

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JELD-WEN, INC.,

Plaintiff,

v.

CDK DISTRIBUTION, INC., CURT HESSEN  
and KEVIN M. OTTERSON,

Defendants.

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MEMORANDUM AND ORDER  
07-C-342-S

Plaintiff Jeld-Wen, Inc., ("Jeld-Wen") commenced this breach of contract action against defendants CDK Distribution, Inc. ("CDK"), Curt Hessen ("Hessen") and Kevin M. Otterson ("Otterson") in the Circuit Court for Rusk County, Wisconsin. Defendants removed this action pursuant to 28 U.S.C. § 1441 citing 28 U.S.C. § 1332 as grounds for removal. The matter is presently before the Court on plaintiff's motion to remand pursuant to 28 U.S.C. § 1447(c). Plaintiff also seeks its costs and attorney's fees incurred as a result of removal. The following facts relevant to plaintiff's motion to remand are undisputed.

BACKGROUND

Plaintiff Jeld-Wen is an Oregon Corporation with its principal place of business in the State of Oregon and its wood window facility located in Hawkins, Wisconsin. Plaintiff develops, manufactures and sells wood window products. Defendant CDK is an Oklahoma corporation with its principal place of business in the

State of Oklahoma. Defendants Hessen and Otterson are both citizens of the State of Oklahoma and officers of CDK.

In 2003 plaintiff and defendants executed a series of agreements that created a business relationship between the parties and eventually led to litigation. First, in April of 2003 CDK completed and returned to Jeld-Wen an Application for Credit that extended credit to CDK for the purchase of wood window products. Second, on July 28, 2003 Jeld-Wen and CDK executed an Exclusive Supply Agreement ("ESA") in which CDK agreed to exclusively sell wood window products manufactured by Jeld-Wen. Third, on November 11, 2003 Otterson signed and delivered to Jeld-Wen a personal guaranty concerning all debts that CDK had or would incur with Jeld-Wen. Then, on March 7, 2006 after several years of business, defendants filed a complaint in the District Court of Tulsa County in the State of Oklahoma.

On May 29, 2007 plaintiff filed a complaint against defendants in the Circuit Court for Rusk County, Wisconsin. Plaintiff is seeking to recover \$41,892.02 in damages suffered due to an alleged excess discount given to CDK from January 8, 2005 through December 31, 2005. In its complaint plaintiff asserts five counts as different legal theories under which it hopes to recover all or part of the damages it allegedly suffered. Also, plaintiff requests relief in the form of 18% per annum interest on its damages along with costs and attorney fees.

## MEMORANDUM

Plaintiff argues that this case should be remanded because defendants failed to demonstrate that the amount in controversy exceeds \$75,000 exclusive of interest or costs. Plaintiff specifically reasons that in determining the amount in controversy defendants incorrectly: (1) aggregated damages, (2) included interest, (3) included claims from separate litigation that are not at issue in the pertinent litigation, and (4) included counterclaims. Thus, plaintiff argues that its requested amount of money damages, which does not exceed \$75,000, should govern and the case should be remanded.

Conversely, defendants argue that when one looks past plaintiff's artfully drafted complaint the amount in controversy actually exceeds \$75,000. Defendants reason that plaintiff's Wisconsin complaint is nothing more than a reassertion of counterclaims plaintiff has brought in the Oklahoma litigation in which the parties are involved. Accordingly, defendants argue that based on the similarities between plaintiff's Wisconsin complaint and its Oklahoma counterclaims the actual amount in controversy exceeds \$75,000.

### **A. Plaintiff's motion to remand**

Generally, removal is appropriate only if a federal district court has original jurisdiction over the action. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993) (citing 28 U.S.C.

§ 1441). Removal statutes should be interpreted narrowly and there is a presumption that the plaintiff gets to choose his/her forum. Id. (citation omitted). The party choosing federal court, in this case defendants, bears the burden of establishing federal jurisdiction. See Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005) (citation omitted). Accordingly, the Court must address whether it has original jurisdiction over this action. There being no dispute that the parties are of diverse citizenship, the sole issue is whether the \$75,000 amount in controversy is satisfied.

Plaintiff is the master of its complaint. Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000). Accordingly, “[w]hen the complaint includes a number, it controls unless recovering that amount would be legally impossible.” Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 815 (7th Cir. 2006).

Moreover, defendant cannot remove the case to federal court if plaintiff sues for less than the jurisdictional amount, even when the plaintiff would be justly entitled to more than the jurisdictional amount. See St. Paul Mercury Indem. Co., 303 U.S. at 294 (footnote omitted). Accordingly, when a plaintiff pleads a set amount of damages lower than the jurisdictional minimum that amount is presumed to govern unless a defendant can prove by a preponderance of the evidence that the amount of damages was pled in bad faith (i.e., recovery of only the pled amount of damages

would be legally impossible). See Rising-Moore, 435 F.3d at 815-16; see also, In re Shell Oil Co., 966 F.2d 1130, 1131 (7th Cir. 1992).

The amount in controversy is determined by the amount the defendant could pay to satisfy the plaintiff's demands in full on the day of removal. Oshana v. Coca-Cola Co., 472 F.3d 506, 510-11 (7th Cir. 2006), cert. denied, 127 S. Ct. 2952, 168 L. Ed. 264 (U.S. Jun. 11, 2007) (No. 06-1443) (citing Hart v. Schering-Plough Corp., 253 F.3d 272, 273 (7th Cir. 2001)). Stated more succinctly, "[i]f the defendant can extinguish the plaintiff's entire claim by tendering \$75,000 or less at the outset, then the amount 'in controversy' does not exceed \$75,000." Hart, 253 F.3d at 274.

Here, plaintiff argues that its state court claim could have been extinguished at removal if defendants had tendered \$41,892.02 plus interest, costs and attorney's fees as requested in the complaint. Plaintiff concedes that legal fees, which include attorney's fees and some litigation costs, can count toward the amount in controversy as long as the legal fees were accrued before the removal date and the prevailing party is entitled to recover them as part of damages. See Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955, 958 (7th Cir. 1998) (citations omitted). Accordingly, plaintiff agrees that its litigation costs and attorney's fees as of June 21, 2007 which were \$333.92 and \$2,497.50 respectively should be added to its request for actual

damages. Adding these requests to the amount of actual damages requested brings the amount in controversy to \$44,723.44.

The 18% per annum interest plaintiff seeks is not included when calculating the jurisdictional amount. The amount in controversy must exceed \$75,000 "exclusive interest and costs." 28 U.S.C. § 1332(a). For purposes of § 1332(a) the Seventh Circuit has defined "interest" as "a sum that becomes due because of delay in payment." Principal Mut. Life Ins. Co. v. Juntunen, 838 F.2d 942, 943 (7th Cir. 1988) (citation omitted). Plaintiff's request for 18% per annum interest is a request for money due because of defendants delay in payment and accordingly, cannot be included in the amount in controversy calculation.<sup>1</sup>

Defendants further argue that aggregating the claims in plaintiff's complaint will cause the amount in controversy to exceed the jurisdictional minimum. Defendants add the damages asked for against CDK with the damages asked for against Hessen and Otterson. However, the damages against CDK, Hessen and Otterson arise from one claim brought under different legal theories. One claim pled in the alternative under separate legal theories cannot be aggregated for jurisdictional purposes. Holmes v. Boehringer Ingelheim Pharmaceuticals, Inc., 158 F. Supp. 2d 866, 868 (N.D. Ill. 2001) (citation omitted).

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<sup>1</sup>Even if the interest which defendants calculated to be \$11,259.20 was included the total amount in controversy would only be \$55,982.64 which is still below the jurisdictional minimum.

Here, plaintiff has one asserted basis for its damages: an excessive discount given to defendants. In its complaint plaintiff lists five separate theories of recovery with the hope that it may recover all or part of its damages under any one of the theories. For example, if plaintiff recovers the entire \$41,892.02 from CDK for breach of contract then there would be no damages left to recover from Hessen or Otterson personally. In the alternative, if plaintiff recovers the \$23,284.91 requested from either Otterson or Hessen personally then CDK would only be liable for the remaining \$18,607.11 of plaintiff's overall request for \$41,892.02 in actual damages. Therefore, defendants' aggregation of the damages plaintiff asked for under different legal theories is inappropriate.

Defendants' final<sup>2</sup> attempt to present facts in support of the amount in controversy exceeding \$75,000 concerns plaintiff's counterclaims in separate litigation taking place in an Oklahoma state court. Defendants argue that plaintiff's counterclaims in the Oklahoma litigation mirror plaintiff's claim in this litigation except for a counterclaim in the Oklahoma litigation that asks for an ESA mandated \$33,000 due to a breach of the ESA entered into by

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<sup>2</sup>The Court does not discuss defendants argument that their counterclaims should be considered in the amount in controversy calculation because (1) defendants cite no law supporting their argument; and (2) no such counterclaims have actually been brought and the Court does not consider potential future developments in deciding jurisdiction. See Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 538 (7th Cir. 2006).

the parties. Based on this mirroring of claims, defendants further argue that the breach of the ESA counterclaim in the Oklahoma litigation is actually in controversy in this litigation despite no mention of the ESA in plaintiff's Wisconsin complaint. Thus, defendants argue for inclusion of the \$33,000 in the amount in controversy calculation.

However, examination of the complaint leaves no doubt that plaintiff has chosen not to bring, and is not required to bring, a claim for breach of the ESA. As stated before, plaintiff is permitted to sue for less than the jurisdictional amount even when it would be *justly entitled* to more than the jurisdictional amount. See St. Paul Mercury Indem. Co., 303 U.S. at 294 (citation omitted). Thus, plaintiff is free to sue defendants for less than the jurisdictional amount even though it may be justly entitled to more if the ESA was breached.

Furthermore, defendants use of the ESA damages to provide an estimate for the amount in controversy incorrectly calculates what the stakes of the litigation could be, instead of what the stakes are given plaintiff's actual demands. See Brill, 427 F.3d at 449. The amount in controversy (i.e., what is at stake in this case) is damages due to defendants' receipt of an excess discount, not damages due to defendants' failure to pay for certain window products in violation of the ESA.

Defendants have failed to present sufficient facts supported by a preponderance of the evidence to establish that an amount in



excess of \$75,000 was required to extinguish plaintiff's entire claim at the time of removal. The presumption in favor of the amount in controversy being controlled by the amount of damages requested for in plaintiff's complaint has not been overcome. Based on plaintiff's complaint, the amount in controversy as of removal had reached only \$44,723.44 which does not satisfy the jurisdictional minimum required for this Court to have original jurisdiction under 28 U.S.C. § 1332. Accordingly, this Court's lack of original jurisdiction renders removal improper and plaintiff's motion to remand will be granted.

**B. Plaintiff's motion for attorneys' fees**

In its motion to remand plaintiff requested just costs and any actual expenses including attorney fees incurred as a result of the removal. Defendants did not argue against plaintiff's request. A party who succeeds in obtaining a remand on the basis that removal is improper is presumptively entitled to recover its fees. Garbie, 211 F.3d at 411 (citation omitted). Accordingly, by failing to argue against plaintiff's request, defendants have not overcome the presumption that plaintiff is entitled to recover its just costs and any actual expenses including attorney fees and as such an award is warranted.

ORDER

IT IS ORDERED that plaintiff's motion to remand is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for just costs and any actual expenses including attorney fees is GRANTED.

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IT IS FURTHER ORDERED that defendants motion to dismiss is  
DISMISSED as moot.

IT IS FURTHER ORDERED that this matter is remanded to the  
Circuit Court for Rusk County, Wisconsin.

Entered this 16th day of August, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge