

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Kreiger**

Civil Action No. **06-cv-00295-MSK**

CONTROLTEC, LLC,
ENERGEX ENTERPRISES, INC.

Plaintiffs,

v.

ANTHONY DOORS, INC. d/b/a
ANTHONY INTERNATIONAL,
ANTHONY DOORS, ANTHONY, INC.
a/k/a ANTHONY MANUFACTURING
CO., INC.,

Defendant.

**DEFENDANT’S RESPONSE IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION**

The Defendant, Anthony, Inc. ("Anthony"), by and through its attorneys, Appel & Lucas, P.C., opposes Plaintiffs’ Motion for Preliminary Injunction and in support therefore states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Procedural Background

Plaintiffs (collectively, “Energex”) commenced this action on February 21, 2006 and filed a Motion requesting a temporary restraining order and preliminary injunction. The Complaint asserted a single claim for relief, seeking to enjoin Anthony from an alleged

continuing violation of an agreement the parties entered into in settlement of prior litigation that Energex had commenced against Anthony.

By Order dated February 22, 2006, the Court denied the request for a temporary restraining order, required Energex to serve a summons, complaint and the Motion on Anthony, and set March 6, 2006 as the date for Anthony to respond to the Motion. The Court's Order noted numerous deficiencies in the Motion, including confusion about the number and identity of the Defendants, lack of sufficient jurisdictional allegations and conclusory and speculative allegations about irreparable harm.

After entry of the Order, Energex filed an amended Complaint and Motion (presumably in an effort to correct the deficiencies noted by the Court), the undersigned accepted service on behalf of Anthony, and the parties jointly moved the Court to extend the time for Anthony's response to the Amended Motion.

Factual Background

Anthony is the leading supplier of refrigerator and freezer doors, shelving and display equipment to the supermarket and convenience store industries. Its unique designs are utilized in warehouse clubs, grocery stores, floral shops, deli cases, meat counters, convenience stores, drug stores, ice cream parlors and retail outlets throughout the world. In addition to its ready to sell doors, sliders, shelving, and lighting, Anthony specializes in creating customized products for clientele with specific needs. Its doors and sliders are used by some of the world's largest merchandisers, such as Costco, Walgreen's, and Wal-Mart. Anthony has distinguished itself with its customers by providing the most advanced state-of-the-art merchandising systems in the marketplace and as a result holds a substantial share of the market.

Retailers that sell refrigerated foods frequently use refrigerated storage areas having metal framed glass doors to display their refrigerated products to their customers. When the refrigerated units are used by the customer, the surface temperature of the metal frame, support structure and the glass door is reduced below the ambient air temperature by the refrigerated interior and moisture tends to condense on the surface of the structural parts of the case and the glass. To prevent condensation on the glass, which would obscure the customer's view of the products, refrigerator doors are sometimes heated to raise the dew point, thereby preventing condensation that would visually obscure the contents of the coolers and lead to exterior condensation and pooling of water in front of the cases.

The heating of the doors is accomplished by using electrical resistant heaters that raise the surface temperature. However, continuous heating is not necessary, wastes electricity and increases the cooling load on the refrigerator or freezer unit. Many companies produce devices that control the door heaters in order to conserve energy. Energex has attempted for several years to manufacture and market such a device.

In 1975, Anthony patented a system for defrosting refrigerator doors by turning on and off the heating unit in the metal frame and glass, depending on whether the relative humidity was below or above a selected level. The patented invention was known as the Sx Optimiser™ and until the early 2000s, Anthony sold the Sx Optimiser™ on its own and as part of the sale of its refrigerated doors. However, over that same time period, competitors such as Honeywell and others developed systems that allowed large retail users to regulate and control the door heaters, which in turn control the condensation/moisture levels for all of their in-store refrigeration units

from a single centrally located control unit, rather than using the Sx Optimiser™ on each unit. As a result, Anthony's sales of the Sx Optimiser™ substantially declined.

The Door Miser was a product similar to the Sx Optimiser™. It regulated the on/off switch on the heater that prevented fogging and condensation on refrigeration doors. It was patented in the 1990's and was manufactured by Peak Energy Systems and distributed by Energex. Energex claimed that the Door Miser was superior to the Sx Optimiser™ in a variety of ways. In November 1999, Brad Geuke, President of Energex, contacted Anthony with information regarding the Door Miser product and requested a meeting to discuss Anthony's potential use of the Door Miser in its refrigerated doors. Anthony agreed to meet with Energex to hear its proposal. Before meeting, Energex asked Anthony to sign a short Confidentiality Agreement, which it did.

When the parties met, Energex explained the claimed benefits of the Door Miser product and offered to provide Anthony with a sample to test with its doors. After testing, Anthony concluded that the Door Miser did not produce significant energy savings over its own Sx Optimiser™ and that there were several disadvantages to the Door Miser that made it unsuitable for use with Anthony's doors. In December 2000, Anthony informed Energex that it had decided not to enter into a relationship with Energex for use of the Door Miser.

In February 2002, Energex sued Anthony in the United States District Court for the District of Colorado, Case No. 02-K-397, claiming that the Confidentiality Agreement that had been signed in February 2000, was a non-competition agreement that prohibited Anthony from manufacturing and selling its own Sx Optimiser™ product, which it had been doing for 25 years. That lawsuit was settled in March 2004 and the case dismissed.

As part of the settlement, the parties signed a Co-Development Agreement. The Co-Development Agreement is multi-faceted. In relevant part it provides:

- A. Energex would design and develop a new anti-sweat controller by March 15, 2005;
- B. The initial target price of the unit would be approximately \$60 per door;
- C. Anthony would make its testing facilities available to Energex;
- D. Anthony would include marketing materials provided by Energex for the new product in Anthony's catalogue and on its web site;
- E. Anthony would provide a list of its sales representatives to Energex so that Energex could contact them to request that they serve as sales representatives for the new product.

Anthony agreed that if Energex timely provided a controller that was competitive as to price and quality, Anthony would not purchase anti-sweat controllers from anyone other than Energex during the term of the Agreement. However, the Co-Development Agreement did not require Anthony to purchase any Energex units and did not prohibit Anthony from installing units manufactured by others in its doors.

Anthony paid Energex more than \$250,000 pursuant to the Co-Development Agreement for research and development expenses and other payments.

Energex failed meet the March 15, 2005 Co-Development Agreement deadline for providing Anthony with a product that was "manufactured, and available to be marketed, sold and delivered to end-users. . . ." See Co-Development Agreement, paragraph 1.2(a). The product was still in prototype at that time and did not function properly. Instead of terminating the Co-Development Agreement, however, Anthony met with Mr. Geuke and his attorney, James Kreutz, and agreed informally to extend the deadline to June 15, 2005. Another meeting took

place in June and Energex claimed that it had a production unit. On June 20, 20205, Anthony issued a purchase order for 100 units at a price of \$100 per unit¹, but Energex conceded that it was unable to fulfill the order at that time, thus conceding that it did not have a product that was “manufactured, and available to be marketed, sold and delivered to end-users. . . .”

On August 11 and 16, 2005, Anthony received 100 production units from Energex. However, the units were different from the prototype, did not fit in the door frame and were thus rejected and returned to Energex on August 28, 2005. The order was filed again by Energex on August 31, with new production units that were the proper size and would fit in the frame. However, the units were defective, were recalled by Energex and were returned by Anthony on September 14, 2005. The 100 production units were finally received by Anthony on October 13, 2005.²

Pricing of the AS-20 units has been a contentious issue for some time. Energex originally proposed to charge Anthony \$326 for each unit. In November, 2005, Energex advised Anthony that the cost of the units would be \$419.00 per unit and other pricing, in the \$300-400 range, was proposed by Energex at various different times. Anthony continually advised Energex that the proposed pricing was not competitive because similar products in the market place (Altech Controls Corporation part number 57000 and CPC (Emerson) part number 810-6121) were available in the \$125 to \$140 range. In addition, Anthony repeatedly advised Energex that its proposed pricing exceeded the Co-Development Agreement target by several

^{1/} These were so-called warranty units under paragraph 3.1 of the Agreement, which were to be priced at an amount not exceeding \$100.00.

^{2/} Energex identifies the anti-sweat controller as the "AS-20".

multiples and was not acceptable. In late 2005, Energex offered to reduce the price to \$250 per unit for California installations only, but it demanded payment terms that were unacceptable (50% up front, plus a reimbursement for tooling costs). Energex did not make price concessions for the sales to states other than California.

At a meeting with Anthony in 2005, Mr. Geuke admitted that his company was not the actual manufacturer of the AS-20 units, as the Co-Development Agreement contemplated, but was having the AS-20 manufactured by others at a cost of \$125 per unit. Anthony suggested a variety of ways that Energex could reduce its manufacturing costs, which Energex rejected. Anthony also offered to purchase the AS-20 at a competitive price, \$140, so that Energex would still be able to make a reasonable profit of \$15 per unit. Energex flatly rejected that practical suggestion, indicating instead that it desired to make a profit of between \$100 and \$200 per unit. After several face-to-face meetings between the parties and numerous e-mails and telephone conversations, Brad Geuke stated on behalf of Energex that it would not price the AS-20 at a lower rate than previously proposed. Therefore, with Energex being fully aware of Anthony's prior requests and because Energex still refused to offer the AS-20 at a competitive price, Anthony terminated the Co-Development Agreement by notice dated January 26, 2006.

ARGUMENT

1. The Parties Agreed to Arbitrate Their Disputes and Resort to Equitable Relief is Therefore Inappropriate.

The Co-Development Agreement contains an arbitration clause, which provides in pertinent part:

13.9. Arbitration. If any dispute arises out of this Agreement, the parties will settle such dispute exclusively by binding arbitration in accordance with the Commercial Arbitration Rules of the

American Arbitration Association in effect on the date of commencement of the arbitration. Arbitration may be commenced by written notice given by any of the parties to the others. The arbitration will be held in Denver, Colorado before a panel of arbitrators appointed by the American Arbitration Association. Judgment upon the award made in the arbitration may be entered by any court having jurisdiction.

The Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, (“FAA”) applies to a “contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . .” 9 U.S.C. §2. Federal policy strongly favors arbitration. See Perry v. Thomas, 482 US 483, 96 L Ed 2d 426, 107 S Ct 2520 (1987). Although the FAA does not oust the Court of jurisdiction over the claims subject to arbitration, the Court is required to stay its proceedings when faced with a valid arbitration clause. Meyer v. Dans un Jardin, S.A., 816 F.2d 533, 538-9 (10th Cir. 1987); 9 U.S.C. §3.

Colorado’s version of the Uniform Arbitration Act, CRS §13-22-201, *et seq.*, applies to any agreement to arbitrate an existing or subsequent controversy. CRS §13-22-206(1). In the present case, the parties expressly agreed in the Co-Development Agreement that Colorado law would govern their dispute. Agreement, paragraph 13.8. Therefore, Colorado’s Uniform Arbitration Act applies, at least to the extent not preempted by the FAA³.

Both the federal courts applying the FAA and the Colorado courts applying Colorado Arbitration Act have concluded that the court has the power, in appropriate circumstances, to

^{3/} The Federal Arbitration Act preempts state laws to the extent there is an actual conflict between the two statutes. See, e.g., Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983).

issue injunctive relief to preserve the status quo⁴ in aid of arbitration. See, eg., Ortho Pharmaceutical Corporation v. Amgen, Inc., 882 F.2d 806 (3rd Cir. 1989); Hughley v. Rocky Mountain HMO, 927 P.2d 1325 1330 (Colo. 1996)⁵. However, it is not appropriate to grant injunctive relief if doing so would require the court to resolve the underlying dispute the parties agreed to arbitrate. Thompson v. Neinaber, 239 F. Supp. 2d 478 (D. N.J. 2002). In that circumstance, injunctive relief should be denied.

In addition, where plaintiff does not seek temporary relief so that he can arbitrate, but instead seeks resolution of the underlying dispute, then injunctive relief should be denied. Id. Moreover, even if injunctive relief is otherwise permissible, it is limited to “the period when the parties await arbitration of their dispute.” Id. at 485. That reasoning is of course consistent with the FAA and the Colorado Arbitration Act, both of which permit a court to order that arbitration take place, but deny the court the ability to decide the dispute which the parties have agreed to submit to arbitration. In addition, that result is consistent with the AAA Commercial Arbitration Rules, which permit the arbitrator to “take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.” Commercial Arbitration Rule 34.

^{4/} Energex's injunction request does not seek to preserve the status quo. Instead, it would require Anthony to change the way it presently conducts its business, in derogation of its customer's wishes, creating great harm to Anthony.

^{5/} Colorado modified the arbitration statute in 2004. CRS §13-22-208 would limit the Court's ability to enter injunctive relief. However, that statute applies only to contracts entered into on or after August 4, 2004. The Co-Development Agreement was entered into in March 2004 and therefore would appear not to be subject to the provisions of new the statute.

The present case is similar to Thompson v. Neinaber, *supra*. As in Thompson v. Neinaber, here Energex does not seek limited injunctive relief so that it can begin arbitration and resolution of the injunction issues would require the Court to resolve the underlying issues that the parties have agreed to arbitrate. Thus, injunctive relief should be denied. Energex seeks very broad relief that would (1) enjoin Anthony from allegedly violating the agreement “by failing to give appropriate notice of suspension or termination,” (2) enjoin the claimed failure to “give a basis for such ‘cancellation’ and (3) enjoin Anthony from “acquiring, purchasing, negotiating, or selling any anti-sweat device” other than Energex’ product. Indeed, the focus of the Amended Complaint is resolution of the ultimate issue, not temporary relief pending arbitration

Items (1) and (2) are not necessary to preserve the right to arbitrate, but instead would be tantamount to a ruling that Anthony had not properly terminated the contract. That relief would be inconsistent with the parties’ agreement that all disputes arising out of the contract would be resolved “exclusively” by arbitration. The third type of injunctive relief sought by Energex would represent a broader prohibition than is provided in the Co-Development Agreement, which (if it was still in force) would only proscribe Anthony’s **purchase** of another device and only if Energex’ device was competitive as to price. The injunction sought by Energex would alter the status quo under the agreement and force Anthony to purchase Energex’ device at a price substantially above-market, a cost Anthony would not be able to recoup from its customers. Thus, the injunction would force Anthony to absorb substantial losses on each unit purchased, while Energex pocketed exorbitant profits. Under the injunction requested, Energex could

essentially charge Anthony whatever it wanted for the product and Anthony would be forced to pay or face the loss of door sales to customers that requested an energy controller.

Thus, the Court should deny the request for injunctive relief because of the parties' agreement to arbitrate all disputes.

2. Energex Cannot Establish any of the Elements Necessary to Obtain a Preliminary Injunction.

A. Introduction and Burden of proof. The purpose of a preliminary injunction under Fed. R. Civ. P. 65, is to preserve the status quo between the parties pending a final determination on the merits of the action. University of Texas v. Camenisch, 451 U.S. 390, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). A preliminary injunction alters the rights of the parties, affording the movant a form of relief before he has proven his case. Because it "is an extraordinary remedy," a preliminary injunction will not issue unless the right to relief is "clear and unequivocal." SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991); Schrier v. University of Colorado, 427 F.3d 1253, 1258 (10th Cir. 2005); Libertarian Party of Colorado v. Buckley, 938 F.Supp. 687, 690 (D. Colo. 1996).

The general standard for application of the four preliminary injunction elements, each of which are discussed in the following section of this brief, is not always followed where the request for an injunction falls into one of three disfavored categories. Those categories are injunctions that (i) disturb the status quo, (ii) that are mandatory instead of prohibitory, or (iii) that afford the moving party substantially all the relief he would recover at a trial on the merits. Libertarian Party, *supra*, at 690. The court in Libertarian Party, held that when one of the disfavored injunctions was sought, a plaintiff could prevail only on a showing that the factors weighed "heavily and compellingly" in their favor. However, the Court in Schrier, *supra*, held

that the “heavily and compellingly” standard “is no longer the law of the circuit.” Schrier, at 1261. Unfortunately, Schrier is unclear about whether the disfavored injunction categories no longer apply or whether it is only the “heavily and compellingly” standard that no longer applies and if the latter, then what standard is applicable.

Nonetheless, Energex's injunction request treads on thin ice in that it requests relief that includes all three of the disfavored categories. The requested injunction would require Anthony to change the way it does business and services its customers. It would mandatorily command Anthony to conduct business in a way that Anthony's clients have said is unacceptable (and force Anthony to purchase Energex' non-cost competitive controllers), and if granted would moot Energex's need to prevail in the arbitration by giving Energex substantially all the relief it might recover at the conclusion of a full trial on the merits. Given the draconian nature of Energex's disfavored injunction request, Energex has a particularly strong burden which may be greater than the “clear and unequivocal” standard.

As the moving party, Energex bears the burden of proof: the “burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought.” Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969).

B. Lundgrin standards.

The factors necessary to establish entitlement to a preliminary injunction are well known: “(1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may

cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.” Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). Energex cannot establish any of these factors by “clear and unequivocal” evidence, much less by any heightened standard, and the preliminary injunction must therefore be denied. Each factor is discussed below.

1. Energex has failed to show a substantial likelihood of prevailing on the merits.

A moving party demonstrates a substantial likelihood of prevailing on the merits of its claim by presenting "a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought." Autoskill, Inc. v. National Educational Support Systems, Inc., 994 F.2d 1476, 1487 (10th Cir. 1993), cert. denied, 510 U.S. 916, 126 L. Ed. 2d 254, 114 S. Ct. 307 (1993); Medias & Co., Inc. v. TY, Inc., 106 F. Supp. 2d 1132, 1135 (D. Colo. 2000).

As far as can be discerned from the Amended Complaint, Energex claims that Anthony has breached the contract in two ways: (1) by failing to identify in the termination notice why the contract was being terminated and (2) by failing to give Energex a thirty day right to cure. Neither argument has merit.

Paragraph 7.1 of the contract is the general termination for cause provision which permits either party to terminate the contract “immediately upon written notice at any time,” if the other party “is in material breach of any” term, condition or covenant of the agreement and fails to cure the breach thirty days after written notice. Paragraph 7.2 is a special termination provision that permitted Anthony to terminate the contract if either: (1) the product was not ready to be manufactured, marketed, sold and delivered to end-users by the Deadline Date or (2) “is not

reasonably competitive as to price or quality with other Anti-Sweat Controllers.” Thirty days notice was not required for a termination under paragraph 7.2.

Anthony terminated the Co-Development Agreement, as it was entitled to do under paragraph 7.2 of the contract, because the product was not reasonably competitive as to price. The price Energex proposed to charge Anthony was \$326 per unit outside of California and \$250 for California installations. The countrywide price is nearly two and a half times the price at which Anthony can obtain competing products and the California price is 1.8 times the cost of competing products. Energex knew this because the parties discussed it on numerous occasions, both orally and in writing, and Energex still refused to charge a reasonable price for the product. Instead, Energex cavalierly has taken the position that it can charge whatever it wants for the product and Anthony is forced to purchase it. That position is of course absurd. Anthony is not forced to buy at whatever price Energex might charge, but is permitted to terminate the contract if the product is not competitive as to price⁶ and that is precisely what it has done. Anthony will present evidence at the hearing of the price of competitive products that will show beyond any question that the price for the Energex product is not competitive. Anthony was therefore justified in terminating the contract pursuant to paragraph 7.2 and Energex did not have any right to cure.

^{6/} Anthony is also permitted to purchase anti-sweat controllers from others, without terminating the contract, pursuant to paragraph 4.1(b) of the contract, which provides that Anthony can purchase devices from others “in the event that Energex, for any reason, is unable or unwilling to provide Anthony on a timely basis” with a product that is “competitive as to price and quality.” This reinforces the notion that the entire transaction was structured around the assumption that Energex would produce a cost-competitive product and there were at least two contractual escapes if the price of the product was not competitive.

Anthony also terminated the contract under paragraph 7.1. Even if the thirty day right to cure contained in paragraph 7.1 applied, Energex has had more than thirty days notice and has not cured by offering Anthony a competitive price and Energex has flatly refused to sell at a competitive price. The testimony and documentary evidence will show without question that Energex had been advised numerous times by Anthony, both orally and in writing, over a period of many months, that the price was not competitive. Indeed, the purpose of the face-to-face meeting between Anthony and Energex in late January, 2005, was to attempt, one last time, to obtain a competitive price for the product from Energex. Energex refused that request and the notice of termination followed immediately thereafter.

Assuming for the sake of argument that thirty days notice was required under paragraph 7.1 before the contract termination could become effective, Energex in fact had months to cure this issue prior to January 26th, and did not, and has had more than forty-five days after the notice of termination and has not cured. Thus, to the extent that the thirty day notice period applied, Energex has had more than thirty days to cure and has failed to do so and the contract has terminated.

Energex cannot show clearly and unequivocally that there has been any breach of contract by Anthony. Instead, the evidence establishes that Anthony has properly and justifiably terminated the contract because Energex tried to hold Anthony hostage on the price. Thus, the first Lundgrin element is not satisfied.

2. Energex has failed to establish Irreparable Injury.

"To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal

citations omitted). "Merely serious or substantial" harm is not irreparable harm. Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001). The injury complained of must be direct and immediate, not remote or speculative. Pankos Diner Corp. v. Nassau County Legislature, 321 F. Supp. 2d 520, 524 (E.D. N.Y. 2003).

Where the harm plaintiff claims could be compensated with money damages, there is no irreparable harm and no right to injunctive relief. Tri-State Generation & Transmission Assoc., Inc. v. Shoshone River Power, Inc., 874 F.2d 1346, 1354 (10th Cir. 1989); JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2nd Cir. 1990); Qwest Communications International, Inc. Securities Litigation, 243 F.Supp.2d. 1179, 1186 (D. Colo. 2003) Thus, simple economic loss does not, in and of itself, constitute irreparable harm because such losses are compensable by monetary damages. Wisconsin Gas Co. v. FERC, 244 U.S. App. D.C. 349, 758 F.2d 669, 674 (D.C. Cir. 1985). The fact that damages would be delayed does not make the remedy inadequate. Aspen Limousine Service, Inc. v. Colorado Mountain Express, Inc., 891 F.Supp. 1450, 1458 (D. Colo. 1995). Loss of good will, sales, profits and reputation is compensable in money damages and therefore cannot be the basis for an injunction. Q-Tech Laboratories PTY Limited v. Walker, 2002 U.S. Dist. LEXIS 16842, 40 (D. Colo. 2002).

Energex claims in its Motion for injunctive relief that its irreparable harm consists of "loss of reputation, goodwill, marketing potential and ability to meet its contractual obligations," (Motion, paragraph 14) and "loss of the marketplace, loss of reputation, loss of goodwill" (Motion, paragraph 20). All of the claimed harm can be adequately compensated with money damages and Energex has therefore failed to allege, much less been able to show, any irreparable harm. Indeed, the Amended Complaint now includes a new claim for relief, seeking monetary

damages for the harm that Energex claims is irreparable. Thus, Energex claims nothing more than simple economic loss from an alleged breach of contract, which does not constitute irreparable harm.

Energex relies on two cases in its Motion, Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70 (2nd Cir. 1978) and Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2nd Cir. 1970)⁷. Motion, paragraph 22. Neither support its argument. Jackson Dairy held that irreparable harm had not been shown because money damages would be adequate compensation for the loss claimed. Id., at 72. It does not stand for the proposition cited by Energex, that the threatened loss of a business is irreparable harm. Semmes did conclude that the threatened termination of a Ford franchise that had been in existence for 20 years may constitute irreparable harm. However, the circumstances of the Energex matter are different. Here, there is no longstanding business, but a start up operation with a new product. In addition, the injunction in Semmes would have merely required Ford to continue to sell cars to the dealership at established prices. However, the injunction sought by Energex would require Anthony to purchase products from Energex at higher, non-competitive prices and would alter, not enforce, the parties' contract. Thus, Semmes is not analogous to the present case and does not support Energex' argument.

All of the injury that Energex claims, including lost future profits, good will, lost sales and lost reputation, could be compensated with money damages. The claimed injury is also

^{7/} The Motion contains an incorrect and incomplete citation to the Jackson Dairy case and the reference to Semmes in the citation is misspelled. Anthony has used the correct citations.

hypothetical and speculative and not certain or great. Plaintiff therefore cannot demonstrate any irreparable harm.

3. The injunction will cause Anthony significantly greater harm than Energex's claimed monetary loss of sales.

Anthony's business would be severely effected by the injunction Energex requests. Anthony's core business is the sale of refrigerator doors. The sale of energy conservation devices represents only a fraction of a percent of total sales. In many cases, customers do not purchase energy controllers for all of the frozen or refrigerated cases in a store, but only for a portion of the total doors. However, typically the customer will source all doors from Anthony. In addition, the customers have been extremely reluctant to purchase controllers directly from an energy control and the doors from Anthony, preferring instead to have Anthony purchase and install the controllers and bill the customer in a single invoice for both the doors and controllers.

Energex has taken the position that it will sell controllers directly to the customers and bill the controllers separately from Anthony's invoice for the doors. However, Anthony's customers have not been willing to do that. Moreover, the customers are obviously resistant to paying an inflated price for a controller that can be purchased for far less money from other sources. If Anthony cannot meet its customers' reasonable expectations regarding pricing, it will lose significant sales and suffer irreparable loss of good will by its customers who have come to expect more from Anthony as the market leader in the sales of refrigerated doors.

Anthony terminated the Agreement because Energex refused to charge a competitive price for its product. By the injunction, Energex seeks to force Anthony to "abide by the contract" and to thereby force its door customers to use Energex' overpriced controllers. The

difficulty is that the customers will not do so for the very reason Anthony terminated the Agreement - the controllers are not price competitive. Thus, the result of reinstating the contract, as Energex requests, is that Anthony's customers would not purchase Energex controllers and since Energex seeks to prohibit Anthony from using any other product, the customers would also refuse to purchase Anthony's doors.

However, the harm to Anthony would not be limited to loss of the sale of doors controlled by energy saving devices. As discussed above, in the typical installation, only a portion of the doors are energy controlled. However, if Anthony cannot provide its customers with energy controlled doors at competitive prices, the customer will not buy the non-controlled doors from Anthony either because the customers source all of the doors from a single vendor. Thus, Anthony would suffer the loss of the entire order, not just the portion related to the energy-controlled doors.

As a result of the foregoing factors, Anthony estimates that issuance of the injunction requested by Energex could result in the loss of \$1,200,000 to \$1,800,000 in **door sales** each month. Thus, the impact of the injunction on Anthony would not be limited to the cost of purchasing non-competitive controllers from Energex, but potentially could affect Anthony's core business doors sales as well. Energex has not quantified its potential injury in any of its pleadings. However, Anthony believes that the total sales by Energex to date have been less than \$70,000 and the entire nationwide market for similar energy controllers for refrigerated doors probably does not exceed \$500,000. Energex has only a small fraction of the relevant market and its potential damage from the claimed breach of contract are only a fraction of the

damages that Anthony would suffer if the injunction were issued. Therefore, the harm to Anthony substantially outweighs the harm to Energex.

4. Energex can not establish that the injunction is in the public interest.

Energex must establish that the injunction, if issued, would not be adverse to the public interest. In the Motion, Energex claims that granting injunctive relief would maintain the status quo and would not disrupt commerce. See Motion, paragraph 23. However, as discussed above, the injunction would not maintain the status quo, but would disrupt it, forcing Anthony to do something the parties' contract does not require - purchase Energex' product on extremely non-competitive terms. Energex had a right to terminate the contract precisely because of Energex' intransigence about the price and granting an injunction would not preserve the status quo, but would give Energex more than it was entitled to under the contract.

Energex apparently relies on Unum Life Ins. Co of Am. v Ward, 526 U.S. 358, 119 S.Ct. 1380, 143 LED 2d 462 (1999), for the proposition that contract termination is not favored. However, Unum does not say that. It dealt with an entirely different issue, the right of an insurance company to deny a claim that was not timely made and whether ERISA preempted state law on that issue. Moreover, Unum was overruled by Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003).

The public interest strongly disfavors issuance of an injunction in this case. Energex entered into a contract that required it to price its product competitively and permitted Anthony to terminate the contract or to purchase controllers from other suppliers if the Energex product was not competitive as to price. Energex's proposed price is not merely higher than others in the

market, but is more than twice as expensive. Energex will not be able to sell its product in the market because of its high costs and the termination of the contract was just and proper.

By means of the injunction, Energex seeks to force Anthony or Anthony's customers to buy the product at a non-competitive price. The public interest would not be served by aiding Energex under these circumstances. Thus, Energex has not carried its burden of showing that the injunction would not be adverse to the public interest and the fourth Lundgrin factor has therefore not been established.

3. A Substantial Bond Would be Required if an Injunction Were Ordered.

Without any discussion or analysis, Energex blithely asserts that a \$1000.00 bond would be sufficient. If that is not a typographical error, it is surely a joke.

A preliminary injunction may not issue without a bond. Rule 65(c); Monroe Division, Litton Business Systems, Inc. v. De Bari, 562 F.2d 30, 32 (10th Cir. 1977); Fireman's Fund Insurance Company v. S.E.K. Construction Company, 436 F.2d 1345 (10th Cir. 1971). The amount of the bond is within the sound discretion of the trial court, but the bond should be in an amount sufficient to protect the enjoined party from any loss, expense or damage caused by an improvident or erroneous injunction. ABA Distributors, Inc. V. Adolph Coors Company, 505 F.Supp. 831 (W.D. MO. 1981).

As discussed above, the potential harm to Anthony as a result of an injunction would be in the range of \$1,200,000 to \$1,800,000 per month. Although Anthony strongly disagrees that an injunction is proper, if one were issued, then a bond to protect Anthony from those potential damages would be required for whatever the duration of the injunction was. Thus, if the injunction were to last a month, Anthony would propose a bond of two times the amount of its

expected damages (\$1,500,000 x 2=\$3,000,000), because the harm to Anthony as a market leader in pricing and value could create such damage to the Anthony's business reputation that it would forever tarnish Anthony's ability to market to some of America's largest retailers (e.g. Costco, WalMart and Walgreens). If the injunction were to last six months, then the bond should be \$18,000,000. Although these amounts are substantial, Energex has sought extraordinary relief from the Court and the damages to Anthony from being wrongfully enjoined would be quite substantial. The purpose of the bond requirement is to protect Anthony from damages it may suffer if an injunction were ordered in error and only a bond sufficient to replace the lost sales and the damages to Anthony's status as the market leader would accomplish its intended purpose.

CONCLUSION

For the foregoing reasons, Anthony opposes Energex's Motion for a Preliminary Injunction and asks that the Court deny the Motion for a preliminary injunction. Instead, the Court should stay these proceedings and direct the parties to arbitrate their dispute pursuant to the contract. Finally, if an injunction were ordered, it should be conditioned upon the posting of a bond in an amount that would be sufficient to compensate Anthony for the costs and damages it would suffer if the injunction proves to have been improvident.

Dated this 13th day of March, 2006.

APPEL & LUCAS, P.C.

[This document was filed via e-file system. The originally signed copy is on file at the offices of Appel & Lucas, P.C.]

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2006, a true and accurate copy of the foregoing **DEFENDANT ANTHONY DOORS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR MODIFICATION OF SCHEDULING AND DISCOVERY ORDER** was deposited in the U.S. Mail, first class postage prepaid, to the following:

James K. Kreutz, Esq.
5445 DTC Parkway, Suite 1036
Greenwood Village, CO 80111

\s\ John D. Nunnally