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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dawn Osborne, Plaintiff/Appellant, vs. Brown & Saenger, Inc., Defendant/Appellee.	**SUPREME COURT NO. 20170254** Civil No. 09-2017-CV-00660

ON APPEAL FROM THE ORDER FOR JUDGMENT AND JUDGMENT ENTERED ON JUNE 29, 2017 BY THE CASS COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT, STATE OF NORTH DAKOTA, THE HONORABLE TOM OLSON PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] I. Whether the district court properly dismissed Appellant Dawn Osborne's action against her former employer, Appellee Brown & Saenger, Inc., without prejudice for improper venue due to the existence of a valid forum-selection clause within the Appellant's employment agreement.

[¶2] II. Whether the district court properly determined it lacked jurisdiction to rule on Appellant Dawn Osborne's motion for preliminary injunction because the district court dismissed the case for improper venue.

STATEMENT OF THE CASE

[¶3] On March 13, 2017, Appellant Dawn Osborne (hereinafter "Osborne") filed and served a Verified Complaint against her former employer, Appellee Brown & Saenger, Inc. (hereinafter "Brown"), raising several allegations related to her employment. (Doc ID#1.) In relevant part, Osborne contended she signed an employment agreement containing a covenant-not-to-compete and reported to Brown alleged unauthorized deductions in pay, withholding of commissions, and failure to return funds to customers. Osborne asserted claims for retaliation, improper deductions, and breach of contract. (App. at 16-17, ¶¶ 121-36.) She further sought a declaratory judgment related to the enforceability of the covenant-not-to-compete. (Id. at 14-15, ¶¶ 112-20.) On the same day Osborne filed the Verified Complaint, she filed a motion for preliminary injunction, also relating to the covenant-not-to-compete and seeking to prevent Brown from enforcing the covenant against her. (Doc ID#5.)

[¶4] After receiving an extension to respond from Osborne, Brown submitted a response to her motion for preliminary injunction. (Doc ID#34.) Concurrently with this response, Brown also filed a motion to dismiss Osborne's action for improper venue due

to a valid forum-selection clause within the employment agreement. (Doc ID#39.) The district court set oral argument on both motions for May 31, 2017. (App. at 2.)

[¶5] Following the motion hearing and upon reviewing all the materials submitted by the parties, the district court granted Brown's motion to dismiss for improper venue. (Id. at 20, ¶ 1.) In its ruling, the district court determined the forum-selection clause was valid and enforceable. (Id. at 22-23, ¶ 11.) The district court further determined that there was no duress, fraud, overreaching, or strong public policy within North Dakota to invalidate this clause. (Id. at 22-25, ¶¶ 11-14.) In particular, though this agreement contained a covenant-not-to-compete, the district court determined—based on caselaw cited by Brown—that the parties' contracted forum would decide whether the covenant was enforceable. (Id. at 23-24, ¶ 12.) Because the district court granted Brown's motion and accordingly dismissed Osborne's action without prejudice, the district court further determined that it lacked jurisdiction to rule or act on Osborne's motion for preliminary injunction. (Id. at 20, ¶ 1.)

[¶6] Thereafter, Osborne filed a notice of appeal. (Id. at 27-28.) Osborne's appeal is timely.

[¶7] In addition to this pending action, there is a second action pending in South Dakota, the forum chosen by the parties in the forum-selection clause. Shortly after Osborne commenced her action against Brown in North Dakota, Brown—through separate South Dakota counsel—commenced the action in South Dakota, pertaining to the same agreement at issue in this case. Osborne has appeared in the South Dakota action. (Doc ID#47.) Upon information and belief, there has been no ruling from the South Dakota court.

STATEMENT OF THE FACTS

[¶8] According to the Verified Complaint, Osborne was hired by Brown in April of 2011. (App. at 5, ¶ 13.) Brown sells office supplies to various businesses and hired Osborne to be a sales representative. (Id.) Brown is headquartered in South Dakota, but operates as a licensed foreign corporation in North Dakota, including in Fargo, where Osborne's office was located. (Id. at 4, ¶ 3.)

[¶9] When hired in 2011, Osborne signed an employment agreement related to her salary and commissions. (Id. at 5, ¶ 17.) This agreement, according to Osborne, also contained a covenant-not-to-compete. (Id. at 5, ¶ 15.) Osborne was aware that the agreement contained this covenant, and she signed the agreement. (Id. at 5, ¶ 17.) Each subsequent year, Osborne signed a new employment agreement to be effective the following year. (Id. at 6, ¶ 25.) These agreements contained new salary and commission terms, as well as a covenant-not-to-compete. (Id. at 6, ¶ 26.)

[¶10] In December of 2015, Osborne, as in prior years, signed another employment agreement with Brown (hereinafter the "Employment Agreement"). (Id. at 10, ¶ 65.) It is this Employment Agreement that is at issue in this case.[1] Similar to Osborne's other agreements, the Employment Agreement outlined Osborne's services to Brown and her compensation. (Supp. App. at 1-2.) Also similar to the other agreements, the Employment Agreement contained a covenant-not-to-compete, providing:

> In consideration of the payment to be made hereunder and in further consideration of Employer providing education and training to Employee, the sufficiency of which consideration is hereby conclusively acknowledged; employee agrees not to engage directly or indirectly, either personally or as an employee, associate, partner, or otherwise, or by means

[1] The Employment Agreement was attached to the Verified Complaint as Exhibit A. (Id. at 10, ¶ 65.) It is now reproduced in the Supplemental Appendix.

> of any corporation or other legal entity, or otherwise, in any business in competition with Employer and, in addition, not to solicit customers of Employer for Employee's own benefit or for the benefit of any third party, during the term of employment and for a period of two (2) years from the last day of employment, within a 100 mile radius of employment location.

(Id. at 2-3.) In addition, the Employment Agreement contained a choice-of-law and forum-selection clause, which read:

> *The parties agree* that this agreement is governed by the laws of the State of South Dakota and *that the state circuit court situated in Minnehaha County, South Dakota, shall be the exclusive jurisdiction of any disputes related to this Agreement*.

(Id. at 3 (emphasis added).)

[¶11] Osborne was ultimately terminated from her employment with Brown on January 18, 2017. (App. at 13, ¶ 93.) Before her termination, Osborne contends she raised issues related to her compensation, deductions, payment to customers, and the covenant-not-to-compete to Brown. (Id. at 16, ¶ 123.) Approximately two months later, Osborne filed suit against Brown in Cass County, North Dakota—not the parties' contracted forum—involving her employment and compensation with Brown. (Doc ID#1.)

LAW AND ARGUMENT

I. Standard of Review

[¶12] This case involves the appeal of an order dismissing Osborne's action against Brown for improper venue pursuant to North Dakota Rule of Civil Procedure 12(b)(3). Concurrently with its response to Osborne's motion for preliminary injunction, Brown filed a motion to dismiss Osborne's action for improper venue based on the forum-selection clause within her Employment Agreement. In dismissing Osborne's action on this ground, the district court relied on the Verified Complaint, as well as the Employment Agreement, which was embraced within the Verified Complaint and which

Osborne attached to the same. Nelson v. McAlester Fuel Co., 2017 ND 49, ¶ 22, 891 N.W.2d 126 (permitting courts to consider, in addition to pleadings, materials embraced by the pleadings without converting a Rule 12 motion into a Rule 56 motion).

[¶13] It does not appear that this Court has addressed the proper standard of review for dismissal of an action for improper venue. C.f. Triple Quest, Inc. v. Cleveland Gear Co., Inc., 2001 ND 101, ¶ 18, 627 N.W.2d 379 (reviewing a case involving a forum-selection clause under a summary judgment standard because the court reviewed matters outside the pleadings). However, N.D.R.Civ.P. 12(b)(3) mirrors Fed.R.Civ.P. 12(b)(3), and therefore, federal interpretations of the rule are instructive. Unemp't Comp. Div. of Emp't Sec. Bureau v. Bjornsrud, 261 N.W.2d 396, 398 (N.D. 1977). Federal courts have indicated the proper standard of review for the dismissal for a lawsuit for improper venue based on a forum-selection clause is de novo. Rucker v. Oasis Legal Finance, LLC, 632 F.3d 1231, 1235 (11th Cir. 2011).

II. The district court properly granted Brown's motion to dismiss for improper venue due to the valid forum-selection clause within the Employment Agreement.

[¶14] Though this Court has never reviewed the enforceability of forum-selection clauses in an employment agreement, it has, in other contexts, examined the plain language of forum-selection clauses in determining whether they require an action to be exclusively brought in another forum. See Triple Quest, Inc., 2001 ND 101, ¶ 21, 627 N.W.2d 379. In doing so, this Court has noted "[i]n cases in which forum selection clauses have been held to require litigation in a particular court, the language of the clauses clearly required exclusive jurisdiction." Id. at ¶ 21 n.2. Courts in other jurisdictions have examined forum-selection clauses in a similar manner and have held

exclusivity renders the clauses presumptively valid. Universal Ops. Risk Mgmt., LLC v. Global Rescue LLC, 2012 WL 2792444, at *4 (N.D. Cal. July 9, 2012).

[¶15] Well-established caselaw from the Eighth Circuit and United States Supreme Court further have held forum-selection clauses "are prima facie valid and are enforced unless they are unjust or unreasonable or invalid." Servewell Plumbing, LLC v. Fed. Ins. Co., 439 F.3d 786, 789 (8th Cir. 2006) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1992)). Due to its presumptively valid nature in a contractual transaction, "the party challenging the clause bears an especially 'heavy burden of proof' to avoid its bargain." Servewell, 439 F.3d at 789 (quoting Bremen, 407 U.S. at 17)). Only "some compelling and countervailing reason," such as fraud, overreaching, or contravention of a strong public policy of the forum, will excuse enforcement of a bargained-for forum-selection clause. Servewell, 439 F.3d at 789-90.

[¶16] The forum-selection clause in this case exclusively requires all disputes relating to the Employment Agreement to be resolved in the courts in Minnehaha County, South Dakota. The district court properly ruled that this clause is valid and no fraud, overreaching, or public policy invalidated the clause at issue. Because Osborne did not bring her claims in the proper venue per the forum-selection clause, the district court dismissed her case without prejudice. This Court should affirm.

A. North Dakota's law with respect to covenants-not-to-compete does not invalidate the subject forum-selection clause.

[¶17] Courts examining the validity of forum-selection clauses look to whether there is a "*strong* public policy" of the forum against these clauses. (App. at 24-25, ¶ 13); Servewell, 439 F.3d at 791 (emphasis added). Importantly, these courts examine the forum-selection clause itself to determine if the forum has a public policy against such

clauses. Mechanix Wear, Inc. v. Performance Fabrics, Inc., 2017 WL 417193, at *7 (C.D. Cal. Jan. 31, 2017); Coral Chemical Co. v. Chemetall US, Inc., 2016 WL 3521952, at *5 (S.D. Ind. June 28, 2016); Rowen v. Soundview Comm., Inc., 2015 WL 899294, at *4 (N.D. Cal. Mar. 2, 2015). They do not look to the agreement in which the clause appears. Mechanix Wear, Inc., 2017 WL 417193, at *7.

[¶18] No such public policy exists in North Dakota against the forum-selection clause in this case. This clause neither limits Osborne's ability to assert claims against Brown nor restricts the time in which she may bring her claims. The clause merely requires that her claims against Brown be resolved in South Dakota. (Supp. App. at 3.) Thus, it does not run afoul of N.D.C.C. § 9-08-05, which provides only that a condition restricting enforcement or limiting the time to bring an action are void. Other states with similar statutes have upheld forum-selection clauses because the parties are not limited in addressing the claims in the selected forum. See Okla. Stat. § 15-216 (mirroring N.D.C.C. § 9-08-05); Hunnicutt v. CHF Solutions, Inc., 2010 WL 1078470, at *5 (N.D. Okla. Mar. 18, 2010) (enforcing a forum-selection clause to dismiss a retaliation and sexual harassment action in Oklahoma because the selected forum in Minnesota was not unreasonable or the product of unequal bargaining power).

[¶19] Osborne's argument to this Court and the district court that her Employment Agreement contains a covenant-not-to-compete and North Dakota has a public policy against these covenants improperly focuses on the agreement in which the forum-selection clause is found, not the forum-selection clause itself. Her argument presupposes that a *North Dakota* court would not enforce the covenant-not-to-compete under *North Dakota* law, providing that contracts restraining an individual from

exercising a lawful profession are generally void. N.D.C.C. § 9-08-06; see also N.D.C.C. § 9-08-01 (stating that clauses that are contrary to an express provision of law are unlawful in North Dakota). In doing so, she focuses on whether the choice-of-law clause, providing that South Dakota law shall govern the Employment Agreement, is valid and, accordingly, whether the covenant-not-to-compete is enforceable.

[¶20] However, neither the choice-of-law clause nor the enforceability of the covenant-not-to-compete clause is at issue. The only issue is whether the forum-selection clause is valid and requires that her claims be brought in South Dakota. If valid, it is a matter for the South Dakota court to determine which state's laws apply—North Dakota or South Dakota—under choice-of-law analysis and, consequently, whether the covenant-not-to-compete is valid under that state's laws. Thrasher v. Grip-Tite Mfg., Co., Inc., 2007 WL 4180716, at *4 (D. Neb. Nov. 21, 2007).

[¶21] Several courts in California have addressed identical circumstances as this case and whether to enforce a forum-selection clause included in an employment agreement, which also has a covenant-not-to-compete. California also has an identical statute as North Dakota, generally invalidating a contract, which restrains an individual from engaging in a lawful profession, trade, or business. Cal. Bus. & Prof. Code § 16600. Notwithstanding California's policy regarding covenants-not-to-compete, the California courts have repeatedly upheld forum-selection clauses. See Mechanix Wear, Inc., 2017 WL 417193, at *7; Rowen, 2015 WL 899294, at *7; Universal Ops. Risk Mgmt., LLC, 2012 WL 2792444, at *7.

[¶22] For instance, in Rowen v. Soundview Communications, Inc., a plaintiff employee entered into an agreement with the defendant employer to provide services, and the

agreement also contained a covenant-not-to compete. 2015 WL 899294, at **1-2. The agreement further provided that it was governed by the laws of Georgia and any claims related to the agreement must be brought in Georgia. Id. at *1. The employee eventually brought a declaratory action in California, contending the covenant-not-to-compete violated California state law. Id. at *2. The employer sought to transfer or dismiss the case based on the forum-selection clause within the parties' agreement. Id. at *3.

[¶23] The federal district court in California upheld the forum-selection clause. Id. at *7. In its decision, the court rejected the employee's argument that the clause violated the public policy of California regarding covenants-not-to-compete because this argument was based on analysis that the choice-of-law clause would not apply to the action. Id. at *4. According to the court, "the choice-of-law analysis is irrelevant to determining if the enforcement of a forum selection clause contravenes a strong public policy." Id. This task, instead, is for the proper court to decide:

> there is no reason why the Georgia court will not or cannot entertain Rowen's . . . choice of law arguments. Rowen may challenge the non-compete agreement in Georgia and argue (under the applicable choice-of-law analysis) that California law should apply in light of Rowen's status as a California resident and California's strong public policy against non-compete provisions . . . . Even if Georgia law is determined to apply, Rowen . . . will still be free to argue that enforcement of the non-compete would be "unreasonable" under Georgia law.

Id. at *6.

[¶24] Though the court in Rowen granted a motion to transfer the case, California courts have also granted motions to dismiss on the same grounds, allowing an employee to pursue claims in the proper forum. See Mechanix Wear, Inc., 2017 WL 417193, at *7; Universal Ops. Risk Mgmt., LLC, 2012 WL 2792444, at *7. Courts in other

jurisdictions—both at the state and federal level—have further upheld forum-selection clauses in agreements containing covenants-not-to-compete, despite the forum's laws on such covenants. See, e.g., Coral Chemical Co., 2016 WL 3521952, at *6; Gagnon v. Ryerson Inc., 2007 WL 473742, at *4 (D. Ore. Feb. 1, 2007); Thrasher, 2007 WL 4180716, at *4; Nelms v. Morgan Portable Bldg. Corp., 808 S.W.2d 314, 318 (Ark. 1991). Again, these courts highlight that it is only their task to decide if the forum-selection clause is valid. The courts do not determine whether the covenant-not-to-compete is valid because such a task has been delegated to the court designated by the parties in their agreement. See Gagnon, 2007 WL 473742, at *4 (finding no evidence that the Illinois court, selected in the parties' agreement, would automatically apply Illinois law or that the employee would be preempted from arguing Oregon law should govern the action involving a covenant-not-to-compete); Nelms, 808 S.W.2d at 318 (noting the employee must pursue his claims in the forum selected by the parties, which would "determine whether the non-competition provisions of his employment contract constitute an unreasonable restraint of trade").

[¶25] These cases are directly on point to the issue of whether a forum-selection clause, such as the clause in the Employment Agreement, is enforceable, unlike the caselaw cited by Osborne, which is the same caselaw she presented to the district court. For instance, Osborne relies on Hall v. Superior Court, 150 Cal. App. 3d 411 (1983), a case venued in California, though an agreement provided that any litigation regarding the agreement may only be brought in Nevada. At issue in Hall, however, was a motion to dismiss "based on the forum selection *and choice of law* provisions" in the agreement. 150 Cal. App. 3d at 415 (emphasis in original). The court in Hall accordingly engaged in a choice-of-law

analysis and found the agreement violated the public policy of California. Id. at 418. Notably, the court also indicated it was not called upon to decide if another forum could apply California law to the issues in the case. Id. at 419.

[¶26] Unlike Hall, Brown's motion to dismiss before the district court was limited to the forum-selection clause alone and did not ask the district court to dismiss her action due to the choice-of-law clause.[2] Indeed, the district court did not engage in choice-of-law analysis, and Osborne's reliance on this analysis and the public policy of N.D.C.C. § 9-08-06 is, therefore, misplaced. See Coral Chemical Co., 2016 WL 3521952, at *4 (stating "the issue is not the choice of law to apply to the merits of the case but whether the court should give effect to the parties' contractually chosen forum"). It is also important to note that since Hall, courts have repeatedly upheld forum-selection clauses under the reasoning mentioned in Hall that the chosen forum is apt to apply another state's laws. See, e.g., Thrasher, 2007 WL 4180716, at *4.

[¶27] Beilfuss v. Huffy Corp., 685 N.W.2d 373 (Wis. Ct. App. 2004), a case heavily relied on by Osborne, is unpersuasive to the issues at hand for the very same reasons. Similar to Hall, the defendant in Beilfuss moved to dismiss a complaint due to both a forum-selection and choice-of-law clause in an employment agreement. 685 N.W.2d at 374. The court, therefore, relied on Hall and applied choice-of-law analysis to invalidate the forum-selection clause. Id. at 378. Again, the facts of Beilfuss are distinguishable from this case because only the forum-selection clause was at issue before the district court and, accordingly, is only at issue before this Court. To apply choice-of-law

[2] Though Brown did examine the various factors to apply South Dakota law to this action in its response to Osborne's motion for preliminary injunction, Brown's motion to dismiss—which is solely at issue in this appeal—pertained only to the validity of the forum-selection clause.

analysis with respect to the forum-selection clause would impermissibly take this task from the state court in Minnehaha County, South Dakota, where the parties agreed to resolve their disputes. See Nelms, 808 S.W.2d at 318.

[¶28] Lapolla Industries, Inc. v. Hess, 750 S.E.2d 467 (Ga. Ct. App. 2013) also improperly tethered the forum's choice-of-law analysis to forum-selection clause analysis to invalidate the clauses without allowing the proper forum an opportunity to resolve the choice-of-law issues. In its analysis, the Lapolla court cited to a Texas decision, DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990), to hold that a Texas court would "likely" apply its law and enforce the non-compete clause. Lapolla, 750 S.E.2d at 476. However, the court in Lapolla failed to address In re AutoNation, a Texas Supreme Court case decided since DeSantis, which held a mandatory forum-selection clause must be upheld, notwithstanding the public policy of non-compete clauses in the forum. In re AutoNation, Inc., 228 S.W.3d 663, 670 (Tex. 2007). Moreover, the Lapolla court assumed the Texas court would apply Texas law, but this result is merely speculative and not preordained, as the proper forum must engage in choice-of-law analysis to determine which state law applies for the particular case. Thrasher, 2007 WL 4180716, at *4. The analysis of Lapolla is simply unpersuasive and should be rejected by this Court.

[¶29] Contrary to Osborne's argument, Brown is not circumventing N.D.C.C. § 9-08-06 by including a South Dakota forum-selection clause in the Employment Agreement. This clause is mandatory and requires Osborne to bring her claims regarding the Employment Agreement in the state court in Minnehaha County, South Dakota. In the South Dakota forum, Osborne is permitted to argue which state law should apply to the Employment Agreement and, consequently, whether the covenant-not-to-compete is enforceable under

that state's laws. Osborne, on the other hand, has circumvented the plain terms of the Employment Agreement in the hopes that a North Dakota court will apply North Dakota law to invalidate the covenant-not-to-compete, yet courts have rejected and discouraged similar attempts by employees. Mechanix Wear, Inc., 2017 WL 417193, at *7 (noting the employee hoped that by filing in California, rather than the prescribed forum, he would be able to take advantage of California state law); Universal Ops. Risk Mgmt., LLC, 2012 WL 2792444, at *6 (finding the "first-to-file rule" to invoke California law not a legitimate basis to invalidate the parties' agreed upon forum clause). This Court should accordingly affirm the district court's decision, dismissing her complaint without prejudice to allow Osborne the opportunity to argue her claims in the proper South Dakota forum.

B. The North Dakota Business Corporations Act does not render the forum-selection clause unenforceable.

[¶30] Upholding the parties' contracted forum-selection clause further does not contravene foreign corporation's duties under the North Dakota Business Corporations Act ("the Act"). Nothing within the Act or elsewhere prohibits foreign or domestic corporations from contracting with employees for a forum-selection clause in the parties' agreements. In fact, § 10-19.1-26 of the Act specifically provides that corporations have the ability to make contracts. N.D.C.C. § 10-19.1-26(7).

[¶31] Section 10-19.1-132(2) of the Act does not change this conclusion. This section merely provides that a certificate of authority for a foreign corporation to do business in North Dakota does not authorize the foreign corporation to exercise any of powers that a domestic corporation is forbidden by law to exercise in the state. Id. § 10-19.1-132(2). Again, however, no provision of state law prohibits a domestic corporation from

contracting with an employee regarding the forum to resolve the parties' disputes, and therefore, no state law restricts foreign corporations from doing so, as well. Osborne interprets this provision to prohibit foreign corporations from including covenants-not-to-compete in agreements with North Dakota employees simply because North Dakota prohibits such covenants, yet her argument again improperly focuses on the enforceability of the covenant under North Dakota law, not the issue at hand regarding whether the forum-selection clause is enforceable. Based on the caselaw cited above, the forum-selection clause is enforceable, irrespective of the fact that Brown is a foreign corporation doing business in North Dakota. See supra Section II.A.

[¶32] Osborne has not cited any caselaw in support of her position that the Act restricts employers from having a forum-selection clause within employment agreements merely because the agreement also contains a covenant-not-to-compete. The caselaw cited by Osborne is distinguishable and does not pertain to either employment agreements or forum-selection clauses. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) (pertaining to the taxing system in California as applied to foreign corporations); Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 544-45 (1922) (relating to a specific state statute requiring any corporation doing business in the state to furnish a letter regarding an employee's discharge); Tasner v. U.S. Indus., Inc., 379 F. Supp. 803 (N.D. Ill. 1974) (involving a lawsuit by shareholders to enforce rights under the Illinois Business Act to inspect records of a foreign corporation doing business in Illinois). No cases appear to have accepted Osborne's interpretation of the Act. In fact, her

interpretation would have far-reaching, unduly restrictive results on various employment situations.[3] Osborne's argument is unsupported and should be rejected by this Court.

C. No other strong public policy of North Dakota invalidates the forum-selection clause.

[¶33] Osborne's equal protection concerns are also misplaced and inapplicable. Osborne only argues there are equal protection issues in not requiring that Brown, as a foreign corporation, be bound by N.D.C.C. § 9-08-06 because other domestic corporations must adhere to this statute. However, the district court never made any determination with respect to whether N.D.C.C. § 9-08-06 is applicable to Brown or whether the statute is per se inapplicable to all foreign corporations. Her argument again mistakes the issue before the district court and this Court because only the forum-selection clause is at issue. The court in South Dakota is tasked with determining whether North Dakota or South Dakota law applies.

[¶34] Moreover, there are no equal protection concerns with the forum-selection clause itself because both foreign and domestic corporations in North Dakota are permitted to enter into contracts and contract for these provisions. N.D.C.C. § 10-19.1-26(7). There is no "unequal" treatment between the two classes to invalidate the clause on this ground. Thus, this case is wholly distinguishable from the case cited by Osborne. Joncas v. Krueger, 213 N.W.2d 1 (Wis. 1973) (determining whether a "corporation" required to

[3] For example, under Osborne's analysis, a Minnesota corporation located in Moorhead, authorized to do business in North Dakota, and entering into an employment agreement to employ a Fargo, North Dakota resident to work in Moorhead could not contract to provide that Clay County, Minnesota state court shall be the exclusive jurisdiction for resolving any disputes arising from the agreement simply because the agreement included a non-compete clause, though such covenants can be valid under Minnesota law. See Kallok v. Medronic, Inc., 573 N.W.2d 356, 361 (Minn. 1998).

pay all debts owing to employees under Wisconsin statute included foreign corporations based on the language of the state's business corporations laws).

[¶35] Once again, Osborne focuses solely on the public policy of N.D.C.C. § 9-08-06 in an attempt to invalidate the covenant-not-to-compete within the Employment Agreement.[4] However, Osborne's action against Brown is not limited to the enforceability of this covenant. Quite to the contrary, Osborne has asserted a retaliation claim allegedly related to opposing this covenant, a wage claim, and a breach of contract claim, in addition to seeking a declaratory judgment regarding the enforceability of the covenant-not-to-compete.

[¶36] These causes of action all relate to the terms and conditions of her Employment Agreement because they pertain to her compensation or the covenant-not-to-compete, yet she has not asserted *any* public policy of North Dakota that requires these claims be heard by a North Dakota court. Indeed, it does not appear that any such policy exists. See, e.g., In re AutoNation, 228 S.W.3d at 669 (noting that Texas has "never declared that fundamental Texas policy requires that every employment dispute with a Texas resident must be litigated in Texas"). Courts routinely apply the law of other states, and the South Dakota courts are equally capable of applying North Dakota law for these various claims, if necessary. See Fabian v. BGC Holdings, LP, 24 N.E.2d 307, 314 (Ill. Ct. App. 2014) (refusing to invalidate a forum-selection clause because a court outside of Illinois may

[4] Osborne's fleetingly assertion in a footnote that the entire Employment Agreement is unenforceable because it was not fully executed is also without merit. (Appellant's Br. at ¶ 28 n.1.) Osborne signed the agreement, showing her unequivocal acceptance of the terms. Wucherpfenning v. Dooley, 351 N.W.2d 443, 444 (N.D. 1984) (explaining acceptance to form a contract must be "absolute, unequivocal, and unconditional"). Moreover, she has not sought in her Verified Complaint to invalidate the entire agreement; in fact, she seeks to enforce the agreement with her own breach of contract claim. (App. at 14.)

resolve a claim based on Illinois statutory cause of action). The district court properly determined the same in dismissing Osborne's action without prejudice to permit her the opportunity to argue her claims in the South Dakota court. (App. at 23-24, ¶ 12.) This Court should affirm the district court's decision on the same grounds.

D. The forum-selection clause is neither procedurally nor substantively unconscionable.

[¶37] Osborne's additional argument that the forum-selection clause is unconscionable is unavailing.[5] As noted by Osborne, North Dakota courts assess unconscionability of contract provisions by employing a two-pronged framework, looking to whether the contract is procedurally unconscionable and substantively unconscionable. Strand v. U.S. Bank Nat'l Ass'n ND, 2005 ND 68, ¶ 7, 693 N.W.2d 918. Importantly, "the party alleging unconscionability must demonstrate some quantum of *both* procedural and substantive unconscionability, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is so one-sided as to be unconscionable." Id. at ¶ 12 (emphasis added) (citations and quotations omitted).

[¶38] Procedural unconscionability encompasses factors related to "unfair surprise, oppression, and inequality of bargaining power." Id. at ¶ 7. Osborne, however, was not simply an unsophisticated party entirely unaware of the terms of the Employment Agreement. Quite to the contrary, she was fully aware of the terms in her agreements with Brown, beginning with her 2011 agreement and each subsequent year. (App. at 5-6.) She also acknowledged that, in 2015, she signed yet another agreement—the Employment Agreement—knowing there was a covenant-not-to-compete, and she even

[5] Osborne attempts, once again, to argue the choice-of-law clause is also invalid on this ground. Her argument in this respect is irrelevant, as the choice-of-law clause neither was at issue in the motion to dismiss nor is at issue in this appeal.

asked to negotiate the terms in 2017. (Id. at 10, 12.) Beneath this covenant is the forum-selection clause. (Supp. App. at 3.)

[¶39] Osborne's awareness of the terms of her agreements with Brown, including the Employment Agreement at issue, present entirely distinguishable circumstances than the case cited by Osborne, Strand v. U.S. Bank National Association ND, 2005 ND 68, ¶ 14, 693 N.W.2d 918, where the clause at issue was sent as a "bill stuffer" to the plaintiff without his knowledge. In this case, Osborne knew of the terms of the Employment Agreement. Courts examining analogous circumstances have held this knowledge rebuts any claim there is procedural unconscionability to invalidate an employment agreement. See Pugh v. Arrow Electronics, Inc., 304 F. Supp. 2d 890, 895 (N.D. Tex. 2003) (finding a forum clause enforceable because it was reasonably communicated to the employee); Lejano v. Bandak, 688 So.2d 86, 90 (La. Ct. App. 1997) (stating the plaintiffs offered no evidence to rebut the presumption that they had knowledge of the clause at issue).

[¶40] The Employment Agreement further was not the product of inequality in bargaining power to be procedurally unconscionable. "In reality, . . . the vast majority of employment agreements are 'take-it-or-leave-it' propositions." Ware Else, Inc. v. Ofstein, 856 So.2d 1079, 1082 (Fla. Ct. App. 2003). Courts have not invalidated all employment agreements on this ground alone, given that employees have the choice to deny employment and the employer may have a desire to "enhance its contractual and economic predictability by inclusion and enforcement of a forum selection clause." Id.; see also Beilfuss, 685 N.W.2d at 376 (finding an agreement not unconscionable because it was not unreasonable for a corporation "to draft an employment contract requiring litigation to take place in its home state"). Indeed, Osborne reaffirmed her desire to

remain with Brown, notwithstanding the terms of her agreements, every year of her employment for six years. On balance of the procedural unconscionability factors, the Employment Agreement and forum-selection clause included within it are not unconscionable. Strand, 2005 ND 68, ¶ 5, 693 N.W.2d 918 (looking to the totality of the circumstances).

[¶41] Even if there is procedural unconscionability, however, the forum-selection clause is still valid because it is not substantively unconscionable and Osborne is unable to show otherwise. Id. at ¶ 12 (requiring a plaintiff to prove both procedural and substantive unconscionability). Substantive unconscionability focuses on the harshness or one-sidedness of the contractual provision in question. Id. at ¶ 20. In essence, if the contractual provision limits or excludes substantive remedies available at law and leaves a plaintiff without an effective remedy, the provision may be substantively unconscionable. Strand, 2005 ND 68, ¶ 20, 693 N.W.2d 918; Const. Assocs., Inc. v. Fargo Water Equipment Co., 446 N.W.2d 237, 243-44 (N.D. 1989).

[¶42] For instance, in Construction Associates, Inc. v. Fargo Water Equipment Co., 446 N.W.2d 237, 240 (N.D. 1989), a clause within a construction contract limited one of the party's liability only to the replacement of a specific part and excluded all other incidental, consequential, or other damages for negligence. This remedy, however, "amounted to nothing whatsoever" because the replacement part was useless in effecting other repairs. Const. Assoc., Inc., 446 N.W.2d at 244. Thus, this Court affirmed the trial court's finding that this clause was substantively unconscionable. Id. By contrast, in Strand, this Court held a "no class action" clause in a credit card agreement did not limit the plaintiff's substantive remedies for recovery, even if a class action would make

recovery more convenient. Strand, 2005 ND 68, ¶ 23, 693 N.W.2d 918. The clause, therefore, was not substantively unconscionable. Id. at ¶ 24.

[¶43] Similar to Strand, Osborne's remedies are not limited under the Employment Agreement. It merely requires that her employment disputes be resolved in a particular forum: the state courts in Minnehaha County, South Dakota. While Osborne suggests the court in South Dakota may enforce the non-compete clause under South Dakota law, her suggestion is mere speculation and she nonetheless has the ability to argue before the South Dakota court regarding which state's laws should apply for the interpretation of the agreement. The Employment Agreement does not foreclose her right in this respect and, therefore, does not limit any substantive rights to her. Rowen, 2015 WL 899294, at *4 (stating the forum selection clause is unreasonable when there is a total foreclosure of remedy in the chosen forum); Lejano, 688 So.2d at 90 (stating the chosen forum would provide appropriate remedies to the plaintiff and was not unconscionable). Because there is no limitation as to her right to bring employment disputes, Osborne cannot carry her burden to establish the employment agreement is substantively unconscionable or void.

III. The district court appropriately determined it lacked jurisdiction to rule on Osborne's motion for preliminary injunction because her action was dismissed for improper venue.

[¶44] Osborne improperly argues in her appeal brief that the district court "erred in denying" Osborne's motion for preliminary injunction. (Appellant's Br. at 27.) The district court did not render any decision on the merits of Osborne's motion. Rather, the district court clearly indicated in its order that it was "without jurisdiction to act" on Osborne's motion because it had already granted Brown's motion to dismiss for improper venue. (App. at 20, ¶ 1.)

[¶45] The district court's determination that it could not render a decision on Osborne's motion was appropriate. By dismissing the action to allow Osborne to pursue her claims in the proper venue in South Dakota, the district court no longer had subject matter jurisdiction over the issues pertaining to her Employment Agreement. Smith v. City of Grand Forks, 478 N.W.2d 370, 373 (N.D. 1991) (stating if the court is without jurisdiction, it is "without the power to further rule on the merits" of an action). As explained in depth above, the district court's decision to dismiss the action for improper venue was appropriate due to the valid and enforceable forum-selection clause. The need for a preliminary injunction in North Dakota, therefore, no longer exists. See State v. Stremick Const. Co., 370 N.W.2d 730, 735 (N.D. 1985) (declining to address the need for a restraining order because the proper forum for determining the issues was with the arbitration board). The district court's ruling with respect to granting Brown's motion to dismiss and declining to rule on the merits of Osborne's motion were both proper, and this Court should accordingly affirm the district court's decision in its entirety.

CONCLUSION

[¶46] For the foregoing reasons, Appellee Brown & Saenger, Inc. respectfully requests this Court affirm the district court's June 8, 2017 order dismissing Appellant Dawn Osborne's action without prejudice due to improper venue.

Respectfully submitted this 11th day of September, 2017.

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CERTIFICATE OF SERVICE

[¶47] I hereby certify that on September 11, 2017, I served the following documents:

1. Appellee's Brief; and
2. Supplemental Appendix of Appellee

on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

Joel M. Fremstad
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Dated: September 11, 2017

/s/ Vanessa L. Lystad
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