

No.

IN THE
Supreme Court of the United States

DORA L. ADKINS,
Petitioner,

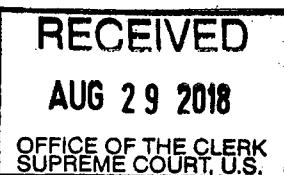
v.

WHOLE FOODS MARKET GROUP, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1) Whether the United States Court of Appeals for the Fourth Circuit erred when it affirmed in part, vacated in part, and remanded the case for further proceedings.
- 2) Whether the United States Court of Appeals for the Fourth Circuit erred when it found no reversible error in the District Court's dismissal of Ms. Adkins' action or its denial of relief on reconsideration.
- 3) Whether the District Court erred in its Order, Dated, January 10, 2018, because the Order granted Whole Foods Market Group, Inc.'s Motion to Dismiss for Failure to State a Claim, and dismissed Ms. Adkins' action.
- 4) Whether the District Court abused its discretion because it enjoined Ms. Adkins from filing any further claims against Whole Foods Market Group, Inc., or any other Defendant in the Eastern District of Virginia without leave of Court.
- 5) Whether the District Court Abused its Discretion because it ordered the Hearing on Motions cancelled and further abused its discretion because it denied Ms. Adkins' Motion for Reconsideration.
- 6) Whether the District Court erred because it dismissed Ms. Adkins' Amended Complaint, Dated, September 18, 2017, and summarized in its order that Ms. Adkins failed to satisfy the elements for four causes of actions and for failure to satisfy the Court's subject matter jurisdiction requirement of \$75,000.

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PARTIES TO THE PROCEEDING

The parties in the United States Court of Appeals for the Fourth Circuit are
Whole Foods Market Group, Inc., and Dora L. Adkins, pro se.

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v.

WHOLE FOODS MARKET GROUP, INC.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Dora L. Adkins, respectfully asks that a writ of certiorari issue to review the judgment by the United States Court of Appeals for the Fourth Circuit. that affirmed in part, vacated in part, and remanded the case for further proceedings and found no reversible error in the District Court's dismissal of Ms.

Adkins' action or its denial of relief on reconsideration in its opinion issued on July 30, 2018.

PER CURIAM BELOW

The Per Curiam of the United States Court of Appeals for the Fourth Circuit was filed on July 30, 2018 and is attached as Pet. Appendix A, pg. 22. The United States Court of Appeals for the Fourth Circuit's Notice, Dated, August 9, 2018; and the Mandate, Dated, August 21, 2018 are attached as Pet. Appendix A, pg. 22. The U. S. District Court for the Eastern District of Virginia Orders, Dated, January 10, 2018 and January 23, 2018 are attached as Pet. Appendix B, pg. 23.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Fourth Circuit for which petitioner seeks review was issued on July 30, 2018. The United States Court of Appeals for the Fourth Circuit found no reversible error in the District Court's dismissal of Ms. Adkins' action or its denial of relief on reconsideration is attached as Pet. Appendix A, pg. 22. This petition is filed within 90 days of the United States Court of Appeals for the Fourth Circuit's affirmed decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

N/A.

STATEMENT OF CASE

A. Facts Giving Rise To This Case

On September 3, 2017, Ms. Adkins suffered a severe and debilitating physical injury of food poisoning after consuming collard greens, some chicken, and Yuca that had just come from the kitchen on a food cart by an employee named Lousa or Youssef as fresh dishes for the Hot Bar newly named Chief Inspired.

B. The District Court Proceedings

On September 14, 2017, Ms. Adkins filed a Complaint [Doc. No. 1] against Whole Foods Market Group, Inc., which was served by a Process Server through the Marshal's office on the registered agent for Whole Foods Market Group, Inc., on September 19, 2017 [Doc. No. 4] and entered by the District Court on September 22, 2017. On September 18, 2017, Ms. Adkins filed an Amended Complaint [Doc. No. 3], which was served by United States Postal Service by Return Receipt on September 19, 2018 on Whole Foods Market Group, Inc., and entered by the Court on September 18, 2017. On October 10, 2017, Whole Foods Market Group, Inc., filed a "Motion to Dismiss for Failure to State a Claim and for Sanctions" [Doc. No. 6] (the "Motion") to the Complaint. In the Motion, Whole Foods Market Group, Inc., sought dismissal of the Complaint and also an injunction precluding Ms. Adkins from filing / any further actions against it in the District Court without prior approval.

In the Motion, Whole Foods Market Group, Inc., referenced the Complaint instead of the Amended Complaint throughout its entire documents. Ms. Adkins

argued that Whole Foods Market Group, Inc.'s Motion should have been denied as MOOT because Ms. Adkins filed an Amended Complaint on September 18, 2017 and entered by the District Court on September 18, 2017 which "superseded and/or replaced" the Compliant [Doc. No. 3] and PL's Opp'n Br. 1 [Doc. No. 15]. It is without merit that Ms. Adkins never served the original Complaint. [Doc. No. 4]. On October 10, 2017, Whole Foods Market Group, Inc., filed the Motion *after* receiving service of both the Complaint and the Amended Complaint. Whole Foods Market Group, Inc.'s Motion was completely directed to the Complaint and not the operative Amended Complaint, which caused a Default. [Doc. No. 6]; Doc. No. 7]; and [Doc. No. 8].

In Ms. Adkins' Amended Complaint, Ms. Adkins alleged a wide range of claims about Ms. Adkins' interactions and treatment by Whole Foods Market Group, Inc., including that Whole Foods Market Group, Inc., attempted "premeditated murder" after monitoring Ms. Adkins' food purchases. *See, (Am. Compl. ¶ 16)* stating that an employee of Whole Foods Market Group, Inc., followed Ms. Adkins during an approximately 2-months timeframe to determine Ms. Adkins' intake of food purchased from the Hot Bar for attempted premeditation murder of Ms. Adkins through [flood] ploisoning"). Based on those allegations, Ms. Adkins alleged a breach of contract (Count I), gross negligence (Count II), intentional infliction of emotional distress (Count III). Ms. Adkins alleged substantial facts that

made all of the claims within the three Counts and Claims for Punitive Damages plausible.

With respect to Ms. Adkins' breach of contract claim (Count I), Ms. Adkins plead facts sufficient to make a plausible claim that Ms. Adkins entered into a contractual relationship as alleged and/or that Whole Foods Market Group, Inc., breached that contractual relationship on September 3, 2017, after Plaintiff paid for the purchase of food from its Hot Bar. With respect to Ms. Adkins' gross negligence claim (Count II), Ms. Adkins alleged facts that showed the alleged degree of negligence. With respect to Ms. Adkins' intentional infliction of emotional distress claim (Count III), Ms. Adkins alleged facts that established sufficiently outrageous conduct; as well as, other elements of intentional infliction of emotional distress claim.

The Amended Complaint stated a claim with respect to the specifically alleged cause of action. Ms. Adkins claim of actual physical injury arose from Ms. Adkins' consumption of allegedly contaminated food purchased from Whole Foods Market Group, Inc., on September 19, 2015. Ms. Adkins allegedly became deadly ill from food poisoning after eating "two duck wraps" and on September 3, 2017, and/or approximately 2 Years later allegedly became severely ill and experienced loss of consciousness after eating collard greens, chicken, and Yuca that was purchased earlier on September 3, 2017 from the "Hot Bar." Am. Compl. ¶¶ 1, 10. The "duck wrap" incident was the subject of prior litigation that Ms. Adkins did not prevail in.

See, Adkins v. Whole Foods Market Group, Inc., No. 1:16-cv-31-CMH-JFA, 2016 WL 1367170 (e.d. Va. Apr. 5, 2016) (granting Whole Foods Market Group, Inc.'s motion to dismiss for failure to state a claim), appeal dismissed, 655 F. App'x 977 (4 Cir. 2016), cert. denied, 137 S. Ct. 1579 (2017) reh'g denied, 137 S. Ct. 2235 (2017). With respect to the incident involving Ms. Adkins consumption of collard greens, chicken, and Yuca purchased on September 3, 2017 from Whole Foods Market Group, Inc., Ms. Adkins' claims satisfied the elements for each of the particular causes of actions that Ms. Adkins alleged and all other cognizable claims. Ms. Adkins' causes of action alleged facts that made plausible that Ms. Adkins incurred the requisite damages necessary for the Court's subject matter jurisdiction through Ms. Adkins' claim for punitive damages. The question of whether or not Ms. Adkins satisfied the subject matter jurisdiction became a MOOT point after Whole Foods Market Group, Inc., failed to respond to the operative Amended Complaint, Dated, September 18, 2017, and was in Default.

Whole Foods Market Group, Inc., further requested through its Motion that Ms. Adkins be enjoined from filing any additional claims against it without leave of court, based upon the following factors: (1) the litigant's history of vexatious litigation; (2) whether the litigant has an objective good faith belief in the merit of the action; (3) whether the litigant is represented by counsel; (4) whether the litigant had caused needless expense or unnecessary burdens on the opposing party and/or the court; and (5) the adequacy of other sanctions. *Id.* (citing *Safir v. United*

States Lines, Inc., 792 F. 2d, 19, 24 (2d Cir. 1986), *cert. denied*, 479 U.S. 1099 (1987)).

While the District Court considered some of the *Cromer* factors in discussing Ms. Adkins' history of filing vexations and duplicative lawsuits and her prior action against Whole Foods –it was not clear to the United States Court of Appeals for the Fourth Circuit that the District Court considered the other specific factors, and the District Court failed to properly limit the scope of the prefilng injunction to the specific circumstances. *Id.* The United States Court of Appeals for the Fourth Circuit noted that litigants are entitled to notice and opportunity to be heard prior to imposition of a prefilng injunction. *Id.* at 819-20. The United States Court of Appeals for the Fourth Circuit vacated the portion of the District Court's order imposing injunction and remanded the case for proceedings consistent with the opinion of July 30, 2018.

On January 10, 2018, the District Court Ordered the following: “Ordered that Defendant, Whole Foods Market Group, Inc.’s Motion to Dismiss for Failure to State a Claim [Doc. No. 6] be, and the same hereby GRANTED, and this action is DISMISSED; and it is further”

“ORDERED that Plaintiff be, and the same hereby is, ENJOINED from filing any further claims against Defendant or any other defendant in the Eastern District of Virginia without leave of Court.” [Doc. No. 97].

“On January 23, 2018, the District Court Ordered denying [Doc. No. 100] Motion for Reconsideration [Doc. No. 102]; denying Motion for Leave from the Court to Present Evidence to Support the Defendant Whole Foods Market Group, Inc.’s, Documents are in Response to the Complaint Dated, September 14, 2017 and not the Amended Complaint Dated, September 18, 2017. The hearing on the Motions currently scheduled for January 26, 2018 at 10:00 a.m., be, and the same hereby is, CANCELLED.” [Doc. No. 103].

C. The Appellate Court Proceedings

On January 23, 2018, Ms. Adkins submitted her Appeal of the Orders entered in the District Court to The United States Court of Appeals for the Fourth Circuit. [Dist. Ct. Doc. 104]. The Fourth Circuit Court of Appeal on July 30, 2018, provided the following unpublished opinion in the case of *Dora L. Adkins v. Whole Foods Market Group, Inc.*, Record No. 18-1102: “We affirm in part, and vacate in part, and remand for further proceedings. We grant Adkins’ motions for leave to proceed *in forma pauperis* and to file a supplemental brief.” On August 9, 2018, Notice was filed by the United States Court of Appeals for the Fourth Circuit. The United States Court of Appeals for the Fourth Circuit order took effect on August 21, 2018, through its Mandate. [Ct. App. Doc. 110] and Pet. Appendix A, pg. 22.

The instant Petition ensued. For the reasons discussed below, the Petition in all respects should be granted.

REASONS FOR GRANTING THE PETITION

I. EVIDENCE SHOWS AND PROVES THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION

ISSUES APPEALED AND/OR ERRORS:

- A. THE DISTRICT COURT ERRED IN ITS ORDER, DATED, JANUARY 10, 2018, BECAUSE THE ORDER GRANTED WHOLE FOODS MARKET GROUP, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, AND MS. ADKINS' ACTION DISMISSED

The Evidence shows and proves Whole Foods Market Group, Inc., did not file its responsive pleadings to the Amended Complaint, Dated, September 18, 2017, which caused a Default. "The Amended Complaint filed by the Plaintiff with the Court on September 18, 2017 superseded and/or replaced the Complaint, Dated, September 14, 2017; thereby, making the Motion to Dismiss Plaintiff's Complaint MOOT. "Pages 1-17 of the Defendant's Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint do not require a Reply in Plaintiff's Brief because the pleadings are to Plaintiff's Complaint of September 14, 2017 and not to the Amended Complaint of September 18, 2017." Whole Foods Market Group, Inc.'s Motion to Dismiss for Failure to State a Claim for which Relief can be granted was not to the Amended Complaint, Dated, September 18, 2017 and must be reversed.

"The District Court erred in its "Order," Dated, January 10, 2018 when the District Court "Ordered that Defendant Whole Foods Market Group, Inc.'s Motion to Dismiss for Failure to State a Claim [Doc. No. 6] be, and the same hereby is GRANTED, and this action is DISMISSED; and it is further Ordered that Plaintiff be, and the same hereby is, ENJOINED from filing any further claims against

Defendant or any other defendant in the Eastern District of Virginia without leave of court.” [Doc. No. 97].

B. THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS ORDER, DATED, JANUARY 10, 2018, BECAUSE IT ENJOINED MS. ADKINS FROM FILING ANY FURTHER CLAIMS AGAINST WHOLE FOODS MARKET GROUP, INC., OR ANY OTHER DEFENDANT IN THE EASTERN DISTRICT OF VIRGINIA WITHOUT LEAVE OF COURT

The District Court abused its discretion when it enjoined Ms. Adkins from filing any other claims because it violates the rights of Ms. Adkins. In the case of *Dora L. Adkins v. Whole Foods Market Group, Inc.*, the facts were well pled to all of the elements for each of the four causes of action and not frivolous. [Doc. No. 3].

“**REPEATED QUOTED ORDER:** The District Court erred in its “Order,” Dated, January 10, 2018 when the District Court “Ordered that Defendant Whole Foods Market Group, Inc.’s Motion to Dismiss for Failure to State a Claim [Doc. No. 6] be, and the same hereby is GRANTED, and this action is DISMISSED; and it is further Ordered that Plaintiff be, and the same hereby is, ENJOINED from filing any further claims against Defendant or any other defendant in the Eastern District of Virginia without leave of Court.” [Doc. No. 97].

C. THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS ORDER, DATED, JANUARY 23, 2018, BECAUSE IT ORDERED THE HEARING ON MOTIONS CANCELLED; DENIED MS. ADKINS’ MOTION TO PRESENT EVIDENCE TO SUPPORT THE DEFENDANT’S DOCUMENTS WERE IN RESPONSE TO THE COMPLAINT, DATED, SEPTEMBER 14, 2017, AND NOT TO THE AMENDED COMPLAINT, DATED, SEPTEMBER 18, 2017; AND FURTHER ABUSED ITS DISCRETION BECAUSE IT DENIED MS. ADKINS’ MOTION TO RECONSIDERATION

The District Court abused its discretion when it DENIED Ms. Adkins' Motion for Reconsideration after the Motion for Reconsideration pled facts that showed an error of law had been made by the District Court. [Doc. No. 103].

"The District Court abused its discretion in its "Order," Dated, January 23, 2017 [Doc. No. 103] when the District Court "ORDERED that the hearing on Motions currently scheduled for January 26, 2018 at 10:00 a.m., be, and the same hereby is, CANCELLED; and it is further ORDERED that Plaintiff's Motion for Leave From the Court for Reconsideration of the Court's Order Dated, January 10, 2018 [Doc. No. 100] and the Motion for Leave For Leave from the Court to Present Evidence to Support the Defendant, Whole Foods Market Group, Inc.'s Documents are in Response to the Complaint Dated, September 14, 2017 and not the Amended Complaint, Dated, September 18, 2017 [Doc. No. 102] be, and the same hereby are DENIED." [Doc. No. 97].

"The District Court abused its discretion in its "Order," Dated, January 10, 2018 and further abused its discretion in its "Order, Dated, January 23, 2018 when "Default" was not entered and "Default Judgment" was not GRANTED to Ms. Adkins according to Rule 15(a)(3). [Doc. No. 97] and [Doc. No. 103].

D. THE DISTRICT COURT ERRED BECAUSE IT DISMISSED MS. ADKINS AMENDED COMPLAINT, DATED, SEPTEMBER 18, 2017, AND SUMMARIZED IN ITS ORDER THAT MS. ADKINS FAILED TO SATISFY THE ELEMENTS FOR FOUR CAUSES OF ACTIONS AND FOR FAILURE TO SATISFY THE COURT'S SUBJECT MATTER JURISDICTION REQUIREMENT OF \$75,000.00

1. Ms. Adkins Stated a Claim For Breach of Contract [Doc. No. 3]
2. Ms. Adkins Stated a Claim For Gross Negligence ([Doc. No. 3]
3. Ms. Adkins Stated a Claim For Intentional Infliction
of Emotional Distress [Doc. No. 3]
4. Ms. Adkins Stated a Claim for Punitive Damages [Doc. No. 3]

The Distinct Court erred because it dismissed the well pled Amended Complaint, Dated, September 18, 2017 that satisfied all the elements for each of the four causes of actions and stated a claim for Breach of Contract; a claim for Gross Negligence; a claim for Intentional Infliction of Emotional Distress; and a claim for Punitive Damages, which are warranted. [Doc. No. 3]. The subject matter jurisdiction and/or the satisfaction of the elements for each of the four causes of actions cannot become an issue after Whole Foods Market Group, Inc., defaulted. Virginia statute § 8.01-38.1 places a cap of \$350,000 on punitive damages courts may award to punish wrongdoers.

“The District Court erred because it dismissed Ms. Adkins’ Amended Complaint, Dated, September 18, 2017; and summarized in its order of January 10, 2018 that Ms. Adkins failed to satisfy the elements for the particular cause of action and for not satisfying the Court’s subject matter jurisdiction, when the Respondent was in Default. The District Court’s “Order,” Dated January 10, 2018 was not *with prejudice*. [Doc. No. 97] and [Doc. No. 103].

II. THERE WAS NO VALID OPPOSITION FROM WHOLE FOODS MARKET GROUP INC.

The following quoted paragraphs from Whole Foods' Reply Brief prove Entry for Default should have been granted to Ms. Adkins and the Motion for Default and Default Judgment granted. Whole Foods Market Group, Inc., became estopped from disputing the validity of the claims and defending against the lawsuit after its failure to respond to the Amended Complaint, Dated, September 18, 2017 and did not file an opposition to the entry of default or to the Motion for Default Judgment in the District Court.

“On February 20, 2018, Whole Foods Market Group, Inc., CONCEDED the Appeal to the Ms. Adkins for reversal and remand by the United States Court of Appeals for the Fourth Circuit by stating the following: “The claims and material factual allegations in the Amended Complaint are virtually identical to those of the original Complaint, and Whole Foods consulted both in preparing its motion to dismiss.” See, Informal Brief of Appellee, pg. 8). “Whole Foods consulted both in preparing its motion to dismiss CONTRADICTS the District Court Order, [Doc. No. 97], when the “Order” stated, “On September 14, 2017, Ms. Adkins, appearing *pro se*, filed a Complaint [Doc. No. 1] against Defendant, which was not served on Defendant. [Doc. No. 97]. If the Complaint was NEVER served, the Defendant could not have consulted with the Complaint in preparing its Motion to Dismiss, which was filed by the Defendant on October 10, 2017. “Because Ms. Adkins never served the original Complaint, Defendant filed the Motion *after* receiving service of the Amended Complaint (the first and only Complaint that has been served on it) and

the Amended Complaint is nearly identical to the original Complaint, Defendant's Motion is clearly directed to the operative Amended Complaint and will not be denied because of its references to the "Complaint." [Doc. No. 97] and; [Resubmitted from Petitioner's Reply to Informal Brief of Defendant-Appellee, Whole Foods Market Group, Inc., Dated, February 23, 2018].

"Although styled as a motion to dismiss the "Complaint" rather than the "Amended Complaint," the Motion to Dismiss; nonetheless, addressed each of the claims and material factual allegations in the Amended Complaint." (See, Informal Brief of Appellee, pg. 6; *See*, Plaintiff's Evidence Submitted to the Court Below; Resubmitted from Petitioner's Reply to Informal Brief of Defendant-Appellee, Whole Foods Market Group, Inc., Dated, February 23, 2018)). Whole Foods Market Group, Inc., did not address the claims and material factual allegations in the Amended Complaint as proven in the document, titled, "Motion for Leave from the Court to Present Evidence to Support the Defendant, Whole Foods Market Group, Inc., documents are in response to the Complaint, Dated September 14, 2017 and not the Amended Complaint, Dated, September 18, 2017. "Continued in Chart Format: Defendant's Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint and for Sanctions compared to Complaint, Dated, and September 14, 2017 to the Amended Complaint, Dated, and September 18, 2017." (pages 1-10). [Doc. No. 103].

III. STANDARD OF APPELLATE REVIEW

Abuse of Discretion for Default Judgment:

The Supplemental Reply Brief provided the Standard of Review used by the various Circuit Courts as is relates to the individual Circuit Court's review and/or opinions regarding Abuse of Discretion for Default Judgment and Abuse of Discretion for Motions for Reconsideration. Note that the cases cited are not in support of the ruling by the District Court to the facts alleged in the case of *Dora L. Adkins v. Whole Foods Market Group, Inc.*, in fact, the Circuit Courts opinions are inapposite. The cases cited from the 9th, 4th, 10th, 5th, 3rd, 8th, Circuit Courts shows common opinions, in that, the Standard of Review for Default Judgment and Motions for Reconsideration are reviewed for Abuse of Discretion which does support the Appellate Review of the United States Court of Appeals for Fourth Circuit in Ms. Adkins' Appeal of the errors found in the Orders of January 10, 2018 and January 23, 2018. [Doc. No. 97] and [Doc. No. 103].

"This court reviews for abuse of discretion the denial of a motion for default judgment under Federal Rule of Civil Procedure 55(b). *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986)." "We review the district court's order denying plaintiff's motion for default judgment under an abuse of discretion standard. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988); *Consolidated Masonry & Fireproof, Inc. v. Wagman Constr. Co.*, 383 F.2d 249 (4th Cir. 1967). "We review for an abuse of discretion the denial of a motion for default judgment." *See, Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1494 (10th Cir. 1995). "We review a district court's denial of a motion for a default judgment for

abuse of discretion.” *See, Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001). “We review the district court’s decision for an abuse of discretion. *Taylor v. City of Ballwin, Mo.*, 859 F.2d 1330, 1332 (8th Cir. 1988) (citation omitted).”

Abuse of Discretion for Motion for Reconsideration:

“We review a denial of a motion for reconsideration for abuse of discretion, but we review the District Court’s underlying legal determinations *de novo* and factual determinations for clear error.” *Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010) (citation omitted).” “We next consider Appellant’s motion to reconsider pursuant to Federal Rule of Civil Procedure 54(b), which we review for an abuse of discretion. *See, Am. Canoe Ass’n. v. Murphy Farms, Inc.*, 326 F.3d 505, 515–16 (4th Cir. 2003).”

De novo for the Dismissal for Failure to State a Claim Upon which Relief May be Granted:

“This court reviews *de novo* the dismissal for failure to state a claim upon which relief may be granted. *Grimes v. Commissioner of Internal Revenue*, 806 F.2d 1451, 1453 (9th Cir. 1986).” “We review *de novo* a district court’s grant or denial of a Rule 12(b)(6) motion, “accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff.” *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007). However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). “To survive a motion to dismiss, a complaint must contain

sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (citation omitted). A “claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.””

Id. at 1950.

IV. DISCUSSION

“Once a plaintiff asserts a claim for relief, the defendant must timely file an answer or otherwise plead in response.” “This is so even after the defendant has answered, but the plaintiff later files an amended complaint under Rule 15. Failure to answer a complaint—original or amended—will result in default.

See, FED. R. CIV. P. 55(a) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit, the clerk must enter the party’s default.”); *Int’l Painters & Allied Trades Indus. Pen. Fund v. Lasalle Glass & Mirror Co.*, 267 F.R.D. 430 (D.D.C. 2010). “The filing of an amended complaint supersedes the original complaint and renders the original complaint without legal effect.” *Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir.2007).

“A District Court abuses its discretion only if its conclusions are based on mistaken legal principles or clearly erroneous factual findings.” *Westberry v.*

Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999). "This court reviews a district court's conclusions of law de novo, but will not set aside its factual findings unless they are clearly erroneous." *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999).

"Federal Rule of Civil Procedure 55(a) provides that when a party has failed to plead, the clerk of the court shall enter a default. Although Ms. Adkins requested the clerk to enter a default, and supported her request by affidavit, the clerk did not do so. Rule 55(a) is not discretionary; it states that the clerk "shall" enter a default when a party against whom relief is sought fails to plead. Therefore, the clerk should have entered a default when Ms. Adkins filed her request and supporting affidavit."

"A judgment of default must be confirmed by proof of the demand sufficient to establish a *prima facie* case. La. C.C.P. art. 1702. The plaintiff has the burden of establishing a *prima facie* case by proving with competent evidence the essential elements of his claim as fully as if each of the allegations of the petition had been specifically denied." *Sessions & Fishman v. Liquid Air Corp.*, 616 So.2d 1254, 1258 (La. 1993). "Simply stated, the plaintiff must present evidence sufficient to convince the court that it is probable he would prevail at a trial on the merits. *Arias*, 9 So.3d at 820. When a demand is based on a delictual obligation, the testimony of the plaintiff, together with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to establish a

prima facie case, shall be admissible, self-authenticating, and sufficient proof of such demand. La. C.C.P. art. 1702B(2)." "The underlying concern is . . . whether there is some possibility that the outcome . . . after a full trial will be contrary to the result achieved by the default." *Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808, 812 (4th Cir. 1988) (quoting 10 Wright, Miller & Kane, Federal Practice and Procedure, § 2697, p. 531 (2d ed. 1983)).

"Review of a default judgment puts competing policy interests at play. On one hand, "[w]e have adopted a policy in favor of resolving cases on their merits and against the use of default judgments." *Id.* On the other, this policy is "counterbalanced by considerations of social goals, justice and expediency, a weighing process that lies largely within the domain of the trial judge's discretion." *Id.* (quoting *Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 936 (5th Cir. 1999)) (alterations and internal quotation marks omitted).

V. REVIEW IS WARRANTED FOR THE REASONS ARTICULATED IN I, II, III, AND IV UNDER THE HEADING REASONS FOR GRANTING THE PETITION

Ms. Adkins has cited compelling reasons warranting this Court's review asserting a clarifying federal question regarding the lower courts error of granting Defendant, Whole Foods Market Group, Inc.'s Motion to Dismiss for Failure to State a Claim; for dismissal of the action; and for finding no reversible error in the District Court's dismissal of Ms. Adkins' action or its denial of relief on reconsideration. A split among the circuits that includes The United States Court of

Appeals for the Fourth Circuit that affirmed the District Court's Orders of January 10, 2018, and January 23, 2018 in the case of *Dora L. Adkins v. Whole Foods Market Group, Inc.* The United States Court of Appeals for the Fourth Circuit erred when it did not reverse and remand *all* of the issues presented by Ms. Adkins in the Appeal of the case of *Dora L. Adkins v. Whole Foods Market Group, Inc.* This Court should reverse The United States Court of Appeals for the Fourth Circuit's decision that found no reversible error in the court's dismissal of Ms. Adkins' action or its denial of relief on reconsideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted."

Dated: August 27, 2018

Respectfully submitted,



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