

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

TempWorks Software, Inc.,

Civil No. **15-CV-04420** (SRN/BRT)

Plaintiff,

vs.

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO
DISMISS COMPLAINT**

Nease Personnel Services, Inc.,

Defendant.

INTRODUCTION

Defendant Nease Personnel Services, Inc. (“Defendant” or “Nease”) brings this Motion to Dismiss for lack of subject matter jurisdiction based upon the fact that Plaintiff TempWorks Software, Inc. (“Plaintiff” or “TempWorks”) cannot show that the amount in controversy in this diversity case exceeds \$75,000.

Moreover, Plaintiff’s claims of accord and satisfaction must fail in that no accord was reached in 2013 that was satisfied when Plaintiff surreptitiously wired \$4,100 into Defendant’s bank account on October 30, 2015, which Nease only discovered after this action was commenced. Indeed, an offer from Plaintiff to Defendant for \$17,500 was rejected only a few days before the \$4100 was wired. This surreptitious wire, made without knowledge or consent by Defendant, is a sham.

Nease respectfully requests that this Court dismiss Plaintiff’s Complaint in its entirety and award Defendant its costs.

STATEMENT OF THE FACTS

Nease operates a personnel agency in North Carolina. Plaintiff and Defendant entered in to a contract in 2013 involving a conversion of Nease's operating software from independent software to software created by TempWorks. (*See* Declaration of Lori Nease dated January 28, 2016 (hereinafter "Nease Decl."), submitted herewith, ¶ 2.)

The implementation of the TempWorks software was disastrous for Nease. (*See id.*) Nease ended up going back to its old software at a very high cost to its business. All of this took place in 2013. (*id.*) During the last three years, TempWorks and Nease have attempted to negotiate a settlement in order to compensate Nease for the cost of the failed transition. (*See id.*, ¶ 3.) The most recent offer by TempWorks, made on October 27, 2015, was \$17,500. (*See id.*; *see also* Exhibit A attached to Nease Decl.) Nease rejected this offer. After Nease rejected this offer, TempWorks surreptitiously wired \$4,100 into Nease's bank account without her consent and commenced this lawsuit, claiming accord and satisfaction. (*See* Nease Decl. ¶ 4 - 6.)

ARGUMENT

TEMPWORKS' LAWSUIT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

The Court should dismiss TempWorks' lawsuit against Nease because the Court does not have subject matter jurisdiction over this action.

TempWorks' Complaint, filed December 29, 2015, asserts that jurisdiction over the controversy is based on diversity of citizenship; Nease is a North Carolina corporation and TempWorks is a Minnesota corporation. (*See* Compl. of 12/29/15, ¶¶ 1-

3.) TempWorks asserts that the “Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy is in excess of \$75,000, exclusive of interest and costs....” (Compl. ¶ 3.) These allegations are not true and cannot suffice to invoke the Court’s jurisdiction.

I. TEMPWORKS CANNOT PROVE THAT THE AMOUNT IN CONTROVERSY EXCEEDS \$75,000.

Subject matter jurisdiction based on diversity of citizenship is set forth in 28 U.S.C. § 1332, which states in pertinent part: “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between ... citizens of different States. 28 U.S.C. § 1332(a)(1). (See Compl., ¶ 3 (stating jurisdiction in this action is based on 28 U.S.C. § 1332(a)(1)). The federal courts are courts of limited jurisdiction, possessing only those powers that are authorized by the Constitution and by federal statutes. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992), cited in *Al-Cast Mold & Pattern, Inc. v. Perception, Inc.*, 52 F. Supp. 2d 1081, 1082 (D. Minn. 1999).

“Where the amount in controversy is properly challenged, the burden is on the plaintiff to establish the jurisdictional amount¹ by competent proof.” *Euge v. Trantina*, 422 F.2d 1070, 1073 (8th Cir. 1970). *Accord Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 410 F.3d 1029, 1031 (8th Cir. 2005) (the party invoking federal jurisdiction has

¹ Section 1332(a)(1) of Title 28 U.S.C. expressly excludes costs and interest from the amount in controversy. *McGuire v. State Farm Fire & Cas. Co.*, 108 F. Supp. 3d 680, 686 (D. Minn. 2015). Additionally, “only attorneys’ fees that are available pursuant to contract or statute are included in the amount in controversy.” *Id.* at 686. *Accord Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 410 F.3d 1029, 1031 (8th Cir. 2005).

burden of showing, by a preponderance of the evidence, that amount in controversy exceeds jurisdictional amount); *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1059 (D. Minn. 2001) (plaintiff bears burden of establishing jurisdictional requirement with competent, preponderant proof). To justify dismissal, however, “it must appear to a legal certainty that the claim is really for less than the jurisdictional amount.” *Curtis v. Peerless Ins. Co.*, 299 F. Supp. 429, 432-33 (D. Minn. 1969) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). Determination of the jurisdictional amount is made solely from the face of the plaintiff’s complaint. *Al-Cast Mold*, 52 F. Supp. 2d at 1083.

The Court should dismiss TempWorks’ Complaint. On the face of the Complaint, TempWorks cannot meet the jurisdictional amount.

When the plaintiff cannot show that the controversy exceeds the jurisdictional amount, the court should dismiss because it does not have subject matter jurisdiction over the controversy. *See Rasmussen*, 410 F.3d at 1031 (holding plaintiff did not meet its burden of proving the jurisdictional amount); *Euge*, 422 F.2d at 1073 (affirming dismissal of complaint where it appeared to a legal certainty that plaintiff could not have recovered damages against the defendants in a sum reaching the jurisdictional amount); *Taylor Inv.*, 169 F. Supp. 2d at 1059-60 (same).

In *McGuire v. State Farm*, for instance, the plaintiff’s complaint alleged only a simple breach of contract, which amount would be, at most, those damages flowing from the alleged breach. The court found that the amount in controversy was not satisfied. 108 F. Supp. 3d at 687. In *Taylor*, the maximum possible damages the plaintiff could

have recovered was the \$20,000 purchase price—“an amount well below the jurisdictional requirement of \$75,000.” 169 F. Supp. 2d at 1055. Therefore, the court granted the defendant’s motion to dismiss for lack of subject matter jurisdiction. *Id.* at 1060. Likewise, in *Dyrdal v. Enbridge (U.S.), Inc.*, 738 F. Supp. 2d 927, 931-32 (D. Minn. 2010), where the claim was worth, at most, \$66,000, the district court concluded that it lacked diversity jurisdiction and dismissed.

Although TempWorks makes the bald assertion that the “Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy is in excess of \$75,000, exclusive of interest and costs” (Compl. ¶ 3), the factual allegations in the Complaint do not support its assertion. TempWorks alleges that the amount of \$4,100 it paid Nease was in accord and satisfaction of the claims between the parties. TempWorks does not seek any amount in damages, but only declarative relief. The most it could recover if it were seeking damages would be the \$4,100 it recently wired into a Nease account without its knowledge or consent; it cannot show that the amount in controversy between the parties exceeds \$75,000.

Therefore, the Court should dismiss TempWorks’ Complaint for lack of subject matter jurisdiction.

II. THERE IS NO FACTUAL BASIS IN TEMPWORKS’ CLAIM FOR AN ACCORD AND SATISFACTION.

Plaintiff’s claims of accord must fail in that no accord was breached.

Since the software failed in 2013, the parties have attempted to settle the dispute. At one point, TempWorks offered to settle the dispute for \$4,100. At no time did Nease

agree to settle for this amount. (Nease Decl., ¶ 6.) TempWorks' most recent offer, near the end of October 2015, was \$17,500, which Nease also rejected. (*Id.*, ¶ 3.) After Nease rejected this offer, TempWorks surreptitiously wired the \$4,100 into Nease's bank account without her consent and commenced this lawsuit.

It was only after the lawsuit commenced that Nease discovered that TempWorks had surreptitiously wired \$4,100 into Nease's bank account on October 30, 2015. (*Id.*, ¶ 5.)

TempWorks' attempt to satisfy an alleged "accord" reached in 2013 by wiring \$4,100 into Nease's bank account cannot stand. Even the "Settlement Agreement and Release" was nothing more than an offer of settlement, was rejected by Nease, and was not executed. (*See* Nease Decl., Ex. A.) The Court should reject Plaintiff's claim that there was an accord reached in 2013, and a satisfaction of it on October 30, 2015, when the facts show undisputedly that this claim is a sham by Plaintiff to make its way into federal court.

III. EVEN CONSIDERING THE AMOUNT OF DEFENDANT'S CLAIMED LOSS DOES NOT SUFFICE TO REACH THE AMOUNT IN CONTROVERSY SO AS TO CONFER SUBJECT MATTER JURISDICTION ON THE COURT.

Although it is clear from the face of the Complaint that Plaintiff cannot demonstrate that there is an amount in controversy that exceeds \$75,000, given that it seeks only declarative relief and the maximum amount of its potential loss is \$4,100, it is anticipated that Plaintiff will argue that the amount of *Defendant's* loss should be aggregated to that of Plaintiff's loss. The Court should reject this argument.

In its Complaint, TempWorks states that “Defendant has demanded \$86,000 in damages from Plaintiff for allegedly failing to perform under the contract.” (Compl. ¶ 30.) Plaintiff might argue, based on this assertion, that Defendant has a compulsory counterclaim that it would bring in this action, the amount of which would result in a total amount in controversy that would exceed \$75,000. *See Washington Scientific Industries, Inc. v. American Safeguard Corp.*, 308 F. Supp. 736, 739-40 (D. Minn. 1970) (applying rule that in diversity action jurisdictional amount is satisfied if, on a realistic basis, there is a claim asserted or that will be or is reasonably likely to be asserted for more than jurisdictional amount). *But see Nagle v. Rutledge*, 100 U.S. 675, 675 (1879) (dismissing suit where only question presented to the Court on branch of case before it was whether plaintiff below was liable for interest on note at certain rate and for identified period, where in no event could the amount reach jurisdictional amount in controversy; rejecting argument that in counterclaim defendant sought more than jurisdictional amount so as to confer jurisdiction).

The problem with Plaintiff’s anticipated argument is that Defendant has not filed any counterclaim representing more than the jurisdictional amount of \$75,000, and even if it is reasonably likely that Defendant will counterclaim in the present action for the amount of its loss, that amount does not reach the jurisdictional amount. Nease has averred that it would settle the parties’ dispute for \$75,000. (*See Nease Decl.*, ¶ 7.) In *Washington Scientific*, the court considered the issue under the reverse facts—the “Plaintiff’s counsel agreed, as would the court, that if defendant were to file a document

reducing its claim to less than \$10,000,² then the case should be dismissed from this court.” *Id.*, 308 F. Supp. at 739. But, where the defendant refused to agree to reduce its claim thus, and the evidence showed that the amount of the defendant’s claim would exceed the jurisdictional amount, the court refused to dismiss for lack of subject matter jurisdiction. *Id.* at 740.

Nease will accept \$75,000 to settle the parties’ dispute—and will claim no more if she is forced to assert a compulsory counterclaim in this matter. Therefore, even assuming Nease will counterclaim for the amount of its damages, and that amount is properly considered when considering jurisdiction, TempWorks still cannot show that the amount in controversy exceeds \$75,000.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court DISMISS Plaintiff’s Complaint in its entirety and award Defendant its costs.

GEORGE E. ANTRIM, III, PLLC

Dated: January 28, 2016

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² The amount of \$10,000 was the jurisdictional amount in controversy under the statute at the time. *See Washington Scientific Industries, Inc. v. American Safeguard Corp.*, 308 F. Supp. 736 (D. Minn. 1970).

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DISTRICT OF MINNESOTA
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TempWorks Software, Inc.,

Civil No. **15-CV-04420** (SRN/BRT)

Plaintiff,

**DEFENDANT'S LR 7.1(d) WORD
COUNT COMPLIANCE
CERTIFICATE REGARDING
DEFENDANT'S MEMORANDUM OF
LAW IN SUPPORT OF
MOTION TO DISMISS COMPLAINT**

vs.

Nease Personnel Services, Inc.,

Defendant.

I, George E. Antrim, III, certify that Defendant's Memorandum of Law in Support of Motion to Dismiss Complaint complies with Local Rule 7.1(d).

I further certify that, in preparation of this memorandum, I used Word Version 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above-referenced memorandum contains 1910 words.

GEORGE E. ANTRIM, III, PLLC

Dated: January 28, 2016

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