

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

**AMBROSE PACKAGING, INC.,**

**Plaintiff,**

**v.**

**Case No. 04-2162-JWL**

**FLEXSOL PACKAGING CORP.,**

**Defendant.**

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**MEMORANDUM AND ORDER**

Plaintiff Ambrose Packaging, Inc. filed this lawsuit alleging a single cause of action against defendant FlexSol Packaging Corp. for tortious interference with a prospective business advantage. The matter is presently before the court on plaintiff's motion to remand (doc. 14) and defendant's motion to dismiss (doc. 15). For the reasons explained below, plaintiff's motion is denied and defendant's motion is granted with prejudice with respect to plaintiff's tortious interference claim and without prejudice to plaintiff filing a motion on or before October 1, 2004, seeking leave to amend her complaint to assert a claim for breach of contract.

**I. Procedural History**

Plaintiff filed this lawsuit in the District Court of Johnson County, Kansas, asserting a single claim against defendant for tortious interference with a prospective business advantage. Defendant filed a notice of removal, invoking this court's diversity jurisdiction.

Defendant also filed a motion to dismiss plaintiff's sole cause of action. This court granted defendant's motion on the grounds that plaintiff had failed to allege any facts to support the conclusory allegation that defendant had engaged in misconduct in interfering with plaintiff's prospective business advantage with the third party, International Multi-Foods. The court granted the motion, however, without prejudice to plaintiff filing an amended complaint to correct this pleading deficiency.

Plaintiff timely filed an amended complaint. Defendant again moved to dismiss plaintiff's amended complaint and the court granted defendant's motion. This time, the court granted the motion on the grounds that plaintiff did not dispute defendant's argument that the two were competitors, hence plaintiff's complaint failed to state a claim because it did not allege that defendant engaged in any independently actionable conduct in interfering with plaintiff's prospective business advantage with International Multi-Foods. Once again, the court granted the motion without prejudice to plaintiff filing a second amended complaint to correct this pleading deficiency.

Plaintiff timely filed a second amended complaint. The second amended complaint essentially mimics the tortious interference claim of the amended complaint and also asserts an additional claim against defendant for breach of contract and reduces plaintiff's damage claim and prayer for judgment to \$74,000. When plaintiff filed the second amended complaint, plaintiff also filed a motion to remand this case to state court on the basis that the second amended complaint reduces plaintiff's damage claim below the \$75,000 amount-in-controversy requirement. Defendant has filed a motion to dismiss plaintiff's second amended

complaint, and plaintiff has not timely responded to defendant's motion to dismiss. Thus, the two matters currently before the court are plaintiff's motion to remand and defendant's unopposed motion to dismiss plaintiff's second amended complaint.

## **II. Plaintiff's Motion to Remand**

"The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal." *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). The original petition filed by plaintiff in state court alleged damages "in excess of \$75,000" and sought judgment "in excess of \$75,000." Pet. ¶¶ 10-11, at 2. Further, defendant's notice of removal pointed out that plaintiff's petition "allege[d] damages in excess of \$75,000." Notice of Removal ¶ 2, at 1. Thus, it is undisputed that the \$75,000 amount-in-controversy was satisfied at the time of removal. The sole issue before the court, then, is whether the court should remand this case to state court on the basis that plaintiff's amendment reducing the amount in controversy to \$74,000 deprives this court of diversity jurisdiction.

The Supreme Court squarely addressed this issue in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). In *St. Paul*, the Court stated that where, as in that case, "the plaintiff after removal, by stipulation, by affidavit, or by amendment of his [or her] pleadings, reduces the claim below the requisite amount, this does not deprive the court of jurisdiction." *Id.* at 292. Once the district court's jurisdiction attaches at the time of removal, post-removal events "which reduce the amount recoverable, whether beyond the plaintiff's

control or the result of his [or her] volition, do not oust the district court's jurisdiction." *Id.* at 293. The Court explained that

[w]e think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his [or her] original claim in the state court, reduce the amount of his [or her] demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim . . . fixes the right of the defendant to remove, and the plaintiff ought not be able to defeat that right and bring the cause back to state court at his [or her] election.

*Id.* at 294. Under *St. Paul* and its progeny, it is indeed a well established principle that once the district court's diversity jurisdiction attaches at the time of removal, a plaintiff may not subsequently divest the court of jurisdiction and force remand to state court by reducing the amount in controversy. See 14B Charles Alan Wright et al., *Federal Practice & Procedure* § 3702, at 67-70 & n.48 (3d ed. 1998 & Supp. 2004) (citing an abundance of case law to support this proposition); 14C Wright, *supra*, § 3725, at 115-18 & n.79 (same); see also *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1340 (10th Cir. 1998) (acknowledging the principle from *St. Paul* that "[o]nce jurisdiction has attached, events subsequently defeating it by reducing the amount in controversy are unavailing"); *Lininger v. State Farm Fire & Cas. Co.*, 958 F. Supp. 519, 520 (D. Kan. 1997) (holding remand was unwarranted by the plaintiff's post-removal reduction of damages below the amount-in-controversy requirement); cf. *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991) (rejecting the analogous argument that the plaintiff's post-removal addition of claims against non-diverse defendants destroyed complete diversity and hence required remand because a party cannot force remand after removal by amending the complaint to destroy federal court jurisdiction).

In this case, as discussed previously, this court's jurisdiction attached at the time that defendant filed its notice of removal. It is clearly established, then, that plaintiff cannot divest this court of jurisdiction by a post-removal amendment to the complaint that reduces the amount in controversy below the jurisdictional amount. Accordingly, plaintiff's motion to remand is denied. *See, e.g., Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291 (11th Cir. 2000) (holding the district court erred by remanding a case based on a post-removal amendment that reduced the amount in controversy below the statutory amount); *see also, e.g., Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883-84 (5th Cir. 2000) (holding a post-removal affidavit and stipulation for damages below the statutory amount did not divest the district court of jurisdiction); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871-73 (6th Cir. 2000) (same, post-removal stipulation); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam) (same).

### **III. Defendant's Motion to Dismiss**

Defendant's motion to dismiss is granted in its entirety on the basis that it is unopposed. *See* D. Kan. Rule 7.4 ("If a respondent fails to file a response within the time required by Rule 6.1(e), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice.").

In addition, the motion is granted on its merits with respect to plaintiff's tortious interference claim. For the reasons stated in the court's memorandum and order dated July 19, 2004, the allegations in plaintiff's amended complaint were insufficient to state a claim for tortious interference with a prospective business advantage. The allegations in plaintiff's second amended complaint are materially indistinguishable from those contained in the amended complaint, and therefore the court's reasoning from its prior order applies with equal force to the allegations in plaintiff's second amended complaint. Accordingly, plaintiff's tortious interference claim is dismissed with prejudice.

Defendant also argues that plaintiff's breach of contract claim should be dismissed because plaintiff's amendment asserting this additional claim is unauthorized. Rule 15(a) of the Federal Rules of Civil Procedure allows a party to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). Subsequent amendments are allowed "only by leave of court or by written consent of the adverse party." *Id.* Plaintiff's permissive period (i.e., "as a matter of course") for filing an amendment has expired. *See Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985) (per curiam) (district court's entry of judgment granting motion to dismiss precludes plaintiff from

amending the complaint as of right). Accordingly, plaintiff can file another amendment only by leave of court or by written consent of the adverse party. In the court's July 19, 2004, memorandum and order, the court granted plaintiff leave to amend only to correct pleading deficiencies on the tortious interference claim, not to assert new claims. Thus, the aspect of the second amended complaint in which plaintiff asserts a new claim for breach of contract is unauthorized, and is therefore stricken. *See, e.g., Vasquez v. Johnson County Housing Coalition, Inc.*, No. 03-2147, 2003 WL 21479186, at \*1 (D. Kan. June 16, 2003) (striking an unauthorized amended pleading). Mindful of the policy that leave to amend shall be freely given, however, the court will allow plaintiff to file a motion on or before October 1, 2004, seeking leave to amend her complaint to assert a claim for breach of contract.

**IT IS THEREFORE ORDERED BY THE COURT** that plaintiff's motion to remand (doc. 14) is denied.

**IT IS FURTHER ORDERED BY THE COURT** that defendant's motion to dismiss (doc. 15) is granted with prejudice with respect to plaintiff's tortious interference claim and without prejudice to plaintiff filing a motion on or before October 1, 2004, seeking leave to amend her complaint to assert a claim for breach of contract.

**IT IS SO ORDERED** this 16th day of September, 2004.

s/ John W. Lungstrum  
John W. Lungstrum  
United States District Judge