**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NORTH DAKOTA**

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| Association of Equipment Manufacturers, AGCO Corporation, CNH Industrial America LLC, Deere & Company, and Kubota Tractor Corporation,<br><br>Plaintiffs,<br><br>vs.<br><br>The Hon. Doug Burgum, Governor of the State of North Dakota, in his official capacity, and<br><br>The Hon. Wayne Stenehjem, Attorney General of the State of North Dakota, in his official capacity,<br><br>Defendants,<br><br>North Dakota Implement Dealers Association,<br><br>Intervenor-Defendant. | ) | **ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION**<br><br>Case No. 1:17-cv-151 |

Before the Court is the Plaintiffs' motion for a preliminary injunction filed on July 25, 2017. See Docket No. 9. The Plaintiffs seek a preliminary injunction prohibiting enforcement of Senate Bill 2289 which amended the North Dakota Farm Equipment Dealership Statute. Defendants Doug Burgum and Wayne Stenehjem filed a response in opposition to the motion for a preliminary injunction on September 29, 2017. See Docket No. 43. The Plaintiffs filed a reply brief on October 6, 2017. See Docket No. 45. Intervenor-Defendant North Dakota Implement Dealers Association filed a response in opposition to the motion for a preliminary injunction on October 10, 2017. See Docket No. 46. The Plaintiffs filed a reply brief on October 17, 2017.

See Docket No. 51. The Equipment Dealers Associations filed an amicus brief on October 17, 2017. See Docket No. 55. A hearing on the motion was held on November 7, 2017. Post-hearing briefs were filed on December 8, 2017. See Docket Nos. 68 and 69. For the reasons set forth below, the Plaintiffs' motion for a preliminary injunction is granted.

## I. BACKGROUND

Plaintiff Association of Equipment Manufacturers ("AEM") is a not-for-profit corporation organized under the laws of Illinois, with a principal place of business in Milwaukee, Wisconsin. AEM is a trade association that represents and promotes the legal and business interests of AEM's 900-plus members and of the equipment manufacturing industry in general. Many of AEM's members enter into individualized contractual relationships with dealers whom they have determined are qualified to market and service their machinery to consumers in specific markets. The relationship between the manufacturers and dealers are governed by dealership agreements which establish the respective rights and duties of each party.

Plaintiff AGCO Corporation ("AGCO") is a corporation organized under the laws of Delaware, with a principal place of business in Duluth, Georgia. AGCO is a manufacturer farm equipment and farm implements, and its agreements with farm equipment dealers in North Dakota are subject to the North Dakota Farm Equipment Dealership Statute. AGCO is a member of AEM.

Plaintiff CNH Industrial America ("CNH") is a corporation organized under the laws of Delaware, with a principal place of business in Burr Ridge, Illinois. CNH is a manufacturer of

farm equipment and farm implements, and its agreements with farm equipment dealers in North Dakota are subject to the North Dakota Farm Equipment Dealership Statute. CNH is a member of AEM.

Plaintiff Deere & Company ("John Deere") is a corporation organized under the laws of Delaware, with a principal place of business in Moline, Illinois. John Deere's is a manufacturer of farm equipment and farm implements, and its agreements with farm equipment dealers in North Dakota are subject to the North Dakota Farm Equipment Dealership Statute. John Deere is a member of AEM.

Plaintiff Kubota Tractor Corporation ("Kubota") is a corporation organized under the laws of Delaware, with a principal place of business in Grapevine, Texas. Kubota is a manufacturer of farm equipment and farm implements, and its agreements with farm equipment dealers in North Dakota are subject to the North Dakota Farm Equipment Dealership Statute. Kubota is a member of AEM.

Defendant Doug Burgum is the Governor of the State of North Dakota. Defendant Wayne Stenehjem is the Attorney General of the State of North Dakota. (Burgum and and Stenehjem will be referred hereinafter collectively as "State").

Defendant-Intervenor North Dakota Implement Dealers Association, ("NDIDA") is a trade association for approximately 115 franchised North Dakota farm equipment dealers. The NDIDA members are subject to the North Dakota Farm Equipment Dealership Statute.

Senate Bill 2289 is entitled "AN ACT to amend and reenact sections 51-07-01.2, 51-07-02.2, and 51-26-06 of the North Dakota Century Code, relating to prohibited practices under farm equipment dealership contracts, dealership transfers, and reimbursement for warranty

repair." See Docket No. 1-3. The pre-existing provisions of the North Dakota Century Code that SB 2289 amends and reenacts are Sections 51-07-01.2, 51-07-02.2, and 51-26-06. These statutory provisions will be referred to collectively as the "North Dakota Farm Equipment Dealership Statute."

Senate Bill 2289 ("SB 2289") was introduced in the North Dakota Senate on January 19, 2017, at the request of the North Dakota Implement Dealers Association. The North Dakota Senate Sponsors of SB 2289 were Senators Kelly Armstrong and Dwight Cook and Assistant Majority Leader Jerry Klein. The North Dakota House sponsors of SB 2289 were Representative Michael Howe, Assistant Majority Leader Don Vigesaa, and Representative Lois Delmore. SB 2289 was passed by the North Dakota Legislature by a vote of 46-0 in the Senate and 86-5 in the House. It was signed into law by Governor Doug Burgum on March 16, 2017. SB 2289 was scheduled to go into effect August 1, 2017. By agreement of the parties, the enforcement of SB 2289 has been stayed until the Court rules on the Plaintiff's motion for a preliminary injunction. See Docket No. 30, p. 2.

The Plaintiffs commenced this declaratory judgment action on July 24, 2017. They contend SB 2289 violates three federal statutes and two constitutional clauses. The Plaintiffs claim that SB 2289 violates: (1) the Contracts Clause of the United States Constitution, U.S. Const. art. I, § 10; (2) the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq.; (3) the federal trademark statute, 15 U.S.C. § 1051 et seq. (the Lanham Act); (4) the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3; and, (5) the interstate price regulation provisions found at 15 U.S.C. § 13 et seq. (the Robinson-Patman Act). The offending provisions of SB 2289 are described by the Plaintiffs as follows:

1. The "No Required Separation of Trademarks" provision. N.D.C.C. § 51-07-01.2(1)(d).

2. The "No Enforcement of Appearance Standards" provision. N.D.C.C. § 51-07-01.2(1)(h).

3. The "No Enforcement of Performance Standards" provisions. N.D.C.C. §§ 51-07-01.2(1)(g) and 51-07-01.2(1)(k).

4. The "No Minimum Inventory or Order Requirements" provisions. N.D.C.C. §§ 51-07-01.2(1)(a) and 51-07-01.2(1)(b).

5. The "No Exclusivity Requirements" provisions. N.D.C.C. §§ 51-07-01.2(1)(c) and 51-07-01.2(1)(e).

6. The "Forced Transfer of Trademark License" provision. N.D.C.C. §§ 51-07-02.2.

7. The "No Market Withdrawal" provision. N.D.C.C. §§ 51-07-01.2(5)

8. The "No Control Over Dealer Locations" provisions. N.D.C.C. §§ 51-07-01.2(1)(i), 51-07-01.2(1)(g), and 51-07-01.2(1)(h).

9. The "Enabling Warranty and Incentive Payment Fraud" provision. N.D.C.C. § 51-07-01.2(1)(j).

10. The "Retroactive Impairment of Existing Warranties" provision. N.D.C.C. § 51-26-06.

11. The "Retroactive Impairment of Existing Contracts" provision. N.D.C.C. § 51-07-01.2(1).

12. The "No Arbitration" provision. N.D.C.C. §§ 51-07-01.2(1)(l).

13. The "Interstate Price Regulation" provision. N.D.C.C. § 51-07-01.2(1)(f).

See Docket No. 1, p. 14.

SB 2289 amends and reenacts Sections 51-07-01.2, 51-07-02.2, and 51-26-06 of the North Dakota Century Code (together, the "Existing North Dakota Farm Equipment Dealership Statute"). Before the effective date of SB 2289, the Existing North Dakota Farm Equipment Dealership Statute:

a. expressly permitted a manufacturer to attempt or threaten to terminate, cancel, or fail to renew a farm equipment dealership agreement and to make a substantial change in the competitive circumstances of a farm equipment dealership agreement if the dealer did not "comply with the terms of the written contract between the parties." (N.D.C.C. §§ 51-07-01.1(1) and (2), 51-07-01.2(5) (before Aug. 1, 2017));

b. did not prohibit enforcement of agreements to arbitrate disputes between manufacturers and dealers of agricultural equipment;

c. prohibited manufacturers from "[c]oerc[ing] or attempt[ing] to coerce a farm equipment dealer into a refusal to purchase farm equipment manufactured by another farm equipment manufacturer" (N.D.C.C. § 51-07-01.2(3) (before Aug. 1, 2017)) but—under the Eighth Circuit's definition of "coercion"—did not prohibit the enforcement of contractual exclusivity provisions;[1]

d. required manufacturers to reimburse dealers for warranty work only for labor "at an hourly labor rate that is the same or greater than the hourly labor rate the dealer currently charges consumers for non-warranty repair work" but not for other categories of expense (N.D.C.C. § 51-07-01.2 (before Aug. 1, 2017)); and

e. explicitly stated that its application was "[n]ot to affect prior contracts." N.D.C.C. §51-07-01.2 (before Aug. 1, 2017).

Each of the foregoing provisions of the Existing North Dakota Farm Equipment Dealership Statute was amended by Senate Bill 2289.

Except for the addition to the Existing North Dakota Farm Equipment Dealership Statute of a new definition of "farm equipment" and "farm implements," all of the amendments to the statute made by SB 2289 are the subject of the Manufacturers' challenge.

The amendment to which the Manufacturers refer as the "No Enforcement of Appearance Standards" provision provides that a manufacturer may not:

> Require a farm equipment dealer to unreasonably remodel, renovate, or recondition the dealer's facilities, change the location of the facilities, or make unreasonable alterations to the dealership premises. A request for a dealer to remodel, renovate, or recondition the dealer's facilities, change the location of the facilities, or make alterations to the dealership premises must be considered in

[1]Cf. Minnesota Supply Co. v. Raymond Corp., 472 F.3d 524, 538 (8th Cir. 2006).

> light of current and reasonably foreseeable projections of economic conditions, financial expectations, and the dealer's market for the sale of farm equipment. A facility modification request is unreasonable if the request is within seven years of a farm equipment dealer's most recent facility remodel, renovation, or reconditioning.

N.D.C.C. § 51-07-01.2(1)(h) (effective Aug. 1, 2017).

The amendments to which the Manufacturers refer collectively as the "No Enforcement of Appearance Standards" provision provide as follows:

> a. Farm equipment manufacturers may not "[u]se an unreasonable, arbitrary, or unfair sales, service, or other performance standard in determining a farm equipment dealer's compliance with a contract or program."

N.D.C.C. § 51-07-01.2(1)(k) (effective Aug. 1, 2017). SB 2289 does not define what performance standards are considered to be "unreasonable," "arbitrary," or "unfair"—leaving that to be decided by the courts.

> b. The "good cause" required for attempted or threatened termination, cancellation, or non-renewal and for a "substantial change in the competitive circumstances" of a dealership agreement pursuant to N.D.C.C. § 51-07-01.2(5) (before Aug. 1, 2017) is redefined as a farm equipment dealer's failure "to substantially comply with the material terms of the written contract between the parties."

N.D.C.C. § 51-07-01.2(1)(g) (effective Aug. 1, 2017).

> c. The "substantial change in the competitive circumstances" of the farm equipment dealership agreement prohibited by the statute is now defined for the first time to include "the removal of authorization to operate at a location from where the dealer is currently operating or the unreasonable removal of a product line or segment."

N.D.C.C. § 51-07-01.2(1)(g) (effective Aug. 1, 2017). SB 2289 also does not define the circumstances under which removal of a product line or segment would be "unreasonable"—again leaving that for the courts to decide in the future.

The amendments to which the Manufacturers refer collectively as the "No Minimum Inventory or Order Requirements" provisions prohibit farm equipment manufacturers from "requir[ing] the farm equipment dealer to maintain or stock a level of equipment, parts, or accessories except as provided in subdivision b." N.D.C.C. § 51-07-01.2(1)(a) (effective Aug. 1, 2017). "Subdivision b," in turn, provides that a manufacturer may not "[c]ondition or attempt to condition the sale of farm equipment, parts, or accessories on a requirement that the farm equipment dealer also purchase other goods or services, or purchase a minimum quantity of farm equipment as a condition of filling an order for farm equipment." N.D.C.C. § 51-07-01.2(1) (effective Aug. 1, 2017).

The amendments to which the Manufacturers refer collectively as the "No Exclusivity Requirements" provisions prohibit farm equipment manufacturers from:

> a. "[r]equir[ing] or attempt[ing] to require a farm equipment dealer into a refusal to purchase farm equipment manufactured by another farm equipment manufacturer"

(N.D.C.C. § 51-07-01.2(1)(c) (effective Aug. 1, 2017)); and

> b. "[r]equir[ing] a farm equipment dealer to either establish or maintain exclusive facilities, personnel, or display space or to abandon an existing relationship with another manufacturer in order to continue, renew, reinstate, or enter a dealer agreement or to participate in any program discount, credit, rebate, or sales incentive."

N.D.C.C. § 51-07-01.2(1)(e) (effective Aug. 1, 2017).

The amendment to which the Manufacturers refer as the "Forced Trademark License Transfer" provision permits a farm equipment dealer to "transfer, assign, or sell a dealer agreement" to anyone, so long as notice is provided to the manufacturer and the transferee meets the manufacturer's "written, reasonable, and uniformly applied standards of qualification,"

which are limited to the proposed transferee's "financial qualifications and business experience." N.D.C.C. § 51-07-02.2 (effective Aug. 1, 2017). Other than limiting standards of qualification to the proposed transferee's "financial qualifications and business experience," SB 2289 fails to define what standards are "reasonable."

The amendments to which the Manufacturers refer as the "No Control Over Dealer Location" provisions define a "substantial change in competitive circumstances to include "the removal of authorization to operate at a location from where the dealer is currently operating" and also provide that farm equipment manufacturers may not "[r]equire a farm equipment dealer to . . . change the location of the facilities," "[u]nreasonably prevent or refuse to approve the relocation of a dealership to another site within the dealer's relevant market area." N.D.C.C. §§ 51-07-01.2(g), 51-07-01.2(h), and 51-07-01.2(1)(i) (effective Aug. 1, 2017). Like other provisions of SB 2289 challenged by the Manufacturers, the "No Control Over Dealer Location" provisions do not define the circumstances under which it would be "unreasonable" for a manufacturer to prevent or refuse to approve the relocation of a dealership.

The amendment to which the Manufacturers refer as the "Enabling Warranty and Incentive Payment Fraud" provision provides that farm equipment manufacturers may not:

> Conduct a warranty or incentive audit or seek a chargeback on a warranty or incentive payment more than one year after the date of the warranty or incentive payment. A manufacturer may not charge back a dealer for an incentive or warranty payment unless the manufacturer can satisfy its burden of proof that the dealer's claim was false, fraudulent, or the dealer did not substantially comply with the reasonable written procedures of the manufacturer.

N.D.C.C. § 51-07-01.2(1)(j) (effective Aug. 1, 2017).

The amendment to which the Manufacturers refer as the "Retroactive Impairment of Existing Warranties" provision expressly applies to pre-existing contracts and requires farm

equipment manufacturers to reimburse dealers for labor, diagnostic, transportation, and travel costs incurred in performing warranty service. N.D.C.C. § 51-26-06 (effective Aug. 1, 2017).

The amendment to which the Manufacturers refer as the "No Arbitration" provision provides that a farm equipment manufacturer may not:

> Require a farm equipment dealer in this state to enter an agreement with the manufacturer or any other party which requires . . . [t]he dealer to bring an action against the manufacturer in a venue outside of this state . . . [r]educing, modifying, or eliminating the dealer's right to resolve a dispute in a state or federal court in this state; or [t]he dealer to agree to arbitration. . . .

N.D.C.C. § 51-07-01.2(l)(2), (4)-(5) (effective Aug. 1, 2017).

The amendment to which the Manufacturers refer as the "No Market Withdrawal" provision defines a "substantial change" in competitive circumstances to include "the unreasonable removal of a product line or segment." N.D.C.C. § 51-07-01.2(1)(a) (effective Aug. 1, 2017).

Finally, the amendment the Manufacturers refer as the "Retroactive Impairment of Existing Contracts" provision makes each of the provisions of SB 2289 applicable retroactively "[n]otwithstanding the terms of any contract." N.D.C.C. § 51-07-01.2(1) (effective Aug. 1, 2017).

For purposes of this motion, the Plaintiffs are only asking the Court to hold that they are likely to succeed on their claims under the Contract Clause of the United States Constitution, the Federal Arbitration Act, and the Lanham Act. The Plaintiffs request this Court enter a preliminary injunction enjoining the State from enforcing SB 2289 pending the outcome of the case.

## II. LEGAL DISCUSSION

### A. PRELIMINARY INJUNCTION

The Plaintiffs seek a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. The primary purpose of a preliminary injunction is to preserve the status quo until a court can grant full, effective relief upon a final hearing. Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984). A preliminary injunction is an extraordinary remedy, with the burden of establishing the necessity of a preliminary injunction placed on the movant. Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003); Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). The court determines whether the movant has met its burden of proof by weighing the factors set forth in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981). The *Dataphase* factors include "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id. "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." Baker Elec. Coop., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987)); see CDI Energy Servs., Inc. v. W. River Pumps, Inc., 567 F.3d 398, 401-03 (8th Cir. 2009). The Eighth Circuit has held that of the four factors to be considered by the district court in considering preliminary injunctive relief, the likelihood of success on the merits is "most significant." S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

### 1. PROBABILITY OF SUCCESS ON THE MERITS

The Plaintiffs contend SB 2289 should be preliminarily enjoined because it violates (1) the Contract Clause of the United States Constitution, U.S. Const. art. I, § 10; (2) the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq.; and (3) the federal trademark statute, 15 U.S.C. § 1051 et seq. (the Lanham Act). A party seeking a preliminary injunction of a federal or state statute or other governmental action based on a presumptively reasonable democratic process must demonstrate that it is "likely to prevail on the merits," a higher bar than the more familiar "fair chance of prevailing" test. See Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 732-33 (8th Cir. 2008); Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1098 (8th Cir. 2013). The Plaintiffs suggestion that SB 2289 was not enacted through a reasoned democratic process and thus they need only satisfy the "fair chance" standard clearly fails. As SB 2289 is a "duly enacted state statute" it is presumptively reasonable. Planned Parenthood, 530 F.3d at 732-33 (applying the "likely to prevail on the merits" test to South Dakota House Bill 1166 and noting this test applies to federal as well as state statutes). When evaluating a movant's "likelihood of success on the merits," the court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" Calvin Klein Cosmetics Corp., 815 F.2d at 503 (quoting Dataphase, 640 F.2d at 113).

#### a. CONTRACT CLAUSE

The Plaintiffs contend that SB 2289 violates the Commerce Clause because it applies retroactively and thus substantially impairs existing contracts. The Defendants contend the

impairments imposed by SB2289 are not substantial because they were foreseeable and serve a significant and legitimate public purpose.

The United States Constitution provides that "No State shall . . . pass any . . . law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. However, this bar is not absolute. Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 110 F.3d 547, 551 (8th Cir. 1997). Whether a state statute violates the Contract Clause is subject to a three part test:

> (1) The first inquiry is whether the state law has, in fact, operated as a substantial impairment on pre-existing contractual relationships. If there is no substantial impairment on contractual relationships, the law does not violate the Contract Clause. If, however, the law does constitute a substantial impairment, the second part of the test is addressed:
>
> (2) The State must have a significant and legitimate public purpose behind the regulation. If there is no significant and legitimate public purpose, the state law is unconstitutional under the Contract Clause. If a significant and legitimate public purpose has been identified, the third part of the test is applied:
>
> (3) [The] Court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842, 850 (8th Cir. 2002) (internal citations and quotations omitted).

**i. SUBSTANTIAL IMPAIRMENT**

Whether a state law works a substantial impairment on a contract is itself subject to a three-part test which provides as follows:

(1) whether there is a contractual relationship,

(2) whether a change in law impairs that contractual relationship, and

(3) whether the impairment is substantial.

Id. It determining whether the impairment is substantial, the Court must consider whether the parties could have reasonably foreseen that their contractual arrangement might be disrupted. Id. at 854. Impairment of existing agreements is not substantial if previous regulation made the law in question foreseeable. Id. at 857.

The first step in this analysis cannot be seriously disputed because there is no question that contracts between the equipment manufacturers and the equipment dealers exist. See Docket No. 50. The second step of the test requires the identification of the precise contractual right which has been impaired. Id. at 851. In this case, SB 2289 applies retroactively and thus impairs numerous contractual terms in existing dealership agreements, including provisions related to arbitration, dealership transfers, warranty work, and exclusivity requirements. See Docket No. 1-8. Therefore, the second component for determining whether the dealership agreements are substantially impaired by SB 2289 is easily satisfied.

The third component of the inquiry is to ascertain whether SB 2289 has actually operated as a substantial impairment of a contractual relationship. SB 2289 unquestionably and substantially impairs the existing dealership contracts at issue. See Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383, 384 (8th Cir. 1994) (finding that the retroactive feature of the Iowa Franchise Act substantially impaired existing dealership agreements and was unconstitutional); Janklow, 300 F.3d at 859 (finding a South Dakota farm implement dealership statute, which applied retroactively, substantially impaired existing dealership agreements). In *Janklow* the contract terms which were found to be substantially impaired related to changes in dealership ownership, part stocking requirements, market penetration, line-make exclusivity, and required advertising. 300 F.3d at 851. Like the law at issue in *Janklow*, SB 2289 voids and/or renders

unenforceable existing contract provisions which require line exclusivity, prescribe how trademarks may be used, require arbitration of disputes, enforce appearance standards, and prohibit the assignment of the agreement. See Docket Nos. 11, 12, 13, and 14. The Court finds as a matter of law that it is clear the existing dealership agreements at issue in this case are substantially impaired by the retroactive features of SB 2289.

Analyzing whether the impairment is substantial also requires the Court to consider whether the regulation was foreseeable. Whether the industry was regulated in the past must be considered, and the more sever the new impairment the more likely it was not foreseeable. Janklow, 300 F.3d at 854. The expectations of the parties concerning future regulations are important in determining whether contractual rights are substantially impaired. While North Dakota has long regulated the relationship between farm implement manufacturers and dealers, it is difficult to comprehend how anyone could have foreseen the sweeping retroactive nature of SB 2289, particularly when one considers the Eighth Circuit Court of Appeals opinions in *Branstad* and *Janklow* which strongly disfavor the retroactive regulations of this nature. The prior version of the law passed by the Legislature did not apply retroactively and such was specifically disclaimed in N.D.C.C. § 51-26-06. SB 2289 appears to be a fairly complete rewrite of the relationship between the farm implement manufacturers and dealers. See Docket No. 1-3. This rewrite thoroughly regulates contract terms, something that was not the focus of the prior version of the law. See Janklow, 300 F.3d at 858-59 (holding prior regulation which did not realign the rights of the parties was not sufficiently pervasive to "destroy the contract expectations of the manufacturers"). North Dakota's regulation of manufacturers and dealers in the past has not been sufficiently pervasive so as to destroy all reasonable expectations of

manufacturers. However, this new legislative enactment (SB 2289) applies retroactively which creates a litany of problems, not the least of which it impairs the contractual rights of all parties who had entered into dealership agreements. Thus, the Court finds the retroactive contractual rewrite imposed by SB 2289 was not reasonably foreseeable.

In conclusion, the Court finds the substantial nature of the impairments imposed by SB 2289 cannot be seriously disputed given SB 2289 applies retroactively to existing dealership agreements, the impairment was not foreseeable, and such laws have "almost uniformly been held unconstitutional" under the Contract Clause. Branstad, 29 F.3d at 385. The Eighth Circuit Court of Appeals in *Branstad* clearly and unequivocally held that the retroactive application of the Iowa Franchise Act was unconstitutional and violative of the Contract Clause. Having determined SB 2289 imposes a substantial impairment on pre-existing contractual rights, the Court must turn to the question of whether North Dakota has demonstrated a significant and legitimate public purpose for the law.

**ii. SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE**

Because a substantial impairment of pre-existing contractual rights exists as a result of the passage of SB 2289, North Dakota must demonstrate a significant and legitimate public purpose underlying the law. In *Janklow,* the Eighth Circuit Court of Appeals described the State's burden in justifying its legislative enactment as follows:

> Because a substantial impairment of pre-existing contractual rights exists, South Dakota must demonstrate a significant and legitimate public purpose underlying the Act. Workers' Compensation Refund, 46 F.3d at 820. The State must show that the regulation protects a "broad societal interest rather than a narrow class." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249, 98 S. Ct. 2716, 2724, 57 L.Ed.2d 727 (1978). The State bears the burden of proof in showing a

> significant and legitimate public purpose underlying the Act. "[I]f a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the State varies directly with the substantiality of the alteration." White Motor Corp. v. Malone, 599 F.2d 283, 287 (8th Cir.1979).

Janklow, 300 F.3d at 859–60. The Eighth Circuit in *Janklow* further instructed that **"leveling the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest."** Id. at 861. In other words, special interest legislation violates the Contract Clause while broad social interest laws do not. Id. Laws which directly alter the obligations and expectations of contracting parties cannot be described as general, social legislation. Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1323 (8th Cir. 1991). The Eighth Circuit has said that "there is no broad public policy interest in readjusting contractual rights and obligations in pre-existing contracts." Janklow, 300 F.3d at 861 n.22.

The apparent purpose of SB 2289 is to protect farm implement dealers from what the North Dakota Legislature deemed to be onerous and unfair contract terms imposed by farm implement manufacturers. There is no clear statement of legislative intent or any other meaningful legislative history from which to ascertain the purpose of SB 2289. While the State suggests another purpose of the bill was to protect North Dakota's farm economy, the Eighth Circuit has said such *post hoc* rationalizations are insufficient when unsupported by evidence. Id. at 860. The Plaintiffs point to the description of the purpose of SB 2289 made by Assistant Majority Leader, and a co-sponsor of the bill, Jerry Klein, during discussion of the bill on the Senate floor wherein he described the bill's purpose as giving a "level playing field to our implement dealers." See Bill Videos for SB 2289, at 2/15/17 1:44 pm, available at

http://www.legis.nd.gov/assembly/65-2017/bill-video/bv2289.html.[2] In other words, the co-sponsor of Senate Bill 2289 expressly admitted that the purpose of the bill was to do precisely what the Contract Clause of the Constitution forbids, and what the Eighth Circuit Court of Appeals in *Janklow* has proclaimed is expressly prohibited.

The NDIDA offers an affidavit from its president in support of its contention that the purpose of the SB 2289 is to protect farm implement dealers from abusive and oppressive actions by farm implement manufacturers, promote fair dealing, and protect small businesses. See Docket No. 46-1. In a press release, the NDIDA, which helped draft SB 2289, described it as a "major farm equipment dealer protection bill." See Docket No. 1-4. However, these descriptions of the purpose of SB 2289 fair no better than the State's. The pronouncement of the Eighth Circuit Court of Appeals in *Janklow* is crystal clear - "leveling the playing field between contracting parties (manufacturers and dealers) is expressly prohibited. The Court agrees with the Plaintiffs that these suggested legislative purposes are simply alternate ways of saying the same thing: leveling the playing field to impair private contracts after the fact for the benefit of farm implement dealers - all of which is prohibited

It is clear that SB 2289 is special interest legislation unsupported by a legitimate public purpose which clearly violates the Contract Clause because it impairs pre-existing contracts. The law directly alters the obligations and expectations of the contracting parties and, as such, is not merely general, social legislation. The special interest legislation runs afoul of the Contract Clause when it impairs existing contracts. Because SB 2289 lacks a significant and legitimate public purpose, the Court need not address the third step of the Contract Clause analysis relating

[2]Bill Videos for SB 2289, available at http://www.legis.nd.gov/assembly/65-2017/bill-video/bv2289.html. Because the videos and related documentation about Senate Bill 2289 are public records, the Court may take judicial notice of them. See generally StuLka v. MeCarville, 420 F.3d 757, 760 n.2 (8th Cir. 2005); Fed. R. Evid. 201.

to whether the adjustment of contract rights is appropriate to the public purpose. See Janklow, 300 F.3d at 862. The Eighth Circuit in *Janklow* clearly confirmed this approach.

**b. FEDERAL ARBITRATION ACT**

The Plaintiffs also contend the SB 2289's "No Arbitration" provision violates the Federal Arbitration Act (FAA). SB 2289's "No Arbitration" provision prohibits manufacturers from requiring a dealer to enter into an agreement in which the dealer agrees to arbitration. See N.D.C.C. § 51-07-01.2(l). The provision in question provides as follows:

> [A] manufacturer . . . may not
>
> l. Require a farm equipment dealer in this state to enter an agreement with the manufacturer or any other party which requires:
>
> (1) The law of another jurisdiction to apply to a dispute between the dealer and manufacturer;
>
> (2). The dealer to bring an action against the manufacturer in a venue outside of this state;
>
> (3) The dealer waive the right to have all of this state's statutory and common law apply;
>
> (4) Reducing, modifying, or eliminating the dealer's right to resolve a dispute in a state or federal court in this state: or
>
> (5) The dealer to agree to arbitration or waive their rights to bring a cause of action against the manufacturer, unless done in connection with a settlement agreement to resolve a matter between a manufacturer and the dealer. The settlement agreement must be entered voluntarily for separate and valuable consideration. Renewal. reinstatement. or continuation of a dealer agreement alone is not separate and valuable consideration.

See Docket No. 1-3, p. 3 (emphasis added). This provision applies "[n]otwithstanding the terms of any contract" and thus applies retroactively to pre-existing contracts. Therefore, it is clearly unconstitutional under *Branstad* and *Janklow*.

The FAA provides as follows:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The purpose of the Federal Arbitration Act is "to ensure that private arbitration agreements are enforced according to their terms." Torres v. Simpatico, Inc., 781 F.3d 963, 968 (8th Cir. 2015). The FAA makes enforceable any arbitration provision in any contract that involves commerce. As the United States Supreme Court has explained, the FAA "declares a national policy favoring arbitration of claims that parties contract to settle in that matter. That national policy . . . forecloses state legislative attempts to undercut the enforceability of arbitration agreements." Preston v. Ferrer, 552 U.S. 346, 353 (2008) (alterations and citation omitted). This displacement of state law by the Federal Arbitration Act is well-established. Id.

There is no doubt that farm implement dealership contracts such as the ones at issue in this case "involv[e] commerce" within the meaning of the FAA. It is clear the FAA preempts state laws that purport to prohibit or burden contractual arbitration provisions, although generally applicable contract defenses may be applied to invalidate arbitration provisions. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). Additionally, the FAA preempts state laws that purport to require arbitrations to be held within a particular State. See KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 50, 52 (1st Cir. 1999). "Mere

inequality in bargaining power . . . is not enough by itself to overcome the federal policy favoring arbitration." Stroklund v. Nabors Drilling USA, LP, 722 F. Supp. 2d 1095, 1099 (D.N.D. 2010), quoting Faber v. Menard, Inc., 367 F.3d 1048, 1052 (8th Cir. 2004).

The Court finds as a matter of law that because SB 2289 prohibits arbitration clauses altogether and also requires that arbitrations be held in North Dakota, it is unquestionably preempted by the Federal Arbitration Act. It should be noted that Judge Piersol in *Janklow* also struck down a similar arbitration provision under a comparable South Dakota law as being unlawful. Equip. Mfrs. Inst. v. Janklow, 136 F. Supp. 2d 991, 1000 (S.D. 2002) aff'd in part, rev'd in part, 300 F.3d 842 (8th Cir. 2002). None of the parties in the South Dakota litigation ever appealed that issue to the Eighth Circuit because the prohibitions under the Federal Arbitration Act are clear.

### c. LANHAM ACT

Having determined the Plaintiffs are likely to succeed on their claims that SB 2289 violates the Contract Clause and the Federal Arbitration Act, the Court need not address the Lanham Act claim. See Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1004 n. 4 (8th Cir. 2012) (concluding that if one claim for relief satisfies the requirements for a preliminary injunction, other claims need not be considered).

## 2. IRREPARABLE HARM

The Plaintiffs contend they will suffer irreparable harm if SB 2289 is fully implemented because SB 2289 impairs existing contracts, creates business uncertainty, and money damages are not available as the State enjoys sovereign immunity. "The basis for injunctive relief in the

federal courts has always been irreparable harm and inadequacy of legal remedies." Bandag, Inc. v. Jack's Tire & Oil, Inc., 190 F.3d 924, 926 (8th Cir. 1999). It is well-established that when there is an adequate remedy at law, a preliminary injunction is not appropriate. Modern Computer Sys., Inc., 871 F.2d at 738. To demonstrate irreparable harm, a plaintiff must show the harm is not compensable through an award of monetary damages. Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 371 (8th Cir. 1991); Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing Northland Ins. Co. v. Blaylock, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000)). The Eighth Circuit has explained that a district court may presume irreparable harm if the movant is likely to succeed on the merits. Calvin Klein Cosmetics Corp., 815 F.2d at 505 (citing Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 753 (8th Cir. 1980)).

In this case, the irreparable harm the Plaintiffs will suffer if SB 2289 is implemented is clear given the Plaintiffs have demonstrated they are likely to succeed on the merits. Because SB 2289 will substantially impair existing contracts in violation of the Contract Clause, irreparable harm may be presumed See Myers v. Gant, 49 F. Supp. 3d 658, 668 (D.S.D. 2014) citing Elrod v. Burns, 427 U.S. 347, 373 (1976); Allen v. Minn., 867 F. Supp. 853, 859 (D. Minn. 1994) (finding the impairment of the plaintiffs' Contract Clause rights constitutes irreparable harm). By depriving the Plaintiffs of their right under the Federal Arbitration Act to enforce an arbitration clause to settle disputes with dealers would impose on the Plaintiffs "the precise risk [they] bargained and contracted to avoid." Northwest Airlines, Inc. v. R&S Company S.A., 176 F. Supp. 2d 935, 941 (D. Minn. 2001) (noting arbitration is often faster and less costly than litigation). By impairing Plaintiffs' trademark rights, Senate Bill 2289 harms the Plaintiffs' reputations and customer relationships in ways that are hard to define and which cannot be easily remedied with money damages. See generally Black Hills Jewelry Mfg. Co.,

633 F.2d at 753. Furthermore, the Plaintiffs likely cannot obtain money damages against the State because it enjoys sovereign immunity. See Entergy, Ark., Inc. v. Neb., 210 F.3d 887, 899 (8th Cir. 2000).

The Court finds the Plaintiffs have clearly demonstrated they will suffer irreparable harm if SB 2289 is not preliminarily enjoined. Thus, this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

### 3. BALANCE OF HARMS AND PUBLIC INTEREST

The balance of harm factor analysis examines the harm to all parties involved in the dispute and other interested parties, including the public. Dataphase, 640 F.2d at 114; Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation omitted). "In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Amoco Prod. Co. v. Village of Gambell, 480 U.S.531, 542 (1987). These factors—balance of harms and the public interest—"merge when the Government is the opposing party." Nken v. Holder, 556 U.S. 418, 435 (2009). Moreover, granting preliminary injunctive relief is only proper if the moving party establishes that entry of an injunction would serve the public interest. Dataphase, 640 F.2d at 113.

The public interests in this case are many and varied. There is certainly a public interest in the democratic process and the enforcement of a duly enacted statute. However, the Court has determined the Plaintiffs are likely to prevail on their claims. In addition, it is always in the

public interest to protect constitutional rights. Emineth v. Jaeger, 901 F. Supp. 2d 1138, 1143 (D.N.D 2012). Protecting trademarks and federal law which favors arbitration are also in the public interest. The Court has carefully considered the public interests in this case and finds the public interests are best served by preserving the status quo until the matter can be fully resolved on the merits.

The balance of harms factor also weighs in favor of preserving the status quo. The Court finds little or no harm will accrue to the State if the status quo is preserved pending a full resolution of the merits. The existing North Dakota Farm Dealership Statute already protects farm equipment dealers in many respects and these protections will remain in place if SB 2289 is preliminarily enjoined. A preliminary injunction will prevent the Plaintiffs from suffering the irreparable harm described above. The Court finds that prohibiting the enforcement of SB 2289 is the most reasonable course of action until the matter can be fully litigated. In balancing the equities and the public interest, the Court finds these *Dataphase* factors weigh in favor of the issuance of a preliminary injunction.

## III. CONCLUSION

After a careful review of the entire record, and a careful consideration of all of the *Dataphase* factors, the Court finds the *Dataphase* factors, when viewed in their totality, clearly weigh in favor of the issuance of a preliminary injunction. The Plaintiffs have met their burden of establishing the necessity of a preliminary injunction. The law in the Eighth Circuit Court of Appeals governs, and the *Janklow* and *Branstad* decisions lend strong support for the decision to issue a preliminary injunction. Common sense dictates that the law cannot stand constitutional muster because (1) it applies retroactively; (2) it prohibits arbitration clauses in contracts which

is expressly prohibited and preempted by the Federal Arbitration Act, and (3) the law is in direct contradiction of decisions from the Eighth Circuit Court of Appeals in *Janklow* and *Branstad* involving similar legislation. Accordingly, the Plaintiffs' motion for a preliminary injunction (Docket No. 9) is **GRANTED**. To preserve the status quo during the pendency of this case, the State is enjoined from enforcing SB 2289 until further order of the Court.

**IT IS SO ORDERED**.

Dated this 14th day of December, 2017.

*/s/ Daniel L. Hovland*
Daniel L. Hovland, Chief Judge
United States District Court