148 (the Kansas legislature "mandated that its statutory language be liberally construed.").

For example, in *Doe*, the court held that e-mail correspondence between representatives from two universities regarding the disciplinary actions taken and complaints made against a specific student concerned the right of free speech. 499 P.3d 1136 at 1140. Similarly, the *Caranchini* court held that the plaintiffs' allegations related to the defendants' right of free speech when "Plaintiff allege[d] that defendants committed libel and slander while they were communicating in judicial proceedings (the TRO proceedings), or when they were petitioning the government (the District Attorney) regarding issues related to their safety (the filing of the TRO and the communications made during the commencement of the telephone harassment case)." 355 F.Supp.3d at 1062.

Courts in other jurisdictions have followed suit. For example, in *McDonald Oilfield Operations, LLC v. 3B Inspection, LLC*, interpreting the similar Texas anti-SLAPP statute, the court held that the purported comments that a company "was not a real company" and that its owner did not "know what he was doing" were statements concerning a matter of public concern and related to "a good, product, or service in the marketplace." 582 S.W.3d 732, 747 (Tex. App.—

Houston [1st Dist.] 2019, no pet.).[2] And in *AOL, Inc. v. Malouf,* the court held that an article communicating that a dentist had been charged with "defrauding state taxpayer of tens of millions of dollars in Medicaid scam" related to a service in the marketplace, the dentist's provision of dental services. 2015 WL 1535669, at *2 (Tex. App.—Dallas April 2, 2015, no pet.) (mem. op.); *see also Krimbill v. Talarico,* 417 P.3d 1240, 1249-1250 (Okla. Civ. App. 2017) (upholding district court's finding, interpreting the similar Oklahoma anti-SLAPP statute, that e-mail regarding individual's leadership issues was related to "a good, product, or service in the marketplace").

Here, the Counterclaims arise from the allegation that it was wrongful for Jacam 2013 to petition the government, through this Court, and to make statements to the courts and the public that Kainz's provision of services and goods contravened his Employee Agreement. *See* Kainz's Amended Answer at pp. 10-11. Further, the Counterclaims arise from Jacam 2013's alleged wrongful communications concerning a judicial proceeding, namely, the TRO hearing and its result. *Id.* Given those allegations, the Counterclaims fall within the purview of speech protected by the KSPSA. *See, e.g., Caranchini*, 355 F.Supp.3d at 1052 (filing of application for TRO and statements made to obtain TRO constituted protected activity under Kansas's anti-SLAPP statute, and since the "court found that some of plaintiff's allegations fell under the broad language of K.S.A. § 60-5320," "it was appropriate to strike those claims under K.S.A. § 60-5320).

The Counterclaims are a model example of a SLAPP: Kainz bases the Counterclaims entirely on Jacam 2013's right to petition, i.e., pursuit of and enforcement of a TRO in this Court--legal actions available under and permitted by Kansas law, the contract between Jacam 2013 and Kainz, and, later, the parties' voluntarily agreement, which the Court memorialized in two agreed

[2] Decisions from Texas and Oklahoma are persuasive, since both the Texas and Oklahoma anti-SLAPP statutes are virtually identical in relevant aspects to the KSPSA.

orders extending the TRO. Given that the KPSPA protects Jacam 2013's right to participate in government to the maximum extent permitted by law and, at the same time, protects its right to file meritorious lawsuits for demonstrable injuries, the statute requires dismissal of the Counterclaims because each is based on protected speech and conduct. Citizens, like Jacam 2013, should "feel free to petition their government without fear of retribution." *Caranchini*, 355 F.Supp.3d at 1062. Kainz's efforts to punish Jacam 2013 for exercising its rights and his attempt to silence Jacam 2013's future speech should be thwarted.

Although it appears that no Kansas court has yet addressed an anti-SLAPP motion to strike in this context, multiple other courts have addressed precisely this scenario, holding that the petitioning conduct "arises from" protected activity. *See, e.g., S.A. v. Maiden*, 229 Cal. App. 4th 27, 35 (Cal. Ct. App. 2014) (applying similar anti-SLAPP statute and holding that "[a] malicious prosecution action arises from protected activity under the anti-SLAPP statute because it involves the filing and prosecution of an underlying lawsuit, or petition to the judicial branch, that allegedly was malicious … every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding."); *see also Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 735 (2003) ("[b]y definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit. Accordingly, every Court of Appeal that has addressed the question has concluded that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute. Courts in our sister states construing similar statutes are in accord" (omitting internal citations)); *Fabre v. Walton,* 435 Mass. 517, 520 (2002) (dismissing an abuse of process claim under a similar anti-SLAPP statute and holding that "[n]otwithstanding [plaintiff's] allegations concerning the motive behind [defendant's] conduct, the fact remains that the only conduct complained of is [defendant's]

petitioning activity."); *and see Serafine v. Blunt*, 455 S.W3d 366, 360 (Tex. App. – Austin 2015, no pet.) (holding that plaintiff's tortious interference counterclaim triggered the anti-SLAPP statute because it was "based on, related to, or in response to [defendant's] filing of the lis pendens, both of which filings are exercises of [defendant's] 'right to petition'"); *Rio Grande H20 Guardian v. Robert Muller Family P'ship Ltd.*, No. 04–13–00441–CV, 2014 WL 309776, at *3 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.) (deciding that claims that were based on defendant's prior legal action were related to defendant's exercise of its right to petition and triggered the anti-SLAPP statute), *disapproved on other grounds by Lipsky II*, 460 S.W.3d 579, 587 (Tex. 2015); *James v. Calkins*, 446 S.W.3d 135, 147–48 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (concluding that fraudulent-lien claim based on filing of lis pendens was "communication in or pertaining to a judicial proceeding").

c. Kainz Cannot Establish a Likelihood of Prevailing on His Counterclaims

Once Jacam 2013 establishes that the KSPSA applies to Kainz's Counterclaims, "the burden shifts to the responding party to establish a likelihood of prevailing on the claim *by presenting substantial competent evidence to support a prima facie case."* K.S.A. § 60-5320(d) (emphasis added). "Substantial competent evidence, under Kansas law, is evidence that 'possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved.'" *Caranchini*, 355 F.Supp.3d at 1063 (citing *Griffin ex rel. Green v. Suzuki Motor Corp.*, 280 Kan. 447, 124 P.3d 57, 67 (2005)). At this step, the Court may consider pleadings and affidavits, but may not accept the facts in the petition as true, since this "would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the complaint." *Doe*, 61 Kan. App. 2d at 148 (quoting *DuPont Merck Pharm. Co. v. Superior Ct.*, 78 Cal. App. 4th 562, 568 (2000), *as*

modified (Jan. 25, 2020)); *see also Zaid*, 2022 WL 4534633, at *8 ("The court need not, however, accept all the plaintiff's allegations as true."). Importantly, baseless opinions and conclusory statements by the claimant will not suffice to meet this burden. *Fisher v. Kansas Dept. of Revenue*, 58 Kan. App. 2d 421, 423, 471 P.3d 710 (2020).

Kainz fails to meet his burden for all Counterclaims on two fronts: first, his bare-bones allegations, unsupported by verification, affidavit, or any evidence, offer nothing in the way of specific facts to support his malicious prosecution, abuse of process, or breach of contract claims. Instead, his Counterclaims consist of generalities and conclusory statements. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based."); *Smith-Utter v. Kroger Co.*, 2009 WL 790183, at *3 (D. Kan. March 24, 2009) ("Plaintiff's unsupported allegations are insufficient to demonstrate that her reputation was harmed."). Second, Kainz fails to offer any facts to support his alleged "damages." Instead, he relies solely on conclusory allegations that he "has been damaged," with no support. Kansas courts have repeatedly held that such conclusory allegations fail to establish a valid claim. *See Zaid*, 2022 WL 4534633, at *7 (finding that plaintiff did not have the required substantial evidence with regards to his damages to avoid dismissal under the KPSPA); *see also Fillmore v. Ordonez*, 829 F. Supp. 1544, 1561 (D. Kan. 1993) aff'd by 17 F.3d 1436 (10th Cir. Mar 1, 1994) (a "claim of malicious prosecution requires …[that] plaintiff sustained damages").

i. Kainz Lacks Substantial Competent Evidence to Support a Prima Facie Case of Malicious Prosecution.

Under Kansas law, a claim of malicious prosecution requires the following elements: 1) defendant initiated, continued or procured civil or criminal proceedings against the plaintiff; 2) in so doing, the defendant acted without probable cause; 3) defendant acted with malice; 4) the

proceeding terminated in favor of the plaintiff;[3] and 5) plaintiff sustained damages as such. *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1561 (D. Kan. 1993), *aff'd*, 17 F.3d 1436 (10th Cir. 1994) (citations omitted). To prove the malice element of the claim, the plaintiff must prove that the defendant "acted primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based." *Budd v. Walker*, 491 P.3d 1273, 1281 (Kan. Ct. App. 2021). As explained below, Kainz's malicious prosecution claim fails as a matter of law.

First, the claim is premature. Kansas law is well-settled that a claim for malicious prosecution "does not accrue until the time for appeal has passed on the original action." *H & H Farms, Inc. v. Hazlett*, 627 P.2d 1161, 1167 (Kan. Ct. App. 1981). Accordingly, "a claim for malicious prosecution founded on a civil action is not the proper subject of a counterclaim since it requires proof of the termination of the former proceeding in favor of the defendant." *Id.* at 1168.

Kainz has no legal authority—binding or otherwise--to support his assertion of his malicious prosecution claim before the time for appeal has passed in this case (and Jacam 2013 is aware of no such authority). In *Nal II, Ltd. v. Tonkin*, the Kansas federal district court examined a New York decision holding that counterclaims for malicious prosecution based on a dissolved temporary restraining order were premature and did not provide a separate proceeding on which to base a malicious prosecution claim. 705 F.Supp. 522, 524 (D. Kan. 1989) (examining *Bercy*

[3] The TRO has not been vacated. The Court's August 3, 2022 Order granting Kainz's and Geo's Joint Motion for Summary Judgment determined only that North Dakota law applies to some of the restrictive covenants in the Employee Agreement and Kainz cannot be restrained from competing in North Dakota or soliciting Jacam 2013's customers. The remainder of the TRO survived, Kainz has not been awarded any damages from Jacam 2013, and this case is still pending. Indeed, the Court's Order, which adopted an earlier North Dakota Order, provides that the Order "does not mean that Jacam does not have a damage claim for what occurred prior to Kainz leaving his employment at Jacam." *See* Ex. 8, at ¶¶ 2-4, attachment at p. 6. The August 3, 2022 Order specifically held: "As to the issue of the enforceability of the non-competition and post-termination customer non-solicitation covenants of Defendant Kainz's Employee Agreement with Plaintiff, as were included in an *ex parte* temporary restraining order issued by the Court in this action on June 11, 2019, and served upon and enforced against Defendant Kainz in the State of North Dakota, the Court finds as a matter of law that those employment agreement restrictive covenants were not and are not enforceable by Plaintiff against Defendant Kainz in North Dakota." Ex. 8 at ¶ 2.

Indus., Inc. v. Mechanical Mirror Works, Inc., 279 F.Supp. 428 (S.D.N.Y. 1968)). Courts in other jurisdictions have likewise held that a malicious prosecution claim does not arise upon the dissolution of a temporary restraining order and is premature until termination of the main action in favor of the party claiming malicious prosecution. *See Henderson v. Armantrout*, 592 S.W.2d 202, 205 (Mo. Ct. App. 1979); *Nix v. Sawyer*, 466 A.2d 407, 411 (Del. Sup. Ct. 1983) (dismissing claim for malicious prosecution of temporary restraining order where underlying action was still pending). Here, Kainz's malicious prosecution claim is clearly premature and cannot survive a motion to dismiss.

Even if the claim were not premature, Kainz fails to state a claim for malicious prosecution. The contract from which all of the Counterclaims flow—Kainz's Employee Agreement—includes Kansas choice of law and venue provisions. As Jacam 2013 explained in its memorandum in support of its 2020 motion for summary judgment and reply (1) Kainz agreed that Kansas law applies to his Employee Agreement, (2) Kansas bears a material relationship to that Agreement, (3) Kansas courts regularly enforce restrictive covenants, and (4) the restrictive covenants in Kainz's Employee Agreement are reasonable. *See* Plaintiff Jacam Chemical Company 2013, LLC's Motion for Partial Summary Judgment and Brief in Support at p. 7; *See* Jacam 2013's Reply in Support of Summary Judgment at pp. 77-14 (excluding attachments). After obtaining undisputed and damning evidence that Kainz violated his Employee Agreement by surreptitiously funneling Jacam 2013's confidential information and trade secrets to Geo, Jacam 2013 had probable cause to seek a TRO to prevent Kainz from causing further harm to Jacam 2013. *See Thompson v. General Finance Co.*, 205 Kan. 76, 468 P.2d 269, 281 (Kan. 1970) ("in actions for malicious prosecution, the inquiry as to the want or existence of probable cause is limited to the facts and circumstances which were apparent at the time the prosecution was

commenced"). The Court agreed, finding that Jacam 2013 had no adequate remedy at law and was at risk of losing intangible assets such as reputation and goodwill if Defendants were not immediately enjoined and, a year later, refusing Defendants' request to find that Kainz's restrictive covenants were unenforceable. Ex. 4 at pp. 2-3; Ex. 7 at p. 59 ("I do believe there are material issues of fact that still need to be addressed").

Here, Kainz has not presented and cannot present, as the KSPSA requires, *substantial competent evidence* of a prima facia case for malicious prosecution. Because Jacam 2013 had probable cause to seek the TRO, Kainz cannot establish a claim for malicious prosecution. *See Budd*, 491 P.3d at 1281. Indeed, this Court's order granting the TRO illustrates that Jacam 2013 acted with probable cause. *See Thompson*, 468 P.2d at 285 (holding that finding at preliminary hearing is prima facie evidence of probable cause).[4] Moreover, this proceeding has not terminated, so the malicious prosecution claim cannot be established. *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438, 443 (Kan. 1980) (essential element for bringing a claim of malicious prosecution is that plaintiff must have received a favorable and final decision in the proceeding).

ii. Kainz Lacks Substantial Competent Evidence to Support a Prima Facie Case of Abuse of Process.

Similarly, Kainz has not presented and cannot present *substantial competent evidence* of a prima facia case for abuse of process. Kainz's abuse of process claim fails as a matter of law.

[4] Some courts have taken the position that a preliminary injunction is at least prima facie evidence of probable cause. *See, e.g., Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 104 F.2d 105, 107 (2d Cir. 1939), *cert. denied*, 308 U.S. 599, 60 S.Ct. 131, 84 L.Ed. 501 (1939) ("The granting of a preliminary injunction upon notice to opposing parties, even though reversed on appeal, is at least [prima facie] evidence of probable cause." (citations omitted)); while other courts, however, have held that a preliminary injunction entered after a hearing is conclusive evidence of probable cause. *See, e.g., Paiva v. Nichols*, 168 Cal. App. 4th 1007, 85 Cal. Rptr. 3d 838, 850-51 (2008) (noting that a defendant can negate the absence of probable cause "by showing that an interim victory in the underlying case—such as the granting of a preliminary injunction in favor of the malicious prosecution defendant (the plaintiff in the prior case)—established probable cause" (citation omitted)); *H.P. Rieger & Co. v. Knight*, 97 A. 358, 361 (Md. 1916) ("The granting of the injunction [after the court is fully informed by proof taken and argument on both sides is] conclusive of probable cause, and hence prevents recovery for malicious prosecution[.]").

"Abuse of process is not just another name for malicious prosecution. While malicious prosecution concerns a lawsuit filed for an improper purpose, an abuse of process concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise from improper or excessive attachments [citation] or improper use of discovery [citation]." *Maiden,* 229 Cal. App. 4th 27, 41-42.

The elements of a claim for abuse of process are (1) that a party made an illegal, improper, or perverted use of the process, meaning a use neither warranted nor authorized by the process, (2) an ulterior motive or purpose in exercising the process, and (3) damages to the other party. *Porter v. Stormont-Vail Hosp.,* 621 P.2d 411, 416 (Kan. 1980) (citing 1 Am. Jur. 2d 252, Abuse of Process, s 4). "If the process used is regular, the motive, ulterior or otherwise, of the alleged abuser is immaterial. A party is protected when the process is valid and used for a legitimate purpose—even with a bad intention, it is not abuse of process." *Jeannine Williams, LLC v. Ice Masters, Inc.*, No. 121,377, 2021 WL 2171161, at *7 (Kan. Ct. App. May 28, 2021). There is no claim for abuse of process "if the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint, even if…the plaintiff knowingly brought suit upon an unfounded claim." *Coldwell-Baker Co. v. Tideman,* Nos. 95,600, 95,618, 2007 WL 136029, at *4 (Kan. Ct. App. Jan. 19, 2007). Abuse of process occurs ***only*:**

> **where someone attempts to achieve through the use of the court that which the court is itself powerless to order. The abuse of process tort is intended to prevent parties from using litigation to pursue alternative objectives and using the court's process to compel another party to act. There is no liability where the defendant has only pursued a lawsuit to its authorized conclusion, no matter now 'evil' the defendant's motives may be. Abuse of process requires some overt act done in addition to commencing a lawsuit; filing or maintaining a lawsuit, even for improper purposes, is not enough**.

Jeannine Williams, LLC, 2021 WL 2171161, at *8 (citation omitted) (emphasis added).

Jacam 2013's use of standard legal process to enforce Kainz's Employee Agreement does not create a cause of action for abuse of process. Kainz alleges no fact that would demonstrate Jacam 2013 used legal process for an improper purpose; instead, they simply attack Jacam 2013's motives in obtaining the TRO,[5] which will not suffice to support an abuse of process claim.

Kainz's bare allegation that Jacam 2013 "knowingly obtain[ed] the wrongful TRO" is not sufficient to show any improper use of process. Because there is nothing to suggest that Jacam 2013 used the TRO for an "illegal, improper, [or] perverted," use or for a use "neither warranted nor authorized by the process," Jacam 2013's motive is immaterial.[6] *See Porter*, 621 P.2d at 416; *Jeannine Williams, LLC*, 2021 WL 2171161 at *7. Moreover, not only did Defendants fail to seek a prompt determination on Jacam 2013's request for injunctive relief, but they also agreed twice to extend the very TRO about which they complain. Ex. 5; Ex. 6.

Jacam 2013 used the TRO for the very purpose such equitable orders are intended. That the Court eventually partially vacated the TRO does not support that Jacam 2013's conduct in connection with the TRO, while it was lawfully in effect, was in any way improper, particularly since Kainz and Geo both voluntarily agreed to extend the TRO twice. Additionally, there is no evidence or even any factual allegation that Jacam 2013 had any improper motive in seeking to

[5] "The purpose of a temporary restraining order is to preserve the status quo until the trial court determines whether a request for permanent injunctive relief should be granted." *J.C. Penney Co., Inc. v. E.R.I.C. Santa Fe Corp*., No. 68,870, 1993 WL 13965651, at * 2 (Kan. Ct. App. Dec. 3, 1993)(citation omitted).

[6] As Jacam 2013 explained in its summary judgment motion relating to enforceability of the Kainz restrictive covenants, Jacam 2013 had a reasonable belief that the Kainz restrictive covenants were enforceable because of the Kansas choice of law provision and Kansas' material relationship to the contract. *See* Plaintiff Jacam Chemical Company 2013, LLC's Motion for Partial Summary Judgment and Brief in Support at p. 7. Judge Hipp's ruling—that fact issues precluded summary judgment—and refusal of Defendants' request to find the restrictive covenants unenforceable supports that Jacam 2013's position was not unreasonable or groundless. Ex. 7 at pp. 16, 48-49, 59.

enforce Kainz's contract or the TRO. The purpose of the TRO was to prevent Kainz from continuing his undisputedly bad acts and causing further harm to Jacam 2013. That was Jacam 2013's entire motive—to stop further damage--and there is no evidence of any "ulterior" reason for Jacam 2013's actions.

iii. Kainz Lacks Substantial Competent Evidence to Support a Prima Facie Case of Breach of Contract.

Finally, Kainz has not presented and cannot present *substantial competent evidence* of a prima facia case for his breach of contract claim. In fact, he has not even pled facts sufficient to survive a motion to dismiss under K.S.A. §60-212(b)(6).

To state a claim for breach of contract under Kansas law, a claimant must allege: "(1) the existence of a contract between the parties; (2) consideration; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) defendant's breach of the contract; and (5) that plaintiff was damaged by the breach." *Britvic Soft Drinks Ltd. V. Acsis Techs., Inc*., 265 F. Supp.2d 1179, 1187 (D. Kan. 2003). Kainz attempts to state that Jacam 2013's enforcement of the restrictive covenants "breached" the Agreement. Kainz's position is insupportable under the plain language of the Agreement, which states in relevant part:

> Company shall have the right to exercise any and all legal and equitable remedies available to Company in the even that Employee has breached the terms and conditions of this Article 4 [Nondisclosure of Confidential Information].
>
> Notwithstanding anything to the contrary herein, the post-termination restrictions in this Article 5 [Noncompetition] shall not apply in any state in which such restriction would be invalid or unenforceable under applicable state laws, as such laws may be amended from time to time, **provided that the court in such state elects not to apply Kansas law**.

Ex. 3 at §§ 4.4, 5.2.d (emphasis added).

First, the Employee Agreement explicitly allows Jacam 2013 to exercise legal and equitable remedies when, like here, an employee misappropriates Jacam 2013's confidential and

proprietary information. Ex. 3 at § 4.4. Second, as explained above, neither this Court nor any other court elected not to apply Kansas law to its analysis of the Employee Agreement's restrictive covenants until at least May 6, 2021, which is when the North Dakota state court issued its order granting Kainz's preliminary injunction motion. Ex. 8 at Attachment, p. 8. This Court did not issue a decision on this issue until August 3, 2022, when it granted Kainz and Geo's Joint Motion for Summary Judgment. Ex. 8. The restrictive covenants at issue expired on May 31, 2021, and there is no evidence or factual averment that Jacam 2013 took action in North Dakota as to those covenants after May 6, 2021. Instead, Kainz's only assertion is that Jacam 2013 took action in Kansas to pursue its claims as to the restrictive covenants based on its good faith belief that Kansas would enforce the parties' choice of law clause. *See* Kainz's Amended Answer at pp. 9-10. Accordingly, Kainz's breach of contract claim lacks a sustainable averment as to the essential element of breach. With this background, there is insufficient evidence for Kainz to overcome the KPSPA requirements for avoiding dismissal.

In addition, the Court should dismiss Kainz's breach of contract claim because Kainz cannot establish—and does not even allege—that he performed or was willing to perform in compliance with the Employee Agreement. *See* Kainz's Amended Answer at pp. 9-10.[7] Kainz *admits* to breaching his confidentiality obligations by sending Jacam 2013's confidential

[7] Kainz will assert that Jacam cannot rely on the "first to breach rule" because Jacam treated the Employee Agreement as if it was continuing and still in effect after Kainz's breach. This is wrong. Jacam 2013 did not treat the Employee Agreement as continuing after Kainz's breach. Jacam 2013 did not attempt to give Kainz anything in exchange for his new or future performance under the Employee Agreement. Jacam 2013's lawsuit for Kainz's material breach of the Employee Agreement and request for enforcement of provisions that survive the Agreement's termination did not signal that Jacam 2013 wished for "the exchange of obligations to continue" between it and Kainz. *Deffenbaugh Indus., Inc. v. Unified Govt. of Wayndotte County/Kansas City, Kansas*, No. 20-2204-EFM, 2021 WL 6072508, at *25 (D. Kan. Dec. 23, 2021) ("the first-to-breach doctrine excuses future performance by non-breaching party—unless that party signals that it wishes the exchange of obligations to continue"). Accordingly, there is no exception to the rule that a plaintiff's performance or willingness to perform a contract is an essential element to a breach of contract claim. *See id*.

information to Geo, which dooms his breach of contract claim. *See, e.g., Bank of America, N.A. v. Narula*, 261 P.3d 898, 902 (Kan. Ct. App. 2011) ("first-to-breach rule precludes a party who has first materially breached a contract from attempting to enforce that contract until the breach is cured"); *Lassiter v. Topeka Unified School Dist. No. 501*, 347 F. Supp. 2d 1033, 1041 (D. Kan. 2004) ("[a] party's uncured material breach of a contract can suspend or discharge the other party's obligation to perform")(citations omitted); Restatement (Second) of Contract § 237 (1981) ("it is a condition of each party's remaining duties to render performance … that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

B. Kainz's Counterclaims Fail to State a Claim Upon Which Relief May be Granted

In the alternative to dismissal of Kainz's claims pursuant to the KPSPA, his claims must be dismissed under K.S.A. §60-212(b)(6) because they do not state a claim upon which relief may be granted. For the reasons outlined above, each of Kainz's Counterclaims fail on their face. Kainz's averments for his malicious prosecution Counterclaim do not state a claim because there is no statement that this proceeding has concluded in Kainz's favor, that the entirety of the TRO has concluded in Kainz's favor, or how or why Jacam 2013 lacked probable cause in pursuing the TRO. Kainz's averments for his abuse of process claim fail because there is no claim that Jacam 2013's TRO activity deviated from a TRO's regular and legitimate function in relation to the cause of action stated in Jacam 2013's Verified Petition. Finally, Kainz's averments for his breach of contract Counterclaim fail because there are no alleged facts that evidence Jacam 2013's breach of any provision in the Employee Agreement, and there are no allegations that Kainz performed

or would perform his task of keeping Jacam 2013's secrets and not unfairly competing against Jacam 2013.

Given the foregoing, the Court should dismiss Kainz's Counterclaims. *See Danzman v. Herington Mun. Hosp. Bd. of Trustees*, 516 P.3d 629, 630-631 (Kan. Ct. App. 2022) (dismissal pursuant to K.S.A. §60-212(b)(6) appropriate because pleadings did "not describe a legal wrong or justiciable controversy").

C. Kainz is Judicially Estopped from Asserting His Counterclaims

As discussed above, on two occasions, Kainz agreed to extend the TRO upon which he bases the Counterclaims. Ex. 5 at p. 1; Ex. 6 at p. 1. Given these prior agreements, Kainz is judicially estopped form pursuing his Counterclaims based on the prosecution of that same TRO.

"The doctrine of judicial estoppel is based upon protecting the integrity of the judicial system by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Bradford v. Wiggins*, 516 F.3d 1189, 1194 (10th Cir. 2008) (internal quotes omitted). "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotes omitted). "While the Court recognized the circumstances under which a court might invoke judicial estoppel will vary, three factors typically inform the decision whether to apply the doctrine in a particular case." *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (internal quotes omitted).

> [C]ourts typically inquire as to whether: 1) a party's later position is clearly inconsistent with its earlier position; 2) a party has persuaded a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was

> misled; and 3) the party seeking to assert the inconsistent position would derive an unfair advantage if not stopped.

Bradford, 516 F.3d at 1194 (internal quotes omitted); *see also Inglish v. Union State Bank*, 911 S.W.2d 829 (Tex. App. – Corpus Christ 1995), *rev'd on other grounds*, 945. S.W.2d 810 (Tex. 1997) ("having agreed to the injunction … appellant should not now be heard to complain about that same injunction."); *Est. of Belden v. Brown Cnty.*, 46 Kan. App. 2d 247, 263 (2011) ("The Kansas appellate courts have recognized and applied judicial estoppel.").

Here, the Counterclaims contradict Kainz's agreements to extend the TRO and representations to the Court in connection with those agreements. After agreeing to the TRO for years, Kainz now seeks to create the perception that Jacam 2013 has been on a crusade to improperly prosecute the TRO against Kainz. This is a situation that Kainz created, and allowing him to take an inconsistent position this far into the case gives him an unfair advantage of creating the fact pattern and timeline to garner favor with the factfinder and fabricate damages. The Court should estop Kainz from gaining this unfair advantage. *See State v. Hargrove*, 48 Kan. App. 2d 522, 550 (2013) (explaining that judicial estoppel is meant, in part, to hold "advocates to their strategic choices and representations").

D. Costs, Fees & Sanctions

K.S.A. § 60-5320(g) requires that a court "**shall award** the defending party, upon a determination that the moving party has prevailed on its motion to strike . . . (1) costs of litigation and reasonable attorney fees; and (2) such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situation." K.S.A. § 60-5320(g) (emphasis added). Thus, should this Court strike one or more of Kainz's claims under the KSPSA, the Court must grant Jacam 2013 its fees and costs in defending those claims. Further, the Court may award

sanctions against Kainz and his attorneys to deter similar conduct by others.

Jacam 2013 requests that the Court strike Kainz's claims under the KSPSA, award Jacam 2013 its costs and attorneys' fees, and award sanctions against Kainz and/or his attorneys to deter baseless claims by others similarly situated. *See Zaid*, 2022 WL 4534633, at *11 (noting that the award of the costs of litigation and attorneys' fees is mandatory under the KPSPA, while sanctions are discretionary.).

V. CONCLUSION

The Kansas Public Speech Protection Act protects Jacam 2013 from unsupported and unsupportable allegations intended to chill Jacam 2013's protected speech and conduct and entitles Jacam 2013 to an early dismissal of Kainz's claims. The Act forces Kainz to "put his money where his mouth is" or be subject to the Court striking the claims and ordering that he pay Jacam 2013's attorneys' fees, costs, and sanctions.

Because Jacam 2013 has met its burden of establishing that the alleged statements and conduct are protected activities under the Kansas Public Speech Protection Act, and (2) Kainz lacks the requisite substantial competent evidence of the elements of his abuse of process, malicious prosecution and breach of contract claims, Jacam 2013 respectfully requests that following a hearing,[8] the Court strike Kainz's Counterclaims, award Jacam 2013 its costs, attorneys' fees, and sanctions sufficient to deter similar conduct, and enter such other and further relief as the Court deems just and proper.

Jacam 2013 further requests, in the alternative, that the Court dismiss Kainz's Counterclaims for failure to state a claim upon which relief may be granted pursuant to K.S.A. § 60-212(b)(6).

[8] Hearing must occur within thirty (30) days of the service of this Motion. K.S.A. § 60-5320(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of October, 2022, a true and correct copy of the above and foregoing was served via email and the Kansas Judicial Branch eFlex System to all counsel of record.

/s/ Ryan M. Peck
Ryan M. Peck

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CASE NUMBER: 2019-CV-000021
PII COMPLIANT

Exhibit B

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IN THE TWENTIETH JUDICIAL DISTRICT COURT
DISTRICT COURT, RICE COUNTY, KANSAS

JACAM CHEMICAL COMPANY 2013, LLC, Plaintiff, v. WILLIAM A. KAINZ, GEOCHEMICALS, LLC, and GENE ZAID, Defendants,	)	Case No. 2019-CV-000021

Pursuant to K.S.A. Chapter 60

RESPONSE TO JOINT MOTION FOR LEAVE TO FILE AMENDED PLEADINGS

Plaintiff Jacam Chemical Company 2013, LLC ("Jacam 2013") submits this Response to the Joint Motion for Leave to File Amended Pleadings of Defendants William A. Kainz ("Kainz") and GeoChemicals, LLC ("Geo") (collectively, "Defendants") and states as follows:

I. INTRODUCTION

Two months before trial, Defendants ask the Court to allow them to add counterclaims they could have brought years ago—counterclaims that will unquestionably necessitate additional discovery (and a fifth scheduling order) and change the date and scope of the trial. Defendants' proposed counterclaims are (1) malicious prosecution, (2) abuse of process, and (3) breach of

contract. Defendants base the proposed new claims on the "wrongfully obtained" temporary restraining order that Judge Hipp issued *more than 3 years ago on June 11, 2019*. Motion at ¶ 7. Defendants fail to explain their delay and fail to disclose to the Court that, not only did they wait 3 years to challenge the TRO, they *twice agreed to extend the TRO.*

Remarkably, they tell the Court "there is no prejudice to Jacam in permitting the amended pleadings." Defendants have no purpose *except* to prejudice Jacam 2013 and further delay the October trial. The Court should deny the Motion.

II. RELEVANT FACTS

1. Jacam 2013 filed this case on June 6, 2019.

2. On June 11, 2019, Judge Hipp issued a Temporary Restraining Order pursuant to K.S.A. § 60-903. (Exhibit 1).

3. Judge Hipp issued the TRO after considering Jacam 2013's Verified Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunction, the Memorandum in support of same, and arguments of Jacam 2013's counsel. *Id.*

4. Judge Hipp found that Jacam 2013 would suffer irreparable injury if the TRO was not issued *ex parte*. *Id.* at ¶ 2. Based on the evidence presented, she determined that advance notice should not be given to Defendants due to the risk of misappropriated information being destroyed and Kainz's demonstrated "willingness to engage in surreptitious efforts by misappropriating the information it the first place." *Id.* at ¶ 6.

5. Judge Hipp found that Jacam 2013 had no adequate remedy at law and was at risk of losing intangible assets such as reputation and goodwill if Kainz and Geo were not immediately enjoined. *Id.* at ¶ 3.

6. Judge Hipp ordered that (1) Kainz and Geo were enjoined from altering, deleting,

or misappropriating Jacam 2013's confidential information, (2) Kainz and Geo were required to permit forensic imaging of their electronic devices and systems, (3) Kainz was enjoined from working for Geo or any other company engaged in competition with Jacam 2013, and (4) Kainz was enjoined from soliciting Jacam 2013's customers. *Id.* at ¶ 4.

7. Judge Hipp did not require Jacam 2013 to post a bond as security for the TRO. *Id.* at ¶ 5.

8. Judge Hipp scheduled a temporary injunction hearing for June 26, 2019. *Id.* at ¶ 1.

9. **On June 19, 2019, all parties, including Kainz and Geo, agreed to extend the TRO, and Judge Hipp issued an order extending the TRO by agreement of the parties.** (Exhibit 2). Defendants agreed to be bound by the TRO "until the earlier of when the parties agree otherwise, or until a hearing is held on Plaintiff's Motion for Temporary Injunction on or before July 31, 2019." *Id.* at ¶ 1.

10. **On August 1, 2019, all parties, including Kainz and Geo, again agreed to extend the TRO, and Judge Hipp issued a second order extending the TRO by agreement of the parties.** (Exhibit 3). Defendants agreed for the second time to be bound by the TRO "until the earlier of when the parties agree otherwise, or until a hearing is held on Plaintiff's Motion for Temporary Injunction on or before September 30, 2019, unless the Court does not have sufficient, consecutive days on its calendar for the hearing before September 30, 2019, in which case the hearing shall be conducted on or before the earliest date on which the Court has sufficient, consecutive days for the hearing and counsel are available." *Id.* at ¶ 1.

11. On March 3, 2020, **Jacam 2013 filed a motion for summary judgment** seeking a ruling from the Court that Kainz's restrictive covenants are enforceable under Kansas law because Kainz's employment agreement contains a Kansas choice of law provision and Kansas bears a

material relationship to that agreement. (Exhibit 4).

12. At the June 2, 2020 hearing on Jacam 2013's summary judgment motion, Defendants' counsel urged Judge Hipp to deny Jacam 2013's motion, rule that North Dakota law applies to Kainz's employment agreement, and rule that Kainz's restrictive covenants are unenforceable. (Exhibit 5, Transcript at pp. 16, 48-49, 54).

13. Finding that genuine issues of material fact precluded summary judgment, Judge Hipp denied Jacam 2013's motion. *Id.* at p. 59. Importantly for purposes of the present Motion, **Judge Hipp declined to issue a ruling, as Defendants requested, that the restrictive covenants were unenforceable**. *Id.*

14. Under the Fourth Amended Scheduling Order:

a. Discovery closed August 10, 2022;

b. Dispositive motions are due by August 23, 2022;

c. The pretrial conference is set for September 21, 2022; and

d. After multiple continuances, the jury trial is set to begin October 17, 2022.

15. For more than 3 years, neither Kainz nor Geo:

a. sought to modify or vacate the TRO;

b. filed a dispositive motion seeking rulings as to any aspect of the TRO;

c. took any action to press for a hearing following entry of the TRO; and

d. took any action to seek relief from the TRO that *they agreed to extend on two separate occasions.*

16. Only in May 2022 did Defendants seek to lift the TRO—nearly 3 years after its entry and 2 years after Judge Hipp's refusal to find the restrictive covenants unenforceable in connection with Jacam 2013's motion for summary judgment.

III. ARGUMENT AND AUTHORITIES

Where there is undue delay, futility of the amendment, or undue prejudice to the opposing party, a court should deny a request to amend pursuant to K.S.A. § 60-215. *Dutoit v. Bd. of Cty. Com'rs of Johnson Cty.*, 667 P.2d 878, 886-87 (Kan. 1983); *Steinert v. The Winn Group, Inc.*, 190 F.R.D. 680, 682 (D. Kan. 2000) (Exhibit 6). Each factor necessitating denial is present here.

A. Defendants' Eleventh-Hour Request to Amend is the Very Definition of (Unexplained) Undue Delay

"The longer the delay, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend." *Schneider v. CitiMortgage, Inc.*, No. 13-4094, 2016 WL 344725, at *3 (D. Kan. Jan. 28, 2016)(citing *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006)) (Exhibit 7). A court must assess whether the reasons for delay "amount to excusable neglect." *Id*. at *3. "This is especially the case where the party seeking amendment gives no adequate explanation for the delay or where the party knows or should have known of the facts upon which the proposed amendment is based but fails" to assert the claim earlier. *Id.*; *see also Steinert*, 190 F.R.D. at 684.

These guiding principles led the Kansas federal district court in *Scheinder* and the Tenth Circuit in *Steinert* to deny leave to amend. In *Schneider*, the court denied leave on the basis of undue delay where the party waited to seek leave until two months after the event it claimed formed the basis of the proposed amendment. 2016 WL 344725 at *3. In *Steinert*, the court denied leave for undue delay where the lawsuit had been pending a year at the time the party sought leave, finding the party knew or should have known of the facts upon which the proposed amendment was based much earlier. 190 F.R.D. at 684.

Here, Defendants waited more than three years and just two months before trial to seek leave to amend. That alone should doom their request. But they also offer no explanation for their extreme delay. Under Kansas law, "a cause of action accrues…[when] the [party] could first have filed and prosecuted his action to a successful conclusion," which certainly does not follow a routine procedural ruling such as a ruling on a summary judgment motion. *LCL, LLC v. Falen*, 422 P.3d 1166, 1174 (Kan. 2018). Thus, any attempt by Defendants to argue that the Court's order on their summary judgment motion triggered their request should be quickly rejected.

Defendants have taken the position that Jacam 2013 "wrongfully obtained" the TRO since the beginning:

- "The contracts relied on by Plaintiff in Plaintiff's Petition are unenforceable under North Dakota Law, which applies in this case." (Exhibit 8, Geo's Original Answer at p. 31, ¶ 74)

- "North Dakota law applies and the contract is unenforceable under North Dakota Law." (Exhibit 9, Kainz's Original Answer at ¶ 5)

- "Kainz admits the Employee Agreement states that it is governed by Kansas law, but Kainz denies that Kansas law would govern since he resides in and works in North Dakota. North Dakota law governs, and *Osborne v. Brown & Saenger, Inc.*, 904 N.W.2d 34 (N.D. 2017) states that non-compete contracts such as the one in issue violate North Dakota's public policy and is unenforceable." *Id.* at ¶ 10.

- "Kainz restates that the subject restrictions are not enforceable in North Dakota." *Id.* at ¶ 19.

- "Kainz states that the restrictive provisions are not enforceable in North Dakota." *Id.* at ¶ 25.

- "[Kainz] admits that Plaintiff obtained an ex parte temporary restraining order enforcing against [him] in North Dakota restrictive covenants which are illegal and against public policy in North Dakota." (Exhibit 10, Kainz's Answer to First Amended Petition at ¶ 20; Exhibit 11, Kainz's Answer to Second Amended Petition at ¶ 25)

Defendants have had *abundant time* since issuance of the TRO in June 2019 to seek amendment (and ample mechanisms to seek vacatur of the TRO). Because they offer no

explanation for their delay, and the basis for their sought amendment has existed from the beginning of the case, the Court should deny their last-minute attempt to amend based on undue delay.

B. Amendment at this Juncture Will Result in a Domino Effect of Delays and Undue Prejudice to Jacam 2013

1. Amendment will necessitate reopening discovery.

Discovery in this case is closed. If the Court allows Defendants' proposed amendment, the Court must allow Jacam 2013 to conduct discovery regarding the counterclaims and damages. As the District of Kansas has recognized, "Reopening discovery would…delay the final pretrial conference, dispositive motions, and trial. The litigation in this case must, at some point, come to a resolution." *Schneider*, 2016 WL 344725, at *5 (denying leave amend because "undue prejudice and protracted delay would result"); *see also Steinert*, 190 F.R.D. at 683 (denying leave because reopening discovery and the need to file motions as to the proposed claims "would prejudice the opposing parties and the orderly administration of justice").

This discovery would necessarily include depositions of counsel in this case, given the agreement to extend the TRO twice. At a minimum, lead counsel for Defendants will certainly be witnesses subject to deposition and trial testimony. A further issue is possible disqualification of counsel under Kansas Rule of Professional Conduct 3.7(a), which provides that "[a] lawyer shall not serve as an advocate at a trial in which the lawyer is likely to be a necessary witness." If the Court allows the proposed amendment, disqualification of trial counsel is certainly a possibility, if not a likelihood, resulting in significant prejudice and expense to Jacam 2013.

2. Amendment will necessitate a new dispositive motion deadline, a fifth amended scheduling order, and a new trial date.

The deadline for dispositive motions is **August 23, 2022.** If the Court allows the

amendment, it must also set a new dispositive motion deadline to allow Jacam 2013 to file dispositive motions on the new counterclaims after completion of discovery on those claims. That will in turn unquestionably necessitate a new trial date, moving the **October 17, 2022** trial date (which has taken years to cement) likely well into 2023. And that in turn will almost certainly necessitate a new trial date for the other case between Jacam 2013 and Geo pending before this Court, *Jacam 2013 v. GeoChemicals and Michael Sorg*, Case No. 2019-CV-000032, which is currently set for trial starting **February 20, 2023**.

And yet, Defendants claim permitting the proposed amendments "will cause no undue delay of the proceedings." Without question, allowing Defendants to add counterclaims will result in a continuance of the October 17, 2022 trial setting, for it would be impossible to conduct discovery and hear dispositive motions on the claims before that time. Through the Covid pandemic, three judicial assignments, and multiple delays due to docket constraints, Jacam 2013 has waited long enough for its day in court. The Court should not allow such gamesmanship.

C. Defendants' Proposed Amendment is Futile

Where proposed claims would be subject to dismissal, such as for failure to state a claim upon which relief can be granted, futility warrants denial of leave to amend. *Steinert*, 190 F.R.D. 682. Defendants' proposed counterclaims fail to satisfy the pleading standard set forth in K.S.A. § 60-212(b)(6), *i.e.*, they are not claims upon which relief can be granted. For this additional reason, the Court should deny the Motion.

1. Defendants' Malicious Prosecution Claims Fail as a Matter of Law.

The elements of a claim for malicious prosecution are (1) that a party initiated, continued, or procured civil procedures against the other party, (2) without probable cause, (3) with malice (meaning the party "acted primarily for a purpose other than that of securing the proper

adjudication of the claim upon which the proceedings are based"), (4) the proceeding terminated in favor of the other party, and (5) caused the party to sustain damages. *Budd v. Walker*, 491 P.3d 1273, 1281 (Kan. Ct. App. 2021). As explained below, Defendants' malicious prosecution claims fail as a matter of law.

a. The claim is premature, as it arises only after termination of the current case.

Kansas law is well-settled that a claim for malicious prosecution "does not accrue until the time for appeal has passed on the original action." *H & H Farms, Inc. v. Hazlett*, 627 P.2d 1161, 1167 (Kan. Ct. App. 1981). Accordingly, "a claim for malicious prosecution founded on a civil action is not the proper subject of a counterclaim since it requires proof of the termination of the former proceeding in favor of the defendant." *Id.* at 1168.

Defendants unsurprisingly cite to no legal authority to warrant leave to add their malicious prosecution claims before the time for appeal has passed in this case (and Jacam 2013 is aware of no such authority). That omission is not coincidental: in *Nal II, Ltd. v. Tonkin,* the Kansas federal district court examined a New York decision holding that counterclaims for malicious prosecution based on a dissolved temporary restraining order were **premature** and did not provide a separate proceeding on which to base a malicious prosecution claim. 705 F.Supp. 522, 524 (D. Kan. 1989)(examining *Bercy Indus., Inc. v. MechanicalMirror Works, Inc.*, 279 F.Supp. 428 (S.D.N.Y. 1968)). Courts in other jurisdictions have likewise held that a malicious prosecution claim does not arise upon the dissolution of a temporary restraining order and is premature until termination of the main action in favor of the party claiming malicious prosecution. *See Henderson v. Armantrout*, 592 S.W.2d 202, 205 (Mo. Ct. App. 1979); *Nix v. Sawyer*, 466 A.2d 407, 411 (Del. Sup. Ct. 1983)(dismissing claim for malicious prosecution of temporary restraining order where underlying action was still pending). Here, Defendants counterclaims for malicious prosecution

are clearly premature and cannot survive a motion to dismiss, rendering them futile.

b. Defendants cannot state a claim for malicious prosecution.

In addition to being premature, Defendants cannot state a claim for malicious prosecution. The contract from which all proposed counterclaims flow—Kainz's employment agreement with Jacam—includes a Kansas choice of law provision in addition to a Kansas venue provision. As Jacam 2013 explained in detail in its memorandum in support of its 2020 motion for summary judgment and reply (1) Kainz agreed that Kansas law applies to his employment agreement, (2) Kansas bears a material relationship to that agreement, (3) Kansas courts regularly enforce restrictive covenants, and (4) the restrictive covenants in Kainz's employment agreement are reasonable. (Exhibit 4 and Exhibit 13). After obtaining evidence that Kainz violated his employment agreement by surreptitiously funneling Jacam 2013's confidential information and trade secrets to Geo, Jacam 2013 had probable cause to seek a TRO to prevent Kainz from causing further harm to Jacam 2013. The Court agreed, finding that Jacam 2013 had no adequate remedy at law and was at risk of losing intangible assets such as reputation and goodwill if Defendants were not immediately enjoined and, a year later, refusing Defendants' request to find that Kainz's restrictive covenants were unenforceable. Exhibit 1 at ¶ 3; Exhibit 5 at p. 59. Because Jacam 2013 had probable cause to seek the TRO, Defendants cannot establish a claim for malicious prosecution. *See Budd*, 491 P.3d at 1281.

Further, Geo's claim for malicious prosecution fails for the separate reason that Geo lacks standing and has suffered no damages. The only aspect of the TRO about which Defendants complain is that it prohibited Kainz from working for Geo. While Kainz may have standing to complain, Geo does not. Under the TRO, Judge Hipp enjoined Geo only from altering, deleting or misappropriating Jacam 2013's confidential information. Exhibit 1 at ¶ 4. Because Geo was not

enjoined from any additional activities, Geo could not have suffered any damages as a result of the TRO. Accordingly, allowing Geo to add a counterclaim for malicious prosecution would be futile because Geo cannot satisfy all elements of the claim. *See Budd*, 491 P.3d at 1281.

2. Defendants' Abuse of Process Claims Fail as a Matter of Law.

Defendants' proposed abuse of process[1] counterclaims also fail as a matter of law. The elements of a claim for abuse of process are (1) that a party made an illegal, improper, or perverted use of the process (a use neither warranted nor authorized by the process), (2) an ulterior motive or purpose in exercising the process, and (3) damages resulting to the other party. *Porter v. Stormont-Vail Hosp.*, 621 P.2d 411, 416 (Kan. 1980)(citing 1 Am. Jur. 2d 252, Abuse of Process, s 4). "If the process used is regular, the motive, ulterior or otherwise, of the alleged abuser is immaterial. A party is protected when the process is valid and used for a legitimate purpose—even with a bad intention, it is not abuse of process." *Jeannine Williams, LLC v. Ice Masters, Inc.*, No. 121,377, 2021 WL 2171161, at *7 (Kan. Ct. App. May 28, 2021) (Exhibit 12). There is no claim for abuse of process "if the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint, even if…the plaintiff knowingly brought suit upon an unfounded claim." *Caldwell-Baker Co. v. Tideman*, Nos. 95,600, 95,618, 2007 WL 136029, at *4 (Kan. Ct. App. Jan. 19, 2007). **Abuse of process occurs *only*:**

> **where someone attempts to achieve through the use of the court that which the court is itself powerless to order. The abuse of process tort is intended to prevent parties from using litigation to pursue alternative objectives and using the court's process to compel another party to act. There is no liability where the defendant has only pursued a lawsuit to its authorized conclusion, no matter now 'evil' the defendant's motives may be. Abuse of process requires some overt act done in addition to commencing a lawsuit; filing or maintaining a lawsuit, even for improper purposes, is not enough**.

[1] Defendants Geo and Kainz have a claim against Jacam 2013 for "abuse of process" in a case they filed in Stark County, North Dakota that has been stayed pending resolution of this case.

Jeannine Williams, LLC, 2021 WL 2171161, at *8 (citation omitted)(emphasis added).

Here, Defendants fail to meet this standard. Jacam 2013's alleged conduct in using legal process to enforce Kainz's employment agreement does not create a cause of action for abuse of process. Defendants allege no fact that would demonstrate Jacam 2013 used legal process for an improper purpose; instead, they simply attack Jacam 2013's motives in obtaining the TRO[2], which will not suffice to support an abuse of process claim. Importantly, Judge Hipp rejected Defendants' request to rule that the restrictive covenants in Kainz's employment agreement are unenforceable. (Exhibit 5, p. 59).

The bare allegation that Jacam 2013 "knowingly obtain[ed] the wrongful TRO" is not sufficient to show any improper use of process. Because there is nothing to suggest that Jacam 2013 used the TRO for an "illegal, improper, [or] perverted," use or for a use "neither warranted nor authorized by the process," Jacam 2013's motive is immaterial.[3] *See Porter*, 621 P.2d at 416; *Jeannine Williams, LLC*, 2021 WL 2171161 at *7. Moreover, not only did Defendants fail to push for a prompt determination on Jacam 2013's request for injunctive relief, they agreed twice to extend the very TRO about which they complain.

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[2] "The purpose of a temporary restraining order is to preserve the status quo until the trial court determines whether a request for permanent injunctive relief should be granted." *J.C. Penney Co., Inc. v. E.R.I.C. Santa Fe Corp.*, No. 68,870, 1993 WL 13965651, at * 2 (Kan. Ct. App. Dec. 3, 1993)(citation omitted).

[3] Defendants seek to mislead the Court about Jacam 2013's knowledge regarding enforceability of Kainz's non-competition covenant by referencing Jacam 2013's position in the unrelated *Multi-Chem* case. Motion at ¶ 11. Unlike Kainz's employment agreement, the employment agreement at issue in the *Multi-Chem* case did not include a Kansas choice of law provision. As Jacam 2013 explained in its summary judgment motion relating to enforceability of the Kainz restrictive covenants, Jacam 2013 had a reasonable belief that the Kainz restrictive covenants were enforceable because of the Kansas choice of law provision and Kansas' material relationship to the contract. (Exhibit 4). Judge Hipp's ruling—that fact issues precluded summary judgment—and refusal of Defendants' request to find the restrictive covenants unenforceable supports that Jacam 2013's position was not unreasonable or groundless. (Exhibit 5, pp. 16, 48-49, 59).

3. Kainz Cannot State a Claim for Breach of Contract

Kainz seeks to add a counterclaim for breach of contract against Jacam 2013 based on the allegation that Jacam 2013 restricted him "from seeking new employment in North Dakota." Motion at ¶ 8. To establish a claim for breach of contract, Kainz must demonstrate: (1) the existence of a contract with Jacam 2013; (2) sufficient consideration to support the contract; (3) his performance or willingness to perform in compliance with the contract; (4) Jacam 2013's breach of the contract; and (5) damages caused by the breach. *See Stechschulte v. Jennings*, 298 P.3d 1083, 1098 (Kan. 2013). Not only is it unclear which provision of his employment agreement Jacam 2013 allegedly breached, but Kainz cannot establish that he performed or was willing to perform in compliance with the agreement. Kainz *admits* to breaching his confidentiality obligations by sending Jacam 2013's confidential information to Geo, which dooms his breach of contract claim. *See, e.g., Bank of America, N.A. v. Narula*, 261 P.3d 898, 902 (Kan. Ct. App. 2011) ("first-to-breach rule precludes a party who has first materially breached a contract from attempting to enforce that contract until the breach is cured"); *Lassiter v. Topeka Unified School Dist. No. 501*, 347 F. Supp. 2d 1033, 1041 (D. Kan. 2004) ("[a] party's uncured material breach of a contract can suspend or discharge the other party's obligation to perform")(citations omitted); Restatement (Second) of Contract § 237 (1981) ("it is a condition of each party's remaining duties to render performance … that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

The futility of Defendants' proposed counterclaims further supports denial of the Motion.

CONCLUSION AND PRAYER

WHEREFORE, for the above and foregoing reasons, Jacam 2013 respectfully requests the Court deny Defendants' request for leave to file amended pleadings and for other and further relief the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of August, 2022, a true and correct copy of the above and foregoing was served via email and the Kansas Judicial Branch eFlex System to all counsel of record.

/s/ Ryan M. Peck
Ryan M. Peck

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

WILLIAM KAINZ and GEOCHEMICALS, LLC, *Plaintiffs and Appellants,* vs. JACAM CHEMICAL COMPANY 2013, LLC, *Defendant and Appellee.*	Supreme Court No. 202200135 Stark County No. 45-2019-CV- 00703 **DECLARATION OF SERVICE**

Dayna Fredrickson declares, under penalty of perjury, that on the 20th day of October, 2022, she electronically filed with the North Dakota Supreme Court the following documents:

1. **Appellants William Kainz and GeoChemicals, LLC's Reply Brief**
2. **Appellants William Kainz and GeoChemicals, LLC's Joint Motion to Take Judicial Notice of Non-Record Items**
3. **Exhibits A and B**

along with this Declaration of Service, and that true and correct copies of the referenced documents were served via email to the following:

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