IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

IN RE: FOLGERS COFFEE, MARKETING LITIGATION.	))	Case No. 21-2984-MD-W-BP This Document Relates to All Actions

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Pending is Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint, (Doc. 115). For the following reasons, the Motion is **DENIED**.

I. BACKGROUND

In this multidistrict litigation ("MDL"), Plaintiffs allege generally that Defendants The J.M. Smucker Company ("Smucker") and its subsidiary, The Folger Coffee Company ("Folgers") are liable for labeling coffee canisters in a way that misrepresents how many cups of coffee a consumer can brew from the canisters' contents. The Court recently issued an order addressing Defendants' motion to dismiss the Amended Consolidated Complaint, which explained Plaintiffs' allegations in detail. (*See* Doc. 105.) The Court will not repeat that material here, but will instead discuss aspects of the procedural history of this case which bear on Defendants' current motion to dismiss.

In April 2021, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated nine cases from across the country, all of which advanced similar allegations about the allegedly misleading labels on Folgers coffee. (Doc. 1.) At the outset of the litigation, the Court directed the parties to confer on a variety of issues, including which group of attorneys should represent Plaintiff. (Doc. 19.) Plaintiffs then divided into two factions, each of which supported a different leadership structure; the Court then appointed the leadership team that currently represents Plaintiffs. (Doc. 48.)

Per the parties' agreement, Plaintiffs then drafted and filed a Consolidated Class Action Complaint (the "First Consolidated Complaint") which incorporated all of the claims from all of the Plaintiffs. (Doc. 62.) However, for each individual Plaintiff who had advocated for a different leadership team, the First Consolidated Complaint substituted a different individual from the same state who raised similar claims; thus, some of the original individual Plaintiffs (the "Original Plaintiffs") were omitted from the First Consolidated Complaint in favor of different individuals (the "New Plaintiffs"). In August 2021, the Court directed Plaintiffs to file an Amended Consolidated Complaint (the "ACC") which included the claims of the Original Plaintiffs. (Doc. 67.) Plaintiffs did so, Defendants duly moved to dismiss the Complaint, and in December 2021, the Court granted the motion to dismiss in part and discussed Plaintiffs' claims in detail. (Doc. 105.)

While this was happening, the New Plaintiffs began filing separate lawsuits in the various states where their claims originated; the JPML subsequently consolidated those suits with this MDL. In January 2022, Plaintiffs requested and received permission to file a Second Amended Consolidated Complaint ("SACC") incorporating the claims of all individual Plaintiffs, both new and original. (Doc. 112.) The SACC became the operative pleading, and in February 2022, Defendants filed the now-pending motion to dismiss it. (Doc. 115.)

Defendants' motion to dismiss does not reiterate the arguments the Court addressed in its previous order addressing the motion to dismiss the ACC; instead, it raises other arguments, most of which are procedural issues relating to the claims of the New Plaintiffs. Therefore, the Court will not summarize the manifold claims in the SACC, and instead will limit its discussion to those aspects of the pleading that are relevant to Defendants' motion. First, the SACC does not

incorporate some of the claims or requests for relief that the New Plaintiffs raised in the suits that were subsequently consolidated with this case. Specifically:

- All New Plaintiffs requested punitive damages in their original complaints, but the SACC does not request punitive damages;
- New Plaintiff Kimberly Clark brought a claim for violating the Magnuson-Moss Warranty Act in her original complaint, but that claim does not appear in the SACC; and
- New Plaintiff Deborah Bosso brought claims for breach of express warranty and breach of implied warranty in her original complaint, but those claims do not appear in the SACC.

The Court will refer to these claims collectively as the "Abandoned Claims." Second, Bosso—who resides and brought suit in New York—asserts claims for both unjust enrichment and a variety of other statutory and common law claims. (*E.g.,* Doc. 144, ¶¶ 142, 213.) With this background in mind, the Court turns to the parties' arguments.

II. DISCUSSION

Defendants raise three arguments in their motion to dismiss. First, they contend that all the New Plaintiffs' claims should be dismissed under the "First-to-File" rule. Second, they argue that the Court should dismiss the Abandoned Claims with prejudice. Third, they request that Bosso's unjust enrichment claim be dismissed. The Court addresses each of these arguments in turn.

1. The "First-to-File" Rule

Defendants first argue that all of the New Plaintiffs' claims should be dismissed under the so-called "first-to-file" rule. (Doc. 116, pp. 11–14.) The "first-to-file" rule provides that a court can "decline jurisdiction over an action when a complaint *involving the same parties* and issues has already been filed in another district." *Orthmann v. Apple River Campground, Inc.*, 765 F.2d

119, 121 (8th Cir. 1985) (emphasis added). Importantly, the first-to-file rule only applies where the same "plaintiff attempts to maintain two actions against the same defendant . . . ." *Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 954 (8th Cir. 2001); *see also Lexington Ins. Co. v. Integrity Land Title Co., Inc.*, 721 F.3d 958, 968 (8th Cir. 2013). Defendants contend that because the New Plaintiffs filed their cases after this MDL was already pending and raised similar claims to those in the MDL, the first-to-file rule bars the New Plaintiffs' claims. (Doc. 116, p. 13.)

The Court finds that the first-to-file rule does not apply for a very simple reason: the New Plaintiffs are not the "same party" as the original Plaintiffs. The New Plaintiffs are different people from the Original Plaintiffs, purchased different canisters of Folgers coffee at different times and locations from the Original Plaintiffs, and consequently, suffered different alleged injuries, giving rise to different claims. Defendants suggest that because this case is a putative class action, the fact that the New Plaintiffs are different individuals from the original Plaintiffs is "inconsequential because, '[i]n a class action, the classes, and not the class representatives, are compared.'" (Doc. 116, p. 13 (quoting *Ross v. U.S. Bank Nat'l Ass'n*, 542 F. Supp. 2d 1014, 1020 (N.D. Cal. 2008)).) But as the Court has emphasized repeatedly, this case is not yet a class action, and indeed, it may never become a class action; and as long as the case remains "simply a collection of individual suits aggregated by the JPML," (Doc. 67, pp. 10–11), the individual Plaintiffs are not fungible in the manner Defendants suggest. Indeed, if Defendants' application of the first-to-file rule were the law, it would obviate the very concept of an MDL: each subsequent suit alleging a similar injury, even if it were filed by a different plaintiff, would have to be dismissed rather than consolidated with the other suits. But that is not the law, and because the New Plaintiffs are not

the "same party" as the other Plaintiffs, the Court declines to dismiss their claims on the basis of the first-to-file rule.[1]

2. The Abandoned Claims

Defendants next argue that the Abandoned Claims should be dismissed with prejudice because they did not appear in the SACC. (Doc. 116, pp. 14–15.) Plaintiffs respond that they "voluntarily dismiss without prejudice any claims not asserted in the [SACC]." (Doc. 118, p. 6.)

"[A]n amended complant super[s]edes an original complaint and renders the original complaint without legal effect." *In re Atlas Van Lines*, 209 F.3d 1064, 1067 (8th Cir. 2000). Thus, when Plaintiffs filed the SACC, the New Plaintiffs' individual complaints were "in effect withdrawn as to all matters not restated in the amended pleading, and bec[ame] functus officio." *Tolen v. Ashcroft*, 377 F.3d 879, 882 n.2 (8th Cir. 2004) (citation omitted). Put differently, the Abandoned Claims are no longer in the case at all, and because they do not exist, they cannot be dismissed—with or without prejudice. Therefore, the Court declines both parties' invitations to dismiss the Abandoned Claims.

3. Bosso's Unjust Enrichment Claim

Finally, Defendants move to dismiss Bosso's unjust enrichment claim, arguing that because Bosso has an adequate remedy at law, he may not assert a claim arising in equity. (Doc. 116, p. 22.) The Court rejected a similar argument Defendants advanced in their initial motion to dismiss, adhering to its general unwillingness to "require the dismissal of equitable unjust enrichment claims where other remedies exist." (Doc. 105, p. 32); *see also Jones v. Monsanto Company,* 2019 WL 9656365, at *4 (W.D. Mo. June 13, 2019).

[1] Defendants also assert that the incorporation of additional Plaintiffs into the case will place a discovery burden on Defendants, because they are limited to twenty depositions and there are fourteen individual Plaintiffs. (Doc. 116, p. 14.) This is a reasonable concern, and the Court would entertain a request to allow Defendant to take additional depositions; but the Court does not believe that the burdens of discovery justify dismissing potentially viable claims.

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