

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

LOUIS B. MCKINZY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 13-2438-SAC
	)	
FOODBRANDS SUPPLY CHAIN	)	
SERVICES INC., <i>d/b/a</i> Tyson Foods, Inc.	)	
	)	
Defendant.	)	

**ORDER**

This matter comes before the court upon Plaintiff’s Motion to Amend Complaint (ECF No. 7) and Plaintiff’s Motion for Leave to file Motion to Amend Complaint Out of Time (ECF No. 8). Plaintiff filed both of these motions on September 17, 2013.

Pursuant to D. Kan. Rule 6.1(d)(1), responses to non-dispositive motions must be filed and served within fourteen (14) days. Defendant had up to and including October 1, 2013, to file response briefs opposing each of Plaintiff’s motions. No response briefs were filed and the time to do so has passed. “Absent a showing of excusable neglect, a party or attorney who fails to file a responsive brief or memorandum within the time specified in D. Kan. Rule 6.1(d) waives the right to later file such brief or memorandum.”<sup>1</sup> The court will then consider and decide the motion as an uncontested motion, and ordinarily grant it without further notice.<sup>2</sup> As a result of Defendant’s lack of responses to each motion, the court considers Plaintiff’s motions as uncontested. The court next addresses each motion individually.

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<sup>1</sup> D. Kan. Rule 7.4(b).

<sup>2</sup> *Id.*

**A. Motion for Leave to file Motion to Amend Complaint Out of Time (ECF No. 8)**

Rule 15(a) of the Federal Rules of Civil Procedure governs the procedure for a party to amend a pleading but it does not place a time limitation on when a party may seek to amend its pleading before trial. Rather, Rule 15(a) distinguishes between when a party may amend its pleading as a matter of course and when a party must seek the opposing party's consent or the court's leave before amending its pleading. Here, Plaintiff complied with Rule 15(a) when he filed a separate motion seeking an order from the court to file an amended complaint. Therefore, the timing of the filing of Plaintiff's Motion to Amend does not prevent its consideration.

Without opposition, Plaintiff's Motion for Leave is granted.

**B. Motion to Amend Complaint (ECF No. 7)**

Fed. R. Civ. P. 15(a)(2) requires the court to "freely give leave when justice so requires." The Supreme Court has held that "this mandate is to be heeded."<sup>3</sup> The purpose of Rule 15(a) "is to provide litigants 'the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.'"<sup>4</sup> A court, however, may refuse to grant leave "only [upon] a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment."<sup>5</sup>

In this case, none of the factors which allow a court to deny leave are present. For this reason and because Plaintiff's motion is uncontested, the court hereby grants Plaintiff's Motion to Amend Complaint (ECF No. 7).

Accordingly,

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<sup>3</sup> *Foman v. Davis*, 371 U.S. 178, 182 (1962).

<sup>4</sup> *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006) (quoting *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982)).

<sup>5</sup> *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 (10th Cir. 2010) (quoting *Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005)).

**IT IS THEREFORE ORDERED** that Plaintiff's Motion for Leave to file Motion to Amend Complaint Out of Time (ECF No. 8) is granted.

**IT IS FURTHER ORDERED** that Plaintiff's Motion to Amend Complaint (ECF No. 7) is hereby granted. Plaintiff shall file his proposed Amended Complaint, in the form attached as an exhibit to his Motion to Amend Complaint, within seven (7) days from the date of this order.

**IT IS SO ORDERED.**

Dated this 29th day of October, 2013, at Topeka, Kansas.

s/ K. Gary Sebelius  
K. Gary Sebelius  
U.S. Magistrate Judge