IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KESTREL HOLDINGS I, L.L.C.,	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 02-2388-CM**
LEARJET INC. AND BOMBARDIER INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This case arises out of the purchase of a Learjet Model 60 business jet aircraft in February 2002. Plaintiff, Kestrel Holdings I, L.L.C. (Kestrel), filed suit against the defendants, Learjet Inc. (Learjet) and Bombardier Inc. (Bombardier), claiming diversity jurisdiction and alleging claims for breach of contract (Count I), breach of the implied warranty of merchantability (Count V), and breach of an implied warranty of fitness for a particular purpose (Count VI).[1] Learjet has filed a counterclaim against Kestrel for breach of contract (Counterclaim Count I) and quantum meruit (Counterclaim Count II).

This matter comes before the court on defendants' Motion for Summary Judgment (Doc. 257) and plaintiff's Motion for Partial Summary Judgment on Defendants' Affirmative Defenses of Real Party in Interest and Joinder of Necessary and/or Indispensable Parties (Doc. 259).

[1]Kestrel previously sought relief for alleged violations of the Kansas Products Liability Act (Count II), the Kansas Consumer Protection Act (Count III), common law negligence (Count IV), fraud by silence (Count VII), and negligent misrepresentation (Count VIII). This court dismissed Counts II, III, IV, VII and VIII on February 24, 2004.

I. Facts[2]

A. Parties

Kestrel is a Delaware limited liability corporation with two principals: Peter Mason and Ross Manire. Mason and Manire are Illinois residents.

Learjet is incorporated under the laws of the State of Delaware and has its principal place of business in Wichita, Kansas. Bombardier is incorporated under the laws of Canada and has its principal place of business in Montreal, Quebec, Canada.

Borders Technology Company, L.L.C. (Borders) was a limited liability company formed and owned by Mason to acquire a Westwind aircraft in 1998 or 1999. Mason was the managing member of Borders at all times material in this action.

NorLease Inc. (NorLease) is a Delaware corporation with its principal place of business in Chicago, Illinois. NorLease is the registered owner of the aircraft at issue in this case pursuant to an August 27, 2001 assignment between Kestrel and NorLease.

Executive Flight Management (EFM), an aircraft charter management company based out of Aurora, Illinois, is responsible for operating the aircraft on Kestrel's behalf. EFM provides the "hands-on" details of operating airplanes, including supplying pilots and providing maintenance services and

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[2]Both parties have moved for summary judgment. The court may therefore assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts. *James Barlow Family Ltd. P'ship v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997).

administration. In addition, EFM charters flights using its clients' airplanes (when not in use by the client) to generate revenue for its clients.

B. The Airplane Purchase Agreement

On March 1, 2001, Borders executed an Airplane Purchase Agreement (the Purchase Agreement) with Learjet to purchase a Learjet Model 60 business jet aircraft.

After execution of the original Purchase Agreement on March 1, 2001, a Learjet Model 60 business jet aircraft with the serial number 60-235 and registration mark N252RP (the aircraft) was allocated to Borders.

On August 27, 2001, Kestrel and Learjet executed a document entitled Amendment to Airplane Purchase Agreement (Amendment No. One), which modified the March 1, 2001 Purchase Agreement and included Learjet's acknowledgement of "the assignment by [Borders] of all of its right, title and interest in, to and under the [March 1, 2001 Purchase] Agreement to [Kestrel] ... pursuant to a certain Assignment of Airplane Purchase Agreement dated March 23, 2001, a true copy of which [had] been delivered to Learjet."

In Amendment No. One, Learjet also consented to the assignment of Kestrel of "certain of its right, title and interest in, to and under the [Purchase] Agreement to [NorLease]," and acknowledged that it had received a true copy of the August 27, 2001 Assignment of Airplane Purchase Agreement between Kestrel and NorLease.

The August 27, 2001 assignment between Kestrel and NorLease states, in pertinent part:

> Assignor [Kestrel] does hereby assign, transfer and set over unto Assignee [NorLease] all of Assignor's [Kestrel's] right, title and interest in, to and under the

> Purchase Agreement which relates directly to the right to take title to the Aircraft and to be named the purchaser and owner of the same in any bills of sale and/or instruments of warranty of title from Seller, provided, however, that Assignor [Kestrel] shall retain the following rights under the Purchase Agreement subject to the Lease Agreement (as defined below): (a) the right to any product warranties (if any) contained in the Purchase Agreement as such warranties may apply to the Aircraft [60-235], (b) any and all rights of [Kestrel] to enforce performance of the terms of the Purchase Agreement against Seller as such terms apply to the Aircraft, and (c) the right to take delivery of the Aircraft.

On December 28, 2001, a document entitled Amendment No. Two to Airplane Purchase Agreement (Amendment No. Two) was executed. Among other things, this document amended and modified the March 2001 Purchase Agreement, as amended by Amendment One, to change the Delivery Date to January 21, 2002 and reduced the overall purchase price for the aircraft by $157,500.

On February 13, 2002, a document entitled Amendment No. Three to Airplane Purchase Agreement (Amendment No. Three) was executed. Among other things, this document amended and modified the Purchase Agreement, as amended by Amendment Nos. One and Two, to change the delivery date to February 14, 2002 and reduce the overall purchase price for the aircraft by $5,074.50.

C. Ownership of the Aircraft

On August 27, 2001, NorLease became the registered owner of the aircraft. Learjet issued an Aircraft Bill of Sale for the aircraft, listing NorLease as the purchaser. On a separate Bill of Sale, Learjet is listed as the "SELLER," and NorLease is listed as the "BUYER."

D. Leasing and Operation of the Aircraft

Pursuant to a March 23, 2001 Lease Agreement, NorLease, the lessor, prospectively leased the aircraft back to Kestrel, the lessee. The Lease Agreement between NorLease and Kestrel lists the "seller" of the aircraft as "Learjet, Inc."

In Section 6.19 of the Lease Agreement, Kestrel expressly acknowledged that "[1]essee [Kestrel] shall have no right, title or interest in or to the Aircraft except the right to use the same upon the terms and conditions within this Agreement . . . ."

Section 6.19 further states that: "[Kestrel shall] not (save as otherwise is expressly consent to by Lessor) sell, transfer, mortgage, hypothecate, lease or execute a bill of sale affecting the Aircraft or any interest therein or suffer to exist any encumbrance on the Aircraft or agree to or purport to do any of the aforesaid . . . ."

Section 6.19 also prohibits Kestrel from doing or permitting "any act or thing which might jeopardize the rights and interest of Lessor [NorLease] in the Aircraft and/or permit to be omitted to be done any act which might prevent those rights and interest from being exercised . . . . ."

The Lease Agreement also contains an assignment clause:

> 7.1 Assignment: Lessor agrees to assign or otherwise make available to Lessee such rights as Lessor may have under any warranty, express or implied, with respect to the Aircraft or Engines made by the manufacturer or any repairer to the extent that the same may be assigned or otherwise made available to Lessee and, without warranty by Lessor as to the enforceability of any of the rights so assigned; to the extent that the same may not be assigned or otherwise made available to Lessee, Lessor agrees to exert its reasonable efforts, at Lessee's request and expense, to enforce such rights as Lessor may have with respect thereto for the benefit of Lessee.

Kestrel, in turn, subleased the aircraft to EFM pursuant to a Sublease Agreement dated August 27, 2001. EFM operates the aircraft as a charter aircraft under Part 135 of the Federal Aviation Regulations pursuant to the Sublease Agreement with Kestrel. EFM and Kestrel are also parties to a

letter agreement dated August 27, 2001, pursuant to which EFM operates the aircraft for Kestrel's use and benefit.

E. Kestrel's Claims and Damages

Kestrel filed this lawsuit on August 21, 2002. Kestrel's claims currently before this court include breach of contract (rescission and/or revocation of acceptance), breach of the implied warranty of merchantability, and breach of an implied warranty of fitness for a particular purpose, arising out of the sale of the aircraft and subsequent problems with the aircraft. Kestrel contends that it is entitled to an order requiring defendants to take the aircraft back and to pay Kestrel more than $15 million in damages. Kestrel's claimed damages include purchase price payments and interest, costs for flights to and from the repair center, a financing prepay penalty, acquisition costs, hangar rent, administrative fees, and costs for crew service, insurance, repair labor, third-party labor, and pilot safety training.

F. Learjet's Counterclaim and Damages

Learjet has brought counterclaims against Kestrel for breach of contract and quantum meruit. Learjet contends that it performed repairs or service work, and/or provided fuel and/or other benefits to the aircraft for Kestrel that were not covered by the warranty agreement, totaling more than $21,000, plus interest. Learjet also claims that Kestrel owes more than $97,000, plus interest, for 81.2 hours of interim flight support provided by Learjet to Kestrel pursuant to the Airplane Purchase Agreement.

G. Ratification by NorLease

On June 10, 2004, Kestrel filed with the court a Notice of Filing of Declaration of Ratification (the ratification) by NorLease, Inc. Through the ratification and a supporting affidavit, Kestrel claims

that when Kestrel and NorLease executed the Assignment in August 2001, their respective understanding of the assignment was that Kestrel would retain any and all rights to enforce the terms of the Purchase Agreement and any and all warranties contained therein; and that such enforcement included any and all rights to file a cause of action in any federal or state court to enforce the terms of the Purchase Agreement and any and all warranties contained therein.

In the ratification, NorLease states that Kestrel's arrangement with NorLease with respect to the aircraft is a lease financing arrangement and that Kestrel has timely made all rental payments under this arrangement. NorLease has not operated the aircraft in any way, and has not paid any costs to operate the aircraft, such as insurance, taxes, hangar rent, pilot expenses, pilot training, maintenance, repair, or Kestrel's attorneys' fees or expenses associated with this action. Under Kestrel's arrangement with NorLease, and as between Kestrel and NorLease, Kestrel is solely obligated to operate, maintain, repair, compile records, register and license the aircraft, and pay all costs associated with its sole obligations with respect to the aircraft.

NorLease also states that, other than defendants' deposition of Eric Parker, a former officer of NorLease, since NorLease's execution of the August 2001 Assignment, NorLease has not been involved in any way in the disputes involving the delayed delivery of the aircraft or any claims by Kestrel, or EFM, about any deficiencies with the aircraft. Likewise, during the same time period, other than in connection with defendants' deposition of Parker, NorLease has not received any correspondence or documents from either defendant about any such disputes or any of defendants' counterclaims.

NorLease also states that, even though under the August 2001 Assignment, Kestrel was not obligated to contact NorLease and seek its consent before filing this action, Kestrel nevertheless informed NorLease of its intent to do so before filing this action and that NorLease fully consented to Kestrel's sole filing and prosecution of this action. NorLease claims to have reviewed the complaint, amended complaint, and pretrial order, and believes the claims and defenses that Kestrel has asserted are the same type of claims that Kestrel reserved in the first paragraph of the August 2001 Assignment.

NorLease further states that, while NorLease does not believe it is a real party in interest or a necessary or indispensable party, "NorLease nevertheless hereby ratifies this cause of action pursuant to Federal Rule of Civil Procedure 17(a), and repeats its authorization that this action may be prosecuted solely by Kestrel."

In the ratification, NorLease further agrees to be fully bound by the results of the action, and agrees to not object to any shaping of relief in any judgment against defendants that avoids any possibility of repetitive litigation over the same claims and defenses at issue in this action. Kestrel claims that NorLease's agreement in this regard includes, but is not limited to, its consent to surrender title to the aircraft if a judgment is entered which requires one or both defendants to take back the aircraft.

Defendants contend that they are unable to respond to or controvert these assertions because the ratification and supporting affidavit were not filed until after discovery had closed and the pretrial order was filed. Both defendants have raised affirmative defenses that NorLease is the real party in interest to Kestrel's claims and that Kestrel has failed to join NorLease as a person or

entity necessary and/or indispensable to a complete adjudication of Kestrel's claims – specifically with regard to any claim that would entail return of the aircraft to Learjet. During discovery, in response to an interrogatory question regarding their real party in interest defense, defendants stated: "NorLease, as the owner of Aircraft 60-235, is a necessary party because in NorLease's absence defendants are at a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of NorLease's claimed interest."

H. Cross Motions for Summary Judgment

Defendants' Motion for Summary Judgment asserts that summary judgment is appropriate in favor of one or both of the defendants on the following issues: (1) in favor of Bombardier because Bombardier is not and has never been a party to any contract with Kestrel; (2) all of Kestrel's claims for rescission or cancellation of the Purchase Agreement, or revocation of acceptance, for lack of subject matter jurisdiction because Learjet and NorLease are both citizens of Delaware – defendants claim that NorLease's citizenship must be considered for purposes of subject matter jurisdiction because of NorLease's participation in the lawsuit through the June 10, 2004 filing of the ratification; (3) Kestrel's claims for breach of implied warranties because the Purchase Agreement disclaimed all implied warranties; (4) Kestrel's claims for consequential or incidental or other damages because the Purchase Agreement limited buyer's remedies for defects in the aircraft to repair, replacement or rework and excluded all other monetary damages; (5) Kestrel's claims for

breach of contract or breach of express warranty because no reasonable jury could find a material breach occurred; and (6) Learjet's counterclaim.

Kestrel's cross motion for partial summary judgment moves for summary judgment on defendants' affirmative defenses of real party in interest and joinder of necessary and/or indispensable parties. Kestrel asserts that defendants cannot and have not shown that there are any issues of material fact as to these affirmative defenses but have merely alleged that they may risk multiple or inconsistent judgments if NorLease is not joined as a party. Kestrel claims that it is entitled to summary judgment on these affirmative defenses for three reasons: (1) by the terms of the August 2001 Assignment from Kestrel to NorLease, Kestrel unambiguously retained all rights to enforce the Purchase Agreement for the aircraft,

including all warranties contained therein; (2) defendants' own actions demonstrate that Kestrel, not NorLease, is the only real party in interest; and (3) NorLease's Declaration of Ratification cures defendants' objections along these lines. Kestrel claims that ridding the lawsuit of defendants' real party in interest and joinder affirmative defenses will streamline it for trial.

II. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential

to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the

other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut," rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. Discussion

Because the court believes that the parties' arguments regarding NorLease's involvement in the case and the effect of the ratification are dispositive, the court focuses on those arguments.

Defendants essentially argue that the legal effect of Kestrel's August 2001 Assignment of its rights under the Purchase Agreement to NorLease makes NorLease the real party in interest for any claims for revocation of acceptance, cancellation or rescission. Defendants do not dispute that Kestrel is the real party in interest for the breach of warranty claims or that Kestrel is the appropriate party against which to bring its counterclaims. Defendants contend that the ownership rights of NorLease to the aircraft are clearly implicated by Kestrel's alternate breach of contract theories through which it seeks to return the aircraft to Learjet. Defendants also argue that, under Kansas law relating to finance lessees, NorLease, as the lessor, is the proper party to seek revocation of acceptance of the aircraft, that NorLease must be made a party to the lawsuit, and that its citizenship be considered for jurisdiction purposes. Because NorLease and Learjet are both Delaware citizens, inclusion of NorLease's citizenship would destroy the diversity jurisdiction of the court.

Defendants further argue that, even if NorLease does not need to be made a party to the lawsuit, since through the ratification, it has given Kestrel permission to proceed on its behalf, the ratification destroys the court's jurisdiction over the case pursuant to Fed. R. Civ. P. 17. Because NorLease has ratified the action, the court must consider NorLease's citizenship under Rule 17. Defendants contend that Kestrel has created a subject matter jurisdiction flaw by having NorLease execute and file the ratification.

Kestrel contends that, through the August 2001 Assignment, it has expressly retained the authority to seek remedies under the Purchase Agreement, which include possible return of the aircraft to defendants. Kestrel thus argues that NorLease has no interest in the litigation and is not a real party in interest - and that defendants have not treated NorLease as a real party in interest. Kestrel also contends: (1) that NorLease is not a necessary party under Fed. R. Civ. P. 19 because NorLease lacks any interest in the litigation; and (2) that NorLease is not an indispensable party to the litigation because none of the parties will be prejudiced by NorLease's absence. Kestrel further contends that defendants' arguments that NorLease is a real party in interest or that defendants will be prejudiced by NorLease's absence have been overcome by NorLease's ratification of the lawsuit. Kestrel also contends that NorLease's citizenship is not material to the issues before the court, and urges the court not to dismiss the case on the eve of trial.

First, the court notes that it is required to address subject matter jurisdiction at any time that such jurisdiction comes into question. "'A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking.'" *Penteco Corp. Ltd. P'ship –1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991) (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)). "Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings." *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (citing *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

Next, the court agrees with Kestrel's arguments that NorLease is neither a necessary nor an indispensable party under Fed. R. Civ. P. 19. NorLease has ratified the lawsuit and, despite its pronouncement that Kestrel retained the right to pursue revocation, cancellation or rescission of the Purchase Agreement, making Kestrel, and not NorLease, the real party in interest, NorLease has ratified Kestrel's prosecution of this suit and agreed to be bound by any outcome. Thus, none of the current parties are prejudiced by NorLease's absence from the lawsuit, and NorLease's joinder is not necessary for complete adjudication of the claims.

However, by filing the ratification pursuant to Fed. R. Civ. P. 17, NorLease and Kestrel have also put into motion Rule 17 and its effects on the case. Rule 17 states that ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." Kestrel argues that the ratification is meant to dispel defendants' concerns about multiple litigation from NorLease, and that NorLease's citizenship should not be considered. Kestrel maintains that NorLease is not the real party in interest for any of the claims. It is undisputed that, if the suit had been brought by NorLease alone, or by both NorLease and Kestrel, no diversity jurisdiction would exist in this case.

The court believes, that, based on the facts set forth by the parties, and the court's cumulative reading of the August 2001 Assignment between Kestrel and NorLease, the Lease Agreement between Kestrel and NorLease, the Purchase Agreement, and the ratification, both Kestrel and NorLease are real parties in interest to this case. It is undisputed that NorLease is the title owner of the aircraft at issue, and has been since the assignment between Kestrel and NorLease in August 2001. NorLease has filed a ratification authorizing Kestrel's actions in the suit. By filing

the ratification pursuant to Rule 17, NorLease has given Kestrel permission to prosecute the case on NorLease's behalf and has agreed to be bound by any judgment in the case, including return of the aircraft – which would require that NorLease sign over its title and interest in the aircraft to defendants. Accordingly, the court finds that NorLease has a real interest in the outcome of the case, even if it is a lesser interest to that of Kestrel. The court finds it would be contrary to the procedural dictates of Rule 17 to permit NorLease to file a ratification pursuant to Rule 17(a) – entitled "Real Party in Interest" – yet permit NorLease to contend that it is not truly a real party in interest. To allow such contradictory use of Rule 17 risks erosion of the purpose of the rule and encourages manipulation of the Federal Rules by parties seeking to circumvent diversity jurisdiction requirements.

The court finds the reasoning of the district court in *RMP Consulting Group, Inc. v. Datronic Rental Corporation* persuasive. 179 F.R.D. 614 (N.D. Okla. 1998) *aff'd in part, vacated in part, rev'd in part by RMP Consulting Group, Inc. v. Datronic Rental Corp.*, 1999 WL 617690 at *1 (10th Cir. Aug. 16, 1999). In *RMP*, the district court found that a Rule 17 ratification by an unnamed party who was a real party in interest would require the court to consider the unnamed party's citizenship from the initial filing in the case. The unnamed party was the limited partnership of the general partner/plaintiff, and consideration of the citizenship of each of the limited partners destroyed the general partner/plaintiff's diversity with the defendant. As was the case in *RMP*, in this case NorLease "should not be permitted to argue that it is substantial enough that its ratification is necessary to proceed, but it is not substantial enough that its citizenship must be

considered for diversity purposes." *Id*. at 621.[3] Moreover, NorLease's citizenship as the ratifying party should be considered from the initial filing in accordance with Rule 17. *Id*. at 622; Fed. R. Civ. P. 17(a) ("ratification . . . shall have the same effect as if the action had been commenced in the name of the real party in interest").

Defendants have suggested that the court dismiss any of Kestrel's claims that involve rescission or revocation of the contract and which would involve return of the aircraft to Learjet. If Kestrel's revocation claims were dismissed, there would be diversity of the remaining parties and Kestrel could continue with the breach of warranty claims brought solely on its behalf.

However, the court cannot take such course of action because, in this case, diversity did not exist when the case was filed. Pursuant to Rule 17, as a real party in interest, NorLease's citizenship should have been considered from the very first filing. *Id*. There is no diversity of citizenship amongst the parties once NorLease's citizenship is considered; therefore, this court has no subject matter jurisdiction over any of the claims in the case.

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[3]Notably, the Tenth Circuit affirmed the district court's determination that it did not have jurisdiction over the case because of a ratification of the lawsuit by a real party in interest that was not joined as a party to the lawsuit. The district court dismissed the case for lack of subject matter jurisdiction. The Tenth Circuit affirmed the district court's finding that it did not have subject matter jurisdiction but reversed the dismissal and ordered the district court to remand the case to state court, where it had originated. Accordingly, this court finds Kestrel's attempts to distinguish *RMP* because the ratifying party in that case actually claimed to be a real party in interest, and was a limited partnership rather than a corporation, unpersuasive.

IT IS THEREFORE ORDERED that defendants' Motion for Summary Judgment (Doc. 257) is granted in part[4].

IT IS FURTHER ORDERED that plaintiff's Motion for Partial Summary Judgment (Doc. 259) is denied.

IT IS FURTHER ORDERED that this case is dismissed for lack of subject matter jurisdiction.

Dated this 10th day of March 2005, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

[4]In light of its holding, the court declines to address the other bases for defendants' summary judgment motion.