

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>LANCE INTERNATIONAL LTD.,</b>	:	
<b>d/b/a AMPAC PACKAGING</b>	:	
<b>SPECIALISTS,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>No. 98-2229</b>
	:	
	:	
<b>MENOMINEE PAPER COMPANY</b>	:	
<b>Defendant.</b>	:	

**MEMORANDUM-ORDER**

**GREEN, S.J.** **August       , 1998**

Before the Court is Plaintiff's Motion to Dismiss Defendant's Counterclaim pursuant to Fed.R.Civ.P. 12(b)(6) and Defendant's Answer thereto. Plaintiff asserts that Defendant is not permitted to bring a counterclaim in Pennsylvania because Defendant is a foreign business corporation without a certificate of authority to conduct business in the state. For the following reasons, Plaintiff's motion will be denied.

Plaintiff Lance International Ltd. is a Pennsylvania corporation with its principal place of business in Landsdale, Pennsylvania, and Defendant Menominee Paper Company is an Indiana corporation with its principal place of business in Menominee, Michigan.<sup>1</sup> On April 8, 1998 Plaintiff filed a complaint against Defendant in the Montgomery County Court of Common Pleas. The complaint states that Defendant breached a contract with Plaintiff and a third party for the interstate sale of paper products known as U-Board. Defendant filed a notice of removal to this court based on diversity of citizenship. Defendant then filed an answer and a counterclaim seeking to recover \$36,803.15 that Plaintiff allegedly owes Defendant for the U-Board product Plaintiff received in May and June of 1997. Plaintiff asserts in its Motion to Dismiss

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<sup>1</sup>Defendant Menominee Paper Company has changed its name to H.M.S.H., Inc.

Defendant's Counterclaim that Defendant does not have the capacity to sue in Pennsylvania and, therefore, has no capacity to assert a counterclaim.

A motion to dismiss for failure to state a claim is warranted if it appears that the plaintiff cannot establish any set of facts which would entitle the plaintiff to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The facts must be taken as true and reviewed in the light most favorable to the plaintiff. See id.

Pursuant to Fed.R.Civ.P. 17(b), the capacity of a corporation to sue or be sued is determined by the law under which it was organized. As an Indiana corporation, Defendant's capacity to sue another party or be sued would be governed by Indiana law and not by Pennsylvania law as both parties contend. Defendant, however, is not suing Plaintiff but, instead, asserting a counterclaim pursuant to Fed.R.Civ.P. 13. Rule 13(a) requires a pleading to state as a counterclaim any claim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

In the present matter, Plaintiff is suing for a breach of contract for the sale of U-Boards, and Defendant's Counterclaim is for the balance due on the same contract. Since Defendant's claim arises out of the transaction or occurrence that is the subject matter of Plaintiff's claim, Defendant counterclaim is compulsory. See Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961). Therefore, Defendant must bring the counterclaim in this action or the claim would be barred in a separate and subsequent action under the doctrine of res judicata. See id. Thus, Plaintiff's Motion to Dismiss will be denied.

An appropriate Order follows.

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	:	
	:	
<b>MENOMINEE PAPER COMPANY</b>	:	
<b>Defendant.</b>	:	

**ORDER**

AND NOW, this            day of            1998, upon consideration of Plaintiff's Motion to Dismiss Defendant's Counterclaim pursuant to Fed.R.Civ.P. 12(b)(6) and Defendant's Answer thereto, IT IS HEREBY ORDERED that Plaintiff's motion is DENIED.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.