

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

CST INDUSTRIES, INC.,

Plaintiff,

v.

Case No. 04-2334-JWL

**JAMES R. RANDALL and ,
ALL STATE TANK
MANUFACTURING, L.L.C.,**

Defendant.

MEMORANDUM AND ORDER

Plaintiff CST Industries filed this action in state court against defendants James Randall and All State Tank Manufacturing (“All State”). Plaintiff asserts claims of breach of contract, violation of the Uniform Trade Secrets Act, and Tortious Interference with Contract. All State removed the action to this court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. The matter is presently before the court on plaintiff’s motion to remand (Doc. #5).

As set forth more fully below, the court grants plaintiff’s motion to remand. Because the notice of removal was filed more than thirty days, indeed more than eleven months, after the initial service and there is no “other paper” that made All State aware that the case was removable to federal court, All State’s motion to remove is untimely.

Also, the court grants plaintiff’s request for attorney’s fees and expenses upon consideration of an affidavit by plaintiff regarding the amount requested and any response by All State.

BACKGROUND

Plaintiff is a Kansas corporation with its principal place of business located in Wyandotte County, Kansas.¹ All State is an Oklahoma corporation with its principal place of business in Grove, Oklahoma. Mr. Randall at all pertinent times resided in Portland, Oregon and was a citizen of Oregon.

Plaintiff is a manufacturer of bolted and factory welded storage tanks for the municipal, industrial and agricultural markets who sells its products and services throughout the United States. Plaintiff claims that the types of storage tanks it manufactures offer a competitive advantage over other storage options such as field-welded tanks, concrete or underground tanks because plaintiff's tanks are constructed above ground, making them easier to build, less expensive and not subject to the environmental problems associated with on site construction.

On May 21, 2000, Mr. Randall entered into an employment relationship with plaintiff, and at that time he signed an employee confidentiality agreement. The confidentiality agreement prohibited Mr. Randall from using directly or indirectly, or disclosing or disseminating to any other person or entity all confidential information, including customer or supplier information, and from interfering with, disrupting or attempting to interfere with or disrupt relationships between plaintiff and any person or entity that was a customer or prospective customer of plaintiff at any time during the term of his employment by plaintiff.

¹ Consistent with the standard governing this motion, all factual disputes are resolved in favor of the non-moving party. *Montano v. Allstate Indem.*, 211 F.3d 1278, 2000 WL 525592, at *1-2 (10th Cir. April 14, 2000).

The confidentiality agreement also prohibited Mr. Randall from directly or indirectly, either individually or in concert with any other person or entity, engaging in any activity, sale or other transaction which is competitive in any manner with business conducted by plaintiff for two years following his voluntary termination from plaintiff. Also in the two years following termination, Mr. Randall was prohibited from contacting, soliciting or responding to any person or entity for the purpose of selling to such person or entity any tank which is steel, glass, stainless steel, bolted or welded, whether the person or entity is one to whom he sold a tank previously or with whom he had contact but did not consummate a sale.

Mr. Randall voluntarily terminated his employment with plaintiff on October 1, 2001. On August 1, 2003, plaintiff filed its Verified Petition in the District Court of Wyandotte County, Kansas upon information and belief that Mr. Randall was working for All State, a competitor of plaintiff, in the capacity of assisting with product pricing and bid proposals, marketing All State's products and services, and soliciting customers for All State. Plaintiff alleged breach of contract and violation of the Uniform Trade Secrets Act against Mr. Randall. Plaintiff alleged tortious interference with contract against All State. Also, plaintiff sought injunctive relief against Mr. Randall and All State. In its Verified Petition, plaintiff did not state whether its damages were in excess of or less than \$75,000, instead stating that "damages as may be proven in this case." Mr. Randall and All State received service of the Petition and Summons on August 19, 2003 by personal service.

On June 30, 2004, All State filed a Request for Statement of Damages pursuant to Kansas Supreme Court Rule 118. Plaintiff replied on July 13, 2004, stating that "it is

impossible for it to respond to such request without receiving the responses to discovery sought to be compelled.” All State also issued a Deposition Notice Duces Tecum for plaintiff’s corporate designee to testify regarding damages at a deposition scheduled for July 8, 2004. Plaintiff refused to produce a witness claiming the cutoff date for discovery had passed as of February 4, 2004.

On July 19, 2004, All State filed a notice of removal claiming that plaintiff’s July 13, 2003 response to the Request for Statement of Damages and plaintiff’s refusal to provide a corporate designee for the July 8, 2004 deposition constituted “other paper” from which All State determined that the case was removable. Plaintiff filed a timely motion to remand the case to the District Court of Wyandotte County on July 29, 2004.

STANDARD FOR REMOVAL

Under the removal statute, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States” 28 U.S.C. § 1441(a). Because federal courts are courts of limited jurisdiction, there is a presumption against the existence of federal jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). Removal statutes, therefore, are strictly construed and any doubt resolved in favor of remand. *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1289-90 (10th Cir. 2001); *Fajen v. Foundation Reserve Ins. Co., Inc.*, 683 F.2d 331, 333 (10th Cir. 1982). The burden is on the party requesting removal to establish that the Court has jurisdiction. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995), *cert. denied*, 516 U.S. 863 (1995). Although the Tenth Circuit has not expressly adopted a standard, it has stated at a minimum that defendants on removal have to prove the jurisdictional amount by a “preponderance of the evidence.” *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1289-90 (10 Cir. 2001).

The right to remove a case to federal court is determined from allegations set forth in the initial pleading, “or other paper from which it may first be ascertained that the case is one which is or has become removable...” 28 U.S.C. § 1446(b).

Section 1446(b) provides, in relevant part:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based..

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action.

“The failure to comply with these express statutory requirements for removal can fairly be said to render the removal 'defective' and justify a remand.” *Huffman v. Saul Holdings Ltd. Partnership*, 194 F.3d 1072, 1077 (10th Cir.1999) (quoting *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1253 (11th Cir.1999)).

ANALYSIS

A defendant may remove any civil action brought in a state court if a federal court has original jurisdiction over the claim. 28 U.S.C. § 1441(a). A federal court has original jurisdiction over diversity actions where the matter in controversy exceeds the sum or value of \$75,000. 28 U.S.C. § 1332(a). All State contends that this court has diversity jurisdiction because plaintiff is a citizen of Kansas, All State is a citizen of Oklahoma, and Mr. Randall is a citizen of Oregon. Also, All State argues that the amount in controversy exceeds \$75,000. While the amount in controversy was not part of the Verified or Amended Petition, All State Claims that “other paper,” plaintiff’s response to All State’s request for a statement of damages under Kansas Supreme Court Rule 118 and plaintiff’s refusal to produce a corporate designee

for the July 8, 2004 deposition, proves by a preponderance of the evidence that plaintiff's claims exceed the amount in controversy. Plaintiff responds by arguing that its response to All State's Rule 118 request is not "other paper" nor was its refusal to produce a designee to testify regarding damages, and therefore All State's request for removal is untimely.

Here, it is clear that the initial pleading does not state grounds for removal since the Verified Petition does not state whether damages were in excess of or less than \$75,000, instead claiming "damages as may be proven in this case." Instead, All State argues that there is "other paper," plaintiff's response to All State's request for a statement of damages and plaintiff's refusal to produce a witness to testify regarding damages, which made it aware that the case was removable.

On June 30, 2004, All State filed a Request for Statement of Damages pursuant to Kansas Supreme Court Rule 118. Plaintiff replied on July 13, 2004, stating that "it is impossible for it to respond to such request without receiving the responses to discovery sought to be compelled." All State argues that plaintiff was capable of calculating damages, and that plaintiff's refusal to do so is a clear statement that the amount in controversy is in excess of \$75,000.

Here, the court disagrees with All State and finds that there is no "other paper" which made All State aware that the case was removable. While Rule 118 statements normally provide a method for establishing federal jurisdiction, or lack thereof, plaintiff's response to All State's Rule 118 request does not provide information relevant to establishing federal jurisdiction. In plaintiff's response to All State's request for a statement of damages, plaintiff

does not merely state that “ ‘it is impossible for’ Plaintiff CST to provide a statement of its alleged damages,” as All State claims in its Notice of Removal. Plaintiff responds by stating that it cannot respond without information requested from All State through discovery. Plaintiff’s response does not give rise to any inference that the amount of its claim exceeds \$75,000. Therefore, it did not constitute “other paper” informing All State that the case was removable.

In support of its argument that plaintiff’s Rule 118 response is “other paper,” defendant cites *Schwenk v. Cobra Manufacturing Co.*, 322 F. Supp.2d 676, 678 (E.D. Va. 2004). *Schwenk* is distinguishable from the facts here.² The *Schwenk* court found that plaintiff’s refusal to stipulate or admit that damages were below \$75,000 when the motion for judgment sought \$74,000 was “other paper.” *Id.* at 680. In *Schenk*, the inference could be drawn that plaintiff was improperly attempting to remain in state court by pleading an amount in controversy below that required for federal jurisdiction, but being unwilling to stipulate damages at that amount. No such inference can be drawn here where plaintiff’s reason for refusing to calculate its damages is a lack of information which plaintiff alleges is caused by All State.

² In *Schwenk*, the plaintiff would not admit that the amount in controversy was not greater than \$75,000, and in argument before the court, plaintiff’s counsel admitted his intention to increase the amount in the *ad damnum* clause of the Motion for judgment to as much as six million dollars, but argued that the federal court did not have jurisdiction because the value of the action was just \$74,000. *Id.* at 678. Based on the totality of circumstances, including the intent to amend the demand for damages, the refusal to stipulate to the amount of damages, and the severity of plaintiff’s injuries, the court found that the amount in controversy was over \$75,000. *Id.* at 679. No such totality of circumstances exist here.

Also, Defendant argues that plaintiff's refusal to produce a witness for the July 8, 2004 deposition to testify regarding plaintiff's damages is "other paper," while citing no authority in support of this position. Plaintiff responds by asserting that it refused to produce a witness since discovery closed as of February 4, 2004.

The court finds that plaintiff's refusal to produce a witness on July 8, 2004 is not "other paper." Similar to plaintiff's stated inability to calculate its damages, plaintiff's refusal to produce a witness was attributed to a discovery dispute.³ There is nothing in plaintiff's action or refusal to act that made All State aware that the amount in controversy exceeded \$75,000. Like plaintiff's Rule 118 response, plaintiff's failure to produce a witness does not constitute "other paper." *See Russell v. Home State Mutual Ins. Co.*, 244 F. Supp.2d 669, 672 (E.D. La. 2003) ("Plaintiff's failure to act or respond cannot have the effect of transforming defense counsel's letter into "other paper.").

The court, therefore, finds that plaintiff's motion to remand must be granted. Since there is no "other paper" that made All State aware that the amount in controversy exceeded \$75,000, All State's removal of the case was untimely, coming more than 30 days after the service of plaintiff's initial pleading, the Verified Petition. *See* 28 U.S.C. § 1446(b).

Before doing so, the court addresses one final issue-plaintiff's request for an award of attorneys' fees and costs associated with obtaining the remand order. *See* 28 U.S.C. § 1447(c)

³ It is worth noting that the defendant did not take steps in the state court to seek the judge's intervention to compel either a response to the Rule 118 request or the production of a witness.

("An order remanding may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). In deciding whether to award costs under § 1447(c), the key factor to consider is the propriety of defendants' removal. The district court does not have to find that the state court action has been removed in bad faith as a prerequisite to awarding attorneys' fees and costs under § 1447(c). *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) (citation omitted) (citing *Daleske v. Fairfield Cmtys, Inc.*, 17 F.3d 321, 324 (10th Cir. 1994)). The district court has "wide discretion" in this matter. *Daleske*, 17 F.3d at 325. The court agrees that such an award should be made here.⁴ Plaintiff, however, did not file an affidavit in support of an amount for fees and expenses. Plaintiff will have until October 18, 2004 in which to submit a supporting affidavit. All State shall have until November 1, 2004 to file any objections.

⁴ All State, in its response to plaintiff's motion to remand, does not argue that the court should not grant attorney's fees or expenses.

IT IS THEREFORE ORDERED BY THE COURT that plaintiff's motion to remand (Doc. #5) is granted and upon consideration of the affidavit by plaintiff regarding the amount requested and any response by defendants, the court will make a further order regarding payment of reasonable expenses and fees associated with obtaining the remand order. The case is remanded to the District Court of Wyandotte County, Kansas. A certified copy of this order of remand shall be mailed by the clerk to the clerk of the state court.

IT IS SO ORDERED this 6th day of October, 2004.

s/ John W. Lungstrum _____

John W. Lungstrum

United States District Judge