

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

IN RE: FOLGERS COFFEE,
MARKETING LITIGATION.

) Case No. 21-2984-MD-C-BP
) This Document Relates to All Actions

ORDER

This case generally concerns allegations that various Defendants sold Folger's coffee canisters which deceptively represented that consumers could brew more cups of coffee from each canister than was actually possible. The Judicial Panel on Multidistrict Litigation consolidated nine suits from around the country and transferred them to this Court on April 1, 2021. (Doc. 1.) On April 22, 2021, the Court ordered the parties to confer to discuss various topics related to managing this case. (Doc. 19.) The parties submitted a report of these discussions on May 6, 2021, (Doc. 41), and the Court held an initial hearing on May 11.

In their report, all of the parties indicated that they believe the Court should appoint interim class counsel, who should then coordinate the drafting of a Consolidated Class Action Complaint. (Doc. 41, p. 4.) This document would include all of the causes of action asserted by the various Plaintiffs in the transferred actions, allowing Defendants to file a single motion to dismiss aggregating all of their arguments as to why various Plaintiffs have failed to state a claim. (*Id.*) The Court generally agrees with this approach.

But the parties disagree on two aspects of this plan. First, in one of the member cases—*Ashton et al. v. The J.M. Smucker Co. et al.*, Case No. 21-0221—Defendants already filed a motion to dismiss which was fully briefed and resolved by the transferor judge. (*See* No. 21-0221, Doc. 56.) The Plaintiffs in that case believe that after their claims are aggregated in the Consolidated Class Action Complaint, Defendants should not be able to renew their arguments to dismiss the claims. (*See* Doc. 41, pp. 2–3.) Defendants disagree. (*Id.* at pp. 5–9.)

The Court generally agrees with Defendants. The Consolidated Class Action Complaint will serve as an amended complaint for all of the member cases, and “[i]t is well-established that an amended complaint super[s]cedes an original complaint and renders the original complaint without legal effect.” *Karnes v. Poplar Bluff Transfer Co. (In re Atlas Van Lines, Inc.)*, 209 F.3d 1064, 1067 (8th Cir. 2000). As a result, the filing of an amended complaint typically renders motions to dismiss an earlier version of the complaint moot. *See, e.g., Pure Country v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002). Thus, the Court finds that Defendants are not precluded from moving to dismiss the claims from the *Ashton* case once those claims are aggregated in the Consolidated Class Action Complaint. But if Defendants choose to exercise that option, the Court will certainly consider the conclusions of the transferor judge, remaining mindful that the “law of the case doctrine directs the court to follow decisions made in earlier proceedings to prevent the relitigation of settled issues in a case.” *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 457 (8th Cir. 1990).

The parties’ second area of disagreement concerns which attorneys should serve as interim class counsel, and how the interim class counsel team should be structured. Defendants have no position on this issue. (Doc. 41, p. 10.) Plaintiffs have divided into three factions. The first faction, which has labeled itself the “Ashton Plaintiffs,” consists of Shelly Ashton, Jay Schoener, Ramon Ibarra, Ellen Moser, Geoff Thomson, and Julie Marthaller. (Doc. 44, p. 5.) The second faction, which has labeled itself the “Smith Plaintiff,” consists of Rodger Smith, (Doc. 46); Smith wholly supports the position of the Ashton Plaintiffs on interim class counsel, and the Court therefore treats him as a member of the Ashton Plaintiffs for purposes of this issue. The third faction, which has labeled itself the “Mawby Plaintiffs,” consists of Sharel Mawby, Frederick Tan, Marcia Sorin, and A. Kevin Fahey. (Doc. 56, p. 5.)

The Ashton Plaintiffs propose the following interim class counsel leadership structure: Lubna Faruqi of Faruqi & Faruqi, LLP and Todd Carpenter of Carlson Lynch, LLP as co-lead interim class counsel; Tim Dollar of Dollar, Burns, Becker & Hershewe, L.C. as liaison counsel; and Bonner Walsh of Walsh PLLC as a member of the executive committee. (Doc. 44, p. 5.) As to the role of the executive committee, the Ashton Plaintiffs propose that Mr. Walsh can consult with lead counsel, manage discovery, present arguments to the Court, and overall use his experience to help guide the team. (*Id.* at p. 12.) The Ashton Plaintiffs refer to their proposed team as the “CLF Team,” (*id.*), and the Court will follow suit.

The Mawby Plaintiffs, in turn, propose this class counsel leadership structure: Christopher Shank of Shank & Heinemann, LLC and Elaine Ryan of Bonnett Fairbourn Friedman & Balint, PC, as co-lead interim class counsel; and Tim Dollar of Dollar, Burns, Becker & Hershewe, L.C. as liaison counsel. (Doc. 45, p. 5.) Alternatively, the Mawby Plaintiffs propose that Mr. Carpenter and Ms. Ryan serve as interim co-lead counsel, and Mr. Shank serve as liaison counsel. (*Id.*) The Court will refer to the Mawby Plaintiffs’ proposal as the “Mawby Team.”

Federal Rule of Civil Procedure 23(g)(3) provides that the Court “may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” When appointing class counsel, interim or otherwise, Rule 23(g)(1)(A) requires the Court to consider (1) “the work counsel has done in identifying or investigating potential claims in the action,” (2) “counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action,” (3) “counsel’s knowledge of the applicable law,” and (4) “the resources that counsel will commit to representing the class.” The Court may also consider “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” FED. R. CIV. P. 23(g)(1)(B).

As to the 23(g)(1)(A) factors, the Court finds that both the CLF Team and the Mawby Team are eminently qualified to serve as interim class counsel in this case; both teams consist of highly seasoned and skilled litigators with extensive experience handling complex litigation, all of whom have dedicated substantial time and effort to investigating this case, and all of whom have detailed knowledge of the applicable law and sufficient resources to represent their clients.

Thus, the question is not whether either team is qualified, but which team has the best chance of effectively representing the putative class and ensuring that this case proceeds in an efficient manner. Two factors persuade the Court that the CLF Team is the best choice in this matter. First, the firms of the two attorneys who would serve as co-lead counsel in the CLF team also filed the first two claims in this MDL: the *Ibarra* and *Ashton* actions, both of which were initiated in early May of 2020, and which were later consolidated in Case No. 21-0221. Moreover, members of the CLF team engaged in extensive investigation—including the product testing that allegedly revealed the misleading character of Defendants’ representations—before initiating these actions. (*See, e.g.*, Doc. 43, ¶ 8 (Declaration of Todd Carpenter); Doc. 43-1, ¶ 17 (Declaration of Lubna Faruqi).) While members of the Mawby Team also engaged in pre-suit investigation, that investigation appears to have been smaller in scope. (*See generally* Doc. 45-1 (Declaration of Christopher Shank); Doc. 45-2 (Declaration of Elaine Ryan).) Other courts, when deciding between two qualified groups of attorneys to appoint as interim class counsel, have used the status of one group as the first to file as an “objective tie-breaker” in that group’s favor. *Michelle v. Arctic Zero, Inc.*, 2013 WL 791145, at *2 n.3 (S.D. Cal. March 1, 2013); *see also Steele v. United States*, 2015 WL 4121607, at *4 n.2 (D. D.C. June 30, 2015); *Richey v. Ells*, 2013 WL 179234, at *2 (D. Colo. Jan. 17, 2013); *Moradi v. Adelson*, 2011 WL 5025155, at *3 (D. Nev. Oct. 20, 2011). This factor is especially relevant where, as here, the first attorneys to file also performed

“abundant work . . . in investigating and pursuing potential claims in the action.” *In Re Bisphenol-A (Bpa) Polycarbonate Plastic Prods. Liab. Litig.*, 2011 WL 13152798, at *5 (W.D. Mo. Jan. 7, 2011).

Second, the CLF team simply represents the majority of the Plaintiffs, cases, and attorneys in this litigation. Counsel in five out of the nine actions consolidated in this case support the CLF team; eleven of the fifteen attorneys who have entered an appearance on behalf of Plaintiffs are members of firms associated with the CLF team; and seven of the named Plaintiffs are associated with the CLF team, while only four are associated with the Mawby team. (*See generally* Doc. 43 (Declaration of Todd Carpenter).) The purpose of appointing interim class counsel is to ensure that the litigation proceeds smoothly and efficiently until the class certification stage, and for obvious reasons, a leadership structure that represents the majority of the plaintiffs and plaintiffs’ attorneys can more effectively achieve this purpose. For that reason, multiple courts have considered the relative support for groups competing for the role of interim class counsel as a factor in deciding which group to appoint. *See, e.g., In re Disposable Contact Lens Antitrust*, 2015 WL 10818781, at *2 (M.D. Fla. Oct. 7, 2015); *In re Shop-Vac Marketing and Sales Practice Litigation*, 2013 WL 183855, at *3 (M.D. Pa. Jan. 17, 2013).

Therefore, the Court **ORDERS** as follows:

- The CLF team is appointed as interim class counsel. Consequently, the Ashton Plaintiffs’ motion to appoint counsel, (Doc. 44), is **GRANTED**, and the Mawby Plaintiffs’ motion, (Doc. 45), is **DENIED**.
- A teleconference is set for Wednesday, June 30, 2021 at 10:00 a.m. (CDT) to discuss the remaining issues from the parties’ status report, and other matters related to managing this case. Parties shall call in by dialing (877) 336-1839 and enter access code 4259420.
- Before the telephone conference occurs, the parties are instructed to confer on the issues they believe the Court should address, and file a joint status report discussing their positions on those issues at least seven days before the conference is set. Along with whatever other issues the parties believe are relevant, the status report

should include a proposed timeframe for Plaintiffs to file their Consolidated Class Action Complaint.

- After the Consolidated Class Action Complaint is filed, Defendants will be allowed to respond in any manner permitted by the Federal Rules of Civil Procedure, including moving to dismiss the claims consolidated from the *Ashton* case.

IT IS SO ORDERED.

DATE: June 7, 2021

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT