

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**ALLIANZ INSURANCE COMPANY** )  
**and PECHINEY PLASTIC** )  
**PACKAGING INC., )**

**Plaintiff,** )

**v.** )

**UCB FILMS,** )

**Defendant.** )

**CIVIL ACTION**

**No. 03-2470-CM**

**MEMORANDUM AND ORDER**

This is a subrogation case brought by plaintiffs Allianz, as subrogee of plaintiff Pechiney, and plaintiff Pechiney in its own right. Allianz seeks to recover in excess of \$388,771.00 for said sums it claims that it was obligated to pay to Pechiney because of an insurance claim made by Pechiney related to an allegedly defective cellophane product that Pechiney purchased from defendant, which defendant manufactured. Pechiney seeks to recover \$250,000 from UCB for its deductible. On January 8, 2004, plaintiff filed a Motion for Leave to Amend Complaint (Doc. 12), to which defendant objected. In essence, plaintiffs sought leave to amend to remove Pechiney as a named plaintiff in this case.

On March 30, 2004, Magistrate Judge Waxse ordered the parties to show cause why plaintiffs' Motion for Leave to Amend Pleadings should not be construed as a Rule 41(a)(2) motion to dismiss Pechiney's action against defendant and why defendant's objections should not be

construed as a request for “terms and conditions” and granted as such. The parties timely responded, and this order follows.

As set forth by Pechiney, after the commencement of this action, counsel for Pechiney discovered that defendant had reimbursed Pechiney in the amount of \$200,000.00 for Pechiney’s out-of-pocket expenses. In addition, defendant has promised to pay Pechiney an additional \$175,000. As evidence of this settlement, plaintiff proffers the Affidavit of John Buras, Pechiney’s Director of Risk Management, wherein Buras states that: (1) “Pechiney no longer has any claims against UCB arising out of the Loss”; and (2) “The amounts received by Pechiney from Allianz and UCB constitute full satisfaction of the expenses incurred by Pechiney as a result of the loss.” (Buras Affidavit, ¶¶ 10 & 11). Attached to Buras’s Affidavit is a written offer of settlement dated June 19, 2003, wherein defendant agrees to pay Pechiney the additional \$175,000.00. Defendant argues that, should Pechiney be dismissed, such dismissal should be with prejudice. Pechiney, on the other hand, contends that its dismissal should be without prejudice since the \$175,000.00 payment negotiated between Pechiney and defendant is still outstanding.

There being no objection by either party, the court construes plaintiffs’ Motion for Leave to Amend Complaint as a Rule 41(a)(2) motion to dismiss. Moreover, neither party disputes that, because Pechiney has recovered in full for its damages, Pechiney has no standing to sue defendant in this lawsuit. Pechiney should therefore be dismissed with prejudice from this action. However, pursuant to *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, (1994), the court will retain jurisdiction to enforce the settlement agreement and hereby incorporates by reference the June 19, 2003 offer of settlement into this order. *Id.* (holding that district court lacks

ancillary jurisdiction to enforce settlement agreement unless the order of dismissal shows either an intent to retain jurisdiction or incorporates the settlement agreement into the order).

Defendant also argues that Pechiney is an indispensable party to this litigation. However, the court has dismissed Pechiney with prejudice and, as such, defendant's concern over the possibility of Pechiney later bringing an action against defendant is moot. The court determines that plaintiff Pechiney is not indispensable to this action. *Universal Underwriters Ins. Co. v. Tony Depaul & Sons, Inc.*, 2001 WL 1175146, at \*1 (E.D. Pa. 2001) ("If an insurer has paid his insured in full for his loss and becomes subrogated to all the insured's rights, the insured is neither a proper nor a necessary party.") (citing 26 Federal Procedure, § 59:124).

**IT IS THEREFORE ORDERED** plaintiffs' Motion for Leave to Amend Pleadings is construed as a Rule 41(a)(2) motion to dismiss plaintiff Pechiney's action against defendant and that defendant's objections are construed as a request for "terms and conditions." Plaintiff Pechiney is hereby dismissed with prejudice from this case. The court retains jurisdiction to enforce the settlement agreement between plaintiff Pechiney and defendant.

Dated this 11 day of May 2004, at Kansas City, Kansas.

**s/ Carlos Murguia**  
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**CARLOS MURGUIA**  
**United States District Judge**