

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

ALICIA MARSHALL, *et al.*, individually  
and on behalf of all others similarly situated,

Plaintiffs,

v.

PRESTAMOS CDFI, LLC and CHICANOS  
POR LA CAUSA, INC.,

Defendants.

Civil Action No. 5:21-cv-04337-JMG

**PLAINTIFFS' OPPOSITION TO DEFENDANT CHICANOS POR LA CAUSA, INC.'S  
MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION  
COMPLAINT**

Plaintiffs Alicia Marshall, Daniel Pronsky, Paris Townsend, Nancilee Holland, Leona Owsley, Kolawole Ahmadou, Kiana Dervin, Kristina Henderson, Dustin Innis, Kelly Stalnaker, Jamie Jones, Georgina Drevnak, John Martin, Ezra Beattie, Gregory Lloyd, Alyshia Johnson, Lametria Marvel, Guy Grichar, Jahbrael Horne, Enobong Etuknwa and Sharon Bradley Smith (collectively, "Plaintiffs"), respectfully submit this response in opposition to defendant Chicanos Por La Causa, Inc.'s ("CPLC") Motion to Dismiss Plaintiffs' Third Amended Class Action Complaint (ECF No. 114). The Court should deny CPLC's motion.

Plaintiffs' Third Amended Complaint (the "TAC") explicitly acknowledges *in the opening paragraph* that, by Order on December 5, 2023 (ECF No. 93), the Court granted CPLC's motion to dismiss and that "Plaintiffs accordingly include CPLC as a defendant in this amended complaint to the extent relevant to Plaintiffs' claims against defendant Prestamos, and to preserve Plaintiffs' rights in the event of an appeal." See ECF No. 108 at 1-2. This is permissible pleading practice. See *U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506,

517 (3d Cir. 2007) (“Adding a section to an amended pleading specifically preserving [a dismissed] claim certainly suffices” to preserve the claim for appeal). *See also G.S. v. Penn-Trafford Sch. Dist.*, No. 20-3281, 2023 WL 4486667, at \*2 n.20 (3d Cir. July 12, 2023) (“To date, we have ‘not adopt[ed] a rigid requirement as to what a plaintiff must do to stand on a dismissed complaint.’”) (quoting *Atkinson*).

The Third Circuit’s ruling in *Atkinson* is spot on. *Atkinson* involved claims by a relator plaintiff under the False Claims Act alleging that defendant companies conspired to defraud the United States Navy in connection with a contract to build oil tankers. *Atkinson*, 473 F.3d at 509. The district court dismissed plaintiff *Atkinson*’s third amended complaint, “relying on both jurisdictional and substantive deficiencies.” *Id.* Plaintiff appealed. One of the defendants argued on appeal that plaintiff “*Atkinson* waived his right to appeal the District Court’s dismissal of [defendant] Sun Ship from the Second Amended Complaint by failing to replead claims against Sun Ship in his Third Amended Complaint.” *Id.* at 515. The Third Circuit affirmed dismissal, holding that “[w]e agree with Sun Ship and hold that *Atkinson* has waived his right to assert error in connection with the dismissal of his claims against Sun Ship.” *Id.* In so holding, the Third Circuit stated that the bright line rule is as follows: “We conclude that where, as here, it would not have been futile to replead dismissed claims but those dismissed claims are nevertheless omitted from an amended pleading, the right to challenge the basis for dismissal on appeal is waived.” *Id.* at 516 (emphasis added).

Indeed, the Third Circuit in *Atkinson* drew a distinction between a plaintiff’s failure to include a dismissed *claim* in an amended complaint, and a dismissed “*defendant* rather than merely a cause of action.” (emphasis in original). *Id.* The Third Circuit held that in the case of failing to include a dismissed *claim* in an amended complaint, “the proper rule allows plaintiffs

to appeal dismissals despite amended pleadings that omit the dismissed claim *provided* repleading the particular cause of action would have been futile.” *Id.* (emphasis in original). By contrast – and directly at issue here – the Third Circuit also held that “[w]hen a plaintiff’s amended complaint leaves out a *party* previously named in the preceding complaint, the equitable principles we enunciate here apply even more strongly because parties that do not appear in amended complaints have a legitimate expectation that they are no longer involved in the litigation.” *Id.*

CPLC relies exclusively on the “final judgment rule” to argue that “Plaintiffs’ appellate rights are preserved” (ECF No. 114-1 at 2). But the final judgment rule does not preserve Plaintiffs’ rights concerning the Court’s prior dismissal of CPLC or even address that issue. *See, e.g., Atkinson, supra; Gagliardi v. Verizon Pennsylvania Inc.*, 357 F. App’x 413, 415 (3d Cir. 2009) (plaintiff could not “challenge the dismissal of that claim because he neither reasserted it in his amended complaint (despite having an opportunity to do so) nor indicated that he intended to stand on that claim as originally pleaded”); *In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Pracs. Litig.*, No. 04-cv-3329, 2010 WL 1407308, at \*4 (E.D. Pa. Apr. 7, 2010) (“Plaintiffs who drop defendants in subsequent complaints waive their right to bring these defendants back into a matter.”).

CPLC cites only *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) and *Carter v. City of Philadelphia*, 181 F.3d 339, 343 (3d Cir. 1999). But those cases involve the issue of when a judgment is final for purposes of appeal under 28 U.S.C. § 1291. *See Digital Equipment*, 511 U.S. at 865 (“This case raises the question whether an order vacating dismissal predicated on the parties’ settlement agreement is final ....”); *Carter*, 181 F.3d at 343 (the district court issued a final judgment pursuant to Rule 54(b) but neglected to set forth

specific findings). The final judgment rule is neither in dispute nor relevant concerning whether Plaintiffs in their TAC had the right and indeed obligation to include CPLC as a defendant to preserve their rights in the event of an appeal.

In fact, if Plaintiffs failed to include CPLC as a defendant in the TAC and an appeal ensued, CPLC could argue that Plaintiffs' allegations in prior pleadings including CPLC as a defendant are of no legal effect and that the passage of time precludes Plaintiffs from asserting or reasserting those claims. *See also Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457, 473–74 (2007) (“Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.”); *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (“An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.”); *Atkinson*, 473 F.3d at 516 n. 16 (citing additional cases).

As CPLC states (ECF No. 114-1 at 2) and Plaintiffs fully acknowledge and concur, this Court granted CPLC's motion to dismiss on grounds of personal jurisdiction and directed the Clerk of Court to terminate the case as it pertains to CPLC. ECF No. 93. But nothing in that Order addressed or purported to address, let alone denied, Plaintiffs' right to potentially appeal that ruling. CPLC is therefore incorrect that Plaintiffs named CPLC as a defendant in their TAC “[i]n direct defiance of” that Order (ECF No. 114-1 at 1) particularly in view of governing Third Circuit precedent in *Atkinson* which CPLC's motion does not even cite.

Further, Plaintiffs have abided by the spirit of Court's Order since the Court dismissed CPLC. For example, Plaintiffs have not served or sought to serve any discovery on CPLC as a party defendant (or even a non-party) since the Court dismissed CPLC. Plaintiffs also do not intend to seek any discovery from CPLC as a party or a non-party going forward; indeed, Plaintiffs already have

obtained jurisdictional discovery from CPLC which is reflected in the record in this case (ECF Nos. 86-87) and which likewise preserves Plaintiffs' rights in the event of an appeal.

Finally, CPLC's Certificate of Conference accompanying its motion states that the parties met to try to resolve this issue before CPLC filed its motion. That is true. But CPLC omits that Plaintiffs offered to stipulate to the dismissal of CPLC if CPLC agreed that Plaintiffs would not be prejudiced by CPLC's absence on grounds of statutes of limitation defenses or otherwise in the event of an appeal later in this litigation. CPLC never responded to that offer, and instead filed its motion the next day.

### **Conclusion**

For the foregoing reasons, the Court should deny CPLC's motion to dismiss.

Dated: May 21, 2024

Respectfully submitted,

**Bailey & Glasser LLP**

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*Attorneys for Plaintiffs and the Proposed Classes*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of May 2024, the foregoing was electronically filed and served through the Court's CM/ECF system to counsel of record.

/s/ Lawrence J. Lederer

Lawrence J. Lederer